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THE POLICY AND POLITICS OF CHARTER MAKING: THE STORY OF NEW YORK CITY'S 1989 CHARTER

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THE POLICY AND POLITICS OF CHARTER MAKING:
THE STORY OF NEW YORK CITY'S 1989 CHARTER

FREDERICK A. O. SCHWARZ, JR. & ERIC LANE*

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INTRODUCTION

On November 7, 1989, the voters of the City of New York approved, by a vote of fifty-five percent to forty-five percent, the broadest and most radical changes to their Charter since 1901.¹ These changes abolished the City's historic Board of Estimate, while preserving a borough voice in government, expanding and increasing the powers of the City Council, retooling almost all of the City's significant decision-making processes, and adding a myriad of other changes.² These changes were the product of a revision process that started in mid-1987 with the first hearings of an initial Charter revision commission,³ and moved to an intense and dramatic pace after March 23, 1989, when the Supreme Court declared the voting system of the Board of Estimate unconstitutional in *Board of Estimate v. Morris*.⁴

We were fortunate enough to play central roles in that process of change. Frederick A. O. Schwarz, Jr., was chairman of the Schwarz Charter Revision Commission (the "Commission"), which was established in January 1989, and succeeded an earlier commission that expired in

1. The first Charter for the greater City of New York was adopted by the state legislature in May 1897 and went into effect in January 1898. This Charter was the first to govern the consolidated greater City of New York, which included New York City (the area now known as the Borough of the Bronx was part of New York City), the City of Brooklyn, and areas that are now known as the Boroughs of Staten Island and Queens. This original Charter was short lived. In 1901, the state legislature enacted a second Charter which reduced the mayor's power and increased the power of the borough presidents by, among other things, placing them on a redesigned Board of Estimate. Thereafter, changes were less frequent and less significant. The major changes were: 1937, the power of the mayor was increased, the Department of City Planning was modernized, the City Planning Commission was created, and proportional representation for the City Council was established (and lasted until 1947); 1961, the power of the borough presidents was reduced and that of the mayor and City Council increased; 1975, a system of community governance was adopted. For a detailed description of the city's governance history, see WALLACE S. SAYRE & HERBERT KAUFMAN, *GOVERNING NEW YORK CITY: POLITICS IN THE METROPOLIS* (W.W. Norton & Co. 1965) (1960) and Joseph P. Viteritti, *The Tradition of Municipal Reform: Charter Revision in Historical Context*, in *RESTRUCTURING THE NEW YORK CITY GOVERNMENT: THE REEMERGENCE OF MUNICIPAL REFORM 16-29* (Frank J. Mauro & Gerald Benjamin eds., 1989).

2. See N.Y. CITY CHARTER (1989).

3. This first Commission was named the Ravitch Commission and is described *infra* notes 35-39 and accompanying text. Between April 22 and May 7, 1987, the Ravitch Commission held one citywide public hearing, as well as one public hearing in each borough. See N.Y. CITY CHARTER REVISION COMM'N, *REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION 17* (Jan. 1989) [hereinafter JANUARY 1989 COMMISSION REPORT].

4. 489 U.S. 688, 690 (1989).

November 1988.⁵ Eric Lane served as executive director and counsel to both commissions. For both of us, the Charter experience was among the most challenging of our careers. We both had had substantial governmental experience—Schwarz as chief counsel to the Church Committee in the mid-1970s,⁶ and as corporation counsel to the City of New York from 1982 through 1986, and Lane as counsel to the State Senate Democratic minority from 1981 to 1986. However, none of our experiences rivaled Charter revision for the combined breadth of our decision-making responsibilities, the sustained political pressure, and the opportunity to affect the lives of the people of a city we both were born in and loved.

Morris was the genesis of the Commission's effort, but the adopted revisions went far beyond simply curing the Board's legal problem. In our view, as well as in the views of other Commission members and large numbers of people with whom we communicated, the then-existing Charter neither satisfied the aspirations of the City's vastly pluralistic population nor met the City's governance needs in 1989.

This article is our exposition on how we arrived at these conclusions and how we tried to shape the Charter to respond to them. It is our story. While it quotes and describes positions taken in 1989 by other Commission members, it does not try to depict the unexpressed reasoning of other participants whose stories, without a doubt, would be different. Nor is our goal to detail or even explore each of the multitude of decisions that represent the Commission's work. Our focus is on the most significant and most controversial issues that confronted the Commission and how they were resolved through the weighing of legal, policy, and political considerations. Through this exploration, we hope to provide the background for what we did and why we did it.

While most significant changes, at least those dealing with the power of elected officials, were controversial, not every controversial decision was significant. For example, the maintenance of the city council president (now public advocate) was extremely controversial, but it was not as significant in the context of other changes. Similarly, changes to the City's landmark laws were of little consequence in the context of our overall mission. However, landmark issues spurred such controversy that we provided a second ballot question for their public consideration, lest the intensity of that debate spill over into the central questions of governance.

5. See N.Y. CITY CHARTER REVISION COMM'N, FINAL REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION, JAN. 1989-NOV. 1989, at 3 (1990) [hereinafter FINAL REPORT].

6. The Church Committee (named for its chairman, Senator Frank Church of Idaho) was the Senate Select Committee on Intelligence that investigated and exposed wrongdoing by the FBI, CIA, and other intelligence agencies.

Two final introductory notes are in order. First, writing ten years after the events in which we were such central participants, we may be tempted to speculate on what might have been the outcome of the process had we been able to predict the occurrence of certain events. For example, in the fall of 1989, David Dinkins was elected mayor, the first minority to hold a citywide elected office. We saw the dearth of elected minority officials and the sense by minorities of exclusion from the City's political processes as a problem with the City government structure. This supported several Commission changes. What would we, or the Commission, have done had we known that, within several short months, a minority would be elected mayor? We will not attempt to answer this or any similar speculative "what if" questions for two reasons. First, our focus is on what was done and why. Second, the Charter revision process was too complex and interrelated to speculate on how a particular change in facts might have affected its outcome.

Additionally, since the adoption of the 1989 Charter, disputes have arisen over the meaning of particular Charter provisions in the context of particular fact patterns. Many of these disputes ended in the courts. Examples are disputes between the mayor and Council over the process to modify the budget,⁷ over the power to close a public hospital,⁸ and over the power to appoint members of a civilian police review commission.⁹ Such disputes are ongoing, the result of competing interpretations of the meaning of particular provisions or dissatisfaction with some clear lines imposed by the Charter. In some cases, these conflicts resulted in a call for further Charter change to enact one view or the other into law. One extreme example was the proposed creation in early 1998, by the City Council, of a commission to weaken mayoral powers, including those over the budget, and a responding proposal by the mayor to create his own Charter revision commission to ensure that such weakening did not occur and to push in the opposite direction.¹⁰

7. See *Council of New York v. Giuliani*, 621 N.Y.S.2d 832, 835 (Sup. Ct. N.Y. County 1994) (allowing the mayor to withdraw a budget modification proposal and thus, in effect, prohibiting the City Council from initiating budget modifications).

8. See *Council of New York v. Giuliani*, 664 N.Y.S.2d 197, 203-04 (Sup. Ct. N.Y. County 1997) (holding that the Charter's "savings provision," section 1152(e), requires a sublease by the Health and Hospital Corporation of Coney Island Hospital to be subject to the City's Uniform Land Use Review Procedures and to the City Council's review).

9. See *Mayor of New York v. Council of New York*, 651 N.Y.S.2d 531, 531-32 (App. Div. 1997) (holding that the City Council does not have the power to create the Independent Police Investigation and Audit Board).

10. See Alan Finder, *Give City Council Increased Power, New York Is Urged*, N.Y. TIMES, Apr. 25, 1989, at B1; Richard Levine, *Koch Voices Some Doubts on Charter*, N.Y. TIMES, May 4, 1989, at B1.

We will discuss many of the issues raised by these disputes. Our goal is not to take sides but to describe the reasons for decisions made with respect to these topics. Hopefully, such reasons will be informative in these ongoing Charter debates.¹¹

Finally, while this tale is ours, the Charter revision effort was, obviously, not ours alone. There would have been no story without the extraordinary efforts of the members of the Schwarz and Ravitch Commissions, who gave of their time and wisdom unstintingly.¹² Nothing close to what we did could have been done without the endless, dedicated, and intelligent efforts of the staff assembled by its leaders Frank Mauro, director of research, and Gretchen Dykstra, director of communications. Also, the many advocates who continually commented on our efforts, offered alternative suggestions, and spent almost as much time as we did pursuing their goals regardless of whether they were adopted, made the product better than the Commission could have produced without them.

CHRONOLOGY OF SIGNIFICANT EVENTS

November 1986	U.S. district court declares that the Board of Estimate violates the "one person-one vote" principle. ¹³
December 16, 1986	Mayor Koch establishes the Ravitch Commission. ¹⁴

11. While these "dueling Commissions" were mutually withdrawn, in the summer of 1998, Mayor Giuliani formed another Charter Commission for the express purpose of attempting to preclude a City Council-sponsored referendum seeking the public's view on whether to move Yankee Stadium to the west side of Manhattan. (Earlier in 1998, Mayor Giuliani had originally announced that there was no need for any Charter revision, claiming it was "unnecessary and premature.") See Elizabeth Kolbert, *Metro Matters: Charter Battle Is a Seriously Comic Matter*, N.Y. TIMES, Feb. 26, 1998, at B1.

12. The Schwarz commissioners were as follows: Frederick A. O. Schwarz, Jr., chairman; Harriet Michel, vice chair; Nathan Leventhal, secretary; Aida Alvarez; Amalia V. Betanzos; Fred W. Friendly; Simon P. Gourdine; Judah Gribetz; Therese M. Molloy; Patrick J. Murphy; Archibald R. Murray; Mario J. Parades; W. Bernard Richland; Most Rev. Joseph M. Sullivan; and David G. Trager. All served on the Ravitch Commission, except for Schwarz, Gourdine, Parades, and Sullivan. These four replaced Ravitch, Father Joseph O'Hare, Frank Macchiarola, and former Mayor Robert F. Wagner.

13. See *Morris v. Board of Estimate*, 647 F. Supp. 1463, 1478-79 (E.D.N.Y. 1986).

14. See OFFICE OF THE MAYOR, CERTIFICATE OF APPOINTMENT TO CHARTER REVISION COMMISSION (Dec. 16, 1986).

April 22 - May 7, 1987	Ravitch Commission holds six fact-finding hearings to solicit public views on Charter revision. ¹⁵
October 8, 1987	Second Circuit Court of Appeals affirms <i>Morris v. Board of Estimate</i> . ¹⁶
April 4, 1988	Supreme Court notes probable jurisdiction in <i>Board of Estimate v. Morris</i> . ¹⁷
April 14, 1988	Ravitch Commission postpones consideration of governance issues in response to the Supreme Court's decision to hear <i>Morris</i> .
November 8, 1988	Public adopts Ravitch Commission revisions through referendum. ¹⁸
January 19, 1989	Mayor Koch establishes the Schwarz Commission. ¹⁹
February 28 - March 15, 1989	Schwarz Commission holds six legislative hearings. ²⁰
March 22, 1989	Supreme Court affirms <i>Board of Estimate v. Morris</i> . ²¹
March 31, 1989	Commission votes to strive to finish its work in time to submit to the voters at the November 1989 general election. ²²
April 4 and 16, 1989	Commission holds two public hearings to elicit views of elected officials.

15. The meetings were held on April 22, 23, 28, 29, 30, and May 7, 1987.

16. See *Morris v. Board of Estimate*, 831 F.2d 384, 393 (2d Cir. 1987), *aff'd*, 485 U.S. 986 (1988).

17. 485 U.S. 986 (1988).

18. See Clara Hemphill, *Election '88 Voters Approve Ethics Reform Proposals*, NEWSDAY (N.Y.), Nov. 9, 1988, at 38; see also JANUARY 1989 COMMISSION REPORT, *supra* note 3, at 11.

19. See FINAL REPORT, *supra* note 5, at 3.

20. These hearings were held on February 28, March 1, 2, 9, 14, and 15, 1989.

21. See *Board of Estimate v. Morris*, 489 U.S. 688, 703 (1989).

22. See N.Y. CITY CHARTER REVISION COMM'N, RECORD OF MOTIONS, VOTES AND CONSENSUS 1 (Mar. 31, 1989).

April 24, 1989	Chairman issues initial ideas for Charter changes. ²³
April 24 - May 15, 1989	At seven public meetings, Commission discusses Chairman's initial ideas and votes on its preliminary proposals. ²⁴
May 1989	Schwarz Commission issues its preliminary proposals.
May 31 - June 13, 1989	Commission holds seven public hearings on its preliminary proposals. ²⁵
June 15, 1989	Chairman releases and discusses revised proposals reflecting many ideas and reactions received from the public, as well as thoughts that came from individual discussions we had with Commission members. ²⁶
June 15 - June 27, 1989	Commission discusses and votes on revisions at six public meetings. ²⁷
Late June 1989	Commission releases Summary of Revised Proposals. ²⁸
July 13, 1989	Commission holds meeting on various open issues.
July 17 - July 21, 1989	Commission holds five public hearings, one in each borough, to get the public's reaction to the Summary of Revised Proposals. ²⁹

23. See N. Y. CITY CHARTER REVISION COMM'N, THE CHAIR'S RECOMMENDATIONS FOR CHARTER REVISION 1-48 (Apr. 24, 1989).

24. The meetings were held on April 24, 25, and May 2, 6, 10, 13, 15, 1989.

25. These hearings were held on May 31, and June 1, 5, 6, 7, 12, and 13, 1989.

26. See N. Y. CITY CHARTER REVISION COMM'N, SUMMARY OF REVISED PROPOSALS 3 (June 1989) [hereinafter SUMMARY OF REVISED PROPOSALS].

27. The meetings were held on June 15, 20, 21, 22, 26, 27, and July 13, 1989.

28. See N. Y. CITY CHARTER REVISION COMM'N, SUMMARY OF REVISED PROPOSALS, *supra* note 26, at 1.

29. The hearings were held on July 17, 18, 19, 21, 1989.

- July 31 - August 2, 1989 Commission holds three final meetings and makes final changes. On August 2, 1989, Commission approves final proposals by a vote of 11-4. The Commission also resolves, without dissent, to present the new Charter to the voters in November 1989.³⁰
- August 11, 1989 Commission submits revised Charter to the U.S. Justice Department for review under section 5 of the Voting Rights Act of 1965, as amended.³¹
- November 7, 1989 Public approves revised Charter at referendum.³²
- December 13, 1989 The Justice Department approves revised Charter.³³

This was an incredibly compressed schedule. As one indication of the work done by the Schwarz Commission as a whole, the transcripts of the Commission's public meetings, legislative hearings, and public hearings, comprise 13,060 pages. We also had scores of meetings with advocates, experts, opponents, and supporters. We felt that all this work, in this compressed period of time, was necessary and appropriate because, substantively, the City had an unconstitutional government that had to be promptly fixed. Politically, a referendum at the regular City election to be held in November would mean that special interests would have less influence and would give us a better chance to win approval than in a later referendum.

30. The meetings were held on July 31, and August 1 and 2, 1989. See N.Y. CITY CHARTER REVISION COMM'N, RECORD OF MOTIONS, VOTES AND CONSENSUS 4, 7 (Mar. 31, 1989).

31. See N.Y. CITY CHARTER REVISION COMM'N, SUBMISSION UNDER SECTION 5 OF THE VOTING RIGHTS ACT FOR PRECLEARANCE OF PROPOSED AMENDMENTS TO THE NEW YORK CITY CHARTER 1 (Aug. 11, 1989); see also Todd S. Purdum, *Charter Papers on the Way to Washington*, N.Y. TIMES, Aug. 11, 1989, at B1.

32. See Alan Finder, *Overhaul of New York City Charter Is Approved, Polls Show*, N.Y. TIMES, Nov. 8, 1989, at B1.

33. See Letter from James P. Turner, Acting Assistant Attorney General, U.S. Department Of Justice, Civil Rights Division, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (Dec. 13, 1989) (on file with the *New York Law School Law Review*); Alan Finder, *New York City Charter Revision Approved by Justice Department*, N.Y. TIMES, Dec. 14, 1989, at A1.

PART I. THE ORGANIZATION, PROCESSES, AND THRESHOLD QUESTIONS
OF THE SCHWARZ COMMISSION

CHAPTER I. THE SCHWARZ COMMISSION

On January 18, 1989, Mayor Edward Koch, pursuant to his powers under section 36 of the Municipal Home Rule Law, appointed Schwarz and fourteen other New Yorkers to serve on a charter revision commission.³⁴ The Schwarz Commission was the second of two appointed by Mayor Koch to respond to *Morris*.

The first commission, chaired by Richard Ravitch, was appointed in December 1986, in response to the district court decision holding the Board of Estimate's voting scheme unconstitutional.³⁵ The creation of the Ravitch Commission had been recommended to the mayor by Schwarz, then serving as corporation counsel. While the Board of Estimate was entitled to appeal the *Morris* decision and to obtain a vigorous constitutional defense, there was a substantial chance the defense would fail. If it failed, the City would have had to started thinking about appropriate changes. The substantial work done by the Ravitch Commission and staff was one factor enabling us to responsibly present recommended Charter changes as early as November 1989.

Some Board of Estimate members (anxious that nothing be done to weaken the Board's appeal) resented, or worried about, the creation of the Ravitch Commission. Partly in response to this concern, and partly to ensure that the Commission's proposals would be regarded as the product of an informed debate, the mayor nominated a majority of the Commission members from lists of names given to him by each of the other Board members and by the City Council. Nearly all of these choices, however, were people the mayor knew—and would, on his own, have found satisfactory.

The Ravitch Commission's efforts to grapple with the question of reconstituting or replacing the Board of Estimate were interrupted in April 1988 by the unexpected decision of the U.S. Supreme Court to review the Second Circuit's affirmance of *Morris*.³⁶ As a result, the Ravitch Commission voted "to postpone any further consideration of . . . [any]

34. See N.Y. MUN. HOME RULE LAW § 36(4) (McKinney 1994); Richard Levine, *Koch Picks Schwarz to Head Charter Commission*, N.Y. TIMES, Nov. 15, 1988, at B3.

35. See *Morris v. Board of Estimate*, 647 F. Supp. 1463, 1478 (E.D.N.Y. 1986); OFFICE OF THE MAYOR, CERTIFICATE OF APPOINTMENT TO CHARTER REVISION COMMISSION, *supra* note 14.

36. See *Morris v. Board of Estimate*, 831 F.2d 384, 393 (2d Cir. 1987), *aff'd*, 485 U.S. 986 (1988).

proposals concerning the structure and functions of the city's elective institutions pending the Supreme Court's decision in the *Morris* case."³⁷

Pursuant to state law, the Ravitch Commission had to complete its work by the second general election after its formation (by November 8, 1988).³⁸ Although the mayor offered to reappoint the entire Commission for a second two-year term, Ravitch resigned to run for mayor, and three other members of the Commission decided not to continue.³⁹

The Schwarz Commission therefore consisted of the eleven members of the Ravitch Commission who continued and four new members, including Schwarz.⁴⁰ Lane had been serving as executive director and counsel. Schwarz—in an easy but very important decision—kept Lane and the rest of the staff in place with only a few changes that Lane recommended. The combination of holdover commissioners and holdover staff allowed the new Commission to take advantage of staff work on a number of issues that the prior Commission never reached because the Supreme Court had decided to review *Morris*.⁴¹

37. JANUARY 1989 COMMISSION REPORT, *supra* note 3, at 21. This decision did not end the Ravitch Commission's work. Aside from a body of material and analysis prepared on questions concerning the legality of the Board of Estimate and the commencement of deliberations on its functions, the Ravitch Commission successfully proposed a series of non-Board-of-Estimate-related provisions for the Charter. These Charter revisions all passed in the 1988 referendum. A description of the work of the Ravitch Commission is contained in its final report, N.Y. CITY CHARTER REVISION COMM'N, REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION, DEC. 1986-NOV. 1988 (Jan. 1989).

38. See N.Y. MUN. HOME RULE LAW § 36(5)(b) (McKinney 1994).

39. In addition to Ravitch, former Mayor Robert Wagner, Fordham President Father Joseph O'Hare, and former Schools Chancellor Frank Macchiarola resigned. Mayor Wagner resigned because he felt his health would not allow him to do the work; Father O'Hare resigned because he was also working extensively for the city on the new Campaign Finance Board, which he chaired; and Macchiarola resigned to run for city comptroller.

40. Biographical information about the 15 commissioners is set forth in the Appendix. Of the 15 commissioners, as noted in the text, six were minority (three African-American and three Hispanic). Four were women. Geographically, four came from Brooklyn, two from the Bronx, five from Manhattan (four below 96th Street), two from Queens, and two from Staten Island. Although during the Commission's work, all members had significant private sector jobs (five in the not-for-profit area), nine had previously worked in city government (Schwarz, Vice Chair Harriet Michel, Secretary Nathan Leventhal, Aida Alvarez, Amalia V. Betanzos, Simon P. Gourdine, Patrick J. Murphy, Bernard Richland and David G. Trager). Five of these, plus Archibald Murray, had also worked in federal or state government. Fred Friendly's public affairs career had included in-depth analyses of constitutional issues. Bishop Joseph Sullivan and Mario Paredes were deeply involved in the concerns of the City through their work on church issues. Therese Molloy was going to law school after having been a bank vice president and chair of a local economic development corporation.

41. See *Morris*, 831 F.2d at 384.

The mayor had approached Schwarz in the fall of 1988 about his willingness to serve as chairman. Schwarz had greatly enjoyed service as Mayor Koch's second corporation counsel from 1982 through 1986. Koch was—to the surprise of many—a very good client. The private person, dealing with governmental business, was different from the public man. He listened well—even to junior staff people whom Schwarz brought to meetings. Koch would change his mind based on legal as well as non-legal advice. Surprisingly to those who knew only the public man, he accepted criticism, sometimes sharp criticism. For example, the last substantive communication between the mayor and Schwarz before the mayor's offer was a letter from Schwarz criticizing the mayor for his comments about Jesse Jackson in the 1988 presidential primary.⁴²

Schwarz's knowledge of the mayor's willingness to accept criticism helped Schwarz realize that the mayor would not prevent him from acting independently as chairman. While the mayor and Schwarz never explicitly discussed this, they both implicitly understood it. The mayor also did not attempt to control matters with the Ravitch Commission.

Schwarz agreed to serve as chairman, but first discussed with the mayor the other vacancies on the Commission. While all of the holdover members of the Commission were experienced in and knowledgeable about City government, in Schwarz's view, a fifteen-member Commission with only four minority members could not function effectively, or appropriately explore City governance problems, or give sufficient legitimacy to the Commission's work. This reasoning (which Lane shared) was based on the City's pluralistic population, the different life experiences reflected in the pluralism, the City's historical discrimination in voting matters,⁴³ the imperatives of the Voting Rights Act of 1965,⁴⁴ the fundamental nature of the questions of allocation of government power likely to arise, and the need to foster trust and acceptance among all groups in the City for moral, policy, and political reasons.

The mayor (who might have already been thinking in the same direction) agreed to name two additional minority members: Simon Gourdine and Mario Paredes. The addition of Gourdine and Paredes increased the Commission's minority membership from four (Vice Chair Michel, Alvarez, Betanzos, and Murray) to six, or forty percent. Subsequent events made it clear that the additional diversity on the Commission helped in many ways.

42. Letter from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, to Edward Koch, Mayor, City of New York (Apr. 25, 1988) (on file with Frederick A. O. Schwarz, Jr., and with the Schwarz Records on file with the Columbia Oral History Project on the Koch Administration).

43. See *infra* notes 71-76 and accompanying text.

44. See 42 U.S.C. § 1971 (1994).

By January 1989, we had a new Commission, we had a staff, and we understood the breadth of our legal mandate.⁴⁵ However, the Supreme Court had not yet decided *Board of Estimate v. Morris*, which had been argued on December 7, 1988. While the Justices, in their questions and comments, seemed skeptical of the City's arguments,⁴⁶ and while we were unhesitatingly predicting that the City would lose, it would have been politically unacceptable, if not impossible, to proceed with concrete proposals before the Supreme Court ruled. The timing of the Supreme Court decision would also greatly affect whether we could finish our work in time for a referendum in November 1989. It was generally predicted that we would be "hard pressed" to do so.⁴⁷

The Commission's first task was then simply to wait for the decision of the Supreme Court. But this delay also allowed the staff to brief the Commission's new members, including Schwarz, on the work they had done for the Ravitch Commission, and for the Commission to hold a series of legislative hearings. Finally, during this time, we began to formulate what would become the chairman's initial proposals.

CHAPTER II. *BOARD OF ESTIMATE V. MORRIS*

On March 23, 1989, in a short opinion by Justice Byron White, the Supreme Court unanimously held that "[b]ecause the boroughs have widely disparate populations—yet each has equal representation on the board," the Board's "structure" violated the "one person-one vote" requirement previously found to be implicit in the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.⁴⁸ Quoting from its earlier

45. A mayoral commission is obligated to "review the entire charter . . . [and] prepare a draft of a proposed new or revised charter. . . ." N.Y. MUN. HOME RULE LAW § 36(5)(a) (McKinney 1994). *But see* *Cruz v. Deierlein*, 644 N.E.2d 1347, 1347 (N.Y. 1994).

46. *See* Linda Greenhouse, *Supreme Court Hears Arguments for and Against Estimate Board*, N.Y. TIMES, Dec. 8, 1988, at B1.

47. *See id.*

48. *Board of Estimate v. Morris*, 489 U.S. 688, 691 (1989). The Supreme Court's decision affirmed the unanimous decision of the United States Court of Appeals for the Second Circuit, which, in turn, affirmed the decision of the district court. *See Morris v. Board of Estimate*, 831 F.2d 384, 393 (2d Cir. 1987), *aff'g* 647 F. Supp. 1463 (E.D.N.Y. 1986).

In an earlier round of litigation, District Court Judge Neaher stated that the "one person-one vote" doctrine did not apply to the Board of Estimate because, unlike *Avery v. Midland County*, 390 U.S. 474 (1968), and *Abate v. Mundt*, 403 U.S. 182 (1971), the Board was not an *elected* governing body but rather was comprised of select elected officials appointed by virtue of their positions to the Board. This view was supported by an earlier

cases, the Supreme Court said that "fair and effective representation" is the "basic aim of legislative apportionment" and that "full and effective participation requires 'that each citizen have an equally effective voice in the election[s] . . .'"⁴⁹ In describing the Board's powers, the Court found it "of major significance" that the Board shared "legislative functions" with the City Council with respect to modifying and approving the City's budget.⁵⁰

The challenge to the Board was simple. The Board consisted of the City's three citywide officials—the mayor, comptroller, and city council president—each with two votes—and the borough president of each borough—each with a single vote. The legal difficulty with the Board's voting system was that every borough had vastly different populations. At the extremes were Brooklyn with 2.2 million people and Staten Island with a population then of about 350,000. In between were Queens with 1.9 million, Manhattan with 1.4 million, and the Bronx with 1.1 million. From a representational perspective, each Staten Island resident had six times more representative power than a Brooklyn resident. Similarly, Staten Islanders had six times the access to their borough president. In real terms, this meant that geography could outweigh people as a basis for the Board's decisions, similar to the manner by which small states are protected in the United States Senate. But the Supreme Court had long before held that the Senate analogy did not help states or municipalities.⁵¹ The Senate was specifically protected by the U.S. Constitution,⁵² whereas analogous state and local systems were not.

Before *Morris*, the Supreme Court already determined that the "one person-one vote" requirement applied to municipalities through the Equal Protection Clause of the Fourteenth Amendment, although some small deviations from exact equality in districts would be tolerated for good reasons.⁵³ Grabbing onto this exception, the City argued that the unique

New York Court of Appeals decision. See *Bergerman v. Lindsay*, 25 N.Y.2d 405, 409-10 (1969). Moreover, the district court concluded that the Board did not have a legislative character. See *Morris v. Board of Estimate*, 551 F. Supp. 652, 656-57 (E.D.N.Y. 1982). (The day this decision came down, Judge Neaher amazed Schwarz by telephoning him to suggest that he had saved the City.) The Second Circuit reversed the lower court's decision, holding that the "one person-one vote" rule *did* apply to the Board and remanding for a decision on whether the rule was violated. See *Morris v. Board of Estimate*, 707 F.2d 686, 690-91 (2d Cir. 1983).

49. *Morris*, 489 U.S. at 693-94.

50. *Id.* at 696.

51. See *Reynolds v. Sims*, 377 U.S. 533, 573 (1964) ("We . . . find the federal analogy inapposite and irrelevant to state legislative districting schemes.").

52. U.S. CONST. art. I, § 3, cl. 1.

53. See, e.g., *Abate v. Mundt*, 403 U.S. 182 (1971).

role that boroughs historically played in New York City government justified the large deviation. Referring to the “structure and function of the Board and of its role in the development of New York City,” the City characterized the Board as “a unique response to the history, geography, culture and demographics of the city.”⁵⁴ The Supreme Court gave this argument short shrift.⁵⁵

It is important to note what the Supreme Court did not decide. First, the Court did not hold that the Board as an institution was unconstitutional, but rather that its voting structure was unconstitutional. This led to one of the central early debates of the Charter revision process: Could the Board legally—and should it substantively—be “saved” by a scheme of “weighted voting” that would, for example, give six votes to Brooklyn’s borough president as opposed to one vote to Staten Island’s? Second, the Court’s decision was based only on the “one person-one vote” principle. The parties did not argue, and the Court did not touch upon, whether an at-large (boroughwide and citywide) system to elect the members of the City’s most important “legislative” body created voting rights issues by suppressing the weight of minority votes. Finally, the Supreme Court did not determine when a new Charter should be in place (although the Second Circuit had called for change within a year). All of these vital and difficult matters were left for the Commission to decide.

Banner headlines greeted the Court’s decision. The *New York Times*, in a front page banner headline, read, *Justices Void New York City’s Government; Demand an End to 5 Boroughs’ Inequality*.⁵⁶ The lead story in the *Times* (one of six, plus an editorial) said the decision’s “immediate impact was to sow considerable confusion in a city that is entering an intense political season.”⁵⁷

The decision to delay consideration of fundamental restructuring until the Supreme Court’s *Morris* decision, and the enormous attention that

54. Brief for Municipal Appellants and Appellant Straniere at 4-5, *Morris v. Board of Estimate*, 831 F.2d 384 (2d. Cir. 1987) (Nos. 87-1022 to 87-1112); see also *Board of Estimate v. Morris*, 489 U.S. 688 (1989).

55. See *Morris*, 489 U.S. at 702 (rejecting City’s claim that the Board should not be disturbed because it allegedly “accommodates natural and political boundaries as well as local interests,” “has been effective,” and “is supported by the city’s history”).

56. Linda Greenhouse, *Justices Void New York City’s Government; Demand an End to 5 Boroughs’ Inequality*, N.Y. TIMES, Mar. 23, 1989, at A1.

57. Linda Greenhouse, *High Court Says Board Violates Rule of One Person One Vote*, N.Y. TIMES, Mar. 23, 1989, at A1. All of the city’s papers gave extensive coverage to the Court’s decision and to the forthcoming responsibilities of the Commission.

In the months that followed, however, among the City’s major media institutions, only the *New York Times*—which assigned two reporters full-time (Alan Finder and Todd Purdum)—and *New York Newsday*—but only its editorial board—gave substantial attention to Charter issues until the referendum heated up in the fall.

accompanied the decision,⁵⁸ demonstrate that major Charter change requires a substantial and politically recognizable reason. Without *Morris*, there would have been no Charter revision. Without *Morris*, attempts to make major changes in the City's governance would have been thwarted, regardless of significant objections to the Board's governmental functions and representational deficiencies.⁵⁹ With *Morris*, broad change became possible, not only because of what it held but because it galvanized attention to questions of governance. Three editorials that appeared soon after the Supreme Court decision evidenced that focus.

A *New York Newsday* editorial entitled *Back to the Drawing Board* noted that "the impending political debate will necessarily be heated at times, perhaps even a bit frightening. Change is inevitably threatening." It concluded by saying that after a life span of 91 years the "City [had] to go back to the drawing board."⁶⁰ A *Times* editorial called *Electricity Suddenly Crackles* posed two questions for the Commission: "What form of government does New York [City] now want? Is moving quickly a virtue, minimizing uncertainty, or a vice, forcing haste in a heated campaign?" In language more colorful than some of its editorials, the *Times* opined that "electricity suddenly crackles because New York must now search for new ways to govern itself."⁶¹ A *Noticias del Mundo* editorial referred to the decision as "[a]n open door for empowerment of the city's minorities." It called for an alliance with "leaders of other minority elements," predicted a "wholesale restructuring" of City government, and said:

[O]ur job . . . will be to make certain the restructuring provides for our future political empowerment because whatever new system is ultimately approved by the voters will be in place for a long time to come—well into the next century when Latinos and other minorities will constitute nearly two-thirds of the city's population.⁶²

58. See *infra* note 62 and accompanying text.

59. See discussion *infra* Chapter V, Part II.

60. Editorial, *And the Court Says It All: City Must Jettison Its Board of Estimate; What's Next?*, *NEWSDAY* (N.Y.), Mar. 23, 1989, at 80.

61. Editorial, *The Right Way to Rule New York*, *N.Y. TIMES*, Mar. 23, 1989, at A28.

62. *Latinos and Charter Revision*, *NOTICIAS DEL MUNDO*, Mar. 1989.

From the moment of the Court's decision, the Commission was flooded with advice, threats,⁶³ and entreaties from politicians, public-interest groups, private-interest groups, and the press. We had much to decide. Before describing how the Commission reached its decisions about the new government, it will be useful first to discuss the factors that affect constitutional writers generally and some that affected us specifically as well as to describe the early process decisions made by the Commission.

CHAPTER III. CONSTITUTIONAL CHANGE

Every Charter, like every constitution, is a child of its time and place and of the views of its own framers. Charters reflect the attitudes and goals of their framers, strained through whatever enactment processes they must undergo. They also reflect their era's worries, concerns, and angers, as well as hopes and aspirations. While influenced by political and governmental theory, writing a constitutional document is not an exercise in the application of abstract thinking. The U.S. Constitution, for example, did not spring full-blown from a philosophical brow. Rather, it reflects a series of compromises among varying individual philosophies, historical perspectives, attitudes, experiences, and perceptions of current events and of political requirements—all within the broad aim of creating a representative and effective national government, while protecting the authority of states and individual rights. The 1989 Charter, although not such a grand undertaking, also reflect the views of its participants in the context of important current events. The attitudes of the participants are discussed throughout this article. The most significant of many current and historic events that shaped the 1989 Charter are discussed below.

I. THE CITY AS WE FOUND IT

New York City in 1989 was not the city of 1901 or of any other year in which major Charter changes occurred. A variety of centrifugal forces threatened to unravel the weave of the City's fabric. Race was foremost among them. The City of 1989 was almost fifty percent minority, primarily African American and Latino, with a growing Asian population.⁶⁴

63. The immediate reaction of Staten Island's Borough President Ralph Lamberti and State Senator John Marchi was to call for Staten Island to secede from the city. Marchi said he would not wait to see what solutions were proposed but would push his secession bill because "we would be better off under the rule of George III." Todd S. Purdum, *Politicians Scrambling to Decide Who Won*, N.Y. TIMES, Mar. 23, 1989, at B4.

64. See Alan Finder, *Minority Groups on Council: Competing Approaches*, N.Y. TIMES, May 30, 1989, at B1.

This number was increasing. The City had once again become a powerful immigration magnet.⁶⁵ In 1989, the City had troublesome racial issues.⁶⁶

Along similar lines, many residents of the "outer boroughs" sensed that despite their representation on the Board of Estimate, they were being shortchanged and that Manhattan was too dominant in governmental decision making.⁶⁷ Representatives of some communities echoed this sense of disenfranchisement. They felt that their borough presidents did not speak for them and that more community-controlled decision making was needed. Another problem was that the Democratic Party had historically overwhelmingly dominated City government.⁶⁸

While these issues were not unknown to earlier commissions, a combination of events—a mayoral election in which race was an issue; the perceived weakening of borough presidents; increasing NIMBY ("not in my backyard") protests over the placement of service facilities in various communities, particularly poor and minority communities;⁶⁹ and concern over whether power was overly concentrated, to name a few—made them particularly important in 1989. Our City was different from the City of the 1901 Charter in one other very important way. The people expected far more government services.

How these and other similar matters played out through our deliberations and affected the new Charter is discussed repeatedly in this article. Race, fear of Manhattan domination, and concerns about a one-party City, in particular, merit special attention at the outset.

A. Race and Electoral Politics

A dominant theme in the Commission's work was enhancing minority political opportunities and increasing the likelihood of minority political participation. Something 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.

65. See Carol Groneman & David M. Reimers, *Immigration*, in THE ENCYCLOPEDIA OF NEW YORK CITY 581, 583-586 (Kenneth T. Jackson ed., 1995).

66. See John Mollenkopf, *Government and Politics*, in THE ENCYCLOPEDIA OF NEW YORK CITY, *supra* note 65, at 492.

67. See *End of a Power in New York City*, N.Y. TIMES, Mar. 26, 1989, at 1.

68. See Evan Cornog & Peter Eisenstadt, *Democratic Party*, in THE ENCYCLOPEDIA OF NEW YORK CITY, *supra* note 65, at 325-26.

69. See *New York: Building Placement Plan Wins Effectiveness Kudos*, PUBLIC FINANCE/WASHINGTON WATCH, Aug. 31, 1992, at 2.

New York City's record on race was mixed. The City had been a pioneer on human rights legislation.⁷⁰ Its opinion leaders were at the forefront of the civil rights revolution of the 1960s—although the battles were often fought far away in the South.

On the other hand, like other northern cities, New York also had a discouraging, and often ugly, history on race. The draft riots in 1863 led to savage lynchings of blacks.⁷¹ More recently, the City, like the states of the former Confederacy, became subject to the pre-clearance requirements of section 5 of the Voting Rights Act because of low minority participation and the use of a literacy test.⁷² Under this section, changes affecting "voting" must pass muster with the Justice Department before they can become effective.⁷³ Using this power, in 1981 the Justice Department set aside the new lines that the City Council drew up to redistrict itself after the 1980 Census on the grounds that they were intentionally racially discriminatory.⁷⁴ During the twenty-year history of the ten at-large borough representatives on the City Council, just one minority was elected—a Hispanic from Manhattan, for one four-year term (1965-69).⁷⁵ From 1977 to 1985, the Board of Estimate had no minority members. The complexion of the Board was changed somewhat by the election of David Dinkins as Manhattan borough president in 1985, on his third try, and by the appointment of Fernando Ferrer as Bronx borough president in 1987, giving minorities two of eleven votes on the Board.⁷⁶

Thus, in 1989, the history and the recent record of the City on issues of race was mixed. Although there were some positives, the negatives were cancer sores on the body of a City that was often, and certainly saw itself as, progressive. Racial tensions were high in 1989 and the years leading up to it. Concerns over police brutality, the Howard Beach killing, the furor over Jessie Jackson's presidential bid in 1988, and many other

70. See, e.g., George Will, *Guffawing Where the Court May Not*, *NEWSDAY* (N.Y.), June 24, 1988, at 95 (discussing the enactment of human rights legislation in 1965).

71. See Iver Bernstein, *Draft Riots*, in *THE ENCYCLOPEDIA OF NEW YORK CITY*, *supra* note 65, at 344.

72. See *United Jewish Orgs. v. Carey*, 430 U.S. 144, 148 (1977) (noting that the City of New York had become subject to section 5 of the Voting Rights Act).

73. See Voting Rights Act, 42 U.S.C. § 1973(c) (1998). This Act was effective in 1989.

74. See, e.g., Maurice Carroll, *U.S. Rejects Plan for Redistricting New York Council*, *N.Y. TIMES*, Oct. 28, 1981, at A1.

75. See *Andrews v. Koch*, 528 F. Supp. 246, 252 (E.D.N.Y. 1981); see also *infra* Chapter VII, notes 52-58 and accompanying text.

76. Herman Badillo had served one term as Bronx Borough President from 1966-1969. Dinkins had three African-American predecessors as Manhattan Borough President: Hulan Jack from 1954-1960; Constance Baker Motley from 1965-1966; and Percy Sutton from 1966-1977. Motley and Sutton had initially been appointed rather than elected.

incidents, fanned the flames. As incisively shown in the report of the Commission on the Year 2000, chaired by former Mayor Robert F. Wagner, Jr., the city seemed to be slipping and sliding into two divided cities.⁷⁷ This second city, the city of the poor, was predominately minority. In 1989 there was tension between the incumbent mayor and many blacks and other minorities.⁷⁸ Furthermore, 1989 was a mayoral election year.

Our Commission's task was to restructure the City's governance scheme for the long term. In doing so, the Commission had to think about the short term as well and had to act in ways that would help to bring people together and avoid exacerbating tension.

Many of the commissioners were attuned to this history and the need for reforms that would provide more opportunities for minority participation in the City's political processes. The addition of two more minority members to the Commission added to the confidence that a sufficient minority voice could ensure such reforms received continual Commission attention.⁷⁹

All of the commissioners heard frustration and discontent from minority witnesses at public hearings, in memoranda and written proposals sent to us by civil rights organizations, and in meetings with many organizations. In 1989, a wide cross-section of minorities had a powerful sense of past unfairness, of exclusion from full and fair participation in the electoral process, of discrimination, and of cynicism about reform. No thoughtful person, concentrating on the needs of New York City in 1989, could have participated in the Commission's work without a firm conviction that these were real concerns, real issues, and real problems for all New Yorkers, whether minorities or not.

Our work had to relate to the structure of government. But the attitude the Commission expressed, including our language, goals, and openness as well as the expression of our ideals, aspirations, and desire to listen, had worth of its own. It helped reduce the likelihood that the Charter debate itself would be "racially divisive," as Mayor Koch predicted.⁸⁰ It also increased the likelihood that we would succeed with the Justice Department and pull together a winning coalition in the referendum.

77. See N. Y. CITY COMM'N ON THE YEAR 2000, NEW YORK ASCENDANT: THE REPORT OF THE COMMISSION ON THE YEAR 2000, at 10-12 (1988).

78. See Mollenkopf, *supra* note 66, at 492.

79. See *supra* notes 44-45 and accompanying text.

80. See, e.g., *infra* notes 115-16 and accompanying text.

B. *Borough Voices and the Fear of Manhattan Domination*

Just as minorities worried about exclusion and unfairness, so did many in the so-called “outer boroughs,” who expressed a fear of Manhattan domination.⁸¹ Unlike race—where the very structure of City government (e.g., the dominance of at-large elections associated with the Board) and specific actions relating to structure (e.g., the 1981 districting of the City Council) were problems—this was not a structural or legal issue. Rather, the outer boroughs sensed that they were eclipsed, dominated, and overshadowed by Manhattan. 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.

Fear of Manhattan domination was nothing new, of course. The theme had run through the City’s Charter and governmental history since the consolidation of 1898.⁸² While many public officials and citizen witnesses expressed worries about Manhattan domination, we had to wrestle with a broader issue. It involved not only the balance between Manhattan and the rest of the City, but also how borough—or, for some advocates, more local—voices should be preserved and expressed in a world without a Board of Estimate. Much of the passion underlying this difficult issue, however, remained the century-old fear that people in, and the interests of, Brooklyn, Queens, the Bronx, and Staten Island, would be suppressed by the central city government. The central government was assumed—accurately or not—to be dominated by Manhattan.

C. *Concerns About a One-Party City*

Another important concern cutting across all of our work and affecting many Commission decisions was that the City was essentially a one-party city. Non-Democratic mayors were occasionally elected (e.g., LaGuardia and Lindsay), but Democrats, from time immemorial, comprised the overwhelmingly dominant party in the City. Other than Mayors Lindsay, who won re-election as a Liberal and eventually became a Democrat, and LaGuardia, who was hardly a typical Republican, and won as a Republican/City Fusion candidate, only Democrats had been elected to citywide office since 1902. In 1989, the Republican “Minority Leader” on the City Council had no fellow Republicans to lead.

While Commission members were not chosen for their party affiliation, the Commission also was mostly Democratic. Nonetheless, the City’s one-

81. See *supra* note 67 and accompanying text.

82. See DAVID C. HAMMACK, *POWER AND SOCIETY: GREATER NEW YORK AT THE TURN OF THE CENTURY 185-203* (1982); SAYRE & KAUFMAN, *supra* note 1.

party phenomenon was troubling. Real and repeated multi-party competition can help develop better ideas. Real party competition can also increase voter interest and voter participation.

We took some actions that increased party competition, but only slightly. The likely continued absence of significant and sustained party competition caused us to think hard about other ways to encourage competitive ideas, particularly by ensuring that other elected officials would compete with whomever was mayor. Our concern about the lack of strong and consistent party competition was also one of many factors contributing to the new Charter provisions relating to open government.

II. POLICY AND POLITICS

Charter framers cannot simply decree what they want. For our proposals to become law, they had to be supported by at least a majority of the Commission, by a majority of the voting public, and by the U.S. Department of Justice. This meant that the proposals needed the support of groups who influenced these decisions. Our obligation was not only to create a sensible Charter, but to create one that could pass all of the political hurdles to making our proposals law. We were, after all, charged with the responsibility of providing a replacement to a government decision-making structure that had been declared unconstitutional on the basis of its representational failures.⁸³ Moreover, at some point, the courts would demand an immediate remedy.

Politics, in the sense of devising proposals that would win approval, affected our work in three interrelated ways. First, we had to develop a consensus on the Commission; second, we had to identify the elements for an election victory; and finally, we had to make sure that the Justice Department would not object to the proposed Charter changes. Our referendum strategy is discussed in Chapter XIII.⁸⁴

The building of consensus on the Commission is discussed in detail in Chapter 11.⁸⁵ To build consensus, we knew we needed support from most of the minority members, and from Nat Leventhal, the most experienced and best connected member of the Commission. We were also convinced that without support from David Trager or Judah Gribetz (both articulate and strong-willed members with substantial government experience), it would be harder to achieve Commission consensus. Finally, we knew we had to pay fair attention to all commissioners, and that without a reasonable

83. See *Board of Estimate v. Morris*, 489 U.S. 688, 703 (1989).

84. See discussion *infra* Chapter XIII.

85. See discussion *infra* Chapter XI.

and open process, attentive to the merits of each member's arguments, we could not achieve consensus.

Elements of this we knew from the start; other elements developed over time. To achieve an electoral victory, we wanted support from the major civic and good government advocacy groups, and from the editorial boards of the City's daily newspapers, particularly the *New York Times*. We needed support from the candidates for mayor, and from the leaders of the City's minority groups and communities. We needed to win at least two of the three largest boroughs, Manhattan, Brooklyn, and Queens, and the City's minority communities. Support from the borough president of Queens became particularly important at the end of our process.⁸⁶ Support from minority leaders and communities would also be essential to our efforts at the Justice Department.

Our political strategies reflected our own policy goals. We believed that many of the proposals that we thought represented good policy would be consistent with the policy views of the groups whose support we were seeking—and that we personally were particularly interested in obtaining. But we knew that this would not always be the case and that policy preferences of Commission members and of the various entities we would be courting, including the editorial boards, would result in a multitude of compromises. The tale of the compromises is recounted throughout the article. Most of the changes to our initial proposals were the product of the wisdom of these suggested changes. Our procedural plan from the outset was to have the Commission put out preliminary ideas and then to use public comment to improve the proposals. Simply put, most accepted changes were better than or as good as the ideas we began with. In some instances, however, we compromised with people or groups whose support we needed. Fortunately, in no case did we accept a demand that we believed deleterious to City governance, although some were offered.

The lesson is that politics matters, and that it should matter. By politics, in the words of Hanna Pitkin, we do not mean "the making of arbitrary choices, nor . . . the . . . bargaining between separate, private wants. [Rather we mean] a combination of bargaining and compromise where there are irresolute and conflicting commitments, and common deliberation about public policy, to which facts and rational arguments are relevant."⁸⁷

86. See discussion *infra* Chapter VII.

87. HANNA FENICHEL PITKIN, *THE CONCEPT OF REPRESENTATION* 212 (1967).

III. A CHARTER COMMISSION, NOT A LEGISLATURE

A charter commission's task is to provide a structure and a process for governmental decision making, not to make the governmental decisions themselves. In our proceedings, this distinction was often blurred by advocates who requested that we make regulatory or redistributive decisions to further their policy goals. Schwarz gave an example at the Commission's June 15 meeting, following several weeks of public hearings: "As a personal view of what we've—what I feel I've learned, anyway, in all of this, the first is the incredible yearning of New York City's citizens and residents for services. We talk a lot about structure, the yearning is for services."⁸⁸

While we could do some things related to the provision of services, and while the ultimate outcome of a better structure should increase the likelihood of better services, a charter is not legislation and a charter commission is not the legislature—the governmental body intended to determine the nature and level of government services.

The City Charter was already mind-numbingly detailed—consisting of more than 60 chapters and 200 pages.⁸⁹ But still we could not—and should not—act as a legislature. "Our job [was] 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."⁹⁰ We needed ways to express the distinction, and Schwarz did so by a metaphor:

[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.⁹¹

88. Public Meeting, June 15, 1989, at 4.

89. As a generality, the more local the government and the later the constitution, the more detail appears. Ease of amendment is also associated with length.

90. Public Meeting, Apr. 24, 1989, at 12.

91. *Id.* at 10.

CHAPTER IV. THE IMPORTANCE OF PROCESS

The legitimacy of governmental efforts in democracies is anchored in their processes. For a charter revision commission, process is particularly important. Its members are not elected, and once appointed, they cannot be removed or replaced.⁹² Its budget is protected against legislative interference, and certain types of competing commissions are prohibited.⁹³ While the public's right to reject a commission's proposals at a referendum means a commission may not simply dictate, that public right is only to say yes or no. This, together with the great power and responsibilities of a charter commission, created an obligation to be open and to engage in a meaningful and extensive dialogue with the public throughout our work.

To accomplish this obligation, we made a number of key decisions at the outset. Clearly our early process decisions dramatically affected our end product for the better. In addition, as we had hoped, our procedural decisions also helped both build allies and temper the opposition of some critics. The fairness and openness of our processes also helped us win Justice Department approval.

I. COMMISSION GOALS

The Ravitch Commission had adopted a series of goals to frame its work. We decided that re adoption and elaboration of these goals would serve an important public and Commission purpose: to provide a touchstone for the Commission's deliberations; to provide logic, rationale, and context for various decisions; and to link Commission decisions to more universal principles, particularly those embedded in the American constitutional experience. These goals would also create a basis for the public to measure our proposals. Adopting goals could be seen as a risky strategy because it gave critics a target with which to judge our work. The value, however, outweighed the risk.

For these reasons, on the day of the release of "The Chair's Initial Proposals" at the Commission meeting held on April 24, 1989, Schwarz restated the Commission's goals as follows:⁹⁴

92. See N.Y. MUN. HOME RULE LAW § 36(4) (McKinney 1994).

93. See *id.*

94. See Public Meeting, Apr. 24, 1989, at 4-7 (providing substantial ensuing discussion and elaboration and a response by 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.

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 Act⁹⁵
2. Balancing power, checking power, is “really in the bones of Americans. That is part of the genius of our Constitution”⁹⁶
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 responsible⁹⁷
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.”⁹⁸
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 at the time of crisis.⁹⁹
6. [I]ncrease the participation of all levels of government and of the people in the things [that] affect their lives[.]¹⁰⁰

These goals were rooted in America’s constitutional history and general thinking about constitutional government. They were also a product of the specific 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 to be represented was high on the list of the City’s current needs. Balancing and checking power would be particularly important in a world without a Board of Estimate and in a City without a flourishing two-party system. Weakness

95. *Id.* at 4-5.

96. *Id.* at 5.

97. *Id.* at 6.

98. *Id.*

99. *Id.*

100. *Id.* at 6-7.

in fixing accountability and clarifying responsibility had been a substantive problem with the Board. The need to enhance efficiency is ever present—and sometimes conflicts with the other goals.¹⁰¹ Finally, 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.

II. LEGISLATIVE HEARINGS

Although the new Commission was in place by mid-January 1989, and the Supreme Court had not yet decided *Board of Estimate v. Morris*, it seemed that we could do some useful preparatory work. At the first Commission meeting, on January 20, 1989, Schwarz said that “to choose to do nothing would be to make a choice, to tie our hands as far as the option of taking action this year.”¹⁰² Following Director of Research Frank Mauro’s suggestion, we proposed, as a starting point, that the Commission hold a series of “legislative” hearings about the workings of City government, rather than discuss any further what ultimate form a revised government should take.

We had two reasons for this approach: political and substantive. First, it would have been impolitic to jump to the topic of structure without giving the Supreme Court reasonable time to decide *Morris*. Doing so would have galvanized opposition and risked the support of people who might support us if the Supreme Court declared the Board unconstitutional. Second, as put by Schwarz, rather than starting by “debating the ultimate questions of how the government should be structured,” we would be better informed and in a stronger position with the “people who must ultimately judge” if we started at the “bottom instead of from the top.”¹⁰³ For example, on land use or budgeting, we would do better by “exploring what actually goes on in government and making sure we really understand.”¹⁰⁴ Of course, many, perhaps most, of the commissioners knew a great deal about how the system worked, and it is unclear whether we would have held these legislative hearings if *Morris* had already been decided. Nevertheless, it turned out to be time very well spent.

This proposal was not accepted without some debate. At the Commission’s second meeting on February 16, a few of the holdover commissioners expressed concern that earlier tentative proposals of the Ravitch Commission and work that supported them not be lost. But work would not be “lost,” and it was difficult to see how learning more could be

101. *See id.* at 9.

102. Public Meeting, Jan. 20, 1989, at 3.

103. *Id.* at 5.

104. *Id.*

harmful. Commissioner Leventhal helpfully cut through the concerns by pointing out that at the legislative hearings, commissioners would obviously be free to ask witnesses questions like: "Last year we thought that this might be a direction to go in, what do you think about it?"¹⁰⁵

Between February 28 and March 15, we held six legislative hearings.¹⁰⁶ The format of the hearings consisted of, in general, opening observations by Schwarz, presentations by staff, questions of the witnesses, and discussion among the commissioners. The subjects covered were: (1) local voice in government, (2) contracting and procurement; (3) land-use decision making; (4) oversight and representation; (5) franchising; and (6) budgeting.

There was an important unstated implication of the breadth of these hearings: Charter revision was likely to be broad. This, in turn, suggested that we were looking at a government without a Board of Estimate.

In addition to being informative, these hearings were valuable in other ways. First, they showed the Commission's open and professional approach to its work. Coming as they did before the Supreme Court's *Morris* decision (and the extra spotlight this threw on the Commission's responsibilities), these hearings affected mostly the more devoted Charter watchers. Second, the hearings built a record for some of our changes, such as what ultimately became of the Independent Budget Office, the "fair share" policy for the distribution of City facilities, the remedies for the City's "slow pay" practices with contractors, and decisions to rectify certain weaknesses of the Board of Estimate, exemplified by its emphasis on last-minute crisis management rather than on earlier planning.¹⁰⁷ These hearings also provided added comfort for significantly increasing the Council's powers, because the hearings showed that the Council recently had focused more on citywide needs in the budget than the Board of Estimate had.

105. Public Meeting, Feb. 16, 1989, at 49.

106. See Legislative Hearings, Feb. 28, 1989, Mar. 1, 1989, Mar. 2, 1989, Mar. 9, 1989, Mar. 14, 1989, Mar. 15, 1989.

107. See, e.g., Letter from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, and Eric Lane, Executive Director, 1989 New York City Charter Revision Commission, to Barry Weinberg, U.S. Department of Justice 10-12 (Sept. 28, 1989).

III. OPEN MEETINGS

We decided that every meeting of the Commission would be public and transcribed.¹⁰⁸ The Ravitch Commission had closed some meetings, and Lane did not believe that openness was required by New York's Open Meetings Law,¹⁰⁹ a view not fully shared by Schwarz. In any event, we thought that the Commission would be better served by allowing the public to see our work. Allowing and encouraging public observation of our efforts would demystify what we were doing and diminish any sense that we were "acting upon" rather than "acting for" the public. Also, public debate makes narrow-minded views more difficult to express.

Initially, the idea of open meetings met some token resistance—expressed individually in private—among a few members of the Commission who wondered whether they could speak as fully in public as they might in private or, alternatively, who questioned whether the Commission's efforts would benefit from public dispute among commissioners. In the end, however, all seemed to agree, although the Commission took no vote on this.

In retrospect, the open meetings did serve the intended purposes. No one ever criticized us for making secret deals. The open meetings did not restrain debate; indeed they may have sharpened it (because of the constant public feedback we received). Nothing that ought to have been said in private could not have been said in public.

Our openness was also helpful with the Justice Department, because process was an important consideration for pre-clearance. Among those who followed the Charter, moreover, it increased understanding of the issues, of the necessary tradeoffs, and of the enormous complexity of what we were doing.

This commitment to openness did not mean that private conversations between the chairman and individual members of the Commission never occurred. They often did. For example, the chairman telephoned individual members, met with them before meetings, or spoke with them in a corridor at a meeting. Examples of 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

108. Transcription was in contrast to the 1975 (and earlier) Charter Commissions (and to much of the Ravitch Commission), where there is no such record for historians, lawyers, or others to examine. *See* Public Meeting, May 15, 1989, at 91-92 (remarking on the unfortunate absence of a record of the deliberations of the 1975 Goodman Charter Revision Commission).

109. *See* N.Y. OPEN MEETINGS LAW § 103 (McKinney 1994).

argument, or indicating how a particular Charter provision might be helpful in attracting support. Openness does not prevent individual persuasion.

IV. PUBLIC HEARINGS—AND AN ITERATIVE PUBLIC PROCESS

In addition to conducting our work in public, we wanted the public to contribute to our work. We decided to plan on an interchange between the Commission and the public, to avoid the undemocratic and ill-formed nature of most referenda.¹¹⁰

Our plan was for the public to monitor, and occasionally participate in, public meetings. In addition, after each round of Commission meetings, which culminated in a preliminary set of proposals, public comment and public hearings followed. Then a new round of Commission discussion, revised proposals, and more public hearings ensued. Schwarz captured the sentiment behind this approach when he presented the chairman's initial ideas to the Commission:

[P]ublic debate and comment "is going to make what is presented today different and better at the end of the process [because] . . . we all need to learn, we all need to grow, we all need to develop, we all need to improve in our ideas . . . , and I know that we will learn from the wider New York City public."¹¹¹

The Commission's rhythm of formulating tentative ideas and hearing public reaction and criticism, followed by establishing more Commission meetings and a new set of sharpened ideas, created some element of risk. Would we be "accused" of changing our minds and, therefore, not knowing what we were doing? In fact, this open and iterative public process helped us enormously. It demonstrated that good policy equals good politics. Considerable political capital and many good ideas were gained from our openness to public participation.

We held two rounds of Public Hearings to obtain public comment on different stages of the Commission's work. At these twelve hearings, held all over the city, 679 witnesses came to press, to pummel, and, in some cases, to praise us—though usually not to praise, because until the Commission issued its own final proposals, everybody was an advocate seeking an edge. Hearings generally started in mid-afternoon. Several went to midnight or beyond. Indeed the length of the hearings became

110. See Eric Lane, *Men Are Not Angels: The Real Politik of Direct Democracy and What We Can Do About It*, 34 WILLAMETTE L. REV. 101 (1999).

111. Public Meeting, Apr. 24, 1989, at 3-4.

something of an inside joke on the Commission. In chairing the public hearings, Schwarz often allowed speakers to talk past their allotted times. This led to much teasing. For example, when Commissioner Richland, a dissenter from our ultimate proposals, nonetheless praised Schwarz's "patience," Fred Friendly jumped in with "[a]nd I'll never forgive him."¹¹²

One aspect of broadening public participation was to ensure that hearings (and Commission meetings) occurred throughout the City and that they not be limited to Manhattan or even to traditional downtown areas in any borough.¹¹³ The public hearings were held in all five boroughs, often in poor or minority neighborhoods. 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.¹¹⁴

One public official, Brooklyn Borough President Howard Golden, criticized this policy, proving perhaps that no good policy goes unassailed. As part of his lead-off testimony at a hearing in the Brooklyn Masonic Temple, located in a community district with a sixty-two percent minority population, the Brooklyn borough president complained that we should have held this hearing "where we can get a representative group of citizens who work."¹¹⁵ This comment led to an extremely heated exchange between Schwarz and the borough president.¹¹⁶

Schwarz called Golden arrogant and insensitive because of his insulting remark, and he attacked Golden for hanging on to the Board of Estimate's old voting structure even though Golden's own Brooklyn constituents were enormously underrepresented. The exchange, which the *Times* described the next day as "among the most acrimonious moments" in the Commission's history,¹¹⁷ was probably the only time during the Commission's history when Schwarz lost his temper. As the *Times* put it, Schwarz, "a seasoned litigator . . . cross-examine[d] Mr. Golden in a tense and withering tone"¹¹⁸

112. Public Meeting, June 27, 1989, at 290.

113. See Public Meeting, Mar. 31, 1989, at 50-52; Public Meeting, Apr. 24, 1989, at 109-10.

114. See Letter from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, and Eric Lane, Executive Director, 1989 New York City Charter Revision Commission, to Richard Posner, U.S. Justice Department 4-5 (Sept. 26, 1989) (on file with the *New York Law School Law Review*).

115. Public Hearing, June 1, 1989, at 15.

116. See *id.* at 16-26, 33, 37.

117. Todd S. Purdum, *Angry Skirmish Over Charter Brings Apology*, N.Y. TIMES, June 2, 1989, at B1.

118. *Id.* Schwarz went too far when he said: "Golden does not have an open mind," prompting Commissioner Leventhal's response: "I don't think it helps us to overstate the case." Public Hearing, June 1, 1989, at 37-38. Schwarz later withdrew the remark, and

While this volatile exchange was a product of anger, it might have helped us politically. Golden would never support any Charter that abolished the Board. The very next witness, Reverend Johnnie Ray Youngblood—an independent minority leader, and co-chair of the East Brooklyn Congregations, which were responsible for the Nehemiah Housing—started his testimony by saying: “We want you to know that we are all from Brooklyn, and we are delighted that you chose this spot . . .”¹¹⁹ Tumultuous applause followed.

Rev. Youngblood also said:

In our experience, the Borough President first represent[s] the Kings County Democratic machine. Secondly, represents the campaign contributors, contractors, lawyers, and insiders who grease that machine. Third, represent[s] the non-minority and minority Council people whom he or she controls; And four, when time permits, . . . the rest of us.¹²⁰

Certainly, this incident dramatically demonstrated the Commission’s determination to break with traditional practices of how and where public business should be conducted.

V. PUBLIC OUTREACH

While the public’s involvement in public hearings and in many meetings with staff and members was extensive, it was insufficient to meet our substantive, political, and legal needs. Therefore, Gretchen Dykstra, the Commission’s director of communications, developed an extensive community outreach program to increase awareness of the Charter process and of the Commission’s proposals, as well as to stimulate public suggestions. Dykstra, a committed believer in public participation, created an active press office, a speakers’ bureau, and a mailing list of 62,000 names—members of the press, public officials, community groups, and as many political, legal and civic groups as it was possible to discover.

Among the materials sent to the mailing list was the *Charter Review*, the Commission’s periodic newsletter.¹²¹ The *Review* contained thoughtful and reader-friendly pieces.

Golden later apologized. *See id.* at 49-51.

119. Public Hearing, June 1, 1989, at 66.

120. *Id.* at 69.

121. *See, e.g.*, CHARTER REVIEW (N.Y. City Charter Revision Comm’n, New York, N.Y.), Fall 1987.

Dykstra and her staff also organized many meetings with all sorts of groups, at which Commission members and staff members would speak with and listen to all sorts of groups. During the early months, the thrust of the meeting focused primarily on the exploration of ideas. During the referendum, the thrust focused primarily on explaining why the Commission had done what it did and, thus, seeking support for the referendum.

Each member of the communications staff was required to have some policy expertise. This allowed them to interact substantively with community groups and with our research staff, thereby enhancing the work of both groups of staff members.

Dykstra's outreach program included placing posters about the Charter process in the subway system; putting notices about Charter change in telephone bills;¹²² distributing a booklet of games and puzzles explaining the City's governmental system to libraries, unions, literacy programs, and schools; distributing fliers to every City worker (385,000); offering a wall poster illustrating the structure of the government; and making public service announcements.

The gist of all this was to increase awareness of the Charter process, rather than to seek support for our specific proposals. We believed that: (1) a good-government aura would help us and (2) the wider the interest in Charter change, the less special-interest opponents could hurt us. Finally, as with everything we did, we had an eye on the Justice Department's ultimate review. (As it turned out, our outreach effort was helpful with the Justice Department when it considered whether the Charter process had been fair to minorities.)

Our outreach efforts also improved public feedback and increased Charter awareness. However, Charter Revision did not readily grab and sustain burning public attention. This was expressed well in two cartoons by Dan Shefelman in *New York Newsday*. One depicted two grave diggers beside a newly dug grave with a Board of Estimate gravestone. One grave digger asks, "Who the heck was he anyway?" The other responds, "Beats me."¹²³ The other cartoon is headed "Election 1989: Scenes We Probably Won't See." The picture shows a huge crowd at a rally with placards like "CHANGE THAT CHARTER"; "DEATH TO THE BOARD OF ESTIMATE"; "CHARTER REVISION ¡SI!"; and, "WAY TO GO FAO."¹²⁴

122. These notices produced approximately 5,000 requests for information.

123. N.Y. CITY CHARTER REVISION COMM'N, NEW YORK CITY CHARTER REVISION COMMISSION SELECTED PAPERS, 1986-1989 II (unpaginated) (on file with the *New York Law School Law Review*).

124. *Id.*

CHAPTER V. TWO CRUCIAL—AND CONTROVERSIAL—THRESHOLD DECISIONS

In its early days, the Commission made two crucial threshold decisions. We would strive to finish in time for the ballot in November, and we would abolish the Board of Estimate. Both decisions were controversial and had powerful and persistent opponents. Both were grounded in the law, politics, and policy. Abolition of the Board vastly increased the Commission's responsibilities; all of its powers had to be reallocated. This made achieving our timing aspiration more difficult and more important.

I. THE DECISION TO STRIVE TO FINISH IN TIME FOR A NOVEMBER REFERENDUM

A. *The Commission's Decision*

On March 31, 1989, just eight days after the Supreme Court handed down its decision in *Morris*, the Commission voted, without dissent, to strive to place proposed Charter revisions on the ballot in November.¹²⁵ Schwarz urged this decision on the Commission for three reasons. First, the system had been held unconstitutional, not for a technical, trivial reason, but because some four million New Yorkers' right to vote was being diluted. This unconstitutional wrong was not to be allowed to fester. Second, even if we wanted to delay, we were not entirely free actors; the courts could intervene.¹²⁶ Third, if we did not act in November, a full year's delay until the next general election would never be tolerated by the courts. A special election in early 1990 would be irresponsible and undemocratic. Special elections in New York City had a history of abysmal turnouts. Low turnout tended to favor special interests—which we believed might tend to oppose a new Charter.¹²⁷

Other reasons for the decision to strive for November were less explicit. Eleven members of the Commission had already served for two years, as had most of the staff. By the beginning of the Schwarz Commission, many proposals for revamping government processes and structure had been completed at the staff level and started to bubble up to

125. Public Meeting, Mar. 31, 1989, at 26.

126. Before the Supreme Court accepted the case, the New York Court of Appeals said the system had to be changed in six months to a year. *See Morris v. Board of Estimate*, 831 F.2d 384, 393 (2d Cir. 1987).

127. *See, e.g.*, Public Meeting, Mar. 31, 1989, at 3-6 (regarding the timing of the referendum); Public Meeting, Aug. 2, 1989, at 48-56.

commissioners. Commission members and staff holdovers were anxious to finish.

A more political reason was that in 1989, elections for the three citywide officials, the Council, and the borough presidents were to take place. Substantively, such elections would afford an opportunity to address Charter revision in a visible competitive setting, and to increase voter turnout, which we felt would offset the ability of entrenched opponents to organize against the revisions. In addition, a number of potential opponents to abolishing the Board would be tied up in elections, and also might want to have in the election a "good government" aura of supporting Charter reform—or not want to be accused of being captives of an old system.

David Dinkins (the Manhattan borough president) and Jay Goldin (the comptroller) were both running for mayor. Both were devotees of the Board of Estimate. Their attention would now be focused on the mayoral race and not on Charter change. In the end, Dinkins became a cautious supporter, and Goldin remained silent. Their positions might have been different had they stayed in their current posts. A related analysis applied to Ruth Messinger, running for Manhattan borough president, and Elizabeth Holtzman, running for comptroller. Both, particularly Messinger, were heavily involved in the Charter process and were ultimate supporters. Whether they would have been so if they had been elected and served on the Board for a year before a referendum was another risk avoided by pushing for the vote in November 1989.

B. *Some Powerful Opponents of Our Decision*

Outside the Commission, proceeding toward a November referendum was not met with universal favor. On March 29, 1989, six days after *Morris*, Mayor Koch invited Schwarz and Lane to dinner at Gracie Mansion, along with First Deputy Mayor Stanley Brezenoff and Corporation Counsel Peter Zimroth. We enjoyed dinner with the usual good food and wine, but in the living room after dinner, the guests aired their view that a referendum in 1989 would be harmful. (Perhaps the meeting occurred because, after *Morris*, Schwarz was quoted as saying, "I think we have to do it in November unless it's impossible."¹²⁸)

They said in effect, "Well, you know it really would be terrible for the City if you were to make the Charter decisions in 1989." It was inevitable,

128. Todd S. Purdum, *Charter Panel Chairman Sees a Larger Role for Minorities*, N.Y. TIMES, Mar. 25, 1989, at A1.

they said, that the Charter debate would be racially divisive. The mayor indicated that he did not want, or need, that.¹²⁹

We told the mayor and his colleagues that we disagreed with them for the reasons given to the Commission two days later. Schwarz also said that he would not lead a group that would have a racially divisive effect.

A potpourri of other public figures with widely varying positions on the merits also urged delay upon the Commission. Governor Mario Cuomo did so in a long telephone call to Schwarz on July 7, 1989. The governor did not tend to be as direct as the mayor. During this conversation, he never made clear to Schwarz his reason for seeking delay.

Schwarz responded to the governor with a new argument sharpened because the race for mayor was clearly becoming competitive. If the Board of Estimate continued in power, without the Commission having resolved its fate, a new mayor (if that were to eventuate) would be pressured unmercifully by his fellow Board of Estimate members saying, in effect: "If you want our support on such and such a vote on the Board, then you must support us on continuing the Board, or in enhancing our powers in a government without a Board." Continued controversy on the shape of the City's future government would not help a new mayor faced with running the current government.

Shortly after the conversation, the governor was quoted as saying at a press conference that he was "not at all sure" the issues could get a fair hearing if they were on the ballot this year, but adding: "I'm not going to suggest that they delay it That's not my point. It is my point to get people to think about this."¹³⁰

Others seeking delay included a group led by former Mayor Beame and developer Lewis Rudin;¹³¹ Assemblyman Albert Vann, leader of the New

129. This was the only time the mayor made private efforts to persuade either of us on a Charter issue. The mayor did write several letters to the chairman, with copies to all commissioners, objecting to or querying various provisions. These matters are discussed below.

At the Commission's last meeting, Commissioner Paredes illustrated the same point by saying that when he had been appointed, Mayor Koch did not ask him to "accept anything but the invitation" and "was the only public official that never called me or pressured me or talked to me about absolutely any issue" See Public Meeting, Aug. 2, 1989, at 73-74.

130. Todd S. Purdum, *Queens Citizens Lobby Charter Panel*, N.Y. TIMES, July 20, 1989, at B4.

131. See Alan Finder, *Charter Panel Facing More Pressure to Delay Vote*, N.Y. TIMES, June 20, 1989, at B1. This group seemed to be substantive opponents of the new proposals and last ditch defenders of the Board. Just what their strategy was in seeking delay was never made clear.

York State Legislature's Black and Hispanic caucus;¹³² and Herbert Sturz, former chairman of the City Planning Commission, former member of the *Times* editorial board, and close friend of both Schwarz and Jack Rosenthal.¹³³ Rosenthal, as the head of the *Times*' editorial board, would play an important role in influencing public opinions about our work. Former Manhattan Borough President Percy Sutton promised a lawsuit to force delay.¹³⁴ None came.

The most sustained and public voice in favor of delay was an informal coalition of minority activist groups—who we referred to as the “Delay Movement,” and who, after our March 31 vote to strive to finish in November, contended that they would not have enough time to prepare their own proposals and react to the Commission's proposals. It might well have surprised these groups to find themselves on the same side of an important issue as Mayor Koch, of whom they were not fans. But they would not learn of this alliance, because the mayor had chosen not to go public with his request for delay.

There was a continuing dialogue between the Commission and the members of the Delay Movement in person, through the newspapers, and in one instance by letter.¹³⁵ Specifically, Angelo Falcon wrote that “the reason” for calling for a delay was that in the 1988 vote on Charter changes, the minority vote had been “extremely disproportionate[ly]” low, indicating a “serious problem” in the [prior] Commission's ability to “effectively reach out to Black, Latino and Asian communities.”¹³⁶

132. Letter from Albert Vann, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (June 27, 1989) (on file with the *New York Law School Law Review*).

133. See Herbert Sturz, Editorial, *Charter Revision: Why So Fast?*, N.Y. TIMES, Apr. 8, 1989, at 27 (concluding a long list of arguments for delay by urging the Commission to “make haste slowly”).

134. See Sam Roberts, *Special Election on the Charter? Danger Ahead*, N.Y. TIMES, May 8, 1989, at B1; see also Finder, *Charter Panel Facing More Pressure to Delay Vote*, *supra* note 131, at B1. Another public official, former Comptroller Harrison J. Goldin, urged the Commission to give the mayor no say in land use and to restrict his role in shaping the budget. See Todd S. Purdum, *Officials Defend Their Posts to Charter Panel*, N.Y. TIMES, Apr. 7, 1989, at B3.

135. Letter from Angelo Falcon, President, Institute for Puerto Rican Policy, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (May 16, 1989).

136. *Id.* Falcon's letter followed a long meeting Schwarz had with a number of the Delay Movement's leaders. At the meeting, Schwarz said that while disagreeing with delay, he understood the concerns about whether minority communities would get sufficiently engaged in the Charter process, and therefore, he would continue to review the timing issue. When Commission staff members were so told, there was great anguish, and in one case, tears. See also Public Meeting, May 13, 1989, at 546-47 (describing

Schwarz's letter response to Falcon attached tables, prepared by Frank Mauro, that showed the drop-off in votes from the 1988 state bond question to the Charter question had actually been lower in predominately minority districts than in predominately white districts. Statistics aside, however, Schwarz responded that we agreed "increased minority participation is of great importance," and that the Commission was "absolutely committed to maximum outreach."¹³⁷ On the issue of timing, Schwarz said:

I told you and others that your concern about minority input and community education was reasonable. However, as I also said, I was not convinced that delay—which would continue a form of government that the Supreme Court has unanimously found unconstitutional as violating principles of fair representation—was appropriate [A] special election has *far* greater turnout problems than those you have focused on.¹³⁸

Generating interest in Charter issues at the time of a contested general election is a "much more achievable goal than getting people to go to the polls for a special election."¹³⁹ The case for a year's delay was not effectively made.

After this exchange, the Delay Movement developed a parallel strategy of arguing for delay (for a full year) while engaging the Commission fruitfully on a number of substantive subjects.

The various proponents of delay never formed an effective coalition against the Commission's decision to proceed. Their views on the merits of Charter reform were too disparate. Some were last-ditch defenders of the Board of Estimate and the status quo. Others (particularly some within the Delay Movement) wanted radical decentralization of City government. Some explicitly shifted to supporting delay only when they did not get their way on a merits issue. None of these widely disparate groups presented a cogent strategy for delay, nor did they provide any good answer to the constitutional, legal, and policy arguments against delay.

All of the disparate urgings for delay were rejected. Nonetheless, the mayor's expressed fear of racial divisiveness, and the Delay Movement's

Schwarz's reporting on meeting with the Delay Movement by saying that although he continued to believe the delay was not justified, the Commission should nonetheless continue to "carefully consider" the subject).

137. Letter from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, to Angelo Falcon, President, Institute for Puerto Rican Policy (May 23, 1989) (on file with the *New York Law School Law Review*).

138. *Id.*

139. *Id.*

concern whether minorities had enough time to participate in and evaluate the Commission's work, were factors contributing to our tone, to our process, to the date of our final proposals,¹⁴⁰ and to our substantive decisions. Our goal was to be open enough and responsive enough to avoid racial divisiveness and to gain substantial minority support. Both goals were met.

II. THE DECISION TO ABOLISH THE BOARD OF ESTIMATE

On May 2, 1989, the Commission, in what it characterized as a "sense of the meeting vote," voted 13 to 1 "that weighted voting is not the way to go, that we have to proceed with an agenda that figures out what is the way to go, [and] that while that does not bar people from speech—we're not gagging anybody—the presumption is, that we are going forward on other than a weighted voting scheme."¹⁴¹

This vote effectively abolished the Board of Estimate, for without weighted voting it was impossible to reconstitute the Board. For reasons that we explain below,¹⁴² this vote was rooted in law, although we also thought there were a number of other drawbacks to the Board beyond its illegality.¹⁴³

As the *Morris* decision only addressed the Board's voting scheme, Board denizens and supporters seized on the limits of the Court's opinion as an opportunity to reconstruct the Board with a new voting scheme. This raised the question whether the Board could legally—and whether it should substantively—be "saved" by use of "weighted voting." The

140. At the outset, it had been assumed that the Commission had to finish its work at the end of June to leave enough time for the Justice Department review. But at a short Commission meeting in the middle of a public hearing on June 6, Schwarz recommended, and the Commission approved, extending our work until late July or early August. This was a "reasonable accommodation" to those who had asked for more time to comment both on the proposals and on the actual proposed Charter language. It also allowed for an entire other round of useful public hearings after another draft of Commission proposals. See Public Hearing, June 6, 1989, at 52-56. One of many outsiders who suggested this extension was Dennis DeLeon, a top aide to David Dinkins, who had worked for Schwarz as an assistant corporation counsel.

This was simply sensible and helpful to the Commission in getting its work done. It also was helpful in rebutting the Delay Movement's argument. The expressed reaction of the Delay Movement was that it was only a "good first step" because we had been moving at a "frenzied and totally incomprehensible pace." Todd S. Purdum, *Charter Panel Postpones Vote on Final Proposals*, N.Y. TIMES, June 7, 1989, at B2.

141. Public Meeting, May 2, 1989, at 77.

142. See discussion *infra* Chapter V, Part II.

143. See discussion *infra* Chapter V, Part IIB.

Commission's vote ended a bruising and time-consuming legal debate over the applicability of the "one person-one vote" doctrine and the Voting Rights Act of 1965 to any form of reconstituted Board of Estimate. This vote also ended a somewhat more hidden debate over the virtues of the Board as a vehicle of governance. Untied from what to many was the City's governing keystone, the Commission was free to explore governance and decision-making options that would affect its publicly stated goals.

A. *A Brief History of the Board of Estimate*

Since 1901, the Board of Estimate consisted of the mayor, city council president, comptroller, and, most important in the representative sense, each of the five borough presidents, voting under various schemes.¹⁴⁴ The presence of the borough presidents on the Board was an intended antidote to the dominance of Manhattan-based Tammany Hall, which had gained control of the Mayor's Office (and most city jobs) after the creation of the greater City of New York in 1898.¹⁴⁵ At various times after 1901, when the borough presidents were added, the mix of votes varied little from that which the Supreme Court held illegal. Prior to 1958, for example, the borough presidents of Brooklyn and Manhattan each had two votes and the remaining borough presidents had one apiece.¹⁴⁶ By 1978—and in 1989—all borough presidents had one vote and each of the three citywide elected officials had two.¹⁴⁷

Throughout its history, the Board exercised considerable power, although these powers waned a bit over the years:

The powers and duties established for the Board of Estimate by charter, local law and state law have reflected changing perceptions of the consolidated city and the methods of its governance. Each of the major Charter changes, 1901, 1936, 1961, and to a lesser extent 1975, have embodied substantial

144. In the 1898 Charter, which provided the framework for the newly consolidated city, the Board consisted of the mayor, comptroller, city council president, corporation counsel, and president of the Department of Taxes and Assessments. See N.Y. CITY CHARTER tit. 5 § 226 (1897).

In the 1901 Charter changes, the borough presidents became members, together with the three citywide elected officials. See Nora L. Mandel, *Borough Presidents*, in THE ENCYCLOPEDIA OF NEW YORK CITY, *supra* note 65, at 129.

145. See SAYRE & KAUFMAN, *supra* note 1, at 688-89.

146. See Edward T. O'Donnell, *Changes to the City Charter, 1653-1989*, in THE ENCYCLOPEDIA OF NEW YORK CITY, *supra* note 65, at 206.

147. See *id.* at 207.

rearrangements of political power among the central city government, the boroughs and, since 1961, particularly 1975, the city's communities. While it is always difficult to discern a trend in historical review, it is reasonably clear the 1936 Charter ended the growth of the Board of Estimate as the "governing body of the city" and in fact stripped the board of substantial powers. The 1961 Charter furthered this decline of borough-based decentralized governments. Three trends have contributed to the overall decline: first, the political acknowledgment that a greater degree of centralization was more efficient; second, that a greater degree of centralization made government more accountable; and, third, the growth of communities (at the expense of boroughs) as entities for organizing and expressing the political views and needs of the city's diverse population.¹⁴⁸

Despite this incremental loss of power, the Board maintained its position as the City's best known body and as the main place where a borough voice could be heard. At the time of the *Morris* litigation, the Board exercised a number of legislative and executive functions. Legislative roles included approval of the City's budget and of changes to its zoning law. Executive roles included approval of all contracts that were not competitively bid, and approval of thousands of land-use decisions, including the location of City-owned facilities such as shelters and prisons. Because of the significant powers the Board exercised and the presence of such an array of elected officials, the Board was widely regarded as the City's most important institution of governance.

This view of the Board was celebrated by two of the most accomplished City historians, Walter Sayre and Herbert Kaufman, who declared:

The Board of Estimate occupies the center of gravity in the city's political process. Almost all other participants ultimately converge upon the Board of Estimate because of the inclusiveness of its powers

. . . The Board also provides . . . the central stage for the city's political contest

. . . The Board of Estimate as an institution is itself also a contestant, perhaps the most powerful single participant, in the

148. N. Y. CITY CHARTER REVISION COMM'N, BRIEFING BOOK II-E-18 to II-E-19 (Jan. 12, 1988) (on file with the *New York Law School Law Review*).

city's political process. This power is the result of a number of extraordinary characteristics combining to make the Board a unique political and governmental institution. It has the most generous grant of formal powers of all the city's governmental institutions; its eight members are the most influential elected officials in the city government; it has developed a mode of operation which maximizes both its formal and informal powers; the relationships of its members with the party leaders are close and usually stable; it has high prestige with other participants, particularly with those to whom it provides a public forum; and its institutional life, especially its informal processes, is surrounded by a helpful amount of mystery. The story of the Board of Estimate is the history of an institution steadily acquiring more formal power, regularly enhancing its formal powers, increasingly fulfilling its own expectations as an institution. This institutional success has been achieved most clearly at the expense of the Board of Aldermen and its successor, the Council—but also at the cost of the Mayor.¹⁴⁹

The Board's proponents offered this description to the courts as a rational basis for deviation from the "one person-one vote" principle and to the Commission and the public as the argument for preserving the Board in some form.

B. *The Decision Relied on Law*

While we did not share this substantive view of the Board, the Commission's decision not to pursue weighted voting, and thus effectively to abolish the Board, was based entirely on a debate focused on law, not governmental merit.

Although Schwarz's proposals in April assumed a government with no Board of Estimate (the direction in which Ravitch's ideas had also been heading),¹⁵⁰ some outsiders, and one member of the Commission, Bernard Richland, continued to propose weighted voting.

Richland was passionate on the issue. On one early occasion after Schwarz finished outlining the chairman's initial ideas, which simply assumed no Board, Commissioner Richland said: "I say to you, like John

149. SAYRE & KAUFMAN, *supra* note 1, at 626-27.

150. During the Ravitch Commission, numerous leading experts had been hired to write on the voting rights issues underlying weighted voting. These issues occupied a great deal of time and attention of the Ravitch Commission.

the Baptist of old, 'Repent ye, repent ye.'"¹⁵¹ Schwarz countered, by saying: "[W]hen you walk into the headquarters of the CIA at Langley, they, too, have the Bible on the wall, and it says, from St. John, '[k]now the truth and the truth shall set you free.'"¹⁵²

It soon became clear that the pressure to "save" the Board had to be explicitly confronted. The nature and scope of our changes would vary enormously, depending on whether the Board of Estimate's powers had to be redistributed. Minds had to be concentrated.

Although Schwarz had given his initial legal reasons against weighted voting,¹⁵³ Commissioner Friendly—frustrated because Richland and various outsiders continually raised the issue—called for an extensive discussion and vote "because if we don't, we are going to be coming back to that all the time"¹⁵⁴ Schwarz agreed, and said we would distribute to the commissioners: (1) the computer runs that demonstrate "two conclusions, both adverse to weighted voting"; and (2) "my best judgment as a lawyer."¹⁵⁵

On May 2, the Commission extensively discussed weighted voting.¹⁵⁶ By a vote of 13 to 1, Commissioner Richland dissenting, the Commission determined that weighted voting was "not the way to go."¹⁵⁷

This meeting was one of the few with acrimony among the Commission members. Richland's long argument in favor of weighed voting had included attacks on the fairness of Frank Mauro's staff work and on former Chairman Richard Ravitch's supposed bias in selecting consultants on the voting rights issues.¹⁵⁸ The fireworks came when Judah Gribetz, a close friend of Ravitch, became red-faced and angrily said to Richland, "[w]e should be above personalization and vilification," and (after Richland said "[d]on't rebuke me, Judah"), added "[y]ou're entitled to be heard on the substance, but you demean yourself and us by vilifying people in this room and outside of [this] room."¹⁵⁹

Without referring to the expert reports, Schwarz presented a series of legal reasons why weighted voting would present "severe problems" under

151. See Public Meeting, Apr. 24, 1989, at 64.

152. *Id.* at 68-69.

153. See, e.g., Public Meeting, Mar. 31, 1989, at 14-16; Public Meeting, Apr. 24, 1989, at 89-91.

154. Public Meeting, Apr. 24, 1989, at 88-89.

155. *Id.* at 89-91.

156. Public Meeting, May 2, 1989, at 1-78.

157. *Id.* at 77. Fred Friendly, who could not be present, sent a letter of support.

158. See *id.* at 21-44.

159. *Id.* at 74.

both the "one person-one vote" principle and the Voting Rights Act.¹⁶⁰ Under the "one person-one vote" rule, weighted voting would not cure the fact that, at the extreme, Staten Island residents would still have six times the access to their borough president as compared with Brooklyn residents. Even if you could "equalize the vote" you could not "equalize the voice." The New York State Court of Appeals had already rejected simple proportional weighted voting, and instead required a system called "critical votes analysis," developed by Professor Banzhaf.¹⁶¹ The Supreme Court's *Morris* decision cast great doubt on the Banzhaf concept.¹⁶² Further, Schwarz believed that the concept would not solve the problems anyway:

[Y]ou can't equalize the voice even if you could equalize the vote. In trying to equalize the vote, simple proportional weighted voting doesn't work, as the New York Court of Appeals has recognized. The methods that are more complex, these computer driven Banzhaf type analyses, the Supreme Court doesn't like, and when you look at them and they play themselves out, they don't work, either, . . . there being too great a deviation.¹⁶³

On the Voting Rights Act, Schwarz said weighted voting presented two great risks: first, "submergence"—meaning that minorities in the larger boroughs do not have the same opportunity to influence or elect their borough presidents; and second, "retrogression"—meaning the loss of voting power for the Bronx (with a minority borough president) under any weighted voting scheme that "can be put forward with a straight face under one person-one vote."¹⁶⁴

160. *See id.* at 4-21. It also would either reduce Staten Island to a "nonentity" or "clearly violate the law." *Id.* at 5-6.

161. *See generally* Iannucci v. Board of Supervisors, 229 N.E.2d 195 (N.Y. 1967); R. Alta Charo, *Designing Mathematical Models to Describe One-Person, One-Vote Compliance by Unique Governmental Structures: The Case of the New York City Board of Estimate*, 53 *FORDHAM L. REV.* 735, 784 (1985) (explaining that critical votes analysis calculates votes in proportion to the district's population, rather than the district's size. Under critical votes analysis, each voter in every district in theory has the opportunity to have a decisive effect on the outcome of an election.).

162. *See* Board of Estimate v. Morris, 489 U.S. 688, 699 (1989) ("[I]ts challenge is hardly met by a mathematical calculation that itself stops short of examining the actual day-to-day operations of the legislative body.").

163. Public Meeting, May 2, 1989, at 17; *see also* Memorandum from Frank J. Mauro to Judah Gribetz (undated) (on file with the *New York Law School Law Review*) (regarding weighted voting).

164. Public Meeting, May 2, 1989, at 20-21.

Richland and other advocates of weighted voting argued that New York City should follow Nassau County's lead in using weighted voting. Schwarz predicted the Nassau County system would be held unconstitutional.¹⁶⁵ Four years later, it was.¹⁶⁶

Some advocates of weighted voting did not trust our legal analysis, because they sensed our opposition to the Board as a governing institution. Edward Costikyan, a partner at the law firm of Paul, Weiss, Rifkind, Wharton & Garrison, a former head of Manhattan's Democratic Party, and a persistent and effective advocate for the Board who participated in the *Morris* defense, remarked that if Lane had favored the Board as an instrument of government, Lane would have tried weighted voting and let the courts decide the legal questions. This is hard to respond to because—quite apart from our concerns about the Board as “an instrument of government”—we were absolutely certain that weighted voting could not solve the Board's constitutional and legal deficiencies.

The substantive problems we saw with the Board, discussed below, had a significant impact on several of the Commission's proposals. During the May 2 debate, however, these substantive problems were not discussed at all,¹⁶⁷ for reasons that reveal something of the delicacy and difficulty of what we were doing. We proposed radical change to a government that was in place. A number of the commissioners—or the organizations they worked for—had important matters before the Board. For them, reliance on the chairman's legal advice was safe; discussion and a vote on substance or policy would have been less so.

C. *Substantive Problems with the Board*

The legislative hearings and the intensive thinking about City government that we did in the early months led us to conclude that despite all the attention it garnered and despite all the important things it decided (or appeared to decide), the Board of Estimate had flaws beyond its representational illegality. The Board simultaneously exercised too little and too much power. It lacked the broad legislative authority needed to promote and effectuate policies different from a mayor's. It nevertheless threw a stunting shadow across the City's legislative branch—the City Council. It therefore impeded the healthy development of countervailing

165. *See id.* at 18.

166. *See Jackson v. Nassau County Bd. of Supervisors*, 818 F. Supp. 509 (E.D.N.Y. 1993); *see also* Letter from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, to Judge Arthur Spatt (undated) (offering ideas about a Charter revision process) (on file with the *New York Law School Law Review*).

167. *See generally* Public Meeting, May 2, 1989.

power to the mayoralty. The *Daily News* editorial board, writing on the day of the Commission's vote, echoed these views by saying that, apart from its legal problems ("sure to be axed by the courts"), "the B of E isn't worth saving. It's an exercise in deal-making, not policy-setting. The members strike bargains on homeless shelters, for example, but never consider how to solve homelessness."¹⁶⁸

The Board concentrated on specific contracts and land-use matters at the very end of the process. As a result, it 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.

While the papers and the politicians all thought the Board was powerful, it exercised little real power; its most significant role in City governance was as a trading post for Board members, particularly borough presidents, to gain mayoral favors in return for Board votes.

Despite claims to the contrary, the Board brought little policy perspective to the decisions it was required to make, because it functioned only at the end of the decision-making process—too late to make any substantial contribution to the decisions shaped by the administration over considerable time. Despite its formal decision-making power, for the most part the Board rubber-stamped administrative decisions. Mayors controlled the Board's agenda, and once they placed a matter before the Board, they did not intend for it to be defeated.¹⁶⁹ From a political perspective, defeat of a matter before the Board would have constituted a mayoral failure; even a close vote could have meant political trouble. Negative votes, except in the rarest of cases, would constitute political warfare with the mayor, a battle members of the Board usually did not want to enter. For example, once Comptroller Jay Goldin decided to challenge Mayor Koch, he then voted against every contract that came before the Board. Previously he had supported most, if not all, mayoral contract initiatives.

Of course, in behind-the-scene discussions, members of the Board occasionally convinced a mayor to make a change. Some such changes were important. However, members of the Board could not affect the fundamental issues that were really important for the City. Nonetheless, the media (and no doubt the Board members themselves) thought the Board's actions must be critical. After all, the Board members were the City's most important elected officials. The media attention to the Board's bi-weekly late-night meetings fed the notion that the Board's playing field must be where the game was played.

168. Editorial, *Nix on Weighted Voting*, DAILY NEWS (N.Y.), May 2, 1989, at 28.

169. Before the Justice Department, we developed the statistics showing how incredibly few votes defeated or even disagreed with mayors.

Even though the mayor dominated the Board, the Board's mandate to make formal decisions shielded mayors from accountability for their decisions. A mayor would respond to any finger-pointing by saying that the mayor could not singly make a decision at the Board and that all who voted "aye" shared responsibility. In fact, one mayoral aide related that the mayor's office labeled their efforts to maximize votes for contracts as an "unaccountability policy." The Commission's concern about such "policy" is reflected in its core goal of enhancing mayoral accountability for mayoral decisions, and is evident in a number of Charter provisions, particularly those dealing with contracts.

The board also had an array of procedural problems. First, discussion among the members usually took place at private Board meetings the day before the public hearing and meeting. Second, members of the Board almost never attended public hearings or meetings, leaving this work to staff members who, after taking public testimony, cast the "mayor's" or "comptroller's" or "borough president's" vote. People would wait in line late into the night to testify before staff members, who sat behind placards that identified their principals, about an issue that the principals had privately decided the day before.

This gave rise to Fred Friendly's comment that showed the lasting negative impact of staff assistants sitting and voting at the Board meetings (behind plaques indicating "The Mayor," "The Comptroller," etc.):

One of the most shocking moments in the history of this Commission, and every time it comes up it shocks me again, is when I've heard that members of the Board of Estimate are not present and the vote is cast for them by their subordinates. I don't believe it. Each time I hear it, I say, "This can't be true," and yet it is true, it's history and this [a requirement that Council members must vote in person] is being written to make sure it never, ever happens again[,] even after our lifetime, Mr. Richland.¹⁷⁰

The decision to eliminate the Board confirmed that the Commission's proposed changes would be broad. The powers of the Board over land use and contracts had to be redistributed, and the elimination of the Board's shared power over the budget required attention to budgets as well. While elimination of the Board did not mean the offices of the members of the Board—particularly the borough presidents and the council president (now public advocate)—would disappear, it was also necessary to consider the

170. Public Meeting, July 31, 1989, at 39-40. At a recent event honoring Richland, Friendly told Schwarz that, long ago, he had warned Board members that the Board's practice looked terrible and was wrong.

following: (1) should they disappear?; and (2) if not, what should be their appropriate roles under a new Charter?

Apart from the changes that we had to consider as a matter of logic, we wanted to consider others as a matter of policy. Schwarz, at the Commission's first meeting discussing specific changes, said that if we merely fixed the Board, then: "[I]f we were to grade ourselves, we would get a passing grade, perhaps a high passing grade, but we won't get high marks" ¹⁷¹

171. Public Meeting, Apr. 24, 1989, at 7.

PART II. THE STRUCTURE AND PROCESSES
OF THE NEW GOVERNMENT

CHAPTER VI. THE STRUCTURE OF THE NEW GOVERNMENT

The decision to abolish the Board of Estimate compelled us to examine the City government's structure and all of its decision-making processes. In theory, we could have done nothing but distribute the Board's functions in land-use, procurement, and budget decision making to other governmental bodies or elected officials. The legal requirement to review the entire Charter and our interest in doing so, however, consistent with our concerns and goals, made a broad review imperative. In fact, from the end of the Ravitch Commission onward, under the leadership of Frank Mauro, our thoughtful and experienced director of research, we prepared for such a review through a variety of research efforts involving the staff and a broad array of experts. The legislative hearings, discussed earlier, were part of that effort.

The open question was where to begin this exploration with the Commission. Should we start, for example, with a discussion of procurement methodologies leading to the roles of various officials in that process, or should we start with a discussion of the roles of elected officials in the government and reach the process questions later?

This question was answered by pressure, both internally and externally, to focus first on the roles of the elected officials and the structure of government. Internally, the Commission wanted first, as Vice Chair Michel said, to talk about "what the structure is going to be before reaching the details of how the Board's functions should be allocated."¹ As Michel explained, it was hard to decide, for example, the role of the borough presidents with respect to contracts without knowing where borough presidents would fit in the overall scheme of things. The chairman's Initial Proposals made assumptions about who the players in City government would be and about their basic roles. Commissioners wanted, however, to have some initial general discussion about that broad picture: who would be the players in the future City government, and what would be the broad outline of their roles?

Externally, the desire to start with structure and the basics of the roles of elected officials was expressed by the intense lobbying of public officials, particularly borough presidents. One newspaper report of an early Commission hearing read: "[A] parade of public officials passed yesterday before the commission [V]irtually all of them presenting

1. Public Meeting, Apr. 25, 1989, at 130.

plans to preserve, protect or defend the powers of the posts they hold."² A week later, another paper opined that "office-holders, office-seekers and special-interest promoters" were making "varied and complicated" proposals to the Commission. "But most can be summed up in a single sentence: 'Give me more power.'"³ Because the borough presidents felt they had the most to lose, they were particularly vociferous and persistent in lobbying Commission members.

All these "office holders" had faces known to us, and we also knew that our decisions about their offices would be controversial and painful for some. Some analysis of structure would be necessary before we could usefully focus on the details of process, which had to assume a structure.

This decision to deal with structure before process reflected only an approach to our deliberations. The lines between structure and process (or operational details) is not clear. For example, the related issues of: (1) how many appointments to the City Planning Commission should be made by the mayor and (2) which of the Planning Commission's decisions could or should be "appealed" to the City Council, are questions of both structure and operational detail. Moreover, some issues of pure structure—such as whether there should be a city council president—continued to be debated from the earliest to the latest meeting.

Despite the fuzziness of these lines, discussion at the Commission loosely followed the outline of looking first at the elected officials and then at the decision-making process—an outline we use in this and the next chapters of this article. The factors underlying our views and the Commission's decisions on the first question (structure) are divided below into sections on: (1) the City Council; (2) the borough voice; (3) the citywide elected officials; and (4) community government.

I. EXPANDING AND EMPOWERING THE CITY COUNCIL

A. *The Emphasis on the Council*

Besides the decision to eliminate the Board of Estimate, the decision to empower and expand the Council was the Commission's most important decision. Although it was not the most difficult decision—that was

2. Todd S. Purdum, *Officials Defend Their Posts to Charter Panel*, N.Y. TIMES, Apr. 7, 1989, at B3. Todd Purdum was evoking the constitutional oath of office, which requires the President to swear (or affirm), to "preserve, protect and defend" the Constitution. U.S. CONST. art. II, § 1, cl. 8.

3. Editorial, *Changing the Charter: Not a Day to Waste*, DAILY NEWS (N.Y.), Apr. 13, 1989, at 46.

probably the relationship between the central government and a borough voice—it was the most important for reasons of both principle and politics.

For a legislature to balance and check the executive branch is the American norm. For all the messiness of legislatures, for all the criticism of them, the basic concept is readily understood and reasonably accepted. Much of the focus of a city government is on the delivery of services, which have proliferated in New York. Underlying these efforts is the legislative function of establishing what services ought to be delivered and at what level of expenditure. These decisions are political in the best sense of the word; that is, they require processes that maximize public input and deliberation. In New York in 1989, the City's extraordinary array of groups and interests assured intense competition for governmental attention. To accommodate this, we needed to focus on the legislative branch of City government.

How to work out the Council's role in the administrative functions that the Board of Estimate had once carried out presented us with a number of difficult questions, which are discussed briefly below, and in detail in Chapter VII.⁴ One reason for our emphasis on the Council, however, was the belief that a legislature could better concentrate on the City's basic problems than the Board of Estimate either had or could, given its lack of power to address fundamental problems. The Board could decide—but only at the last minute and very seldom actually changing an administration decision—where, for example, a shelter could be located. It could not, however, enact legislation dealing with homelessness. This difference emerged in an exchange that began when Commissioner Richland contended that the “basic problems of the City” are matters such as where shelters could be located. Schwarz replied:

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 and focusing, characterizing, as the basic problem of the City, where we should put a shelter, while absolutely a vital question, is not the basic problem of the City.

The basic problem of the City is—[using the subject of homelessness to make the point]: How do we avoid so many people having to go into shelters? And what we should be striving for is what can we do to help the structure be one that causes people to focus on what [are] really the basic problem[s] of the

4. See discussion *infra* Chapter VII.

City and not the manifestation of that at the last minute of the process.⁵

Another reason for emphasis on the Council reflected the Commission's first goal of "fair representation." The Council could be the most representative of the City's elected bodies. Persons elected from smaller districts are, by definition, closer to and more likely to reflect their constituents. Apart from this truism, a Council with an increased number of members would greatly increase the opportunity of minorities to be elected. This, we believed, was fair, right, and necessary given the climate in the city in 1989, and important given how the city's complexion would change over the decades ahead.

The empowerment of an expanded and more representative Council also was part of our legal and political strategy. Legally, we knew the issue with the Department of Justice would be: Did the new Charter diminish minority rights? We wanted to be able to say, on the contrary, that it enhanced minority opportunities to participate in the political process. On the political side, we wanted to prevent the Charter debate from being "racially divisive," as the mayor had predicted in Gracie Mansion.⁶ We wanted support from all elements of the City; the top priority of most of the minority participants in the Charter debate was for an expanded, more representative Council. Since the "one person-one vote" rule required the Council to be apportioned by population, another political benefit was that the Council members would overwhelmingly come from outside Manhattan. While this did not stop some Charter opponents from sloganizing that the new government would be "Manhattan dominated," this argument was undercut by the fact that on the 1989 Board of Estimate seven of eleven votes were cast by people from Manhattan. Finally, on the political side, an expanded Council appealed to Republicans, and substantively we believed the City needed more two-party competition.

We believed the Council was important for many reasons. But what kind of a Council should it be? Should it be bicameral or unicameral? Should the borough presidents sit as members? What should be the size of the Council? Who should draw the district lines (as required after each decennial census) and what criteria should govern their work? What should be a Council member's term of office and should there be term limits? Should our Commission address the Council's internal rules, and, if so, how? Should Council members be "full" or "part" time or, put more

5. Public Meeting, Apr. 24, 1989, at 36-37.

6. See discussion *supra* Chapter V.

accurately, should there be limitations on Council members' outside income? When should the first election for the new Council take place?

Each of these matters presented important, and sometimes difficult, questions. Before turning to how we resolved these questions (and why we did what we did), we set out: (1) the state legislation that relates to the Council; (2) a brief history of the Council, and how its size and structure changed from 1898 through 1989; and (3) some observations about the strengths and weaknesses of the Council as we found it in 1989.

B. *The Council's Powers and Status as We Found Them*

1. Powers, 1989

The City Council is the City's legislative body, vested with the legislative power of the City, except as otherwise provided by the Charter. The legislative power of the City, however, is delimited by the state constitution, which first mandates a local legislature,⁷ and then authorizes local governments through their legislatures to "adopt and amend local laws not inconsistent with the provision of this constitution or any *general* law relating to its property, affairs or government"⁸ A general law, in contrast to a special law, is defined by the Constitution as one "which in terms and in effect applies alike to all . . . cities"⁹ A special law is defined as one "which in terms and in effect applies to one or more, but not all, . . . cities"¹⁰ For the state legislature to act by special law on the property, affairs, or government of a city, the local legislature must invite it to do so through a home rule message, defined as a "request of two-thirds of [its] total membership," or a request of a majority of its membership along with the mayor.¹¹ Article IX also contains a directive that the "[r]ights, powers, privileges and immunities granted to local governments by this article shall be liberally construed," a provision intended to repudiate "Dillon's Rule, or the traditional, judicial rule of interpretation that local powers are to be narrowly construed."¹²

7. See N.Y. CONST. art. IX, § 1(a).

8. *Id.* § 2(c)(i) (emphasis added). Article IX also lists a series of specific legislative powers that can be exercised by local government in the event that they are not considered related to property, affairs, or government.

9. *Id.* § 3(d)(1).

10. *Id.* § 3(d)(4).

11. *Id.* § 2(b)(2)(a).

12. *Id.* § 3(c); see also Richard Briffault, *Intergovernmental Relations, in* INTER-GOVERNMENTAL RELATIONS IN THE NEW YORK STATE CONSTITUTION: A BRIEFING BOOK 119, 129 (G. Benjamin ed., 1994).

Despite what seems like a broad preference for local action in the state constitution, state legislation has often been aimed at micro-managing the affairs of local governments in general and New York City in particular. The state courts usually had permitted this. One well-known example is the New York Court of Appeals upholding legislation that provided for certain benefits for a cultural institution if it "held fee title to contiguous [tax] exempt real property in excess of fifty thousand square feet in area for a period of at least five years" and if the institution was located within "a city having a population of one million or more"—a term frequently used in state legislation that is facially neutral, but which in fact covers only New York City—with "average annual admissions of at least five hundred thousand persons . . . for a period of at least five years . . ."¹³ According to the New York Court of Appeals, "[a]lthough the statutory specifications fit the present statistics applicable to the Museum of Modern Art, there is no showing that other institutions could not, in time, meet them also."¹⁴

The legislative record and history prove the thinness of that claim. Clearly the bill was solely directed at the Museum of Modern Art. It has not, and could not, be used again.¹⁵ This case also illustrates the low regard in which the City Council had traditionally been held. The bill in the State Assembly was initially defeated in part because some members felt that a home rule message was necessary.¹⁶ It was passed only after a provision was inserted that required approval by the Board of Estimate (and not the City Council).¹⁷ About this defeat and insertion, Chief Judge Breitel, in his dissent, wrote: "The city's elected legislative body is the City Council, and it should have been for the council to decide how the bill should be approved. The Legislature's callous substitution of the Board of Estimate for the City Council violates both the spirit and the letter of the home rule"¹⁸

In 1989, the legislative power of the City Council included: the power to adopt local laws; the power to override the veto of the mayor; the power to amend the Charter in certain instances; the power to fill vacancies; the power to advise and consent on certain appointments; and the power to investigate and to oversee consistent with its legislative powers.¹⁹ Through the existing Charter, however, the Council shared its power to appropriate

13. N.Y. GEN. MUN. LAW §§ 307(1), 302(15) (McKinney 1986).

14. *Hotel Dorset Co. v. Trust for Cultural Resources*, 385 N.E.2d 1284, 1288 (N.Y. 1978).

15. *See* N.Y. GEN. MUN. LAW §§ 301, 325 (McKinney 1986).

16. *See id.*

17. *See id.*

18. *Hotel Dorset Co.*, 385 N.E.2d at 1296 (Breitel, C. J., dissenting).

19. *See* N.Y. CITY CHARTER ch. 2 § 21, 28 (1976, as amended through 1988).

money with the Board of Estimate—the Council alone had the power to raise property taxes—and had no power over zoning legislation.²⁰ This was part of the Board's authority.²¹

2. Status, 1989

Historically, the Council's reputation was not particularly good. Sayre and Kaufman capsulized the Council as follows:

Though the comment of one was that the chief activity of the Council is naming streets is certainly unnecessarily ungenerous, there is just enough truth in this hyperbole to give it some sting. The legislative record of the City Council has certainly not been distinguished. Nor is its record as a guardian of the public purse.²²

Henry Stern, a former Manhattan "at-large" member of the Council, said of the Council that it "was not even a rubber stamp because 'a rubber stamp leaves an impression.'"²³ While Stern was quick with quips, the Council sometimes did historically seem to see its role as a junior partner of the mayor.

Among the reasons for the historic weakness of the Council was the presence and prestige of the Board, with its jurisdiction over items that normally would be legislative.

The 1989 Council, however, was not nearly as poor and tawdry as Sayre and Kauffman, or Stern, described it. To the contrary, the Council was becoming a more able body with a sense of its representative obligations and policy-making responsibilities.

Peter Vallone was elected as Council leader in early 1986. Vallone was ambitious for the Council, strengthened its professional staffs, and from the start—long before the Supreme Court decision—was a persistent advocate of the abolition of the Board of Estimate.

Vallone involved the Council in the issues of the day. Despite his own religious tenets, he allowed the Council to debate and pass one of the nation's first gay rights laws (which his predecessor had bottled up for

20. *See id.* ch. 10 § 254.

21. *See id.* ch. 8 § 200, 201.

22. WALLACE S. SAYRE & HERBERT KAUFMAN, *GOVERNING NEW YORK CITY: POLITICS IN THE METROPOLIS* (W. W. Norton & Co. 1965) (1960).

23. Editorial, *Vallone Class of DEM Field*, *DAILY NEWS* (N.Y.), Sept. 8, 1998, at 28.

years).²⁴ Further, testimony at our legislative hearings evidenced a Council that demonstrated, in its budget actions, concern for citywide issues, rather than simply district issues. Indeed, under Vallone, the Council's changes in the annual City budgets were much more focused on basic City needs than the Board of Estimate's. Similarly, an expert on the environment said that the Council "has been the city's major environmental catalyst in recent years."²⁵

Our view of the Council was captured by Schwarz's response to Commissioner Richland's criticism of the Council's competence. After stating that Richland's view was not "fair to the facts" because it was the Council, in recent budget negotiations, that "paid attention to important Citywide needs . . .,"²⁶ Schwarz added that "it's unfair to our trust in democracy to assume that a popularly elected body, particularly if we can make it more representative of all the citizens of New York City, cannot do the job."²⁷

As a matter of principle, we had to assume that a democratically elected body would rise up to reflect the voters' expectations. The Council under Vallone had stirred from slumber, and was moving in the right direction, which certainly made it easier for us to move as we did. Despite its progress, however, the Council was not sufficiently representative and had too much dead wood.

As we thought about expanding the Council, the subject to which we next turn, our dominant goal was to increase the opportunities for racial and (to a lesser extent) political diversity. Additionally, we believed that expansion of the Council by sixteen members (about fifty percent), accompanied by the consequent redrawing of all lines and the widened responsibilities of the body, would draw in new blood and help shake up the Council.

C. *Size, Number of Houses, and Terms of Office*

The size of a legislative body, the number of houses, and the terms of office for its members have historically been central points in debates

24. Jennifer Preston, *New Yorkers Peter Vallone: The Council's New Whip*, NEWSDAY (N.Y.), Dec. 15, 1986, at 4.

25. Eric A. Goldstein, Letter to the Editor, *Environmentalists Favor Revised City Charter*, N.Y. TIMES, Oct. 31, 1989, at A26.

26. Public Meeting, May 6, 1989, at 53-54.

27. *Id.*

concerning the reform and legitimacy of legislative bodies.²⁸ As might be expected, our deliberations on the City Council focused on these issues. Framing the debate were concerns about representativeness, particularly regarding minority opportunities to elect candidates of their own choice, efficiency, and an attempt to reach a balance between them.

Regarding size, the New York State Commission on the Governmental Operations of the City of New York, stated (somewhat in the vein of Polonius):

[A] legislative body should be large enough to be truly representative, to provide for deliberation and the debate of public issues, to prevent control by corrupt influences, and to guard against too easy a combination for improper purposes. [But] small enough to get capable men and women, to avoid confusion and expedite action, to avert excessive involvement by its members in administrative details, and to center responsibility for its action or inaction.²⁹

The Council we found was a unicameral body of thirty-five members, serving four-year terms, elected from single member districts of approximately 200,000 constituents each.³⁰ It consisted of thirty-four Democrats and one Republican. It had seven African-American members.³¹ But the history of changes in the Council's size (as well as its structure) reflected a continuing debate over representativeness. Thus the Commission joined in an effort to relate the Council's size to New York City's new demographics, and the needs of the city as we saw them.

1. Historical Changes

The 1898 Charter established a bicameral body consisting of a Board

28. As James Madison wrote in Federalist Papers No. 55: "No political problem is less susceptible of a precise solution than that which relates to the number most convenient for a representative legislature." THE FEDERALIST NO. 55, at 341 (James Madison) (Clinton Rossiter ed., 1961).

29. 3 NEW YORK STATE COMM'N ON GOVERNMENTAL OPERATIONS OF THE CITY OF NEW YORK, BACKGROUND RESEARCH ON THE TOP STRUCTURE OF THE GOVERNMENT OF THE CITY OF NEW YORK 57 (1961).

30. See N.Y. CITY CHARTER ch. 2 § 50 (1976, as amended through 1988).

31. See Charles V. Hamilton, *Needed, More Foxes: The Black Experience, in URBAN POLITICS NEW YORK STYLE* 359, 380 (Jewel Bellush & Dick Netzer eds., 1990).

of Aldermen of sixty members and a Council of twenty-nine members.³² This arrangement was replaced in 1901 by a seventy-three member unicameral Board of Aldermen after some claimed the bicameral bodies were "snarling" City government.³³ The aldermen were elected for two-year terms from single-member districts.³⁴ Borough presidents were also seated on this body, an idea that was to recur for a short time in 1989. Charter amendments reduced the size of the Board of Aldermen to sixty-seven in 1916 and to sixty-five in 1921.³⁵ In 1924, the state legislature provided for the City's second bicameral legislative body, the Municipal Assembly, consisting of the Board of Aldermen and the Board of Estimate.³⁶

The City's legislature again became a unicameral body through the 1936 Charter, which created a single-house City Council.³⁷ Because of the proportional representation system to select its members for two-year terms from at-large boroughwide districts, this Council varied in size from a high of twenty-six members to a low of seventeen.³⁸ The proportional representation system, created to break the massive Democratic majorities characterizing earlier legislative bodies and to reduce opportunities for corruption,³⁹ provided a more representative, or at least a more politically diverse, body. But this also led to its downfall. For, in addition to a few Republicans, several Communists and representatives of a variety of other splinter parties were elected.

Proportional representation was repealed in 1947 by referendum.⁴⁰ It was replaced by a twenty-five member Council whose members, each now serving four years, were elected from districts co-terminus with state senate districts on a winner-take-all basis.⁴¹ This again strengthened the Democratic Party's domination of the Council. In 1949, the first election after abolishing proportional representation, the Democrats controlled over 80% of the seats (although they only received 52.6% of the vote),

32. See Edward T. O'Donnell, *Changes to the City Charter, 1653-1989*, in THE ENCYCLOPEDIA OF NEW YORK CITY 203, 205-06 (Kenneth T. Jackson ed., 1995).

33. See FREDERICK SHAW, THE HISTORY OF THE NEW YORK CITY LEGISLATURE 12 (1954).

34. See *id.* at 57.

35. See *id.* at 59.

36. See *id.* at 43.

37. See O'Donnell, *supra* note 32, at 206-07.

38. See *id.*

39. See SAYRE & KAUFMAN, *supra* note 22, at 617-20.

40. See O'Donnell, *supra* note 32, at 207.

41. *Id.* at 207.

compared to the 61% they had controlled in 1945, the last election under proportional representation.⁴²

As a result of continuing concern over Democratic dominance of the City Council, in 1961, by Charter revision, the Council was increased to thirty-five members with the addition of ten at-large members to the Council, two from each borough.⁴³ As no party was permitted to nominate more than one at-large candidate in each borough, and no voter was permitted to vote for more than one candidate, this plan assured representation for minority parties.⁴⁴ Then, in 1967, the Council was increased to thirty-seven with the addition of two new districts.⁴⁵ This change also ended the use of state senate lines as a basis for Council districting.⁴⁶ In 1973, the Council was again expanded by the addition of six new districts in an attempt to provide opportunities for more minority representation.⁴⁷ Two more members were added through the reapportionment of 1981, resulting in thirty-five single-member districts and ten at-large borough districts.⁴⁸

In 1981, the at-large districts were declared unconstitutional as a violation of the "one person-one vote" rule, because, for example, they gave both Brooklyn and Staten Island two seats.⁴⁹ The at-large districts were eliminated from the Charter in 1983, by a Charter revision

42. See SAYRE & KAUFMAN, *supra* note 22, at 619.

43. See O'Donnell, *supra* note 32, at 207.

44. See *id.* at 208; see also Charles Brecher, *City Council*, in THE ENCYCLOPEDIA OF NEW YORK CITY, *supra* note 32, at 229.

45. See Douglas Muzzio & Tim Tompkins, *On the Size of the City Council: Finding the Mean*, in RESTRUCTURING THE NEW YORK CITY GOVERNMENT: THE REEMERGENCE OF MUNICIPAL REFORM 89 (Frank J. Mauro & Gerald Benjamin eds., 1989).

46. See Brecher, *supra* note 44, at 229.

47. See *id.* at 229-30.

48. See Muzzio & Tompkins, *supra* note 45, at 89.

49. See *Andrews v. Koch*, 528 F. Supp. 246 (E.D.N.Y. 1981) (decided by Judge Edward Neaher, who was also the district court judge in *Morris*), *aff'd on opinion below*, 688 F.2d 815 (2d Cir. 1982), *aff'd sub nom.* *Giacobbe v. Andrews*, 459 U.S. 801 (1982). The reason for the change of name in the Supreme Court was that Mayor Koch accepted Schwarz's recommendation that the City not seek review by the Supreme Court because there was no legitimate argument to counter the Second Circuit's "one person-one vote" ruling. Anthony Giacobbe, who continued to press for review, was the Republican at-large member from Staten Island.

A second recommendation that the mayor accepted was to use the Municipal Home Rule Law to appoint a Charter Revision Commission to focus on Charter changes that were necessary or sensible if and when the Supreme Court held that the at-large seats could not survive. This was the first use of a mayorally appointed Charter Commission since 1961 and only the second in over half a century. See Muzzio & Tompkins, *supra* note 45.

commission chaired by Columbia's President Michael Sovern.⁵⁰ This left thirty-five single member districts.⁵¹

2. A Unicameral Body with 51 Members

Our own choice of a unicameral body consisting of fifty-one single member districts reflected several goals: (1) to enhance minority opportunities to elect candidates of their own choice; (2) to increase minority membership (and minority-party membership); (3) to maintain a Council of manageable size in which all members could meaningfully participate; and (4) to increase constituent responsiveness by decreasing the size of each district.

An example of how the concern over representativeness dictated our results was the withdrawal from consideration of a trial balloon bicameral body. One thought in offering this idea reflected Lane's observation that some unicameral bodies in single-party jurisdictions tended toward precipitous legislative action. To force a more disciplined and deliberative regimen on the City's lawmaking process, we suggested a smaller upper house. For some members of the Commission, particularly David Trager, the small upper house was initially seen as an opportunity to give a legislative role to borough presidents. The issue of bicameralism is discussed more fully in the borough voice section below.⁵² The key reason for withdrawal of the idea was that the addition of a smaller upper house—nineteen members with borough presidents as members—could have diminished any gains in minority power in the lower house. This illustrates the value of the Commission's adopted goals. The commitment to fair representation as the primary goal trumped any argument in favor of bicameralism, regardless of its other merits.

After Schwarz suggested expansion to fifty members on April 24,⁵³ the Commission on May 6 extensively discussed the factors supporting an increase in the City Council's size.⁵⁴ Frank Mauro presented detailed charts with data on the correlation between minority population and minority representation in the districts of the City Council and in the state assembly and state senate. This data, and general experience, showed that "for a minority to have a reasonably effective chance of being elected, you need a quite high percentage" of minorities in a district—70% or above.⁵⁵

50. See O'Donnell, *supra* note 32, at 208.

51. See Muzzio & Tompkins, *supra* note 45, at 89.

52. See discussion *infra* pp. 36-42.

53. See Public Meeting, Apr. 24, 1989, at 48.

54. See Public Meeting, May 6, 1989, at 127, 141-88.

55. *Id.* at 182.

This reflected “historic prejudice,” and issues of citizenship (fewer minorities were citizens), age (more minorities were too young to vote), and voting participation (which, in turn, can be correlated with poverty, education, and a sense of exclusion).⁵⁶ The data also showed that “if you alter the size of the districts by making the districts smaller, you increase the number of districts where there will be a ‘quite high percentage.’”⁵⁷ The data also showed that with an increase to fifty districts, the percentage of “high percentage” minority districts could go up to 35 or 40% from the current twenty-six.⁵⁸

Based on this data, the Commission voted to expand the Council to fifty-one members.⁵⁹ Only Commissioner Richland dissented. He argued that the increase would “fool” people because the results would not be achieved.⁶⁰ (As things turned out, the minority numbers on the new Council in fact went from nine to twenty, or almost 40%.)

Outside the Commission, there was a lot of praise and only limited controversy over expanding the Council. Some Council members, including some minority members, argued that enlargement would not produce our predicted results and that it would reduce the importance of individual Council members. Substantively, we did not agree with this view.⁶¹ Politically, we had little reason to pay it more than casual attention. The Council was a clear beneficiary of Charter changes regardless of what we did on its size. We were confident that Peter Vallone and other Council members in the end would not jeopardize the Charter’s chances in a referendum.

The number fifty-one was chosen as “an attempt to balance two issues . . . minority representation with workability”⁶² After we tentatively decided on fifty-one members, some representatives of minority communities urged us to increase the number of districts still further. They

56. *See id.* at 175-82.

57. *Id.* at 82.

58. *See id.* at 154.

59. *See id.* at 188. There were 51, rather than 50, to assure an odd number, which reduced the (theoretical) chances of the need for a tie-breaker vote by the city council president.

60. *See id.* at 187.

61. *See* Letter from Congressman Major Owens, Coalition for Community Empowerment, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (Apr. 14, 1989) (on file with the *New York Law School Law Review*) [hereinafter April 14, 1989, Letter from Congressman Owens to Schwarz] (The Council members’ response was designed to “preserve their personal powers We regret the fact that what is good for most minorities and for the long-term happens to be perceived as an inconvenience for the incumbents.”).

62. Public Meeting, May 6, 1989, at 178.

argued that a fifty-nine member Council would produce even more majority-minority districts. There was enough "serious testimony" that we asked Frank Mauro to do another study.⁶³ After the analysis demonstrated that an increase to fifty-nine districts would not increase the number of minority-majority districts, the Commission confirmed its decision to adopt the fifty-one district plan. The motion to remain with fifty-one was made by one minority member, Arch Murray, and seconded by another, Amy Betanzos, who said she was "convinced that staying at the fifty-one will enhance minority participation and still have a workable size for the Council."⁶⁴ This fifty-one member plan was ultimately supported by leading advocates of a larger Council.⁶⁵

A possible fifty-nine member Council was also discussed from a second perspective—that of coterminality with the City's fifty-nine community districts. The 1976 Charter revision required New York City to establish community districts, each with a community board of not more than fifty persons for, among other stated reasons, "the planning of community life within the city, the participation of citizens in city government within their communities."⁶⁶ The 1976 Charter also provided that "[t]he community districts may serve as the basis for city council districts for the election of council members"⁶⁷ Building on this provision, Commissioner Amy Betanzos suggested that there be fifty-nine Council districts, each coterminous with a community district. This was an intriguing idea. Coterminality could create more legislative accountability and electoral competition as community board members observed and worked with the Council members from their district. Unfortunately, we could not do this, because the community boards were not nearly of equal population, and, leaving aside the angst of change, their purposes required other criteria to take precedence. Coterminality thus expired on the alter of the "one person-one vote" rule.

D. Redistricting

Almost as important as expanding the Council were our decisions relating to the Council's redistricting. The goal to increase opportunities for minority representation depended, not just on the size of a district, but

63. See Public Meeting, June 15, 1989, at 34-35 (referring to public hearings and public meetings).

64. Public Meeting, June 27, 1989, at 46-52.

65. See, e.g., Public Hearing, July 21, 1989, at 255-64 (containing testimony of Dr. Luther Blake, Coalition of African Americans and Latinos for a Just City Government).

66. N.Y. CITY CHARTER ch. 69 § 2700 (1976).

67. *Id.* § 2701(d).

on who drew the lines and what criteria were followed. More generally, the integrity of district line-drawing lends legitimacy to the legislative process.

Expanding the Council's size to fifty-one could not, by itself, guarantee the Commission's goals of providing more minority representational opportunities and achieving broader representation generally. Accomplishing these goals also depended upon the districting system because "how the district lines are drawn is the way in which to deliver on the expectation and design of enhancing representation for underrepresented groups in the Council."⁶⁸ In attempting to improve districting, there is the "how" approach and the "who" approach. "How" equals districting criteria; "who" equals who does the districting.⁶⁹

1. Criteria

The insertion of districting criteria into constitutional-type documents has a long—and often unsuccessful—history, as reformers sought ways to counter self-protective legislative redistricting. In 1989, the existing Charter included a number of the traditional criteria—such as protection of communities and compactness—as well as the "one person-one vote" doctrine inspired by the Supreme Court cases from the 1960s that imposed the standard on state and local legislative districting.⁷⁰ The Commission's several additions to the criteria reflected the Commission's goals and the issues of our day.

The first addition, a provision that districting was to ensure "effective representation of racial and ethnic minorities,"⁷¹ was proposed and passed at one of our earliest meetings.⁷² It was placed second in the order of priority of the districting criteria, following only the obligatory "one person-one vote" criterion.

This provision not only furthered the paramount goal of a more representative government, but also served some of our more political

68. Public Meeting, June 22, 1989, at 2.

69. For a distinction between "who" and "how," see David Wells' testimony at the Public Hearing, July 19, 1989, at 236-50. Mr. Wells had worked on New York districting issues for 30 years, and was the plaintiff in *Wells v. Rockefeller*, 311 F. Supp. 48 (S.D.N.Y. 1970), the case which held New York's Congressional districting unconstitutional. Testifying near the end of our process and focusing on the "how," Wells said the Commission's approach was "praiseworthy" and "commendable" and suggested a further improvement. See Public Hearing, July 17, 1989, at 236-50; Public Meeting, July 31, 1989, at 64-67.

70. See generally *Reynolds v. Sims*, 377 U.S. 533 (1964).

71. See Public Meeting, May 6, 1989, at 130.

72. See *id.* at 130-39.

aims. We wanted to avoid the "racial divisiveness" that had been predicted at Gracie Mansion.⁷³ On the Commission itself, this addition was one of several early steps that solidified the support of the core of our minority members—as can be seen by the enthusiastic reactions of Commissioners Gourdine and Betanzos.⁷⁴ In addition, this provision was one more signal to minority voters and minority groups of the seriousness of our efforts. Finally, provisions like this certainly could only be helpful in a Justice Department review.

While we emphasized districting criteria designed to increase political opportunity for minorities, we—with the knowledge and understanding of gay leaders—did not emphasize a change designed to increase political opportunity for gays. The existing Charter included a districting criterion that, to the maximum extent practical, "district lines shall keep intact neighborhoods and communities with established ties of common interest and association, whether historical, racial, economic, ethnic, or religious."⁷⁵ We added the words "or other" to this list.⁷⁶

We intended this addition to increase the opportunity for New York's gay community to elect a representative of its own. This attempt was cloaked in more general language because a more specific term might cause unnecessary controversy.

The gay community in New York, after years of fighting for equal rights protection⁷⁷ and organizing themselves and the resources of the City in the fight against AIDS, understood the existing Charter's term "common interest and association."⁷⁸ They wanted district lines to create a district in Manhattan that increased the likelihood of a gay person being elected to the Council. After several meetings with leaders of the gay political community, we agreed on the "or other" language at a meeting in Schwarz's law office.⁷⁹ In response to concern that the term "other" could be interpreted without reference to the gay community (although all agreed that it was hard to imagine to what other community reference could be made, given the Charter's existing list). We agreed to provide a clear

73. See discussion *supra* Chapter V.

74. See Public Meeting, May 6, 1989, at 130-32.

75. See Public Meeting, June 22, 1989, at 71; N.Y. CITY CHARTER ch. 2A § 52(c) (1989).

76. See Public Meeting, June 22, 1989, at 71; N.Y. CITY CHARTER ch. 2A § 52(c) (1989).

77. See NEW YORK, N.Y., LOC. L. NO. 2 (1986). The City finally included legislation in the City Charter that prohibited sexual orientation discrimination in 1986.

78. See N.Y. CITY CHARTER ch. 2A § 52(c) (1989).

79. That they were willing to accept our solution was substantially helped by the efforts of Tim Tompkins, Lane's executive assistant, who, among many other duties, was the Commission's informal liaison with the gay community.

statement of intent to the new Districting Commission, upon its establishment. This was done by Lane as a lead-off witness to the Districting Commission in 1990.

One last criterion was unique for its political value to the Commission. Section 52(f) provides that district lines may not be drawn “for the purpose of separating geographic concentrations of voters enrolled in the same political party into two or more districts in order to diminish the effective representation of such voters.”⁸⁰ Staten Island Council Member Susan Molinari, the only Republican in the Council, suggested this criterion, to limit political gerrymandering, at a public hearing.⁸¹ The Commission agreed with this criterion.⁸² It was a good idea for two additional reasons. First, one of our goals in expanding the Council was to increase political diversity on the Council. Second, Molinari’s support would help with two groups—Staten Islanders and Republicans. Indeed, the combination of more districts and this provision were a reason for support from not only Molinari but also State Senator Roy Goodman, chairman of the 1975 Charter Commission as well as of the New York County Republican Party. In addition, Susan Molinari’s father, Guy, a Congressman running for Staten Island borough president, supported the Charter.

2. The Districting Commission

In 1989, responsibility for Council district line-drawing rested with a districting commission of nine politically and geographically diverse members. The mayor appointed all nine of the members, but the City’s two largest political parties each nominated ten members. The mayor had to choose two from each party. The mayor also designated the commission’s chairman.

This districting system had been in place only since 1983. Prior to that the Council performed its own districting. Nonetheless, the 1983 Sovern Charter Revision Commission decided to grant the appointment power to the mayor as a response to the debacle over the Justice Department’s rejection of the Council’s 1981 districting plan under the Voting Rights Act.

Even though this system had only been in place for six years, we did not favor leaving so much power to the executive in a system where the legislature was meant to be independent of, and a check on, the executive. Imagine a mayor indicating to Council members that district lines—a subject in which legislators are intensely interested—might be affected by

80. N.Y. CITY CHARTER ch. 2A § 52(f) (1989).

81. See Public Hearing, July 17, 1989, at 78-79.

82. See Public Meeting, July 31, 1989, at 63.

how a Council member acted on matters that concerned the mayor. Even though Commissioners Betanzos and Murray had served on the Sovereign Commission, the Commission agreed that we should change the system again. The question was, "how?"

a. The Appointors

Our initial focus was on how the Districting Commission members should be appointed. While Peter Vallone and other members of the Council lobbied to regain the power lost to the Council in the 1983 Charter amendments, the Commission never even considered such a change. Not only was the 1981 debacle of recent vintage, but in our view, left to their own devices (or vices), all legislatures charged with redistricting themselves address only the members' self-interest and pay as little heed as possible to other considerations. Moreover, such an approach would undermine our efforts to make the Council accountable and stronger by encouraging competition for its seats. It could also undermine the goal of increasing minority opportunity. Neither did we think that a strong legislature required districting power as long as the process of districting was not mayorally dominated. Finally, we viewed independent districting as a reform to enhance legislative legitimacy. This latter point played into our political strategy. Independent districting commissions generally are high on the "good government" lists of civic and reform groups, as well as editorial boards. The support of these groups was an important element of our formula for political victory. Their support would have been at some risk had we chosen another alternative. On the other hand, we had no concern whatsoever about losing the Council's support as long as the fundamental shifts in power were in its direction.

Consistent with strengthening the Council and making it an independent check on the mayor, the Commission decided early to increase the size of the independent districting commission to fifteen and to reduce the mayor's overall appointment power from five out of nine to seven out of fifteen.⁸³ The Commission also decided that the Council's appointments should be direct. The political party with the largest delegation was assigned five appointments, while the second largest delegation was assigned three.⁸⁴ Political and borough diversity were also required. A majority of the Commission chose the chairman.

83. See Public Meeting, June 27, 1989, at 3-4.

84. Because the possibility existed, in theory at least, that the Council could be entirely Democratic, provisions were made for the city's second largest party through its county committees to make nominations (not appointments) to the mayor.

b. The Appointees

Section 50(7)(1) of the Charter requires that the Districting Commission “shall” include members of the “racial and language minority groups” protected by the Voting Rights Act “in proportion, as close as practicable, to their population in the city.”⁸⁵ As we discuss below, despite the Justice Department’s approval, this ultimately was held unconstitutional—but not until after the new Districting Commission redistricted the City for the election of the new Council in 1991.⁸⁶

The general subject was first raised by Borough President David Dinkins’ testimony before the Commission on April 4, 1989:

See, I know as a victim of apportionment back in 1966 from the state legislature that . . . it depends on where the lines are, and where the lines are gets to be a function of who makes the lines, or we used to say who chooses the choosers, and so it depends.⁸⁷

Others made many similar comments during the early months of hearings and meetings. Given the history of discrimination, the idea of minority participation in districting was fundamental (just as increased diversity on the Council was fundamental for the Commission). However, the method for effecting it was problematic. At our May 6 public meeting, Commissioner Betanzos proposed that the Districting Commission be “reflective of the ethnic and racial composition of the City, because I think the lines would be very different if it were that rather than nine white men.”⁸⁸ While other members of the Commission supported this thrust, as exemplified by Commissioner Gourdine,⁸⁹ questions were raised about the ambiguity of such language and whether it should be more specific. Nothing was resolved, and a similar discussion, equally as inconclusive, took place at the Commission’s May 13 public meeting.⁹⁰

85. N.Y. CITY CHARTER ch. 2A § 50(b)(1) (1989).

86. See *Ravitch v. City of New York*, No. 90 Civ. 5752, 1992 WL 196735 (S.D.N.Y. 1992). For a discussion involving the Commission’s acceptance of this provision, despite Schwarz’s first negative reaction, see *infra* notes 91-97 and accompanying text.

87. Public Hearing, Apr. 4, 1989, at 41.

88. Public Meeting, May 6, 1989, at 135-36. Under the old Charter, the Districting Commission had nine members. See N.Y. CITY CHARTER ch. 2A § 50(a) (1976, as amended through 1988).

89. See Public Meeting, May 6, 1989, at 138. “[W]ho makes the decision, will often impact on what the decision is.” *Id.*

90. See Public Meeting, May 13, 1989, at 488-94.

The topic of the Districting Commission's diversity intensified during the period of public comment and at seven public hearings (mid-May to mid-June) that followed release of the Commission's preliminary proposals. In addition to the public hearings at which the issue was raised, commissioners and members of the staff held several meetings with citizens and various groups. While these meetings covered a vast array of topics and took place with the full gamut of groups in the City, a cross section of minority groups expressed a powerful sense of political exclusion and cynicism about reform.

Our plans to expand the size of the Council and to make the "fair and effective representation" of minorities a key districting criteria were praised. Nonetheless, the witnesses and various groups remained concerned about whether future districting commissions would, in fact, carry through on the Charter Commission's goals. For example, at a four-hour evening meeting that Gretchen Dykstra, Commissioner Paredes, and Schwarz held in Chinatown, with some twenty-five representatives of the City's growing Asian-American community, the participants contended that prior City and state reapportionments had unfairly divided the City's Asian-American communities. They reiterated their view that a Districting Commission without an Asian-American member would be unfair to them, and would dampen the enthusiasm needed to foster increased voter registration and participation. Similarly, Latino advocates and officials meeting in Borough President David Dinkins' offices told Schwarz, Lane, and Commissioner Betanzos that the Commission's aims for reform on "fair representation" could not be assured without Latino representation on the Districting Commission.

Frank Mauro initially responded to these concerns at the Commission's June 22 meeting by saying that the Districting Commission "shall include" minorities protected by the Voting Rights Act.⁹¹ Mauro pointed out "[t]he advantages and disadvantages of that: The strength is, that it insures that there will be some representation on the Districting Commission of some groups. What it doesn't do . . . some have said it doesn't insure any sort of proportionality."⁹²

To this, Schwarz immediately added: "I don't think we should be writing quotas into the Charter, but we should signal that we want those appointments to be made."⁹³

From Schwarz's perspective, the risk of quotas in the Charter was that they might encourage racial controversy. From a political standpoint, how would long-time opponents to quotas, like Mayor Koch, react?

91. See Public Meeting, June 22, 1989, at 25-26.

92. *Id.*

93. *Id.* at 26.

Commissioner Gourdine challenged Schwarz's thinking by indicating that if "quota" was the proper word, we already planned one with party membership on the Districting Commission. He added that it was "very, very important" that we assure "the representation of all the protected groups" and that the Districting Commission reflect the "aspirations, at least, if nothing else, the backgrounds of the people we are seeking to protect."⁹⁴ Commissioner Paredes added, "I see your great interest in being fair by serving the racial and language groups . . . ," adding somewhat critically, that without a more concrete proposal than the one Frank Mauro had begun with the current proposal "[s]till that doesn't protect us."⁹⁵

During a break, Lane met with Gourdine. Lane concluded that mandating minority participation could be legally defended as a tool to protect voting rights goals, and that it would be desirable to accept Gourdine's position.

Shortly thereafter, Schwarz accepted this tentative conclusion. The reasons were several. On the legal side: (i) there had been historic—and recent—discrimination against minorities in drawing Council lines; (ii) in contrast to set-asides for minorities in governmental contracting or for a governmental job, here there would be no non-minority "victim"—unlike the nonminority contractor or job applicant who (absent a quota or set-aside) presumably would take the contract or job—no person would otherwise be entitled to a position on the Districting Commission; and (iii) this was not to be an ongoing institution of government, but rather an episodic (every ten years), short-term, unpaid, political function where the task was, in part, to implement the policies of the Voting Rights Act. On the political side, this proposal: (i) was very important to the Commission's minority members; (ii) would be helpful with a number of advocates; and (iii) might be helpful with the Justice Department. In addition, however sensitive to discrimination or attuned to the need for fairness that a non-minority person may be, an African American, or a Hispanic, or an Asian American can bring valuable added insights and experiences to an issue.

On June 27, 1989, the Commission, without dissent or debate,⁹⁶ adopted the proposal that ultimately became part of the Charter.⁹⁷ We would have more than a month between this meeting and our last round of

94. *Id.* at 29-31.

95. *Id.* at 35-36.

96. This must reflect Schwarz having had some one-on-one telephone calls with commissioners, explaining the justifications for the provisions.

97. *See* Public Meeting, June 27, 1989, at 3-7; N.Y. CITY CHARTER ch. 2A § 50 (1989).

meetings to subject the provision to public debate and to test its controversiality.

In marked contrast to some matters about which we received multiple comments, however, there were relatively few comments on this provision. Of those, all but two were favorable.⁹⁸ The first criticism was in a letter from the Jewish Community Relations Council and in parallel testimony from David Pollock representing that group. Pollock's testimony was very restrained. The Commission had been "ingenious" in its work on redistricting. Nevertheless, the "proportionality" language was "problematic [for] us."⁹⁹ Pollock recognized prejudice in the political system by stating, "I hope for the day in my lifetime that prejudice will cease against African Americans and Latinos."¹⁰⁰ He went on to say that Chinese Americans, as well as Greek, Irish, and Italian Americans ("[w]e can run the gamut"), also deserve representation.¹⁰¹

The other negative comment came from Mayor Koch in a letter to Schwarz that arrived on July 28, just three days before we were to start our final three days of hearings.¹⁰² The last of the mayor's four stated concerns about the pending Charter draft related to the proportionality provision. Again, the comment was muted. The mayor began by saying that "any mayor, in the interest of fundamental fairness," would want to assure that all groups are "fairly represented" on a districting commission.¹⁰³ He echoed one of our points: This "imperative" is strongest on a body like the Districting Commission which will "allocate political power for the ensuing decade."¹⁰⁴ The mayor did not agree, however, that it would be "wise" to require membership based upon protection status under the Voting Rights Act.¹⁰⁵ He remarked, "[a]s you know, I believe that this type of legally mandated proportionality based on race and ethnicity has no place in our system of government. I urge you not to go down this road."¹⁰⁶

98. Favorable comments came, for example, from Julius Chambers (Executive Director/Counsel of the NAACP Legal Defense and Education Fund), Roscoe Brown (President of One Hundred Black Men), Ruben Franco (President and General Counsel of the Puerto Rican Legal Defense and Education Fund), and David Dinkins.

99. See Public Meeting, July 21, 1989, at 171.

100. *Id.* at 171.

101. *Id.* at 172.

102. See Letter from Edward Koch, Mayor, City of New York, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Review Commission 4-5 (July 28, 1989) (on file with author) [hereinafter July 28, 1989, Letter from Mayor Koch to Schwarz].

103. *Id.* at 4.

104. *Id.*

105. *Id.* at 4-5.

106. *Id.* at 5.

This letter, although muted, caused us concern. Serious opposition from Mayor Koch, particularly on an issue such as this, could have spelled disaster for our attempts to avoid—indeed to bridge—racial tensions. It could jeopardize our referendum chances.

We thus went with some foreboding to Gracie Mansion for an outdoor meeting on a beautiful summer weekend morning to go over the mayor's four concerns with the mayor, Deputy Mayors Bobby Wagner and Stan Brezenoff, and others. This was just one or two days before our final meetings were to be held. What would we do if the mayor decided to oppose the Charter on this basis? Was compromise possible? Schwarz explained the context of our decision, particularly the prior discrimination and "no victim" points, and urged the mayor—despite his well-known and deeply felt principles—to accept what the Commission had done. The mayor did not voice disagreement. We left reasonably assured that, while we may not have convinced the mayor, he would support our overall effort. This he did as soon as the Commission had finished its work.¹⁰⁷

A couple of days before the meeting with Mayor Koch, Schwarz met with Commissioner Gribetz to urge Gribetz to support the overall Charter despite having lost on a few issues. Gribetz told Schwarz that Pollock and some others had been pressing him on the issue of the Districting Commission's composition. Schwarz reminded Gribetz of the arguments in favor of our position. Gribetz responded that he had told the protestors to "cool it."

In retrospect, it is unfortunate that we were not pressed harder on the issue. If we had been, a compromise was available. We could have limited the proportionality requirement to the first districting for the new Council. This was, after all, what the Commission was concerned about. As a remedy for past discrimination, moreover, a one-shot requirement such as that should have sailed through the courts.

The Justice Department specifically approved the proportionality requirement. The argument later failed with the district court, and this decision was not appealed.¹⁰⁸ The plaintiffs did not challenge the application of the provision to the districting for the new Council's 1991 election; the court's decision came after that. Effectively, therefore, the

107. During the Charter referendum campaign, the mayor did not say anything about this provision. But in 1990, during a public panel on the new Charter with Schwarz and others, he attacked the challenged provision, while still supporting the Charter overall.

108. See *Ravitch v. City of New York*, No. 90 Civ. 5752, 1992 WL 196735 (S.D.N.Y. 1992). Richard Ravitch, who was the lead plaintiff, had been the Commission's prior chairman. See NEW YORK, N.Y., OFFICE OF THE MAYOR, CERTIFICATE OF APPOINTMENT TO CHARTER REVISION COMMISSION (Dec. 16, 1986). During the referendum, Ravitch remained silent on the issue—a course of action that had been urged upon him by Schwarz at a luncheon during the referendum campaign.

proper compromise solution was what happened. Schwarz later felt that he had, in this instance, been asleep at the switch and had not thought through the issues adequately.

E. *No Term Limits*

In an early article, Schwarz was quoted as characterizing the City as a one-party state where incumbents hold office for life.¹⁰⁹ We did not do anything about the “for life” part of this characterization. The Ravitch Commission had discussed whether to add term-limits provisions to the Charter. It had decided not to.

We had no inclination to reopen the issue. Both of us opposed term limits, particularly for legislators.¹¹⁰ Moreover, we were working in the year of a contested mayoral primary where one candidate had been in office for three terms. Therefore, even if the Commission had favored term limits for executives, to decide that in the summer of 1989 might have appeared to be intervening in the primary battle.¹¹¹

F. *The Powers of the New Council*

The Council was charged with exercising the City’s legislative powers, as defined by state law and by the Charter.¹¹² Prior to 1989, the Council shared budget enactment authority with the Board of Estimate. It had no responsibility for City zoning, land-use decision making, contracts, or franchises.

1. Lawmaking Powers

The abolition of the Board of Estimate required distribution of its powers to other institutions of government. The assignment of the budget and zoning powers, both fundamentally legislative, to the Council was an obvious decision—consistent with our goals of empowering the legislature,

109. See Purdum, *Officials Defend Their Posts to Charter Panel*, *supra* note 2.

110. See Frederick A. O. Schwarz, Jr., Editorial, *Term Limits Is an Idea Whose Time Hasn’t Come*, DAILY NEWS (N.Y.), Oct. 28, 1993, at 51. The editorial opposed the term limits referendum put on the ballot by Ronald Lauder’s efforts (and money). The referendum succeeded.

111. The Charter was subsequently amended to provide for term limits. See N.Y. CITY CHARTER ch. 50 § 1138 (1989, as amended through 1993).

112. See discussion *infra* Chapter VI.

making it more representative, and creating a more traditional legislative-executive model.

The difficult decisions were whether to allocate to the Council the Board's individual decision making on land use, contracts, and franchises. In land use, for example, the Board was charged with deciding all sorts of particular land-use issues, such as whether a special permit for a developer should be issued. These decisions were not questions of broad policy. Such decisions almost always compromise legislative deliberation. Legislatures work best when their efforts are directed at broad lawmaking, and where most of the members have a representative stake and interest in the outcome. Legislatures work at their worst when the subject is narrow, relating, for example, to a single member's interest or district. In this situation, the public is often denied legislative deliberation. Systems of member prerogatives tend to arise, and the member whose district or interest is effected tends to control the issue. Other members accede because they expect to exercise a similar prerogative when an issue affects their districts. Failure to attract the full body's attention can also make such decisions the breeding grounds for corruption. In fact, in 1905 the Council's power to approve individual franchises was ended after a scandal erupted over the Council's exercise of that power.¹¹³

Not every decision results in the same dynamic. For instance, a decision to block putting a shelter in a particular district touches the entire legislature. As long as shelters are needed, they must go somewhere, and one legislator's refusal to permit a shelter in his or her district means that it has to go to another, ultimately making the question of shelters the legislature's—and not a particular legislator's—issue.

On this basis, we initially opposed any such grants of authority. This remained the Commission's final determination on contracts and franchises. Thus, while the Board of Estimate had to approve all noncompetitively bid contracts, the Council has no such power.

Some members of the Commission and a great many advocates differed with us on this point regarding land-use issues. They argued that such decisions were often highly controversial in the neighborhoods that they affected, and that they required political oversight. With this view we had little problem, and we arrived at a procedural method to determine whether a particular project was controversial. Under this approach, if government participants in the land-use review process could not reach consensus, Council review could be triggered. This "triple no" approach, as it came to be known, provided the additional advantage of enhancing the role of the affected borough president in local land-use decision making because their position would be the trigger for Council review. This solution satisfied

113. See SAYRE & KAUFMAN, *supra* note 22, at 629.

almost all members of the Commission, but not some advocates, particularly those associated with a number of reform groups. The Puerto Rican Legal Defense Fund argued that our failure to grant the full power, once held by the Board of Estimate, to the Council would violate the Voting Rights Act. In the end, as we discuss at greater length in Chapter VII,¹¹⁴ the position of the reform groups and the legal issues led us to allow the Council to "call-up" for review any land-use item if fifty percent of the Council voted to do so.¹¹⁵

2. Power over the Council's Own Budget

A somewhat obscure issue, but one of significant importance to our goal of an independent legislature, related to the Council's budget for its own operations. Most legislatures create their own budget, which is then included in the budget bills sent to the executive for his or her consideration.¹¹⁶ In New York City, however, the Council was traditionally treated as an agency, just like the Transportation or Sanitation Departments. Thus, the Council's proposed budget first had to be submitted to the mayor before it was included in a budget bill. The mayor could effectively control the Council's budget by controlling what went into the budget bill and the form it took.

Our change, modeled on the state system, was to give the mayor only one shot at the Council's budget through the mayor's power to veto budget items, subject then to a Council override.

G. *The Council's Rules of Procedure*

While an arcane subject, legislative rules are an extremely important part of the legislative process: assigning power, defining procedure, and shaping policy. Every house of every legislature operates under procedural rules that govern everything from the form of a bill to the method by which it is introduced and considered. For the most part, legislative rules are not found in constitutional documents, but in the standing rules of the particular legislature, promulgated pursuant to the almost generic constitutional grant that each legislative body should determine its own rules. In response to public dissatisfaction with legislative practices, these broad grants of

114. See discussion *infra* Chapter VII.

115. See N.Y. CITY CHARTER ch. 8 §197(a)-(d) (1989).

116. See Public Meeting, May 13, 1989 at 511-12; Public Meeting, May 15, 1989 at 52-65.

authority have historically been limited by the addition of procedural rules to constitutions.

Such changes often have limited impact on the legislative process. For example, the New York State Constitution requires a state bill to mature on legislative desks for three days before passage,¹¹⁷ but in Albany almost every important bill is passed on the last day or two of the session under a gross misuse of the governor's power to issue a "message of necessity."¹¹⁸ Some constitutional rules also introduce the courts in the legislative process. Where the rule is clear, but ignored, this may be of value. Where the rule is unclear, however, judicial imposition on legislative practices is not something to be encouraged.¹¹⁹

In 1989, the Charter contained a number of such rules, including rules providing for a vice chairman (now speaker),¹²⁰ requiring a majority of all Council members for enactment of a bill,¹²¹ mandating that the vote of each member be recorded;¹²² imposing single subject, title, and aging requirements;¹²³ and requiring professional budget staff.¹²⁴

The abolition of the Board of Estimate and ascension of the Council to a central policy-making role created a serious debate over rules relating to the power of the Council's leadership, the accessibility of its processes, and the responsibilities of its members. The Council had a long tradition of excessive leadership dominance. To many, Vallone, while greatly improving the quality of the Council's work, maintained this tradition. The Council also had a long and shabby tradition of reducing opportunity for the public to participate and observe its processes. Frequently, for example, it held committee meetings without meaningful notice and provided little information as to what occurred. Finally, the Council's new governmental centrality raised questions concerning the appropriateness of its members serving "part time"—a misnomer, as we illustrate below.

Against this background, many of the participants in the Charter revision process expressed concern that our goal of a meaningful legislature

117. See N.Y. CONST. art. 3, § 14.

118. See Editorial, *What's the Rush? The State Constitution Gives the Public Three Days to Review Legislation; Budget After Budget, the Governor Takes that Right Away*, POST-STANDARD (Syracuse, NY), June 6, 1996, at A8 ("It has been common practice for the governor to issue messages of necessity that allow the three-day requirement to be circumvented.").

119. See, e.g., *King v. Cuomo*, 613 N.E.2d 950 (N.Y. 1993); *Heimbach v. State*, 454 N.Y.S.2d 993 (App. Div. 1982).

120. N.Y. CITY CHARTER ch. 2 § 44 (1989, as amended through 1997).

121. See *id.* § 34 (1989).

122. See *id.* § 35(b).

123. See *id.* §§ 36, 41.

124. See *id.* § 37.

would be frustrated by a procedural framework that allowed the concentration of too much power in the hands of the legislative leadership, denied the public the opportunity to observe legislative efforts, and allowed members to pursue second careers that could divert their attention from the legislative task and possibly create other forms of conflicts. Schwarz characterized some of these concerns at the June 22 public meeting: “[T]he specter that has been mentioned [by a number of reform groups] is, that the mayor and one person (the legislative leader) [will be] able . . . to control everything in the City.”¹²⁵ Responding to the criticism from Commissioner Richland that imposing any rules on the Council would undercut its “standing and dignity,” Commissioner Leventhal said that, as a “matter of general principle,” we should not impose specific rules on the Council. However, because there was “a major shift in power and responsibility,” the standards we suggested seemed “very reasonable” and should actually “enhance the ability of the Council to get the public confidence in its expanded role.”¹²⁶ Schwarz said the same—and added that we were being “responsive” to concerns “from a number of quarters.”¹²⁷

1. A Little Decentralization

Our primary goal was to create a strong legislature. This may include, but is not the same as, strong legislators. While we wanted the members of the Council to be of the highest quality (and we wanted the full support of the reform community), central to our own policy view was a legislature that would assert itself as a body both in its policy-making and its investigatory functions. This required the type of discipline that was difficult to achieve without a strong leadership structure, particularly in a unicameral, largely one-party, legislative body.

Additionally, our own view was that as strong as a speaker was, he or she could only exercise leadership power with the approval of a large number of legislators. On the other hand, it became evident that we had to adopt some changes to accommodate the demands of a number of good government groups who were our potential allies—and to do so regardless of whether these changes were only symbolically important. Attention focused on the Council leader’s power to appoint committee chairs, and to control committee and legislative floor agendas. Legislation could not move without the leader’s approval, regardless of the support in the Council for that legislation. This appeared to be an extraordinary power

125. Public Meeting, June 22, 1989, at 94.

126. *Id.* at 93-95.

127. *Id.* at 93-94.

for a single individual. To address this situation, we proposed the following changes, found in section 46 of the Charter:

The council shall determine the rules of its own proceedings. . . .
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. .
128
. .

Facially, each of these changes provides an opportunity for members to circumscribe overly strong leadership. However, certainly on the rules relating to discharge of a bill from a committee to the floor, the act of discharge would signal a breakdown in leadership that would probably mean the end of that leader's tenure.

2. More Public Accessibility

Legislative accessibility presented an entirely different and much clearer issue. Meaningful participation in the legislative process requires information about its activities. The Council—like most legislative bodies when left to their own devices—had been sloppy, at best, about assuring opportunities for public observation and participation. Many advocates commented on how hard it was to find out what went on at the Council, particularly at its committee meetings. This was a real problem and needed a remedy.

The Commission added provisions that required: (i) reasonable notice of all committee meetings and that all committee votes be recorded and publicly available;¹²⁹ (ii) Council meetings to be reasonably noticed and that such notice include a list of proposed local laws to be considered;¹³⁰ and (iii) complete transcripts of each Council meeting and committee hearing be made available to the public.¹³¹ Council committee budgets were also required to be published.¹³²

128. N.Y. CITY CHARTER ch. 2 § 46 (1989).

129. *See id.*

130. *See id.* § 42.

131. *See id.* § 45.

132. *See id.*

Finally, Council members were required to vote personally, rather than by proxy.¹³³ This reflected the Commission's disdain for the proxy voting practice of the Board of Estimate. Hearing of the Board's proxy voting became, as Fred Friendly said, "one of the most shocking moments" in the Commission's history.¹³⁴

3. "Full Time" Versus "Part Time" Council Members

Given that we were about to increase greatly the powers, responsibilities, and status of the City Council, some people—mostly outside the Commission, but some inside as well—pushed very hard for us to require that Council members work "full-time" on the Council. Harriet Michel found it "absolutely inconsistent" with empowering the Council, and giving it increased responsibility and visibility, not to "require that those who will be doing this important job, give it their full-time attention"¹³⁵

As phrased, it was hard to argue with the position. However, the terms "full-time" and "part-time" were misleading. The real question was whether we wanted to compel people on the Council to have no other source of earned income.¹³⁶ This would:

get into all of the issues that are bedeviling the United States Congress of how you define proper income versus improper income. You get into class distinctions, where people who happen to be wealthy because they clip coupons, have a favored status over people who, consistent with the obligation to work hard, make some money from some other work.¹³⁷

Moreover, of the existing Council members who worked "full-time," some were very good, and others were "not very good and not very productive."¹³⁸ Similarly, there were members with another source of earned income who are "very good and who work enormously hard," whereas others flopped on both counts.¹³⁹ Thus, the factual record had not

133. *See id.* § 35.

134. Public Meeting, July 31, 1989, at 39.

135. Public Meeting, June 22, 1989, at 105-06.

136. *See* Public Meeting, May 15, 1989, at 107-10.

137. *Id.* at 108.

138. *Id.* at 109.

139. *Id.*

established a “clear litmus test” between “people who are productive and the people who are not.”¹⁴⁰

Historically, as Judah Gribetz pointed out, this country has a tradition of “citizen legislatures,” mixing people who had outside jobs with those who did not.¹⁴¹ The assumption was that both were expected to devote “equal time” to their duties as a legislator.¹⁴² This is still true for a number of state legislatures.

In addition to these historical and conceptual difficulties, there was the practical and political concern that if Council members could not have any outside earned income, it would be unfair not to recommend a substantial increase in pay. Given all the other issues we needed to ask the voters to focus on, “recent history tells one” that to put the question of “what politicians ought to be paid” to the voters would “not serve the end” of the public accepting the reforms we believed were necessary and appropriate.¹⁴³ We did, however, make one change in the Charter to increase attention to the issue. Over the previous several years, changes in pay for elected officials had been based upon recommendations by a panel of distinguished outsiders. As Gene Russianoff—the unflappable and indefatigable reform advocate from New York Public Interest Research Group (“NYPIRG”)—pointed out to us, the Shin Commission (known for its chair, insurance executive Richard Shin) had in its most recent review decided that it did not have legal authority to consider the outside income of Council members.¹⁴⁴ We changed the Charter to make clear that the next such pay Commission could consider the issue.¹⁴⁵

4. Vice President to the Speaker

The leader of the Council had the title “Vice President of the Council,” reflecting the presence of the “City Council President.” Both titles were misleading, and the leader’s title was demeaning. We changed the Council leader’s title to “Speaker,” and subsequently the council president’s title was changed to “Public Advocate.”

140. *Id.* at 110.

141. *See id.* at 115-16.

142. *See id.* at 116.

143. *See id.* at 108-09.

144. *See* Public Meeting, July 31, 1989, at 17-25.

145. *See* N.Y. CITY CHARTER ch. 2 § 26(c) (1989).

H. *Accelerating the First Election of the New Council*

A Council election would take place in 1989. Because the 1989 election would also decide whether the new Charter would go into effect, this would be, by definition, an election of the existing thirty-five person Council using existing district lines. The next regularly scheduled Council election would not be for four years. Unless we could accelerate the next election, the old Council with greatly increased responsibilities, but without the representational benefits of expansion and our other reforms, would be in place until 1993.¹⁴⁶

In her remarks on June 27, the last day of our second round of Commission meetings, Harriet Michel emphasized the importance of accelerating. After recognizing the difficulties, she said:

I just have to tell you, I have a discomfort level. Assuming that this is the last thing that will happen . . . , that is, the selection, the expansion . . . of the new Council, and in between, over the next three years with phasing in all of these new powers with, essentially, the same thirty-five people that are there now . . . I am just uncomfortable with that¹⁴⁷

Because acceleration was both important and difficult, we had been working on it for some time. Commissioner Michel's remarks were an added spur.

The subsequent public testimony of Roscoe Brown, president of One Hundred Black Men as well as president of the Bronx Community College, drove home the same point—and was of great political significance. Brown testified that acceleration to 1991 was “extremely important” because “[t]his is the greatest change that has been made in New York City government in decades” and “more empowerment to minorities, the sooner . . . the better.”¹⁴⁸

The new point in Brown's testimony was that acceleration was so important that it should be done even if it was necessary to redistrict based on 1980 Census data.¹⁴⁹ Brown also said that, assuming we continued to “make progress,” the referendum on the new Charter should take place in

146. Under state law, moreover, local elections cannot be held in even-numbered years, the years in which elections for state offices are held. This meant that if we were to accelerate the election of the new Council, it would require an election in 1991. *See* N.Y. CONST. art. XIII, § 8.

147. Public Meeting, June 27, 1989, at 184.

148. Public Meeting, July 21, 1989, at 180-84.

149. *See id.* at 181-83, 88.

1989.¹⁵⁰ As Schwarz pointed out, this would be the only way a new Council could be elected in 1991.¹⁵¹

A newspaper article captures the political implications of the exchange. It described Schwarz listening “intently” to Mr. Brown, and noting “pointedly” that the expanded, more representative Council could only be elected in 1991 if the new Charter was approved “this year.”¹⁵²

According to the article, Mr. Brown agreed, but Schwarz had a different audience in mind—the minority civic leaders who endorsed a delay on the Charter referendum. “A black political leader from Brooklyn noted the political significance of the dialogue between Mr. Brown and Mr. Schwarz a few moments later. ‘This is going to put a lot of pressure on the delay faction,’ he said in a hallway. ‘So now what exactly do we get from a delay?’”¹⁵³

It was clear that if we could find a way to accomplish redistricting in time for the 1991 election, we could win substantial additional support for a 1989 referendum. Through prodigious work and creativity, Frank Mauro came up with a highly detailed schedule that would permit redistricting, using 1990 Census data, to occur for a 1991 election of the new fifty-one member Council.¹⁵⁴ This multistep schedule is set forth in section 52-2 of the Charter.¹⁵⁵

Harriet Michel noted the substantive and political importance of achieving acceleration:

I’d like to say how pleased . . . I am that we’ve been able to do two things here. First is to not allow all of the new responsibilities and powers that we’ve given to the City Council to, I use this word advisedly, be fumbled until 1993, but to in fact allow for greater inclusion by providing for an earlier date.

Two, what I think it does is it will encourage a lot of groups who thought that perhaps we needed to take more time to look at our proposals and talk about the issue of delay, I think it will encourage them that inclusion of minority groups will happen at an

150. *See id.* at 184-85.

151. *See id.* at 185-86.

152. Alan Finder, *Next Task: Explaining and Persuading*, N.Y. TIMES, Aug. 3, 1989, at B4.

153. *Id.*

154. *See* Public Meeting, July 31, 1989, at 73-86.

155. *See* N.Y. CITY CHARTER ch. 2A § 52 (1989).

earlier date and encourage the support [for] going forward in November.¹⁵⁶

Schwarz, seeking to broaden the positive impact beyond minorities, said that acceleration would "increase the opportunities for representation for people who traditionally have not had the same opportunities, and that's also good for every single person in New York"¹⁵⁷ Acceleration of the election to 1991 passed without any "no" votes. However, Commissioners Alvarez and Molloy puzzlingly abstained without explanation.¹⁵⁸

The political benefits of the acceleration began immediately. On the evening of the day the Commission voted to accelerate the election, the New York State branch of the National Association for the Advancement of Colored People ("NAACP") delivered a position paper to Schwarz's apartment.¹⁵⁹ The first substantive point in the letter was that the Charter referendum should take place in 1989.¹⁶⁰ The letter concluded with a much-appreciated compliment:

The Charter Revision Commission has undertaken a most serious and daunting task. It has done it with a significant amount of pressure from the myriad of interest groups with a stake in the future of New York. Despite the knotty and complex issues and the pressures, the Commission has served with openness[,] sensitivity and class.¹⁶¹

The acceleration of the next Council election to 1991 is a clear example of where good policy made good politics.

156. Public Meeting, July 31, 1989, at 87.

157. *Id.* at 88.

158. *See id.* at 103.

159. *See* Public Meeting, Aug. 1, 1989, at 5-6. The paper was dated July 30, but the timing of its delivery, and conversations held at the time, support the conclusion that the Commission's action on July 31 contributed to the NAACP's helpful letter being actually delivered.

160. *See* Position Paper of New York State NAACP to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (July 30, 1989).

161. *Id.*

II. PRESERVING A BOROUGH VOICE—CHANGING THE STAGE

The Commission paid a great deal of attention to how a borough voice should be expressed in New York City. This was both substantively and politically difficult.

A. *Reasons to Preserve a Borough Voice*

Theoretically, one could posit a city government limited to a mayor and council, without borough presidents. This is the basic structure in most American cities. However, New York's history, our view of the needs of the City in 1989, the seemingly uniform view of commissioners, political reality, and possible issues under the Voting Rights Act, led us to assume throughout that there should be a borough voice, and that it should not be expressed only through Council borough delegations. The issue was not whether, but how, a borough voice would be expressed in the post-*Morris* era with no Board of Estimate.

While history ought not imprison thought, it is relevant. The City was created in 1898 by the amalgamation of the long-established and very large cities of Manhattan (already called New York) and Brooklyn—each with extensive existing government structures and each becoming a borough in New York City—and the communities that became the boroughs of Queens, the Bronx, and Richmond (Staten Island).¹⁶² While many of the sponsors of the greater City created in 1898 thought that consolidation would result in breaking the hold of the Democratic party on New York, they were wrong, as the first mayor of the consolidated City was Democrat Robert Van Wyck. The Republican forces, which controlled Albany then, teamed again with the City's reform movement to enact a second Charter, under which a second election in the new City was held, resulting in the election of the fusion candidate Seth Low. This second Charter, promulgated in 1901, redistributed power in the City. The power of the mayor was reduced; the power of borough governments was enhanced. The primary vehicle for effecting this goal was the reconstitution of the Board of Estimate to include the City's elected officials and borough presidents. The borough presidents were also given considerable power over public improvements in their boroughs.

In the decades between that revision and 1989, the borough role in City government changed substantially. Most important, the borough presidents' role in service delivery was repeatedly reduced until the 1961 Charter, which transferred all remaining public improvement powers of the borough presidents to the City's Departments of Highways and Public

162. See SAYRE & KAUFMAN, *supra* note 22, at 11.

Works. Despite these sorts of changes in the details, by 1989, a significant governmental voice for the boroughs had become a fixture of the City's government.

Borough identity was, in the years after consolidation and still in 1989, particularly important for the four boroughs other than Manhattan. There were powerful feelings that Manhattan had dominated, and fears that it would continue to dominate, any new government. Many witnesses from all over the city consistently expressed this theme. While the testimony of borough presidents themselves could be seen as tinged by self interest, they were by no means the only voices expressing this concern. It was deeply felt by many in the City.

The newly expanded City Council would have about eighty percent of its members from outside Manhattan; comparatively, the 1989 Board of Estimate had seven of the eleven votes (or more than sixty-three percent) held by people living in Manhattan. Nonetheless, no one on the City Council spoke for—or at least represented—boroughs as a whole. An added reason in 1989 to keep a borough voice was that the new Council was untested. We were also concerned about one-party domination of New York City. People elected to represent boroughs could add to the competition of ideas and could challenge the mayor and other citywide officials.

Sustained lobbying and diverse testimony urged a meaningful borough role; only a few witnesses or persons who sent us position papers or letters urged elimination of borough presidents. Reverend Johnnie Ray Youngblood called for their elimination. He called borough presidents "self-serving political machines," often selected by Council delegations rather than elected.¹⁶³ The borough presidents, Youngblood said, were responsive to the party machine and to contributors, and only "when time permits, as an afterthought, represent[ing] the rest of us."¹⁶⁴ Richard Emery, the lawyer who had brought and won *Morris*, suggested that, rather than a borough voice, coalitions of communities in the Council (e.g., Bedford-Stuyvesant and Southern Queens, or Riverdale and Staten Island), would be the way to protect interests smaller than the City but bigger than a single Council district.¹⁶⁵

163. See Public Hearing, June 1, 1989, at 69. There was substantial truth to this comment. The 1989 Charter changes ended this practice by requiring elections for all vacancies. See N.Y. CITY CHARTER ch. 4 § 81(e) (1989).

164. Public Hearing, June 1, 1989, at 69.

165. See, e.g., Sam Roberts, *Charter Panel Looks Past Ruling and Sees Far-Reaching Changes*, N.Y. TIMES, Mar. 26, 1989, at 1. This suggestion led to a fair amount of rhetoric about fostering racial or class dissension. See also Editorial, *The Future of a Delusion*, STATEN ISLAND ADVANCE, June 23, 1989, at A24 (referring to Emery as "the Robespierre of this unwanted revolution").

While a number of editorials urged eliminating the Office of the City Council President, none (as far as we recall) advised eliminating the borough presidents. For example, the *Daily News* editorial board (which recently has called for the elimination of borough presidents as a useless “rip-off”¹⁶⁶) appealed for a vote in favor of the Charter, in part because, under the new Charter, “the beeps will retain significant influence in City Hall.”¹⁶⁷ Throughout our long process, the *Times*’ editorials frequently expressed concern that powers proposed to be given to borough presidents or neighborhoods would curb the essential central powers of the City, but they never called for elimination of a borough voice. *New York Newsday*’s editorials made an adequate borough voice the litmus test of their support.¹⁶⁸

Given all this, whether a proposed Charter without a borough voice could have passed muster with the voters is dubious.¹⁶⁹ In any event, neither we, nor any commissioner, gave serious thought to this question. As Schwarz said on the day the chairman’s initial ideas were introduced:

[I]f [the borough presidents] didn’t exist, we would want to invent something akin to them, because what they provide is an intermediate role between those who are elected in the smallest constituencies and those who are elected in the city as a whole. And with [a] government as big as ours, covering as large a physical area, covering as many people, we need that intermediate voice. And we need it substantively . . . [not] because one is focusing on what do you do about people who are in current positions.¹⁷⁰

David Trager, the most articulate and consistent proponent of a borough voice, described as a “key agenda” a “borough perspective” to be “an intermediary buffer between the power of the City and the local communities”¹⁷¹ On the day the Commission voted to eliminate the

166. See Editorial, *Deep Six These Six*, DAILY NEWS (N.Y.), Nov. 3, 1997, at 32.

167. *Thumbs Up on the Charter*, DAILY NEWS (N.Y.), Oct. 29, 1989, at 36.

168. See discussion *infra* Chapter XIII, n.283.

169. Equally, there would have been a question whether elimination of borough presidents would have passed muster with the Voting Rights Section of the Civil Rights Division of the Justice Department. While elections held on a boroughwide basis in some boroughs *created* voting rights problems, those in other boroughs resulted in minorities being elected—David Dinkins in Manhattan being the latest example.

170. Public Meeting, Apr. 24, 1989, at 50; see also Public Meeting, May 2, 1989, at 64.

171. Public Meeting, Apr. 24, 1989, at 110; see also Public Meeting, May 2, 1989, at 82-91.

Board of Estimate, several other commissioners stressed that in light of this decision, it was particularly important to find new ways to express a borough perspective.¹⁷² Trager particularly pressed “borough economic survival.”¹⁷³ He argued that, with only citywide officials and local Council representatives, “no one will be pushing that issue, [and] no one will be pushing the boroughs’ cultural institutions.”¹⁷⁴ Without a borough perspective, “all the resources are Manhattan oriented.”¹⁷⁵ Whether this was logical—with the overwhelming majority of the Council and of the City’s voters coming from outside Manhattan—is somewhat beside the point. The general conclusion that a borough perspective was needed was convincing.

Trager saw the issue as “a borough perspective” in a very large City, and not as what to do about borough presidents per se.¹⁷⁶ Nevertheless, Trager and others doubted the sufficiency of borough delegations. There seemed to be no compelling idea for how to build in a “borough perspective” without the use of the borough presidents.

B. *The Nature of the New Borough Voice*

At the outset, we faced a threshold issue: Should the borough presidents have a legislative or an executive role? Their role on the Board of Estimate had been legislative with respect to the budget and zoning matters and a hybrid between legislative and executive on the particular contract and land-use (including site-selection) matters that came before the Board. The rhetoric of several, if not all, borough presidents was that their “vote” on the Board made them effective advocates for their boroughs. When the Ravitch Commission suspended operations, it was about to discuss David Trager’s idea of placing the borough presidents on the City Council, but with each borough’s delegates proportional to its relative share of the City’s population.

For these reasons, it seemed sensible first to discuss whether a new legislative role should be structured. After a brief flurry of exploration, however, this was dropped because it seemed to risk undercutting the Commission’s goal of fair representation for minorities on a newly empowered Council.

172. See, e.g., Public Meeting, May 2, 1989, at 57-58, 62-63.

173. Public Meeting, May 6, 1989, at 9.

174. *Id.*

175. *Id.* at 10, 115-18 (arguing that the Brooklyn borough presidents were responsible for reviving several Brooklyn institutions).

176. *Id.* at 10.

We first discussed the idea of a bicameral City Council with an “upper” house of approximately nineteen members, including the five borough presidents. This would allow the borough delegations to reflect closely the varying populations of the boroughs. On April 24, Schwarz opened the discussion of bicameralism by saying that we should look at the “governmental pluses or minuses only if it would, and would be seen as likely to result in fair representation for everybody in this city, including minority people in this city . . . I don’t believe, as a person, and I don’t believe collectively we would want to propose an innovation[,] even if it were seen as having significant governmental advantages, unless it will, in fact, open doors and will be seen as opening doors.”¹⁷⁷

On the “be seen” part of this threshold test, we had met on April 22 to discuss Charter issues with Congressman Major Owens and colleagues on the Coalition for Community Empowerment. They reacted dubiously to a bicameral legislature. While this initial reaction from one group was not conclusive, it did sharpen the issue.¹⁷⁸

At our May 2 meeting (where the Commission decided to eliminate the Board), the Commission decided not to pursue bicameralism. Schwarz said that “[o]n the plus side, it had seemed . . . a method to balance power, and another center of power, [and a source for] competing ideas”¹⁷⁹ However, it did not meet the threshold test of being “something that would open doors for minorities, and [be] perceived as doing so”¹⁸⁰

The Commission agreed next to look at David Trager’s idea of a unicameral City Council with the borough presidents serving on it. Trager argued that the concept could satisfy the need for a borough voice, and through the clash of six “gorillas”—the leader of the Council and the five borough presidents—produce better ideas.¹⁸¹

At our meeting of May 6, the Commission voted (with one dissent and two abstentions) not to have the borough presidents sit as members of the Council. Schwarz described the concept as “the most innovative idea that has come before our body,” but expressed concern that it would end up “diluting and weakening the Council.” Schwarz also said that the clash among “gorillas” would lead to “guerilla warfare and not consensus,” that “there is some concern about dilution of the enhanced opportunity for minorities that we hope to derive from the new City Council,” and that the

177. See Memorandum, titled *On Bicameralism*, from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (Apr. 24, 1989) (on file with the *New York Law School Law Review*).

178. See April 14, 1989, Letter from Congressman Owens to Schwarz, *supra* note 61.

179. Public Meeting, May 2, 1989, at 109-10.

180. *Id.* at 110.

181. See *id.* at 102-03.

proposal was "neither fish nor foul nor good red herring."¹⁸² Several other commissioners expressed similar concerns.¹⁸³

Shelving the suggestions of a legislative role did not end the need to work out an appropriate borough voice. Trager, again giving a good summation of reasons for a borough perspective and disagreeing with some of the points made against the proposal of a role for the borough presidents on the Council, voted in favor of his proposal.¹⁸⁴ He had earlier suggested, however, putting "together a package of roles for the Borough Presidents . . . [and] a package of executive function and legislative function that would make a meaningful role for them."¹⁸⁵ Vice Chair Michel voted to "shel[ve]" the legislative-role concept, but "with the understanding" that if proposals for an executive role did not meet her "threshold interest of guaranteeing that Borough Presidents, in fact, have significant power" then we should come back to service in the Council.¹⁸⁶

Lane and Frank Mauro had already worked on ideas concerning possible executive roles for the borough presidents. Schwarz suggested the ideas to the Commission for preliminary discussion.¹⁸⁷ At least two commissioners who voted against the idea of borough president seats on the Council said that those preliminary ideas were "significant and meaningful,"¹⁸⁸ and a "start."¹⁸⁹ However, the Commission was clearly not yet near a workable consensus on the borough-voice issue.

The details of how we developed that consensus and worked out the executive role for the borough presidents are covered in Chapter VII's discussions of the Charter provisions on budgeting, land use, contracts, and service delivery.¹⁹⁰ In addition, Chapter I describes how the Commission

182. Public Meeting, May 6, 1989 at 3-5.

183. *See, e.g., id.* at 109-21. Commissioner Murray said: "[B]ring about paralysis of the City Council"; Commissioner Gribetz said: "[D]oesn't do the trick of achieving . . . a meaningful borough perspective"; Commissioner Gourdine said: "[W]ould be a dilution of minority representation"; and Commissioner Richland said: "[W]ould be demeaning [to the borough presidents]." This last concern was expressed by Commissioner Richland, and echoed elsewhere by Brooklyn Borough President Golden. It reflected, in part, a reluctance to let go of the old order and, in part, a skepticism about (or even contempt for) the Council. *But see id.* at 53-54 (containing responses to Richland's negative comments about the Council).

184. *See id.* at 115-18.

185. Public Meeting, May 2, 1989, at 83-88.

186. Public Meeting, May 6, 1989, at 119-21.

187. *See id.* at 14-107.

188. *Id.* at 108.

189. *Id.* at 113.

190. *See* discussion *infra* Chapter VII.

came to a consensus. Some general points can nonetheless usefully be made here.

Some of our aims obviously conflicted. The solutions were not easy. We had to devise a legal solution. Some of the proposals made to us were blatantly illegal. We wanted a borough voice, not a veto. Yet, if it were only a voice, without some power, how could it be meaningful? How much power could be given to a borough voice without hampering the City's overall needs? We wanted the borough presidents to play some role in each area they had covered on the Board—but it would necessarily, and for policy reasons, be a different role.

Our aim was to have their role be proactive rather than reactive, as it often was on the Board. The borough presidents could be more useful this way, whatever the loss of the drama of the last minute, usually feckless, votes on the Board. An important question remained, however: Could we convince people that the borough president would have meaningful power without a vote?

In a sense, no issues were wholly local. This is best illustrated by land use. The location of a shelter, a prison, or a landfill is profoundly local to its neighbors, or perhaps a whole borough. The location is citywide as well, because such facilities meet citywide needs. Similarly, changing zoning may harm a locality, but help the overall city by improving economic development.

III. CITYWIDE ELECTED OFFICIALS

Our thinking about the offices of mayor, comptroller and city council president (now public advocate) must be seen as a whole. The great power of the mayoralty under the new, as well as old, Charter was relevant to the continuing need for the other offices as countervailing forces. The role we saw for the comptroller—or more precisely the role we did not want the comptroller to play—was also relevant to why we preferred to retain a council president.

A. *The Mayor*

Throughout the history of greater New York City, the mayor has been the most powerful elected official in the City. While each Charter change has increased the mayor's power marginally, the central role of the mayor

has remained unchanged.¹⁹¹ Through powers over the budget and the appointment and removal of department heads, the mayor manages almost all of the day-to-day affairs of the City. While the City Council has considerable power in the legislative arena, the City, unlike states and the federal government, mostly delivers direct services, almost all of which are under the mayor's management. Additionally, the mayor often sets the agenda for the City Council through the power to propose and the veto power.

Our efforts did not run against this history. The abolition of the Board of Estimate itself affected the mayor least of any elected official, although it did raise many issues as to the mayor's powers with respect to, for example, budgets, land use, and contracts. Basically, the question became which of the Board of Estimate's powers should be granted to the mayor. Our answer was to assign to the mayor all executive decisions (e.g., letting contracts) to promote our goals of efficiency and accountability. These shifts of power are discussed throughout Chapter VII.

There were hard questions about the relationship between the powers of the central administration and the Council and borough presidents. In addition, there was sharp disagreement—mostly outside the Commission—on whether our changes would strengthen or hobble the mayor. In our view, the mayoralty needs to remain strong.

B. *The Comptroller and the City Council President (Public Advocate)*

From a structural point of view, the continuation of a strong mayor—and the likelihood that a single political party would continue to dominate the city—favored continuing the other citywide offices as added checks on the mayor. Furthermore, the Council was still untested. In addition to serving as sources of competing ideas, the other citywide offices could be springboards for people to build a record to run for mayor. Given that the Commission was going to keep the offices—though, as we show below, with repetitive and contentious debates about whether the Office of Council President should survive—there were some common themes in how we thought about the two offices. We wanted each to have a sphere, but a somewhat separate sphere, in which to check and balance the mayor—the comptroller for fiscal issues and the council president for service issues.¹⁹²

191. See generally N.Y. CITY CHARTER REVISION COMM'N, BRIEFING BOOK (Jan. 12, 1988) [hereinafter BRIEFING BOOK] (providing a brief history of the mayor's powers) (on file with the *New York Law School Law Review*).

192. See Public Meeting, Apr. 24, 1989, at 44-45; Public Meeting, May 13, 1989, at 422; Public Meeting, June 20, 1989, at 314.

We wanted to encourage both to suggest improvements and not be mere gadflies. Finally, we wanted more attention to procedural fairness.

1. The Comptroller

In theory, starting from scratch, the City—as the United States—could have had an unelected chief fiscal officer, just as the City—in contrast to the state—has a chief legal officer who is not elected. There was no inclination, however, to have a nonelected comptroller either on or outside the Commission.

Importantly, there was a very strong sentiment on the Commission that the comptroller should concentrate on issues of fiscal concern and not the substance of City policy. Here, the experience of many of the commissioners with comptrollers on the Board of Estimate clearly affected their views of what a comptroller should, and should not, do. Given a vote on the Board on contract, land-use, and budget issues, comptrollers had ranged far beyond auditing concerns. Furthermore, a number of commissioners felt these votes and other actions were outside the proper expertise of a comptroller and had become overly “political,” particularly if a comptroller was contemplating a run for mayor.

We clarified and enhanced the comptroller’s audit powers, making clear, for example, the power to audit any agency—the majority of whose members were appointed by City officials (removing any doubt about the power to audit the Board of Education, an agency created by state law).¹⁹³ We also increased the comptroller’s obligations by requiring an audit of every City agency at least once every four years.¹⁹⁴ As part of our emphasis on procedural fairness, we required the comptroller to furnish draft copies of all audit reports to the head of the affected agency and to include any response in the final version of the audit.¹⁹⁵ As part of our emphasis on openness, hearings that the comptroller held had to be made available to the public.¹⁹⁶ Finally, with respect to audits, the comptroller had to make an annual report to the mayor and Council describing all major audits and what corrective actions had been recommended and taken.¹⁹⁷

193. *See* N.Y. CITY CHARTER ch. 5 §§ 93 (b), (c) (1989).

194. *See id.* § 93(c).

195. *See id.*

196. *See id.*

197. *See id.* § 93(f).

2. The City Council President (Public Advocate)

While there is no bright line between service and fiscal issues, the idea that the comptroller should focus on fiscal matters led, as a matter of symmetry and substance, to the conclusion that the council president should emphasize service issues. In contrast to the comptroller, however, the issue of whether there should be a city council president was sharply disputed outside the Commission and was divisive within the Commission.

So serious did these internal disputes become that two members told us, in moments of passion, that their support for the Commission's revisions was contingent upon the preservation or abolition of the Office of City Council President. This was extraordinary, considering that this was not the most important question in light of our overall task. It was also extraordinary considering that abolition of the position might raise a problem with the Justice Department. Whether the second commissioner really would have voted against the whole Charter if the office were abolished, and whether preservation of the office in fact underlay the negative vote of the first commissioner, cannot, of course, be definitively known. There certainly seemed to be puzzling passion on this issue.¹⁹⁸

We opted for keeping the office for the several reasons set out below.

A threshold question arose from the Charter's provision that the council president was to succeed the mayor in the event the mayoralty became open. Therefore, if not a council president, there had to be an alternative successor.

The principal proponents of abolishing the Council presidency suggested the successor come from a new office, a vice mayor, running on the ticket with a mayoral candidate (analogous to the vice president of the United States).¹⁹⁹ These proponents, however, inadvertently framed the question in a way that helped lead four of the six minority commissioners to oppose the vice mayor idea—five of six supported retaining the Office of Council President. Thus, Judah Gribetz, in a long and articulate argument against retaining the council president, quoted a City Council member who said he spoke for the Council's minority caucus: "[g]iven the City's demographics," mayoral candidates were likely to be white, and a black or Hispanic would likely be selected as the "running mate."²⁰⁰

198. See Public Meeting, June 20, 1989, at 177-78 (a "kind of . . . strange air that obscures this discussion") (statement of Commissioner Paredes); see also *id.* at 251 (urging "less heat" among the commissioners) (statement of Chairman Schwarz).

199. There was mention of, but no support for, having the comptroller or the speaker of the Council be the designated successor.

200. Public Meeting, May 6, 1989, at 215.

This led to concern that “the ticket would always be a majority as Mayor, minority as Vice Mayor,”²⁰¹ or as Commissioner Arch Murray said:

I think the idea of a vice mayor was probably a good idea twenty years ago, but as the minority community begins to produce candidates that have realistic opportunities for Citywide success, I’m afraid this notion of a Vice Mayor can be abused, and used as a device for saying, Joe, you’re a nice guy, but why don’t you run for this number two spot this time, we will look at you again next time around.²⁰²

We did not assume that an ethnically mixed ticket would automatically have a white running for mayor. Additionally, Simon Gourdine supported having both a vice mayor and the city council president as a way to increase opportunities for minorities.²⁰³ “[W]e are at a very unusual stage . . . [the opportunity] . . . may not come again for another twenty or thirty years”²⁰⁴ Nevertheless, the vice mayor proposal was somewhat soured at the start.²⁰⁵

The discussion of a vice mayor as an alternative to the council president continued off and on for several meetings. This debate, however, was subsumed by the discussion of whether to eliminate the Office of the Council President.²⁰⁶

Apart from the idea of substituting a vice mayor, the proponents of abolishing the Office of Council President argued:

(1) The ombudsman function of the council president would be better performed by an appointed, rather than an elected, official;

(2) Oversight of the mayor’s service delivery function would be better performed by the Council, and, moreover, an oversight role for the council president would undercut the Council; and

(3) A council president would not have enough to do.²⁰⁷

201. *Id.* at 227.

202. *Id.* at 230-31.

203. *See id.* at 221-22.

204. *Id.* at 222.

205. *See* Public Meeting, May 13, 1989, at 291-317.

206. The Commission debated, in some detail, whether to retain the office at parts of four separate meetings. *See* Public Meeting, May 6, 1989; Public Meeting, May 13, 1989; Public Meeting, June 20, 1989; Public Meeting, July 31, 1989.

207. In addition, several commissioners, most persistently Fred Friendly, pointed out that the name “City Council President” was misleading. The City Council regarded the name as an affront. Although we agreed with the point, we chose not to press for the name

Whether an ombudsman should be elected could be argued either way, but the record showed that elected council presidents performed this service usefully.

The argument that the Council would be undercut seemed a makeweight. Additional checks on the City's service delivery performance help, not hurt, the City. How vigorous the new Council would be on oversight matters could not be known in 1989.

Finally, it was clear that, given our desire for an additional citywide official as an added check on the mayor and the huge mayorally controlled City bureaucracy, it would be important to focus on additional specific responsibilities, as well as the general oversight function.

The crucial issue for us, ultimately, was the additional check on powerful mayors.²⁰⁸ It was a huge city, with a huge central administration having very wide-ranging responsibilities for service delivery. The mayor would remain very powerful. Some normal sources of criticism were rather weak—we had essentially a one-party state—and the Council's oversight vigor was untested. Moreover, in response to an argument about cost, a study showed that the City had fewer elected officials per resident than the surrounding counties of Westchester, Nassau, and Suffolk.²⁰⁹

In support of continuing the council president, we had "political" and legal considerations as well. We did not want to lose the support of the commissioner, who had indicated that he would not join an overall consensus without retention of the office. We thought that eliminating one of the three citywide elected positions would be seen as a negative factor—perhaps not by itself enough to lead to a negative result, but nevertheless a negative factor—by the Justice Department in its analysis of whether potential opportunities for minorities had been decreased. We also believed that having three, as opposed to two, citywide elected officials, increased the opportunities for diversity among the City's elected officials and for aspiration of all elements of the city's diverse population.

change. We knew the Council could change it (as they did to public advocate). *See* NEW YORK, N.Y., LOC. L. NO. 19 (1993). In addition, we knew that this issue gave rise to emotional reactions from some commissioners, and we chose not to exacerbate them.

208. In a recent case upholding the public advocate's right to Police Department files bearing on the department's handling of complaints of police abuse that had been sustained by the Civilian Complaint Review Board, the New York State Supreme Court relied on the Charter Commission's record as making it "evident that the intent of the Commission was to make the public advocate a 'watchdog' over City Government and a counter-weight to the powers of the mayor." *Green v. Safir*, 664 N.Y.S.2d 232, 234 (Sup. Ct. N.Y. County 1997), *aff'd as modified*, 679 N.Y.S.2d 383 (App. Div. 1998).

209. *See* Public Meeting, May 6, 1989, at 232-33.

Finally, political and substantive reasons supported an added check on the mayor. As Commissioner Leventhal said on the day of our first debate on this issue:

[T]he day the Supreme Court made its decision, the very likely possibility emerged that whatever this Commission does, would be subject to the charge that we are giving too much power to the Mayor To take the only other Citywide official who can voice opposition, on a policy basis, to the Mayor, and convert that into—if you will pardon the expression—a Dan Quayle-like position, has me concerned.²¹⁰

As with the comptroller, the Commission wanted the council president to serve as a “watchdog” on the mayor on service issues and to propose solutions, rather than merely point out “inadequacies, inefficiencies, mismanagement and misfeasance”²¹¹ Thus, section 24 (f)(2) of the Charter, in addition to requiring review of complaints relating to “services and programs” of a “recurring and multiborough or Citywide nature,” required the council president to “make proposals to improve the city’s response” to service issues.²¹² We recognized that this language would not ensure useful solutions. Here, we relied on the public’s good sense to assure the performance of such responsibility on an elected official who could challenge a mayor: “[I]f the public heard four years of someone being just a gadfly, just saying, you stink, without coming forward with workable and affirmative ideas, I think they’d say, well, you make a good gadfly, but you wouldn’t make a good Mayor.”²¹³

Preserving the office as an additional check on the mayor, for its oversight of services, and for its ombudsman role would probably have been sufficient for us in 1989. However, we believed in addition that the maintenance of the office would help to build a coalition in favor of the Charter outside the Commission.

IV. COMMUNITY GOVERNANCE

As a result of an immense effort to decentralize and to increase community control of the City government, the 1975 Charter Revision Commission (the Goodman Commission) established an extensive

210. *Id.* at 201-02.

211. *Green*, 664 N.Y.S.2d at 234.

212. N.Y. CITY CHARTER ch. 2 § 24(f)(2) (1989).

213. Public Meeting, May 6, 1989, at 236.

community governance system. Although the 1976 Charter did not decentralize authority, it did provide for command decentralization over a number of local issues. No longer would every local service issue need to be resolved at City Hall. The 1976 Charter also provided for a community voice, although no veto power, in City land-use decision making through the Uniform Land Use Review Procedure ("ULURP"). The line between advice and decision-making is clear in New York's scheme of community governance. The Goodman Commission did not provide for a direct community power, but only for a meaningful opportunity for the expression of community views. The result of this arrangement was that community governance has remained a somewhat ambiguous concept in practice, with a number of community boards, mostly the wealthiest or best organized, becoming persuasive advocates of their community's interests to government agencies.

We approached the subject of community governance with considerable political anxiety. Our initial sense was that community activists were dissatisfied with their advisory role in City government and longed for more power in the process. This view was shaped by complaints gathered by the Ravitch Commission and by reporting of community dissatisfaction with either private development projects or City uses of land disfavored by the community where the land was located. On the other hand, from the beginning, neither we nor other members of the Commission were prepared to enhance community power at the expense of citywide authority or to undermine our efforts to strengthen the City Council. We anticipated that this would lead to conflict with a well-organized and vocal segment of the City's political structure—its community boards. Fortunately, no significant conflict developed. It seems, based on our review of the testimony before the Commission, that many members of community boards did not advocate increased power, and that much of the attention of the activists was directed toward advocating a strong role for the borough presidents, particularly in Queens. In the end, many community board members asked for increased resources and greater opportunities to participate in the decision making in which they were involved. Along those lines, the Commission did adopt a number of revisions to enable the City's community boards to better perform their existing functions.

The basic vehicles for community governance were community districts and their community boards and service districts, which together are intended "for the planning of community life within the city, the participation of citizens in city government within their communities, and the efficient and effective organization of agencies that deliver municipal services in local communities and boroughs."²¹⁴ Community district lines were to be drawn to satisfy certain criteria, including conformity with

214. N.Y. CITY CHARTER ch. 69 § 2700 (1989).

historic communities, suitability for the delivery of certain services, and, if other criteria were satisfied, population equality.²¹⁵ The goal was to create a sensible relationship between the districts and delivery of services.

In 1989, the fifty-nine community districts had huge population discrepancies. (This did not violate the "one person-one vote" rule, because the districts were deemed to be advisory.)²¹⁶ For example, six of the twelve districts in the Bronx had populations below 100,000, while in Manhattan two were above 200,000. These population discrepancies were a product of the primacy of the service criteria and of population movement since the original map was adopted in the mid-1970s. One consequence of these population discrepancies was the Commission's inability to seriously consider creating fifty-nine Council districts based on community district lines. The Commission did require evaluations of community district maps to measure the effectiveness of the districts.²¹⁷

Atop each community district was a community board, which in 1989 included no more than fifty individuals appointed by the borough presidents, at least half of whom had to be chosen from names suggested by Council members whose districts overlapped the community districts. This meant that if a community district covered more than one Council district, each Council member could submit nominations for half of the community board members, regardless of the population within the community board a particular Council member represented. This situation produced considerable criticism from a few members of the Council, who had watched some borough presidents ignore their nominees and instead choose nominees of other favored Council members. Under this scheme, it was possible for a Council member to have none of his or her nominees appointed to any community board if he or she shared a community district with another Council member. Some people testified that some borough president appointments were remarkably monochromatic. We resolved this issue by limiting each Council member's list of nominees to his or her district's proportion of the population in the community district.

The borough president was also required to ensure that each community board member have a significant interest (usually business or residence) in the district and that membership reflect the different neighborhoods of the districts.²¹⁸ The Commission added the requirement

215. *See id.* §§ 2701(a)(1)-(2), (b).

216. *See generally* Board of Estimate v. Morris, 489 U.S. 688, 693 (1989).

217. *See* N.Y. CITY CHARTER ch. 69 § 2702(a) (1989) (requiring the mayor to prepare and present a report to the Council every ten years commencing on October 1, 1993).

218. *See id.* ch. 70 § 2800(a)(1)-(2).

that borough presidents "shall consider whether the aggregate of appointments fairly represents all segments of the community."²¹⁹

One concern of community board representatives was the absence of sufficient staff to support the many technical functions that the board required. This was especially true of the less wealthy community districts in which volunteer professional help was not readily forthcoming. We addressed this issue by authorizing community boards to hire not only a district manager but also "other professional staff and consultants" within their budget.²²⁰

Finally, as a result of several complaints we received about a growing secretiveness of some community boards, we required all community boards to maintain publicly accessible records of their proceedings and transactions.²²¹

CHAPTER VII. THE PROCESSES FOR BUDGETS, LAND-USE, FRANCHISE, AND PROCUREMENT DECISION MAKING

The abolition of the Board of Estimate required the Commission to determine which of the Board powers would be assigned to which elected official or governmental institution and compelled a detailed review of the array of processes through which those powers were granted. Though the goals we had adopted provided a rough framework for our decision making, the numerous detailed changes that we made reflected, beyond the application of these goals, the thoughtful and studied efforts of the Commission members and staff in close association with a variety of city officials, outside experts, and advocates. Several themes are common. We wanted policy making to be primarily the responsibility of the Council because of the Council's representativeness and accessibility. We wanted executive decisions to be exclusively the role of the mayor to improve efficiency and to assure accountability. We wanted also to find a meaningful role for the borough presidents as executives. Finally, we wanted to find a way to impose some level of planning discipline on the government. We clearly achieved some, but not all, of these goals. In some instances, for example, our initial judgments about what was exclusively executive or exclusively legislative were wrong, and we changed our minds. In other instances, we made compromises to secure support for our overall efforts. These efforts and their results are explored in the following sections.

219. *Id.*

220. *Id.* § 2800(f).

221. *See id.* ch. 47 §§ 1058-1060.

I. THE CITY BUDGET

A. *The Legal Framework*

Day to day, year by year, the most fundamental decisions that American governments make involve which services to provide and who should bear the costs of those services. As Justice Kennedy recently wrote, "Money is the instrument of policy and policy affects the lives of citizens."²²² This is particularly true at the local levels of government because, despite the primary regulatory powers of the federal and state government, it is at the local level where most services are actually delivered.

These decisions over what services to render and how to fund them are not abstract. It is through them, at all levels of American government, that the intense rivalries among vast arrays of advocates for conflicting or competing policies are resolved. As Schwarz noted at an early public meeting:

A budget is the annual opportunity for debate between the various public officials among themselves and for the public to have a chance to think about what we are doing as a city. What are our values? What do we think is important and how are we going to get there? So, a budget is not lifeless, a lifeless, boring accountant's document. A budget is the heart and soul of the values of the people who live in New York.²²³

A budget includes decisions on whether to reduce or raise taxes, add police, raise City employees' wages, extend library hours, provide more or less for the homeless, repair the city streets or sewers, repair the parks, close a fire house, reduce 911 response times, provide tax incentives for businesses, or support the arts. All these decisions must be subject to calculations concerning the effects of the policy including its political and fiscal costs, and all invariably compete for limited, often scarce, dollars.

The choices among competing values are often hard to make. For example, during the summer of 1998, the mayor and the City Council struggled with a difficult budget impasse, with the Council having overridden the mayor's veto of its proposed budget and the mayor seemingly refusing to spend the money appropriated by the Council for

222. *Clinton v. New York*, __U.S.__, 118 S. Ct. 2091, 2109 (1998) (Kennedy, J., concurring).

223. Public Meeting, Apr. 24, 1989, at 16-17.

certain services.²²⁴ While this battle was obscured by technical budget terms, the battle centered on issues concerning the exercise of power in the City and competing visions for the City. This debate was largely a consequence of the power of the newly empowered, more representative Council exercising its responsibility for setting City policy, and a strong mayor resisting such legislative forays.

Such debate can have a significant impact on city residents. For example, the mayor's acts caused a number of not-for-profit corporations to lay off staff and reduce services,²²⁵ despite the override of the mayor's veto and the consequent inclusion of appropriations for these services in the enacted budget.²²⁶

Decisions over raising and allocating funds are made through a complex, non-stop City budget process, which is the primary subject of this section. This process reflects the City's evolution from a weak to strong mayoral government. Since at least 1936, the mayor has dominated the budget process through the Office of Management and Budget ("OMB").²²⁷ In effect, OMB is responsible for providing all of the information necessary for the mayor's tasks of preparing, submitting, reviewing, and administering the budget.²²⁸ OMB became so pervasive by 1989 that many critics, including governmental officials, saw it as hindering initiative and change.²²⁹ Reflecting on his service as a City commissioner, Professor Ross Sandler told the Commission that "[t]he only person who has a stake in your success as a Commissioner is you yourself and the Mayor, [OMB] has none, and in fact . . . their stake is almost in your failure as opposed to your success."²³⁰ While perhaps the product of a particular government agency's disappointments, this comment reflects a concern that was shared by many about OMB's dampening role. Nevertheless, OMB had played a

224. See Dan Barry, *Council Overrides the Mayor to Restore Funds to Budget*, N.Y. TIMES, June 17, 1998, at A1.

225. See Mike Allen, *Small Programs Fall Victim to Budget Battle in City Hall*, N.Y. TIMES, June 22, 1998, at B6.

226. See Barry, *supra* note 224.

227. See Legislative Hearing, Mar. 15, 1989, at 54-55; *How The City's Budget-Making Process Evolved*, CHARTER REVIEW (N.Y. City Charter Revision Comm'n), Spring 1989, at 7.

228. See Legislative Hearing, Mar. 15, 1989, at 52.

229. See *id.* at 197 (statement of Jerald Posman, former Deputy Chancellor, Board of Education, asserting, "I don't have very much respect for the city budget process, I don't have very much respect for OMB as an organization.").

230. *Id.* at 196.

major role in keeping the City financially stable in the years since the City's 1975-1978 fiscal crisis.²³¹

This crisis had lingering effects and affected the Commission's decisions on a number of budgetary issues. Years of tinkering with revenue estimates, pushing expense budget items into the capital budget when revenues were insufficient to meet perceived programmatic needs, and an overall lackluster management of the budget by elected officials resulted in near insolvency for the City during the mid-1970s.²³² The consequence was not only a series of restrictive state laws, described below, but also a political and fiscal climate that a decade later in 1989 still required exercising caution in approaching changes in budget procedures or allocation of budget powers.²³³

This climate was reinforced by numerous fiscal watchdogs.²³⁴ In this context, mayoral authority to constrain and manage the budget was a dominant theme. Gordon Davis, a former Commissioner of the Department of Parks, illustrated this point in an answer to a question concerning his advocacy of strong mayoral budgeting powers:

[W]e all say [that fiscal conservatism is important] and we don't say it because we're theoreticians. We say it because we were all around in 1975, and we know what the real bottom line is in this discussion. The real bottom line is the city goes broke because nobody is managing what's coming in and what's going out.²³⁵

Finally, some saw mayoral budget domination as a counterweight to legislative spending tendencies fueled by the City's role as the direct provider of services. As Professor Sandler noted:

The demand in my department, we don't provide human service, we provide infrastructure services so huge that without very strong city-wide leadership given by the Mayor, we could not function. It's—I think it's the level of demand that comes to us. People want free transportation, they want every street perfect, everything;

231. See generally MARTIN SHEFTER, *POLITICAL CRISIS/FISCAL CRISIS: THE COLLAPSE AND REVIVAL OF NEW YORK CITY* (1985).

232. See generally *id.*

233. See generally *id.*

234. For example, the Citizens Budget Commission ("CBC") played a major role as a fiscal watchdog. For a discussion of the CBC's role, see Ray Horton, *Panel Four: Will the Structure of City Government Be Able to Meet the Next Generation's Demands*, 42 N.Y.L. SCH. L. REV. 1041 (1998).

235. Legislative Hearing, Mar. 15, 1989, at 246.

there has to be a strong central Mayor to meld those virtually unlimited demands.²³⁶

On the other hand, others felt the City's budgetary disputes failed to do justice to the City's compelling human needs.²³⁷ They hoped, at the very least, for changes in priorities.

The Commission, thus, grappled with a number of budgetary issues. After the removal of the Board of Estimate, we believed combining lawmaking and budgetary powers would make the City Council more effective on policy matters and allow it to act as a better counterweight to mayors on budgetary disputes. Combining these powers, however, did not answer the question of how much budget power the Council or borough presidents should have to fulfill their envisioned roles.

In the end, after we removed the Board of Estimate and made the Council the sole legislative body of the City, our other changes to the budget process were relatively modest. The mayor's budget powers were not significantly reduced.²³⁸ The Council's powers were increased, but not substantially.²³⁹ The borough presidents were given roughly the same opportunities to influence the budget as before, although they had to work harder—and more openly—to get results because they no longer had a vote in a legislative body and could not operate at the last minute behind closed doors.²⁴⁰

Other reforms concerned providing more information to the Council and the public about the contents of the budget and involved the creation of the Independent Budget Office,²⁴¹ which is discussed in a later chapter.²⁴² Had we witnessed the attempts of the present mayor to frustrate Council policy initiatives, as described earlier, the Commission might have been less cautious.

In the following section, we will describe the budget process as we found it. This description requires attention to the formalities. Of course, these are only the required steps in the budget process. They do not tell the story of budget making or of the flurry of human activity that surrounds each step. Gordon Davis again provided an apt observation:

236. *Id.* at 264-65.

237. *See, e.g., id.* at 266-73.

238. *See* N.Y. CITY CHARTER ch. 1 § 8 (1989).

239. *See id.* ch. 2 § 28.

240. *See id.* ch. 4 § 82.

241. *See id.* ch. 11 §§ 259-60.

242. *See* discussion *infra* Chapter VIII.

The budget is too mutable to be science, too ragged to be art, too persuasive to be wisdom, too discordant to be music, too petty to be just, too inelegant to be philosophy, too precise to be religion, too incestuous to be love, therefore it must be politics.²⁴³

Since the middle of the nineteenth century, local finances have faced tight state constitutional controls. Article VIII of the State Constitution describes the limits of local debt,²⁴⁴ how local governments can contract debt,²⁴⁵ and the time and method by which they must repay debt.²⁴⁶ Article VIII also contains limits on the amounts localities can raise through the real estate tax.²⁴⁷ In fact, as Professor Richard Briffault points out:

[T]he entire subject of local taxation is subject to state regulation. The power to tax is not one of the home rule powers of local government. Indeed, Article XVI expressly provides that the "power of taxation shall never be surrendered, suspended or contracted away" and state laws which delegate the taxing power "shall specify the types of taxes which may be imposed thereunder and provide for their review." This prohibits blanket enabling acts empowering localities to impose taxes at their own discretion.²⁴⁸

The City has been authorized to raise property taxes on its own, subject to a ceiling in the state constitution.²⁴⁹ To change other taxes, the City must petition the state legislature.²⁵⁰

The City's budget process also faces a variety of statutory restraints. The City's 1975-1978 fiscal crisis resulted in extraordinary state regulation of the City's financial activities to enable the City to regain access to the credit market. Among the statutes enacted to address the emergency were the Financial Emergency Act of 1975²⁵¹ and the Municipal Assistance Corporation Act of 1975.²⁵² In 1989, an amended Financial Emergency

243. Legislative Hearing, Mar. 15, 1989, at 182.

244. See N.Y. CONST. art. VIII, § 4.

245. See *id.* § 2.

246. See *id.*

247. See *id.* § 10.

248. Richard Briffault, *Local Government and the New York State Constitution*, 1 HOFSTRA L. & POL'Y SYMP. 79, 95 (1996).

249. See N.Y. CONST. art. XVI, § 2.

250. See *id.* art. IX, § 2.

251. See N.Y. UNCONSOL. LAW §§ 5401-20 (McKinney 1997).

252. See N.Y. PUB. AUTH. LAW §§ 3001-03 (McKinney 1997).

Act²⁵³ provided a backdrop to City fiscal activity, though its special controls were not active because the City's finances had remained stable for a number of years.²⁵⁴ Yet a state-controlled financial control board (FCB)²⁵⁵ remained ready at any time to assume effective control of the budget if certain statutory conditions were not satisfied.²⁵⁶ The FCB's views continued to be extremely influential and its three "Private Members" were engaged with the Commission on financial issues.

This statutory regulation had substantial political consequences. Any changes in the budget process would be studied and commented on by the FCB and other budget watchdogs.²⁵⁷ Their views would affect members of the Commission and a variety of opinion makers. This point was driven home to the Commission in a letter from the Private Members of the FCB to the Chair and Members of the Commission: "[U]nlike the State and most other local jurisdictions, the special history of this City and its fiscal crisis imposes a special burden on the City—that of never being wrong (budgetarily). There is virtually no margin for error."²⁵⁸

B. *The Budget-Making Process as We Found It*

In 1989, and since 1936, the City's budget process actually produced two budgets: expense and capital.²⁵⁹ The expense budget covered the costs of running the daily operations of the City, including the wages of City employees, rent for City offices, the costs of most services and supplies bought by City agencies, including such costs as foster care services, homeless services, and the cost of repaying loans taken out by the City.²⁶⁰ The expense budget was funded through City tax revenues, various fees, and monies from the state and federal government.²⁶¹ The projected

253. See N.Y. UNCONSOL. LAW §§ 5401-20 (McKinney 1997).

254. See *id.* § 5402.

255. See *id.* § 5406 (creating the financial control board).

256. See *id.* § 5402(12).

257. See *id.* § 5408.

258. Letter from Donald D. Kummerfeld, Heather L. Ruth, and Stanley S. Shuman, Private Members of the New York State Financial Control Board, to Chairman and Members of the 1989 New York City Charter Revision Commission 6 (June 12, 1989) (on file with the *New York Law School Law Review*) [hereinafter Letter from Private Members of the Financial Control Board to the Charter Revision Commission].

259. See *The Budget and the City Charter*, CHARTER REVIEW (N.Y. City Charter Revision Comm'n), Spring 1989, at 3-4.

260. See *id.*

261. See *id.* at 4.

revenues from these sources for the 1989-1990 fiscal year (July 1 to June 31) totaled \$26.8 billion.²⁶²

Through the capital budget, the City financed the construction, reconstruction, and acquisition of structural improvements such as its buildings, parks, bridges, and streets.²⁶³ Expenditures for major pieces of capital equipment such as garbage trucks, street cleaners, and computers were also authorized.²⁶⁴ Most of the money for the projects and equipment covered by the capital budget came from the sale of City bonds.²⁶⁵ Some capital money also came from state and federal sources.²⁶⁶ For fiscal year 1990, the proposed capital budget was about \$4 billion.²⁶⁷

The budget process in place in 1989 was largely a product of the 1936 Charter reforms, which centralized substantial power in the Office of the Mayor. It did so by assigning the power and responsibility to prepare and manage the budget to the mayor and removing it from the then-Board of Estimate and Appropriation.²⁶⁸ The 1936 Charter also established the City's present July 1 to June 30 fiscal year, divided the budget into expense and capital, and provided a detailed schedule and process for how the budget was to be prepared.²⁶⁹ Finally, the 1936 Charter set up the Board of Estimate and Council as two legislative houses for budget enactment.²⁷⁰

As the Commission began working in 1989, the basic outlines of the 1936 processes remained intact with the following major Charter changes. The Council and Board's budget powers were equalized in 1961.²⁷¹ The mayor's ability to vote on the budget as a member of the Board of Estimate was removed in 1975.²⁷² In 1975, the Charter limited the mayor's veto to legislative increases in the budget²⁷³ and established that a mayoral veto could be overridden by a two-thirds vote of either the Board or Council and

262. *See id.*

263. *See id.*

264. *See id.*

265. *See id.*

266. *See generally id.*

267. *See id.*

268. *See How the City's Budget-Making Process Evolved, supra* note 227, at 6.

269. *See The Budget and the City Charter, supra* note 259, at 3-4.

270. *See* N.Y. CITY CHARTER ch. 6 §§ 123, 124 (1936) (directing adoption of the budget by the Board of Estimate and the Council, respectively).

271. *See* BRIEFING BOOK, *supra* note 191, at VI-A-33 (providing the members of the Commission with the historical context for the budget discussions, focusing on the 1961 Charter revisions).

272. *See id.* at VI-A-35 (focusing on the 1975 Charter revisions).

273. *See id.*

then a confirmation by a majority of the other.²⁷⁴ Finally, the 1976 Charter provided more community input during budget preparation.²⁷⁵

The painstaking details of the budget process as it existed in 1989 are too technical and arcane for this forum. Instead, we offer a general outline and some details of the more significant procedural steps.

By no later than January 16 of each year, the mayor was required to submit a preliminary budget statement ("preliminary budget") to the Board of Estimate and the Council. Such statements were to include proposed expenditures and anticipated revenues for the ensuing fiscal year.²⁷⁶ The timeliness of submitting these statements was important because the final budget was to be enacted by the end of June, and sufficient time was needed for a variety of forms of review.²⁷⁷

This preliminary budget consisted of three constituent statements: (1) departmental estimates of agency expenditures for the next fiscal year; (2) a plan to balance the expense and revenue budget, if the tentative plan was not in balance; and (3) a four-year financial plan covering estimates and revenues.²⁷⁸

Departmental estimates formed the heart of the preliminary budget. They were the product of each City agency and were submitted to, and revised by, the director of OMB (subject to "appeal" to the mayor).²⁷⁹ In preparation of these estimates, the agencies worked with projections from OMB on how much they would have to spend.²⁸⁰ Agencies might have been informed, for example, that they would have ten percent more or less to spend than they did in the prior fiscal year. Or they might have been told by OMB or the mayor's Office of Operations that they would have more to spend in a particular area that the mayor wanted to emphasize. Through this process, mayoral policy preferences were honored by the agencies in the initial budget presentation.²⁸¹ The departmental estimates were also required to include statements of the budget's impact on the level

274. *See id.*

275. *See id.*

276. *See The Budget and the City Charter, supra* note 259, at 4.

277. *See* N.Y. City Charter Revision Comm'n, *The Budget, in* HOW DOES NEW YORK CITY WORK? THE MAJOR PROCESSES OF CITY GOVERNMENT 7, 8-9 (Apr. 1989).

278. *See id.* at 7. This last requirement was imposed on the City by the Financial Emergency Act of 1975 and enacted into the Charter by the City Council thereafter. The Financial Emergency Act is currently codified at N.Y. UNCONSOL. LAW §§ 5401-20 (McKinney 1997) and is referenced in the current Charter at N.Y. CITY CHARTER ch. 38 (1989).

279. *See generally* N.Y. CITY CHARTER ch. 6 §§ 111-12 (1976, as amended through 1988).

280. *See id.* § 112(d).

281. *See id.* § 112(a).

of services provided,²⁸² and agencies that delivered local services were required to consult with relevant community boards about the estimates.²⁸³

The departmental estimates were divided into proposed units of appropriation (“UAs”) for both personal services (“PS”), including salary and benefits,²⁸⁴ and for other-than-personal services (“OTPS”), including materials, supplies, and non-capital equipment.²⁸⁵ In theory, units of appropriation were a breakdown of an agency’s budget by separate categories of spending. “Each proposed unit of appropriation for personal service” was supposed to “represent the amount requested for a particular program, purpose, activity, or institution.”²⁸⁶ Despite the Charter’s requirements, the personal services categories were subject to substantial agency discretion.²⁸⁷ For example, the Police Department could characterize all of its PS expenditures as one UA called “policing.” Or it could break them down into a variety of PS categories such as traffic, public transportation, patrol, investigation, internal affairs. Choices on how to define a UA could be of enormous political importance in executive-legislative relationships and, as will be discussed, commanded a considerable amount of our attention in 1989.

After the mayor presented the preliminary budget, community and borough boards were required to hold public hearings on its contents;²⁸⁸ then the Board of Estimate and City Council were required to hold joint hearings on the preliminary budget and comments of community and borough boards.²⁸⁹ Subsequent to these hearings, the Board and Council were required to submit their findings and recommendations to the mayor.²⁹⁰

In late April, the mayor was required to submit an executive budget and budget message to the Board of Estimate and the Council.²⁹¹ The executive budget was similar to the preliminary budget with changes resulting from additional information about revenues, the formal public hearing process, and the extensive lobbying by agencies and various advisory groups during the preceding months.²⁹² The budget

282. *See id.*

283. *See id.*

284. *See id.* ch. 6 § 112 (1976, as amended through 1988).

285. *See id.*

286. *Id.* § 112(b).

287. *See id.* §§ 112(c)-(d).

288. *See id.* §§ 112(a)-(b).

289. *See id.* § 115.

290. *See id.*

291. *See id.* § 116.

292. *See generally id.* § 177.

message—which by Charter was not part of the budget that was adopted²⁹³—was in effect the mayor’s narrative on the budget, which included explanations of budget policies and goals, schedules, revenue estimates and proposals for changes in revenue sources, comparisons between the prior year and the proposed year spending, and information about local service district spending.²⁹⁴ Additionally, as a result of changes proposed by the Ravitch Commission and adopted in 1988, the expense budget and message had to contain information relating to appropriations and expenditures for the maintenance of capital projects.²⁹⁵ This provision was intended to instill some accountability in the government for the ongoing care of its capital structure, and was the result of a crisis in bridge maintenance that paralleled the deliberations of the Ravitch Commission.

The late-April date for the inclusion of the mayor’s executive budget and message itself had more significance than simply measuring the opportunity for public comment. Because the state fiscal year ends on March 31 of each year,²⁹⁶ an accurate determination of the amount of state revenues for New York City could be determined after that date. However, the routine delays in the State’s budgets over the last decade have removed this advantage.

Once the mayor sent the budget to the Council and Board of Estimate, both bodies were required to hold budget hearings.²⁹⁷ The Council and the Board had the power to increase, decrease, add, or omit any unit of appropriation in the budget and to add, omit, or change any terms or conditions on expenditures.²⁹⁸ A term or condition on an expenditure is, in effect, a limitation on that expenditure.

After the hearings, the Council and Board had until early June to adopt a budget by concurrent resolution.²⁹⁹ The end date for legislative action was an important statement of policy in the 1989 Charter. If the deadline was not met, the budget of the current fiscal year would continue to operate until the adoption of a new budget.³⁰⁰ By continuing the prior budget, the City could avoid the type of budget crises seen at both the state and federal levels, where because of budget impasses, a government shut-down has

293. *See id.* § 117(b).

294. *See id.* § 117(a).

295. *See id.* §§ 117(b)(10)–(11).

296. *See* N. Y. STATE FIN. LAW § 3 (McKinney 1997) (establishing the state’s “Fiscal year”).

297. *See* N. Y. CITY CHARTER ch. 6 § 119 (1976, as amended through 1988).

298. *See id.* § 120(a).

299. *See id.* § 120(b).

300. *See id.* § 120(c).

been threatened or has occurred.³⁰¹ From a political perspective, this end date placed considerable pressure on the parties to resolve budget disputes—unless living with the old budget became a politically attractive policy alternative.

After the Council and the Board approved the budget, the mayor had no power to veto any reductions, but could veto any increase or addition or any change in any term or condition.³⁰² Vetoes required a return of that item to the Board and the Council, with objections being placed in writing.³⁰³ Either body could then override the veto by a two-thirds vote of either body and a majority vote of the other body.³⁰⁴ Failure of the legislative bodies to act on a veto or vetoes by June 20 resulted in the expense budget—as modified by the disapprovals—being deemed adopted.³⁰⁵ On June 22, if the budget was out of balance based on the mayor's estimate of the ensuing fiscal year's revenues, property taxes would have to be raised to cover any deficit.³⁰⁶

Mayoral authority to manage an enacted budget was very broad. Recall that the budget is based on revenue estimates, not cash in hand.³⁰⁷ This is a complex effort that basically can never be correct. As Alan Proctor, Deputy Director of OMB, told the Commission:

I'd say probably three quarters to four fifths of our effort is an ongoing effort to try to balance risks. We know that we will be wrong on every single revenue item. What our effort focuses on is to try to make sure that in aggregate our upside risks are balanced by our downside risks so that the highest probability is that we will come close in total to the A revenue in the budgets.³⁰⁸

As the budget had to be balanced by year's end, the mayor's foremost fiscal management responsibility was to assure this. The Charter provided a number of tools to support that effort. Among them were the mayor's authority to establish quarterly allotments for each agency for each of its

301. See, e.g., Jerry Gray, *2 Sides in Senate Disagree on Plan to End Furloughs*, N.Y. TIMES, Jan. 1, 1996, at A1 (discussing a several-week shutdown of the federal government beginning December 15, 1995).

302. See N.Y. CITY CHARTER ch. 6 § 121(a) (1976, as amended through 1988).

303. See *id.*

304. See *id.* § 121(b).

305. See *id.*

306. See *id.* § 122.

307. See *id.* § 112(a).

308. Legislative Hearing, Mar. 15, 1989, at 58.

units of appropriation.³⁰⁹ Through this process the mayor created a spending plan for agencies that allowed a watchful eye on the City's actual revenues as the year progressed.³¹⁰ If revenues were lower than predicted, the agencies would have less to spend. But what if the mayor wanted to reduce spending in one agency or on one unit of appropriation, but not in another, in the event of a prospective deficit? Or what if the City's revenues were higher than estimated? The Charter also provided the mayor with authority to modify units of appropriation.³¹¹ Without approval by others, the mayor could increase or decrease a unit of appropriation within an agency—but only by up to 5% of that unit of appropriation.³¹² Moreover, if the mayor wanted to move money among agencies or charge more than 5% of a unit of appropriation within a single agency, legislative approval was required.³¹³ Either the Board or Council was empowered to block such transfers within thirty days of notification of the mayor's proposed modification.³¹⁴ The expenditure of new revenues, on the other hand, required more than a simple notice and opportunity to disapprove. Here, the requirement was the same as for the original budget enactment: an affirmative legislative vote, an opportunity to amend or condition the proposals, and an opportunity for the mayor to veto and the legislature to override.³¹⁵

To a large extent the broad outlines of the expense budget process described above were also applicable to the preparation, enactment and administration of the capital budget. A few differences warrant comment. The first is that the capital budget appropriated spending for physical improvements that usually take more than a year to complete,³¹⁶ while the expense budget spending was only for the ensuing fiscal year.³¹⁷ As the revenue source for most capital projects is money borrowed through the sale of bonds, the ability of the City to borrow was limited by caps on its borrowing authority and by the market's willingness to accept City bonds at an affordable rate.

Another important distinction between the two budgets was the involvement of the City Planning Commission and Department in the

309. See N.Y. CITY CHARTER ch. 6 § 123(b) (1976, as amended through 1988).

310. See *id.* § 124(a).

311. See *id.* § 124(b).

312. See *id.*

313. See *id.*

314. See *id.*

315. See *id.* § 124(f).

316. See generally *id.* ch. 9 § 211.

317. See *id.* ch. 6 § 111(b).

capital budget process.³¹⁸ While an impasse over the expense budget resulted in extension of the current expense budget until a new budget was enacted,³¹⁹ a failure to agree on a capital budget would yield a different result: if projects were acted upon by the Board and Council, they would be deemed to have been adopted at the lower amount of any item in dispute.³²⁰

C. The 1989 Changes

The decision to abolish the Board of Estimate necessitated a review of its budget role, and also provided an opportunity to review budget decision making generally, all within the framework of the Commission's adopted goals. Should, for example, the new Council simply replace the Board as the sole body for budget enactment? If so, should there be any specially mandated legislative processes? If so, also, were the Council's budget powers sufficient to meet its new role as sole legislative body? What role, if any, should the borough presidents play in the budget process? What impact would any proposed changes have on the ability of the mayor to manage the budget? Of course, these questions were interrelated. Any change in the budget power of one office or entity impacted the power of the others. This reality presented the Commission with some substantial conflicts among our three goals of adequately empowering the "new" Council, of establishing a meaningful vehicle for assuring a borough perspective in the budget process, and of maintaining the mayor's strong hand as helmsman of the process and as presumptive guardian of fiscal responsibility.

1. The Role of the Council

The transformation of the Council from one house in a bicameral legislative process on the budget to the only legislative body in a unicameral legislative process added enormously to the Council's budget power. Mayors could no longer reduce the Council's sway or frustrate its will by playing Council and Board against each other. Aside from this change, however, we made only a few other changes to enhance the Council's power, but did attempt to improve its deliberative process

318. *See id.* ch. 9 § 220.

319. *See id.* ch. 6 § 121(b).

320. *See id.* ch. 9 § 222(b).

through requiring that more information be provided to the Council and implicitly to the public.³²¹

Despite our desire that the new Council have all tools necessary for performance of its representative and other functions, we were, as discussed earlier,³²² acutely concerned that too much tinkering with the budget procedures might be fiscally irresponsible. Also, it would unquestionably result in an outcry from the fiscal community and their influential constituencies.

2. Revenue Estimating

The most significant budget power possessed by the mayor was the exclusive authority to estimate revenues for the forthcoming year.³²³ This was a power not held by either the President of the United States or the Governor of the State of New York. We had received strong testimony that the continuation of this exclusive authority would undermine our efforts to make the Council strong and independent. For example, Penelope Pi-Sunyer, Director of the City Project, testified in March of 1989:

The fundamental problem is that the City Council and Board of Estimate have no power over revenue estimates. I think this is a really very fundamental, even with the greater City Council capacity now, and they really have developed a great deal of expertise with new staff and new committee leadership to look at revenues and think of ways that the City could raise and increase its revenues or improve them or make them more equitable.³²⁴

Lane and Frank Mauro were particularly sympathetic to considering change, based on their state experience. For the City, this meant that if the legislature wanted to spend more money than the mayor had estimated, they had to take it from other programs, take responsibility for raising property taxes, or secure additional taxing authority from the state.³²⁵ Whether or not this exclusive mayoral power was appropriate in the abstract, we decided that of all the budget powers of the mayor, this one was sacrosanct. Given the fiscal crisis, it was not possible to change this

321. In this connection, our addition of the Independent Budget Office discussed in the next chapter was an important step. See discussion *infra* Chapter VIII.

322. See *supra* text accompanying notes 222-43.

323. See N.Y. CITY CHARTER ch. 58 § 1515(a)(1) (1989).

324. Legislative Hearing, Mar. 15, 1989, at 395.

325. See *id.* at 393-96.

mayoral power in 1989. Giving such power to an untested Council, in our view, would have raised grave concerns about upsetting what was perceived as the City's fragile hold on fiscal integrity—a view almost hauntingly emphasized by the Private Members of the FCB in the statement cited earlier: "There is virtually no margin for error."³²⁶

So certain were we of the volatility of this issue that, for almost the only time in the Commission's work, Schwarz preempted debate. This is illustrated by the exchange with Commissioner Sullivan at the meeting at which the Chairman's Preliminary Proposals were submitted. In response to Bishop Sullivan's suggestion of a role for the comptroller in revenue setting, Schwarz quickly declared:

Where I would come out on that . . . is to force the Mayor's assumptions out on the table . . . [and to] require the Mayor to professionally . . . respond to any other elected official . . . who comes up with a different figure based on methodology.

Let the debate then play out as an informed debate, but not take away from the Mayoralty the ultimate . . . responsibility for revenue estimates [F]irst, I think it would be wrong substantively. Second, I think very much we do not want to do something that raises, [for] . . . the bonding agencies and other people who judge the City of New York, the specter of removing things that have come in as part of the fiscal restraint that is in response to the fiscal crisis.³²⁷

And again on May 10, in response to Nat Leventhal's query concerning the comptroller's revenue estimating authority, Schwarz stated: "I think we ought to . . . require the Comptroller to comment about the budgetary figures. I believe that for reasons of fiscal conservatism, we ought not to change the way the system has worked, which leaves the ultimate authority on setting revenue estimates with the Mayor" ³²⁸

We did institute two major changes beyond the provisions designed to require more "sunshine" and increase the likelihood of informed discussion of revenue estimates. First, the Commission provided in section 1515 that any "person or organization" may set forth alternative revenue estimates for consideration by the mayor.³²⁹ Also, the mayor "shall" consider any

326. Letter from Private Members of the Financial Control Board to the Charter Revision Commission, *supra* note 258.

327. Public Meeting, Apr. 24, 1989, at 104.

328. Public Meeting, May 10, 1989, at 184.

329. See N.Y. CITY CHARTER ch. 58 § 1515(d) (1989).

such alternative if it is "accompanied by a statement of the methodologies and assumptions upon which such estimate is based in such detail as is necessary to facilitate official and public understanding of such estimates."³³⁰ Second, the Independent Budget Office was also required to provide the Council, the comptroller, and other elected officials with its analysis and information concerning estimated revenues.³³¹ Of course, in leaving in place the final authority with the mayor, our assumption was that mayoral power to estimate revenues would be exercised only on a good faith, professional basis and not as a tactical ploy in a potential battle with the City Council.

3. Impoundment Power

Another change requested by the Council, borough presidents, and a number of witnesses before the Commission was to clarify whether the mayor's authority to impound money included an impoundment power other than to insure a balanced budget. Or, as Frank Mauro stated in describing a proposal to prohibit impoundments for "policy" reasons:

impoundment would not be possible under this is where the legislature adds an appropriation to the budget, the Mayor does not line item veto it, and, then, later on during the year, for reasons other than balancing the budget, or other than being able to accomplish the [same] purpose for less, the Mayor for policy disagreement reasons, prohibits the agency from spending the money.³³²

We used the word "clarify" throughout our presentation and documents³³³ because of our view that the Charter's existing language did not authorize any policy impoundments. Indeed, it was our view that the Charter could not authorize policy improvements because such authority would conflict

330. *Id.* § 1515(c).

331. *See id.* ch. 11 § 260(a)(2).

332. Public Meeting, May 13, 1989, at 248-49.

333. *See, e.g.*, Public Meeting, May 15, 1989, at 245; N.Y. CITY CHARTER REVISION COMM'N, SUMMARY OF PRELIMINARY PROPOSALS 9 (May 1989) (suggesting a requirement that the mayor "spell out in writing . . . the reasons for 'impounding'—refusing to spend—money appropriated by the Council") [hereinafter SUMMARY OF PRELIMINARY PROPOSALS].

with the state constitutional requirement that every local government have a directly-elected legislative body responsible for initial policy making.³³⁴

We began with two proposals. The first, the clarification, and the second, a sunshine provision under which the mayor would have to inform the Council of any impoundment along with its impact on services and service goals. The sunshine proposal survived debate,³³⁵ the clarification proposal did not.

At the May 13, 1989, public meeting, David Trager urged that the only requirement be one of sunshine.³³⁶ Trager was worried about creating a cause of action for any private agency which had money withheld by the City.³³⁷ The weakness with the clarification proposal was not really the litigation question, but that the proposal itself was too abstract. In essence, Judah Gribetz's question—"why are we addressing this issue, and what has been the experience with impoundment up to now, which would furnish the basis for considering the issue"³³⁸—could not be answered. It appears from the Commission's record, however, that, if the Commission had been acting based on a record of impoundment abuse, the Commission would have gone on to wrestle with trying to devise substantive limitations.

4. Budget Modifications

Another somewhat abstruse budget issue on which we spent considerable time at the Council's urging was the process of mid-year budget modifications. The Council wanted all budget modifications of five percent or greater to be subject to the enactment process that the existing Charter required only for new revenues.³³⁹ In simple terms, the Council wanted to be able to add its own policy judgment to the deliberative mix and not be limited just to saying no.³⁴⁰ We initially agreed with this position because of our view that such authority would further our goal of empowering a more diverse Council. We thus made this proposal part of

334. See N.Y. CONST. art. IX, § 1(a) ("Every local government . . . shall have a legislative body elective by the people thereof.").

335. See N.Y. CITY CHARTER ch. 6 § 106(e) (1989) (requiring that "the mayor shall notify the council of [impoundment] determination[s] and the implications and consequences of those impoundments . . .").

336. See Public Meeting, May 13, 1989, at 252.

337. See *id.* at 252-53.

338. *Id.* at 250.

339. See *id.* at 267-68.

340. See *id.* at 259-60.

the Chairman's Initial Proposals presented to the Commission on May 13, 1989.³⁴¹

In the ensuing weeks, the proposal was subject to substantial criticism particularly from the mayor and the private members of the FCB. According to the mayor:

[T]here would be a dramatic and unnecessary increase in the number of budget modifications that would require approval of the City Council. This alone would entail substantial delays in the provision of needed services as well as require a large increase in legislative staff. Second, the procedure would limit the flexibility of the City commissioners. Managers must have the ability to revise their budgets and operation to meet agreed—upon goals. Without this flexibility no manager can succeed. Last, by permitting the opportunity to launch new or enhanced programs, the new Charter would encourage the government to emphasize short—term political gain at the expense of such fiscal practices and the achievement of broad objectives. For example, if public assistance expenditures are below the required increased expenditures for jails, what purpose other than a narrowly political one, can be served by the legislature's intervention to prevent an appropriate shift of funds and require instead a new program. Ultimately, how would increases in mandated expense not anticipated in the budget be paid for?³⁴²

This latter point was also echoed by the Private Members of the FCB:

This does not appear to be a structure designed to foster disciplined budget administration. In particular, it could easily lead to circumstances where a modification to transfer funds from the General Reserve to cover the cost of an unpopular mandate (e.g., rising welfare caseload) could be siphoned off for more popular uses, leaving the General Reserve inadequate to meet its statutorily required purposes.³⁴³

341. *See id.* at 256-70.

342. Letter from Edward I. Koch, Mayor, City of New York, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission 11 (May 31, 1989) (on file with the *New York Law School Law Review*) [hereinafter May 31, 1989, Letter from Mayor Koch to Schwarz].

343. Letter from Private Members of the Financial Control Board to the Charter Revision Commission, *supra* note 258, at 4-5.

Again, our concern about undermining, or appearing to undermine, mayoral control of budget administration cautioned against pushing the issue without refinement. At the June 26 meeting of the Commission, we presented a new iteration of the proposal.³⁴⁴ This time, in answer to the mayor and FCB members, the proposal maintained the current rejection process to the transfer of money for the continued operation of current services at the level at which they were currently being operated, but allowed full Council review of the transfer of monies for additional services³⁴⁵—for example, if the mayor proposed transferring money for additional police.

The debate on this new proposal led to its abandonment. Commissioner Leventhal's simple question at the June 26 meeting killed the issue: "Why don't we let the process of negotiation take place?," asked Leventhal.³⁴⁶ "If the mayor wants to move money and the Council says 'Well, that's not a bad idea but really I think this should be included too' and if they feel strongly about it they [the Council] could, essentially, require the Mayor to change his modification."³⁴⁷ In other words, the existing just-say-no policy represented real power and, when exercised, could force meaningful negotiation on the Council's alternatives.³⁴⁸

5. Appropriation Authority

Finally, in one other area we thought it necessary to strengthen the Council's budgetary hand. We had received some testimony that there were a number of funds controlled by City agencies from which expenditures could be made without appropriations. In budget parlance this was known as off-budget spending,³⁴⁹ and we proposed to stop it. As Frank Mauro described to the Commission:

344. See Public Meeting, June 26, 1989, at 109-42.

345. See *id.*

346. *Id.* at 115.

347. *Id.* at 115-16.

348. See *id.* at 141-42 (reflecting the vote to "leave the Charter the way it is" in this area). The modification powers of the Council were tested in a lawsuit. See *Council v. Giuliani*, 621 N.Y.S.2d 832 (Sup. Ct. N.Y. County 1994). The consequence of this lawsuit was a negotiated settlement between the mayor and Council.

349. Spending that is not subject to the Council's control is commonly referred to as "off-budget spending." See Letter from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, to Barry H. Weinberg, Acting Chief, Voting Rights Section, U.S. Department of Justice 8, 14-15 (Sept. 29, 1989) (on file with the *New York Law School Law Review*).

What this captures is, it makes sure that all funds and accounts directly under the control of City agencies and officers, would be subject to appropriation, and we sent out as an example, Comptroller Regan's audit of the Department of City Planning's management of the monies it collects as amenities from developers

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The proposal was also intended to cover City-created not-for-profit corporations, such as the Public Development Corporation, created by Mayor Lindsey through an executive order.³⁵¹ After an intense debate on our coverage of these entities as well as grants and gifts from private entities to government agencies, the Commission decided not to require changes relating to private entity gifts or grants.³⁵² We did, however, subject to coverage any entity a majority of whose board members were directly or indirectly appointed by City officials.³⁵³

6. More Information About the Budget

The Commission proposed four changes to the budget process intended to provide more meaningful information about City spending.³⁵⁴ None of these changes elicited serious criticism or debate.

The first proposal addressed the executive practices in establishing units of appropriation.³⁵⁵ We viewed the executive's efforts to fulfill the Charter's existing dictates as spotty at best. An exchange between Frank Mauro and Charlie Brady, OMB's Associate Director, at the legislative budget hearing makes this point:

Mr. Mauro: It appears . . . that the Department of Juvenile Justice has more than one program, purpose, activity or institution under its jurisdiction, yet it presents its personal service request as one unit of appropriation.

350. Public Meeting, May 13, 1989, at 220.

351. *See id.* at 223-24.

352. *See id.*

353. *See id.*; N.Y. CITY CHARTER ch. 6 § 111 (1989).

354. *See* N.Y. CITY CHARTER REVISION COMM'N, SUMMARY OF REVISED PROPOSALS 13 (June 1989).

355. *See id.*

Mr. Brady: Units of appropriation are rather static over the years.³⁵⁶

We thought this “static” condition needed to be changed in order to make it easier for elected officials and the public to understand and influence the expense budget. Our proposal, which remained relatively constant throughout the process and which was included in section 100 of the new Charter, was that a unit of appropriation (whether for personal or other-than-personal services) could not extend beyond a single program, purpose, activity, or institution, unless the Council adopted (either on the recommendation or with the approval of the mayor) a resolution “setting forth the names, and a statement of the programmatic objectives, of each program, purpose, activity or institution to be included in such a Resolution, a proposed unit of appropriation.”³⁵⁷ We also required that each unit of appropriation in the departmental estimates, “the preliminary expense budget and the executive expense budget” be accompanied by a statement of programmatic objectives.³⁵⁸

The second change designed to provide more information about the budget was the requirement that a contract budget be included within the expense budget.³⁵⁹ This reform was first urged during the Ravitch Commission by the public service unions, concerned about the levels of work that the City was “contracting out.” In 1989, it was also advocated by a number of civic organizations. Given the decision to place responsibility for entering into particular contracts with the executive branch (which meant the decision-making role of other elected officials that had been played by the Board of Estimate would disappear), we believed that the Council should have an annual opportunity to participate in setting contract policy through the contract budget. The goal was to provide a policy check on City contracting and a public understanding of the amounts, categories, and justifications for contractual spending programs.

A third change, intended both to provide additional public information and to impose some additional discipline on the budget process, was the requirement that local laws and budget modifications be accompanied by a fiscal impact statement, which was to include a statement of the fiscal impact of any law or modification on the revenues or expenditures of the City.³⁶⁰

356. Legislative Hearing, Mar. 15, 1989, at 80-81.

357. N.Y. CITY CHARTER ch. 6 § 100(c) (1989).

358. *Id.* § 100(d).

359. *See id.* § 104.

360. *See id.* ch. 2 §§ 33(a)-(b).

Finally, a number of critics had expressed concern about what seemed to them a cascading quantity of tax relief being granted by the City to a variety of businesses and other entities. Our response to these concerns was to include the requirement of a tax benefit report.³⁶¹ Under this provision, the mayor was to provide to the Council each February a detailed accounting of tax benefits for the prior year.³⁶²

7. Legislative Oversight

One final change we made regarding the Council's budget role was to require all standing committees of the Council to hold oversight hearings.³⁶³ Our goal was, at a minimum, to "leave the message that the Council, with its responsibilities, ought to be carrying out an important role with respect to how well or how poorly the Executive Branch is doing"³⁶⁴ The criticism of this proposal was that it constituted an impermissible level of Council management by the Charter, but we were looking for some way to decentralize the Council and to respond to the criticism of some of our critics who were potential allies, such as Citizens for Charter Change, that the Speaker was too strong. As Schwarz stated, "[W]e should lay on the Council that element of public accountability."³⁶⁵

8. Borough Presidents

The most intensely contested question we faced regarding the budget was the role the borough presidents were to play. Inside the Commission, Dean Trager and several members were pushing hard for a substantial borough voice in the new government, most likely through a strong office of borough president.³⁶⁶ Outside the Commission, the borough presidents lobbied hard for considerable power, particularly in budget and land-use processes. This was echoed by many community representatives who testified to support them. In fact, so central to our mission was devising an appropriate role for the borough presidents on the budget and other topics that at our May 10 public meeting we took the unusual step of

361. *See id.* ch. 10 § 240.

362. *See id.*

363. *See id.* ch. 2 § 29(a)(2).

364. Public Meeting, May 15, 1989, at 43.

365. *Id.* at 123.

366. *See, e.g.*, Public Meeting, May 6, 1989, at 8-10; Public Meeting, May 13, 1989, at 198, 206-07.

allowing two borough presidents, Ferrer and Schulman, to speak to the Commission on their proposals for their own roles.³⁶⁷

As Schwarz stated at the May 13, 1989 public meeting, our view was to try “to find a way to let the Borough Presidents exercise a discretion similar to what they exercise today.”³⁶⁸ On the budget front, this meant we had to find a way for the borough presidents to have a meaningful opportunity to seek for their boroughs certain amounts of money from the capital and expense budgets.

The Chairman’s Initial Proposals reflected only a vague approach to this because the Commission had not yet settled on the role that borough presidents were to play. But by the end of the process, after rejecting a legislative role for the borough presidents, we had a proposal that was very controversial—at least until it was understood. First, the mayor was required to include in the executive expense budget items recommended by the borough presidents, amounting to 5% of all discretionary spending increases.³⁶⁹ Discretionary spending increases were defined basically as increased expenditures over which the City had discretion, but not including increased costs of existing programs or increases due to federal or state mandated programs.³⁷⁰ Our estimate was that this amount would equal between \$150 and \$180 million each year. Second, the mayor was required to include in the capital budget those projects recommended by the borough presidents amounting to 5% of all requested increases in capital spending.³⁷¹ Both of these borough president allocations were to be divided among the borough presidents by formulas.³⁷² Additionally, the mayor was to include in the expense budget an amount equal to 0.9% of the borough presidents’ capital allocation for expense budget (e.g., planning) requirements of such capital projects.³⁷³ Third, the mayor was required to submit additional borough president budget recommendations (not included in the executive budget) to the Council, with an explanation of why those expenditures had been omitted.³⁷⁴ These additional recommendations were required to be kept within the mayor’s revenue estimates, so that for every addition a cut or new revenue had to be identified. Finally, the Council was required to vote on all borough

367. See Public Meeting, May 10, 1989, at 23-24.

368. Public Meeting, May 13, 1989, at 204.

369. See *id.* at 209, 215.

370. See N.Y. CITY CHARTER ch. 6 § 102(a) (1989).

371. See *id.* ch. 9 § 211(a).

372. See *id.* ch. 6 § 102(b); ch. 9 § 211.

373. See *id.* ch. 6 § 102(b).

374. See *id.* ch. 9 § 211(d).

president proposals either through its vote on the executive budget or by independent vote on proposals outside the executive budget.³⁷⁵

Regarding the role of the City Council in the budget proposals of the borough presidents, in all instances, the City Council would have the final say, as they would with the mayoral proposals. As the borough presidents were now to be executives, they could only propose either in the executive budget or in separate proposals their expenditure preferences.³⁷⁶ For these proposals to become law, the Council would have to adopt them.³⁷⁷ The Commission had rejected, on May 10, a proposal that borough president budget items would require a super majority of Council members for rejection rather than the simple majority for all other budget items.³⁷⁸ Our view was that such items were entitled to no greater preference than those proposed by the mayor, and that for a borough president to succeed he or she would have to have the political and policy clout sufficient to convince the Council of the virtues of the proposal.

These final proposals were challenged on many fronts, reflecting some misunderstanding of their respective rationales. Most significant was the challenge to the 5% allocation of the executive expense budget. For example, after our first discussion of this idea at our May 10 public meeting, the mayor wrote:

The budgetary consequences of this formula are far-reaching and damaging. In my view, this automatically creates a five percent surcharge on new, non-mandated expense budget programs. Consider the following example: At some point in the future, a mayor decides to increase police expenditures by \$100 million. In fact, this program will cost \$105 million, with five million dollars to be divided up among programs chosen by borough presidents.³⁷⁹

Among a few members of the Commission, this proposal was also received with some skepticism. Bishop Sullivan, at the May 13 public meeting, stated: "It's gimmicky budgeting I think it's very bad government,

375. *See id.* ch. 10 § 254.

376. *See id.* ch. 4 §§ 82(7)-(8).

377. *See id.* ch. 10 § 254.

378. *See* Public Meeting, May 10, 1989, at 180-82.

379. Letter from Edward I. Koch, Mayor, City of New York, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission 1 (May 15, 1989) (on file with the *New York Law School Law Review*). The letter was actually received by the Commission on May 13, 1989, and was therefore available for discussion at the meeting on that date.

it's government by formula."³⁸⁰ Nat Leventhal declared: "I remain uneasy about the 5% as it applies to the expense budget."³⁸¹

Our view, on the other hand, was that the proposal did not have the impact the mayor urged, that it was important for the Council and the public to hear a borough perspective on the budget, and that the proposed system was better than the old system in which borough presidents simply added their money to the budget without the opportunity for public debate.³⁸² Finally, we believed that it would have been a serious political error to deny the borough presidents a meaningful opportunity to play a role in the budget process. For these reasons, we were determined to stay the course on this proposal despite the substantial criticism it was receiving. As Schwarz stated at the May 13 Commission meeting:

With respect to the philosophical or conceptual issues, it is fair to say that the proposal runs contrary to the basic idea of executive budgeting which has been the cornerstone of budgeting theory in this country for most of the Twentieth Century.

On the other hand . . . this proposal does facilitate a balancing and blending of community, borough and Citywide perspectives in the budget process and, at least, I would hope that it can be structured in a way that is positive . . .

Thus, despite the fact that it is a departure from the norm . . . we are . . . dealing with an unusual situation where we are changing from the current system

[and later] Now, this is a device designed to continue to give them that opportunity, subject to the disposition of the City Council, which, if they do something foolish, is going to refuse to accept the foolish thing.

And, I think, further, it has a public policy benefit over where we are today, because where we are today is, what the Borough Presidents add, is done . . . in the dark of night on the last day.³⁸³

380. Public Meeting, May 13, 1989, at 189.

381. *Id.* at 207.

382. *See id.* at 199-200.

383. *Id.* at 181-82, 199.

We also responded directly to the mayor's criticism that this 5% was a surcharge on the mayor's budget:

I think the proposal was created and is consistent with history in the City of New York and with the strange phenomenon that, in this huge City, we, sort of, have different levels of government

. . . .

I think the word, "surcharge" really, in a way, begs the question of whether this is good public policy. If you think it's good public policy, it's not a surcharge. If you think it's bad public policy, it is a surcharge.³⁸⁴

On this basis the proposal was initially adopted by vote of ten to four.³⁸⁵ However, this was not the end of the matter.

During the public comment period between our first and second round of public meetings, the mayor intensified his pressure on the Commission. In a letter dated May 31, 1989, he laid out what he characterized as "a fundamentally different view . . . regarding the appropriate relationship between the City's elected officials"³⁸⁶ which he described as follows:

When I took the oath of office . . . twelve years ago, I said that New York City is a stroke of genius Although we reflect over a hundred different nationalities, speak dozens of different languages, and live in five different boroughs and hundreds of different communities, we have always been able to find common ground despite our differences and to find a common purpose that outweighs our parochial concerns.

We are fortunate that the founders of our City chose to establish a "strong Mayor" form of government. With a strong chief executive, we have created a unified City out of five boroughs

. . . .

It is essential that the Charter Revision Commission . . . retain this form of government, balancing the executive powers and responsibilities of the Mayor against the legislative powers and responsibilities of the City Council. . . . To accomplish this, the new Charter must retain—not diminish or dilute—the powers of the Mayor while strengthening the City's legislative branch

384. *Id.* at 214-15.

385. *See id.* at 216.

386. May 31, 1989, Letter from Mayor Koch to Schwarz, *supra* note 342, at 2-3.

In significant respects, the Commission's preliminary proposals do not do this

. . . .

I think the idea of a Borough President set-aside injects budgetary and political mischief into the relationships between elected officials Borough Presidents, with no executive responsibility for carrying out the laws, or legislative responsibility for passing the laws, are given a cost-free role in the budget process.³⁸⁷

Added to this voice was a *Daily News* editorial calling on us "to dump plans to give borough presidents discretionary power over 5% of the city's capital budget."³⁸⁸ Additionally, the Private Members of the FCB and the Citizens Budget Commission criticized the proposal, particularly as it applied to the expense budget.³⁸⁹ Of course all of these critics erred in referring to the proposal as a "set-aside." It was not; the borough presidents could only propose, but the Council still had to approve.

But for all of this concern from influential voices, we were determined to maintain our position for both policy and political reasons. Schwarz's opening comments at the June 26 public meeting stated strongly our position:

To really generalize, I feel satisfied that what Frank [Mauro] has done makes the proposals responsible, good government . . . focusing on the Borough Presidents for a moment, their role in the expense budget and the capital budget is [now] done at the last minute and, in effect, figuratively, in the dark of night, whereas this role will be done up front at the time the budgets are presented to the Council for the Council's disposition and in the full light of day to the public, the press, any critics.

It seems to me it is a useful way to make the Borough Presidents players in the budget process. It makes them real players that causes people to come together with them, and the things they propose will have to pass the test of being useful.³⁹⁰

387. *Id.* at 3-4, 10.

388. Editorial, *Koch on the Charter*, DAILY NEWS (N.Y.), June 6, 1989.

389. See Letter from Private Members of the Financial Control Board to the Charter Revision Commission, *supra* note 258, at 2-6.

390. Public Meeting, June 26, 1989, at 3-4.

To accomplish this purpose the Commission wanted to be sure that providing this power to the borough presidents would not significantly weaken the mayor's budget power. As Commissioner Leventhal stated, "[W]e voted against a number of things the Mayor wants, and that's okay, but I want to understand what his objection is."³⁹¹ We were prepared for this task, and at the June 26 meeting we undertook a several hour examination and defense of every detail of the proposal.³⁹² Included in that examination was some attention to the definition of "mandated expenses."³⁹³ On that date, the proposal was adopted by a vote of nine to one to one, leaving for the last days of our meetings only the formula for allocating the expense budget pronounced among the borough presidents.³⁹⁴

9. The Capital Budget

We made a few changes in the capital budget process designed to be opportunities for planning. These changes were not substitutes, however, for the commitment to planning that had to be made by the City's elected officials. Primarily, we re-introduced the City Planning Commission ("CPC") and the City Planning Department ("CPD") to the process, but not to the extent they had been included prior to 1975, nor to the extent they wanted.³⁹⁵ The Koch administration had adopted the practice of issuing a ten-year capital plan every odd year with the executive budget.³⁹⁶ We added this as a requirement in the Charter, calling it a ten-year capital strategy.³⁹⁷ More importantly, our proposal required City Planning to issue and the Director of CPD to issue a draft ten-year capital strategy by November 1 of each even-numbered year, and required the CPC to hold hearings on the strategy.³⁹⁸ The CPC was then to submit its comments on the draft to the mayor.³⁹⁹ The theory was that this attention to long-range planning should influence the next executive budget.

391. *Id.* at 39.

392. *See id.* at 39-107.

393. *See id.* at 80-82.

394. *See id.* at 107-08.

395. *See id.* at 118-19.

396. *See* Cerisse Anderson, *Capital Housing Budget Upheld: Appellate Division Dismisses Environmental, Discrimination Claims*, 205 N.Y. L.J., Jan. 28, 1991, at 1.

397. *See* N.Y. CITY CHARTER ch. 9 § 215 (1989).

398. *See id.* ch. 10 § 228.

399. *See id.*

II. LAND-USE DECISION MAKING

Land-use regulation is among the most important of New York City's governmental functions. Land use touches many of the central concerns of the City's life: its economic well-being, the vitality or decay of its neighborhoods, the quality of its citizens' lives, and the ability of the government to provide essential services. With respect to essential services, the productive use of land enhances tax revenues. Land is essential to the provision of many government services. Land is scarce and competition for its various private or public uses is often fierce. Through City decisions about land use, communities can be uprooted or preserved, new communities can be created, fortunes can be made or lost, and the power of various political offices or agencies can wax or wane. Added to the day-to-day disputes that arise from the placement or nature of particular projects are the historic structural tensions between planners and politicians, and between advocates of decentralized decision making and those that favor centralized decision making.

The fierceness of such competition assures that the processes through which land-use decisions are made are continuously subject to intense scrutiny from the multitude of groups that have an interest in land-use decisions. Such scrutiny assured that whatever proposals we were to offer (and there were many) would precipitate an intense debate which would require considerable attention. As Todd Purdum reported in May 1989, only part-way through the process, "None of the initial recommendations . . . for reshaping city government have changed more in response to public debate and criticism than [Schwarz's] ideas on how to control land in a place that he has called a 'land town.'"⁴⁰⁰

The long debate over land-use decision making and the evolution and changes in our recommendations evidenced the wisdom of the initial decision to make the Commission's process as open, extensive, and participatory as possible. Our initial knowledge of land-use decision making was somewhat abstract; without the extensive public exposure and public reaction, preliminary ideas might have prevailed with little change, at a substantial cost to City governance. As reported by the *Times* after the introduction of the Chairman's Preliminary Proposals, "Of all Mr. Schwarz's proposals; none seem to generate more confusion or controversy than his ideas on how to control land in a City where land might be its most contested commodity."⁴⁰¹

400. Todd S. Purdum, *Schwarz Yields to Critics on Land Use*, N.Y. TIMES, May 12, 1989, at B1.

401. Todd S. Purdum, *From Jails to Cityspire: Schwarz Provides a Vision of Zoning*, N.Y. TIMES, Apr. 24, 1989, at B1.

In the end, after an array of proposals, the Commission settled on a scheme that shifted some mayoral powers to the Council and borough presidents,⁴⁰² broadened membership on the CPC,⁴⁰³ required attention to be paid to fairness among communities in the siting of City facilities,⁴⁰⁴ increased planning opportunities and obligations,⁴⁰⁵ and attempted to build some efficiencies into the process.⁴⁰⁶

A. *Land-Use Decision-Making Process as We Found It*

Since the 1936 Charter, New York City's land-use decision making process had been mayorally dominated. This had been done to assure a single City view of land use and to attempt to introduce some planning expertise into the City's never-ending "development." Through the CPD and CPC, the mayor controlled the City's land-use decision-making agenda, with the Board of Estimate, at least in theory, providing a political check on land-use decisions.⁴⁰⁷ In short, the basic land-use decision-making process contemplated the following: applications for change by parties named in the Charter; a gate-keeping function by the CPD; advisory community comments; a decision by the CPC; and final—almost always perfunctory—approval or modest changes by the Board of Estimate.⁴⁰⁸

At the heart of this process was the CPC and CPD, which had seven members, all mayorally appointed.⁴⁰⁹ Six were appointed for staggered terms of eight years.⁴¹⁰ The mayor also appointed the director of the CPD⁴¹¹ who served (at the mayor's request) as the CPC's chair.⁴¹² The CPD was a mayoral agency responsible for providing advice on physical planning and public improvement to elected officials and staff assistance to

402. See SUMMARY OF PRELIMINARY PROPOSALS, *supra* note 333, at 12.

403. See *id.* at 11.

404. See *id.*

405. See *id.*

406. See *id.*

407. See N.Y. CITY CHARTER ch. 3 § 69 (1936). After 1975, a formal community voice was added through the establishment of community boards and their roles; the boards exist in the current Charter at N.Y. CITY CHARTER ch. 8 §§ 197-a, 197-c (1989).

408. See generally N.Y. CITY CHARTER ch. 8 (1976, as amended through 1988) (governing city planning).

409. See *id.* § 192(a).

410. See *id.*

411. See *id.*

412. See *id.* § 191(a).

the CPC.⁴¹³ The CPD served as the gate-keeper for the Uniform Land Use Review Process ("ULURP"), determining what projects or land-use changes were moved into the process and when.⁴¹⁴

The Charter charged the CPC with responsibility for "the orderly growth, improvement and future development of the city, including adequate and appropriate resources for the housing, business, industry, transportation, distribution, recreation, culture, comfort, convenience, health and welfare of its population"⁴¹⁵ and with initial approval of a variety of land-use projects. Created in 1938, the CPC was seen as an independent voice for experts, in a period in which expertise was thought to be the solution to every problem. By 1989, the CPC—referred to in one study as this "*coup d'etat* by the planners and their allies"⁴¹⁶—had become, despite the good efforts of many of its members, in effect a mayoral agency, dependent on the political power of the incumbent mayor for any success. Additionally, the press of daily business, including state-imposed requirements of environmental review,⁴¹⁷ resulted in little attention to broad planning issues.

This system was the subject of considerable criticism. To start with, there was almost universal criticism of the gate-keeping processes of the CPD, which, depending on the particular critic's perspective, took far too long, did not share enough information, or was too committed to projects before the review process began.

Some community advocates judged the advisory roles of the community boards insufficient and argued for more power.⁴¹⁸ Then Assemblyman (now Congressman) Jerrold Nadler, for example, proposed a super-majority requirement for a final decision-making institution to reverse a community board's decision except in certain cases "where no one wants [the particular use] in their backyard."⁴¹⁹ Others argued that they were not provided enough resources to fulfill even their advisory roles, particularly regarding complex land-use decisions.⁴²⁰

On the other hand, developers and City officials were becoming increasingly concerned about the concessions that well-organized and

413. *See id.* §§ 191(b)(1)-(5).

414. *See id.* § 197-c(b).

415. *Id.* § 197-a.

416. SAYRE & KAUFMAN, *supra* note 22, at 372.

417. These requirements exist in the current Charter at N.Y. CITY CHARTER ch. 8 § 192(e) (1989).

418. *See* Legislative Hearing, Mar. 2, 1989, at 330-50.

419. Public Hearing, May 7, 1987 (testimony of Jerrold Nadler to the Charter Revision Commission).

420. *See* Legislative Hearing, Mar. 2, 1989, at 442-50.

affluent community boards were able to extract from developers in return for their support.⁴²¹ Many wondered whether the validity of projects ought to depend upon extracting some unrelated benefit for the community, particularly as the communities that usually benefitted were the most affluent. A similar concern was that poor, particularly minority, communities were the chosen site of a vastly disproportionate number of undesirable City uses, such as shelters or sanitation department garages.⁴²²

B. *The 1989 Changes*

The decision to abolish the Board of Estimate necessitated a review of the land-use functions it performed. This also provided an opportunity to review land-use decision making generally, all within the framework of the Commission's adopted goals. For example, should the new Council simply replace the Board as the final arbiter of all land-use decisions or only for some of them? If not, to which institutions of governance should these powers be distributed? Should these various institutions or their decision-making processes be modified? What would be the balance between mayoral and non-mayoral appointments to the CPC? Running through all these questions was the question of how centralized or decentralized land-use planning and decision making ought to be.

Some of these questions could not be answered in isolation. For example, a decision to replace the Board with the Council might lead to a decision to maintain a mayorally-dominated CPC, while a decision to limit the Council's land-use decision-making authority might lead to a more decentralized CPC.

1. The Balance Between the City Planning Commission and the City Council

Our initial proposals attempted to separate legislative from executive power, and to balance citywide, borough, and local interests and planning and political interests. The key elements were to limit the Council's authority to changes in the general zoning resolution (the purely legislative land-use function, which we thought constitutionally and politically belonged to the Council—subject, of course, to a mayoral veto and potential override), and to establish a Land Use Commission ("LUC") of eleven members to succeed to the Board of Estimate's more specific land-

421. See Public Hearing, May 7, 1987 (testimony of Steven Spinola to the Charter Revision Commission).

422. See Legislative Hearing, Mar. 2, 1989, at 330-50.

use decision-making authority.⁴²³ We also hoped that by creating LUC we would provide the CPC with more opportunity to plan, by removing some of their day-to-day responsibilities. All LUC's eleven members were to be appointed by the mayor, but seven were to be nominees of other elected officials: one each from the city council president and comptroller, and one each from the five borough presidents.⁴²⁴ LUC's site-specific zoning changes would be subject to a Council call-up procedure by which the Council could review such decisions upon the vote of two-thirds of its members.⁴²⁵ This same majority would be required to reverse LUC's decision.

On the ULURP front, in addition to determining the final decision maker for land-use decisions, our intention was to open up the CPD's certification process to community boards and borough presidents to give them early warning of projects within their domains.⁴²⁶ Boards could also hire a planner in addition to their district manager.⁴²⁷ Finally, all amenities extracted by community boards would have to be disclosed, as we required for many other governmental decisions.⁴²⁸

This arrangement satisfied a number of our goals. First, and most important, it preserved the Council's legislative function. As Schwarz stated at the May 2 public meeting: "[L]et's have the Council, with its budget power and its legislative power, think about how we cure homelessness, and not about whether there's a shelter in one member's district."⁴²⁹ It also guarded against corruption by limiting the Council's power over specific projects. LUC, on the other hand, would serve the important purposes of maintaining an array of voices in land-use decisions and making those decisions more efficient. LUC also helped preserve a borough voice in one of the City's most important decision-making processes. Finally, LUC was intended to free the CPC to do more planning.

These proposals had a reasonable theoretical base, but faced problems of definition and workability. Several also ran into considerable criticism. The proposal for the dual Commission arrangement was withdrawn prior to the Commission's debate on the proposals,⁴³⁰ due to concern that the

423. See N. Y. CITY CHARTER REVISION COMM'N, THE CHAIR'S RECOMMENDATIONS FOR CHARTER REVISION 41 (Apr. 24, 1989) [hereinafter CHAIR'S RECOMMENDATIONS].

424. See *id.*

425. See *id.* at 26.

426. See *id.* at 28.

427. See *id.* at 29.

428. See *id.* at 28.

429. Public Meeting, May 2, 1989, at 164.

430. See Purdum, *Schwarz Yields to Critics on Land Use*, *supra* note 400.

intended amalgamation of Board of Estimate and CPC functions was unworkable. Critics argued there would be neither mayoral accountability for day-to-day land use decision-making nor broad political accountability for controversial decisions.

By the May 10 public meeting, we had decided there should only be a single commission, the CPC.⁴³¹ Given the substantial limits on Council review then contemplated, the CPC would be reconstituted with eleven members—four appointed by the mayor, two by the city council president, and one by each borough president.⁴³² We gave two appointments to the city council president because we thought that the audit function of the comptroller should preclude an appointment to an executive line agency.⁴³³ This shift from a Planning Commission entirely appointed by the mayor to a multi-appointed CPC with a mayoral minority reflected our view that because the CPC would have the final say on a number of land-use decisions, it should not be mayorally dominated.

Reaction to this plan was immediate and intense, but it came from diametrically different directions. For example, Citizens for Charter Change, a coalition of labor unions, elected officials, and good government groups, announced in a memo that our proposal should fail for two reasons:

The City Council should be able to review decisions on how city-owned land is used—and what major projects get built on private land. The Council should be able to block inappropriate projects by a simple majority vote.

. . . .

A new Planning Commission should be independent and foster long-term planning. The mayor should have no more than two appointees and the Commission chair should be elected by its members.⁴³⁴

This position reflected fear that centralized power would suffocate community voices and overwhelm opposition to unfair land-use sitings.

431. See SUMMARY OF PRELIMINARY PROPOSALS, *supra* note 333, at 11.

432. See CHAIR'S RECOMMENDATIONS, *supra* note 423, at 44; Todd S. Purdum, *Charter Panel, For Now, Finishes Reshaping the Government*, N.Y. TIMES, May 16, 1989, at B4.

433. See Richard Levine, *Schwarz Foresees No Sceptered Mayor in New York*, N.Y. TIMES, Apr. 27, 1989, at B1.

434. Memorandum from Citizens for Charter Change to Concerned Citizens and Groups (May 24, 1989) (on file with the *New York Law School Law Review*).

This view was heightened by what many of these advocates viewed as an imperial mayoralty.⁴³⁵

From the other direction, Mayor Koch complained in a letter to the Commission:

What is lost in this new City Planning Commission is a unified, citywide perspective on land use issues. This perspective has been the hallmark of our City Planning Commission. It has kept the development of land use policy above the political fray and beyond the reach of narrow, parochial concerns. It is essential that this citywide perspective be maintained under the new Charter. . . .

In my view, where there is no change in the zoning text, the zoning map or an urban renewal plan, final authority over land use decisions, including special permits, authorizations and site selections, should rest with the City Planning Commission. . . .

I fear that your proposal will give legislative legitimacy to the NIMBY reaction that now threatens to block any socially responsible land use policy. The legislative tradition of comity and deference, which grants one legislator, in essence, the power to determine the collective vote on matters affecting his or her district, means that any time a member of the City Council does not like a land use decision in his or her district, that member will have no difficulty mustering the required votes to take jurisdiction and vote it down. This is a sobering thought. We would run the risk of land use paralysis.⁴³⁶

This view reappeared in the joint testimony of the incumbent and five former chairpersons of the CPC at the public hearing on June 6, 1989.⁴³⁷ Their testimony, read by Robert Wagner, Jr., was a closely-reasoned call for mayoral control of the land-use process.⁴³⁸ At this and other hearings, however, representatives of the Coalition for Charter Change and other advocates testified in precisely the opposite direction.⁴³⁹ So substantial

435. See Editorial, *Borough Power: Moving Toward a Fairer, Broader View of the City*, NEWSDAY (N.Y.), June 19, 1989, at 44; Alan Finder, *Critics of First Charter Plan Praise Proposed Revisions*, N.Y. TIMES, June 17, 1989, at A27.

436. May 31, 1989, Letter from Mayor Koch to Schwarz, *supra* note 342, at 5, 7-8.

437. See generally Public Hearing, June 6, 1989 (advocating City Council review of land use and calling for more centralization).

438. See *id.* at 3.

439. See *id.* at 12.

were the differences between the two views and so adamantly were they presented that one member of the Commission, Fred Friendly, announced himself "shell shocked."⁴⁴⁰ Others lined up on various sides of the issue with considerable intensity.⁴⁴¹

After this round of testimony, we still saw good reasons to limit the Council's land-use authority to legislative decisions and not extend it to administrative, project-specific questions. But we had become convinced that some administrative decisions were so controversial that they required review by elected officials and should be resolved by the Council. Finally, we were beginning to agree with the critics who declared that we had gone too far in decentralizing the CPC. We attempted to balance these considerations in our proposals to the Commission as we began our second round of public meetings on June 15, 1989.⁴⁴²

As we show below,⁴⁴³ the June 15 meeting was the Commission's single most important meeting, and the changes proposed at this meeting, especially on land use, were crucial to building the Commission's overall consensus.⁴⁴⁴ Focusing on the balance between Council review and CPC composition (though other land-use changes were proposed as well), we proposed expanding the Council's general jurisdiction from changes in the zoning resolution to all zoning changes, urban renewal plan changes, and dispositions of City-owned residential property.⁴⁴⁵ The Council was required to act within forty-five days—failure constituted an approval so the process could not be stalled—and a Council action was subject to veto, which it could override.⁴⁴⁶ The policy basis for such expansion was that—as with zoning changes—such changes could have a dramatic impact on city communities and should be subject to political review.

We also proposed that the Council be permitted to review other controversial land-use decisions. After much discussion on how to define a controversial land-use decision, we suggested a procedural test. During

440. *See id.* at 37.

441. *See id.* at 112.

442. *See Finder, Critics of First Charter Plan Praise Proposed Revisions, supra* note 435.

443. *See* discussion *infra* Chapter XI.

444. *See Finder, Critics of First Charter Plan Praise Proposed Revisions, supra* note 435 (stating, for example, "disputed city projects could be reviewed by the city council").

445. The last addition showed how a wide-ranging exchange at public hearings helped the Commission. From listening to these sources, we had become convinced that for "poor communities where the City owned blocks of housing, . . . a potential change in the nature of the housing is the functional equivalent of a zoning change for a middle class or wealthy community" Public Meeting, June 21, 1989, at 139.

446. *See* Public Meeting, June 15, 1989, at 15-18; Public Meeting, June 21, 1989, at 155.

the ULURP process, if the relevant borough president (now included in the process) and the relevant community board voted against a particular land use, which was nonetheless then approved by the CPC, the borough president could force Council review if he or she reiterated opposition to the project.⁴⁴⁷ This process—which became known as the “triple no”—recognized that the term “controversial” was not objectively definable; it also created opportunities for useful negotiation among affected groups by using potential Council review as an incentive for negotiations.⁴⁴⁸

The political basis for these changes was the clamor from a number of Commission members, and from advocates, including many we initially hoped would be allies. Some critics also warned that failure to provide a political check on land-use decision making raised voting rights questions because such a check had existed previously through the Board of Estimate.⁴⁴⁹

The decision to extend the Council’s jurisdiction had an important collateral effect. It logically compelled and justified a strengthening of the mayor’s hand on the CPC; we proposed giving one of the city council president’s appointments to the mayor, for a total of five of twelve members.⁴⁵⁰

While these new proposals received favorable reviews, we soon decided to adjust the balance among the various land-use interests by giving the mayor still greater influence on the CPC in light of the enhanced Council review. Schwarz presented these changes at the June 20 Public Meeting:

As . . . you know, there are views that come from really quite opposite directions. There is a group of people who passionately take the view that the Mayor should appoint 6, a majority of the 11. And that group of people includes the former chairs of the Planning commission, it includes the Mayor, it includes the New York City Bar Association, it includes a number of other civic groups. . . .

And their argument is that the central administration retains principal responsibility for land uses; and the chief executive is

447. See Public Meeting, June 15, 1989, at 15; Public Meeting, June 21, 1989, at 105, 163-64.

448. See Public Meeting, June 15, 1989 at 13; Public Meeting, June 21, 1989 at 125.

449. See Public Meeting, June 21, 1989 at 112, 131, 139, 147.

450. See Public Meeting, June 20, 1989, at 280-82, 297.

accountable; and that the accountable person should be able to carry out the responsibility.

. . . .
The argument on the other side is: Well that makes it too easy for the mayor to, or the mayor's designees to accomplish something, albeit the changes I proposed last Thursday put less pressure on that question because of the appeal rights that community boards, borough presidents have and a number of things that go to the City Council. But that is a powerful argument also. . . . And the way I believe we can answer both concerns is to have the Mayor have 6 appointees and to have the borough presidents and the council president each to have 1, so you have a 12 person body.⁴⁵¹

This arrangement was tentatively approved with little dispute, except for a strong challenge by Commissioner Judah Gribetz at the June 21 meeting to the role of the Council on land-use decision making.⁴⁵² Gribetz condemned the "triple no" and wanted all land-use decisions that had been under the jurisdiction of the Board of Estimate to go to the Council, undermining our attempts to limit the Council's land-use jurisdiction to legislative and controversial issues and to strengthen the hand of the borough presidents in land-use decisions.⁴⁵³ But after a long exchange, the Commission agreed on June 21 to support the proposal as presented, subject to continued public comment.⁴⁵⁴

Our compromise solution on the roles of the mayor, borough presidents, and the Council remained the subject of substantial—but inconsistent—criticism during the public comment period in July. Borough President Ferrer wrote that "[t]he testimony I submitted . . . addresses the serious flaws of the Commission's proposals, which I believe effectively foreclose meaningful participation of county government in the process of New York City governance."⁴⁵⁵ And specifically about land use:

In the strongest possible terms I restate my objection to the present voting profile of the proposed Planning Commission. It is almost unheard of for a governmental entity to be allocated a voting formula of even numbers

451. *Id.* at 281-82.

452. *See* Public Meeting, June 21, 1989, at 117-18, 124-25, 142.

453. *See id.* at 125, 131, 135, 138, 213.

454. *See id.* at 181-82.

455. Letter from Fernando Ferrer, Bronx Borough President, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission 1 (July 27, 1989) (on file with the *New York Law School Law Review*).

. . . .

The 11 person configuration is simply more reflective of New York City and affords a reasonable forum for borough land use planning.

I am further distressed that the Commission has limited the areas requiring Council review and vote on land use matters. . . . In short all land use matters that now come before the Board of Estimate, should be required to be reviewed by the City Council, and such review should trigger a Council Vote.

The Charter Commission's land use proposals are further flawed because as it now stands, the Planning Commission can effectively "check" community input and the voice of local government by halting land use projects at the Planning Commission level. . . . [The borough presidents'] right of appeal is compromised by the fact that the Commission's proposals do not require the City Council to vote on the Borough President's appeal. . . . The practical outcome will be that the voice of the communities will be unfairly quieted. In a borough such as mine which is "majority minority", foreclosing meaningful community participation in county land use determinations presents serious questions of disenfranchisement such as might warrant Justice Department consideration.⁴⁵⁶

We found this letter nettlesome. We had spent considerable time and effort trying to win Ferrer's support. Many of his ideas had influenced Charter changes. But our efforts at compromise often drew only new requests for additional power or other changes. Ultimately, we concluded that Ferrer would simply be unwilling to support the Commission—although whether he was motivated by his substantive reasons or some political concern or aim was unclear. Ferrer's July 27 letter evidenced the wisdom of that conclusion, particularly in light of his seeming willingness to give up his power under the "triple no," the very type of power for which he had been fighting for many months in the name of his ideas about borough or county government. His playing the Justice Department card was also disconcerting given the significance of their review to our process and the fact that he had never raised such an issue before. Our own calculation, at this time, was that his support was unsecurable. Nonetheless, a number of advocates, who generally

456. *Id.* at 2-3.

supported our efforts, shared Ferrer's criticisms concerning the Council's limited right of review.

Criticism was not confined, however, to advocates who sought more Council or borough president power. On July 28, for example, we received a letter from Mayor Koch, with an equally dire beginning: "I continue to believe that in significant respects, the Commission's proposals are fundamentally flawed. This is particularly true in the area of land use."⁴⁵⁷ More particularly, the mayor argued:

I was troubled to learn that the latest proposal of the Charter Revision Commission will ensure that virtually every land use decision will be reviewable by the City Council. . . .

In earlier correspondence with the Commission I have expressed my fear that an overly broad legislative power to review land use matters will lead to the transcendence of parochial concerns, will result in logrolling, and will ultimately threaten to bring rational development in the City to a halt. . . .

If, despite the force of these objections, you decide to subject every decision to City Council review, you must by force of logic and common sense, rethink your position regarding the appointments to the City Planning Commission. If every decision now goes to the City Council, on what basis would you continue to deny the mayor a majority of the appointments to the City Planning Commission? It becomes even more critical . . . that the City Planning Commission express a citywide perspective on land use matters in order to be an effective counterweight to the more narrow concerns reflected by the fifty-one members of the City Council.⁴⁵⁸

Joining the mayor in this view was the *New York Times* Editorial Board:

Nor would the mayor have a majority on the new City Planning Commission. The newest draft makes an expanded and inevitably more parochial Council the final arbiter on most land-use issues. That makes more essential the need for a professional Planning Commission controlled by an accountable, citywide official – the

457. July 28, 1989, Letter from Mayor Koch to Schwarz, *supra* note 102, at 1.

458. *Id.*

mayor. Otherwise, it's hard to see how the city could ever build facilities it needs, like jails.⁴⁵⁹

Comment by the *Times* editorial board mattered because one prong of our political strategy was a *Times* endorsement. While some disagreements with the *Times* over an array of issues were inevitable, the *Times*' view on land use was of particular import because of the paper's long commitment to a central City voice in land-use decision making.⁴⁶⁰

Apart from this wave of divergent criticism and concern over our proposals, we came to the view that if the Council's review powers increased, mayoral appointees ought to be a majority on the CPC (although staggered appointments and five-year terms would reduce the power of any one mayor). Our reasoning was not that without a mayoral majority the CPC would be unprofessional or that its decisions would be more parochial. In fact, there was no logic or evidence to support the view that controversial decisions left to the CPC itself would pit the mayor against all others. Our concern was that the mayor be justly accountable for land-use decisions, since the mayor would be held responsible for them.⁴⁶¹

In one of our closest calls, we decided we needed to broaden Council review, despite the reservations of the *Times*, Mayor Koch, and a variety of others. This view had the support of a number of our strongest potential allies within the political, civic, and labor communities. Claire Shulman, the borough president of Queens and a tentative ally, was pushing this position even though it would reduce her own power. Shulman's support was another element in our election formula, particularly in light of the unflagging and intemperate opposition of the borough president of the City's other large borough—Brooklyn. We were also concerned that casting the Council's land-use decision making authority as a voting rights issue—the Board of Estimate had this power, the Council does not—might trigger some problems at the Justice Department, if the Council could not at least “call up” the remaining land-use decisions.

In the end we decided to increase the size of the CPC to thirteen and give the mayor the additional appointment, for a total of seven mayoral appointments,⁴⁶² and to provide an opportunity for Council review of all of

459. Editorial, *The Trees, and Tilt, in the Charter*, N.Y. TIMES, July 30, 1989, at 22.

460. See, e.g., Editorial, *New York City's Land-Use Puzzle*, N.Y. TIMES, May 13, 1989, at 24.

461. The Commission adopted a reduced term of office for CPC members—from eight to five years—consistent with its view that there ought to be more mayoral accountability. See N.Y. CITY CHARTER ch. 8 § 192(a) (1989).

462. Members were to be “chosen for their independence, integrity and civic commitment.” *Id.* Each appointment (other than the chair) was to be subject to Council confirmation. See *id.*

the land-use decisions formerly decided by the Board of Estimate.⁴⁶³ Automatic review of these newly-added land-use decisions was not required; rather we provided a majority call-up mechanism that would allow the Council to review what a majority wanted.⁴⁶⁴ As with all Council review, decisions were subject to veto and the veto to a two-thirds override.⁴⁶⁵

The Council call-up justified creating a mayoral majority, and the mayoral majority provided reciprocal justification for the Council call-up. Schwarz introduced the new proposal, in slightly different language, at the Commission's August 1, 1989, meeting, at which it was adopted:

This is a matter which is, if you use an image of a balloon, it's something where as one pushes at one part of the process, it affects one's analysis of another part of the process. Our effort has been to find a way to appropriately balance the interests of local perspectives, the interests of Citywide perspectives, to appropriately balance the opportunities and procedures for review by the City Council, and as we've worked through the months, I think our own thinking has evolved.⁴⁶⁶

2. Planning Versus Politics

In New York City, if not elsewhere, planning and politics are frequently at odds. Short-term political goals frequently trump longer-term planning interests.⁴⁶⁷ This is a natural consequence of electoral politics and of human nature—a tendency to resolve issues of the moment and leave long-term issues for the future when someone else will have to decide. We could neither change human nature nor do away with elected leadership, but from the beginning of the process we asked the question: “[W]hat can we do, in a charter, to ‘help’ . . . make the government concentrate on planning, concentrate on problem alleviation, and not only concentrate—or, not predominately concentrate on crisis resolution.”⁴⁶⁸ In answer, the Commission adopted a number of changes, except for the proposal to

463. *See id.* § 192(f).

464. *See id.* § 197-d(b)(3).

465. *See id.* § 197-d(g).

466. Public Meeting, Aug. 1, 1989, at 6-7.

467. *See generally* Annmarie Hauck Walsh, *Public Authorities and the Shape of Decision Making*, in *URBAN POLITICS, NEW YORK STYLE*, *supra* note 31, at 214 (suggesting that major cities such as New York have difficulty accomplishing objectives in city government).

468. Public Meeting, Apr. 24, 1989, at 8-9.

establish a new agency (LUC) to handle the day-to-day affairs of land-use decision making and freeing the CPC to plan.⁴⁶⁹ Our hope was that these changes, while not a guarantee of perfect planning, would put “a little thumb on the scale.”⁴⁷⁰

a. Strategic Planning

The Commission spent considerable time and effort looking for ways to impose some planning discipline on the City. One proposal was to appoint a deputy executive director of strategic planning in the CPD.⁴⁷¹ Similarly, the new Charter required the CPD to assist the mayor in the preparation of strategic plans, including the report on the social, economic, and environmental health of the City,⁴⁷² the strategic policy statement,⁴⁷³ and the ten-year capital strategy.⁴⁷⁴

The Commission’s thinking about planning had many roots, of which we mention two. A joke (current when the *Post* was an afternoon paper) poked fun at the City’s short-term view: “Planning is worrying about this afternoon’s *Post*; long-term planning is worrying about tomorrow morning’s *New York Times*.”⁴⁷⁵ The report of the Commission on the Year 2000 expressed the concern more soberly:

New Yorkers need a long-term view of what New York is all about: that requires strategic planning. . . . Strategic planning is particularly important when aggressive development is causing the face of the city to change far more rapidly, and drastically, than planners are willing to control or even comprehend. Strategic planning would not only permit city government to plan service delivery to match development and change, it would also enable neighborhoods and citizens to participate in a more rational and humane process, understanding how discrete projects and programs fit into the overall plan for the city.⁴⁷⁶

469. See *id.* at 12-57 (detailing all of the proposals), 57-120 (discussing the various proposals).

470. Public Meeting, June 21, 1989, at 21.

471. See N.Y. CITY CHARTER ch. 8 § 191(b)(7) (1989).

472. See *id.* ch. 1 § 16, ch. 8 § 6.

473. See *id.* ch. 1 § 17, ch. 8 § 6.

474. See *id.* ch. 9 § 215.

475. See generally Public Meeting, June 21, 1989, at 26-28 (containing a discussion of the need for longer-term planning).

476. N.Y. CITY COMM’N ON THE YEAR 2000, NEW YORK ASCENDANT: THE REPORT OF THE COMMISSION ON THE YEAR 2000, at 177 (1988).

b. 197-a Plans and Zoning Planning

Section 197-a provides for the proposal, review, and approval of plans for the development of the City.⁴⁷⁷ It was included in the 1976 Charter as a means of inviting more community-based planning. As Lane explained it to the Commission:

Originally, [the 197-a plans] were put into the '75 Charter as we moved away in the City from the idea of master planning. . . . [T]his was sort of a compromise response [to those who wanted only community-based planning] by allowing both the Planning Commission or Community Boards . . . to propose something called 197-a plans, which have not been well defined yet, but they are being defined in the process of their being used by Community Boards and by other groups, in the evolution of this section.

Originally, they were used by the City Planning commission for mall development, like the mall on Wall Street⁴⁷⁸

Despite the good intentions of the Goodman Commission,⁴⁷⁹ we heard considerable testimony about the inability of community boards to exercise their planning authority because any effort was being met by the CPD with either dismissal or a request for an unaffordable Environmental Impact Statement (EIS) under state law.⁴⁸⁰ Our solution was to require the City to pay for an EIS, if a community board's proposed plan satisfied CPC standards and were sound.⁴⁸¹ These conditions were established to ensure that all parties knew the standards for plans and to protect the City from having to pay automatically for an EIS for any plan submitted.⁴⁸²

The Commission also authorized borough presidents to submit 197-a plans.⁴⁸³ This greatly enhanced borough president power, because with five members of the CPC appointed by the borough presidents, a submission by

477. See N.Y. CITY CHARTER ch. 8 § 197-a (1989).

478. Public Meeting, June 21, 1989, at 18.

479. See generally, Joseph P. Viteritti, *The Tradition of Municipal Reform: Charter Revision in Historical Context*, in *RESTRUCTURING THE NEW YORK CITY GOVERNMENT: THE REEMERGENCE OF MUNICIPAL REFORM 28* (Frank J. Mauro et al. eds., 1989) (referencing the encouragement of citizen participation in local government).

480. See Public Meeting, June 21, 1989, at 30-31.

481. See *id.* at 31-34.

482. See *id.* at 31.

483. See N.Y. CITY CHARTER ch. 8 § 197-a (1989).

one might be seriously considered by the CPC.⁴⁸⁴ Without this change, Borough President Ferrer, for example, would have had no formal way to propose useful changes for blighted sections of the Bronx. Thus, the 197-a changes were designed to draw more creative local voices into land-use planning.

Of course, any plans approved by the CPC were subject to Council review.⁴⁸⁵ The Council also had authority to overturn CPC disapprovals by a two-thirds vote, and the mayor could force the CPC to expedite its decision making.⁴⁸⁶ These provisions addressed a concern among Commission members, particularly Commissioner Trager, that a more diverse CPC might try to block efforts that the mayor felt was in the best interest of the City.⁴⁸⁷

The new Charter also required the CPC to prepare a zoning and planning report every four years.⁴⁸⁸ This required a statement of the CPC's planning policy, analysis of portions of the zoning resolution that merited reconsideration in light of the policy, and proposals for implementing the planning policies.⁴⁸⁹

c. Environmental Review

Attention to environmental issues had been legally required and substantively important for some time. We attempted to improve the City's compliance. The CPC was required to join the Department of Environmental Protection in assigning staff to an office of environmental coordination to assist City agencies in fulfilling their environmental review responsibilities.⁴⁹⁰

3. Accelerating Certification

Several advocates, notably Queens Borough President Shulman, persuaded us that the CPD and the CPC were ignoring or delaying applications for certification required before the ULURP process could

484. *See id.* § 192.

485. *See id.* § 197-a(d).

486. *See id.*

487. *See* Public Meeting, June 21, 1989, at 37.

488. *See* N.Y. CITY CHARTER ch. 8 § 192(f) (1989).

489. *See id.*

490. *See id.* § 192(e).

start.⁴⁹¹ We were told this was either because they were overworked or because of a "not-invented-here" attitude. Shulman also contended that big, spectacular proposals relating to Manhattan were consistently given priority. The Commission's response was to provide that, under certain conditions, a borough president could force certification of an application with only five of the CPC's thirteen votes.⁴⁹²

4. "Fair Share" and the Citywide Statement of Needs

Many community advocates contended, and the Commission agreed, that some communities were overburdened by undesirable City facilities (as well as being under-served by desirable ones). This was a particular concern of poor and minority communities, but others as well. For example, Staten Islanders felt they were also overburdened, principally because of the Fresh Kills landfill.

There was early attention to this issue in a lengthy legislative hearing on March 2. Advocates such as Wendy Brown of the Medgar Evers Center for Law and Social Justice and Marla Simpson of New York Lawyers for the Public Interest⁴⁹³ made the point effectively. Melvyn Hestor, first deputy administrator of the Human Resources Administration, also provided factual support for the conclusion that poor communities were overburdened.⁴⁹⁴

The Commission responded to these concerns by the adoption of Charter sections 203 ("Criteria for Location of City Facilities")⁴⁹⁵ and 204 ("Citywide Statement of Needs").⁴⁹⁶ The sections combined a number of key Commission aims: (1) more attention to fairness among communities; (2) more attention to planning; and (3) opportunities for decentralizing land-use decision-making.⁴⁹⁷

Under section 203, the City may promulgate rules establishing criteria for the location of new City facilities, as well as for the closing, expansion, or reduction in size or capacity for service delivery of existing facilities.⁴⁹⁸

491. See *Shulman Calls for Major Improvements in Charter Revision*, PR NEWSWIRE, July 19, 1989.

492. See N.Y. CITY CHARTER ch. 8 § 197-c(c) (1989).

493. See Legislative Hearing, Mar. 2, 1989, at 390-93, 488-93. The fair share concept won praise from a wide variety of communities, however. For example, Staten Islanders felt they were also overburdened, principally because of the Fresh Kills landfill.

494. See *id.*

495. See N.Y. CITY CHARTER ch. 8 § 203 (1989).

496. See *id.* § 204.

497. See *id.* §§ 203-204.

498. See *id.* § 203(a).

The criteria shall be designed to further the fair distribution among communities of the burdens and benefits associated with city facilities, consistent with community needs for services and efficient and cost effective delivery of services and with due regard for the social and economic impacts of such facilities upon the areas surrounding the sites.⁴⁹⁹

These criteria—which became known as “fair share” criteria⁵⁰⁰—had both a general and a specific purpose. The general purpose was to help focus more attention on land-use decision making. The specific purpose was fairness.

At the Commission’s crucial meeting of June 15,⁵⁰¹ fair share was one of the proposals made by Schwarz.⁵⁰² The Commission accepted it and then discussed how to apply it without being too rigid. Charter section 203(a), quoted above, was the result.⁵⁰³ The City must 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 1970s required governments to consider environmental factors without mandating specific results.

Each year, the mayor must submit to the Council, borough presidents, and borough and community boards a citywide Statement of Needs concerning City facilities prepared in accordance with the fair share criteria.⁵⁰⁴ This statement also had to explain the public purpose of any new or significantly expanded facility and describe its size, location, and “the specific criteria to be used in locating” it.⁵⁰⁵ Similar information was required for closings or significant reductions of City facilities.⁵⁰⁶

499. *Id.*

500. Legislative Hearing, Mar. 2, 1989, at 391; Memorandum from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, to Charter Revision Commission Members 3 (June 15, 1989) (on file with the *New York Law School Law Review*) (regarding land-use proposals).

501. *See generally* Public Meeting, June 15, 1989.

502. *See* Memorandum from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, to Charter Revision Commission Members, *supra* note 500, at 11-12.

503. *See* N.Y. CITY CHARTER ch. 8 § 203(a) (1989).

504. *See id.*

505. Frederick A. O. Schwarz, Jr., Changes Proposed by the Chair to the Adopted Preliminary Proposals as the Result of Public Testimony and Comment 2 (June 15, 1989) (on file with the *New York Law School Law Review*).

506. To fit with the budget preparation cycle, this information had to be presented each year by November. *See* N.Y. CITY CHARTER ch. 8 § 203(a) (1989).

In support of the planning objective, the Statement of Needs had to cover the current and the following two fiscal years.⁵⁰⁷ For planning and disclosure reasons and to facilitate a fair share analysis, the Statement of Needs had to include a "map together with explanatory text, indicating . . . the location and current use of all city-owned real property"⁵⁰⁸ as well as state and federal health and social service facilities in the City.⁵⁰⁹ Each City agency had to submit to the mayor its own plan. The mayor would review all of them with the CPC and Department of General Services ("DGS") before issuing the Statement.⁵¹⁰ For all of these steps, the mayor had to apply fair share criteria.

Section 204 also had elements designed to foster more local influence on land-use planning. First, agencies preparing their statements of need had to "review and consider" needs statements and budget priorities submitted by community boards.⁵¹¹ Second, borough presidents could propose locations for facilities in their respective boroughs.⁵¹² If the borough president certified that these met fair share and location criteria set forth in the Statement of Needs,⁵¹³ the borough president's proposed location was either accepted or nine of the CPC's thirteen members had to approve another location.⁵¹⁴

This change, which also had its roots in proposals made at the June 15 meeting,⁵¹⁵ reflected the view of borough presidents and many advocates that local officials may know more than the central administration about the local impact of City facilities. Because they "do know something about how to meet City needs," we wanted to "give a little edge to that."⁵¹⁶ (Of course, choosing to accept an unpopular facility requires a borough president to exercise political will and courage.)

507. *See id.* § 204(a).

508. *Id.* § 204(d).

509. *See id.*

510. *See id.* § 204(e).

511. *See id.*

512. *See id.* § 204(f).

513. *See id.*

514. *See id.* § 197-a(d) (outlining the procedures by which the CPC may approve or disapprove any plans).

515. *See generally* Public Meeting, June 15, 1989.

516. Public Meeting, June 21, 1989, at 86.

III. FRANCHISES, REVOCABLE CONSENTS, CONCESSIONS, AND LICENSES

The City possesses inalienable rights to its streets, highways, avenues, parks, wharves, and other public property.⁵¹⁷ There is enormous demand for the use of this property. Through franchises, revocable consents, concessions, and licenses, the City has established techniques to grant permits to private entrepreneurs, such as cable, bus, and ferry companies; restaurants; and newspaper purveyors, for use by the city's residents. The distinction among these uses provokes uncertainty, but we offer our view (which is now part of the Charter),⁵¹⁸ and caution as Schwarz stated at one public meeting: "[N]either the King nor the deity, in fact, has laid down immutable rules on what is a franchise, and what is a concession, and what is a revocable consent"⁵¹⁹

A franchise is a right granted to a private party to use public property for a public service.⁵²⁰ Cable television systems, bus routes, and bus shelters are all examples of franchises. A revocable consent is a right granted to a private party to use public property for a private purpose.⁵²¹ Examples of revocable consents are a bridge over a street that connects two private buildings and a sidewalk café. A revocable consent, unlike a franchise, is revocable at any time. A concession is similar to a revocable consent, but it is generally a right granted to a private party for the use of property that is generally under the jurisdiction of a particular agency.⁵²² An example of a concession is a vendor in a park or a parking lot. A license (or permit) is also similar to a revocable consent and concession, but it is usually granted without contract and for a fee that is unrelated to the value of the economic benefit that comes from the use of the property.⁵²³ Examples of licensed uses of property are tour buses, newsstands, street vendors, and carters. To illustrate the confusion concerning these rights, note that a hot dog stand in a park requires a concession, while a hot dog stand on a street corner requires a license.

As with land-use decisions, disputes over the private use of public land can be fierce. Lewis Hartman, President of the Junior Tennis League, a witness at our legislative hearing on franchises, made this point clearly:

517. See N.Y. CITY CHARTER ch. 15 § 383 (1989).

518. See *id.* § 362.

519. Public Meeting, May 15, 1989, at 12.

520. See N.Y. CITY CHARTER ch. 14 § 362(b) (1989).

521. See *id.* § 362(d).

522. See *id.* § 362(a).

523. See Legislative Hearing, Mar. 14, 1989, at 11-26.

In most other places in the United States, there is enough private land available to do all sorts of things. We have very tough quality of life issues in New York City because we need to get the most out of public land for rich people as well as poor people, in order to have just a half-decent quality of life⁵²⁴

The City had been particularly criticized for allowing cable companies to serve the richer communities without giving adequate attention to the poorer ones. As Commissioner Friendly commented at a public meeting: [R]ight now, cable . . . follows the dollar; if you are rich you get cable in most parts of the City; if you're poor, you don't."⁵²⁵ Bus franchises and outdoor cafés have also caused community complaints. Parks advocates have protested private food vendors. And, recently, the mayor has unsuccessfully attempted to block both artists and food vendors from using the streets.⁵²⁶

The Commission made two major decisions on the subjects. First, the Commission placed responsibility for franchise policies in the Council (subject to mayoral veto and Council override).⁵²⁷ Second, for the application of these policies, we provided clear procedures for the granting of each of the rights and made the mayor responsible for their final execution.⁵²⁸ These efforts did not occupy extensive Commission time. Although we did hold a legislative hearing on the topic⁵²⁹ and also committed considerable staff time, most of the particulars with which we dealt did not engender much debate. The brevity of our discussion reflects this phenomena. We made no changes in the City's licensing processes, and we omit any further reference to this subject.

A. The Public Property Decision-Making Processes as We Found Them

The processes for public property decision making we found⁵³⁰ were almost unrecognizable because of a general confusion over definitions and a broad, agency by agency, array of processes and practices. The fullest

524. *Id.* at 274-75.

525. Public Meeting, June 22, 1989, at 157.

526. See Mike Allen, *Vending Ban Widens: Not Just Food but also Books and Art*, N.Y. TIMES, June 2, 1998, at B1.

527. See N.Y. CITY CHARTER ch. 14 § 363(c) (1989).

528. See *id.* § 372.

529. See generally Legislative Hearing, Mar. 14, 1989.

530. See generally N.Y. CITY CHARTER ch. 14 (1976, as amended through 1988); Legislative Hearing, Mar. 14, 1989.

picture that can be presented is the transcript of the legislative hearing held on March 14, 1989.⁵³¹ In this section we attempt only to present the broad outlines of what we found.

1. Franchises and Revocable Consents

All franchises had to be approved by the Board of Estimate, with staff work handled by the Board's Bureau of Franchises.⁵³² The terms of a franchise were embodied in a contract that could not exceed twenty-five years.⁵³³ The process for obtaining a franchise was commenced by an applicant submitting a petition requesting a particular franchise.⁵³⁴ The Bureau of Franchises distributed that petition to various appropriate City agencies, including the CPD for the purpose of initiating the environmental quality review. Once the proposal had been approved by the agencies or modified pursuant to any objections, the petition was submitted to the ULURP, with two procedural differences.⁵³⁵ First, approval of the franchise required a three-fourth vote of the Board of Estimate,⁵³⁶ and second, that vote did not conclude the process. After the Board approved a petition, a contract incorporating the terms of the franchise had to be approved by the Board, again by a three-fourths vote, after a public hearing.⁵³⁷ Finally, the mayor had an additional time period to approve or disapprove of the Board's resolution on the contract.⁵³⁸ The failure of the mayor to act was deemed a disapproval.⁵³⁹

The procedure for approval of revocable consents corresponded to that of a franchise, except that the Board only needed to approve the revocable consent once (no contract required) and by only a majority vote.⁵⁴⁰

2. Concessions and Licenses

The granting of concessions, while seemingly charged to the Board's jurisdiction under the Charter, was routinely handled by agencies on their

531. *See id.*

532. *See* N.Y. CITY CHARTER ch. 14 §§ 363, 366-a (1976, as amended through 1988).

533. *See id.* § 364.

534. *See id.* § 366-a(a).

535. *See id.* § 366-a(b).

536. *See id.* §§ 371, 372.

537. *See id.*

538. *See id.* § 373.

539. *See id.*

540. *See id.* § 374.

own.⁵⁴¹ After some criticism of the Parks Department's processes for granting concessions,⁵⁴² Mayor Koch, in 1978, established a Concessions Review Committee, which was required to approve most concessions.⁵⁴³ By 1989, the committee had mandated certain provisions for all concessions, including a limit of two years (in most cases) and a requirement that all capital improvements come at the expense of the concessionaire and become the property of the City.⁵⁴⁴

B. *The 1989 Changes*

The decision to abolish the Board of Estimate (and its Bureau of Franchises) both dictated and provided an opportunity to review the various processes for granting uses of public property, particularly franchises and revocable consents, which both required Board approval. As noted earlier, unlike land-use decision making, our proposals on franchises, revocable consents, and concessions provoked little dispute or debate.⁵⁴⁵ Despite this, the Commission adopted substantial reforms in an attempt to separate the policy and implementation aspects of these decisions and to unravel the existing knots produced by years of inconsistent decisions and practices. Broadly stated, we established definitions of each of the uses of public property⁵⁴⁶ (except licenses) and then established standard procedures to be followed for awards of the uses.⁵⁴⁷ These procedures are described below.

1. Franchises

Most importantly, we required that no franchise could be executed, without the City Council first adopting a general authorizing resolution in the same manner by which a law is enacted.⁵⁴⁸ The resolution was intended to provide the Council the opportunity to debate whether a particular type of franchise was valuable and under what terms and conditions it should be let. The insertion of the Council into the franchise process was intended to further our goal of diverse and broad public participation at the policy-

541. See Legislative Hearing, Mar. 14, 1989, at 6-30; see also BRIEFING BOOK, *supra* note 191, at V-D.

542. See Public Hearing, Mar. 14, 1989, at 6-30.

543. See *id.*

544. See *id.*

545. See *supra* note 529 and accompanying text.

546. See N.Y. CITY CHARTER ch. 14 § 362 (1989).

547. See *id.*

548. See *id.* § 363(c).

making level. But we did not allow the Council to initiate an authorizing resolution. The Commission required that there be a determination of need by the responsible agency and the mayor.⁵⁴⁹ A responsible agency, under the Commission's definition, is an agency with the expertise and responsibility for a particular type of franchise (or revocable consent).⁵⁵⁰ For cable, we created a new department of telecommunications and charged it with primary responsibility for all aspects of cable franchises.⁵⁵¹ The establishment of a department of telecommunications⁵⁵² reflected the growing attention on the importance of telecommunications. Indeed, Commissioner Friendly had been advocating such an agency for the City for many years.⁵⁵³ As observed by Nat Leventhal, "The recommendation to establish a separate cable agency . . . was one of the earliest recommendations that was made, and it was frustrated from the beginning [by the Bureau of Franchises]. We are talking 20 years ago."⁵⁵⁴

After the adoption of a general authorizing resolution, the responsible agency would shape a request for proposals consistent with the terms of that resolution.⁵⁵⁵ The Commission's decision to require a request for proposal, even if the idea for a franchise originated with a particular individual, reflected the Commission's commitment to the competitive process. As Frank Mauro described: "Somebody might come with the idea, but I think what the City has come to conclude over the years is even if someone comes with an idea, you've got to open it up to competition."⁵⁵⁶ If such a proposal had land-use implications, it would be subject to the ULURP process, including the right of the Council to review the franchise on its own motion or subject to the triple no described earlier. Allowing the Council to have a second look at the franchise at first seemed redundant to some of the commissioners. But the request for a proposal, unlike the authorizing resolution, was intended to include particulars, such as the route for bus franchises that would be absent from the proposal. The proposal, in most cases, would contain a broader geographic designation or issues of safety or fiscal integrity. Of course, the Council could through amendment to a proposed authorizing resolution,⁵⁵⁷ delimit the geographic

549. *See id.* § 363(b).

550. *See id.* § 362(c).

551. *See id.* ch. 48 § 1070.

552. This office was later merged with the Department of Energy and renamed the Department of Energy and Telecommunications. *See* N.Y. CITY CHARTER ch. 48 (1989, as amended through 1998).

553. *See* Public Meeting, June 22, 1989, at 155-56.

554. Public Meeting, May 13, 1989, at 539.

555. *See* N.Y. CITY CHARTER ch. 14 § 363(e) (1989).

556. Public Meeting, June 22, 1989, at 208-09.

557. *See* N.Y. CITY CHARTER ch. 14 § 363(c) (1989).

area for a particular franchise, but the ULURP process also gave the Council the benefit of additional input from community boards, borough presidents, and the CPC on the impact of a particular proposal on a community or borough.⁵⁵⁸

Once through ULURP, if ULURP was required, a franchisee would be selected, pursuant to any processes set forth in the authorizing resolution.⁵⁵⁹ Each selection by an agency would then be subject to the review of the newly created Franchise and Concession Review Committee, comprised of the mayor, the director of the Office of Management and Budget, the corporation counsel, the comptroller, and an appointee of the mayor.⁵⁶⁰ The borough president for the borough in which the franchise or concession was located was also made a member.⁵⁶¹ If more than one borough was intended to be covered by a particular franchise, the relevant borough presidents must choose one of their number to represent them.⁵⁶²

The Commission required affirmative votes of five members of the Franchise and Concession Review Committee for the approval of a franchise.⁵⁶³ Notwithstanding this vote, we also required that the mayor separately approve every franchise agreement.⁵⁶⁴ This provision was intended to assure mayoral responsibility and accountability for every individual franchise agreement. Finally, once a franchise agreement was completed, it had to be registered with the comptroller as if it were a contract under section 328 of the Charter.⁵⁶⁵

2. Revocable Consents

Revocable consents, as before, continued to parallel the franchise process. But, importantly, because they are for private, and not public, uses, we did not require an authorizing resolution by the Council, nor any requests for proposals. Consideration of a revocable consent was to be initiated by the party who wished the revocable consent.⁵⁶⁶ All such petitions were to be submitted to the Department of Transportation and

558. *See id.* § 197(c).

559. *See id.* § 363(f).

560. *See id.* § 373(a).

561. *See id.* Mayor Koch's original Concession Review Committee had had an appointee of the Council's majority leader. In our view, this provided the Council with too much of an executive role.

562. *See id.*

563. *See id.* § 373(c).

564. *See id.* § 372.

565. *See id.* § 375.

566. *See id.* § 364(d).

ultimately approved by the Department of Transportation.⁵⁶⁷ We chose that department to serve this function because most revocable consents involve use of the city's streets. For historic reasons, we exempted sidewalk cafés from the Charter process and made them subject to existing provisions of local law.⁵⁶⁸ This assignment of responsibility to the Department of Transportation did not exclude other agencies from reviewing revocable consents. Indeed, the new Charter required the Department of Transportation to forward petitions to all responsible agencies for their initial review.⁵⁶⁹ Before the final approval of any revocable consent, the responsible agency must first hold a public hearing on the petition.⁵⁷⁰ If during the review process the CPD determines that a revocable consent had land-use impacts or implications, it would be subject to ULURP in the same fashion as a franchise.⁵⁷¹

3. Concessions

Concessions were and remain one of the most confusing rights to public property granted by the City. Both the proposal for a Grand Prix Racetrack in Flushing Meadow Park and a proposal for a hot dog stand in Van Courtland Park would be concessions. They were defined as "a grant made by an agency for the private use of city-owned property . . . except that concessions shall not include franchises, revocable consents and leases."⁵⁷² In one sense this answered a question posed by Commissioner Friendly to Frank Mauro: "In twenty words, say why you couldn't make concessions franchises."⁵⁷³ Aside from this "definition," because of a dispute that occurred while Donald Manes was the borough president of Queens over a concession for the Grand Prix Racetrack in Flushing Meadow Park, we provided that all "major" concessions pass through ULURP.⁵⁷⁴ We defined a major concession as one that had significant land-use impacts, as determined by the CPC, or those for which an environmental impact statement was required by law.⁵⁷⁵ Finally, we

567. *See id.*

568. *See id.* § 364(e).

569. *See id.* § 364(d).

570. *See id.*

571. *See id.*

572. *Id.* § 362(a).

573. Public Meeting, May 15, 1989, at 14.

574. *See* N.Y. CITY CHARTER ch. 14 § 374(b) (1989).

575. *See id.*

provided that concessions be issued only pursuant to procedures established by the Franchise and Concession Review Committee or with its approval.⁵⁷⁶

IV. THE PROCUREMENT OF GOODS AND SERVICES⁵⁷⁷

Each year the City spends close to twenty-five percent of its budget on goods and services contracts with vendors throughout the country.⁵⁷⁸ Through these contracts the City buys everything from pencils and paper to bullets and fire hoses. It also hires private businesses to provide child care and food and shelter for the homeless, to repair roads, and to supply all other goods and many services required to make the city work. In 1989, the City spent over \$6 billion of its \$30 billion budget on procurement.⁵⁷⁹ Both the quality of City services and the integrity of the City's finances depend on the processes used to determine the prices and providers of goods or services. Despite the significance of these procurement processes, they do not generate the drama of the budget process or the fierceness of land-use decision making. As a consequence, they garner less attention, which can open the way for waste and corruption.

Concern about City contracting had already arisen by 1989, when we started our efforts. The Parking Violations Bureau corruption scandals had been exposed in 1986.⁵⁸⁰ For this reason and others, as reported in a 1988 *Charter Review*:

During 1986, the State-City Commission on Integrity in Government (the Sovern Commission, [after its Chair Michael Sovern, President of Columbia University]) made city contracting one of its principal subjects of inquiry. It urged a "through overhaul of the contract and procurement procedures" that it characterized as "highly fragmented, complex and opaque." A 1986 report by State Comptroller Edward Regan found a disturbing lack of record-keeping and written guidelines by the city agencies

576. *See id.* § 374(a).

577. For another treatment of the City's procurement processes, see Joseph A. Cosentino, Jr., Note, *New York City's Procurement System: Reversing the Cycle of Corruption and Reactionary Reform*, 42 N.Y.L. SCH. L. REV. 1183 (1998).

578. *See City Contracts and the City Charter*, CHARTER REVIEW (N.Y. City Charter Revision Comm'n), Late Spring 1988, at 1-3.

579. *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, 143 (1995).

580. *See id.* at 148-49.

responsible for administering contracts. And a 1987 city-commissioned report by the Institute of Public Administration, a non-profit consulting firm, identified the city's contracting policies and practices as a major cause of hidden costs, deficient quality and delays in the city's purchase of goods and services.⁵⁸¹

Such criticisms were confirmed during our legislative hearing on contracts on March 1, 1989.⁵⁸²

During the years 1986 to 1988, the City attempted to address some of the concerns raised by its procurement critics. In 1986, it began building a central computer record of vendor performance,⁵⁸³ and, in 1987, it created an Office of Contracts to review, standardize, and advise on contract procedures.⁵⁸⁴ Despite these changes, the procurement process remained in substantial disrepair. As described by the New York State Commission on Government Integrity,⁵⁸⁵ after making an exhaustive study of procurement in the City in 1989 (paralleling our work):

The Commission has found that the City's contracting system is fragmented and chaotic. The City's contracting operations are awash in a sea of paper, plagued by inordinate delays and clouded by unclear and inconsistent rules and procedures which slow City business to a crawl and discourage vendors from stepping forward to bid. As a result, the City often pays far more than it should for goods and services, wasting millions of taxpayers dollars. At the same time the widespread reluctance of vendors to do business with the City offers opportunities for bid-rigging and corrupt side-deals.⁵⁸⁶

581. *City Contracts and the City Charter*, *supra* note 578, at 1, 3.

582. *See generally* Legislative Hearing, Mar. 1, 1989.

583. *See City Contracts and the City Charter*, *supra* note 578, at 3.

584. *See id.*

585. This Commission, also called the Feerick Commission, had been established by Governor Mario Cuomo in 1987 based on a recommendation by the Sovern Commission. Its mandate was "to investigate weaknesses in existing laws, regulations, and procedures . . . relating to such areas as campaign financing, judicial selection, conflicts of interest, the solicitation of government business and approvals, and the use of public and political party positions for personal enrichment." John D. Feerick, *Reflections on Chairing the Commission on Government Integrity*, in GOVERNMENT ETHICS REFORM FOR THE 1990s: THE COLLECTED REPORTS OF THE NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY 1, 2 (Bruce A. Green ed., 1991).

586. *A Ship Without a Captain: The Contracting Process in New York City*, in GOVERNMENT ETHICS REFORM FOR THE 1990s: THE COLLECTED REPORTS OF THE NEW YORK STATE COMMISSION ON GOVERNMENT INTEGRITY, *supra* note 585, at 460-62.

The growing concern about the integrity of the procurement process assured that whatever changes we proposed would have to address the chronic and important problems described by these observers. Unlike land-use or budget decision making, the questions we had to answer did not attract broad public attention. Nor did the Commission believe there was much doubt about which branch of government ought to be responsible for procurement. The Board of Estimate had voted on all contracts not competitively bid.⁵⁸⁷ Whatever happened to the Board, the Commission was going to change this, and no one thought the Council should make individual contract decisions. It was clear from the start that mayors should handle procurement.⁵⁸⁸ No function could be more administrative and none could be more in need of clear accountability. The approach to contracts under the Board of Estimate system had been one of "nonaccountability," according to a high ranking member of the Koch administration, speaking to Lane, Frank Mauro, and Richard Ravitch in early 1988. Similarly, Schwarz stated the following when he testified before the Feerick Commission:

In terms of integrity, one of the problems [the Board of Estimate] leaves for the City is, if something does go wrong, nobody can be held responsible because each [of the Board members] can say, "Well, I don't know, we all did it," and then they point to each other. Specifically, it lets the Mayor off the hook, and I think that is a severe fault from an integrity point of view. . . .⁵⁸⁹

Assuming mayors could be made responsible for procurement, a remaining question, posed by David Trager at a legislative hearing on March 1, 1989, was whether there were ways to "streamline the process" without "compromising the public sense" of the need for oversight.⁵⁹⁰

A. *The Procurement Process as We Found It*

The former Charter had contained a detailed procedure for contracting.⁵⁹¹ Despite the detail, a full understanding of the process

587. *See id.* at 477.

588. *See id.* at 463.

589. *Id.* at 466 (quoting statement of Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, before the New York State Commission on Government Integrity).

590. Legislative Hearing, Mar. 1, 1989, at 127.

591. *See generally* N.Y. CITY CHARTER ch. 13 (1976, as amended through 1988).

requires reference to the City Administrative Code⁵⁹² (the City's collection of local laws) and to a variety of regulations. Here, we review the Charter essentials.

The 1976 Charter employed competitive sealed bidding as its primary means of contracting.⁵⁹³ The elements of public letting were public advertisement, sealed bids, and letting to the lowest responsible bidder.⁵⁹⁴ A responsible bidder was measured by capacity, character, and capability, meaning that if they could perform the contract close to the bid price they bid, they would be considered responsible.⁵⁹⁵ If an agency determined that a low bidder was not responsible, the rules of the Board of Estimate called for review by a Board of Responsibility consisting of the comptroller, the corporation counsel, and the head of the agency.⁵⁹⁶ The agency could also reject all bids if it deemed the rejection was in the City's best interest. The Board of Estimate, by a two-thirds vote, could also choose other than the lowest bidder "for the public interest."⁵⁹⁷ Under this authority, for example, the Board could reject a bidder who refused to comply with the City's anti-apartheid provision, if another bidder within five percent of the low bid agreed to comply.⁵⁹⁸

The preference for competitive sealed bidding was intended to maximize competition and reduce waste and corruption. Its weaknesses were that it was slow, and it constrained the purchasing agency to consider only the price of goods submitted by a qualified bidder.⁵⁹⁹ Therefore, the Charter also provided five exceptions to competitive sealed bidding: (1) low cost purchases, where the cost of the public bidding might have outweighed the value of the goods or services to be purchased; (2) emergency purchases, where the delay in bidding might have been more costly than the benefit; (3) sole source purchases, where there was no competition for the goods or services required; (4) consultant contracts, where the particular skills of a particular party might be required; and (5) special case contracts, a catch-all for purchases otherwise considered inappropriate for public letting.⁶⁰⁰

592. See generally N.Y. CITY ADMIN. CODE, tit. 6 (governing the City's procurement processes).

593. See N.Y. CITY CHARTER ch. 13 § 343 (1976, as amended through 1988).

594. See *id.* § 343(b).

595. See *id.*; see also, e.g., *Picone v. City*, 29 N.Y.S.2d 539 (Sup. Ct. N.Y. County 1941); *Martin Epstein Co. v. City*, 100 N.Y.S.2d 326 (Sup. Ct. N.Y. County 1950).

596. See N.Y. CITY CHARTER ch. 13 § 343(b) (1976, as amended through 1988).

597. *Id.*

598. See N.Y. ADMIN. CODE § 6-115 (1988); BRIEFING BOOK, *supra* note 191, at VII-A-19.

599. See *A Ship Without A Captain*, *supra* note 586, at 477-80.

600. See N.Y. CITY CHARTER ch. 13 (1976, as amended through 1988).

Publicly let contracts constituted about sixty percent of all contracts.⁶⁰¹ Consultant and special case contracts which had to be approved by the Board accounted for most of the other forty percent. They were used to obtain most of the City's social services and architectural and engineering consultants, as well as specialized goods and equipment.⁶⁰²

The Charter assigned responsibility for the procurement of services to the agency charged with providing those services and for the procurement of goods for all agencies to the DGS.⁶⁰³ DGS was also charged with construction contracts.⁶⁰⁴ Since the 1936 Charter, the Board of Estimate had been responsible for regulating publicly let contracts, approving contracts to other than the lowest responsible bidder, and, for the most part, approving contracts not publicly let.⁶⁰⁵

Other than the requirement for Board approval, there were few rules governing consulting and special case contracts. The Board was supposed to approve the processes for letting the contract and then to approve the contract.⁶⁰⁶ In fact, however, the Board only approved the contract after it had been let, leaving the contracting agency to determine the procedures.⁶⁰⁷ From this abdication of responsibility flowed an agency-by-agency practice of procurement. This was one reason for Mayor Koch's establishment of the Office of Contracts in 1987.⁶⁰⁸ Typically, these contracts would be let either following a request for proposals or on a sole source basis.⁶⁰⁹ Sometimes the City would consult a pre-qualification list for special case or consultant contracts.⁶¹⁰ The list included providers who had proven competent and responsible.

After 1987, except for social service renewal contracts, emergency contracts, and low-cost purchases, any contract not subject to open bidding had to be submitted to the Office of Contracts first for a review of the reason. After the vendor had been selected and before submission to the Board of Estimate, there was another review to confirm that the required procedures had been followed.⁶¹¹

601. See BRIEFING BOOK, *supra* note 191, at VII-A-2.

602. See *id.* at VII-A-27.

603. See N.Y. CITY CHARTER ch. 13 §§ 344(a)-(b) (1976, as amended through 1988).

604. See *id.* § 344(b).

605. See N.Y. CITY CHARTER ch. 13 (1936).

606. See N.Y. CITY CHARTER ch. 13 § 349 (1976, as amended through 1988).

607. See *id.* § 343(b).

608. See *City Contracts and the City Charter*, *supra* note 578, at 3.

609. See Richard Ravitch, *Letter from the Chair*, CHARTER REVIEW (N.Y. City Charter Revision Comm'n), Late Spring 1988, at 3.

610. See N.Y. CITY CHARTER ch. 13 § 318 (1989).

611. See N.Y. CITY CHARTER ch. 13 § 343(b) (1976, as amended through 1988).

Once a contract had been executed, it had to be registered by the comptroller.⁶¹² At a minimum, the purpose for this registration was to make sure that there was an appropriation for such a contract. No contract could be effective unless registered. The comptroller had thirty days in which to perform the task, after which the contract was deemed registered.⁶¹³ As we will see, there were questions about whether the comptroller could refuse to register a contract based on a belief that something was wrong with it.⁶¹⁴

Once executed, under the City's Administrative Code, agencies were required to monitor the performance of every contractor and to maintain performance evaluations at a central spot open to agencies and members of the Board of Estimate and Council.⁶¹⁵ In the mid-1980s, the City began to develop contractor databases and to require that these databases be checked prior to contracting.⁶¹⁶ The City could also debar contractors for a period of three years,⁶¹⁷ but there were few rules governing how this was to be done.

B. *The 1989 Changes*

The decision to abolish the Board of Estimate made it easier to do what the Commission would probably have done anyway—make the mayor accountable for procurement. We and the overwhelming majority of the Commission shared the view of State Comptroller Ned Regan:

Once you put a purely administrative function into that kind of a quasi-legislative body . . . that is the source of the problem. [R]egardless of . . . how you feel about the . . . Board of Estimate and borough presidents . . . , they should not, under any circumstances, have the power over contracts that they do. . . .

. . . .

It is an administrative function if there ever was one. It ought to be placed with the administrator, and the administrator as we know [it should] run[] for office every four years. That is where the judgment comes [from].⁶¹⁸

612. *See id.* ch. 5 § 93(n).

613. *See id.*

614. *See infra* notes 622-28 and accompanying text.

615. *See* BRIEFING BOOK, *supra* note 191, at VII-A-29 to VII-A-30.

616. *See City Contracts and the City Charter*, *supra* note 578, at 3.

617. *See* N.Y. CITY CHARTER ch. 13 § 345 (1976, as amended through 1988).

618. Legislative Hearing, Mar. 1, 1989, at 312-14.

Richard Ravitch had reached the same conclusion in 1988, listing as one of his proposals for a new government: "[To] hold the mayor clearly accountable for the procurement activities and decisions of the administration while subjecting the process to checks and balances which do not diffuse responsibility."⁶¹⁹

Our own goals, building upon those recommended in the Ravitch Report, were for a more rational, more competitive, more open, and more accountable procurement process. Put simply (probably too simply) we saw a process in which: (1) the services intended to be contracted for (but not specific contracts) would be debated annually through the contract budget (discussed in the budget section of this chapter);⁶²⁰ (2) the responsibility and accountability for contracts would be assigned entirely to the executive branch and, in some cases, the mayor himself; (3) greater opportunities would be offered to potential vendors through the required provision of more information in a more sensible way and through attention to prompt payment; and (4) post-contract monitoring would include an opportunity for borough president involvement, as well as oversight by other elected officials.⁶²¹

1. General Municipal Law Section 103

The decision to abolish the Board of Estimate did raise one serious legal question: whether its demise triggered the applicability of a state law requiring that "[e]xcept as otherwise expressly provided . . . by a local law adopted prior to September first, nineteen hundred fifty-three, all contracts for public work involving an expenditure of more than twenty thousand dollars and all purchase contracts involving an expenditure of more than ten thousand dollars, shall be awarded . . . to the lowest responsible bidder . . ."⁶²² The Charter process in place in 1989 had been adopted prior to 1953;⁶²³ our concern was that substantial changes might trigger the state law—an extremely undesirable consequence given the extent and

619. Memorandum from Richard Ravitch, Chairman, 1988 Charter Revision Commission, to All Members of the Commission (Mar. 28, 1988) (section titled "Contracting & Procurement") (on file with the *New York Law School Law Review*).

620. See *supra* text accompanying note 359.

621. See CHAIR'S RECOMMENDATIONS, *supra* note 423, at 6-7.

622. N.Y. GEN. MUN. LAW § 103(1) (McKinney 1987).

623. See *Changes to the City Charter, 1653-1989*, in THE ENCYCLOPEDIA OF NEW YORK CITY, *supra* note 32, at 203, 207.

sophistication of the City's procurement needs.⁶²⁴ Lane believed that the statute would not be applicable for two reasons: first, because of its text and context, and second, because of a view set forth in a state comptroller's opinion that minor changes in procurement practices would not trigger the applicability of this statute.⁶²⁵

There was an interesting story in our attempt to change the procurement process and obey state law. As noted earlier, State Comptroller Ned Regan had been a rigorous critic of the City's procurement process and urged many of the changes we had made.⁶²⁶ In August, after the final approval of the new Charter, we received a congratulatory letter from the comptroller, a press release, and an attached analysis from his staff. But the staff analysis suggested that at least some of our good work might violate state law for the reasons suggested above. Lane called the comptroller, who acknowledged some surprise at the situation. Within an hour, Lane received a return call from Regan promising to halt distribution of the document and requesting a staff meeting. The meeting in the offices of the corporation counsel convinced the comptroller's staff that the process would not violate state law.

Unfortunately, at least with respect to the best-interest exception to the low bid requirement for public work, the New York Court of Appeals has not agreed with our legal analysis. In *Diamond Asphalt v. Sander*,⁶²⁷ the court held that granting the mayor power to bypass the low bidder for the best interest of the City under section 313(b)(2) triggered the applicability of General Municipal Law section 103(1), under which no such bypass is authorized.⁶²⁸ The City submitted a motion for reargument, which was denied.

2. The Mayor and the Agencies

From the start, our goal was to make the mayor and the City's agencies and departments accountable and responsible for contracts. This was consistent with our overall efficiency and accountability goals and would remedy one of the main criticisms of the procurement process. Schwarz made our position clear on this point immediately: "It's to make the

624. See Eric Lane, *The Sorrows of Seabury or How Not to Read a Statute*, CITYLAW (Center for N.Y. City Law, N.Y.L. Sch., New York, N.Y.), Sept./Oct. 1995, at 73, 77, 79.

625. See *id.* at 78.

626. See OFFICE OF THE NEW YORK STATE COMPTROLLER, REFORMING THE CONTRACT PROCESS IN NEW YORK CITY I (Report 17-87, Sept. 11, 1986).

627. 92 N.Y.2d 244 (1998).

628. See *id.* at 264.

Mayor clearly accountable . . . for procurement decisions so that it will not be possible, in the future, for people to say, 'Well, gosh, it's not my responsibility.'⁶²⁹

We made the agencies responsible for procurement, and we required the mayor or designated deputy mayor to approve basically all noncompetitively bid contracts over \$2 million.⁶³⁰ This requirement stemmed from a Commission discussion that included an alliance between Commissioners Leventhal and Gribetz that both acknowledged was unusual.

THE CHAIRMAN: Now, Nat has an item with respect to contracts that I think we should focus on.

SECRETARY LEVENTHAL: It's actually Judah and me together. We would like, it's unprecedented.

. . . .

COMMISSIONER GRIBETZ: No yawning. Now be alert, it is coming from the two of us.

. . . .

SECRETARY LEVENTHAL: [A]ll we're saying is that we should fix responsibility, at least in certain instances, for certain contracts above the Commissioner level, within the executive, so that we know we are taking a second look at some of these contracts.⁶³¹

We made one exception to the principle of mayoral procurement accountability. For independently elected officials and the Council, the Charter designated the elected official and the speaker or a member of the Council designated by the speaker as the one accountable for the contracts of their office or institution.⁶³² We wanted these offices and institutions to act independently of the mayor, but they also had to be accountable for their procurement decisions.

Agency exercise of contract power was not to be done in the dark. For most non-competitively bid contracts of more than \$100,000, the head or deputy head of an agency was required to hold a public hearing before entering into the contract.⁶³³ Some Commission members were concerned that such hearings would waste agency time and add the very inefficiency

629. Public Meeting, Apr. 25, 1989, at 10-11.

630. See N.Y. CITY CHARTER ch. 13 § 317(b) (1989).

631. Public Meeting, May 15, 1989, at 208-12.

632. See N.Y. CITY CHARTER ch. 13 § 310(1) (1989).

633. See *id.* § 326.

we were trying to avoid. But this dissent was quelled by the observation of former First Deputy Mayor Nat Leventhal at the April 25 public meeting:

Well, I start with the fundamental assumption that one of the positive aspects of the Board of Estimate . . . is that there has to be a public hearing before a major contract is entered into, at least, other than through competitive bidding. . . . [T]here ought to be some requirement that the Commissioner, before he signs a contract, at least, of certain size, have the same obligation to hear what other people might want to say and, hopefully, it could be done in such a way that it's no more burdensome to the process of contracting . . . than the current Board of Estimate

But the concept of . . . [letting] everybody enter into contracts without this requirement where he has to sit there, or she has to sit there and hear the criticism and take it and know what they're doing and maybe have their mind[s] changed, I think would be a shame.⁶³⁴

For efficiency reasons, our initial proposal exempted contract renewals from such hearings.⁶³⁵ We thought criticism of such contracts could come through the borough president monitoring process described below.⁶³⁶ But Commissioners Leventhal and Gribetz joined forces again to persuade the Commission that the hearings would not be very time consuming. As Commissioner Gribetz said, "That's about four meetings of the Board of Estimate if the calendar is about 300 or 400 items each, that it used to be in my day. It doesn't impress me."⁶³⁷

In the end, there was a compromise. The renewal exemption was removed, and the Procurement Policy Board ("PPB") was granted the power to:

exempt from this public hearing requirement contracts to be let which do not differ materially in terms and conditions, as defined by the board, from contracts currently held by the City where the

634. Public Meeting, Apr. 25, 1989, at 84-85.

635. See Public Meeting, June 20, 1989, at 325.

636. The Human Resources Administration (the City's main social service department) had said that if renewals were excluded, the Commission's proposal would cover approximately 175 contracts a year compared to 1100 to 1200 hearings they would need to hold if renewals were included. See *id.* at 332-33.

637. *Id.*

parties to such contracts are the same; provided, that under no circumstance may such exemption apply to any contract in value exceeding ten million dollars.⁶³⁸

3. General Procurement Rules and Exceptions

Within an environment designed to promote executive responsibility and accountability, the new Charter maintained competitive sealed bidding as the normal method for the procurement of goods and services, along with the special case, small, and emergency purchase exceptions.⁶³⁹ This decision sparked some debate, because many of the City's most important contracts—those with social service agencies—were let through requests for proposals to insure that price was not the only determinative factor.⁶⁴⁰ The concern, expressed most clearly by Commissioner Leventhal, was that “by focusing on competitive sealed bids as though that were the best way of making awards of contracts, . . . we are a little behind the times.”⁶⁴¹ On this point, we thought our hands were tied by state law.⁶⁴² As Schwarz noted: “State law . . . creates the preference for competitive sealed bidding and . . . [we are] trying to keep ourselves in the grandfather protection.”⁶⁴³ To which he then added:

[A]s a matter of legislative history . . . is it useful to say that we are not . . . trying to stack the deck in terms of how the agencies are meant to proceed; they have to follow these procedures, but we're not implying . . . that we think one system is better than the other.⁶⁴⁴

The special case exception was expanded to cover consultant contracts.⁶⁴⁵ Without the Board of Estimate, agencies were free to determine their own use of the special case exception within the new standards set forth in the Charter and under the rules established by the Procurement Policy Board (“PPB”).⁶⁴⁶

638. N.Y. CITY CHARTER ch. 13 § 326(a) (1989).

639. *See id.* § 312.

640. *See* Public Meeting, June 20, 1989, at 152-54.

641. *Id.* at 148.

642. *See id.* at 151-54; *see also* N.Y. GEN. MUN. LAW § 103(1) (McKinney 1987).

643. Public Meeting, June 20, 1989, at 150.

644. *Id.* at 150-51.

645. *See* N.Y. CITY CHARTER ch. 13 § 312(b)(1) (1989).

646. *See id.* § 311(b).

Also noteworthy was our expansion and amendment of the City's disclosure obligations for opportunities for contracts and awards of contracts.⁶⁴⁷ We hoped both to improve opportunities for bidders and to increase competition. For example, contract information had to be listed by type rather than by agency.⁶⁴⁸ Also, agencies were required to reach out to vendors continuously by identifying every category of goods and services regularly procured, and by publishing in the *City Record*⁶⁴⁹ a notice soliciting the names of vendors interested in future procurement opportunities for those goods.⁶⁵⁰

Finally, with respect to competitively bid contracts, the agency letting the contract was given authority to determine whether the successful bidder was responsive and responsible.⁶⁵¹ This was intended to eliminate the Board's burdensome processes to expedite determinations of non-responsibility and any court challenges to such decisions.⁶⁵²

Among the most significant procurement process changes was the definition of the special case circumstances that justify the use of procurement methods other than competitive sealed bidding.⁶⁵³ As noted earlier, this was a very important process for the City, particularly because of its extensive procurement of social services. Along with critics of the process, we had concluded that case-by-case determination by the Board of Estimate had produced no systematic approach to such choices. Nor did an agency even have to justify—publicly, or in most cases even privately—a decision to avoid competitively sealed bids. We attempted to fix this by defining special case situations as those in which “it is either not practicable or not advantageous to the City to use competitive sealed bidding.”⁶⁵⁴ We added a list of circumstances intended to describe situations in which price should not or could not be the sole determining factor.⁶⁵⁵

In addition to defining the circumstances under which alternative procurement methods could be used, agencies were required always to use

647. *See id.* § 325(a)(3).

648. *See id.*

649. CITY RECORD is published weekdays and includes the City's public notices. Its mandate is found in section 1066 of the Charter. *See* N.Y. CITY CHARTER ch. 47 § 1066 (1989).

650. *See id.* ch. 13 § 325(a)(3).

651. *See id.* § 313(b)(2).

652. *See id.* § 313(b)(3).

653. *See generally id.* §§ 314-16.

654. *Id.* § 312(b).

655. *See id.*

the procurement method most competitive under the circumstances.⁶⁵⁶ The alternative methods, ranked by competitiveness, were: (1) competitive sealed bids from pre-qualified vendors;⁶⁵⁷ (2) competitive sealed proposals;⁶⁵⁸ (3) competitive sealed proposals from pre-qualified vendors;⁶⁵⁹ (4) sole source;⁶⁶⁰ and such other alternative as defined by the PPB.⁶⁶¹ The PPB was also authorized to identify types of goods and services for which competitive sealed bidding is not possible or advantageous.⁶⁶² We intended this authority to remove the burden on agencies of making such determinations themselves and to force consistency. To choose an alternative method, an agency had to justify its decision in writing, to be filed with the PPB and summarized in the City Record.⁶⁶³

A word about prequalification is in order. Prequalification of vendors permits agencies to evaluate the capability and qualification of potential vendors before issuing requests for bids or proposals for specific contracts.⁶⁶⁴ Particularly in the area of construction, prequalification produces a more efficient procurement process. An agency can limit its selection to those on the prequalified list without public advertising and the same level of concern over capability. One concern, however, was how potential new vendors, including minority-owned and women-owned businesses, might make the list. As Commissioner Michel noted, "we have to be careful as we draft this that those who are currently doing business with the City [do not] have a leg up and get locked in forever as their suppliers."⁶⁶⁵ We addressed this concern by requiring that "entry into a pre-qualified group shall be continuously available."⁶⁶⁶

Also for the first time, the Commission adopted standards for requests for proposals, the second on the list of procurement alternatives. Generally such an approach is appropriate when price alone is not a sufficient measure of the product to be purchased, but historically the City had used such an approach in a wide variety of situations. This specific approach is very important to the City because of the broad use of not-for-profit entities

656. *See id.*

657. *See id.* § 318.

658. *See id.* § 319.

659. *See id.* § 320.

660. *See id.* § 321.

661. *See id.* § 322.

662. *See id.* § 317(a).

663. *See id.* § 322.

664. *See id.* § 324 (outlining the process for prequalification).

665. Public Meeting, June 20, 1989, at 156.

666. N.Y. CITY CHARTER ch. 13 § 324 (1989).

for an extensive array of social services.⁶⁶⁷ Price alone should not determine the vendor of such services. So serious was the issue of not-for-profits to the Commission (several members were knowledgeable because they ran or worked for not-for-profits, and many were on the boards of not-for-profits) that we required the PPB to address those circumstances in which "the use of procurement is . . . desirable to develop, maintain or strengthen the relationships between non-profit and charitable organizations and the communities where services are to be provided."⁶⁶⁸

The Commission required a number of steps to ensure that notification of such opportunities was broad and that information about what the City wanted to buy was equally and fairly shared with all potential suppliers.⁶⁶⁹ Finally, the Commission adopted a number of provisions that were intended to ensure that sole source contracts would be employed only when there really was just a single source.⁶⁷⁰ All of these changes were adopted with a broad consensus among the Commission members.

One matter that did receive considerable discussion, though in the end little dissent, was our attempt to deal with the thorny question of access to the contract process of minority-owned and women-owned businesses.⁶⁷¹ We discuss this issue in Chapter VIII.⁶⁷²

4. The Procurement Policy Board

One of the most substantial criticisms of the City's procurement process was that, notwithstanding the Charter framework, the procurement system was "fragmented and chaotic"⁶⁷³ and not understandable or consistent. Our answer was to establish an agency to develop comprehensive rules for all contracts let under the Charter.⁶⁷⁴ This PPB was to be comprised of five members, three appointed by the mayor and two by the comptroller.⁶⁷⁵ To increase outside expertise, one appointee of each elected official could not be employed by the City.⁶⁷⁶ All of the appointees had to have demonstrated appropriate business or professional

667. See generally Public Meeting, Apr. 25, 1989, at 34 (discussing the preferred forms of procurement procedures employed by New York City).

668. N.Y. CITY CHARTER ch. 13 § 311(b)(4) (1989).

669. See, e.g., *id.* §§ 313(b)(1), 334.

670. See *id.* § 321.

671. See Public Meeting, Apr. 25, 1989, at 49-65.

672. See discussion *infra* Chapter VIII.

673. *A Ship Without a Captain*, *supra* note 586, at 461.

674. See N.Y. CITY CHARTER ch. 13 § 311 (1989).

675. See *id.* § 311(a).

676. See *id.*

experience.⁶⁷⁷ We decided to have appointees from the comptroller, at least in part, out of the concern over triggering the more rigid procedures required under the General Municipal Law section 103.⁶⁷⁸ But as Schwarz expressed, we also thought that “through the audit responsibility, the comptroller has now, and will continue to have . . . expertise in the field . . . of contracts.”⁶⁷⁹

5. The Role of the Comptroller

We also clarified the comptroller’s authority to register contracts.⁶⁸⁰ Should the function be basically a ministerial act, as the executive branch contended? There was considerable debate on this question, during which Commissioners Leventhal and Gribetz returned to their customary opposite sides. Some reference is important to explain the ultimate definition of the comptroller registration function and to describe the Commission’s dynamics.

Richard Ravitch had proposed that the role of the comptroller in registering contracts should be to verify the appropriation, the honesty of the process, and the integrity of the contractor.⁶⁸¹ Lane had helped craft that suggestion, but by the beginning of 1989 he had decided the comptroller should simply verify the appropriation.

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.⁶⁸² But on the registration of contracts, this line was not clear. In any event, our initial proposal in April 1989 was that to help promote efficiency and accountability, the comptroller’s role on contracts should be ministerial—limited to verifying the availability of the appropriation.⁶⁸³ This view was shared by Leventhal: “I don’t think this should become an opportunity for a de novo review of whether the contract should be entered into. You’ll never get a contract registered.”⁶⁸⁴

677. *See id.*

678. N.Y. GEN. MUN. LAW § 103(1) (McKinney 1987).

679. Public Meeting, Apr. 25, 1989, at 80.

680. *See* N.Y. CITY CHARTER ch. 13 § 328 (1989).

681. *See* Public Meeting, Apr. 25, 1989, at 100.

682. *See generally id.* at 94-115 (discussing the comptroller’s duties and responsibilities regarding contract registration).

683. *See id.* at 95.

684. *Id.*

Gribetz responded: "I'm not offended by the phrasing that we used last year."⁶⁸⁵ Essentially, it had been suggested during the debate of the Ravitch Commission that the comptroller have the power to block a contract based on the integrity of the process and its participants. Gribetz continued, "I think that has more of a benefit and less of a downside of obstructionism in a specific case. . . . To my mind, . . . I think that it is something that he should do . . . in the business of checks and balances"⁶⁸⁶

The issue was taken up by Commissioners Trager and Murphy. Trager, as we have noted, had been the U.S. Attorney for the Eastern District of New York, and Murphy had been Deputy Commissioner of the New York City Police Department. Together, their view of such an issue carried weight. Trager's view was:

[T]he Comptroller . . . would have the bully pulpit of being able to say . . . , "I don't think this contract was arrived at by proper procedures," but I still would not want to allow him to use that as a device . . . to delay.

. . . .

I want the clarity that the Mayor is responsible.⁶⁸⁷

Murphy added, "I don't think we should really build it in to give him that kind of power to stop the process."⁶⁸⁸ While the sense of the meeting clearly favored this position, we agreed to keep studying the issue.⁶⁸⁹

We returned to it again at the public meeting of May 13.⁶⁹⁰ Gribetz restated his position: "[T]o me, the value of the integrity of the contract process . . . in a government without a Board of Estimate outweighs the other value."⁶⁹¹ In support of this position he offered the New York state model under which the state comptroller has considerable authority to block a contract.⁶⁹² We continued to maintain our commitment to a more limited role for the comptroller and offered a modest compromise to resolve the issue. As presented by Schwarz:

685. *Id.* at 99-100.

686. *Id.*

687. *Id.* at 102.

688. *Id.* at 106.

689. *See id.* at 107.

690. *See* Public Meeting, May 13, 1989, at 378-79.

691. *Id.* at 384.

692. *See id.* at 379.

Could we get a combination of those two . . . By limiting the registration power to the availability of the appropriation . . . but stating that the Comptroller—if the Comptroller has any doubt about the other items [integrity of process or participants] the comptroller should bring those forthwith to the attention of the executive.⁶⁹³

This was the gist of the ultimate resolution. The new Charter provided that the comptroller could object to a contract on grounds that either the process was corrupt or that a vendor was corrupt. But the mayor could insist on the registration of such a contract, after answering the comptroller's objection in writing.⁶⁹⁴ This compromise reduced the friction and kept the policy goal of mayoral accountability intact.

6. Slow Pay

One point of concern at public hearings was the City's tardy payment of its contract obligations.⁶⁹⁵ This was not only unfair to vendors, but many critics also thought it cost the City money and reduced the availability of high quality goods and services as potential contractors either decided not to do business with the City or tried to cover the cost of anticipated slow pay in their contract proposals.⁶⁹⁶ Slow pay was particularly harmful for not-for-profit providers of social services. As described by Darwin Davis, Executive Director of Black Agency Executives:

If, in fact, the City will continue to delay payment for services, and you have to understand community based organizations are not wealthy organizations, very few of them have endowments, very few have monies that they might roll over to deliver services while they are contracted to deliver them How do you pay staff? How do you even submit the reports you have to submit to be evaluated in that interim.⁶⁹⁷

693. *Id.* at 385.

694. *See* N.Y. CITY CHARTER ch. 13 § 328(c) (1989).

695. *See* Public Meeting, June 26, 1989, at 262-63, 265.

696. *See id.* at 270.

697. Legislative Hearing, Mar. 1, 1989, at 212-13.

Some commissioners, especially Amy Betanzos, wanted to introduce an interest penalty for slow pay on contracts.⁶⁹⁸ We were concerned that such detail was beyond our function as charter writers. As Nat Leventhal put it, "There are a lot of operational problems out there" not addressed in the Charter and if we "pluck this out" as "worthy of special consideration, I would feel better knowing how much money is at stake."⁶⁹⁹ Lane did determine, through consultation with the Koch administration, that an interest requirement would not "inadvertently cause some terrible fiscal impact."⁷⁰⁰ Believing that the Charter should not be overly legislative, however, we concluded that the best approach would be to instruct the PPB to make rules "for the expeditious processing of payment vouchers . . . including . . . a program for payment of interest to vendors."⁷⁰¹

7. Oversight

With procurement responsibility moving entirely to the mayor (subject to the Council's annual contract budget), we had to provide that the performance of contracts would be monitored and evaluated. Agencies would have affirmative responsibility for monitoring contract performance as set forth explicitly in section 333(a).⁷⁰² Such evaluations had to be included in an agency contract file,⁷⁰³ which had to be maintained and publicly accessible under section 334.⁷⁰⁴ Also, the comptroller had the power to conduct post-contract audits of any contract.⁷⁰⁵ We also knew that without the Board of Estimate, the Charter should include some formal way for borough presidents to assess the performance of contracts in their respective boroughs before any renewal of such contracts.⁷⁰⁶ Ravitch had proposed that a borough president could force a hearing on an objection to renewal of a contract.⁷⁰⁷ There was good reason to believe that borough presidents with their close ties to community boards and other active groups and citizens would have a good sense of contract performance in their boroughs.

698. See Public Meeting, June 26, 1989, at 266, 269.

699. *Id.* at 285-86.

700. Public Meeting, July 31, 1989, at 138.

701. N.Y. CITY CHARTER ch. 13 § 332 (1989).

702. See *id.* § 333(a).

703. See *id.* § 334(a).

704. See *id.*

705. See *id.* § 330.

706. See *id.* § 333(b)(1).

707. See Public Meeting, May 6, 1989, at 90.

We decided to work with the Ravitch proposal. Schwarz proposed a monitoring function for borough presidents at our May 6 public meeting, indicating in response to an inquiry from Commissioner Richland that it should be limited: "We don't want to give them a veto, that's wrong in principle . . ." ⁷⁰⁸ Not surprisingly, borough presidents disagreed. Bronx Borough President Ferrer urged that: "[T]he . . . Mayor's Office of Contracts must be reorganized to include an appointee of each Borough President. This office would be responsible for holding hearings and approving contracts currently covered under section 349 [special case] of the City Charter." ⁷⁰⁹ But such an approach was so inconsistent with our insistence on mayoral accountability that it was not seriously considered. For the Commission, the task was to determine an appropriate and useful post-contract role for the borough presidents.

At the May 13 public meeting, we proposed that, if a borough president concluded that a particular contract in his or her borough should not be renewed or be renewed only with particular terms or conditions, he or she should notify the executive branch. ⁷¹⁰ If the borough president was not satisfied with the executive response, he or she could convene a panel, consisting of an appointee of the mayor, the comptroller, and an administrative judge from the City's Office of Administrative Trials and Hearings (OATH), to hear the borough presidents' claims. ⁷¹¹ The panel's judgment would not obligate the executive branch in any way. But as Schwarz stated, "I can't imagine if the three people say the contract ought [not] to be renewed that that wouldn't be persuasive." ⁷¹²

The OATH judge suggestion drew fire from Commissioner Trager, who believed this would make the process too judicial or formal. He favored a more flexible process. ⁷¹³ Commissioner Gribetz proposed that the borough president alone be the hearing officer and that the agency be forced to come before the borough president. ⁷¹⁴ Trager replied as follows:

[W]hat I think may happen, Judah, and the reason I don't go along with it is that they'll end up with less of a voice, because I think it will [be] viewed by the Mayoral agency as just a hoop to get

708. *Id.* at 102.

709. Public Meeting, May 10, 1989, at 54.

710. *See* Public Meeting, May 13, 1989, at 336-37.

711. *See id.* at 337-38.

712. *Id.* at 338.

713. *See id.* at 341-42.

714. *See id.* at 351-52.

through. They'll send down whoever will be necessary to give an answer and they'll dismiss [it].⁷¹⁵

But in another of those infrequent alliances with Commissioner Gribetz, Commissioner Leventhal responded: "We're talking about an advisory procedure at best, and, therefore, I think . . . [that we should] let the borough presidents control the process and make their point as strongly as possible and not have to plead their case to the City Council President, the Mayor's representative or anybody else."⁷¹⁶ But the Trager view carried by an eight-to-five vote;⁷¹⁷ there would be a mixed panel consisting of the mayor, city council president, and comptroller.⁷¹⁸

8. Public Information

Throughout the process, we paid considerable attention to making information about City government public. With our interest in expanding opportunities for new vendors and also for public monitoring, we needed a way to make contract information easily available. We borrowed a section from the American Bar Association's model procurement code.⁷¹⁹ Section 1064 requires the mayor to maintain a central contract registry with a copy of every contract, information on how it was let, and other details important for public review.⁷²⁰

CHAPTER VIII. BEYOND THE BASICS

The prior chapter describes how the Commission redistributed the Board's functions with respect to the budget, land use, franchises, and contracts. As discussed previously,⁷²¹ for both substantive and political reasons, the Commission did much more than "just" fix the Board in reallocating its responsibilities.

This chapter describes a potpourri of additional Charter changes that went beyond the reallocation of the Board's powers and responsibilities and beyond the changes relating to the Council and other elected officials.

715. *Id.* at 354.

716. *Id.* at 355-56.

717. *See id.* at 362.

718. *See* N.Y. CITY CHARTER ch. 13 § 333(b)(2) (1989).

719. *See* MODEL PROCUREMENT CODE FOR STATE AND LOCAL GOV'TS §§ 1-401, 3-202 (Feb. 1979).

720. *See* N.Y. CITY CHARTER ch. 47 § 1064 (1989).

721. *See* discussion *supra* Chapter VII.

While each of these changes is independently important, they all relate to the new Charter's goals: first, countervailing sources of power were necessary to balance the enormous powers of the mayor and the mayor's bureaucracy; second, increased information about government would empower voters and enhance the quality of debate about City affairs; and, third, increased opportunities needed to be provided for all New Yorkers to seek government business and jobs.

In addition, we hoped that each of these policy driven changes would also help build the constituency necessary to increase support for the proposed new Charter.

The new programs and policies described below are the following: the Independent Budget Office ("IBO"); new requirements relating to open government and regular reports on the social, economic, and environmental health of the City; the delivery of services; programs relating to equal opportunity; limits on high City officials also holding high political party posts; civil service issues; and decentralization of the City's delivery of services.

I. THE POWER OF INFORMATION AND INDEPENDENT IDEAS

Before and after the 1989 Charter changes, the city had a powerful mayor, supported by a large, strong bureaucracy. On certain matters (e.g., revenue estimates), the mayor had greater powers than governors or the President.⁷²² No institution could match the ability and strength of the mayor's analytical capacities on fiscal issues, such as those in the Office of Management and Budget ("OMB").⁷²³ Under the new Charter, the City Council would have substantial powers to check the mayor, but these powers were only potential powers whose actual use was untested. To effectively exercise these powers, the Council would need more access to information and independent analysis. While the media devoted much coverage to New York City government, the media focused primarily on spectacular, short-term issues and not on how well New York City compared with other cities and how communities within the city compared with each other. City residents were not well informed about the workings of their government, and the City government did little to direct residents' attention its way.

To address these concerns, we created the Independent Budget Office and added measures for ensuring greater access to public information to the City Charter.

722. See *id.* ch. 10 § 225 (1989); U.S. CONST. art. II; N.Y. CONST. art. IV, § 3.

723. See N.Y. CITY CHARTER ch. 10 § 225 (b) (1989).

A. *The Independent Budget Office*

Chapter XI of the new Charter created the IBO.⁷²⁴ The IBO provides fiscal analyses to the public and responds to the requests of the Council, its members, and elected officials other than the mayor.⁷²⁵ It provides independent revenue estimates and other analyses at crucial points in the Charter-mandated budget cycle and issues research findings on fiscal matters facing the City.⁷²⁶ It serves as an independent, nonpartisan check on the mayor's OMB.⁷²⁷ It is not an additional fiscal monitor like the Financial Control Board, but rather an independent budget office modeled on the respected Congressional Budget Office and the California Legislative Analyst.⁷²⁸

The IBO had its genesis in one of the Commission's early legislative hearings held before the Supreme Court decided *Morris*. During a meeting addressing oversight of the City's government, a panel discussed independent budget offices in other cities.⁷²⁹ The witnesses included former directors of the Congressional Budget Office, the California Legislature's independent Legislative Analyst, and an analyst from Suffolk County.⁷³⁰

Research conducted by Frank Mauro also corroborated our view that City legislators and other elected officials received less information concerning budgets and fiscal analysis than did mayors, putting the legislators and other officials at a disadvantage in dealing with mayors.

We believed an independent, nonpartisan budget office could even the balance, allowing legislators and other officials to more effectively and responsibly check the mayor's budgetary powers. Moreover, the public would be better equipped to evaluate fiscal issues when provided with more than one competent source of analysis.

The Chairman's Initial Proposals to the Charter Commission included an IBO. At the end of our first round of Commission meetings, we decided not to include it among the Commission's preliminary proposals because

724. *See id.* ch. 11 § 259.

725. *See id.* § 260 (a).

726. *See id.*

727. *See In re New York Pub. Interest Research Group v. Giuliani*, 214 N.Y. L.J., Sept. 11, 1995, at 29.

728. *See id.*; *see also* David Kaplan & Christina Pretto, *Independent N.Y.C. Budget Office Called More Than Monitor*, 316 THE BOND BUYER, 29868 (Apr. 2, 1996).

729. *See* Legislative Hearing, Mar. 3, 1989, at 167-243.

730. *See id.*

there was not yet sufficient Commission support.⁷³¹ Instead, we waited until after the first round of public hearings to revisit the question.⁷³²

During the first round of hearings, we heard public testimony supporting the merits of an IBO. This testimony, in conjunction with public input and additional reflection, convinced us to include an IBO in the proposals to the Commission.⁷³³ Thereafter, the IBO sailed through the Commission.⁷³⁴

On June 22, the Commission discussed the policy reasons favoring an IBO.⁷³⁵ Frank Mauro again described the IBO as responding to the concern that the OMB, "which works for the executive branch," was "overly dominant" in the City's dialogue on fiscal matters.⁷³⁶ As David Trager added, the IBO was designed to give the "other institutions of government an institution of high standing to which they can turn for analysis, just as the executive branch can turn to the OMB."⁷³⁷

At this time, the assumption was that the new office, while nonpartisan and independent, would be tied to the Council in the same way as the Congressional Budget Office was tied to Congress.⁷³⁸ Peter Vallone, however, did not want an independent budget office within the Council, preferring to control all budgetary analysis for the Council through the speaker's own central Council staff.⁷³⁹ We found this institutional desire for a monopoly on fiscal analysis no more persuasive than the idea that the mayor should have such a monopoly through the OMB.

731. See Public Meeting, May 15, 1989, at 40-41.

732. See *id.*

733. See Public Meeting, June 15, 1989, at 7; see also Memorandum to Commissioners: Changes Proposed by the Chair to the Adopted Preliminary Proposals as a Result of Public Testimony and Comment, June 15, 1989, at 3 (on file with the *New York Law School Law Review*).

734. There were only two dissenting votes. Commissioner Gribetz voted no twice. On the initial vote, he was joined by Mario Paredes. On the final vote, Paredes voted in favor, and Gribetz was joined in dissent by Aida Alvarez. See Schwarz Commission Record of Minutes and Votes, June 22, 1989, at 2, and Aug. 1, 1989, at 12.

735. See Public Meeting, June 22, 1989, at 101-03, 114-31.

736. *Id.* at 114. This concern about OMB's unbalanced power was, moreover, shared by Commission members who had worked in the executive branch. This was true for Schwarz, despite his great respect for the people at OMB. (Indeed, when young people seeking to work in government ask where to start, Schwarz would always advise non-lawyers to work at OMB.) Nat Leventhal, the city's former first deputy mayor, indicated he was "not a big fan of OMB, as everybody knows." *Id.* at 118.

737. *Id.* at 126.

738. See *In re New York Pub. Interest Research Group v. Giuliani*, 214 N.Y. L.J., Sept. 11, 1995, at 29.

739. See Kaplan & Pretto, *supra* note 728.

As a result, we moved to an independent office outside of the Council, but available to serve it, its members, other elected officials, and the public.⁷⁴⁰ The IBO director was to be appointed for a four-year term by a majority of a committee consisting of the comptroller, the council president (now public advocate), a borough president chosen by the borough presidents (added at the suggestion of David Trager),⁷⁴¹ and a Council-member chosen by the Council.⁷⁴²

The day before the Commission finished its work, we added a Charter provision protecting the budget of the IBO.⁷⁴³ This is the only City office whose budget is protected by the Charter. We added this provision because we could foresee a future mayor and speaker, each jealous of their monopoly on budget information and analysis, seeking to eliminate an independent and respected rival source. Some told us that this led to the demise of the similar office which had been added to the Charter by the Goodman Charter Revision Commission in 1977, but eliminated in the City's budget negotiations of 1981.⁷⁴⁴

In any event, we were concerned (with good reason as subsequent events show⁷⁴⁵) that those who controlled information and analysis would seek to defund the IBO—as had been done to the prior charter commission's work—because they feared a non-partisan, independent, competent rival. We believed that these fears were actually good reasons to have an IBO.

740. See Public Meeting, June 22, 1989 at 101-02.

741. See *id.* at 120-24.

742. See N.Y. CITY CHARTER ch. 11 § 259(a) (1989). In addition, chapter 11 requires an IBO Advisory Committee consisting of various experts. See *id.* § 259(d).

743. See *id.* § 259(b).

744. A more pointed allegation was made during the March legislative hearing by Charles Brecher, director of research for the Citizens Budget Commission, who had said the office had been eliminated in 1981 as a trade-off for additional dollars for other elected officials. See Legislative Hearing, Mar. 3, 1989, at 202-10. When this was later repeated, Commissioner Leventhal, who had been the City's first deputy mayor at the time, said "I can't let that stay in the record. I was there at the time" and it was not what happened. See Public Meeting, June 22, 1989, at 118.

745. A series of two cases over two years held that the Dinkins and Giuliani administrations had illegally refused to fund the IBO. See *New York Pub. Interest Research Group v. Giuliani*, 644 N.Y.S.2d 38 (App. Div. 1996); *New York Pub. Interest Research Group v. Dinkins*, 83 N.Y.2d 377 (1994). After finally bowing to these court rulings, Mayor Giuliani still made unsuccessful attempts to get the state legislature to amend the Charter to eliminate the IBO and recently asked his 1998 Charter Revision Commission to do so. See Clifford J. Levy, *For Charter Panel, a Meaty Idea, but Will It Work?*, N.Y. TIMES, Aug. 7, 1998, at B1.

B. *Requiring More Openness*

Chapter 47 of the Charter ("Public Access to Meetings and Information") adds a number of provisions relating to open government and citizen access to information.⁷⁴⁶ A new Commission on Public Information and Communication was created with responsibility for enhancing the availability of public information about the workings of City government.⁷⁴⁷ The Commission was also required to publish annually a directory of computerized information produced or maintained by City agencies, which was required by law to be publicly available and include specific descriptions of the content of the information and the format and methods of accessing it.⁷⁴⁸ The public proceedings of the City Council and the City Planning Commission had to be made available for cable casting and broadcasting.⁷⁴⁹ Further, the City was required to include in all future cable franchises and franchise renewals a requirement that channels be designated for governmental use and that the franchisee provide the interconnections necessary for public broadcasting and cable casting of the proceedings of the Council, its committees, and the Planning Commission.⁷⁵⁰

In addition, City officials had to promptly furnish copies of papers on demand⁷⁵¹ and make their books, accounts and papers available for inspection.⁷⁵² Similarly, the mayor had to assure public access to information about City contracts and contractors.⁷⁵³ Various agencies and the Council and its committees had to hold open meetings.⁷⁵⁴ All budget documents required under the Charter had to be public and widely available.⁷⁵⁵

The sources of these provisions were many. We shared the conviction of James Madison that "[a] popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."⁷⁵⁶ From outside the Commission, Gene Russianoff was one of many pushing for more openness. Inside the

746. See N.Y. CITY CHARTER ch. 47 (1989).

747. See *id.* § 1061.

748. See *id.* § 1062.

749. See *id.* § 1063(b).

750. See *id.* § 1063(a).

751. See *id.* § 1058.

752. See *id.* § 1059.

753. See *id.* § 1064.

754. See *id.* § 1060.

755. See *id.* § 1065.

756. Letter to W.T. Barby, Aug. 4, 1822, 9 Writings of James Madison 103 (Hunt ed. 1910).

Commission, Fred Friendly had a particular interest in information technology and a general understanding from his years as a journalist that governments needed to be pressed to open up.

Public access to information being vital to the health of any democracy, it was particularly important where the government, like New York City's, had an unusually powerful mayor and mayoral bureaucracy. Moreover, in a City which had "essentially a one-party government, one wishes to maximize the opportunities for the newspapers and citizen groups to be able to have information so they can perform the function, in effect, of the fourth estate."⁷⁵⁷

Finally, at a citizen meeting in Jamaica, Queens, a "wonderful woman" described how she did not know what City services were available for her children.⁷⁵⁸ Generalizing from this, we added a requirement that the Commission on Public Information and Communication make recommendations concerning "the distribution of information to the public about the purposes and locations of the city's service delivery facilities."⁷⁵⁹

C. *Requiring More Substantive Information*

Our job was to write a Charter dealing with governmental power and responsibility, not legislation addressing citizens' daily needs. Of course, we hoped that many changes, including a more representative legislature, would impact favorably upon those daily needs. But structure, not services, was our direct responsibility. Not surprisingly, however, many people who testified or came to meet with us passionately pressed for better health care, a cleaner environment, better housing, better services for all, and a fairer shake for the city's poor and disadvantaged.

For example, Marshall England, the Director of the Health Action Resources Center in Harlem, pressed us in meetings to have the Charter guarantee health care essentials to every New Yorker.⁷⁶⁰ It was obvious both from studying the subject and listening to England that, as with so much else, there were vast disparities among New Yorkers regarding both access to, and the outcomes of, health care. Additionally, with the correlation between poverty and race, the health care available to, and health of, minority New Yorkers was both comparatively and relatively poor. Despite this correlation, it was not our job to legislate solutions. Moreover, even if it was our job, we did not know enough to do so.

757. Public Meeting, Aug. 1, 1989, at 428.

758. *See id.* at 430-31.

759. N.Y. CITY CHARTER ch. 47 § 1061(d)(6)(ii) (1989).

760. *See* Public Hearing, July 20, 1989, at 295-99.

Our response, therefore, was to unleash the power of information to help inform and motivate voters, who in turn could influence their legislators.

This response was the genesis of what is now section 16 of the Charter. Section 16 requires the mayor to submit an annual report to the Council, borough presidents, and community boards analyzing the "social, economic and environmental health" of the City and proposing strategies to address issues raised by the analysis.⁷⁶¹ The report is to include "generally accepted indices of unemployment, poverty, child welfare, housing quality, homelessness, health, physical environment, crime," and other similar issues.⁷⁶² Most importantly, the report is required to show comparisons on these matters among the City's "subdivisions" and between the City and relevant national, regional, or other standards or averages.⁷⁶³

The Commission's work had shown that there were unfair disparities on all the issues covered by section 16 among the communities of the City. Moreover, these disparities were not only unfair but, unless addressed, would increasingly harm the city by dividing it into "two cities."⁷⁶⁴ We also believed that the approach taken in section 16 would help garner support from two of our key building blocks as we looked toward the referendum minorities and good government groups.

After his meetings with us, England testified at the Commission's Public Hearing in the Bronx on July 20, 1989.⁷⁶⁵ The dialogue during this testimony was an example of how, as the summer progressed, the hearings were a two-way street. The Commission was continuing to receive and learn from comments and ideas from the witnesses. At the same time, the Commission was seeking support from witnesses, like-minded people, and the general public.

Before England started his testimony, Schwarz expressed "personal great appreciation" to England for "having called our attention to the power of information" leading to a "potentially enormous powerful section of the Charter."⁷⁶⁶ In response, England started his testimony by saying "you just disarmed me," and added that "we express those same statements when we make public statements about the Charter."⁷⁶⁷ England went on to add how impressed he was that only the night before, the Commission had sent a

761. See N.Y. CITY CHARTER ch. 1 § 16 (1989).

762. *Id.*

763. See *id.*

764. See N.Y. CITY CHARTER REVISION COMM'N, THE REPORT ON THE COMMISSION ON THE YEAR 2000, at 181 (1987).

765. See generally Public Hearing, July 20, 1989.

766. Public Hearing, July 20, 1989, at 295-96.

767. *Id.* at 296.

representative to a Harlem Hospital community board meeting and “we have seen the Charter listen to local groups.”⁷⁶⁸

Subsequently, during England’s substantive remarks, Schwarz interjected that:

the philosophy we have expressed [in Section 16] [is] in the line, I think, from St. John, ‘know the truth and the truth shall set you free,’ and what we want to do is to empower the argument with the facts. I believe that the facts that you have put forward when admitted by the government are undeniable in their force...[our] belief is that facts drive justice.⁷⁶⁹

Our work on chapter 47 and section 16 illustrates a more general point. A fair, open, and extensive process is critical to the legitimacy of any charter revision commission’s work. As the Marshall England, and wonderful-lady-from-Jamaica stories illustrate, the Commission members had to be open to listening—sometimes over a long period of time—to benefit from and creatively react to citizen ideas.

II. SERVICE DELIVERY

We heard from many citizens about their feelings that City services were inadequate and government bureaucrats too remote.⁷⁷⁰ Although much of this was outside our Charter mission, the concerns did have a relationship to the portions of our work that focused on working out the proper role for borough and community government.

The Commission took few specific steps to address service delivery concerns. We provided that agencies delivering services in neighborhoods should have “Borough Commissioners” to increase attention to local needs.⁷⁷¹ Similarly, borough presidents were given some discretion to shift services among community districts in their boroughs.⁷⁷² These changes were made in recognition that while the Charter “can’t pave the streets,”⁷⁷³ we might be able to increase attention given to the quality of local service delivery and, at the same time, add to borough presidents’ new executive responsibilities. However, the Commission tread lightly on service delivery matters because we recognized that matters concerning service

768. *Id.* at 296-97.

769. *Id.* at 299-300.

770. See discussion *supra* Chapter IV.

771. See N.Y. CITY CHARTER ch. 69 § 2704(f) (1989).

772. See *id.* § 2704(g).

773. Public Meeting, June 15, 1989, at 31.

delivery should be addressed more by legislation than by the Charter. Nat Leventhal and Pat Murphy also expressed concerns about not overburdening City agencies.⁷⁷⁴

Finally, we spent some time discussing whether the current system of decentralization was working as intended by the 1976 Charter Commission. However, given all else that we had to do to fix, as promptly as possible, the City's unconstitutional government and all the correlative related changes, it was not practical for the Commission to take on the task of a "full investigation of decentralization and what might be done to improve it."⁷⁷⁵ Therefore, the Charter required a one-time task force to report to the mayor and Council its conclusions on such matters and its recommendations for changes.⁷⁷⁶

III. DUAL OFFICE HOLDING

Section 2604(b) of the Charter prohibits elected officials and certain high-ranking administrative officials from serving as a political party leader while they hold their governmental job.⁷⁷⁷ During the Commission's debates, two theories in favor of the ban were discussed. First, it would serve to diffus[e] power, and "cut down on concentration of power" to have multiple sources from which "arguments can be developed."⁷⁷⁸ Second, as best expressed by Arch Murray:

[W]hen you elect someone to governmental office, you expect that person to give you his or her best efforts in that office . . . seeking with all of their energy to advance the interests of those constituents. When a person is elected to party office, I think the expectation is that he or she will seek to advance the interests of that political party [I]t strikes me as being less than totally fair to the other constituents who happen not to be a member of his political party.⁷⁷⁹

At the very end of the Commission's proceedings, Amy Betanzos, joined by Harriet Michel, expressed concern that applying the rule to Council members who were party district leaders would adversely impact minorities; seven of the nine members who would be affected were

774. See Public Meeting, June 20, 1989, at 25-96.

775. Public Meeting, May 15, 1989, at 174.

776. See *id.* at 175-81.

777. See N.Y. CITY CHARTER ch. 68 § 2604(b)(15) (1989).

778. Public Meeting, June 27, 1989, at 223.

779. *Id.* at 224.

minorities.⁷⁸⁰ Nat Leventhal argued that we should think of the principle, not the person.⁷⁸¹ Schwarz added that, as a pragmatic matter, if the prohibition were applied, two people would be elected, one by the party, and one to the Council, with the result that "other people will have an opportunity to thrive and to grow."⁷⁸² Nonetheless, the proposal with Council members as district leaders included in the ban failed. Once this proposal was deleted, the ban passed.⁷⁸³

IV. ISSUES OF FAIRNESS AND OPPORTUNITY

The new Charter included four offices related to equal opportunity and non-discrimination.⁷⁸⁴ These inclusions reflected the importance of the issue of race in the City when we were working,⁷⁸⁵ the centrality of these issues to many Commission members, and the shadow of the Justice Department. The new Charter also included an Office of Language Services.⁷⁸⁶

On April 25, the Commission began its discussion of what became the Office of Economic Opportunity, which focuses on opportunities for minority-owned and women-owned business enterprises to compete for City

780. See Public Meeting, Aug. 1, 1989, at 584.

781. See Public Meeting, Aug. 2, 1989, at 14-15.

782. Public Meeting, Aug. 1, 1989, at 590.

783. See Public Meeting, Aug. 2, 1989, at 16-25.

784. These were:

1. The Office of Financial and Economic Opportunity designed to "enhance the ability of minority and women-owned business enterprises to compete for city contracts, to enhance city agencies' awareness of such business enterprises, and to ensure their meaningful participation in the city procurement process." N.Y. CITY CHARTER ch. 13-A § 340(1) (1989). The office also was to administer any programs for "small and locally-based" business. See *id.* § 343;
2. The Office of Labor Services designed to assure that contractors doing business with the City afford equal opportunity and do not discriminate. See *id.* ch. 13-B § 350(3);
3. The Department of Personnel was given a number of new requirements to monitor the fairness of the City's own employment practices. See *id.* ch. 35 §§ 813(a)(12)-(15) and (b)(8). Also, agency heads were given correlative responsibilities. See *id.* at §§ 814(a)(19)-(20) and (h-k); and
4. The Equal Employment Practices Commission, which was to review the fairness of the employment practices and procedures of City agencies and the Department of Personnel. See *id.* ch. 36 § 830(a).

785. See discussion *supra* Chapter III.

786. See N.Y. CITY CHARTER ch. 1 § 15(4)(c).

contracts.⁷⁸⁷ We made clear that we “can’t sit here and say a certain percentage of the contracts should be done by . . . [such] organizations.”⁷⁸⁸ This would be “wrong in principle.”⁷⁸⁹ A month later, Commissioner Richland asked, “It doesn’t provide for preferment, does it?”⁷⁹⁰ Schwarz replied that it does not, explaining that its purpose is “to enhance opportunities.”⁷⁹¹ The question of “principle” was, of course, also a question of law, because the Supreme Court in *City of Richmond v. J.A. Croson Co.*⁷⁹² had already held that in the absence of a specific showing of discrimination a municipality could not constitutionally require that a set percentage of contracts go to minorities, women, or any other group.⁷⁹³ Thus, even if we had wanted to put in set-asides or quotas, which we did not, we could not do so. Harriet Michel, an expert on the subject, responded with some pique to Commissioner Alvarez’s question, which had suggested that the language might call for quotas, by saying that “[t]his is not a set-aside. The purpose of this office is to [be a] matchmake[r] Please do not in your questions at all suggest that this is a set aside, a quota for sheltered markets, because it is not.”⁷⁹⁴

Running through our discussions of equal opportunity for minorities was the broader theme of decentralizing power. As Schwarz said, “[a] way of decentralizing power is to increase the likelihood that people from all income elements and all areas have an opportunity to participate in the delivery of services.”⁷⁹⁵

To some extent, the City already had offices dealing with some of the subjects we covered in the Charter. For example, an Office of Labor Services—focusing on equal opportunity in the work force of businesses who contracted with the City—already existed. This was only established, however, by executive order. We believed that “charterizing” it would not only sharpen and improve the office, but also ensure that policy “not be left to the whims of each individual Mayor as he or she was elected.”⁷⁹⁶

Leading up to the Commission’s three final meetings in late July and early August, Lane had some tense and difficult discussions about these chapters with Mayor Koch’s Commission liaisons. They urged us to avoid any implications that the Charter language required quotas. We had the

787. See Public Meeting, Apr. 25, 1989, at 1-65.

788. *Id.* at 59.

789. *Id.*

790. Public Meeting, June 27, 1989, at 25.

791. *Id.*

792. 488 U.S. 469 (1989).

793. See *id.* at 488-89.

794. Public Meeting, Aug. 1, 1989, at 293-94.

795. Public Meeting, Apr. 25, 1989, at 59.

796. Public Meeting, Aug. 1, 1989, at 294.

same desire, both as a philosophical matter and to avoid potentially “killer” opposition from the mayor and others. Although time consuming and tense, these negotiations did not frustrate our goals.

When the four Chapters were voted on for the final time, Harriet Michel preceded the motion to adopt with this summation:

Joe Klein wrote in the New York Magazine a couple of weeks ago that race is the most important issue in this city and threatens to divide us as a city . . . [W]e, as a city[,] have not always presented our best face in terms of what city administrations could have and might have done, with regard to race relations. [Today] I am proud to be part of a Commission that has taken the opportunity to write into its charter, to assure that we face the realities of today and that the demographics of this city are changing and that our minority . . . population has not always gotten its due. That we have taken the time, in this charter to do our best—not as far as I personally would have liked to see us go, in fact—but we have taken the time and this Commission and this staff has supported, introducing factors into the charter that would make sure that minority New Yorkers get what they are due in this city.⁷⁹⁷

Schwarz responded to Michel’s summation by agreeing that what we were proposing was “among the most important things” we were doing for the City.⁷⁹⁸ He stated, “[I]t’s good for every single person in the city that we address these issues of discrimination that have existed for too long[,] and work on our hope of equal opportunity for all persons.”⁷⁹⁹

CHAPTER IX. AVOIDING KILLER ISSUES

As part of our responsibility to produce a Charter that would pass successfully at the polls, we had to avoid “killer” issues. By “killer” issues, we mean matters that were not necessary to decide, but which, if decided wrongly, could kill all the proposed reforms in a referendum.

To determine which issues were “killer” ones, we relied on common sense, as informed by a relatively recent experience in New York state. The state’s 1967 Constitutional Convention proposed many sensible reforms, including a new system of redistricting using a bipartisan commission

797. *Id.* at 351-52.

798. *Id.* at 352.

799. *Id.*

instead of the legislature itself.⁸⁰⁰ Nevertheless, the enterprise failed. According to many, it failed because of the Convention's proposal of one particular change: to eliminate the state constitution's so-called "Blaine Amendment," which prohibited state and local support of schools "under the control or direction of any religious denomination."⁸⁰¹ Instead, the amendment would substitute the looser standards of the First Amendment's Establishment Clause.⁸⁰² As stated thirty years later by Professor Ross Sandler:

The 1967 Convention foundered on its leadership's failure to gauge accurately the political environment in which the voters would ultimately judge their proposals. A climax of a public referendum distinguishes charter writing from other legislative processes, and the 1967 Convention misjudged what was needed to win.⁸⁰³

We had an even greater responsibility not to "misjudge what was needed to win." We were not proposing wholly discretionary changes in the government. We were charged instead with responsibility to create the necessary fixes for an unconstitutional government. If the Charter failed at the polls, the situation would have been chaotic, and important constitutional rights would have continued to be suppressed. Failure to win would have been irresponsible.

Some of our necessary issues that we had to deal with, if mishandled, could have led to a loss. For example, failure to address the need for fair representation for all New Yorkers would have been inconsistent with our personal priorities and values, and could have led to defeat at the polls (as well as with the Justice Department). Similarly, failure to present a workable balance between the needs of the City as a whole and its constituent units would have prevented the Commission itself from coming together as well as it did, and probably would also have resulted in a loss of the referendum. Another issue, which, if mishandled, could have led to a loss, relates to fiscal responsibility and cost. As discussed earlier, the memory of the fiscal crisis was clear; editorial writers and opinion makers

800. See HENRIK N. DULLEA, CHARTER REVISION IN THE EMPIRE STATE: THE POLITICS OF NEW YORK'S 1967 CONSTITUTIONAL CONVENTION (1997); Robert Stone, *Education*, in DECISION 1997 CONSTITUTIONAL CHANGE IN NEW YORK (Gerald Benjamin & Henrik N. Dullea eds., 1997).

801. N.Y. CONST. art. IX, § 4 (1893).

802. See Stone, *supra* note 800.

803. Ross Sandler, *The Convention Referendum*, CITYLAW (Center for N.Y. City Law, N.Y.L. Sch., New York, N.Y.), May/June 1997, at 3.

would have been quick to criticize us if we had risked reopening those self-inflicted wounds.⁸⁰⁴

While we had to address these major issues, we also politically had to decide how to address some questions unnecessary to presenting a new government. These issues are: (i) the Landmarks Law as applied to churches and synagogues and (ii) the Civilian Complaint Review Board and police brutality.

I. THE LANDMARKS LAW AS APPLIED TO RELIGIOUS INSTITUTIONS

Initially, we had planned minor Charter changes relating to landmarks. One of these changes was to end the Landmarks Commission's anomalous status as part of the Parks Department and give it the prestige of a separate agency. This change was done together with some procedural changes relating to opportunities for public comment and Council review.⁸⁰⁵ Separate agency status was intended to reflect the importance of landmarks and the Landmarks Commission to the City. We also thought it would have the added benefit of possibly attracting support from the many passionate devotees of landmarks.

During our round of public hearings on the preliminary proposals, however, a new demand was pressed upon us, a demand that threatened to divide the Commission itself and which, if mishandled, could have risked our success in the referendum.

This new issue reflected a tension between secular government and religion, between helping the needy and preservation of history and beauty. A coalition of religious leaders, the Interfaith Commission on Landmarking Religious Property, testified that landmarking of churches and synagogues violated freedom of religion and led to costs and lost opportunities that limited the ability of the religious institutions to carry out their mission, including providing for the poor.⁸⁰⁶ The attack was on both the initial designation of religious structures as landmarks and on the difficulties churches and synagogues had in getting "hardship" relief after they were landmarked.⁸⁰⁷

804. See discussion *supra* Chapter VII.

805. See N.Y. CITY CHARTER ch. 21-A § 534(7)-(9) (1989).

806. See Public Hearing, June 7, 1989, at 334-41; Public Hearing, July 19, 1989, at 292-94.

807. See Public Hearing, June 7, 1989, at 338-39; Public Hearing, July 19, 1989, at 292-94.

The attack on the Landmarks Law, and the Landmarks Commission, was often thoughtful and principled, but always angry.⁸⁰⁸ Even though the demands were more legislative than structural, they could not be ignored. In part, this was because of the passion and strength of the advocates, and in part because several members of the Commission itself shared the advocates' passionate feelings.⁸⁰⁹

Arrayed on the other side of the issue were equally passionate and committed advocates, devotees of the Landmarks Law for whom even to discuss changing one jot or tittle in the Landmarks Law was apostasy. Many witnesses came forth to denounce any changes. Advertisements were run on the radio warning "Mr. Schwarz" that any proposed Charter that undercut the Landmarks Law would be opposed and defeated. Some of the witnesses on behalf of the status quo hurt their cause by seemingly accusing the religious institutions of greed and avarice, by accusing commissioners of bias,⁸¹⁰ and by responding to the arguments of the religious institutions "quite frankly in a less polite way."⁸¹¹

The defense of the status quo, however, was not limited to secular voices. Some church leaders who testified disagreed with the Interfaith Commission. One said that "[i]f anything happens to weaken the landmark

808. Many witnesses came to present their grievances. (Often during this testimony there was extensive dialogue between commissioners and the various witnesses.) Representative examples are the testimony of Rev. N. J. L'Heureux, chair of the New York State Interfaith Commission on Landmarking and Religious Property, together with colleagues. See Public Hearing, June 7, 1989, at 334-69. Although the presentation was principled, we picked out some of the stronger statements to show the passion and anger. For example, L'Heureux said that the landmarks law was used "for the purpose of abusing the civil and property rights of religious congregations . . . [which are] singled out in a discriminatory manner . . ." *Id.* at 337. He also asserted that landmarking imposes an "intrusive financial burden . . . [which] destroys the congregation's ability to provide the essential spiritual and human services for which the church and synagogue exists." *Id.* at 340. Finally, George McCormack, counsel for the Archdiocese of New York, remarked that the average Landmarks Commission hearing was like a "circus." *Id.* at 347.

Rev. Wilbur T. Washington, pastor of the First Reformed Church of Jamaica, citing an example of money that he believed was wasted on "gratuitous [church] ornamentation," also alleged that the Landmarks Commission required funds to "preserve three cute curves, measured by a micrometer, hundreds of feet above the street level where they can be appreciated only by an elitist handful of citizens with binoculars." *Id.* at 296.

809. See, e.g., Public Hearing, June 7, 1989; Public Hearing, July 18, 1989; Public Hearing, July 19, 1989.

810. See Public Hearing, July 18, 1989, at 174-90. Fred Friendly reacted to one attack, which he considered "a rude assault on [his] colleague [Judah Gribetz]," by saying, "I start out on your side. You have for the first time given me a little push in the other direction." *Id.* at 181, 184-85.

811. Public Hearing, July 19, 1989, at 315.

law . . . New York will be in real trouble.”⁸¹² This split among religious leaders mirrored the bitter schism among the parishioners of St. Bartholomew’s, the elegant landmarked church and vestry building, located at Park Avenue and 50th Street.⁸¹³

This was a classic killer issue. True believers were on both sides, focusing on a single question and threatening to make its resolution the litmus test of support for the Charter as a whole. Both sides could count on the passions of large numbers of people.

Our discussions began on June 21. They did not begin well. Some of the same fervor from outside the Commission was reflected, though somewhat more gently, inside the Commission. Bernie Richland, describing himself as “a devout agnostic,” expressed his annoyance at “being snowed by fancy people who have a great interest in art and architecture and they don’t really think there is anything serious about the problems of small churches and small religious institutions.”⁸¹⁴ Mario Paredes denounced a “secularist mentality today in society that wants to get rid of religious issues and everything that has to do with religion and church and God, or whatever, immediately.”⁸¹⁵ Fred Friendly responded, “[T]hink again before you brandish those of us who don’t see it your way as necessar[ily] sacrilegious.”⁸¹⁶

A motion to exempt religious institutions from landmarking without “the express consent” of their congregations was made.⁸¹⁷ Bishop Sullivan made the most striking statement in the ensuing debate. The Bishop expressed respect for the Landmarks Commission’s service of beauty, saying the Church has “a common cause with them, to maintain beauty in the community.”⁸¹⁸ He said, however, that their “criterias . . . are

812. Public Hearing, July 18, 1989, at 171 (statement of Reverend Stephen Garneau, Director of St. Georges Episcopal Church in Manhattan).

813. One side of the schism (the leadership of the church and vestry) wanted to tear down St. Bartholomew’s vestry building, sell it to a developer, and use the proceeds for the church’s religious mission, including serving the needy. The other side, composed of some church members, believed that to do so would undermine the church and hurt the City.

The church leadership ultimately lost its court challenge to the application of the Landmarks Law. *See* St. Bartholomew’s Church v. City of New York, 914 F.2d 348, 351 (2d Cir. 1990); *see also* Letter from J. Sinclair Armstrong, Chairman and President, The Committee to Oppose the Sale of St. Bartholomew’s Church, Inc. to Chairman and Members, 1989 New York City Charter Revision Commission (July 21, 1989) (urging disqualification of Commissioners Gribetz, Murray, Sullivan, and Paredes) (on file with the *New York Law School Law Review*).

814. Public Meeting, June 21, 1989, at 264-65.

815. *Id.* at 283.

816. *Id.* at 286.

817. *See id.* at 278.

818. *Id.* at 267.

somewhat different from ours.”⁸¹⁹ Religious institutions’ mission to serve poor people will become more important in “a tremendously changing City” and more difficult if property were landmarked and locked into landmark status.⁸²⁰ Mario Paredes followed, referring to excessive landmarking as raising “a question of human life,” and a “question of survival . . . [i]n any inner city.”⁸²¹ When the exemption motion was debated, however, it was Bishop Sullivan who most forcefully urged caution. Referring to the issue as “very personal, because there is a strong desire to see us exempted,” the Bishop warned about “entanglement” issues, and expressed concern about “caus[ing] jeopardy [to ‘our cause’] because we reach too far.”⁸²² The Bishop exhorted, “I have a major concern that what we do as a body does not get so weighted down that it [removes] the possibility of us putting . . . an agreed-upon proposal on the ballot in November.”⁸²³ The Bishop urged the Commission to come up with a “middle ground.”⁸²⁴

After the debate, the motion was pressed to a vote: three members voted in favor, three voted against,⁸²⁵ and four abstained.⁸²⁶ As Fred Friendly said, “The abstentions win.”⁸²⁷

On the designation aspect of the problem, a “middle ground” on the Commission in fact emerged from a proposal by Commissioners Friendly and Trager on June 27. They proposed that, in deciding whether to approve the Landmarks Commission’s designation of a property as a landmark, the City Council should be specifically allowed to include “the impact of the designation on the provision of education, charitable and social services,” not only to religious institutions.⁸²⁸ This proposal would allow ultimate decision makers to weigh the concerns of the religious

819. *Id.*

820. *Id.* at 266-67.

821. *Id.* at 268.

822. *Id.* at 284-86.

823. *Id.* at 285.

824. *See id.* at 286.

825. Schwarz was one of the three no votes, explaining that there was a “legal question” in providing a special exemption for religious institutions and that we lacked sufficient information in any event. A hint of concern about such a provision being a killer issue was also given. *See id.* at 281-82.

826. *See id.* at 288.

827. *Id.*

828. Public Meeting, June 27, 1989, at 256; Public Meeting, June 21, 1989, at 270-74 (the dialogue between Schwarz and Judah Gribetz moved in this direction).

institutions. Its phrasing had the added benefit of avoiding legal questions that might arise if religious institutions alone were singled out.⁸²⁹

With minor changes, this proposal was the ultimate solution on designation,⁸³⁰ although no solution to the hardship review aspect of the problem had yet been discussed. David Trager concluded his remarks with hope that the proposal would "have a healthy impact on people starting to talk to each other instead of taking very rigid positions."⁸³¹ Unfortunately, the proposal did not lead to this.

The Friendly-Trager proposal on designation was made available for public comment at a series of public hearings held in July. At the hearings, the opposing sides continued to debate with each other. Schwarz, who had engaged in dialogue with witnesses on both sides, expressed frustration at the continued gulf and asked the parties to try to settle their differences. Eventually, the Chair of the Landmarks Commission and the leaders of the Interfaith Commission met with Schwarz in his law office.

During the evening of August 1, the Commission's penultimate meeting that started at 9:45 a.m. and finished at 11:30 p.m., we revisited the landmarks/religious issue while discussing many other Commission issues.

Schwarz reported that the discussions between the parties on designation were fruitful; on hardship review, however, "respectful disagreements" continued.⁸³² On designation, the religious community needed only to be assured that the Council would not be "inhibited in its review, and could conceivably reject a designation for any reason, including the effect on the entity's ability to perform its mission."⁸³³ This necessity was clarified by a letter from Corporation Counsel Peter Zimroth and by the legislative history of the Commission.⁸³⁴ On hardship review, the Interfaith Commission made a relatively modest proposal. A separate administrative panel would be created to hear appeals by any institution that

829. See generally Public Meeting, June 27, 1989. In *Walz v. Tax Comm'n*, 397 U.S. 664 (1970), a New York statute provided real property tax exemptions to, among others, religious organizations for properties used solely for religious purposes. The statute also exempted any property owned by a wide range of not-for-profit organizations involved in educational or charitable activities. Critical to the Court upholding the statute was the breadth of the New York statute not being limited to religion. See *id.* at 673.

Two decades later, in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), the Court struck down a Texas statute that exempted religious magazines from sales tax. The Court stated that when a statute was so narrowly drawn as to confer benefits only to religious groups, there is an impermissible sponsorship of religion. See *id.* at 11. This was precisely the problem the Commission sought to avoid. See Public Meeting, June 21, 1989, at 281-82.

830. See Public Meeting, June 27, 1989, at 260.

831. *Id.* at 268-69.

832. See Public Meeting, Aug. 1, 1989, at 406-09.

833. See *id.* at 409.

834. See *id.* at 410-13; Public Meeting, Aug. 2, 1989, at 85-86, 91.

was “tax-exempt” (the phrasing thus avoiding the legal problem created by singling out religious institutions).⁸³⁵ This proposal, argued the Interfaith Commission, would result in speedier decisions, involving less cost. The Landmarks Commission agreed to give the proposal “serious good faith consideration.”⁸³⁶ As Commissioner Betanzos observed, however, “that’s no agreement.”⁸³⁷

The Commission sought a consensual result, but with just one day left, the chances seemed slim. Earlier in the evening, David Trager suggested that we resolve the issue after our August 2 Justice Department deadline to give the parties more time to negotiate.⁸³⁸ Schwarz initially believed this idea was “creative” and “sensible,” and Lane opined that the hardship issue did not have to be submitted to the Justice Department.⁸³⁹ Later in the evening, however, Harriet Michel argued compellingly against postponement. Although she agreed that the landmark issues were hard and that it would be desirable to allow time for agreement,⁸⁴⁰ she argued that it would be indefensible to allow for delay on this subject but not for the far more comprehensive issues on which the Delay Movement focused:

[to delay the landmarks question] opens us up to a whole range of criticism that I personally, as an individual minority member of this [Commission], do not feel prepared to face and I do not want to . . . be put in that position . . . because it ruins my credibility in my community.⁸⁴¹

Commissioner Paredes countered by urging postponement because “every rule has its exception,” but Commissioners Gourdine and Betanzos agreed delay would cause perception problems and urged a vote the next day.⁸⁴²

Schwarz told the disputing parties that “we cannot ignore the comments” of the members who “expressed their distress” at delay and suggested “in the strongest possible terms” that the parties reach an agreement that night.⁸⁴³ Schwarz also signaled to the Landmarks Commission that it would be wise to concede, because “[he] sensed from

835. See Public Meeting, Aug. 1, 1989, at 558.

836. *Id.*

837. *Id.*

838. *Id.* at 440-41.

839. *Id.* at 442-43.

840. See *id.* at 566-67.

841. *Id.* at 566.

842. See *id.* at 567-70.

843. *Id.* at 570-71.

the members of the Commission that there was a good deal of equity in this particular proposal” of the Interfaith Commission.⁸⁴⁴

Although the disputing parties met until 3:30 a.m., they did not reach an agreement.⁸⁴⁵ Therefore, the Commission itself had to come to closure. Clearly, the idea of a separate tribunal had the support of the Commission. The remaining question was the tribunal’s standard of review when deciding a Landmarks Commission designation on appeal.⁸⁴⁶ Schwarz was not willing to let this be decided hastily. We had an insufficient record; a wrong decision could turn this matter into a killer issue. Ultimately, however, the solution was found: create the new tribunal and allow a subsequent local law to decide its standard of review.⁸⁴⁷

This long episode thus ended on our last day. But because of our ongoing concerns about landmarks being a killer issue, we also agreed to place the landmarks proposals on the referendum as a separate question—the only question separated out from the totality of Charter questions.⁸⁴⁸ As Si Gourdine stated when explaining his support for the separation:

We have just been subjected to such a cross-barraged activity on both sides of this issue that I personally would not want to see the entire effort that we have been involved with subjected to the risks of failure because of the landmark controversy.⁸⁴⁹

II. THE CIVILIAN COMPLAINT REVIEW BOARD

Long before our Commission was appointed, there had been a bitter Charter controversy over the composition of the Civilian Complaint Review Board (“CCRB”), which was designed to review claims of police brutality.⁸⁵⁰ In 1966, shortly after his election as mayor, John Lindsay issued an executive order that established a civilian-controlled board to review complaints of police brutality; if the accusations were “substantiated,” the board could make recommendations for action to the police commissioner.⁸⁵¹ The police union and its allies raged; they

844. *Id.* at 571.

845. *See* Public Meeting, Aug. 2, 1989, at 99.

846. *See id.* at 80, 103, 105.

847. *See id.* at 112-18.

848. *See id.* at 139-40.

849. *See id.* at 140.

850. *See* Paul Hofmann, *Civilian Control of Police Review is Set Up by City*, N.Y. TIMES, May 3, 1966, at A1.

851. *See id.*

gathered many more than the required number of petition signatures (more than 250,000) to cause a referendum on the question whether the Charter should be amended to forbid civilians from sitting on such a board.⁸⁵² The referendum campaign was nasty and racially divisive. The Charter was amended to reverse Lindsay's change and create an all-police board appointed by the police commissioner.⁸⁵³

In 1986, a local law, passed by the Council and endorsed by Mayor Koch, further amended the Charter to permit one half of the members of the Review Board to be civilians.⁸⁵⁴ While opposed by the police union, this change was not particularly divisive.

At our public hearings, many witnesses came to urge changing the Charter again to make the Review Board all civilian. Their testimony was often graphic and always emotional. This was also a demand of Coalition for Community Empowerment, a group led by Congressman Major Owens,⁸⁵⁵ among others. Of course, many of the commissioners did not need testimony or letters to realize that while most police officers were not abusive or brutal, too many were—and that minorities bore a disproportionate share of both the verbal and physical abuse. This disproportionality was known to many commissioners either through life experience or through work.⁸⁵⁶

The Police Review Board issue was potentially even more divisive for the City than landmarking religious structures.⁸⁵⁷ Racially divisive issues had been raised in the City once before, and if we addressed the issue, it clearly could have jeopardized our obligation to right the City's constitutional wrongs and create a new government structure.

We had separately talked to some commissioners individually—including Si Gourdine, who had briefly raised the issue at the

852. See Robert D. McFadden, *Review Board's Stiffest Test Posed by Tompkins Sq. Riot*, N.Y. TIMES, Aug. 12, 1988, at B4.

853. See *id.*

854. See *id.*; see also Todd S. Purdum, *A Handful of Touchy Issues Continue to Plague Charter Panel*, N.Y. TIMES, July 4, 1989, at 33.

855. See April 14, 1989, Letter from Congressman Owens to Schwarz, *supra* note 61.

856. For example, as corporation counsel, Schwarz's awareness of the issue had been heightened by police brutality cases brought against the City, and even more so by work done in connection with Congressman John Conyers' congressional hearing on the subject held in the City. See Wayne Barret, *Mayor, Media Ignore Conyers Hearing on Police Brutality*, VILLAGE VOICE (N.Y.), Dec. 2, 1997, at 24. In the course of preparing for this hearing and for a speech on the subject, Mayor Koch convened a meeting of all his high-ranking black officials; every single one described incidents of police mistreatment that had involved themselves and their family members. See Ronald Smothers, *Blacks, after Howard Beach, Unite on Goals, Split on Policy*, N.Y. TIMES, Aug. 12, 1988, at A1.

857. See Purdum, *A Handful of Touchy Issues Continue to Plague Charter Panel*, *supra* note 854.

Commission's June 15 meeting⁸⁵⁸—about reasons for not acting on police brutality as part of the Charter process, as well as about the likely harm to the Commission's overall effort if we did act. These commissioners had strong feelings about the Police Review Board issue, but eventually accepted our reasoning for excluding it. It seemed likely that we would not wrestle with this particular issue.

Then, as we were ending our June 27 meeting—the last day of the Commission's second round of meetings and immediately before we were to issue the Commission's Revised Proposals—Mario Paredes called for discussion of police brutality, “addressing this question to [Schwarz] personally.”⁸⁵⁹ Commissioner Paredes reminded us that “in every borough,” witnesses had urged the Commission “to talk about it.”⁸⁶⁰ Although he contended that we should discuss police brutality, Commissioner Paredes said that he personally did not favor changing the Charter.⁸⁶¹ Amy Betanzos, who had earlier said she accepted the wisdom of not getting into the issue, despite her personal concerns as to police brutality, reacted by saying, “If it's brought up, it's something to be discussed.”⁸⁶²

David Trager responded by giving substantive and political reasons for why we should not act on the CCRB. On the substantive side, Trager had had recent experience with the issue, both as a member of the State Investigations Commission and as a member of a Commission that had recently recommended to the mayor nominees for the new civilian members to the CCRB.⁸⁶³ Trager pointed out that the new law (making the CCRB half civilian) had been in existence for only two years and that some “really first-rate people” had been appointed as civilian members. Trager further noted that the CCRB, in a recent report on disturbances in Tompkins Square Park, had “criticized some of their own procedures, [and] made recommendations for change in their own operations and within the Police Department.”⁸⁶⁴ The new CCRB “ought to be given a reasonable time to see how it will work out . . . I think it ought to be given a fair shot.”⁸⁶⁵

This was what Trager referred to as “the positive side” of not acting.⁸⁶⁶ He added: “[O]n the negative side, I think if we start to go into that whole

858. See Public Meeting, June 15, 1989, at 61-62.

859. Public Meeting, June 27, 1989, at 291.

860. See *id.* at 291-92.

861. See *id.* at 292.

862. *Id.*

863. See *id.* at 293.

864. *Id.*

865. *Id.* at 293-94.

866. See *id.* at 294.

thing we're just going to raise a political storm and we have enough around."⁸⁶⁷ To act would "just open[] a political Pandora's box."⁸⁶⁸

The Pandora's box, however, had already been opened. We did not want to let this issue fester and were convinced both that the Commission could not make any great progress on the substance and that it could severely injure the Commission to try. We called a special short Commission meeting for July 13, 1989, to deal with a few questions that were left open at the end of the last series of Commission meetings, but primarily to determine whether to pursue the CCRB issue.⁸⁶⁹ A staff memo surveying several jurisdictions had been sent out over Commissioner Trager's comments.⁸⁷⁰ This memorandum showed that the composition of police complaint review boards did not seem to make a significant difference in results; it seemed rather that the keys to effectiveness were the non-Charter issues of resources, staffing, procedures, and political will, not board composition.⁸⁷¹

Commissioner Trager made the same substantive points he had before and said the staff memorandum added others.⁸⁷² Schwarz said:

I think the real question is as posed by David [Trager]. There's a new group which seems to be working well which has the majority of minorities on it, has the even split and has been recommending reforms which the Commissioner, apparently, is accepting. And I think the question is not what can we do, but whether it's appropriate to allow the reform, which was put into effect less than two years ago, to go forward . . . in the hopes that it does accomplish the beneficial results which everybody seeks.⁸⁷³

The Commission decided not to act.⁸⁷⁴ Obviously, the problem of how to review allegations of police brutality has not gone away. We believed, however, that the 1989 charter revision was not the proper way to address the issue.

867. *Id.*

868. *Id.*

869. *See* Public Meeting, July 13, 1989, at 12.

870. *See id.*

871. *See id.* at 12-13.

872. *See id.* at 12-14.

873. *Id.* at 15.

874. *See id.* at 16.

PART III. THE PATH FROM POLICY TO LAW

CHAPTER X. THREE HURDLES TO A NEW CHARTER

Three things had to happen to create a new Charter. First, the Commission had to agree on the structure and the details of the largest change in New York City's government since the turn of the century. The Commission approved the proposed new Charter by an 11 to 4 vote on August 2, 1989, though a consensus had formed earlier.¹

Second, the Department of Justice had to decide whether the changes had a discriminatory purpose or a discriminatory effect on persons protected by the Voting Rights Act. On October 30, 1989, the Department approved the procedures for holding the referendum election.² On December 13, 1989, the Department approved the substance of the Charter changes.³

Third, the voters of New York City had to approve the Charter at a referendum held on November 7, 1989. They did so by a vote of fifty-five percent to forty-five percent.⁴

While the three hurdles had different time frames and decision-makers, they were related. A narrower consensus on the Commission would have made it more difficult for the referendum to pass. Similarly, obtaining support from five of the six minority commissioners probably helped with the Justice Department.

The "case" we made to the Justice Department for approving the new Charter and the arguments we made in the referendum campaign were essentially the same as the points that drew the Commission together. The Board had to be replaced. The City needed to provide fair political opportunities for all its citizens, including minorities. Borough voices, as well as other local voices, needed an opportunity to be heard. A strong mayor was needed, yet the mayor had to be held accountable. And, the City's government had to be more open.

1. See Public Meeting, Aug. 2, 1989, at 132; Todd S. Purdum, *Panel Finishes Plan to Revise New York City's Government*, N.Y. TIMES, Aug. 3, 1989, at A1.

2. See Letter from James P. Turner, Acting Assistant Attorney General, Civil Rights Division, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (Oct. 30, 1989) (on file with the *New York Law School Law Review*) [hereinafter Letter from James P. Turner to Schwarz].

3. See Alan Finder, *New York City Charter Revision Approved by Justice Department*, N.Y. TIMES, Dec. 14, 1989, at A1.

4. See Alan Finder, *Opposition to Charter Change Diverse*, N.Y. TIMES, Nov. 10, 1989, at B3.

Nevertheless, the emphasis in the referendum campaign and before the Justice Department differed. For example, the issue of race and the effect of the Charter changes on minorities was the central issue with the Justice Department.⁵ In the referendum campaign, increasing opportunities for minorities, as well as all New Yorkers, were among the central themes, along with many others.

From start to finish, the Commission's work generated irreconcilable suggestions. A long article summarized the series of public hearings after our preliminary proposals. They were described as "a numbing recitation of diametrically opposing viewpoints."⁶ For example, some said our proposals would "cripple a mayor,"⁷ while others said we would "crown him."⁸ Some said the Council would "never live up to its [new] powers,"⁹ while others said the Council "would never receive the power it deserves."¹⁰ In the following chapters, we give several other examples of "diametrically opposing viewpoints."

While the Commission listened to advocates and the general public and showed its willingness to change tentative ideas in response to cogent criticism, advocates with widely varying agendas continued to assert their own inconsistent, irreconcilable demands. Gene Russianoff of the New York Public Interest Group ("NYPIRG") analogized these demands to those of lobbyists before the state budget is approved: "[B]efore final action everyone is standing in the hallway and saying 'society is ruined unless my bill passes' [but after final action] it is useful to call them up . . . and ask them how they really did."¹¹ This was also the case with the Charter. After the Commission issued its final plan, many who formerly suggested the sky would fall said that they favored the Commission's plan and urged a "Yes" vote. These latter-day conversions included public interest groups such as NYPIRG, politicians such as Queens Borough President Claire Shulman and Mayor Koch, and editorial boards such as *New York Newsday* and the *New York Times*. Every one of these proponents had been pushing us in very different directions during the Commission's deliberative process.

We believe that the decisions made during the Commission's deliberative process were driven by the best interests of the City. The

5. See Alan Finder, *New York City Charter Revision Approved by Justice Department*, *supra* note 3.

6. Todd S. Purdum, *Charter Plan and Critics: Opposition Slowing Process in New York*, N.Y. TIMES, June 13, 1989, at B1.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Alan Finder, *Charter Panel's Test*, N.Y. TIMES, Aug. 3, 1989, at B4.

decisions supported our case before the Justice Department and in the referendum. As the *Daily News* stated in its editorial endorsing the Charter, "The best politics is good government."¹² Suggesting that the Commission's decisions were an abstract exercise in political philosophy, however, would be naive. We needed to prevail; principle and politics had to work together. Many specific and substantively useful changes in the Charter were aimed at gaining support from the Commission, the public, editorial boards and other influential opinion makers, advocacy groups, and the Justice Department.

The Commission's unprecedented open deliberations and interactive public process also helped us jump over all three hurdles. The Commission's substantive decisions improved as a result. Moreover, the Commission's openness and responsiveness helped both with the Justice Department and with many opinion makers, who, in turn, wrote helpful editorials and influenced the voters in the referendum. The fairness and responsiveness of our process also took some of the animus out of some opponents' critiques.

One final generality also applies to all three hurdles: the dissenters on the Commission and the Charter's opponents before the Justice Department and in the referendum continued to be miles apart in their views. For example, the referendum opposition consisted very substantially of, on the one hand, die-hard defenders of the Board of Estimate who pined for the past (altered only by weighted voting), and, on the other hand, advocates who despised the old Board of Estimate and thought the City needed a radical change—though precisely what changed was never detailed. The varying views of the opposition were somewhat more subtle than this simplification. Nonetheless, the opposition's lack of a coherent counterplan or unified vision of the City made it difficult to mount an opposing case. Their lack of unity also suggested the Commission had probably found a sensible middle ground.

CHAPTER XI. BUILDING A CONSENSUS ON THE COMMISSION: SUBSTANCE AND COLLEGIALLY

I. COLLEGIALLY HELPS

Building a consensus among fifteen independent and strong-willed people from different backgrounds can be a daunting assignment. It was particularly so with Charter revision: the commissioners had a one-time assignment, the power of major city players was at stake, the issues were

12. Editorial, *Thumbs Up on the Charter*, DAILY NEWS (N.Y.), Oct. 29, 1989, at 36.

hard and hotly contested, and all the work had to be done in full public view.

In such circumstances, building a collegial atmosphere becomes a necessity. Despite the fast pace, the long hours, the intense and unceasing public and private pressure from powerful forces and persistent advocates, and the difficult and important issues, the Commission's meetings were remarkably free of rancor. There was even humor. The discussions of substance were substantive. Commissioners—certainly all those who voted for the Charter—believed that their ideas were listened to and taken seriously. None, including the chair, prevailed on every issue. Members felt, however, that ideas were taken seriously and that the dialogue was respectful and fair.

At the final vote, some commissioners went out of their way to praise the Commission's teamwork.¹³ Even Commissioner Richland, who had promised to dissent since May when the Commission voted against weighted voting and thus to abolish the Board, praised the Commission's collegiality and openness.¹⁴

The commissioners' willingness to compromise was crucial. As Arch Murray said on our last day, "[T]he present can be the enemy of the good . . . [W]e also have had to make some compromises."¹⁵ This was true for every commissioner who voted for the Charter.¹⁶

II. SUBSTANCE CONTROLS

Good will alone was not enough for consensus. However, it allowed for the exchange of ideas that produced consensus. It also helped members accept some results that were not what they would have written as a "philosopher King sitting in a cave without hearing from anyone else and just scribbling on the wall of the cave."¹⁷

A. *Four Early Foundational Blocks*

By May, the Commission had begun to form a consensus in four broad and vital areas:

13. See Public Meeting, Aug. 2, 1989, at 60, 61, 64, 71, 189.

14. See *id.* at 185; see also Public Meeting, June 27, 1989, at 290.

15. Public Meeting, Aug. 2, 1989, at 71.

16. See Public Meeting, June 20, 1989, at 201; Public Meeting, July 31, 1989, at 271-72; Public Meeting, Aug 1, 1989, at 221, 351-52; Public Meeting, Aug. 2, 1989, at 49-50, 119-20, 141-42.

17. Public Meeting, Aug. 2, 1989, at 49.

a. All fifteen members were convinced we should strive to place a new Charter before the voters in November.

b. Fourteen of the fifteen members were convinced we should abolish the Board of Estimate.

c. Those fourteen believed there should be a strong legislative body to balance mayoral power.

d. All commissioners wanted to increase opportunities for minorities in the City's political system.

With these foundation blocks in place, the Commission had given itself a deadline, had committed itself to a broad review of government operations, had decided to empower the legislature, and had a core theme of legal and moral significance to the City's future. These four key initial decisions did not resolve every detail of governmental structure and operations, and their implications had to be worked out if the Commission's consensus was to bear fruit in time for a referendum in November. The Commission also had to strike the balance between central and local power, while ensuring a meaningful voice for the boroughs.¹⁸ After our June 15 meeting, it was clear we could reach consensus on this issue as well.¹⁹

B. *The June 15, 1989, Meeting*

This probably was the Commission's single most important meeting. It certainly was our most dramatic. We issued our preliminary proposals one month earlier.²⁰ In the intervening month, the Commission held seven public hearings,²¹ where 372 witnesses from all over the City commented on the proposals and offered their own ideas. We also received 168 written comments,²² and commissioners and staff members met with interested groups all over the City.²³

We, working closely with staff, worked hard to prepare for the June 15 meeting, our first meeting after receiving all of these comments. Our

18. See Editorial, *Borough Power: Moving Toward a Fairer, Broader View of the City*, NEWSDAY (N.Y.), June 19, 1989, at 44.

19. See Alan Finder, *Critics of First Charter Plan Praise Proposed Revisions*, N.Y. TIMES, June 17, 1989, at A27.

20. See Todd S. Purdum, *Charter Panel, For Now, Finishes Reshaping the Government*, N.Y. TIMES, May 16, 1989, at B1.

21. The first five hearings, held in each of the five boroughs, were general and covered every topic. The last two focused on "fair representation." They were convened as part of our effort to focus on communication with minority communities.

22. N.Y. CITY CHARTER REVISION COMM'N, CATALOGUE OF SCHWARZ COMMISSION CORRESPONDENCE, Vols. III-V (1989).

23. See Public Meeting, June 15, 1989, at 3-4.

goals were to find the right balance between central and local power while preserving our support from the City's good government groups.

We made enormous progress on both fronts at the June 15 meeting, but not without drama—drama that, fortunately, strengthened bonds among the commissioners.

1. The Drama

The meeting, held at the Adam Clayton Powell State Office Building in Harlem, was twice interrupted by protestors.²⁴ First, a very angry and disturbed man loudly demanded to know if “[Mayor] Koch ha[d] appointed a commission that will limit African-American and Latino power in New York City.”²⁵ The man physically threatened Mario Paredes who tried to stop his tirade.²⁶ When Fred Friendly, our eldest member, stood up to help Paredes, the man threatened him as well.²⁷ Then the man told Therese Molloy and the chair that they would get their “ass kicked.”²⁸ He called the Commission “lily white,”²⁹ and finished by yelling that “y’all make decisions that affect this community[;] you be sensitive about people, because we’re concerned, and we love our community. We love our children, we love our race, and we not going to apologize for it.”³⁰ Although this cry ended the interruption,³¹ the atmosphere was tense for everyone, particularly for Friendly, Paredes, and the others who were on the side of the table where the man had approached.

The second interruption came about ten minutes later from some representatives of the Delay Movement.³² They began demanding that the Charter revision vote be held in 1990.³³ Then they vowed to make their opinions “forcibly” known.³⁴ Referring to the commissioners as “this

24. *See id.* at 42-49, 62-68.

25. *Id.* at 43.

26. *See id.* at 43-44.

27. *See id.* at 45.

28. *Id.*

29. *Id.* at 43.

30. *Id.* at 48-49.

31. *See id.* at 49. Schwarz had been present at a 1983 hearing on police brutality in the same room. At that time, the room erupted after a similar interruption occurred. Congressman John Conyers, chairing the meeting, was unable to regain control and had to shut the hearing down. *See* Sam Roberts, *Hearing on Police Cut Off in Harlem*, N.Y. TIMES, July 19, 1983, at A1.

32. *See* Public Meeting, June 15, 1989, at 62-68. *See also* discussion on decision not to delay referendum, *supra* Chapter V, Part I.

33. *See id.* at 62.

34. *Id.*

Koch-appointed Commission,"³⁵ they claimed that the Commission had failed to effectively include minorities in developing ideas for the new Charter and that the time table "limited participation from the minority community."³⁶ They also said that refusal to postpone the referendum "would signal to policy makers across the nation that New York City continues to be one of the last bastions of institutionalized racism in our urban centers where people of color remain [relegated] to second class citizens[hip]." ³⁷ The demonstrators left chanting "Schwarz, Schwarz, Have You Heard? [New York] is not Johannesburg."³⁸

How were we to view the demonstrations? On the merits, we were not persuaded about a delay in May³⁹ and were later unpersuaded when we finished in August.⁴⁰ We also knew minorities had been involved in the process⁴¹ and that we would continue to make special efforts toward that end. Some of us also knew that, despite the angry public words of the Delay Movement demonstrators, a number of their members had recognized privately that we were open and committed to fairness.⁴² Nonetheless, both interruptions confirmed two things we already knew. First, there was a lot of anger and frustration in the City's minority communities.⁴³ Second, moving so quickly with Charter revision caused problems for everyone—problems that were expressed forcefully by protestors. By challenging our authority and our motives, the Delay Movement hurt its own cause by drawing Commission members closer together. For instance, Harriet Michel expressed empathy for the way a "very angry man" who "cares about his community," had "handled" his anger.⁴⁴ She added, however, "I sure as hell don't feel like I have to defend myself as an African-American woman in my own commitment to my community[,] and participating on this [Commission]." ⁴⁵ She added that commissioners "are not unknown to [the] people of New York . . .

35. *Id.* at 64.

36. *Id.* at 63-64.

37. *Id.* at 67-68.

38. Todd S. Purdum, *Charter Chairman Widens Proposals*, N.Y. TIMES, June 16, 1989, at B3.

39. See discussion *supra* Chapter V, Part I.

40. See Public Meeting, Aug. 2, 1989, at 50-78.

41. See *id.* at 60.

42. One such private conversation was overheard by a reporter, whose later story quoted the Delay Movement leader as saying he "wanted to commend the Chairman for his openness and commitment to fairness." Alan Finder, *What Gets Charter Panel All Riled Up*, N.Y. TIMES, July 5, 1989, at B1. The reporter then suggested an irony that two weeks later (at the June 15 meeting) the speaker led the demonstration. See *id.*

43. See *id.*

44. Public Meeting, June 15, 1989, at 80.

45. *Id.* at 81.

most of the people around this table have been public servants for a very long time. Their philosophies, their integrity, their perspective, in many instances, are very well-known."⁴⁶ She added, "I have been called every name. I have been accused of everything. And you know what? You have to keep your eye on the prize."⁴⁷

Fred Friendly said, "I think Harriet is right. I think we've had a coming together at today's meeting."⁴⁸ He further pointed out that "we've [also] been buffeted by Borough Presidents, not all of them, but many of them, who've attacked us slightly more politely than we were today, but not much more politely . . ."⁴⁹ Friendly echoed Michel's call to keep the Commission's "eye on the prize," and urged us on with further rhetoric from the Civil Rights movement: "[W]e have to be resolute and proud of what we're doing and we have to do it well and we have to give it to the people and say, 'Its ours to propose, it's yours to dispose, now is the time.'⁵⁰

Unquestionably, there was an emotional "coming together" of the commissioners, though all the emotion in the world would not have carried the day without substance behind it. It was substance, particularly on land-use issues, that led Friendly to state, "I heard from some Commissioners things today that I didn't think I'd hear, and I'm glad to hear it."⁵¹

2. The Substance

The June 15 meeting began with a bow to our own process and, at the same time, with a message to the concerns of New Yorkers. Schwarz referred to our "unparalleled" outreach over that past month in responding to piles of letters and holding public hearings, forums on fair representation issues, meetings and discussions "with people in all boroughs, in all walks of life, fully reflecting the diversity of this City."⁵² Schwarz then tried to put the comments we had received in perspective for both the commissioners and observers. He said that we had heard from some discordant voices that sounded some "powerful and insightful" criticism of our preliminary proposals, and many were "trying to be advocates, trying to leverage us . . ."⁵³ He said the challenge would be to

46. *Id.* at 84.

47. *Id.* at 83.

48. *Id.* at 86.

49. *Id.*

50. *Id.* at 88.

51. *Id.* at 86.

52. *Id.* at 3-4.

53. *Id.* at 5-6.

“harmonize, to seek the best from [these] voices” and to “[seek] a balance on these difficult issues.”⁵⁴

The commissioners were given two proposals. One outlined proposed changes and new ideas on eight broad topics.⁵⁵ The second was a long memorandum on land-use policy.⁵⁶ It was the land-use memorandum and the ensuing discussion that did the most to foster consensus among the commissioners.

The land-use proposals addressed several different, and sometimes conflicting, concerns. Could a proper role be found for a borough perspective? Would local communities, particularly poor and minority communities, be treated fairly? And would central planning be effective?

During our earlier work on the preliminary proposals, we had rejected various ways of ensuring a borough perspective by giving a legislative role to borough presidents.⁵⁷ We believed that we needed to develop an appropriate executive role. By the close of our first round of Commission meetings on May 15, we had not yet done so. This problem had to be solved. In terms of building the Commission’s consensus, David Trager emphasized that he was not satisfied on this issue.⁵⁸ We needed Trager’s support. He was an effective advocate and analyst on the borough voice issue and an influential and balanced Commission member.

Fortunately, the new proposals contained a number of ideas for strengthening the borough voice on land-use. They included the “triple no” appeal to the City Council,⁵⁹ the super-majority in the Planning Commission required to reject a borough president’s proposal for an alternate site for a proposed City facility,⁶⁰ and other items discussed in Chapter VII.

When David Trager announced that “real progress”⁶¹ has been made on land use, it was clear that we had the beginning of a consensus on the Commission.

54. *Id.*

55. See N. Y. CITY CHARTER REVISION COMM’N, CHANGES PROPOSED BY THE CHAIR TO THE ADOPTED PRELIMINARY PROPOSALS AS A RESULT OF PUBLIC TESTIMONY AND COMMENT, Exhibit 71-a (June 15, 1989) [hereinafter CHANGES PROPOSED BY THE CHAIR].

56. See Memorandum from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, to the Charter Revision Commission Members (regarding land-use proposals) (June 15, 1989) (on file with the *New York Law School Law Review*).

57. See Alan Finder, *Charter Panel Tilted Scales Toward Minorities and Away From Boroughs*, N.Y. TIMES, May 16, 1989, at B4.

58. See Public Meeting, May 15, 1989, at 150.

59. See Public Meeting, June 21, 1989, at 125.

60. See CHANGES PROPOSED BY THE CHAIR, *supra* note 55, at 3.

61. Public Meeting, June 15, 1989, at 35.

Nat Leventhal was crucial to the Commission's success. He was enormously influential both inside and outside the Commission. Leventhal was fully versed in the intricacies of City government, and had a sound understanding of the relationship among issues and the political factors that would help win voter approval. Therefore, it was reassuring when Commissioner Leventhal followed Commissioner Trager's comments by saying:

[I]n a very brief paper you've done a terrific job of responding to[,] I think[,] a very wide variety of comments I think most of this stuff looks very good. I particularly had a chance to look at land use, which I like a lot.⁶²

Fred Friendly, who tended more to rhetorical flourishes than Leventhal or Trager, and who had just come through the emotions of a verbal and near physical assault, said, "[A]bout land-use, I think it's inventive. I think it's almost [inspiring]. I love it."⁶³

The proposed land-use changes were not only directed at developing an appropriate borough voice. They also responded to concerns of both: (i) all of the living former chairs of the City Planning Commission that a citywide perspective would be hampered by elements of our preliminary proposals; and (ii) minority and other community advocates. Proposed changes relevant to these advocates included the "Fair Share" plan for siting facilities. They also included a provision that disposition of City-owned residential property should automatically be reviewed by the City Council because "for poor communities the City's disposition of its residential property is the functional equivalent of a zoning change⁶⁴ in middle-class or upper-income communities."⁶⁵

The Fair Share and City residential zoning provisions were sound policy steps aimed at concerns of the City's poorer communities. They were also among those changes designed to help with the City's "progressive" and "good government" groups. Other proposed changes put forward at the June 15 meeting that were particularly relevant to these groups were, most importantly, the introduction of an independent budget office;⁶⁶ the proposals relating to more openness and more democracy in

62. *Id.* at 40-41.

63. *Id.* at 87.

64. We had already concluded that all zoning changes would have to go to the City Council because they amounted to a change of law.

65. Public Meeting, June 15, 1989, at 14.

66. See CHANGES PROPOSED BY THE CHAIR, *supra* note 55, at 1.

the City Council;⁶⁷ proposals on Access to Information;⁶⁸ proposals concerning the Department of Information commissioner;⁶⁹ proposals on service delivery;⁷⁰ and proposals on dual City and political party office-holding.⁷¹ All of these were also relevant to the concerns of particular commissioners —especially the chair. All stemmed from repeated themes in our recent public hearings and were an effort to “seek the best” from discordant voices.⁷²

The effect of these changes was also clearly beneficial in gaining support for the City’s “good government” community.

Obviously, neither our substantive nor our political work was over. From outside, as well as inside the Commission, this meeting’s proposals were viewed as extremely important. Their importance is illustrated by a few newspaper excerpts.

—*New York Newsday*, a consistent editorial voice speaking for an appropriate borough voice, referred to a “seemingly new direction” as “noteworthy and commendable,” but added: “Something not too far from true genius is still needed, however, to steer a correct course between the sometimes conflicting goals of five-borough empowerment and centralized government.”⁷³

—The *New York Times* reported that the range of widely varying comments we had to address: “Mr. Schwarz’s proposals were intended to advance the [C]ommission’s work by addressing objections from housing groups, environmentalists, development lawyers, civil-rights groups, borough presidents, Council members and Mayor Koch.”⁷⁴

Many individuals were quoted as saying the Commission was moving in the right direction. Unfortunately, although many commentators wanted us to move further, they were urging us to move in diametrically different directions. Thus, Borough President Ferrer was quoted as saying that there had been “progress . . . in the right direction” but that the borough presidents’ powers over land-use planning, as well as over the delivery of services and the award of contracts, should be increased.⁷⁵ Sylvia Deutsch, the chair of the City Planning Commission, also described the land-use

67. *See id.*

68. *See id.* at 4.

69. *See id.*

70. *See id.* at 5.

71. *See id.*

72. *See* Public Meeting, June 15, 1989, at 5.

73. Editorial, *Borough Power: Moving Toward a Fairer, Broader View of the City*, *supra* note 18.

74. Purdum, *Charter Chairman Widens Proposals*, *supra* note 38.

75. Finder, *Critics of First Charter Plan Praise Proposed Revisions*, *supra* note 19.

provisions as "moving in a direction that is more comfortable" but said that the mayor should have more say over land-use planning.⁷⁶

The June 15 meeting was short but extraordinarily productive. Most reactions from the discordant outside voices were positive. Clearly, the Commission had come more together. There was, however, still an enormous amount to do. After the June 15 meeting, it was clear to us that we should be able to put together a Commission consensus.

III. SMALLER ISSUES OF PARTICULAR CONCERN TO PARTICULAR COMMISSIONERS

Common ground on the major substantive issues facing the Commission, as well as the respectful, collegial Commission process, were the keys to building the Commission's consensus. In addition, several commissioners—sometimes building upon staff analysis and proposals that developed at our earlier legislative hearings—came up with ideas for useful reforms on a number of subjects important to them. Some of these ideas were added to the Charter.

For example, we added provisions requiring the City to pay interest for late contract payments.⁷⁷ Late payments hurt the City because fewer people were willing to contract with it. They also hurt contractors, particularly smaller, non-profit and community-based organizations. Another example was the creation of a separate Department of Telecommunications.⁷⁸ This had been unsuccessfully proposed by Fred Friendly many years earlier. With advances in technology, however, the idea had become more sensible. Finally, the Charter contained a new chapter on minority and women contractors,⁷⁹ which was one of Harriet Michel's special interests.⁸⁰ Although we would have had a Commission consensus without the smaller changes, including them only helped.

IV. MAKING A VIRTUE OUT OF CRITICISM

During the Charter revision process, we were criticized from all directions. In the beginning, this criticism bothered some of the commissioners. For example, during our first round of public hearings,

76. *Id.*

77. *See* discussion *supra* Chapter VII.

78. *See* Alan Finder, *Charter Panel Approves Bar on Political Leaders in Elected Offices*, N.Y. TIMES, June 28, 1989, at B1.

79. *See* N.Y. CITY CHARTER ch. 56 § 1301 (1989, as amended through 1997).

80. *See* Public Meeting, Aug. 1, 1989, at 295.

Fred Friendly described himself as “almost shell-shocked” at the sharp contrasts among various witnesses’ views on the likely effects of our preliminary proposals on land use.⁸¹ After reviewing our new proposals on June 15, however, Friendly was no longer “shell-shocked.” He called upon the Commission to “get going” because he felt that “now [was] the time.”⁸² Similarly, the minority members and others like Schwarz with histories of concern for civil rights were disturbed by members of the Delay Movement challenging our commitment to equal opportunity for minorities. Critiques from old friends were also unpleasant. Schwarz’s close friends, Jack Rosenthal, the head of the *New York Times* editorial board, and Herb Sturz, the former head of the City Planning Commission, and, at the time, an imaginative new real-estate developer, used public criticism to push us to move the process along. The *Times* ultimately endorsed the Charter;⁸³ Sturz continued to criticize it.⁸⁴

We were able, however, to cope with the criticism for several reasons. First, for every critic on an issue, we had supporters on the same issue. Second, because the critics came at us from such diametrically different directions, we often felt that we were in the sensible middle. On land use, for example, some critics said that we would hamstring the mayor, strengthen borough and local groups, and in general prevent difficult decisions.⁸⁵ Other critics said that we would enshrine the mayor, emasculate local groups, and in general allow developers, or “the City” to ride roughshod over everything and everybody.⁸⁶

Third, some of the criticism could, as the *Daily News* reported, “be summed up in a single sentence. Give me more power.”⁸⁷ A column in the *Times* said, “[i]f the arguments against the [C]harter plan are often couched in the language of the Founding Fathers, the emotions sometimes seem like those of cranky children.”⁸⁸ We knew that our job was to winnow out the good ideas that were interspersed among “cranky” or self-centered critiques.

81. Public Hearing, June 6, 1989, at 37; see also Todd S. Purdum, *Charter Panel Postpones Vote on Final Proposals*, N.Y. TIMES, June 7, 1989, at B2.

82. Public Meeting, June 15, 1989, at 88-89.

83. See Editorial, *The Only Reasonable Charter Choice*, N.Y. TIMES, Nov. 1, 1989, at A28.

84. See Lou Chapman, *In N.Y. Real Estate Market, Buy or Build?*, N.Y. OBSERVER, Sept. 25, 1989, at 15.

85. See Purdum, *Charter Plan and Critics: Opposition Slowing Process in New York*, *supra* note 6.

86. See *id.*

87. Editorial, *Changing the Charter: Not a Day to Waste*, DAILY NEWS (N.Y.), Apr. 13, 1989, at 14.

88. Richard Levine, *Charter Debate: A Glass Half Full or Half Empty?*, N.Y. TIMES, May 11, 1989, at B1.

Fourth, the advocates on every side of every issue were vying for advantage. There was nothing we would gain by agreeing too quickly. When the process was over, we were confident that many advocates would be persuaded.

Finally, we knowingly and intentionally adopted a process where we would subject our debates and preliminary ideas to critiques and criticisms. We were acting "in an age when sunshine laws and open meetings raise expectations and expose unsettled interest groups and nervous officeholders to every threatening conceit or unwieldy trial balloon that has been floated, then deflated days later."⁸⁹ Our openness, moreover, went far beyond the law. Open debate at meetings, announcements of tentative proposals, time spent listening to and learning from public reactions to and criticism of those proposals, and Commission refinement of proposals were all vital to the development of "good policy" and "good politics."

It was also important to reassure the commissioners and the public about our work and to help them properly weigh the conflicting criticism. Thus, at the crucial June 15 meeting, Schwarz reminded the Commission that, having heard "discordant" critical voices, "our job is to harmonize, to seek the best from those voices."⁹⁰ He said:

We've been listening all over this City. We're going to continue to listen We've learned a lot from people in every walk of life [W]e're going to continue to. But we have to use our judgment. We take the best of what we've heard[;] nobody has told us something that is perfect . . . but we must use our judgment to come up with what is the best that we can come up with.⁹¹

Thereafter, Schwarz directed his comments as much to the public as to the commissioners, saying that New Yorkers must be willing to compromise because "[e]verybody has to realize it can't be perfect for them, because that's an impossibility."⁹²

V. THE DISSENTERS

Of the fifteen commissioners, four—Bernard Richland, Therese Molloy, Aida Alvarez, and Judah Gribetz—dissented at the Commission's

89. Todd S. Purdum, *Charter Panel Has Quickly Produced a Consensus*, N.Y. TIMES, May 13, 1989, at A29.

90. Public Meeting, June 15, 1989, at 5.

91. *Id.* at 88-89.

92. Alan Finder, *Charter Panel Edgy on Forming Public Consensus*, N.Y. TIMES, July 22, 1989, at 28.

final meeting on August 2.⁹³ Except for Alvarez and Gribetz, the dissenters did not agree with each other. In addition, except for Richland's plan, which was to keep the Board of Estimate but add weighted voting, none of the dissenters presented an alternative plan, as opposed to disagreeing on some specifics. In the ensuing referendum campaign, the force of the dissents was weakened by there having been neither consistency among the dissenters, nor an alternative plan from them.

Commissioner Richland made clear from the outset that he could not support any Charter without a Board of Estimate. In the end, Richland said we should keep the Board of Estimate and provide weighted voting. The other three dissenters, however, supported the Board's abolition.

Despite Richland's insistence on keeping the Board alive, his participation throughout the Charter process was always collegial. For instance, he was often helpful with drafting details, even on chapters that he would have rejected.⁹⁴

Commissioner Molloy began her opposing comments by "thank[ing] everybody at this table for their kindness," and by acknowledging "many good things" that are "creative and innovative," including giving "the legislative power to the legislature."⁹⁵ Having "prayed and asked for direction and guidance," however, she came down against the plan because she feared the mayor would have excessive "centralized" power, while the boroughs would be left "with little or no power."⁹⁶ Molloy concluded by explaining that "the voices that are loudest to me are the voices of the people in the city where services are not being properly distributed."⁹⁷ She said that these worries had "kept me awake nights . . . I am one of the lucky white middle class that do not have[] many of these problems."⁹⁸ Although, in Commissioner Molloy's opinion we had created "a good centralized charter," we had failed "to do something really great to bring power down to the people . . ."⁹⁹

93. See Todd S. Purdum, *Panel Finishes Plan to Revise New York City's Government*, N.Y. TIMES, Aug. 3, 1989, at A1.

94. Schwarz—who had affection for the somewhat garrulous former corporation counsel—thanked Richland for "preserving [his] principles and helping to sharpen the Chapters." Public Meeting, July 31, 1989, at 4-5.

95. Public Meeting, Aug. 2, 1989, at 67-68.

96. *Id.*

97. *Id.* at 68.

98. *Id.* at 69.

99. *Id.* at 69-70.

Precisely what Commissioner Molloy would have had us do "to bring power down to the people" is not clear from our debates.¹⁰⁰ In any event, on the decentralization and borough president points none of the other dissenters joined with Molloy. Indeed, Commissioner Gribetz argued throughout our post-June 15 proceedings that the borough presidents would be given dangerously too *much* power on land-use issues because of the "triple no."¹⁰¹

The separate dissenting arguments of Commissioners Richland and Molloy each stood alone on the Commission.¹⁰² Each of their arguments represented one wing of the divided opponents in the referendum campaign. In contrast, Commissioners Gribetz and Alvarez stood together on almost everything—indeed, we cannot remember them ever having voted differently. Their issues, however, played little role in the referendum campaign.

Gribetz and Alvarez were passionate about getting rid of the city council president and having a vice mayor instead—Gribetz concentrating more on the former and Alvarez on the latter.¹⁰³ Commissioner Gribetz had made clear both privately and publicly to each of us how strongly he felt about it and that to him "the issue [of getting rid of the Council President] is central to the health of this proposed Charter and the efforts to get it enacted into law."¹⁰⁴

During the Commission's debates, Commissioner Gribetz repeatedly made the case against retaining the council president.¹⁰⁵ It was never clear to us just why this issue loomed so large for him in thinking about the Charter as a whole. His position surely could be, and was, argued with force, but it was not "central to the health of this proposed charter."¹⁰⁶

100. On June 20, Commissioner Molloy, in response to some remarks of David Trager, had said she was "always" in favor of "decentralization," and that she thought our new land-use plan did not "give the City to the boroughs or to the Council or to the Community Boards." Public Meeting, June 20, 1989, at 306. Schwarz replied, "I hope it doesn't give the City to anybody, but produces a balanced system of government that allows for it to be fair to all those conflicting interests." *Id.* David Trager took Molloy's comment as directed at him and said he did not regard it as "fair." *Id.* at 307. Trager went on to say, "I think I have been viewed somewhat as the voice of the boroughs here, and I think this latest proposal does achieve a balance." *Id.*

101. See Public Meeting, June 21, 1989, at 236-46.

102. See Public Meeting, June 20, 1989, at 300-09.

103. See Public Meeting, July 31, 1989, at 249-54.

104. *Id.* at 255. In fact, in the referendum campaign the retention of the city council president was not a central issue, drawing tut-tuts from a few and praise from others, but getting second-rank attention.

105. See *id.* at 249-53.

106. *Id.* at 255.

Commissioner Gribetz also repeatedly argued that every land-use decision made each year by the Board, should automatically go to the City Council.¹⁰⁷ He began, however, with a more pointed attack upon the “triple no.”¹⁰⁸ One of Commissioner Gribetz’s concerns was that giving a borough president power to decide not to challenge an important land-use matter would give rise to a potential for corruption.¹⁰⁹ However, he chose not to make this argument before the whole Commission, stating only that he had “told Fritz”¹¹⁰ the reasons for his opposition. When we concluded, in the closing days of the Commission, that any land-use item that did not otherwise go to the Council could be “called up” by a vote of fifty percent of the Council,¹¹¹ Commissioner Gribetz argued that every land-use item should *automatically* go to the Council.¹¹² We do not know whether the Commission’s decision to not automatically send every land-use issue to the Council would have produced a “No” vote from Commissioner Gribetz absent the Commission’s decision to maintain the Office of the City Council President.¹¹³

At the final meeting, Fred Friendly unsuccessfully urged Gribetz to change his negative vote because there were some issues that Friendly also had lost, and “sometimes it hurt like hell to lose.”¹¹⁴ Friendly reminded us that all of the “family prophets” (Madison, Hamilton, Pinkney, and Franklin) had had disagreements with parts of the U.S. Constitution, but nonetheless all had supported the whole.¹¹⁵ Somewhat ironically, it had been Commissioner Gribetz—in the course of losing one of many arguments on the council president and urging others to change to his position—who had first articulated the importance of commissioners being “open-minded” and being willing to modify positions in the “spirit of all of us coming to a consensus.”¹¹⁶ Nevertheless, despite the Friendly plea and his own earlier recognition of the importance of being willing to

107. See Public Meeting, Aug. 1, 1989, at 179-86.

108. See *id.* at 180-81.

109. See Public Meeting, July 31, 1989, at 249-58.

110. *Id.* at 254.

111. See Public Meeting, Aug. 1, 1989, at 179-81.

112. See *id.* at 179.

113. Although during the referendum campaign, Commissioner Gribetz, in rather collegial and professional private debates with the two of us before some Jewish groups, expressed his principled opposition to the provision requiring that the Districting Commission have at least proportional representation of the City’s minority groups, Commissioner Gribetz never voiced any such position during the Commission’s debates.

114. Public Meeting, Aug. 2, 1989, at 127-29.

115. See *id.* at 127.

116. Public Meeting, June 20, 1989, at 179.

modify positions to come to consensus, Commissioner Gribetz exercised his right to dissent.¹¹⁷

Commissioner Alvarez joined with Gribetz in pressing for a vice mayor and calling for the elimination of the city council president.¹¹⁸ She voted with Commissioner Gribetz on all the land-use matters that provided for the "triple-no" and ultimately joined him in opposition to land-use provisions that did not provide for all land-use items to go automatically to the Council.¹¹⁹ Perhaps because her own work schedule made attending meetings difficult for her, Commissioner Alvarez did not participate in discussion of many of the issues. (This contrasted with Gribetz who focused on all substantive issues and on many precise smaller drafting issues and offered significant comments on both.)

Commissioner Gribetz chose not to state his reasons in opposition when he voted "No" on the Charter as a whole, simply stating that "[i]t's your day, Fritz[.]" and that "[a] lot of my reasons have come forward in the intense activity all of us have had in the long and recent atmospheres exchanging views."¹²⁰ Commissioner Alvarez did give reasons. After saying that the Commission conducted a "good process," she read several pages claiming that "the genuine opportunity for reform has been missed," and that "this charter proposal is largely a patch work of political accommodations rather than a progressive vision of the city"¹²¹ This criticism was weakened considering that Alvarez herself did not offer any reforms except for the vice mayor.

Commissioner Alvarez then aimed her rhetorical passion at land use and the role of minorities, saying that "[a]pparently the City Council may be good enough for minorities but the charter does not have the confidence to allow the legislative body to make all the important political decisions."¹²² Harriet Michel responded: "We [minorities] are not [monolithic] and our interpretation of what's in the charter is vastly different, maybe it's progress and maybe not. But I suggest that it shows some political sophistication that we don't always see things alike."¹²³ Alvarez's response was that the Commission was "doing nothing to

117. See Public Meeting, Aug. 2, 1989, at 130.

118. This led them to vote "no" on many other chapters where the council president would have any role, however minor. One example was the Independent Budget Office where the council president was one of several officials involved in the appointment of the executive director.

119. See Public Meeting, June 20, 1989, at 205-16.

120. Public Meeting, Aug. 2, 1989, at 122.

121. *Id.* at 124.

122. *Id.*

123. *Id.* at 125.

empower minorities in terms of the rewriting of this Charter.”¹²⁴ Commissioner Betanzos’s reaction to a similar earlier comment was to say, “Then you should participate more so that we will do more.”¹²⁵

It is tempting to speculate whether personal relationships in any way affected the split on the Commission. Of the eleven supporters, Schwarz had previously known and worked well with all except for Fred Friendly and Mario Paredes—neither of whom he had ever met but for whom he quickly developed a mutual respect.¹²⁶ Certainly prior relationships of trust, respect, and friendship help. They cannot, however, carry the day in a highly public enterprise, vital to the future of New York, where each commissioner’s personal reputation is on the line. Thus, one cannot imagine, for example, Nat Leventhal supporting a new Charter that did not have an executive branch able to lead, or David Trager supporting a new Charter that did not adequately provide for a borough perspective, or Si Gourdine supporting a new Charter that did not expand opportunities for minorities.

Of the four dissenters, Schwarz did not previously know Alvarez or Molloy at all, barely knew Gribetz, and had known Richland only as a former corporation counsel. Certainly, Richland’s vote would have been no different if his most trusted former co-worker and best friend had chaired the Commission. With the other three dissenters, the support of Friendly and Paredes suggests that lack of a prior relationship should not, as a matter of logic, have made much of a difference.

VI. THE QUESTION OF THE QUESTION

Aside from the landmarks proposals as described earlier,¹²⁷ the Commission decided on the last day that we would present the Charter to the voters as a single question, as is specifically permitted by Municipal Home Rule Law section 36 (5)(b).¹²⁸ Any one of our myriad changes could have been stated as a separate question, but we had worked out a document “where we have looked at every piece of the puzzle and we have tried to balance one piece against another. The pieces fit together.”¹²⁹ Schwarz

124. See Public Meeting, June 20, 1989, at 199.

125. *Id.* A newspaper article several weeks later reported the exchange, and added: “Ms. Alvarez missed the next four meetings.” Finder, *What Gets Charter Panel All Riled Up?*, *supra* note 42.

126. See, e.g., Public Meeting, June 15, 1989, at 88 (comment by Fred Friendly); Public Meeting, Aug. 2, 1989, at 74-75 (Mario Paredes’s remarks on the last day of the Commission meetings).

127. See discussion, *supra* Chapter IX.

128. See N.Y. MUN. HOME RULE LAW § 36(5)(b) (McKinney 1997).

129. Public Meeting, Aug. 2, 1989, at 134.

gave a number of illustrations as to why it would be unworkable, and untrue to our work, to state separate questions. For example, the expansion of the City Council:

Now, you could think about that . . . as a separate matter[,] but that would do violence to the way in which we came together[,] because as we all remember our dialogue . . . about shifting the powers from the Board of Estimate elsewhere, and [it] became clear how much new influence the City Council would have, it became central to our thinking that we should expand the body and make it a more representative body through the expansion and through the heavy work we did on the district in the Commission.¹³⁰

In addition, to “begin the very act of separating the questions [themselves] is a divisive act.”¹³¹ It would have been divisive on the Commission because “[w]e have come together. We have compromised together. We have tried to find the best of the arguments from all of the competing forces”¹³² Separate questions could have been divisive and harmful with the electorate.

CHAPTER XII. WINNING APPROVAL FROM THE JUSTICE DEPARTMENT

Because three of the city’s five counties were covered by section 5 of the Voting Rights Act,¹³³ which requires pre-clearance for any changes affecting voting, the Commission had to submit the changes to the Justice Department for a no-objection approval before they could go into effect.¹³⁴ Because the Justice Department had broadly defined voting, because we regarded the proposed Charter changes as all interrelated, and because we wanted to avoid time-wasting and unproductive questions about or challenges to any failure to submit particular changes, we decided to submit the entire proposed Charter to the Department of Justice.

We specifically submitted the proposed Charter to the Voting Rights Section of the Department’s Civil Rights Division. This section was run by a small group of nonpartisan professionals who had an appropriate degree of skepticism about government submissions. Their process was

130. *Id.* at 135.

131. *Id.* at 137.

132. *Id.*

133. 42 U.S.C. § 1973c (1998).

134. *See id.*

exhaustive but not unnecessarily formal. Anyone could submit comments or objections; the Department of Justice frequently solicited comments from knowledgeable observers and relevant advocacy groups.

The referendum campaign and the Department of Justice process were going on at the same time—one in New York, the other in Washington, D.C.—and in lengthy written submissions to the Department of Justice. Several times, the two of us talked about what it would feel like to lose either one. Although the loss of either would hurt badly, a loss at the Justice Department would hurt more.

I. A HUGE SUBMISSION AND A ROCKY START

On August 11, we jointly signed a massive submission to the Justice Department.¹³⁵ A fifty-five page brief was flown to Washington by Lane. The accompanying eighty exhibits and fourteen appendices (which included sixty-seven volumes of material such as transcripts and letters) and voluminous other records were transported by van.¹³⁶

We did not believe the question facing the Justice Department was close at all, and ultimately it was not. A law professor who had previously practiced as an attorney for the Justice Department (and who had been a consultant for the Ravitch Commission), was quoted on the day of our submission as saying it looked as if the Commission had “bent over backward to be . . . fair You’d think they shouldn’t have any trouble, but one just never knows.”¹³⁷

It is true that one “never knows.” The two of us flew to Washington on September 14, 1989, for our first meeting with the Department of Justice. To our surprise, we received a cool reception.

We were not sure why the reception was so cool, although we got an inkling that the Justice Department had not yet focused on our lengthy submission, and that some opponents had protested to the Justice Department that the Commission’s process and outcomes were adverse to the political interests of protected minorities. Ultimately, when we saw

135. See Letter from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, and Eric Lane, Executive Director, 1989 New York City Charter Revision Commission, to Barry Weinberg, Acting Chief, Voting Rights Section, Civil Rights Division, U.S. Department of Justice (Aug. 11, 1989) (on file with the *New York Law School Law Review*) [hereinafter August 11, 1989, Letter from Schwarz and Lane to Barry Weinberg].

136. See Todd S. Purdum, *Charter Papers on the Way to Washington*, N.Y. TIMES, Aug. 11, 1989, at B1.

137. *Id.*; see also Editorial, *For Voting Rights, a Clear Triumph*, N.Y. TIMES, Aug. 17, 1989, at A22 (noting that the commission “has painstakingly met . . . and even exceeded . . . the commands of the Voting Rights Act”).

what various opponents submitted in writing about the new Charter and the processes that led to it, we understood completely what had happened. If what was contained in the submissions had been true, we deserved a cold reception. It was not true, however, as we later demonstrated.

Before we finished our first meeting, we had begun to thaw the icy reception. At the lunch break, we all shared some laughs. Additionally, Schwarz attempted to weave into the discussion his civil rights credentials and those of a number of others on the Commission. Most importantly, we began a discussion of the Charter's merits. Despite the positive aspects of the meeting, we left surprised, somewhat discouraged, and knowing that we had a lot to do on both the process and the substantive issues.

Thereafter, in response to the accusations, we engaged in some sustained, tough, and effective lawyering. This was quite unlike the softer arts at work all through the Commission's long period of listening and consensus building. Despite the frustrations of defending against misleading claims, perhaps it was a relief to be able to use a big stick instead of speaking softly. In any event, it was clearly necessary to show, with specificity, often using their prior inconsistent statements, that various opponents were making misleading, untenable, and often contradictory arguments.

II. ISSUES OF PROCESS

The attempt by opponents to show the Commission's process had been unfair to minorities was ill-advised. It allowed us not only the opportunity to expose numerous misstatements but also to stress many positives on our outreach efforts to minorities and our responsiveness to minority issues. This, in turn, probably helped our case with the Department of Justice on the substantive merits.

The process issues were largely raised by members of the Delay Movement. There certainly was a legitimate case for delay because the issues were very complex. The Commission was moving fast. Would the public be able to make an informed vote? Would minorities be particularly disadvantaged by the pace of our work?

While the Delay Movement's issues were legitimate, for the Commission the answer was clear. The government was unconstitutional. Real rights of real voters, including minorities, were being abused. Delay could cause legal problems.¹³⁸ A subsequent special election would favor entrenched interests. There was no evidence that if there were a year of

138. See *Board of Estimate v. Morris*, 489 U.S. 688, 690 (1989) (holding that the existing apportionment of the New York City Board of Estimate violated the constitutional "one person-one vote" requirement).

delay, New York City would suddenly turn into a year-long New England town meeting absorbed daily with questions of Charter revision.¹³⁹

During the Commission's extensive process, the Delay Movement never went beyond its opening argument in favor of delay. In making its subsequent case to the Department of Justice, the Delay Movement left behind its principled and legitimate opening argument to make incredible attacks on the Commission.

We were able to respond with quotes and facts that had the dual benefit of making our substantive case, and undercutting the credibility of the opponents' assertions to the Department of Justice about the Commission's process.¹⁴⁰ A few examples are:

—The opponents had quoted at great length some early critical process testimony by Marla Simpson, of the New York Lawyers for the Public Interest, an advocate on low-income and housing issues. This allowed us to quote Ms. Simpson's final testimony at the Commission's final public hearing:

I have to say, as an advocate that works on community and issues that affect persons of low income, I have never worked with a governmental agency that spent as much time listening to people as this one does. If it hasn't been enough, I share the frustration, but I do think you deserve some amount of credit for being open and . . . responsive . . . and to continue to ask questions well into

139. See August 11, 1989, Letter from Schwarz and Lane to Barry Weinberg, *supra* note 135, at 50-55. See also Public Meeting, Aug. 2, 1989, at 48-79.

140. The Commission's relevant written submissions on process were as follows:

(i) August 11, 1989, Letter from Schwarz and Lane to Barry Weinberg, *supra* note 135, at 44-55 and exhibits and appendices.

(ii) Letter from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, and Eric Lane, Executive Director, 1989 New York City Charter Revision Commission, to Barry Weinberg, Acting Chief, Voting Rights Section, Civil Rights Division, U.S. Department of Justice (Sept. 28, 1989) (on file with the *New York Law School Law Review*) [hereinafter September 28, 1989, Letter from Schwarz and Lane to Barry Weinberg].

(iii) Letter from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, and Eric Lane, Executive Director, 1989 New York City Charter Revision Commission, to Mark Posner, Attorney, Voting Rights Section, Civil Rights Division, U.S. Department of Justice (Sept. 26, 1989) (on file with the *New York Law School Law Review*) [hereinafter Letter from Schwarz and Lane to Mark Posner].

We met with the Department of Justice several times. We also had a number of telephone conversations answering various questions.

the night . . . and I think you deserve some level of commendation on that.¹⁴¹

We were able to use similar 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.¹⁴²

—The process objections of the Delay Movement had included the suggestion that the Charter process had not started until after the Supreme Court's *Morris* decision in March 1989; this was incorrect. One way of showing it was incorrect was to quote comments from several signatories of the process complaint letter to the Department of Justice showing their sustained involvement since as early as 1987—an involvement in which they made many suggestions that pushed in substantive directions that coincided with the Commission's ultimate conclusions.¹⁴³

—In response to a suggestion that the Commission's hearings were not accessible, we were able to show that two-thirds of the Commission's public hearings had taken place in community board districts where at least fifty percent of the population were members of minority groups.¹⁴⁴ In fact, this statistic was an understatement because if one left out Staten Island, where there were no such districts, eighty-seven percent of the Commission's public hearings were in predominately minority districts—and this did not include the forums on fair representation or scores of informal meetings.¹⁴⁵

The objections regarding the process also gave us another chance to make a key merits-related point to the Department of Justice, saying that:

[As the Commission] worked out the details of the broad ideas, and responded to the extensive public dialogue about those ideas, it consistently made improvements and added details to enhance minority representation, participation, and rights. These changes were made because of the importance the Commission gave to these goals These changes were also made because of the

141. September 28, 1989, Letter from Schwarz and Lane to Barry Weinberg, *supra* note 140, at 2-3 (quoting Public Hearing, July 21, 1989, at 275-76).

142. *See id.* at 13-15.

143. *See id.* at 6-12.

144. *See* Letter from Schwarz and Lane to Mark Posner, *supra* note 140, at 4-5 and Attachment D.

145. *See id.*

Commission's open process and the many suggestions it received from advocates for these values.¹⁴⁶

Similarly, we were able to point out the irony of the process critics' accusations that changes made by the Commission "made it hard to react," particularly when many of the changes were made in response to points made by these same critics.¹⁴⁷ At the last Commission meeting, after Schwarz had summarized the constitutional, legal, and policy arguments against delay, Commissioner Leventhal had forcefully made a similar point:

The [argument] is that this Commission has changed its mind so often and it's hard to follow. Of course, in that sense we are a victim of our own success. We have made modifications, because we have listened to each other[,] and I think more importantly we have listened to everyone out there who has come to talk to us. By doing that[,] we have shown ourselves, I think, to be open and responsive and that hardly seems to me to be a reason for delay.¹⁴⁸

In the end, the critics' objections to the process undermined their substantive arguments, because these process criticisms were objectively false. Making the process objections may have represented frustration by the objectors of "having achieved many, but not all, of their substantive goals."¹⁴⁹ Alternatively, it may have been an auto-pilot response that community advocates should always attack the fairness of officials with whom they disagree. Finally, it could have been the case that counsel presenting the arguments just did not know the record well and the clients who signed the process submissions did not think through what they were signing.

We were annoyed at being wrongly accused of having used an unfair process, but engaging in the process debate ultimately helped us with the Department of Justice.

III. ISSUES OF SUBSTANCE

The case we made to the Department of Justice was both simple and detailed. The new Charter would enhance minority rights. It would not be

146. September 28, 1989, Letter from Schwarz and Lane to Barry Weinberg, *supra* note 140, at 9.

147. *Id.* at 13.

148. Public Meeting, Aug. 2, 1989, at 56.

149. September 28, 1989, Letter from Schwarz and Lane to Barry Weinberg, *supra* note 140, at 2.

retrogressive. This was the case whether the proposed changes were looked at individually, or (as the cases suggest) as a whole.¹⁵⁰ No issue received more thorough care and consideration by the Commission. This was the simple case.

In rebuttal, however, the case we made to the Department of Justice was also very detailed. We took on each and every assertion made by the objectors.¹⁵¹

As had been true throughout the Commission's work, the critics of the substance of the Charter were sharply at odds with each other. Thus, some said the Board should have been retained with weighted voting, while others said that it was properly abolished.¹⁵² Some critics went on to say

150. See, e.g., *City of Richmond v. United States*, 422 U.S. 358 (1975); *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973). These cases involved municipal annexations of predominately white suburbs where one retrogressive effect was to reduce minority strength in the city as a whole. The Court nonetheless found that no legally significant retrogression had occurred because the annexation was accompanied by a shift from at-large to ward elections for the local legislature. This gave minorities "representation reasonably equivalent to their political strength in the enlarged community." *City of Richmond*, 422 U.S. at 370. We said our case was stronger because, unlike the two Virginia cases, none of the Commission's proposed changes were retrogressive.

151. The Commission's relevant submissions on the substantive changes were all very detailed and are only summarized here. The submissions were as follows:

(i) August 11, 1989, Letter from Schwarz and Lane to Barry Weinberg, *supra* note 135, at 44-55;

(ii) Letter from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, and Eric Lane, Executive Director, 1989 New York City Charter Revision Commission, to Barry Weinberg, Acting Chief, Voting Rights Section, Civil Rights Division, U.S. Department of Justice (Sept. 29, 1989) (on file with the *New York Law School Law Review*) [hereinafter September 29, 1989, Letter from Schwarz and Lane to Barry Weinberg];

(iii) Letters from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, and Eric Lane, Executive Director, 1989 New York City Charter Revision Commission, to Barry Weinberg, Acting Chief, Voting Rights Section, Civil Rights Division, U.S. Department of Justice (Oct. 5, 1989) (two letters of same date) (on file with the *New York Law School Law Review*) [hereinafter October 5, 1989, Letters from Schwarz and Lane to Barry Weinberg];

(iv) Letter from Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission, and Eric Lane, Executive Director, 1989 New York City Charter Revision Commission, to Sandra Coleman, Deputy Chief, Voting Rights Section, Civil Rights Division, U.S. Department of Justice (Oct. 6, 1989) (on file with the *New York Law School Law Review*) [hereinafter Letter from Schwarz and Lane to Sandra Coleman].

152. Opposition opinions were generally expressed directly to the Justice Department. See September 29, 1989, Letter from Schwarz and Lane to Barry Weinberg, *supra* note 151, at 7; Purdum, *Charter Plan and Critics: Opposition Slowing Process in New York*, *supra* note 6 (paraphrasing Borough President Ralph J. Lamberti as arguing that the Board

that the borough presidents should have been abolished, while others said that they should have been given more power.¹⁵³ Some critics said we had created an "imperial Mayor," while others said that the new Charter would "weaken the power of the Mayor, increase the power of the Borough Presidents and Community Boards and, in general, make life a lot more difficult for real estate developers."¹⁵⁴

Having critics sing discordant tunes was, of course, nothing new for us. What was new, however, was critics contradicting their own previous positions. This was most glaring with Bronx Borough President Ferrer. To the Department of Justice, he argued that the Board should be saved by weighted voting. Before that, however, he had argued to the Commission that if weighted voting were to be adopted for the Board, "I probably would toddle myself down to Federal Court, be among the first, if that were to happen."¹⁵⁵ In arguing before the Commission, however, the borough president was scornful about the Board's powers and practices. For example, he said the Board was deficient because "it allowed too many key players in City Government to point the other way when a major decision was being made or when a decision that should have been made was not made."¹⁵⁶ He said the Board also could not really influence land-use decisions because "[b]y the time it reaches the Board of Estimate, they are made. One must either say yes or no. But saying yes or no is a bit like coming to the wedding a little late."¹⁵⁷ Similarly, he said that the Board's budget power was marginal and that the Board did not provide real decision making.¹⁵⁸

Bronx Borough President Ferrer had been one of the most articulate and persistent of the advocates appearing before the Commission. His vision of a new "county executive" form of government presented many

of Estimate could be preserved through a particular scheme of weighted voting); Todd S. Purdum, *Charter Panel Dooms New York Board of Estimate*, N.Y. TIMES, May 3, 1989, at A1 (reporting that W. Bernard Richland, member of the Charter Revision Commission, was in favor of a weighted-vote system, and that the commissioners voted 13 to 1 against weighted voting).

153. See September 29, 1989, Letter from Schwarz and Lane to Weinberg, *supra* note 151, at 7 n.14 (citing the Statement of East Brooklyn Congregations, Queens Citizen Organization, and South Bronx Churches, submitted on July 25, 1989, to the Department of Justice).

154. See Comment by Herbert Sturz, *quoted in* Chapman, *supra* note 84 (submitted as Attachment 1 in September 29, 1989, Letter from Schwarz and Lane to Barry Weinberg, *supra* note 151. See also Editorial, *The Only Reasonable Charter Choice*, *supra* note 83.

155. See Public Hearing, Apr. 6, 1989, at 61.

156. *Id.* at 26-27.

157. Public Meeting, Apr. 29, 1987, at 165.

158. These and many other prior inconsistent statements were marshalled for the Department of Justice. See Letter from Schwarz and Lane to Sandra Coleman, *supra* note 151.

ideas about borough presidents playing an executive role and becoming more effective and creative by being involved earlier in the process.¹⁵⁹ Although the Commission moved in Ferrer's direction, we were not willing to adopt Ferrer's full vision, because we believed it would weaken and break up the City. His vision also involved too many distinctions that sounded good in theory but would be difficult to apply, such as the difference between local and citywide interests in decisions about land use. Some of these concerns of Commission members were apparent from discussions during Ferrer's long testimony on April 6, 1989.¹⁶⁰ After the Commission's crucial meeting of June 15, however, Ferrer was quoted as saying, "[w]e're moving in the right direction."¹⁶¹ Nevertheless, not too long after this it became clear to us that Ferrer would be an opponent. Why he made arguments to the Department of Justice (or allowed arguments to be made on his behalf) that were so clearly contrary to his own prior statements is a mystery. But, as with some of what the Delay Movement said about the Commission's process, the opportunity to use opponents' prior words to help make our case was a gift. In any event, the record of Ferrer's many prior negative statements about the Board was hardly a firm platform on which to build a case for saving the Board.

Former Manhattan Borough President Percy Sutton, an African American, joined Ferrer as the only other minority who argued to the Justice Department that the Board should have been preserved through weighted voting.¹⁶² Sutton argued that he had been, in effect, mayor of the minorities, and that he had been able to steer contracts to minority organizations.¹⁶³

Quite apart from Ferrer's prior anti-board statements, there were many weaknesses in the plea to save the Board in the name of minority rights. First, no solution was even offered to address the legal problems under both the "one person, one vote" doctrine and the Voting Rights Act. The Board was an institution "where minorities have always been significantly

159. See *id.* at 2-3 (citing Brooklyn Borough President Ferrer's 1987 PROPOSAL FOR CONSTRUCTION OF A COUNTY BUDGET and 1988 PROPOSAL FOR CHARTER REFORM).

160. See Public Hearing, Apr. 6, 1989, at 4-105. After his initial presentation was finished, Ferrer was credited with being the first of the City's "major elected officials" to put "an agenda on the table for people to consider." *Id.* at 27-28. Then followed 75 pages of interesting exploration of his ideas, including some tough questioning and discussion of difficult hypotheticals.

161. Finder, *Critics of First Charter Plan Praise Proposed Revisions*, *supra* note 19.

162. For Mr. Sutton's views, see Alan Finder, *Coalition Opposing Charter Revision Starts Its Campaign*, N.Y. TIMES, Sept. 28, 1989, at B1; Bob Liff, *Charter Change Hurts Minorities: Opponents*, NEWSDAY (N.Y.), Nov. 2, 1989, at 19.

163. See Finder, *Coalition Opposing Charter Revision Starts Its Campaign*, *supra* note 162.

under-represented.”¹⁶⁴ Weighted voting would make the voting rights problems worse. It would do so because Brooklyn and Queens—two boroughs where minorities had failed dismally in borough-wide elections—would be the principal beneficiaries of re-weighting the borough presidents’ votes. In addition, the Bronx, with a minority borough president, would have a greatly diminished “weighted” vote.

Second, the old Board had to be compared to the proposed new Council. There were no minority members on the Board from 1977 to 1985. In 1989, there were two minority members on the Board, the largest minority representation, which gave minorities 18.2% of the Board’s voting power.¹⁶⁵ There was no hard evidence to support the claim that minorities had exercised greater power on the Board than their share of votes. In any event, minority strength on the Board had to be compared to the minority membership expected on the new and expanded Council. “It is hard to imagine a group with 35-41% voting strength wielding *less* power than one with only 18.2% voting strength.”¹⁶⁶ As former Third Circuit Judge Arlin Adams had advised the Commission, “such a ‘less is more’ theory is based [on] highly debatable assumptions and is simply contrary to the Voting Rights Act’s goal of enhancing opportunities for minority representation.”¹⁶⁷

Finally, we marshaled the evidence of the Board’s practical weaknesses. These ranged from the tiny number of votes where the mayor lost anything,¹⁶⁸ to its lack of staff,¹⁶⁹ to its after-the-fact role, to revealing critiques like those of Bronx Borough President Ferrer quoted earlier. This same evidence also helped us respond to those objectors who agreed that the Board should be abolished but held up its supposed great powers as a benchmark to test the fairness to minorities in a debate about how those powers were to be distributed under a new Charter.¹⁷⁰

Two other claims frequently recurred in the opponents’ arguments: first, not all of the Board’s powers went to the Council; and second, the borough presidents would be weaker than in the past.

The first claim ignored the fact that the Council, in the aggregate, would have more power than the Board did and that it would be more representative of minorities. We also concluded that “given the nature of the Board . . . and its unwieldy mixture of executive, administrative and

164. September 29, 1989, Letter from Schwarz and Lane to Weinberg, *supra* note 151, at 7.

165. *See id.* at 22.

166. *Id.* at 24.

167. *Id.*

168. *See id.* at 14-16 and Attachment 2.

169. *See id.* at 10 n.6.

170. *See id.* at 22-26.

legislative functions," it was "inevitable, and appropriate" that some of its powers not be given to the Council.¹⁷¹ One such power was the power to approve specific contracts. "The Council is a legislature; the Board of Estimate is not."¹⁷²

In assessing the Council's powers under the proposed new Charter, the objectors made two obvious mistakes. First, one of their lawyers argued that the new Charter failed to give the Council plenary legislative authority.¹⁷³ In fact, the provision was there; it had just been moved for sound drafting reasons.¹⁷⁴ Second, objectors claimed that depriving the Council of any of the Board's powers would effectively benefit the mayor, adding that Council action was subject to a mayoral veto, which could only be overridden by a two-thirds Council vote. The mayor had no veto of Board action.¹⁷⁵ This ignored the fact that the mayor had two of eleven votes on the Board. For the Board to act over the mayor's opposition would have required six of the remaining nine votes, i.e., the same two-thirds vote necessary to override a veto of Council action.¹⁷⁶

Opponents also ignored a number of progressive changes. On land use, for example, the critics failed to note the "fair-share" criteria,¹⁷⁷ designed to protect low-income and minority communities by requiring equitable standards for the siting of City facilities.¹⁷⁸ Similarly, on procurement, they ignored the creation of the Office of Economic and Financial Opportunity.¹⁷⁹ On budgets, they did not mention the IBO¹⁸⁰ or numerous sunshine provisions designed to level the playing field between mayors and others in City government.¹⁸¹

Where not every function of the Board was transferred to the Council, we reiterated that the changes were appropriate given the different nature of the two bodies. As we said about procurement, "different does not mean less."¹⁸² The Board, after all, did not set substantive contract policy for the whole City. The newly empowered Council, however, could do so via the annual contract budget, subject to mayoral veto, subject in turn to

171. *Id.* at 18.

172. *Id.* at 18-19.

173. *See id.* at 26-28.

174. *See id.* at 28.

175. *See id.* at 27-28.

176. *See id.* at 28.

177. *See id.* at 36.

178. *See id.*

179. *See id.* at 32-35 and Attachment 4.

180. *See id.* at 28-31 and Attachment 4.

181. *See id.* at 40.

182. *Id.* at 32.

Council override.¹⁸³ Moreover, the Board only passed on contracts that were not competitively bid.¹⁸⁴ On the contracts they did review, their action came at the last minute. In the last three years for which there was data, the Board defeated only one contract.¹⁸⁵ Overall, we felt our procurement changes were not only “far more consistent with good government and cost efficiency standards,” but would also lead to “greater and more permanent progress” on the involvement of minority firms.¹⁸⁶ “[T]he sporadic efforts of an individual Board member are no substitute for legislative policies of general application.”¹⁸⁷

On land use, the critics referred to the new City Planning Commission as “mayor-dominated,” never mentioning that the old Commission had only mayoral appointees. The mayor could name only seven of the thirteen members of the new City Planning Commission.¹⁸⁸ Moreover, except for the chair, all members had five-year terms, staggered to further reduce the “domination” of any particular mayor.¹⁸⁹ In addition, echoing Nat Leventhal’s debate with Judah Gribetz, we said that to require the Council to review every land-use decision when put “in terms of actual effect, as opposed to theoretical argument . . . would arguably be retrogressive . . . and certainly would be bad government.”¹⁹⁰

With respect to borough presidents, we showed weaknesses in the power of the Board and with respect to minorities getting elected to the Board. We noted:

The overall thrust of the Charter Revision is not to diminish the role of the borough presidents but to give them new executive functions within their boroughs—functions which will enable them to initiate proposals, require them to make fiscal, land use, and service delivery choices, and compel public deliberation and decision on their initiatives.

As Borough President Shulman observed, “it is anticipated that, if anything, the obligations of the borough presidents will increase and not diminish.”¹⁹¹

183. See N.Y. CITY CHARTER ch. 6 § 104 (1989).

184. See September 29, 1989, Letter from Schwarz and Lane to Barry Weinberg, *supra* note 151, at 32.

185. See *id.*

186. *Id.* at 32, 35.

187. *Id.* at 34.

188. *Id.* at 39-40.

189. *Id.* at 40.

190. *Id.* at 38.

191. *Id.* at 46.

Our written submissions to the Department of Justice were finished by early October. In subsequent meetings and phone calls, the Justice Department's interest was focused on both the substance and the fairness, openness, and extent of our efforts to involve minorities. For one meeting in Washington, we took Si Gourdine and Arch Murray, who helped make the arguments that the Charter changes were positive and progressive on fairness to, and opportunities for, minorities.

When the referendum arrived, we had still not heard from the Department of Justice. In December, however, we received its approval letter.

IV. THE DEPARTMENT OF JUSTICE'S APPROVAL

On December 13, 1989, the Department of Justice announced that the City had met its burden with regard to each of the changes in the Charter.¹⁹² While the opponents and commissioners had made voluminous objections to the Department of Justice, the four-page decision from the Justice Department was short and to the point.

The Department of Justice began by stating that the "decision to replace the Board of Estimate plainly appears to have been based on legitimate, nonracial reasons."¹⁹³ There was no further elaboration, either on the legal problems with the Board or on its governmental weaknesses or strengths. The bulk of the letter dealt with the allegations that the way the Board's powers were transferred would "substantially shift the locus of power to the mayor"—the "imperial mayor" argument, that it was unfair to minority voters who "historically have not had a full and equal opportunity to elect a candidate of their choice" for mayor.¹⁹⁴

The Department of Justice noted that minorities had little more success in electing officials to the Board.¹⁹⁵ The Department of Justice assumed, however, for the purpose of its analysis, that the Board had usually operated by consensus, and further that this would have magnified the power of its minority representatives.¹⁹⁶ We did not accept either assumption. They concluded that the Charter amendments achieved "a complex division of powers and duties, with the mayor and [C]ouncil as the

192. See Letter from James P. Turner, Acting Assistant Attorney General, Civil Rights Division, U.S. Department of Justice, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (Dec. 13, 1989) (on file with the *New York Law School Law Review*).

193. *Id.* at 2-3.

194. *Id.* at 3-4.

195. See *id.*

196. See *id.*

principal recipients of the [B]oard of [E]stimate's responsibilities, but with the [B]orough [P]residents and other citywide officials retaining important roles."¹⁹⁷ The Department of Justice then adopted as its own the points we had stressed. It noted the importance of the new Council. Minority voters "likely will have an increased opportunity to elect members of the enlarged and more powerful [C]ity [C]ouncil."¹⁹⁸ The Justice Department said the Council will have "substantial decision-making authority in the major city government areas of the budget, land use, contracts and franchises."¹⁹⁹ Moreover, the Justice Department said:

Since the Board of Estimate exercised executive as well as legislative functions, significant powers are allocated to the mayor, but not without checks and balances provided to other elected officials which, it appears, should avoid any retrogression in the opportunity for minority participation in city government.²⁰⁰

Then the Department of Justice noted the recent mayoral victory of David Dinkins, called "a minority-sponsored" candidate.²⁰¹ However, they said that their "determination would have been no different had another individual been elected this year."²⁰²

Finally, the Department of Justice analyzed the requirement for selection of minority group members to the Districting Commission. They approved this requirement, referring to it as a "flexible goal" that "serves a legitimate remedial purpose."²⁰³ The need for remedial action was proven by the attorney general's objection to the 1981 councilmanic districting plan.²⁰⁴ "The record shows" that this provision was "a recognition of the need to insure that a broad cross-section of the electorate will participate in development of council districting plans."²⁰⁵

The news accounts of the Department of Justice's approval quoted, among others, Schwarz, Bronx Borough President Ferrer, and Richard Emery, who had brought the *Morris*²⁰⁶ case.²⁰⁷ Ferrer said he was not

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 4.

204. *See id.*

205. *Id.*

206. *Board of Estimate v. Morris*, 498 U.S. 688 (1989).

207. *See Alan Finder, New York City Charter Revision Approved by Justice Department, supra* note 3.

surprised: "I don't cry over spilt milk."²⁰⁸ Emery said the new Charter represented "a major step in the direction of government integrity and a new era of openness and equality for New York citizens."²⁰⁹ Schwarz said, "I'm really, really happy,"²¹⁰ and added, "I would have been personally distressed to the utmost to have anybody conclude after a rigorous investigation that we had not carried out our desire to deliver a more fair and more representative government."²¹¹ "We did our job well," Schwarz concluded.²¹² "Now it is up to the elected officials to carry forth the effort."²¹³

CHAPTER XIII. THE REFERENDUM CAMPAIGN

Our job was to fashion a new Charter; only the public could transform it into law. Because the *Morris* decision meant the City's Charter had to change, and because we believed the City would be harmed if the issues were not resolved in 1989, our responsibility was to fashion a proposed Charter that would pass muster at the polls. While the formal "campaign" did not come until after the Commission finished its work in August, we had our eye on how to win the referendum from the earliest days. For example, as we set out in Chapter V, we rejected Mayor Koch's March plea to hold the referendum after November 1989, not only because we thought delay was bad for constitutional, legal, and policy reasons, but also because we thought an election in 1989 increased our chances of winning a referendum vote.²¹⁴

From the beginning, we had a nascent strategy for how to develop a winning coalition. This strategy began with relatively vague principles but over time became increasingly more focused on individuals, institutions, and groups who ultimately could help pull together a majority of the people.

We knew that unless our work was sensible and produced by a fair process, it would not be supported at the polls. Beyond this connection between good policy and good politics, we believed from the outset that we could not prevail without substantial minority support. Absent substantial minority support, we believed we would lose much support from others—as we also would if the Charter issues became racially divisive. Although

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.*

214. See discussion *supra* Chapter V.

support from minorities had to be widespread to achieve this goal, David Dinkins' individual support was particularly important because he was running for mayor.

We also believed that to prevail at the polls, Charter changes had to be seen as reform. The support of "good government" groups, who had a record of interest in Charter-type issues and who had access to and influence with editorial boards and other opinion makers, was a vital element in achieving this goal.

Another category of supporters that we knew from the early days would be crucial was more amorphous. It consisted of those most likely to vote on Charter issues—citizens who were more attentive to public issues, and likely assiduous readers of newspapers. We knew that Charter issues were hard to grapple with even for this group. Therefore, to develop support from this group of voters, we felt that the views of opinion makers would be vital. Of these opinion makers, we believed the *New York Times* editorial board would be most important.

To succeed, our proposed changes had to be seen not only as reforms but also as responsible revisions—fiscally as well as in the sense of not making the difficult work of running a complex City even more difficult. To achieve this somewhat amorphous goal, opinion makers were again important. Of those who could affect this group's opinions, we saw Mayor Koch as particularly important.

As it evolved, our strategy was focused primarily on types of voters more than voters from particular geographic areas. We understood that winning in Staten Island would be most difficult, and that Manhattan contained a disproportionate number of the types of voters most likely to vote, but that there were plenty in the other boroughs as well. By mid-summer, however, we were also, for reasons discussed below, particularly interested in maximizing our chances of winning in Queens. This led to substantial attention toward gaining Borough President Claire Shulman's support.²¹⁵ It also was one of the reasons for working hard to get the editorial support of *New York Newsday*.

The next section elaborates on what we have just summarized: the key elements of our strategy to build a coalition for the referendum. Ultimately, we wanted support from as many politicians and other opinion leaders and groups as possible.

The coalition of core supporters that our strategy aimed to develop was broad, and in some ways not made up of natural allies—for example, minorities and Mayor Koch; groups who emphasized change and those who were most concerned with responsibility; or the editorial boards of the

215. See Alan Finder, *About New York; Borough Leaders and the Charter: A Winding Road*, N. Y. TIMES, Nov. 2, 1989, at B1.

Times and *Newsday*, who pressed the Commission from diametrically opposite directions.²¹⁶ By the end of the process, as more and more people picked sides with the referendum vote nearing, the coalition of support was even more clearly one of strange bedfellows.²¹⁷

How was it possible to pull together such a broad and surprising—in terms of usual alliances—coalition? Clearly what pleased one group might disappoint or anger another. It was also clear that no one group was entirely pleased—indeed, we believed that “. . . if anybody were 100 percent pleased, we’d be 100 percent wrong.”²¹⁸ Many factors could be singled out for success in pulling together this disparate core coalition. To single out one as most important is difficult, but we believe it was our process. By listening intently, by respectfully exchanging ideas with people having widely varying priorities, by finding ways to pick—and often further develop or change—some, but not all, ideas pressed upon us by advocates coming from different directions, by the Commission openly debating the merits of ideas, and by articulating broad goals that resonated with the best of America’s founding ideals and responded to the City’s current needs, we believe the Commission was able to develop good will, respect, and support.

The referendum opponents of the Charter were also extraordinarily diverse.²¹⁹ While supporters coalesced, opponents did not. Thus, we were helped—as we were during both the Commission’s work and before the Justice Department—by two facts. First, the opponents were deeply divided in their critiques of the proposed new Charter. Second, the opponents had no coherent, broad-gauged, alternate vision of Charter change to propose to the voters.

To be sure, one wing of the divided opponents offered the “vision” of sticking close to the status quo—keeping the Board with weighted voting.²²⁰ While the status quo may have been fine with some politicians, a few insiders, and many Staten Islanders,²²¹ it was not a very exciting platform for most voters.

Finally, in attracting support and presenting our case to the voters, we were helped by the concern that if the Charter were not approved, the situation would be unsettled at best. The government would still be illegal. Others, such as the courts or the state legislature, might move in to impose

216. See discussion *infra* Chapter XIII, Part I.

217. See discussion *infra* Chapter XIII, Part II.

218. Todd S. Purdum, *A Handful of Touchy Issues Continue to Plague Charter Panel*, N.Y. TIMES, July 4, 1989, at 33.

219. See Alan Finder, *Opposition to Charter Change Diverse*, *supra* note 4.

220. See Joyce Purnick, *Officials Angered by Conflict over Estimate Board*, N.Y. TIMES, Feb. 21, 1988, at 34.

221. In fact, weighted voting would not have helped Staten Island.

a solution. These other bodies, however, would be less able to provide a wide range of reforms,²²² or less caring about the special needs of New York City. During the referendum, we played this tune—which could be called a substantive form of negative campaigning—along with our positive case for the new Charter.

I. BUILDING THE CORE COALITION

A. *Minorities*

We start with minority votes not because they were key to the referendum majority—although they were important and we won in every district that was predominately African American—but because had the Charter become racially divisive, the effects throughout the City would have been harmful enough to lead to a referendum defeat or a victory of which we would not have been proud.

Enhancing fair representation was the Commission's "first and foremost" goal. We also believed, and asserted throughout the Commission's meetings and in the referendum, that we had delivered on this goal.

Remember that Schwarz's initial step after being asked to be chair was to urge the mayor to add two more minority members to the Commission.²²³ This was done for the substantive reasons discussed earlier.²²⁴ It also had a useful political effect on the Commission's working relationship with minorities. For example, very shortly after the appointment of the new Commission, Hulbert James—who was active in Citizens for Charter Change and close to David Dinkins, and who had administered a voter registration campaign inspired by Jesse Jackson during the 1988 Presidential Primary—told Schwarz that it would now be easier to work with and trust the Commission because of its more representative character. James later endorsed the Charter.²²⁵

222. For example, a judicial solution would almost certainly have to be limited to a narrow fix of the "one person-one vote" rule violation. This would mean no expansion of the City Council, no fair-share land-use criteria, no Independent Budget Office, no change in the composition of the City Planning Commission, no role for the borough presidents in the budget, and no increased role (and thus accountability) for the executive branch on contracting.

223. See discussion *supra* Chapter I.

224. See discussion *supra* Chapter I.

225. See generally List of Supporting Organizations and Individuals as of October 19, 1989 (on file with the *New York Law School Law Review*).

As we set out in many places earlier, the story of the substantive development of the Charter after the Commission began formulating its proposals is replete with provisions added to carry out our view of good policy that also amounted to good politics with minorities. While there were minority opponents of the Charter, there were more supporters. This was particularly so after the Commission had accelerated the next Council election to 1991—a decision which itself is a prime example of how good policy made for good politics. Thus, in the referendum, we were supported by the following minority leaders: David Dinkins; Roscoe Brown, head of 100 Black Men²²⁶; the NAACP²²⁷; Stanley Hill, head of District Council 37; New York Democratic Congressman Floyd Flake; and Rev. Calvin Butts, Pastor of Harlem's Abyssinian Baptist Church, among many others. All of these were African Americans. There were Hispanic and Asian public-figure supporters as well, though they were fewer in number. This difference may have been explained by the fact that except for the Delay Movement, there were fewer Hispanics and Asians deeply involved in the Charter process than there were African Americans. Also, the eventual opposition of Bronx Borough President Fernando Ferrer, the highest elected Hispanic official in City government, may have been relevant.

Our hope with respect to minorities was not only to gather every supporter we could, but also to affect the tone of any opposition—to make sure it was focused on the substantive issues. This hope was fulfilled. Those minorities who opposed the Charter did not make gut-wrenching claims of prejudice; their issues were important but rather dry and technical. Their recognition that we had been open and committed to fairness probably mitigated rhetoric and passion during the referendum campaign.

One example of this is Esmeralda Simmons, Executive Director of the Center for Law and Social Justice at Medgar Evers College in Brooklyn, and a leader in the Delay Movement. Like Hulbert James, Simmons told Schwarz early on that the change in the composition of the Commission was an important step. She also said that, in general, she found the 1989 Commission's process and tone refreshingly open and attentive on issues of concern to minorities. Although she opposed the Charter because she

226. 100 Black Men is an organization of prominent black professionals. See generally John Kifner, *Hasidim Won't Try to Stop a West Indian Celebration*, N.Y. TIMES, Aug. 30, 1991, at B3.

227. The NAACP Legal Defense Fund ("LDF") (on whose board Schwarz sat) did not take a formal position. (LDF is a separate organization from the NAACP.) But behind the scenes during the referendum, Julius Chambers, LDF's director/counsel, was helpful in highlighting the Charter's positive aspects and in calming some members of the Delay Movement.

felt the vote should be delayed and that the changes strengthened the mayor, gave too much power to the speaker, and should have done more to decentralize decision making, she also praised the Commission's work as enhancing political opportunities for minorities.

Another opponent who mixed praise with criticism was Congressman Major Owens. In the late spring or early summer, during a long and difficult meeting with a group of about twenty persons at District Council 37, Owens came up to Schwarz in a corridor during a break, smiled, and alluded that Schwarz had the most difficult job in New York. Although he later opposed the Charter, he did so in a very muted way.

Still another example of recognition by minority opponents that we had been open and committed to fairness came from Ruben Franco, president and general counsel of the Puerto Rican Legal Defense and Education Fund. Franco had played a major role in articulating the Voting Rights implications of limiting the extent of the Council's land-use review powers,²²⁸ and had opposed the Charter before the Justice Department. Nonetheless, Franco wrote Schwarz saying that:

The resulting Charter is not a perfect one, as I am sure you will agree. Indeed, we at the Puerto Rican Legal Defense and Education Fund, Inc., strenuously objected to parts of it. However, it is much better than we have had. Importantly, it provides for the demographic changes that are occurring in this City. I think that Latinos, African-Americans, Asian-Americans, and other so-called minorities, will benefit.²²⁹

On our process, Franco was even more complimentary, saying that "you were very democratic and made a very serious effort to reach as many people as possible," and that "[y]ou did the best you could to be as all-inclusive and informative as possible."²³⁰

The force of this letter could be said to be weakened somewhat because it was written after the Charter process was over. Nonetheless, the substance of the letter was consistent with many private comments made by opponents to us throughout the process. Furthermore, the tone of the letter

228. See *supra* Chapter VI, n.98.

229. Letter from Ruben Franco, President and General Counsel, Puerto Rican Legal Defense and Education Fund, Inc., to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (Dec. 28, 1989) (on file with the *New York Law School Law Review*).

230. *Id.* Similar praise for our process from an opponent came this year from Borough President Ferrer in testimony criticizing the process of the 1998 Charter Revision Commission.

was consistent with the fact that, except for the interruption of June 15,²³¹ the minority opponents of the Charter did not unleash the sort of rhetoric that would have fulfilled the Gracie Mansion prediction of a racially divisive campaign.²³²

David Dinkins was important to us because he was a mayoral candidate. His importance was heightened because he was an important minority leader. With Dinkins, as with Koch,²³³ the timing of the Charter referendum (coinciding with a mayoral election year) was important in garnering his support. Indeed, this was probably even more so with Dinkins. Although Mayor Koch might have tried to press harder on some issues, we are confident that he would have supported the Charter even if it was not an election year when he was running for mayor (as he continued to do after he had lost the primary to Dinkins in September). With David Dinkins, however, it is at least possible that if he had been planning to stay as Manhattan borough president, he would have opposed the Charter.

David Dinkins was a devotee of the Board of Estimate. Had he not decided to run for mayor, it is certainly possible that he would have joined Percy Sutton—his friend, business colleague, and predecessor as Manhattan borough president—in urging weighted voting and opposing the Charter both in the referendum and before the Justice Department.²³⁴ It may also be revealing that Dinkins' formal endorsement of the Charter did not come until after he had won the Democratic primary against Koch,²³⁵ though this may also simply reflect David Dinkins' more cautious style.

After Dinkins had decided to run for mayor, and after *Morris* had been decided by the Supreme Court, Dinkins engaged in the Charter process in ways that seemed to reflect that there would be a new Charter and that, as the Commission's recommendations crystallized, he found a good deal to praise.²³⁶

On August 2, shortly before the Commission's last meeting, Harriet Michel and Schwarz had breakfast with David Dinkins and Barbara Fife,

231. See Public Meeting, June 15, 1989, at 42-49. An unidentified person disrupted the meeting and loudly criticized the apparent lack of racial mix of those present, and voiced the need for sensitivity toward African-American issues. See *id.*

232. See discussion *supra* Chapter V.

233. See discussion *supra* Chapter V.

234. See Purnick, *Officials Angered by Conflict over Estimate Board*, *supra* note 220.

235. See Manhattan Borough President David N. Dinkins, Statement by David N. Dinkins on Charter Revision (Oct. 27, 1989) (on file with the *New York Law School Law Review*) [hereinafter October 27, 1989, Statement by Dinkins].

236. See Public Hearing, Apr. 4, 1989, at 4-66; Public Hearing, June 6, 1989, at 192-210; Public Hearing, July 21, 1989, at 148-69. The testimony these last two hearings (with the exception of the first three pages of the June 6 transcript) was given on behalf of Dinkins by his aide, Barbara Fife.

a principal assistant who had been involved in the Charter process herself. The only substantive concern that Dinkins expressed was his view that party district leaders should not be banned from also holding City elected office or vice versa. Driving over to Brooklyn for the Commission meeting, Harriet Michel and Schwarz commented both that the dialogue was not very wide ranging and that it seemed as if Dinkins would be supportive of the overall Charter.

Dinkins let his support be known shortly after the September 12th primary,²³⁷ but it took him some time to give a more formal statement. That statement did not come until October 27, 1989.²³⁸ Presumably, Dinkins was under great pressure from Percy Sutton; possibly he hoped the Justice Department would have definitively acted one way or the other. His own careful, deliberative style was very likely to have contributed to the delay.

When the Dinkins release came, it was not flamboyant. He began with a gesture to opponents; he had "listened to . . . concerns" and "found many are warranted and legitimate."²³⁹ Although a "reorganization of this magnitude" would "understandably evoke public controversy," he commented that an "overly extended process can serve to fragment the binding, unifying spirit of consensus that is needed to implement a workable City Charter."²⁴⁰ Dinkins was indirectly communicating to the Delay Movement, whose members presumably were overwhelmingly his supporters in the mayoral race. He added that delay would raise questions about the legitimacy of government actions, contribute to a "general sense of uncertainty that might impact on New York's standing in the financial community," and lead to intervention by others "less empathetic to . . . our city's government."²⁴¹

Dinkins then expressed his "hope that the new Charter [would] provide a government that is fully representative; that the distribution of resources and power will be equitable, and, that the system will encourage maximum

237. See Alan Finder, *Coalition Opposing Charter Revision Starts Its Campaign*, *supra* note 162.

238. See October 27, 1989, Statement by Dinkins, *supra* note 235.

239. *Id.* at 1. The concerns listed later in the release, however, were neither central nor particularly clear. These include the following: conflicts of interest on the City Planning Commission and the Council; a need for more guidelines on equal employment opportunity; "limited public review" of sole source contracts; absence of an appeal process of the Board of Standards and Appeals decisions; and "need for a clear borough-based voice in land use planning . . ." *Id.* at 2. Although Dinkins said that if he became mayor he would address these matters by executive order or proposed Charter amendments, he did not.

240. *Id.* at 1.

241. *Id.*

public participation.”²⁴² In any event, because institutions are “not static” and are “capable of responding effectively to the challenges facing New York City,” Dinkins said that “the overriding best interests of the citizens will be able to prevail” under the new Charter.²⁴³

Though we would have liked more praise for the Charter reforms, the Dinkins endorsement—with its prudential focus on potential harms if the Charter were defeated, and its confidence in the Charter’s potential—was probably more useful for the referendum. The tone was consistent not only with David Dinkins’ usual style, but also with what may have been seen as his immediate political needs in the closing days of the mayoral race: an emphasis on, and recognition of, the importance of fiscal caution and governmental responsibility.

B. *Good Government Groups*

The second part of our hoped-for coalition to support a new Charter was “good government” groups. Without their substantial support, we would have had a tough time characterizing the proposed changes as reforms. Showing consistent concern for Charter-type issues and having ready access to editorial boards and opinion makers, their voices were even more important than their members’ votes.

Throughout our process, we met frequently with these groups. Their interests varied on substantive questions. What they did share was an interest in the process. Without many of our substantive changes, we would not have won their support. Clearly, their respect and admiration for our process helped.

We won overwhelming support from the good government groups. The New York Public Interest Research Group (“NYPIRG”), Citizens Union, the Citizens Budget Commission, the League of Women Voters, and the Women’s City Club were among many civic groups actively engaged in supporting us. NYPIRG mounted an election day campaign at the polls. Citizens for Charter Change and its co-Chairs, Ruth Messinger and Stanley Hill of District Council 37, were closely linked with the advocacy of established good government groups. We discuss Messinger²⁴⁴ and Hill²⁴⁵ below.

These organizations, consistently monitoring the interests of New Yorkers and particularly attuned to “good government” and process issues, were among the spirited groups of the public. For some, their zenith in

242. *Id.* at 3.

243. *Id.*

244. See discussion *infra* Chapter XIII, Part I.

245. See discussion *infra* Chapter XIII, Part II.

City politics may have been decades earlier. Others needed to diversify their membership and their appeal. Together, their role in the Charter process was sustained and substantive.

C. Edward Koch

We certainly wanted Mayor Koch's support. We were particularly worried that if he were to oppose the Charter on the grounds of fiscal irresponsibility or excessive bureaucracy, he could hurt us substantially. This was true whether or not he won the Democratic Party primary.

Koch was substantively and substantially involved throughout the period the Commission was meeting to hammer out its proposals. In addition to the meeting at Gracie Mansion—where he had unsuccessfully urged us not to finish in 1989²⁴⁶—the mayor sent the Commission six lengthy letters commenting on drafts and urging changes or clarifications in various provisions.²⁴⁷ Each of these letters was reasoned and thoughtful. Some points were persuasive; others were not.

Only two of the concerns raised made us worry about losing the mayor's support. These were expressed in the July 28 letter, about (1) the entitlement of minorities being appointed to the Districting Commission; and (2) the lack of a mayoral majority on the City Planning Commission,

246. See discussion *supra* Chapter V.

247. See Letter from Paul Dickstein, Director, Office of Management and Budget, to Edward I. Koch, Mayor, City of New York (May 5, 1989); Letter from Paul Dickstein, Director, Office of Management and Budget, to Eric Lane, Executive Director, 1989 New York City Charter Revision Commission (May 12, 1989); Letters from Edward I. Koch, Mayor, City of New York, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (May 15, 1989; May 31, 1989; July 28, 1989) (letters on file with the *New York Law School Law Review*); see also discussion *supra* Chapter V.

The mayor and his colleagues also communicated indirectly through the press and others. One example is the *Times* editorial opposing our initial proposal of a borough presidents' 5% budget role. See Editorial, *Misfire by the Charter Commission*, N.Y. TIMES, May 30, 1989, at A20. Another example is the letter from the private members of the Financial Control Board. See Letter from Donald D. Kummerfeld, Heather L. Ruth, and Stanley S. Shuman, Private Members of the New York State Financial Control Board, to the Chairman and Members of the 1989 New York City Charter Revision Commission (June 12, 1989) (letter on file with the *New York Law School Law Review*) [hereinafter Letter from Private Members of the Financial Control Board to the Charter Revision Commission].

Although after the Gracie Mansion meeting in March, the mayor's suggestions to us were made by letter, we met with him twice thereafter. On June 19, we described to him the changes we had proposed to the Commission at the crucial meeting of June 15, and later we met to discuss the criticisms in his letter of July 28. See *supra* notes 457-58 and accompanying text.

particularly if all land-use matters could be "called up" to the Council.²⁴⁸ The mayor was either persuaded to accept, or chose not to oppose, the first issue, and we resolved the second in favor of a mayoral majority, for reasons both merit-based and political.²⁴⁹

In any event, while Mayor Koch was capable of being stubborn on matters of principle and unpredictable, it would have been politically difficult for him to oppose the Charter, at least until the end of the September primary. First, he had appointed its chair and members. This fact, although relevant, was not dispositive. Second, he was in a primary race with David Dinkins. Given that much of the Charter was aimed at increasing opportunities for minority political representation, and given that challenges were being made to the mayor's racial sensitivity in the primary race, it would have been difficult for Mayor Koch to oppose the Charter. Despite these political drawbacks, however, Mayor Koch would have opposed the Charter if he had not been convinced of its merit.

In winning the mayor's support, it was also helpful that he had no empathy whatsoever for the arguments made by either wing of the opposition and no affinity for the opposition leaders. Thus, he had no particular love for the Board of Estimate, and he certainly would not have favored further decentralization of the City.

Whatever the motivation, we were pleased to get the mayor's endorsement; it was prompt and clear. Thus, on August 3, the day after the Commission finished its work (and while he was engaged in the primary race), the mayor announced his support.²⁵⁰ Although he disagreed with some provisions—not specifying which—he offered what a reporter characterized as "mostly praise," and said, "[O]verall . . . what the commission has done is to be commended and supported."²⁵¹ During the referendum campaign, the mayor continued to step forward in support of the Charter.²⁵²

D. Claire Shulman

In order to understand Shulman's importance to us, we need to review the position of the other borough presidents—and to do so in the context of

248. See Letter from Edward I. Koch, Mayor, City of New York, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (July 28, 1989) (on file with the *New York Law School Law Review*).

249. See discussion *supra* Chapter VII, Part II.

250. See Alan Finder, *Ferrer to Fight Charter Plan at the Justice Department*, N.Y. TIMES, Aug. 4, 1989, at B4.

251. *Id.*

252. See Alan Finder, *Would New Charter Create Throne Room at City Hall?*, N.Y. TIMES, Oct. 18, 1989, at B1.

the fear of Manhattan domination.²⁵³ Brooklyn Borough President Howard Golden was an angry opponent from the start. He chose not to engage in suggesting provisions for a Charter without the Board. Although Ralph Lamberti of Staten Island was quoted the day after the Supreme Court's *Morris* decision as supporting Staten Island's secession,²⁵⁴ he later engaged in the process of offering some ideas about running the City without the Board. We met with him in Staten Island's Borough Hall several times. Unfortunately, the fear in Staten Island about the *Morris* decision and the loss of the Board prevented him from ultimately supporting the Charter.²⁵⁵ Although Bronx Borough President Ferrer was heavily and creatively involved in the Charter process at first, he later decided to oppose the Charter.²⁵⁶ This was very disappointing to us for two reasons. First, we had worked extensively with Ferrer exploring his ideas, and even derived the gist of a number of Charter changes from them. Second, he was an important minority leader.

There were ironies about the positions of Ferrer, Golden, and Lamberti. As shown above, Ferrer's ultimate position supporting the preservation of the Board through the use of weighted voting was blatantly inconsistent with his own previous positions.²⁵⁷ Although Brooklyn voters were the principal victims of the "one person-one vote" violation, Golden was an adamant defender of the prior Board.²⁵⁸ Finally, Lamberti supported weighted voting even though the only possible scheme—one that would still be unconstitutional—would reduce Staten Island to a non-entity on the Board.²⁵⁹

Ruth Messinger, who clearly was going to become Manhattan borough president, had been heavily involved in thinking about Charter change and proposing ideas. She was instrumental in founding Citizens for Charter Change, of which she was co-chair. She had close relations with the good government groups and with David Dinkins. We met with her several times. After the June 15 changes, she became a likely supporter. Although she continued to push on some core issues, including giving the

253. See discussion *supra* Chapter III, Part I.

254. See Dick Zander, *New York Politics: Putting Secession on Back Burner*, *NEWSDAY* (N.Y.), July 10, 1989, at 16.

255. However, Guy Molinari—who left a safe seat in Congress to run for borough president, and who defeated Lamberti—endorsed the Charter.

256. See Letter from Fernando Ferrer, Bronx Borough President, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (July 27, 1989) (on file with the *New York Law School Law Review*).

257. See *supra* notes 155-61 and accompanying text.

258. See, e.g., Howard Golden, *New York Forum About Politics No Requiem for Heavyweights*, *NEWSDAY* (N.Y.), June 16, 1989, at 90.

259. See Purdum, *Charter Plan and Critics: Opposition Slowing Process in New York*, *supra* note 6. Lamberti privately admitted that his scheme was unconstitutional.

City Council the right to “call-up” land-use issues, she ultimately gave substantial support to seeking a “yes” vote in the referendum.

Therefore, of the four non-Manhattan borough presidents, three were openly opposed as the Commission ended its work. Thus, we thought it important to get the support of Claire Shulman, borough president of Queens. Her support was important because Queens was second only to Brooklyn in the number of voters and was more politically well-organized.²⁶⁰ Perhaps even more important than the number of votes, however, was that her support could counteract the notion that the Charter favored Manhattan. The logic in such an idea was weak, given that a shift of power to the Council would greatly increase the power of the City’s non-Manhattan majority.

Claire Shulman became Queens’ deputy borough president in 1986.²⁶¹ In early 1986, she was designated [by the Council] to replace Donald Manes as borough president after Manes committed suicide while facing corruption charges.²⁶² Shulman was a tough and effective negotiator. She was also widely liked as a person and was very popular in Queens.

Shulman was heavily involved in the Charter process, as evidenced by her testimony and long letters.²⁶³ Particularly in the beginning, Shulman was cantankerous both in her written and oral communications. During

260. At the July 19, 1989, public hearing in Queens, Borough President Shulman, before agreeing to support the Charter, organized many witnesses to praise the borough presidents and express concern that the changes we were contemplating would harm communities. Council member Walter McCaffrey—one of the most forceful and resourceful advocates for the Council—spoke with Schwarz during a break and said not to worry because this is a “Council-dominated” borough. Nonetheless, we were worried that Shulman might organize and motivate opposition in Queens. See Public Hearing, July 19, 1989, at 104.

261. See generally Maurice Carroll, *The New York Newsday Interview: Claire Shulman: Why Borough Power Must Be Preserved*, NEWSDAY (N.Y.), May 10, 1989, at 65.

262. See Eddie Borges, *The Evolution of Peter Vallone*, VILLAGE VOICE (N.Y.), Sept. 8, 1998, at 53.

263. See Public Hearing, Apr. 4, 1989, at 182; Public Hearing, June 7, 1989, at 17; Public Hearing, July 19, 1989, at 14; Public Meeting, May 10, 1989, at 24. (Shulman and Ferrer made a presentation and were questioned at a Commission meeting.); see also Letter from Fernando Ferrer, Bronx Borough President, Ralph Lamberti, Staten Island Borough President, and Claire Shulman, Queens Borough President, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (May 8, 1989); Letter from Fernando Ferrer, Bronx Borough President, and Claire Shulman, Queens Borough President, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (June 20, 1989); Letter from Ralph Lamberti, Staten Island Borough President, and Claire Shulman, Queens Borough President, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (July 18, 1989) (letters on file with the *New York Law School Law Review*).

early Commission meetings, her displeasure was evident. For example, at one meeting where she and Ferrer were allowed to interrupt the proceedings and make a presentation, she responded to Schwarz's "welcome" by saying, "You have welcomed me many times . . . [t]o [no] avail. We have even shared food together, and had, socially, very enjoyable times."²⁶⁴ She made it very clear that enjoyable times aside, she did not like the changes we were considering with respect to the powers of the borough presidents.²⁶⁵

Despite her occasional cantankerousness, Claire Shulman was unable to keep her good nature down. Although she, like Ferrer and Lamberti, made many suggestions that influenced the Commission's eventual proposals, there was an important difference. Unlike Ferrer's county executive form of government and some of Lamberti's clearly unconstitutional ideas, Shulman did not make radical, unrealistic, or illegal proposals.

One Sunday evening, the two of us, Frank Mauro, and Andy Lynn, the staff member primarily concentrating on land use, met for dinner at Claire Shulman's home. The purpose was to review Shulman's ideas about land use. The substance of the meeting was frustrating. While genial, Shulman's approach was to push her own ideas and to reject the ideas of the Commission.

Nonetheless, we believed that at the end, Shulman could decide to support the Charter. After all, while on the Board, Shulman had been accustomed to pushing for advantage until the very end and then declaring victory and becoming a supporter. Lane's meetings with Nick Garufis, Borough President Shulman's counsel, gave him hope that she would ultimately endorse the Charter. Important supporters of Shulman on the Council such as Peter Vallone and Congressman Thomas Manton, the Queens Democratic Party leader, were also pushing for her approval. In any event, on July 28th, just three days before the start of the Commission's final set of meetings, the two of us went out to Queens to meet in Borough Hall with Shulman and Garufis. We reminded them of the many ways in which Shulman's concerns had already led to Charter reforms. We warned of the potential harm to the City if there was no solution this year. It was clear that this point did concern the borough president. She responded by pushing on a few more relatively small points. We said "no" to some of her suggestions. To others, we said that we would urge the Commission to make the adjustments requested.²⁶⁶ In

264. Public Meeting, May 10, 1989, at 24.

265. *See id.* at 26.

266. These were: (1) requiring that the decisions on where the City would rent office space would be made using a process that would allow boroughs (in reality the non-Manhattan boroughs) to argue in favor of location in their borough to foster economic

return, Shulman said she would support the Charter. We failed, however, to have her say when she would offer her support. This was a mistake.

The changes were made.²⁶⁷ Shulman, however, moved glacially toward announcing her support. A wrap-up newspaper report after the Commission finished its work in August included her picture and described her as taking a "more conciliatory tone"; her spokesman described her as "pleased" that some "major issues" were changed during the Commission's last round.²⁶⁸ Shortly thereafter, she wrote a letter to a constituent saying that, under the new Charter, borough presidents' responsibilities would be "different but substantial" and "if anything, the obligations of the Borough Presidents will increase and not diminish."²⁶⁹

This statement was fine—it coincided with our view that an executive role early in the process had far more potential than the last-minute, usually feckless show of power on the Board. It was also helpful in making one of our points to the Justice Department. But as an individual letter to one constituent it was not helpful in the referendum and did not fully deliver on Shulman's commitment to us.

To get the full commitment, it took some prodding directed at both Shulman and Garufis. It was clear the borough president had a problem—one of her own making. During the spring and early summer, she had energized a number of community supporters to decry the Charter changes that were being discussed.²⁷⁰ How was she going to now support the Charter? That opposition remained among some of her supporters as illustrated by an editorial in *The Wave*, the Rockaway local paper. It urged a "no" vote on the Charter because there would be an "imperial mayor." The article also stated:

development; (2) making clear that borough presidents would be able to start the certification process for development; and (3) allocating among the five borough presidents their share of the five percent of discretionary funds in the mayor's proposed expense budget. (This last item added land area to the existing factors of population and poverty; each factor played an equal one-third role in the allocations.) See Public Meeting, Aug. 1, 1989, at 77-78, 502-03.

267. See Public Meeting Aug. 1, 1989, at 77-83, 98, 217-18, 502-26; Public Meeting, Aug. 2, 1989, at 3-4.

268. See Finder, *Ferrer to Fight Charter Plan at the Justice Department*, *supra* note 250.

269. Letter from Claire Shulman, Queens Borough President, to Richard A. Pfefferle (Aug. 23, 1989) (on file with the *New York Law School Law Review*). This letter was an exhibit to a letter from Schwarz and Lane to Barry Weinberg of the Justice Department. See September 29, 1989, Letter from Schwarz and Lane to Barry Weinberg, *supra* note 151.

270. See Todd S. Purdum, *Queens Citizens Lobby Charter Panel*, N.Y. TIMES, July 20, 1989, at B4.

Rockaway has learned the hard way that the Manhattan view is often diametrically opposed to what we want and need for Rockaway. In the past, the protection of Claire Shulman and Walter Ward has kept the Manhattan wolves from our collective door.

Now, they will have little power, paper tigers with lots of “advisory power” and no vote.²⁷¹

Aside from the legal problems with any borough president “vote,” and the creative opportunities of a borough president being an executive with a role at the front end when projects get started, what is most revealing about this editorial is the reference to Walter Ward. As a Council member under the new Charter, not only would he have a vote, but he would have it as part of a substantially strengthened Council. This editorial is an example of why we were right in believing that it would be important to have a non-Manhattan borough president endorsing the Charter.

Despite her dilemma, Shulman was not the sort of politician who would fail to honor a commitment. Thus, although she had to be prodded, she announced her support on October 24—almost two months after she had promised it.²⁷²

The phrasing of the endorsement was rather tepid. The press release was headed *Shulman ‘reluctantly’ backs Charter changes; says she ‘negotiated best provisions possible for communities.’*²⁷³ Moreover, her decision was described as “personal”; each voter should decide for himself or herself how to vote.²⁷⁴ Finally, addressing people she had earlier helped to motivate against the Charter, she said she “fully under[stood] and sympathize[d] with their position” in campaigning against the Charter.²⁷⁵

271. Editorial, *Say ‘No’ to Charter Revision*, THE WAVE (Rockaway, N.Y.), Oct. 19, 1989, at 20.

272. See Queens Borough President Claire Shulman, *Shulman ‘Reluctantly’ Backs Charter Changes* (Oct. 24, 1989) (on file with the *New York Law School Law Review*).

273. *Id.*

274. See *id.*

275. *Id.* After saying, “Many of our civic organizations, which are the best in the City, are campaigning to defeat the proposed Charter,” Shulman singled out Patricia Dolan and Camille Rye. *Id.* at 2. As Shulman correctly observed, they had “attended and monitored virtually every meeting held by the Charter Commission.” *Id.* They also testified at four public hearings held in June and July. The thrust of this testimony was as follows: the power of borough presidents should be increased, land-use decision making should be further decentralized; the mayor should only have two appointments on the City Planning Commission; the Council should not be expanded; all land-use questions should go automatically to the Council for review; and the vote on the Charter should be delayed. Despite this litany, Dolan and Rye both praised the Commission’s frankness, openness,

Such organizations had “made it possible for me to negotiate from a position of strength and to win improvements in the final proposal which will help to insure the survival of Borough government”²⁷⁶

Despite these qualifications and acknowledgments to opponents, Shulman’s attached letter described the new Charter as “the best Charter provisions possible for our communities”—provisions which should “afford us a fair share of City services and protect us from a potentially overreaching and insensitive City government.”²⁷⁷

As with David Dinkins’ endorsement three days later, the text was certainly not what we would have written. The fact of endorsement was what mattered.

E. Other Politicians

Once we had decided to abolish the Board and to make the Council an empowered legislature, Council members were going to support us. Some did not like expansion of the Council, and few welcomed acceleration of their next election to 1991. The Council leadership wanted the Council to have more budget powers, while some Council members wanted to limit the leaders’ powers. Despite all of these gripes, however, the Council would be the greatest institutional beneficiary of Charter revision. Its members greatly helped in the referendum.

No other politicians were really part of the core coalition that we sought to create. Nonetheless, we mention a few that were involved substantively in the Commission’s deliberations or whose ultimate endorsement is worth more than just passing reference.

As part of our effort to win voters concerned about whether the Charter changes would be responsible, it helped that we won the support of State Comptroller Ned Regan, City Comptroller Jay Goldin, and Elizabeth Holtzman, who won the Democratic Party primary and eventually became

patience, and qualified staff. See Public Hearing, June 1, 1989, at 212-15; Public Hearing, June 5, 1989, at 210-17; Public Hearing, June 7, 1989, at 100-05, 143-52; Public Hearing, July 19, 1989, at 183-86, 254-57.

Despite their persistent criticism, on the last day of the Commission’s deliberations the Commission members signed a placard for Dolan and Rye that recognized their attendance at more Charter meetings than anyone other than the chair. See Purdum, *Panel Finishes Plan to Revise New York City’s Government*, *supra* note 93 (with accompanying picture of placard signing).

276. Queens Borough President Claire Shulman, “Dear Neighbor Letter” 2 (Oct. 24, 1989) (on file with the *New York Law School Law Review*). This letter was attached to Shulman’s statement backing the Charter. See Shulman ‘Reluctantly’ Backs Charter Changes, *supra* note 272.

277. *Id.*

city comptroller. All offered detailed and sensible suggestions on provisions relating to the city comptroller's role. Ned Regan, who was included in many substantive issues, was also an early and important advocate for the procurement reforms that the Commission made.²⁷⁸

While plenty of Democratic officials were involved, supportive, and important, the Democratic Party itself was basically irrelevant. We did think about the Republicans. Thus, winning the support of State Senator Roy Goodman—Chairman of the Manhattan Republican Party and chair of the 1975 Charter Revision Commission—was helpful. Goodman was particularly interested in changes (including those suggested by Council Minority Leader Susan Molinari) that would increase opportunities for political diversity. (Incidentally, Ned Regan also happened to be a Republican.)

As the Republican nominee for mayor, it would have been unfortunate not to have Rudolph Giuliani's support. Into the month of September, Giuliani had been involved in a bruising Republican primary fight with Ronald Lauder in which Lauder spent a lot of money trying to smear Giuliani. The Charter was not an issue. Further, Giuliani did not testify before or submit anything to the Commission. Apart from his preoccupation with the primary, Giuliani had not been immersed in the workings of City government, as had both Koch and Dinkins.

On a few occasions, Schwarz and Lane separately met with Jennifer Raab, Giuliani's Issues Coordinator,²⁷⁹ to answer questions and make points about the Charter. Furthermore, during the campaign, Schwarz was on a couple of panels with Giuliani, at which Schwarz ultimately discussed the Charter. Giuliani, then a mayoral candidate, endorsed the Charter.²⁸⁰

The Charter was not an issue in the campaign between Dinkins and Giuliani. This was not surprising: both were supportive; there would be little gain from trumpeting their disagreements with Charter opponents; Charter issues were hard to reduce to sound bites; and, they probably thought the Charter would prevail so that it was not necessary to stress the

278. See Dick Zander, *New York Politics: Waiting to Hear Grand Old Plan*, *NEWSDAY* (N.Y.), June 26, 1989, at 20; see also discussion *supra* Chapter VII note 618.

279. Ms. Raab had previously worked for Schwarz at his law firm.

280. See Finder, *Coalition Opposing Charter Revision Starts Its Campaign*, *supra* note 162. After more than four years experience working under the Charter, Mayor Giuliani said he was satisfied with the balance of power under the Charter and that "it should be left alone for a while." Vivian S. Toy, *A Move to Shift Balance of Power in New York City*, *N.Y. TIMES*, Jan. 7, 1997, at A1. Shortly thereafter, Mayor Giuliani appointed a charter commission as a device to keep a Council-sponsored referendum, regarding keeping the Yankees in the Bronx, off the ballot.

risks of defeat to the City.²⁸¹ By the end, both Dinkins and Giuliani had other things on their minds.

Andrew Stein, the incumbent city council president, lobbied very hard in support of preservation of that office and also seemed to have solicited testimony to that effect from some political and civic leaders. Presumably, Stein understood that if the office were eliminated, it would not happen until after the 1989 election, and probably not until 1993. Stein was probably also concerned, however, that a decision by the Commission and voters to eliminate the office would hurt his aspirations to run for mayor in 1993. Although Stein was persistent in his lobbying, it did not affect our views on the question of whether to preserve the office. Stein advocated adoption of the Charter during the referendum.²⁸²

F. *Editorial Boards*

This is a long story, reflecting both the importance of particular editorial board endorsements, and also some stories more generally about the difficulties of pulling together our coalition and the varying kinds of arguments that succeeded in attracting editorial support from different papers.

From the first days, Lane believed and persuaded Schwarz that an endorsement from the *New York Times* would be important, and probably carry great weight. The logic was that Charter issues are complex; voters need help in making up their minds, and editorial endorsements would be particularly important because the voter profile on referenda—as compared with elections for president, governor, or mayor—tends to have a higher proportion of relatively careful newspaper readers.

We also thought editorial support from the other major dailies—the *Daily News*, *New York Newsday*, and the *Post*—would be important, although support from the *Post* seemed the least likely. This section begins with the *Times* and *New York Newsday* because their role during the Commission's process is illustrative of how editorial boards, like other advocates, can become players in the process.

Players is the right word. Long ago, Schwarz had believed that editorials were probably the product of isolated pundits, sitting, thinking, and then writing. He believed their ideas emerged fully formed like Athena from the brow of Zeus—sort of a secular immaculate conception.

281. On this last point, the impact of the last-minute, opposition television commercials paid for by Borough Presidents Ferrer and Golden did not carry the day. See discussion *infra* Chapter XIII, Part II.

282. See Alan Finder, *Ferrer to Fight Charter Plan at the Justice Department*, *supra* note 250.

Dealing with the press—as a member of the Church Committee investigating the FBI, CIA and other intelligence agencies, later as a pro-bono lawyer attacking the constitutionality of the census undercount, and as corporation counsel—had long since disabused Schwarz of these naive thoughts.

Editorial writers are engaged in the affairs of the day. They welcome, or at least accept, facts and arguments being urged upon them. Moreover, just like politicians, they may negotiate, threaten, bargain, and bluff using their own bully pulpits.

1. The *New York Times* and *New York Newsday*: Contrasting Approaches

Experience with the *Times* and with *New York Newsday* during the Charter process is a textbook illustration of two editorial boards' contrasting approaches. Both pushed on many issues. Both knew they could not get everything they wanted, so each had a core principle that was essential to winning their ultimate support. One rather enormous problem in getting the support of both papers, however, was that they were pushing in the opposite direction. The *Times*' central concern was whether the City's central administration would be able to get difficult things done. *New York Newsday*'s central concern was whether the "outer boroughs" in general, and the borough presidents in particular, would be able to have sufficient influence to protect communities from the central administration.²⁸³ Thus, the story of eventually getting the editorial support of both these papers reflected a tension that also ran through the Commission's work.

The *Times* and *New York Newsday* both wrote editorials right after the Supreme Court's *Morris* decision. Neither mourned the loss of the Board of Estimate. *Newsday* said action this year would be best,²⁸⁴ the *Times* said the "threshold question" of when to move was "portentous."²⁸⁵ Both said our challenge would be enormous.²⁸⁶ The differences between the two papers over the succeeding months helped prove that point.

283. See Editorial, *And the Court Says It All*, NEWSDAY (N.Y.), Mar. 23, 1989, at 80.

284. See *id.*

285. See Editorial, *The Right Way to Rule New York*, N.Y. TIMES, Mar. 23, 1989, at 28.

286. See *id.*; Editorial, *And the Court Says It All*, *supra* note 283.

The *Times*' editorial board was run by Jack Rosenthal.²⁸⁷ Joyce Purnick was the member of the board most focused on City issues.²⁸⁸ Purnick had covered City Hall as a reporter when Schwarz was corporation counsel.²⁸⁹ Schwarz was a close friend of Rosenthal's and friendly with Purnick. Prior to the Charter revision work, the *Times* editorials had been very kind to Schwarz.²⁹⁰ Editorial support, however, does not follow from friendship.

The *Times* wrote numerous editorials during the Commission's process as well as during the referendum campaign. With two reporters assigned full time, the paper performed a public service far exceeding any other paper and dwarfing the piddling and superficial efforts of television. Despite the admirability of this public service, what really mattered to us was getting their ultimate editorial endorsement. The *Times* editorial board, like politicians such as Claire Shulman, held their cards close to their vests and continually pressed and pushed for their points of view.

The chairman's Initial Proposals were described as a "thoughtful, provocative plan," and "remarkably ambitious."²⁹¹ However, they needed "clarity, streamlining and careful vetting."²⁹² It would be right to get rid of the Board—weighted voting was "a wistful exercise almost certainly doomed as impractical and insufficiently democratic."²⁹³ But the city council president should also "go the way of the Board."²⁹⁴

A little over two weeks later, the *Times* thundered against our first vote to continue the position of council president.²⁹⁵ There would be nothing to do, absent a vote on the Board. It would likely "dilute" the Council's role.²⁹⁶ The risk is creating a "costly, potentially irresponsible critic with a platform for self-promotion."²⁹⁷ Shortly thereafter, the *Times*

287. See Jack Rosenthal, *On Language; Diluting the Awe by Some*, N.Y. TIMES, Aug. 20, 1989, at 30 (stating that Jack Rosenthal is editorial page editor of the *New York Times*).

288. See *Joyce Purnick Is Appointed to the Times Editorial Board*, N.Y. TIMES, Oct. 12, 1988, at B2.

289. See, e.g., Joyce Purnick, *Public Financing: Will It Be No? Yes? Or a Yawn?*, N.Y. TIMES, Aug. 29, 1988, at B1.

290. See discussion *supra* Chapter II.

291. Editorial, *First Draft of Government*, N.Y. TIMES, Apr. 26, 1989, at A26.

292. *Id.*

293. *Id.*

294. *Id.* By 1998, the *Times* had changed its mind, referring to the public advocate (and the Independent Budget Office) as "provid[ing] independent assessments . . . under the Mayor's powerful mantle, institutional reason enough to keep them both alive." Editorial, *A Rush to Charter Revision*, N.Y. TIMES, June 26, 1998, at A22.

295. See Editorial, *An Unpresident for the City Council*, N.Y. TIMES, May 12, 1989, at A30.

296. *Id.*

297. *Id.*

editorialized against the idea of giving the borough presidents what it called “discretionary authority” or “control” over part of the City’s expense budget (although approving the same concept for the capital budget).²⁹⁸ The *Times* reported that the proposal could lead to “needless chaos” and “institutionalizes the pork barrel.”²⁹⁹

This language might have been appropriate if, under our proposal, the borough presidents did, in fact, have “authority” or “control” over five percent of discretionary increases in the City’s expense budget. As set forth in Chapter VII, however, they did not.³⁰⁰ They could propose, but their proposal had to be included in the mayor’s budget. Moreover, the City Council eventually “controlled” whether the particular expenditures would be accepted or not.³⁰¹

The *Times*’ mistake about the proposed borough presidents’ five percent expense budget role was the same mistake made by Mayor Koch and the private members of the Financial Control Board.³⁰² This similarity was likely not coincidental. While we do not know this for certain, based upon the chronology and our prior experience in government, it is probable that the Koch administration—as well as others pushing in different directions—was lobbying the *Times* editorial board in the hopes of getting it to write editorials that would affect the Commission. Joyce Purnick, moreover, was a great admirer of Robert Wagner, Jr., one of Mayor Koch’s deputy mayors, and Schwarz’s former colleague. Wagner had run unsuccessfully for Manhattan borough president against Andrew Stein in 1977, and there may have been some hard feelings left. We do not know whether this had any effect on the *Times* editorials regarding the council presidency (held in 1989 by Stein). At one point, however, Schwarz was told that Judah Gribetz’s passionate position against the Office of City Council President was to some small degree affected by his aversion to Stein and that this, in turn, was affected by some slight to the Wagner family.

It seemed to us, however, that the major and continuing theme in the *Times*’ editorials during the Charter process was not about specifics like the council president or the borough presidents’ five percent budget role, but rather a more amorphous expression of concern about whether Charter changes would make it harder to get difficult things done in an already

298. See Editorial, *Misfire by the Charter Commission*, *supra* note 247.

299. *Id.*

300. See discussion *supra* Chapter VII, Part I.

301. See discussion *supra* Chapter VII, Part I.

302. See Letter from Edward I. Koch, Mayor, City of New York, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (May 15, 1989) (on file with the *New York Law School Law Review*); Letter from Private Members of the Financial Control Board to the Charter Revision Commission, *supra* note 247.

fractious city. Apparently, Joyce Purnick's past in covering City government on a daily basis had burned this concern into her mind. This was also, perhaps, a worry of Robert Wagner, Jr., whose June 6 testimony to the Commission on behalf of all the living former chairs of the City Planning Commission had highlighted this issue.³⁰³ This concern was expressed particularly in the *Times*' editorial comments about land use.³⁰⁴

Initial expressions were mild. The Chairman's Initial Proposals were wise to "change the emphasis endemic to the present system: from late-night shouting at the end of the process to broader appraisal at its start."³⁰⁵ But would the process be too "cumbersome?"³⁰⁶ As the Commission began to work out ideas for an appropriate borough voice without the Board, editorials began to warn the Commission to be careful. The warning was directed toward a proposal by borough presidents "who have been cajoling, even bullying commission members . . ."³⁰⁷ The editorial then argued the Commission could "tilt the balance toward communities" and that "[w]eakening the central government in the pursuit of community empowerment hurts everyone—including communities in legitimate pursuit of influence."³⁰⁸ In early June, the *Times* called the Commission's preliminary proposals "an improvement," but noted that it had "one grave flaw. It so lavishly doles out responsibility to the borough presidents and the City Council president that it weakens the mayor."³⁰⁹ The borough presidents' five percent budget role was again criticized, and again misunderstood. On land use, the editorial reported that the proposal "diffuse[d] authority." In addition, picking up on Joyce Purnick's worry, "How would anything unpopular ever get built?"³¹⁰ Focusing on land use, the editorial then called for a mayoral majority on the Planning Commission,³¹¹ echoing the testimony of Robert Wagner, Jr., and other former Planning Commission chairs.

In its editorial written just before the Commission's final set of meetings, the *Times* editorial board gave a very clear signal of what really mattered to it, and presumably to its decision on whether or not to endorse the Charter. While a nod was given to continuing concerns about the

303. See Public Hearing, June 6, 1989 at 6.

304. See Editorial, *New York City Land-Use Puzzle*, N.Y. TIMES, May 13, 1989, at 24.

305. Editorial, *First Draft of Government*, *supra* note 291.

306. *Id.*

307. Editorial, *New York City's Land-Use Puzzle*, *supra* note 304.

308. *Id.*

309. Editorial, *The Charter: Wait, Weight or Improve?*, N.Y. TIMES, June 7, 1989, at A26.

310. *Id.*

311. See *id.*

council president and about the borough presidents' five percent budget role, the paper concentrated on what it saw as two flaws reflected by the editorial's title, *The Trees, and Tilt, in the Charter*.³¹² The "trees" referred to "matters best left for the Council to legislate," citing as examples the Commission on Public Information and Communication, the new provisions on equal opportunity, and the requirement of an annual report comparing City services with national standards.³¹³ The editorial continued: "The second flaw is a repeated tilt against mayoral power. It arises from the commendable desire to make government more responsive to people and communities. However, the tilt is so pronounced as to raise fears of political paralysis. The most notable example concerns land use."³¹⁴ Many things were criticized about our land-use proposals: the City Council review authority; the planner for each community board; the allowance of borough presidents and the Council to introduce zoning change proposals; and—in reference to the Fair Share requirements—"impos[ing] [of] an ambiguous concept of community fairness onto siting of city facilities."³¹⁵

The editorial seemed rather blatantly to signal that the *Times*' editorial support in the referendum would be tied to changes. Thus, it said: "It's not too late to correct both flaws [the "trees" and the "tilt"] and thus encourage conscientious voters to approve the charter proposals in November."³¹⁶

Despite the importance of a *Times*' endorsement, nothing critiqued in editorials was changed by the Commission. The Commission had decided upon all of their criticized matters after debate. In addition, there would have been too much to lose both on and off the Commission to consider changing them. However, one final *Times*' criticism focused on a matter that we had already become concerned about: the lack of a mayoral majority on the City Planning Commission, particularly given the recent change to allow the Council to "call up" any land-use siting issue.³¹⁷

Would changing this be enough to help get what we regarded as a crucial endorsement, even if we did not do any of the other things the *Times* had been urging upon us? Could we get support from *New York Newsday*, which had been pushing the Commission in a different direction than the *Times*—*Newsday* concentrating on protection of the boroughs and local communities, the *Times* on the importance of the central administration not being unduly hampered by local concerns?

New York Newsday was started by Newsday to cover New York City. It sought to make inroads in the City market, particularly in Queens, where

312. Editorial, *The Trees, and Tilt, in the Charter*, N. Y. TIMES, July 30, 1989, at 22.

313. *See id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *See id.*

it sought to uproot the two other tabloids, the *Daily News* and the *Post*. Its coverage of City affairs was well written and comprehensive, often more extensive than the *Times*'s, though not in covering the Charter. *New York Newsday*'s editorial page was run by Tom Plate.

The fact that *Newsday* would be focusing on the boroughs was clear from the day after *Morris* was decided. On its editorial page, *Newsday* published Bronx Borough President Ferrer's proposed Charter changes. As its accompanying editorial stated, these or other thoughtful provisions must be adopted since all five boroughs must not "be deprived of their individual voices at the high table of government."³¹⁸ After the Commission's crucial meeting of June 15, *Newsday* described the Commission as "moving toward recommendations that reflect a real sensitivity to borough and community needs"³¹⁹ On the other hand, *Newsday* wrote that "[s]omething not too far from true genius is still needed, however, to steer a correct course between the sometimes conflicting goals of five-borough empowerment and centralized government."³²⁰

Not surprisingly, the *Times* also recognized the importance of steering this same course and that both "goals" were important. Where the *Times* would steer more toward the central government, however, *Newsday* would steer more toward the boroughs. We wanted the support of both papers. We sought the *Times*' support for the reasons given above. We sought *Newsday*'s assistance in showing that borough presidents would have a useful and creative future role, and in rebutting the case that the new Charter would somehow enshrine Manhattan above the other four boroughs. Schwarz spent many meetings, both during the Commission's process and later during the referendum, trying to persuade Plate and his colleagues of the good sense of what we had done and the good reasons for what we had not done.

2. The Endorsements by Key Newspapers

Earlier we described the contrasting pressures coming from the editorials of the *New York Times* and *New York Newsday* during the Commission's deliberations. Would we win support from either, and could we possibly get the support of both? What about the *Daily News* and other key papers?

318. Editorial, *And the Court Says It All*, *supra* note 283.

319. Editorial, *Borough Power: Moving Toward a Fairer, Broader View of the City*, *supra* note 18.

320. *Id.*

a. *New York Newsday*

New York Newsday came out first. Accompanied by pictures of Schwarz and Claire Shulman—proof her endorsement was at least helpful—the editorial’s title was: *The Charter No One Loves: But You Don’t Have to Love it to Vote for This Important and Necessary City Reform*.³²¹ Noting that to vote “no” “would be to sacrifice the good on the altar of some unarticulated ideal that might never be realized,” *Newsday* reported that the very nature of the Board’s considerable powers “compelled a rather extensive redesign of city government.”³²² The redesign was “less a sleek Porsche than a four-door gas-guzzler—but it is very far from the Edsel that its opponents claim it is.”³²³

Adopting our theme that the people should trust democracy, Tom Plate and his colleagues opined that “to balk at placing power and accountability in the institutions of mayor and council is to run away from democracy for fear that it might not work.”³²⁴ With respect to the future role of borough presidents, one of *Newsday*’s key concerns, the editorial accepted our theme that the new roles could be more useful: “[T]he bottom line is that a new beep role has been carved out and the city should be the better for it. If the beeps would bring even a modicum of imagination, resourcefulness and determination to the new ball game, they should find their jobs meaningful and important”³²⁵ Finally, in a conclusion almost as pleasing as the endorsement itself, the editorial came back to our process: “The commission has worked hard to elicit citywide comment and criticism—and to explain patiently to citizens what precisely its proposals would do. We think it has done its job well.”³²⁶

b. *The New York Times*

As early as October 13, the *Times* had endorsed the separate landmarks question as “balanc[ing] both sides so carefully that it satisfies neither. But it could make modest improvements and merits support.”³²⁷ In fact, what we had wanted to do when faced with irreconcilable demands from

321. Editorial, *The Charter No One Loves*, *NEWSDAY* (N.Y.), Nov. 2, 1989, at 76. The title echoed Schwarz’s earlier comment that if anyone thought we were 100% right, we would be 100% wrong.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

327. Editorial, *Say Yes to the Landmarks Compromise*, *N.Y. TIMES*, Oct. 13, 1989, at A32.

implacable adversaries was, as the doctors' oath says, "First of all, do no harm"—no harm to the landmarks system or to our larger purpose of reforming the City's basic government.

The main Charter changes, however, were the main event. On these, the *Times* kept silent. The two of us and Si Gourdine had a last meeting to make our case with Jack Rosenthal, Joyce Purnick, and a couple of their colleagues on October 19. While we were optimistic, we truly did not know whether or not we would get the endorsement.

Finally, on November 1, six days before the vote, we read the good news in the *Times*.³²⁸ Our proposals were characterized as "conscientious" and "reasonable."³²⁹ In addition, our emphasis on the risks to the City from failure to approve the changes had worked. According to the *Times*, "[T]here isn't much choice"; defeat would "risk" a judge imposing "a temporary solution[.]" and "paralyzing uncertainty" should be avoided.³³⁰

The changes were simply characterized as: "[A] plan aimed at increasing minority representation and maintaining a strong central government while still providing for communities to be heard. It abolishes the Board of Estimate, shifts many of its powers to a strengthened and potentially more representative City Council and preserves the borough presidents."³³¹

Conceding "room for disagreement on the details," the editorial concluded that "the commission's broader decisions reflect wise choices."³³² The *Times* then turned its fire against our opponents, echoing the points we had been making for months. It suggested that saving the Board through weighted voting could violate the law, and made "no practical sense."³³³ Moreover, the critics' arguments were labeled "often-conflicting."³³⁴ For example, some said we had created an imperial mayor, others a weakened mayor. The argument of "[s]ome black and Hispanic officials" that the changes could "prevent minorities from emerging as political leaders" was characterized as "a hard argument to follow[,] [because] the Charter plan would continue, even expand, [minorities'] opportunity for election as borough presidents and as leaders of the new Council."³³⁵ The editorial then continued: "What the varied concerns about the new charter have in common is a discomfort with change that is so

328. See Editorial, *The Only Reasonable Charter Choice*, *supra* note 83.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.*

334. See *id.*

335. *Id.*

strong it impels a romanticization of the Board of Estimate.”³³⁶ This statement was followed with a sentence that must have come straight from the pen of Joyce Purnick, who had covered City Hall for several years. “No one who has stayed up till 3 a.m. watching that untidy institution eke out one bargain after another is likely to mourn its demise.”³³⁷

c. *The Daily News*

The *Times* and *Newsday* have been highlighted because of their contrasting focuses during the Commission’s deliberations. We also saw the *Daily News* as very important, and we worked hard to get its editorial support.

During the Commission’s long process, the *Daily News* had written several editorials that were critical of the status quo and generally favorable toward our work. As we entered the referendum campaign, however, we did not know whether the Charter would get the *Daily News*’ endorsement. Schwarz had several meetings with Bob Laird, who had responsibility for drafting the *Daily News* editorial. Laird, formerly Mayor Lindsay’s press secretary, was the paper’s deputy editor of the editorial page. He had a friendly way, but he also asked many probing questions.

The *Daily News* editorial came out on Sunday, October 29.³³⁸ Using a car metaphor, which *Newsday* later echoed, the *Daily News* said that this “car will run well” and “[w]hy buy new—why not keep the old jalopy? The answer is that the transmission—the Board of Estimate—is busted beyond repair.”³³⁹

The editorial then took on the critics. Those who called for weighted voting as “a quick fix” were wrong—“[e]very possible cure would be worse than the problem” and the death of the Board “is no great loss[,] [since] [t]he current structure favors political deal making over sensible long-term planning.”³⁴⁰

Other critics who agreed a new Charter was “necessary,” were characterized as utterly inconsistent. For example, some critics argued that the Charter was “too sweeping,” while others claimed that “it doesn’t go far enough.”³⁴¹ Similarly, some critics stated that “[i]t’s undemocratic—the

336. *Id.*

337. *Id.*

338. See Editorial, *Thumbs Up on the Charter*, *supra* note 12. An accompanying editorial urged a “No” vote on the landmarks question. See Editorial, *Thumbs Down on No. 3*, *DAILY NEWS* (N.Y.), Oct. 29, 1989, at 36.

339. Editorial, *Thumbs Up on the Charter*, *supra* note 12.

340. *Id.*

341. *Id.*

mayor and City Council majority leader will run the show," while others claimed that "it's too democratic—nothing will ever get decided."³⁴²

The editorial conceded that "the document was written not by saints and visionaries, but by men and women who sought reasonable compromises on a long, long list of governance issues."³⁴³ It went on to state that "overall" the Commission "has sculpted a government that will be balanced, effective, fair and accountable."³⁴⁴

The *Daily News* then addressed two questions described as going "to the heart of civic life."³⁴⁵ They were: "Will the voice of the ordinary citizen be heard in City Hall?"; and "Will the best interests of the city as a whole normally prevail over parochialism?"³⁴⁶

The answer to the first question was "yes"—referring to the new role for borough presidents and saying that "citizens should find potent new allies in their Council representatives, who will be members of an enlarged, strengthened, more racially balanced body."³⁴⁷

The answer to the second question depended substantially on "how well the Council exercise[d] its new powers."³⁴⁸ There was reason for optimism because: "[T]he Council is a democratic institution—far more so than the [Board of Estimate]. So it's reasonable to expect it to evolve into a responsible legislature. Not perfect. But one that heeds democracy's practical rule: The best politics is good government."³⁴⁹

Those last six words could have been the title of this article if it did not seem a bit presumptuous. This pithy, well-written editorial, made our hearts sing.

d. A Few Other Papers

The Charter was opposed by the *Post*, the city's fourth major daily.³⁵⁰ It opined that the Board, if not "ideal," was "better than anything else

342. *Id.*

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.* Beyond the core of its endorsement, the *Daily News* also praised the Charter's "muscular mayor [who] will be around to scrap for a citywide agenda," a "Council president and controller whose duties will be more sharply focused on watchdogging the public interest," and "several provisions [that] will give New Yorkers more government information and access," including the Independent Budget Office. *Id.*

350. See Editorial, *No to the Revised City Charter*, N.Y. POST, Nov. 1, 1989, at 24.

under consideration,” and could have been “adapted—perhaps via weighted voting”³⁵¹ It also stated that if the Charter is defeated, “nothing terrible is going to happen to the city.”³⁵² Criticizing the changes as creating “a vast bureaucratic morass,” the *Post* focused on land use, opining that the provisions “would severely restrict, some say paralyze, development,” and siting of unpopular uses such as jails “would become all but impossible.”³⁵³

Of all the ultimate editorials from papers other than the four major dailies, we pick out just three—two against the Charter, from *Crain’s* and the *Staten Island Advance*, and one for the Charter, from the *Village Voice*. We pick these, not because we know whether they were influential, but because they help make wider points.

Crain’s “vote no” editorial made the point that the various opponents’ arguments were at war with each other, and were all vastly different than *Crain’s*.³⁵⁴ The editorial confessed that in urging defeat of the Charter: “[W]e identify ourselves with an unholy alliance. Many who oppose this charter do so because they want nothing less than community veto power over city actions Others do so in hopes of keeping power centered in the borough presidencies, something we doubt is legal. We find ourselves linked with those who charge that this plan creates an imperial mayor. We endorse a strong mayor and we believe the City Council, whatever its past failings, will emerge as a strong check on the mayor.”³⁵⁵ This candid start, perhaps reflecting the intellectual honesty of *Crain’s* publisher Alair Townsend,³⁵⁶ was not very different from the way we were characterizing the opponents.

Crain’s concluded, however, that even though they were joining an “unholy alliance,” the Charter should be defeated.³⁵⁷ Its concern centered on land use where, in *Crain’s* opinion, (and echoing the critical views of Schwarz’s friend, Herbert Sturz, Schwarz’s and Townsend’s former colleague in city government): “[T]he mayor’s power has been significantly weakened, despite his ability to appoint a majority of the planning commission. Indeed, our fear is that this charter provides so many checks on the mayor that it represents a severe dilution of executive power.”³⁵⁸

351. *Id.*

352. *Id.*

353. *Id.*

354. See Editorial, *Defeat Charter: It Will Paralyze Land Use in City*, *CRAIN’S N.Y. BUS.*, Oct. 30, 1989, at 10.

355. *Id.*

356. Townsend had been one of Schwarz’s colleagues in City government, where she had been budget director and later deputy mayor for economic development.

357. See *id.*

358. *Id.*

Recognizing that “[d]efeate of the Charter would mean uncertainty for New York,” *Crain’s* took an indirect and undocumented slap at Mayor Koch and expressed hope that a “new mayor will take an aggressive role in a new round of charter deliberations. With a strong counterweight to those who would dilute power, we believe a [new] charter will emerge that will benefit all New Yorkers.”³⁵⁹

The *Staten Island Advance* had absolutely no self doubt or introspection. The Charter changes were “profoundly detrimental to Staten Island’s future.”³⁶⁰ City residents had “precious little time to study and understand them”³⁶¹ Staten Island residents should all turn out to vote because voters in other boroughs were both “mostly indifferent” and “being stamped into approval of the charter changes by a high-powered propaganda campaign.”³⁶²

Although it was not surprising, this editorial was nonetheless disappointing. From the early days of our process, we had worked very hard to try to persuade the editors of the *Staten Island Advance* that the Board could not legally be saved, and, further, that if one accepted that premise, the Charter changes would not hurt Staten Island. This premise, however, was simply not acceptable to them. Though no reasoned counter case was ever presented, and no lawful alternatives to the status quo were offered, Staten Island was by definition the borough that was hurt most by *Morris*.

The *Village Voice* was at the polar opposite extreme. For the *Village Voice*, getting rid of the Board was not just a legal necessity for which no tears should be shed, but rather an unadulterated blessing.³⁶³

According to the *Village Voice*, the “single most important achievement” of the “most radical reshuffling of city government since the beginning of the century” was that “it rids the city” of the Board.³⁶⁴ “Beyond the board’s unconstitutionality, its emphasis on boroughwide elections has been a historic deterrent to minority empowerment.”³⁶⁵ The *Voice* then turned its rhetorical fire on the political forces in opposition:

359. *Id.*

360. Editorial, *The Ballot Proposals*, STATEN ISLAND ADVANCE, Oct. 30, 1989, at B16.

361. *Id.*

362. *Id.*

363. See Editorial, *Charter Endorsement*, VILLAGE VOICE (N.Y.), Nov. 7, 1989. While dated November 7, 1989, as a weekly newspaper, the issue would have been published six or seven days earlier.

364. *Id.*

365. *Id.*

Most of the major political forces aligned against this charter proposal—led by the Bronx, Brooklyn, and Staten Island borough presidents—fought the court challenge to the board's constitutionality as well, never acknowledging the gross malapportionment of this body. Their current opposition to the charter proposal is merely their latest, rearguard action to protect an indefensible status quo that has no duplicate anywhere in American municipal life.³⁶⁶

The *Village Voice* also warned against the consequences of defeat.³⁶⁷ New proposals for 1990 would leave voters with even less time to analyze them. Furthermore, a new mayor who appointed a new Commission:

will be in his first year in office, horse-trading on crucial board issues with the same borough presidents whose powers will be decided by his commission. The charter will become the everyday barter of board swaps. Beeps like Brooklyn's Howie Golden, the symbolic artifact of the board's reactionary defenders, will press for a weighted voting system that will preserve the board until the next court challenge. Such a system will empower white Brooklyn and Queens, whose votes will dominate a weighted board, and extend the clubhouse grasp on city affairs into another decade.³⁶⁸

II. THE DEBATE HEATS UP

There was little public activity on the referendum for a few weeks after the Commission's final vote in early August. We were busy preparing for the Justice Department. The staff prepared and publicly issued a forty-nine page Summary of Final Proposals.³⁶⁹ Both of the exercises did help to focus on points to emphasize for the referendum. Mayoral primaries were taking place,³⁷⁰ and Charter debates would have been premature.

366. *Id.*

367. *See id.*

368. *Id.*

369. *See* N.Y. CITY CHARTER REVISION COMM'N, SUMMARY OF FINAL PROPOSALS (Aug. 1989).

370. The primaries were held on September 12, 1989.

A. *A Potentially Divisive Issue*

During this period, some Jewish groups began to express concern about the provision requiring minority representation on the Districting Commission. Before the referendum, this led to two or three quiet, non-publicized discussions of the issues underlying the provision. At these meetings, we explained the justifications and listened to the criticism. We believed that the Jewish leaders would ultimately understand our position; we also hoped to dissuade them from opposing the Charter because of it. Fortunately, the provision did not prove to be a difficult and publicly divisive issue.

The Jewish leaders who expressed to us their strong feelings regarding the minority representation provision handled the issue responsibly. It pleased us that no dramatic public attack was made. We do not know whether this was based on our points on the merits, on the overkill of opposing the whole Charter on this one issue, on the potential racial divisiveness that might flow from making it a public issue, or from the combination of all three. In retrospect, it would have been better had the issue been raised more forcefully when the Commission was working. Had that happened, we would have focused more on, and almost certainly would have limited the provision to, the first redistricting. Schwarz made this point during the discussions with the Jewish leaders. An additional reason for their public restraint could have been that the leaders had not spoken more clearly earlier.

B. *Some Restraints on Campaigning*

State law imposes certain restraints on the use of government personnel, time, and resources in a referendum campaign. On the other hand, state law anticipates the use of personnel and resources to educate voters on referendum issues.³⁷¹ The Commission, while independent, was a governmental institution. The Commission members were unpaid; staff members were paid.

The Commission's duty to educate the public provided a splendid opportunity to advocate for the new Charter without advocating directly for a favorable vote. Under Gretchen Dykstra's leadership, we did so with relish. Through a series of publications, we attempted to put a favorable cast on the proposed Charter. We also referred to opposing views and

371. See N.Y. MUN. HOME RULE LAW § 36(6)(c) (McKinney 1994).

encouraged all constituents to vote on the Charter, whatever their positions.³⁷²

Moreover, Schwarz and members of the Commission, through scores of personal appearances before groups all over the City, in speaking to reporters, and in writing, felt no inhibitions in giving reasons why the Charter merited support.³⁷³ The staff also made hundreds of appearances at forums to educate people about the Charter.³⁷⁴ Finally, the Commission produced two major pieces which were widely circulated to the Commission's large mailing list and in the City's Sunday papers immediately prior to the referendum.³⁷⁵

C. *Strange Bedfellows Urge a "No" Vote*

On September 27, a newly created group called New Yorkers for a Better Charter (the "Opposition Coalition") issued an eight-page press release on behalf of a coalition of "more than 100 good government, business, community and labor organizations . . ."³⁷⁶ To us, and to the *New York Times* reporter covering the story the next day, what was not said in the press release and press conference was revealing. Thus, as reported, "many of the plans' opponents have said for months that the new charter should preserve the Board . . ."³⁷⁷ The Opposition Coalition "did not mention it."³⁷⁸ This reveals that this Opposition Coalition could not stay together and call for preservation of the Board. For example, the Delay Movement members in the Opposition Coalition, such as Esmeralda Simmons, had contempt for the Board and were rivals of its apostles, such as Howard Golden.

The Opposition Coalition did come together on one point. The one common theme was delay, which was articulated by Chairman Lew Rudin: "This is the most fundamental and complex change in our municipal

372. We were, in fact, sued over our efforts by a group claiming that our literature was too adversarial. The suit was later dismissed.

373. See, e.g., FINAL ISSUE, THE CHARTER REVIEW (N.Y. City Charter Revision Comm'n), Winter 1989-90.

374. See discussion *infra* Chapter XIII, Part II.

375. See NEW YORK CITY CAMPAIGN FINANCE BOARD, NEW YORK CITY VOTER GUIDE: GENERAL ELECTION (Nov. 7, 1989) [hereinafter CFB'S VOTER GUIDE].

376. See New Yorkers For a Better Charter, Broad-Based Coalition Urges "No" Vote on Charter 1 (Sept. 27, 1989) (on file with the *New York Law School Law Review*) [hereinafter Coalition Urges "No"].

377. Alan Finder, *Coalition Opposing Charter Revision Starts Its Campaign*, *supra* note 162.

378. *Id.*

government in generations—and cannot be rushed through without regard to the people who will be governed by it.”³⁷⁹

Former Borough President Percy Sutton, for example, added “the citizenry” had not had adequate time to “make a knowledgeable and reasoned decision about the most far-reaching governmental changes ever to be proposed in New York City’s history.”³⁸⁰ Sutton’s credibility on this point, however, was weakened by the fact that he had not contributed to the Commission’s hearings or debates. Moreover, Sutton seemed to seek delay as a way to maintain the Board and, in his words, his position as a “mayor to the minorities.”³⁸¹

In the release, real estate magnate Lew Rudin—another extraordinarily strange bedfellow with the community activists in the Opposition Coalition—opined that “[i]f it is confusing to the experts, it must be confounding to the electorate.”³⁸² One picture accompanying a *Times* article about the coalition showed “Borough President Howard Golden” and “the developer Lewis Rudin.”³⁸³ This combination was not likely to suggest to readers that a reform agenda united the opponents.

A plea for delay and further explanation, issued six weeks before the vote, was not a powerful, positive appeal to the electorate. Indeed, except for the unarticulated appeal to stick with the Board, and thus the status quo, the Opposition Coalition came forward with no positive alternative, suggesting instead a series of complaints listed haphazardly.

Borough President Golden stressed that all Commission members had been “appointed by Mayor Koch,” ignoring the role he and other elected officials had played in the original appointments.³⁸⁴ Golden’s point had been made before, and it did not rally New Yorkers against the Commission itself. Perhaps this was because the record showed that the Commission had done several things Mayor Koch did not want. Additionally, many New Yorkers had respect either for Koch (who would soon be concluding his twelve years as mayor), or for the Commission’s members.

Golden added that the new Charter “divides and demeans us, splitting the city along racial and ethnic lines under the pretext of increasing minority empowerment.”³⁸⁵ Borough President Ferrer viewed the minority

379. Coalition Urges “No,” *supra* note 376, at 1.

380. *Id.* at 2.

381. See Finder, *Coalition Opposing Charter Revision Starts Its Campaign*, *supra* note 162.

382. Coalition Urges “No,” *supra* note 376, at 1.

383. Finder, *Coalition Opposing Charter Revision Starts Its Campaign*, *supra* note 162.

384. See Coalition Urges “No,” *supra* note 376, at 4.

385. *Id.*

issue differently. He apparently liked our objectives on this subject, but said expansion of the Council did not “guarantee” that minorities would be represented in proportion to their members in the population.³⁸⁶ Nor, he opined, would the Charter grant “meaningful power to the Council.”³⁸⁷

The Coalition press release concluded by saying that the Commission had done too much:

The Charter Commission had a mandate to correct the Board of Estimate voting pattern because the U.S. Supreme Court ruled that it violated the one person, one vote principle.

The Commission went further, following Mayor Koch’s agenda to solidify power at City Hall.³⁸⁸

Neither of us found the press release to be very powerful. It made no positive case; its negatives could be answered. We also knew that we could match the opponents with supporters from particular groups, such as the environmentalists and unions. Our jobs were first, to convince the Justice Department to approve the new Charter,³⁸⁹ and second, to gather support among city voters for the referendum on the Charter—solidifying supporters, working for editorial and other endorsements, and sharpening the positive case for the Charter.

D. *Strange Bedfellows Also Say Vote “Yes”*

Just as there were strange bedfellows in opposition, so were there in support of the Charter changes. These strange bedfellows included, for example: Mayor Koch and some of his bitterest and most persistent critics, such as Stanley Hill, Calvin Butts, Victor Gotbaum, and Ruth Messinger; Messinger and later mayoral rival Rudolph Giuliani; District Council 37 and the Chamber of Commerce and Industry; and Senator D’Amato and Citizens Union and the NYPIRG.

The diversity among supporters of the Charter was a strength. For the opponents it reflected a weakness—a failure to come forward with a positive alternative plan. As Richard Wade, Professor of Urban History at the Graduate Center of CUNY, stated after the referendum, the

386. *See id.* at 5.

387. *Id.* at 5.

388. *Id.* at 8.

389. We were finalizing key rebuttal documents on the day the press release was issued. *See discussion, supra* Chapter XII.

opponents “didn’t have a coherent program,” and their “fragmented nature” limited their ability to sway voters.³⁹⁰ In contrast, we could, and did, use the theme that if strange bedfellows were on our side, our core program must make sense.³⁹¹ Similarly, we could, and did, use the theme that with critics making diametrically opposed attacks, we should be seen as having found the sensible middle ground.³⁹²

E. *A Potpourri of Groups and Individuals*

In addition to the debates over broad issues such as the mix between central and local power, fair representation, and the powers of the Council and its speaker, the referendum debate also involved several smaller questions of concern to particular interest groups. This echoed what had happened at the Commission’s public hearings and in the constant effort by disparate groups—often pushing in opposite directions—to win points that were important to them. At the end of the day, nobody knew how many votes changed depending upon these narrower issues. We worked hard to persuade on all issues, big and small.

1. Environmentalists

The Opposition Coalition’s press release said that “environmentalists also voiced their concerns.”³⁹³ Quoting Marcy Benstock, who had led the opposition to Westway, the release said that the Charter would “undermine the promotion of environmentally sound alternatives such as recycling instead of burning garbage in incinerators.”³⁹⁴ Why? No reason was given.

During the Charter process, Schwarz had had several meetings in his law office with a coalition of environmental groups whose lobbying was facilitated by Richard Kahan.³⁹⁵ Several ideas in the Charter had part of their genesis in these meetings. This work paid off just days after the Opposition Coalition’s release. Steve Kass and Mike Gerard, two well-known pro-environment lawyers, who in court issued a long article on *The Proposed Charter and Environmental Review*.³⁹⁶ The article described the

390. Finder, *Opposition to Charter Change Diverse*, *supra* note 4.

391. *See id.*

392. *See id.*

393. Coalition Urges “No,” *supra* note 376, at 4.

394. *Id.*

395. *See id.*

396. *See* Steve Kass & Mike Gerard, *The Proposed Charter and Environmental Review*, N.Y. L. J., Oct. 14, 1989, at 3.

“extensive” public comment on the Commission’s many preliminary proposals, and added that subsequently Schwarz and senior staff “had met informally with a broad range of individuals and organizations” interested in the environment and the City’s planning process.³⁹⁷

The proposed Charter, as finally issued, was characterized as “a significant improvement,” and as a “far better balance between the competing demands of neighborhood and City-wide concerns.”³⁹⁸ Kass and Gerard also praised a number of “discreet provisions” that would “enhance public and agency participation in the State Environmental Quality Review Act (“SEQRA”) process.”³⁹⁹ The Charter also was credited with beginning to address the City’s need for “long-term planning and meaningful environmental actions” beyond the scope of SEQRA.⁴⁰⁰

Kass and Gerard concluded by expressing their belief that “the public would be well served” by the Charter’s approval, though they expressed “some reservations” about the separate landmarks question.⁴⁰¹

A few weeks later, the *Times* published a letter from Eric Goldstein, a senior attorney at the Natural Resources Defense Council (“NRDC”).⁴⁰²

Goldstein recommended a “yes” vote after referring to the “carefully balanced” provisions of the Charter as a “plus for good government.”⁴⁰³ “Fair share” was described as “ground-breaking.”⁴⁰⁴

Particularly satisfying, in light of Marcy Benstock’s unsupported conclusion about recycling in the Opposition Coalition’s release,⁴⁰⁵ was Goldstein’s reference to recycling in his praise of the City Council and its “greater political clout” under the new Charter.⁴⁰⁶ The Council’s Environmental Protection Committee “has been the City’s major environmental catalyst in recent years. Asbestos control, a phase out of apartment house incinerators, and the landmark mandatory recycling program, are just three advances it initiated.”⁴⁰⁷ The personal does, of course, mix with the political. For Schwarz, then an NRDC Board member, it would have been humiliating not to have substantial environmental support. In the fall of 1989, however, what we wanted most

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.*

402. See Eric. A. Goldstein, Letter to the Editor, *Environmentalists Favor Revised City Charter*, N.Y. TIMES, Oct. 31, 1989.

403. *Id.*

404. *Id.*

405. See Coalition Urges “No,” *supra* note 376, at 4.

406. See Goldstein, *supra* note 402.

407. *Id.*

were pro-Charter votes. It seemed as if the environmentalists on our side were making by far the better case.

2. Unions

Both of us had worked with union leaders when in government and knew how determined and skillful they could be on behalf of their members. Yet, we had no particularly close personal ties.

The Opposition Coalition's release had headlined the opposition of "labor organizations."⁴⁰⁸ The use of the plural seemed a bit of a stretch, because the only union leader quoted in the release was Arthur Cheliotos of the Communications Workers of America, and the list of supporters added only the president of the New York State Court Clerks Association.⁴⁰⁹

During the Commission's work, Cheliotos had testified that the Commission should propose a broad list of changes in the City's "merit selection" system for employees because "the City systematically breaks the Civil Service law."⁴¹⁰ In private meetings with Lane, Cheliotos had vociferously pressed the same issues.

Many labor leaders took no public position on the Charter, including Sandy Feldman of the Teachers Union. Eventual labor supporters of the Charter included Stanley Hill of District Council 37, his predecessor Victor Gotbaum, Sonny Hall of the Transit Workers Union, Phil Caruso of the Patrolmens Benevolent Association, Nick Mancuso of the Uniformed Firefighters Association, and Edward Ostrowski of the Uniformed Sanitation Workers Association.⁴¹¹ Only Stanley Hill of District Council 37, however, had substantial involvement in the Charter process.

Hill was one of the co-chairs of the Citizens Committee for Charter Change and, as such, he had pressed for a wide variety of Charter changes that had nothing to do with more narrow union issues. Hill was also an important minority figure. Hill and his colleagues, Bill Thomas and District Council 37 economist Carol O'Cleareicain, were involved in a wide spectrum of issues, including expansion of the Council, land-use fairness, and various open government proposals.⁴¹² O'Cleareicain was one of the more effective lobbyists. She pushed for particular points of view but also understood the limits of her arguments.

408. Coalition Urges "No," *supra* note 376, at 1.

409. *See id.* at 3, 8.

410. *See* Public Hearing, July 18, 1989, at 22.

411. All of these were presidents or executive directors of their unions. *See* List of Supporting Organizations and Individuals as of October 19, 1989, *supra* note 225.

412. *See id.*

District Council 37, through O'Cleareicain, also pressed for some more focused "union" issues. We adopted some of these proposals, which are found in chapter 35 of the New York City Charter.⁴¹³

The Charter endorsement literature sent by District Council 37 to its thousands of members urged a "yes" vote. In its four-page flier "Why DC 37 says Vote Yes," the union began by noting it had "diligently monitored and worked with" the Charter revision process.⁴¹⁴ It described the Commission as "receptive to and understanding of" the union's positions.⁴¹⁵ District Council 37's "overriding concerns" were: to "increase citizen participation," and "thus minority representation"; to "increase government accountability"; and to "[l]imit potential for corruption."⁴¹⁶ The Charter proposals, District Council 37 said, include "70% of our requests plus two years worth of discussions with resident New Yorkers."⁴¹⁷ Specific changes that were highlighted were Council strengthening and expansion, which "should result" in better minority representation;⁴¹⁸ a more independent Civil Service Commission, thus "freeing" it from dependence on the Department of Personnel;⁴¹⁹ reports on the "number and length of service of provisional employees";⁴²⁰ the new contract budget powers given to the Council—"we will be able to fight contracting out in the beginning";⁴²¹ "[p]ay equity will be City policy";⁴²² as well as "[g]reater public access to information."⁴²³ On the issues narrowly relating to union issues, the Charter contained less than the union had sought, but apparently enough. At the end, the union asked what would happen if the Charter did not pass, and expressed the fear that a federal judge, or "the Republican Justice Department," or the state legislature would dictate "how this city should run."⁴²⁴ Referring to the earlier fiscal crisis, District Council 37 said it had "made great sacrifices in the seventies specifically to prevent this."⁴²⁵

413. See N.Y. CITY CHARTER ch. 35 (1989).

414. District Council 37, Why DC 37 Says "Vote Yes" for the New City Charter, Nov. 7, 1989, at 2.

415. *Id.* at 3.

416. *Id.* at 2.

417. *Id.* at 3.

418. *See id.* at 4.

419. *See id.*

420. *Id.*

421. *Id.*

422. *Id.*

423. *Id.*

424. *Id.* at 3.

425. *Id.*

3. Business Groups

Although developer Lew Rudin was one of the leaders of the opposition, more business leaders came out in favor of the Charter. Ronald Shelp of the New York City Partnership, and Jim Gifford of the New York City Chamber of Commerce and Industry, had been substantial participants in the meetings of the Commission. Although supportive of changes that would be helpful generally to the City's climate for business, such as addressing lack of opportunity for minorities, they focused heavily on governmental efficiency and on whether land-use decision making would become too hard. Joined by the New York Building Congress, the General Contractors Association, and numerous other business leaders, they announced their support during the referendum campaign.⁴²⁶

We worked hard for the endorsement of some of these groups. With others we had no contacts. We do not know on what basis they supported the new Charter. Were they students of constitutional government, convinced we had come up with a better balance? Did they think through the risks to the City of failure to approve the new Charter? Did they sign on to please other supporters, particularly those thought likely to have power under the new Charter? But as the City moved towards a vote, the support, not what motivated it, was our main concern.

4. Cardinal O'Connor

For Schwarz personally, the most surprising Charter supporter was John Cardinal O'Connor. During Schwarz's tenure as corporation counsel, the Cardinal had repeatedly disagreed with his position on key issues. For example, issues had arisen over the City's legal positions on gay rights and on the application of civil rights laws to social service agencies affiliated with the Catholic church that contracted with the City to provide, among other things, group homes for foster care.⁴²⁷ The foster care case also involved the delicate question of how to handle family planning information for girls, particularly non-Catholic girls, in foster care agencies affiliated with the church but financed by City contracts.⁴²⁸ The Cardinal complained to the mayor about Schwarz's positions.

426. See List of Supporting Organizations and Individuals as of October 19, 1989, *supra* note 225.

427. See, e.g., Ari L. Goldman, *Cardinal Eases Threat to Curb Foster Services*, N.Y. TIMES, Mar. 30, 1987, at B1. See also Suzanne Daly, *Archdiocese to Continue Foster-Care Services*, N.Y. TIMES, Sept. 3, 1988, at A25; *Cardinal Assesses Foster-Care Dispute*, N.Y. TIMES, Jan. 26, 1987, at B7.

428. See Goldman, *supra* note 427.

At a Gracie Mansion dinner in late 1986, just before Schwarz finished his term as corporation counsel, the Cardinal seemed to express some personal distaste. Someone had asked where Schwarz was going after leaving the City. After hearing the answer, the Cardinal (without a smile) interjected, "Do they know what they are getting?"

Mario Paredes worked to get the Cardinal's support for the Charter. Paredes invited Schwarz to a breakfast with the Cardinal on October 13 at the Cardinal's residence. The breakfast went very well. The Cardinal spoke of his respect for what we had done, particularly on landmarks, but on the main Charter as well. He expressed his wishes for success. Subsequently, a supporting editorial appeared in the Archdiocese newspaper.

5. Women's Groups

Gender issues were not at the core of the Charter changes. However, we did vote to include women-owned companies along with minority-owned companies in the coverage of the Office of Economic and Financial Opportunity,⁴²⁹ to add a pay equity requirement that wages not be set according to sex, race, or other factors that may result in potential discrimination,⁴³⁰ and to change the Charter to make its language gender neutral.⁴³¹ Presumably, these changes were not an important part of the calculus affecting women's votes. Nonetheless, the pay-equity provision was the reason why the National Organization for Women-New York City wrote a letter to the editor of the *New York Times* urging NOW-N.Y.C. members to vote for the Charter.⁴³²

6. Governor Cuomo

Except for Schwarz's telephone call with the governor in response to his probing about delay,⁴³³ we did not talk directly with Governor Cuomo. During the Commission's deliberations, we met with Evan Davis, the governor's counsel, to go over what the Commission was doing and why. During the referendum, Lane spoke with various aides to the governor. Here the effort was not so much to seek support as to make sure there was no opposition. This was successful.

429. See N.Y. CITY CHARTER ch. 13-A § 340 (1989).

430. *Id.* ch. 35 § 810(a).

431. See Public Meeting, Aug. 1, 1989, at 394.

432. See Francoise Jacobsohn, President, NOW-N.Y.C., Letter to the Editor, N.Y. TIMES, Nov. 6, 1989, at A22.

433. See discussion *supra* Chapter V.

F. *Costs and Corruption*

The opponents claimed the Charter changes would be terribly expensive. Their arguments floundered due to their gross exaggerations. In a letter to the *Times*, our Commission colleague Bernie Richland wrote, "The proposed Charter would cost the city's people more than \$100 million a year."⁴³⁴ Most of Richland's argument was flawed.

Richland's \$100 million figure had been used earlier by Borough Presidents Golden and Ferrer. According to a late October newspaper critique, they had been saying that the costs would be \$100 million "or more."⁴³⁵ When the two borough presidents were asked for details supporting their estimates, however, "they were unable to identify new costs that approached the large sums they have been citing."⁴³⁶ A good example of exaggeration was the claim by Ferrer's spokesman defending his boss' sweeping statements that the new IBO would cost "at least \$30 million."⁴³⁷ However, because IBO's budget was set at ten percent of the Office of Management and Budget's, the correct cost was \$3.1 million.⁴³⁸

After many weeks, Borough President Golden backed down from a total cost of \$100 million and used the figure of \$36.7 million.⁴³⁹ Frank Mauro said the new costs would be \$16 million without counting likely savings.⁴⁴⁰

In the public discourse on this issue, Schwarz had the last word in a November 2 letter to the *Times*, replying to Richland's earlier letter.⁴⁴¹ The

434. W. Bernard Richland, Letter to the Editor, *Can New York Afford This New City Charter?*, N.Y. TIMES, Oct. 17, 1989, at A26.

435. See Alan Finder, *Charter Proposal for New York Generates Little Public Debate*, N.Y. TIMES, Oct. 28, 1989, at A1.

436. *Id.*

437. *Id.*

438. *See id.*

439. *See id.*

440. *See id.*

441. See Frederick A. O. Schwarz, Jr., Letter to the Editor, *Revised City Charter Will Save Money, and It's Constitutional*, N.Y. TIMES, Nov. 2, 1989, at A30.

letter mixed critiques of Richland's accuracy⁴⁴² with the positive fiscal case for the Charter.

The letter began by referring to fiscal watchdogs who supported the Charter:

The most respected watchdogs of New York City government finances, including the Citizens Budget Commission, the New York City Chamber of Commerce and Industry, and [State] Comptroller Edward V. Regan endorse the proposed revisions
⁴⁴³

We were able both to deflect the opponents' complaints about costs and come forward with the support of careful independent fiscal monitors. In addition, the letter—which reflected the same points we were making in debates and various forums—provided a platform to repeat one of our themes about the Commission's proposed changes in contracting.⁴⁴⁴ The opponents' main attack on these changes were that they would help create an "imperial mayor." Our response included saying that focusing responsibility would add to accountability as well as efficiency. The letter highlighted the efficiency point: "Costs would be more than offset by savings, principally from reforms to the city's procurement system."⁴⁴⁵

Schwarz's letter supported this by referencing comments by prestigious sources. Frank Cary, former chairman and chief executive officer of IBM (and as such a previous client of Schwarz's), had recently finished heading a "private sector survey" of City government operations.⁴⁴⁶ Cary had written that he strongly supported the Commission's contract reforms.⁴⁴⁷ The other endorsement—from the State Commission on Government

442. For example, in addition to overstating the IBO's costs tenfold, the opponents' claimed cost of \$12 million for borough commissioners was actually about \$1.7 million, "resulting in better city services"; the \$10 million claim of additional bureaucracy was about \$600,000, resulting in "more competition for contracts by women-owned and minority-owned businesses, and greater public access to information about government programs." *Id.*

The largest single component of increased costs would be about \$4 million for an expanded Council with greater responsibilities. "The commission believes this would make New York government more representative and responsive." *Id.*

443. *Id.*

444. *See id.*

445. *Id.*

446. *See id.*

447. *See id.*

Integrity (“State Integrity Commission”)—both supported our changes and bludgeoned the City’s current contract system.⁴⁴⁸

According to John Feerick, the Commission’s proposals provided a “framework” within which the City would be “able” to make “wise purchases of goods and services, using coherent, state-of-the-art procedures that will themselves lessen the opportunities for fraud and corruption.”⁴⁴⁹

This was well put—or so we thought. Again, we have no way of knowing the impact of any one of these endorsements upon “ordinary” voters or on other opinion leaders. Ultimately, though, the aggregate effect of our wide variety of supporters’ endorsements presumably was helpful.

G. *Making Our Case*

As the referendum heated up, we were extremely busy: making our case to citizen forums, community groups, professional associations, and editorial boards; writing editorials; participating in interviews on radio and television (which began, superficially at least, to wake from its slumber at the end); and making and remaking our points to reporters and to whomever else was available. In other words, we were campaigning.

What follows describes our main arguments. Our statements below come from the *New York Times*’ extensive coverage of the Charter debate.⁴⁵⁰ As we remember it, this printed record is fully consistent with what we were saying at community meetings, bar association forums, editorial board meetings, and radio and television interviews.

Despite the occasional prolixity of the Charter changes, our main themes in the referendum debate were pretty simple. The themes often

448. *See id.* The State Integrity Commission, appointed by Governor Cuomo, was chaired by Fordham Law School Dean John Feerick. *See* Editorial, *Fear and the Feerick Commission*, N.Y. TIMES, Apr. 19, 1987, at 16. A man with a well-deserved reputation for fairness, integrity, and caution, Feerick was joined on the Commission by many notable individuals. Among them were Cyrus Vance, former Court of Appeals Judge Bernard Meyer, Patricia Hynes, and Richard Emery. *See also* Letter from John Feerick, Chairman, Commission on Government Integrity, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (Oct. 30, 1989) (on file with the *New York Law School Law Review*) [hereinafter Letter from John Feerick to Schwarz]; Commission on Government Integrity, *The Commission on Government Integrity Endorses Proposed City Charter Provisions on Contracting* (Oct. 30, 1989) (on file with the *New York Law School Law Review*).

449. Letter from John Feerick to Schwarz, *supra* note 448.

450. The *Times*’ coverage included a six-part series of articles by Alan Finder titled *City Charter: The Voters’ Turn*.

reflect the six clear and simple goals the Commission had resolved to seek on April 24.⁴⁵¹

Again and again, we reminded people that the Charter had to change. The Supreme Court had held the current government unconstitutional. Change was required, and we were “confident we [had] changed it for the better.”⁴⁵²

We presented the Commission’s reforms as opening up a brighter future, and the opponents as defending a flawed—and unconstitutional—status quo. In making these points, we sometimes indulged in rhetoric. For example:

—“New York City should not be like Southern governors after the *Brown* decision, who stood in the schoolhouse door resisting changes in the law to reflect the Constitution.”⁴⁵³

—“To say that [the Council] might not live up to their responsibility is, first, to have no trust in democracy and, second, to be a prisoner of the past.”⁴⁵⁴

Unlike the Commission’s own debate—where, for internal Commission reasons,⁴⁵⁵ the recommendation to eliminate the Board was based solely on its legal indefensibility—during the referendum, we also made the case that the Board’s performance had been deeply flawed and its overall impact in some respects harmful. Thus:

The Board of Estimate simultaneously exercises too little and too much power. It lacks the broad legislative authority needed to promote and effectuate policies different from a mayor’s. It nevertheless throws a stunting shadow across the city’s legislative branch—the City Council. It therefore impedes the healthy development of countervailing power to the mayoralty.⁴⁵⁶

The Board’s work had been “truly in the dark of night, with only deputies there.”⁴⁵⁷ As for the borough presidents’ power on the Board, it

451. See discussion *supra* Chapter IV, Part I.

452. Alan Finder, *As the Charter Vote Nears, New Yorkers Still Argue*, N. Y. TIMES, Oct. 15, 1989, at 24.

453. *Id.*

454. Alan Finder, *Puzzled About New Charter? There Are 2 Basic Questions*, N. Y. TIMES, Oct. 17, 1989, at B1.

455. See discussion *supra* Chapter V, Part II.

456. Frederick A. O. Schwarz, Jr., Editorial, *Government That’s Fair*, N. Y. TIMES, Nov. 4, 1989, at 25.

457. Alan Finder, *Would New Charter Create Throne Room at City Hall?*, *supra* note 252.

had been "jawboning" which "was really a luxury"; they had been "passive last-minute ad hoc reactors"; "they had a vote, and the almost invariable result was that they were outvoted."⁴⁵⁸ Under the new Charter, however, the borough presidents, "if they have energy and will, can really do a better job for their constituents"⁴⁵⁹

The new Charter should lead to better planning and give more attention to the City's real needs. Thus:

We've tried to increase the attention given to planning and the general effort to address the city's problems in a systematic sense and at the outset . . . instead of the relatively overbalanced emphasis now on ad hoc disputes, individual disputes, resolved at the last minute.⁴⁶⁰

At the same time, the new Charter made mayors more accountable for their actions on, for example, contracts.⁴⁶¹ Responding to critics who said we would produce "an imperial mayoralty," we dismissed the claim as "pure rhetoric," and noted that "[t]he Mayor doesn't think that. Other people are worried in the opposite direction."⁴⁶² We also repeatedly returned to the importance of the Charter's added or strengthened checks on the mayoralty. Moreover, we stressed that the "proper controls on power" under the new Charter were in the tradition of "separation of powers in the traditional American sense."⁴⁶³

Only on fiscal issues did we rely on the praise of outsiders, referring to "fiscal watchdogs" such as the Citizens Budget Commission, State Comptroller Regan, the State Integrity Commission, and Chairman of the Private Sector Survey of Government Operations, Frank Cary.⁴⁶⁴

Concluding an editorial published three days before the referendum, Schwarz simplified our case and critiqued the opponents' case:

458. Alan Finder, *The Fight over Changing the Borough Presidents' Role*, N.Y. TIMES, Oct. 19, 1989, at B1.

459. *Id.*

460. Alan Finder, *Redefining Comptroller, Council Head*, N.Y. TIMES, Oct. 21, 1989, at 28.

461. See Finder, *Would New Charter Create Throne Room at City Hall?*, *supra* note 252.

462. *Id.*

463. Alan Finder, *As the Charter Vote Nears, New Yorkers Still Argue*, *supra* note 452.

464. See Schwarz, *Government That's Fair*, *supra* note 456.

Because these proposed changes upset the status quo, they have aroused some opposition. The opponents, however, hold contradictory and irreconcilable views. Their common denominator—"just say no" to the charter proposals—is not good enough for New York. Not when we must change our government to comply with the Constitution. Not when we have the chance to improve our government. And certainly not when a failure to change our government would present the next administration with terrible unresolved legal problems and pressures from all the inconsistent voices opposing change.⁴⁶⁵

H. *Voices at the End*

As the referendum campaign reached its close, we had already described the decisions made by a number of editorial boards. In addition, new opponents and supporters never heard from before began voicing their views, and we and our opponents had enormously contrasting last-minute appeals for support.

1. Last Minute Participants

As in any campaign, many supporters or opponents come forward at the end. Most just lent their names. Examples of politicians who endorsed the Charter at the end included former Governor Hugh Carey, former Mayors John Lindsay and Robert Wagner, Senators Alfonse D'Amato and Daniel Patrick Moynihan, former Assembly Speaker Stanley Fink, and scores of others.⁴⁶⁶ Other notables included Cyrus Vance, Gordon Davis, Victor Gotbaum, Joseph Papp, Martin Segal, and many others.⁴⁶⁷

Although we had talked to some of these people, this list of individuals was put together by others, possibly by the group called Citizens for the New Charter.⁴⁶⁸ The executive director of that group, Bonnie Potter, had several meetings or telephone conversations with us and was given access to some of our materials, including the harder-hitting critiques of opponents

465. *Id.*

466. *See, e.g.*, List of Supporting Organizations and Individuals as of October 19, 1989, *supra* note 225.

467. *See id.*

468. Citizens for the New Charter was a coalition supporting the Charter proposal and included many former officials and union and civic leaders, including then-Council member Ruth W. Messinger. The opposition coalition, New Yorkers for a Better Charter, included three borough presidents. *See* Alan Finder, *2 Camps Try to Sway Charter Voters*, N.Y. TIMES, Oct. 19, 1989, at B2.

in our Justice Department reply submissions. Potter produced a very effective nine-page response to every argument of "those who oppose the Charter."⁴⁶⁹ The response was made available to supporters and gave them suggestions on possible arguments to make.

Assembly Speaker Mel Miller and Brooklyn Congressman Charles Schumer were examples of last-minute opponents of the Charter. During our process, Miller had subjected us to a tirade about what he viewed as our many failures and seemed to threaten to take things into his own hands, if we did not make certain changes. We did not make those changes. While pugnacious and loud, the tirade was neither persuasive nor completely understandable. Despite the speaker's great power over his colleagues in the assembly, many of them endorsed the Charter, as did his predecessor Stanley Fink.⁴⁷⁰ On October 19, Miller issued a five-page release urging rejection of the Charter so that New Yorkers could "devote the coming year to an in-depth consideration of alternative choices"⁴⁷¹—consideration which Miller himself had failed to provide earlier in 1989 or previously to the Ravitch Commission.

Congressman Schumer had not played a role during the Charter deliberations. Then, three days before the referendum, he was co-author with Miller of a *Times* editorial opposing the Charter.⁴⁷² On the new land-use procedures, the Miller-Schumer editorial warned against "a recipe for paralysis."⁴⁷³ Furthermore, they wrote that the new budget procedures were "a complicated labyrinth," and the new contract oversight system was "an open invitation to nit-picking and obstructionism."⁴⁷⁴ After these aggressive conclusory remarks, the authors seemed a bit defensive when they asked: "Are we complaining that the charter revision is too much democracy? No. It is too much government."⁴⁷⁵

The article ended by asking for a "no" vote and "sending the Charter Commission back to work."⁴⁷⁶ However, no matter how the vote came

469. Bonnie Porter, *The Charter and Its Critics* (unpublished document on file with the *New York Law School Law Review*).

470. See List of Supporting Organizations and Individuals as of October 19, 1989, *supra* note 225.

471. Melvin Miller, *New York State Assembly Speaker, State Legislature Leader Urges Voters Defeat Proposed New York City Charter Provisions 5* (Oct. 19, 1989).

472. See Melvin Miller and Charles E. Schumer, *It's Urban Paralysis*, N.Y. TIMES, Nov. 4, 1989 at 25.

473. *Id.*

474. *Id.*

475. *Id.*

476. *Id.*

out, we could not go “back to court” after it took place. The Charter Commission would be out of business under state law.⁴⁷⁷

2. Vastly Different Final Appeals

As the referendum campaign closed, we tried to be clean and hard-hitting on the merits, but constitutional in tone. Our opponents’ tone was very different.

The publications of the Commission itself were lengthy and focused on the merits. The *Charter Review* Election Special’s “sampling” of opinions even included two negative arguments, one from Commissioner Richland, the other from Leslie Lowe, who had participated extensively in the Charter debate and then had represented the Delay Movement before the Justice Department.⁴⁷⁸ The Commission’s Voters Handbook on Charter Change was a favorable description of the Commission’s goals and decisions, but was more descriptive than adversarial.⁴⁷⁹ Answering the question “What Would Happen if the Charter Proposals Do Not Pass?,” the Voter’s Handbook made points that could worry people, but began by conceding the answer was not clear:

477. See N.Y. MUN. HOME RULE LAW § 36(6)(e) (McKinney 1994).

478. See *A Sampling of Opinions: The Final Proposals for Charter Revision*, THE CHARTER REVIEW (N.Y. City Charter Revision Comm’n), Fall 1989 Election Special, at 10.

479. See N.Y. CITY CHARTER REVISION COMM’N, THE VOTER’S HANDBOOK ON CHARTER CHANGE (Fall 1989) (on file with the *New York Law School Law Review*) [hereinafter THE COMMISSION’S VOTER’S HANDBOOK]. Copies of the *Handbook* were distributed to voters in October and November of 1989. The *Handbook* was also included in the City’s papers on the Sunday before the referendum. Opponents tried unsuccessfully to enjoin this in New York State Supreme Court. See Finder, *Charter Proposal for New York Generates Little Debate*, *supra* note 435.

The Alliance for a Better Charter, a coalition of individuals and groups opposing the Charter revision, distributed a six-page flier, the cover page of which exactly mirrored the Commission’s *Handbook* except for the insertion of the word “Thinking” in front of Voter’s. In answering the question “What Would Happen if the Charter Didn’t Pass?,” it quoted the Commission’s statement in full, adding, “Anyone who tells you that the city would be brought to a halt if the 1989 charter proposals do not pass is either sadly misinformed or lying to you.” See ALLIANCE FOR A BETTER CHARTER, THE THINKING VOTER’S HANDBOOK ON CHARTER CHANGE 5 (Fall 1989) (on file with the *New York Law School Law Review*).

In a radio debate, Borough President Ferrer accused Schwarz of exaggerating the likelihood of court intervention—a “bogyman . . . being brought . . . to frighten and mislead the people of this city into an affirmative vote.” Finder, *Charter Proposal for New York Generates Little Debate*, *supra* note 435. Our point of the risks to the City was broader than court intervention, which was a possibility. Additionally, the opposition coalition’s use of the Commission’s own words is inconsistent with Ferrer’s accusation.

It's impossible to know. The federal court that found the voting structure of the Board of Estimate unconstitutional could step in and impose a solution on the city. This solution could *only* address the narrow one-person, one-vote issue. The mayor and the Council could ask the state legislature, including all the representatives from outside of New York City, to change the city's government. Or another charter revision commission might be established.⁴⁸⁰

Schwarz's final comments also tried to avoid claims of perfection. Thus, after making a case for the Charter that was hopefully persuasive and a critique of the opponents that was hopefully fair, Schwarz's last words in the last editorial were:

The proposed charter is not a perfect document; no charter can be. It is the product of fallible men and women doing their best to address hard issues.⁴⁸¹

Our one radio advertisement, run on the city's all-news stations, was short, restrained, and did not run very often. We did not have money for more:

The United States Supreme Court has ruled. The current Board of Estimate is unconstitutional and things must change.

I'm Fritz Schwarz, Chair of the Charter Revision Commission. My colleagues and I have heard from thousands of people throughout the entire City and now have proposed major changes to the way our City works. We believe that abolishing the Board of Estimate and shifting most of its powers to an enlarged and empowered City Council will make government fairer and more efficient. Some people don't agree with us. You'll hear many views, both for and against, but whatever you decide, please remember to vote on questions two and three. You'll find them on the right hand side of the ballot on November 7th.⁴⁸²

480. THE COMMISSION'S VOTER'S HANDBOOK, *supra* note 479, at 15.

481. Schwarz, *Government That's Fair*, *supra* note 456.

482. Radio Advertisement (broadcast, Oct. 1989) (text of the advertisement is on file with the *New York Law School Law Review*).

The opponents finished with an unsubstantive, emotional, television advertisement campaign. Schwarz found it sleazy; Lane found it strong and clever. However characterized, it presumably had an impact in persuading a number of people to vote "no."

The advertisement displayed slimy worms slithering their way out of a can labeled "A Can of Worms—Proposed Changes to the City Charter."⁴⁸³ Paid for in part by the campaign funds of Borough Presidents Golden and Ferrer—in a legal, but dubious, use of money previously donated to help them get elected⁴⁸⁴—the advertisements were the work of the Opposition Coalition.⁴⁸⁵ The coordinator of that coalition said earlier the group hoped to raise "up to \$1 million" for an advertising campaign.⁴⁸⁶ While we do not know the exact cost of this negative advertisement campaign, it ran repeatedly in the days leading up to the election.

The negative advertisement campaign illustrates one of the dangers of referendum campaigns. Big money and nonsubstantive emotional appeals can have a particularly great impact in referenda when most voters are faced with voting on the issues without spending much time to fully understand them.⁴⁸⁷

Additionally, this advertisement campaign lowered the tone of the Charter debate and did not reflect well on its sponsors. Our concern as the election approached, however, was not really focused on such lofty questions as the appropriate tone. Our concern was whether the advertisement would worm its way into voters' minds and increase the "no" vote. Although we have seen no analysis of the advertisement, we believe it affected the voters.

CHAPTER XIV. THE REFERENDUM VOTE

I. THE BALLOT QUESTION

At the Commission's final meeting on August 2, after we had decided on a separate landmarks question, there was some discussion of the form in which the Charter questions should be put to the voters.⁴⁸⁸ Even this seemingly mechanical question had significance.

483. See Alan Finder, *Foes and Backers Begin Ads on Charter Revision*, N.Y. TIMES, Nov. 1, 1989, at B4.

484. See *id.*

485. See Finder, *2 Camps Try to Sway Charter Voters*, *supra* note 468.

486. See *id.*

487. See generally Eric Lane, *Men Are Not Angels: The Real Politik of Direct Democracy and What We Can Do About It*, 34 WILLAMETTE L. REV. 101 (1999).

488. See Public Meeting Aug. 2, 1989, at 152-72.

While Lane said the law would have allowed a highly conclusory and utterly uninformative question, such as “shall the amendment to the Charter proposed by the Charter Revision Commission be put into law,”⁴⁸⁹ he opposed doing this, and no commissioner, except Commissioner Richland, thought this type of question would be sensible or appropriate.⁴⁹⁰ There was a consensus that there should be a question that would succinctly be followed in “bullet” form by some of the key changes. A model for this was handed out at the meeting.

After some discussion, Harriet Michel suggested that the chair and staff be delegated responsibility for the actual language.⁴⁹¹ Mario Paredes urged more discussion and then pushed for a bit more advocacy in the bullets—for example, he suggested that the statement announcing the expansion of the Council be followed by an explanation that this was done “in order to establish a body more representative [of] the population of the City.”⁴⁹² Schwarz, as a litigator, believed that phrasing the question is a major part of winning the battle. Therefore, he added that we could not use suggestive language but instead would have to state the bullets “a little more neutrally” or “clinically.”⁴⁹³ Paredes made a few more suggestions on the bullets that were appreciated as “helpful guidance” within the “neutrality” limitation.⁴⁹⁴ Additionally, there were “practical limitations” as to what could be said because of space limitations on the ballot.⁴⁹⁵

After the Commission adopted Michel’s suggestion with only Commissioner Richland dissenting (because he wanted no bullets),⁴⁹⁶ Paredes asked for assurance that the separate landmarks question would be put forward equally “forceful and positive.”⁴⁹⁷ Schwarz agreed that “it will be put forward with the same spirit.”⁴⁹⁸

As ultimately worked out, the ballot question was:

Should the changes to the City Charter, as proposed by the Charter Revision Commission, be adopted? Among these changes are:

—abolishing the Board of Estimate;

489. *Id.* at 153-54.

490. *See id.* at 162-63.

491. *See id.* at 166-67.

492. *Id.* at 169.

493. *Id.* at 170. Schwarz’s concern was that improperly phrased questions could be challenged in court.

494. *See id.* at 170-71.

495. *See id.*

496. *See id.* at 173.

497. *Id.*

498. *Id.*

—adding sixteen members to the Council by making Council districts smaller, giving the Council sole legislative responsibility for the adoption of the budget, and giving it new responsibilities in the areas of land use and franchising;

—giving each borough president new responsibilities in the areas of budget preparation, selection of sites for City facilities, land-use review, and franchise approval;

—giving the council president new responsibilities to investigate citizen complaints and to monitor agency performance and Charter compliance;

—adding one appointee of each borough president and one appointee of the council president to the City Planning Commission; and

—establishing new procedures for awarding City contracts, for facilitating equal opportunity in City contracting, for determining the geographical distribution of City facilities, for monitoring the equal employment practices of City agencies, for making City records and information available to the public, and for redistricting the Council.⁴⁹⁹

Opponents presumably would not have written the bullets the same way, but our aim was to make them fair. No one challenged our language as unfair. Nonetheless, the repeated use of the word “new” might have had some subliminal positive effect. Presumably, however, most voters do not have, or take, much time to parse out referendum questions. This is one of many reasons why referenda should be used sparingly.

II. THE VOTER’S GUIDE

Among the 1988 Charter reforms stemming from the Ravitch Commission was a requirement for a Voters Guide,⁵⁰⁰ to be issued by the

499. The form of the landmarks ballot question was similar. On the ballot, there was also a proposed (minor) amendment to the State Constitution protecting county sheriffs from personal liability and making counties responsible for any official misconduct. This was ballot proposal No. 1, making the main Charter proposal No. 2 and the landmarks question No. 3. See THE COMMISSION’S VOTER’S HANDBOOK, *supra* note 479.

500. See N.Y. CITY CHARTER ch. 46 § 1053 (1976, as amended through 1988).

newly created Campaign Finance Board.⁵⁰¹ The guide was to include, among other things, “where there is a ballot proposal or referendum, concise statements explaining such proposal or referendum, and an abstract of each such proposal or referendum.”⁵⁰² The guide was required to be “prepared in plain language using words with common and everyday meanings.”⁵⁰³

Because the Voters Guide would be distributed to all voters and come from a nonpartisan governmental body, we thought what it said would be quite important. The Campaign Finance Board’s executive director was Nicole Gordon, who had earlier come from private practice to work with Schwarz in the corporation counsel’s office. While proponents and opponents could, and did, make their positions known to her and her staff, the Voters Guide was written by Gordon.

After the Voters Guide printed the ballot questions, it stressed the importance of the Charter vote: “Every day, City government makes decisions that make big differences in your life. Many New Yorkers think they don’t have much to say about how these decisions are made. On Election Day, New Yorkers will have an opportunity to decide whether to reshape their government as proposed.”⁵⁰⁴ This statement was followed by brief, descriptive answers to the following questions: “What Is the Charter?”; “What is the Charter Revision Commission?”; and “Charter Revision—Why Vote Now?”⁵⁰⁵ A brief description of the recommended changes also followed.⁵⁰⁶ We found these descriptions rather helpful, including the facts that the Supreme Court had set the process in motion and that the mayor’s appointments to the Commission had been made “with suggestions from the other members of the Board of Estimate.”⁵⁰⁷

After these neutrally phrased, but helpful, descriptions came “pro” and “con” statements.⁵⁰⁸ These were prepared by the Board “based on statements received from many groups both for and against the Charter revision proposals.”⁵⁰⁹ We thought the “pro” position fairly captured the case we had been making on “Why Vote Now?,” and on the reasons for the changes to the structure and processes of City government. What was particularly interesting about the “con” position was its revelation of the internal split among opponents. For example, the borough presidents’

501. See CFB’S VOTER GUIDE, *supra* note 375.

502. N.Y. CITY CHARTER ch. 46 § 1053(e) (1989).

503. *Id.*

504. CFB’S VOTER GUIDE, *supra* note 375, at 14.

505. *Id.* at 14-15.

506. See *id.* at 15-17.

507. *Id.* at 14.

508. See *id.* at 17.

509. *Id.*

power had been “virtually eliminated”—or they would be given too much power over the budget.⁵¹⁰ On land use, small local groups will be able to delay or block land-use approvals—or “the Mayor will dominate the regulation of land use at the expense of community interests.”⁵¹¹

To our knowledge, no research has been done on the impact of these Voter Guides on voter participation and understanding since they went into effect in 1989. Certainly, there was no research concerning the impact on the Charter vote. Those who read the Voters Guide, however, would have become aware of the importance of voting on the issues at stake. We believed this was both good government and good for our side.

III. THE VOTE

On Tuesday, November 7, the polls opened at 6:00 a.m. and closed fifteen hours later at 9:00 p.m. We both voted early. Members of both of our families electioneered near our respective polls. Later, we had an extended lunch with some staff members. The long, tense wait then began.

Waiting for final results, we spent the evening with staff members at Lane’s apartment. In the early evening, we began to hear sketchy, but favorable, exit poll results. Then came the news that we had won. We felt relief and joy. Schwarz and Bronx Borough President Ferrer were asked to comment on television. After going to the Channel 7 station, however, the interview was canceled, and the television stations went back into slumber.

The overall vote on the main Charter question was fifty-five percent in favor to forty-five percent opposed—514,773 to 425,598.⁵¹² Although typically only about one-third as many votes are cast on ballot questions as are cast in the more highly publicized races for national, state, and citywide office, on this Election Day there were about half as many votes cast on Charter revision as in the mayoral election.⁵¹³

510. *See id.* at 19, 21.

511. *Id.* at 21.

512. *See 1989 Election Returns: Charter Revision Wins, 55%-45%*, CHARTER REVIEW (N.Y. City Charter Revision Comm’n), Winter 1989-90, at 3. “These statistics were compiled from the official canvass prepared by the City Board of Elections.” *Id.* With a smaller overall vote, the landmarks question carried by 57% to 43%. *See id.*

513. Overall, the vote on the Charter was 49.5% of the vote in the mayoral race (47.6% on the landmarks question). Staten Island had the least fall-off in voting with 64.7% of the mayoral vote. This statistic reflected, no doubt, the special concern Staten Islanders had about the aftermath of *Morris*. *See The Ballot Proposals, supra* note 360. The other boroughs were: Manhattan (54.3); Queens (52.5); Brooklyn (43.5); Bronx (41.8). *See id.* at 3.

Breaking down the election into smaller pieces, we were told the Charter won in every predominantly African-American district. On a borough-by-borough basis, the Charter won overwhelmingly in Manhattan, and lost overwhelmingly in Staten Island;⁵¹⁴ it lost in the Bronx and won in Brooklyn and Queens, with the Queens vote percentages matching the overall City vote closer than any other borough.⁵¹⁵

Results on Question 2⁵¹⁶

Borough	Yes	%	No	%
Bronx	55,939	46.4	64,757	53.6
Brooklyn	123,766	51.9	114,565	48.1
Manhattan	161,718	67.2	79,076	32.8
Queens	148,167	56.2	115,311	43.8
Staten Island	25,183	32.7	51,890	67.3
Total	514,773	54.7	425,598	45.3

Accompanying these statistics in the final issue of the *Charter Review* was a letter from the chair which concluded by picking up themes used throughout our long road to victory:

The new Charter is not a perfect document; no Charter can be. Nor will it solve every problem we face; the Charter does not say how potholes are to be filled or streets cleaned. But I believe that it does lay a foundation for City government that will be responsive to all our needs, represent us better, and give us greater opportunities to influence the decisions that affect our lives. Now it is up to our elected officials, the government watchdog

514. See 1989 Election Returns: Charter Revision Wins, 55%-45%, *supra* note 512, at 3.

515. See *id.*

516. *Id.*

organizations and all of us as citizens of New York to work to fulfill those goals.⁵¹⁷

APPENDIX

Because this is our story and because of our leadership role, this Article includes a lot about what we said and did, and why we did so. However, each commissioner played an important role. Any successful group is much more than the sum of its individual members. Ours was. We learned from each other during our long process, and the end product was much different and far better than it would have been had anyone tried to devise a new Charter as a philosopher king sitting alone and musing.

Starting with the two other officers and then proceeding alphabetically with the other commissioners, we provide here a thumbnail sketch of the commissioners, their backgrounds, and their roles during our deliberations. We understand that these descriptions cannot possibly do justice to the breadth of the commissioners' interests.

Harriet Michel, as vice chairman, and Nat Leventhal, as secretary, were the two other officers. They were also officers on the Ravitch Commission.

Michel was president of the National Minority Supplier Development Council and former president and chief executive officer of the New York Urban League. She had also worked for the federal and City governments. Michel was passionate and eloquent at several key points. Attentive to issues of fairness to minorities, she pushed for balance against an overly strong mayor. Michel was helpful in developing support for the Commission among black leaders.

Leventhal was president of the Lincoln Center. He had been the City's first deputy mayor in the Koch Administration. He had been commissioner of two City housing agencies under Mayors Koch and Lindsay, and had been Mayor Lindsay's City Hall chief of staff. He was the Commission member most experienced in the workings of City government. Leventhal played a significant role on every issue. Although strong-willed, Leventhal understood how to move toward building consensus and electoral support.

Aida Alvarez was a vice president for municipal finance at First Boston. She had been a journalist and involved in public affairs for the City's Health and Hospitals Corporation. She was an advocate of replacing the city council president (now public advocate) with an elected deputy mayor. She was one of four dissenters on the Commission's final vote.

517. *Id.* at 2.

Amalia Betanzos was president of Wildcat Services, a non-profit employment program. She had been City Commissioner of Youth Services, president of the National Association for Puerto Rican Civil Rights, and a member of the City's Board of Education. Betanzos had a quick wit and focused on fairness to minorities and on assuring an adequate role for boroughs.

Fred Friendly was the Edward R. Murrow Professor Emeritus at the Columbia School of Journalism. He had originated and produced a public television services on the U.S. Constitution, and had been president of CBS News. Because he knew less about the workings of city government in the beginning of the Charter revision process, Friendly asked probing "why" questions. He used his knowledge of constitutional principles and history to make general points. He also had an ear for the quotable, pithy remark.

Simon Gourdine was director of labor relations for the Metropolitan Transportation Authority. He had been commissioner of the Department of Consumer Affairs, secretary of the Rockefeller Foundation, and deputy commissioner of the National Basketball Association. Gourdine was very attentive to increasing opportunities for minorities.

Judah Gribetz was a partner at Mudge Rose. He had been a deputy mayor in the Beame Administration and counsel to Governor Hugh L. Carey. Gribetz was one of the four dissenters and was angry about losing on the question of whether to abolish the office of city council president. At the end of our work, he was critical of how and when the City Council would engage in land-use issues. Nonetheless, despite his anger, Gribetz sharpened the debate and provided detailed drafting on issues.

Therese Molloy was going to law school. Her prior career had been in banking, where she had risen to be a vice president at Chase Manhattan. She had also been the chair of the Greater Jamaica Development Corporation. Molloy was particularly concerned with the role of communities and boroughs. She was one of the four dissenters on the final vote.

Patrick Murphy was vice president for worldwide security at Merrill Lynch. He had been chief of operations and first deputy commissioner of the City's police department. Murphy paid particular attention to protecting City government departments from undue burdens and to assuring that Staten Island got fair treatment under a regime without a Board of Estimate.

Archibald Murray was executive director and attorney-in-chief of the Legal Aid Society. He had been commissioner of the state Department of Criminal Justice Services and an assistant counsel to Governor Nelson A. Rockefeller. Murray was a gentle and modest man, whose words carried weight.

Mario Paredes was executive director of the Northeast Catholic Pastoral Center for Hispanics. He had been director of the Brooklyn

Diocese Department of Religious Education for Hispanics. Paredes started with the least knowledge about City government. He worked extremely hard to learn. In addition to his role on a number of substantive issues, Paredes was very helpful in urging outreach and openness.

Bernard Richland was an adjunct professor of local government law at New York Law School. He had been corporation counsel under Mayor Beame and general counsel to the 1973-1975 Charter Revision Commission. For Richland, one issue was preeminent—finding a way to save the Board of Estimate. He stood alone on this and dissented for this reason. Although the Board of Estimate was Richland's key issue, he weighed in on many issues and helped provide drafting clarity, even where he thought our way was wrong.

Bishop Joseph Sullivan was executive vice president for Catholic Charities for the Brooklyn Diocese. He had been a member of the City's Commission on the Year 2000 and a director of the Fund for the City of New York. Sullivan advanced the issue of fairness—pressing the commissioners to set aside their personal objectives when these objectives might harm the Commission's overall work.

David Trager was dean of Brooklyn Law School and chair of both the Temporary State Commission of Investigation and the Mayor's Committee on the Judiciary. He had been the U.S. Attorney for the Eastern District of New York. Trager was engaged on every issue. He was particularly important in pushing for a borough role and in helping to craft appropriate balances between central and more local power.

Additional biographical details about the members can be found in the attachment to the Mayor's January 19, 1989, Certificate of Appointment and vol. 1, nos. 1-3, and vol. 2, nos. 3-4 of the *Charter Review*.

