NYC Charter Revision Commission

Preliminary Staff Report and Recommendations to the Chair of the 2010 Charter Revision Commission

July 9, 2010

New York City Charter Revision Commission
2 Lafayette Street, 14th Floor
New York, N.Y. 10007

July 9, 2010

Dear Chairman Goldstein:

As you requested in June, the staff has prepared a preliminary report to serve as the basis for further discussion and action by the commission.

The contents reflect discussions with commissioners, information elicited at the public hearings and expert issue forums, and at meetings with representatives of good government organizations and concerned citizens. We have examined the social science and other literature on the issues discussed in the report and conducted legal research in conjunction with the New York City Corporation Counsel's Office, which serves as formal legal adviser to the commission.

The most difficult part of writing this report has been choosing from among the many creative and meritorious ideas put forth those the commission has the time and resources to prepare for the ballot in November. With that in mind, the report discusses, first, those proposals which staff believes could be ready by November, and, in Part V, those proposals which need further study or are not within the commission's authority to propose, or for other reasons should be reserved for the future.

As you have said from the start, this is an iterative process. We expect that some of the staff's recommendations will pass the test of the summer's debate and others may be left on the table for future action. The commissioners may want as well to add proposals for discussion or for inclusion on the ballot. We view this report as the first step in an exciting discussion that is just beginning.

The staff looks forward to working with you and the other commission members to refine and distill the very best ideas to present to the voters.

Yours truly,

Lorna Goodman

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About the Commission

On March 3, 2010, Mayor Michael R. Bloomberg established the 2010 New York City Charter Revision Commission and appointed Dr. Matthew Goldstein, as Chair, and 14 other community leaders to serve on the Commission. The Mayor has charged the Commission with reviewing the entire Charter in order to propose amendments that would increase the efficiency and effectiveness of government. In addition, he requested that the Commission consider presenting the issue of term limits to the voters. The Mayor has also charged the Commission with conducting an extensive outreach program that encourages broad and diverse public participation and seeks ideas and opinions from a wide variety of civic and community leaders.

The Commissioners

Matthew Goldstein, Chair, is Chancellor of the City University of New York (CUNY). He has served as President of Adelphi University, President of Baruch College; President of the Research Foundation of CUNY; and as Acting Vice Chancellor for Academic Affairs of CUNY. He earned his doctorate from the University of Connecticut in mathematical statistics and a bachelor's degree in statistics and mathematics from The City College of The City University of New York. He lives in Manhattan.

John H. Banks, Vice-Chair, is Vice-President for Government Relations at Consolidated Edison. He was named director of Government Relations at Consolidated Edison in 1999, City Council Chief of Staff in 2000, and moved to his current position in 2002. He is a member of the Metropolitan Transportation Authority board and lives in Brooklyn.

Angela Mariana Freyre, Secretary, is Senior Vice-President and Deputy General Counsel of The Nielsen Company. She serves as a member of the City's Conflicts of Interest Board and as a commissioner on the Latin Media and Entertainment Commission. She is a former partner at the international firm Coudert Brothers. She lives in Manhattan.

Anthony Perez Cassino is an attorney at the firm of Milbank, Tweed, Hadley & McCloy, where he oversees pro bono activities. He has served as the Director of Pro Bono Services for the New York State Bar Association and as an Aide and Counsel to Assemblyman Jeffrey Dinowitz. He is also a community leader and former City Council candidate who served as Chairman of Bronx Community Board No. 8 from 2004-2008. Mr. Cassino also served as Board Chairman of the Riverdale Nursery School and Family Center; and is the founder of two organizations: the Coalition of Riverdale/Kingsbridge Schools and the Northwest Bronx Democratic Alliance. He lives in the Bronx.

Betty Y. Chen is a Vice-President for Planning, Design and Preservation at the Governors Island Preservation and Education Corporation and a member of the City Planning Commission. Ms. Chen has worked for the Lower Manhattan Development Corporation, where she was responsible for the development of the World Trade Center Master Plan. She was also a former project architect with the New York firm Tod Williams, Billie Tsien Architects. She lives in Manhattan.

David Chen is the Executive Director of the Chinese-American Planning Council, Inc. and the founding Chairman of the Board of Directors of the Chung Pak Local Development Corporation. He is also a member of the board of the Chinatown

Partnership Local Development Corporation and served as a Commissioner on the 2004-2005 Charter Revision Commission. He lives in Brooklyn.

Hope Cohen is Associate Director of the Regional Plan Association's Center for Urban Innovation. Previously, she was Deputy Director of the Manhattan Institute's Center for Rethinking Development, where she focused principally on issues of urban environment and infrastructure. Ms. Cohen has also served at MTA New York City Transit. She also served as Board Chairperson of Manhattan's Community Board No. 7 and as Co-Chairperson of that Board's Land Use Committee. She lives in Manhattan.

Anthony Crowell is Counselor to the Mayor. He currently serves as Board Chair of the Brooklyn Public Library and is an adjunct professor of state and local government law at Brooklyn Law School and New York Law School. Mr. Crowell served as a Commissioner on the 2004-2005 Charter Revision Commission; Chief Counsel to the 2003 Charter Revision Commission; Co-Executive Director to the 2002 Charter Revision Commission; General Counsel to the 2001 Charter Revision Commission; and counsel to the 1999 Charter Revision Commission. He has also served as Assistant Corporation Counsel. Before joining the City, he managed government affairs and policy at the International City/County Management Association in Washington, D.C. He lives in Brooklyn.

Stephen J. Fiala is Richmond County Clerk and Commissioner of Jurors, and a former City Council member. Mr. Fiala has also served on the 2004-2005 Charter Revision Commission. He lives in Staten Island.

Ernest Hart currently serves as Associate Dean at Columbia University Medical Center and as Chair of the Civilian Complaint Review Board. He also serves on the Committee on Character and Fitness of the Supreme Court Appellate Division, First Department, and on the Queens Borough Public Library Board of Trustees. Previously, Mr. Hart served as Chief of Staff and Counsel to Deputy Mayor Dennis Walcott, as well as the Chair of the New York City Equal Employment Practices Commission and as a member of the New York City Board of Collective Bargaining. He has also been an adjunct professor of law at New York Law School. He lives in Queens.

Rev. Joseph M. McShane, S.J. is President of Fordham University, where he had previously served as dean of Fordham College at Rose Hill, Professor of Theology and a member of the Board of Trustees. Father McShane has also served as President of the University of Scranton in Pennsylvania. In June 2008, he was appointed to the Commission on Metropolitan Transportation Authority Financing by New York Governor David A. Paterson. He lives in the Bronx.

Kenneth M. Moltner is currently counsel in the litigation department of Bressler, Amery & Ross, P.C. He is an adjunct professor in the School of Continuing Education at New York University and Hunter College and has presented Continuing Legal Education lectures at the New York City Bar Association and the New York County Lawyers' Association. He was formerly Chair of Community Board No. 8 in Manhattan and has been active in the movement for term limits. He lives in Manhattan.

Katheryn Patterson is Vice-Chair of the Board of Trustees of the Juilliard School, Director Emeritus of the Board of Directors of Greenwich House, and a member of the Board of Trustees at Trinity School. She also serves on the Campaign Finance

Board and was a member of the 2003 Charter Revision Commission. She is a former partner at the international firm Coudert Brothers. She lives in Manhattan.

Carlo Scissura is Chief of Staff to Brooklyn Borough President Marty Markowitz. Previously, he was an attorney in full-time private practice and worked in both the New York State Senate and Assembly. He has served as a member of Brooklyn Community Board 11, Vice-President of Brooklyn Community School Board 20, and President of Brooklyn's Community Education Council for District 20. He lives in Brooklyn.

Bishop Mitchell G. Taylor is Senior Pastor of Center of Hope International, a non-denominational church located near the Queensbridge Houses. In addition to his work as a pastor, Bishop Taylor is CEO of the East River Development Alliance (ERDA), a not-for-profit organization he founded in 2004 to expand economic opportunity for public housing residents. Bishop Taylor was appointed to the Civilian Complaint Review Board in 2009. He lives in Queens.

The Commission Staff

Lorna B. Goodman is Executive Director of the Commission. She served most recently as Nassau County Attorney, a position she held since 2002. The first woman appointed County Attorney, she was the chief civil legal officer in the County and supervised a team of more than 100 lawyers. From 1976 to 2001, she served at the New York City Law Department in a variety of roles, and on the Executive Staff from 1991-2001. She holds degrees from Vassar College and Hofstra Law School.

Frederick P. Schaffer is General Counsel of the Commission. He serves as General Counsel and Senior Vice Chancellor for Legal Affairs of The City University

of New York. He also serves as General Counsel to the CUNY Construction Fund. He was a litigation partner in the law firm of Schulte Roth & Zabel LLP and served as Counsel to Mayor Koch, Chief of Litigation in the New York City Law Department and Assistant U.S. Attorney in Manhattan. He was an Associate Professor at the Benjamin N. Cardozo School of Law. He has degrees from Harvard and Harvard Law School, where he was an editor of the Harvard Law Review. He clerked for the Honorable Francis L. Van Dusen, Circuit Judge on the U.S. Court of Appeals for the Third Circuit.

Joseph P. Viteritti is Research Director of the Commission. He is currently the Blanche D. Blank Professor of Public Policy at Hunter College (CUNY), where he is Chair of the Department of Urban Affairs & Planning and Director of the Public Policy Program at Roosevelt House. He previously served as an advisor to the New York City Charter Revision Commission (1987-1988), Executive Director of the New York State Charter Commission for Staten Island (1991-1996), advisor to the Districting Commission for the City Council (1991), and Executive Director of the Commission on School Governance (2007-2008). He has taught at Princeton, NYU, Harvard, and SUNY, Albany. He has just published his tenth book.

The Commission also relies on additional core staff, including: attorneys Ruth Markovitz, Deputy Director; Jeffrey Friedlander, Senior Advisor to the Commission and First Assistant Corporation Counsel to the City's Law Department; Commission Senior Counsels Lisa Grumet, Myles Kuwahara, John Low-Beer, Joan Margiotta and, formerly, Ashley Goodale; Matthew Gorton, Communications Director; Lisa Jones, Director of Administration; Jay Hershenson, Senior Vice Chancellor for University Relations at CUNY and Senior Commission Advisor; David Fields, University

Dean/Special Counsel to the Chancellor and Parliamentarian; Ryan Merola, Senior Research Assistant; Nana Akowuah, Research Analyst; and legal and research interns Lee Brand, Brenda Cristerna, Stephanie Lin, Noah Lindenfeld, Danielle Melfi, Jon O'Brien, Talia Werber and Lina Zhou.

Overview of the Charter Revision Process

First adopted in 1898, the New York City Charter is the basic document that defines the organization, power, functions, and essential procedures and policies of city government. It sets forth the institutions and processes of the City's political system and broadly defines the authority and responsibilities of city agencies and elected officials – the Mayor, the City Council, the Comptroller, Borough Presidents, and the Public Advocate –while, for the most part, leaving the details of operation to local law and agency rulemaking. Unlike the United States Constitution, which is rarely amended, the City's Charter is a fluid document that is often amended to provide a more efficient and responsive government for the people of New York City. Indeed, while the U.S. Constitution has been amended only 27 times in its 216-year history, the Charter has been amended over 100 times since 1989 by local law and a number of times by referendums and by state law.

In the United States, city governments receive their legal authority from the states in which they are located. In the State of New York, municipalities have broad authority to structure how they operate by virtue of the Home Rule provisions of the State Constitution and the Municipal Home Rule Law (the MHRL). The City's charter, along with the State Constitution, the MHRL, and other state statutes, provides the legal framework within which the City may conduct its affairs.

Section 36 of the MHRL permits the Mayor to establish a charter commission in New York City consisting of between nine and fifteen members. The Mayor selects the chair, vice-chair and secretary of the Commission. All members must be residents of New York City and may hold public offices or employment. Pursuant to the MHRL § 36, a charter commission must review an entire charter and put proposals for its amendment before the voters, including proposals that, if enacted by the City Council, would require approval in a mandatory referendum (such as provisions curtailing the powers of an elected official) and provisions that could be otherwise adopted through local law.

A charter commission may propose a broad set of amendments that essentially "overhauls" the entire charter, or may narrowly focus upon certain areas and explain why such an approach is preferable in a report to the public.[1] The proposed amendments must be consistent with general New York State laws and can only effect changes that are otherwise within the City's local legislative powers as set forth in the State Constitution and the Municipal Home Rule Law. They may be submitted to voters as one question, a series of questions, or alternatives.[2]

Charter commissions are not permanent commissions and are limited by MHRL § 36(6)(e). A commission expires on the day of the election at which a proposed new charter or amendments prepared by a commission are presented to the voters. However, if a commission fails to submit a new charter or any amendments to the voters, the commission expires on the day of the second general election following the commission's creation. There are no prohibitions against the reappointment of a

[1] MHRL § 36(5)(a).

[2] MHRL § 36(5)(b).

commission or appointment of a new commission upon the expiration of an existing commission.

The Commission's Public Outreach Efforts

From its inception, the Commission has pursued a varied and vigorous public outreach practice, using current multimedia and social networking platforms designed to provide notice, availability, and accessibility to the Commission's work. To that end, the Commission undertook a number of initiatives, including:

- Providing live webcasts of Commission hearings, meetings, and issue forums.
- Rebroadcasting Commission hearings on NYCTV, the city television network (Channel 74).
- Publishing hearing notices, press releases, transcripts, archived video and expert biographies on the Commission's website: www.nyc.gov/charter.
- Partnering with CUNY-TV to develop public service announcements in 11 languages, which were distributed to media outlets and advocacy groups, and continuously featured on the Commission's website.
- Establishing an online presence though social networking sites such as Facebook ("NYC Charter Revision Commission") and Twitter ("CityCharterNYC"), which enables the Commission to receive interactive comments during public hearings.
- Issuing Commission notices to over 1,800 press and major media contacts, including 200 ethnic and community news outlets.
- Establishing an e-mail distribution list comprising over 4,000 groups and citizens, including community boards, neighborhood groups, civic organizations, not-for-profits and advocacy groups, as well as members of the City Council, other elected officials, and their staffs.
- Issuing routine e-mail "blasts" containing Commission schedules and hearing information to over 44,000 citizens registered on the NYC.gov listserv.
- Locating Commission meetings and hearings in diverse neighborhoods in each of the five boroughs, at sites accessible by public transportation.

- Providing Commission notices in several languages, including Spanish, Chinese, Russian, and Korean.
- Providing information via the City's 311 hotline, which, in addition to relaying Commission hearing schedules and locations, directs callers to the Commission's website for further information.
- Providing language assistance to the hearing impaired upon request.

The Commission's website, prominently displayed and accessible through the City's website, www.nyc.gov, also provides a great deal of information to the public: it contains a downloadable copy of the current City Charter; a schedule of the Commission's meetings, hearings and forums; transcripts, videos and live webcasts of the Commission's meetings, hearings and forums; biographical information about the Commissioners; contact information for the Commission; and archived materials from previous Commissions. In response to its outreach efforts, the Commission has already received numerous letters, telephone calls, e-mails, and online submissions requesting information, expressing concerns or containing proposals for Charter revision.

Meetings and Hearings

The Commission held its initial public meeting on March 18, 2010. Chair Goldstein introduced the members of the Commission and stressed the Commission's determination to ensure extensive public opportunities to participate in the charter revision process.

The Commission subsequently hosted an initial round of five public hearings, one in each of the five boroughs, to solicit suggestions and opinions from New Yorkers. The first, on April 6, 2010, was in Manhattan, followed by hearings on April 12

in the Bronx, April 13 on Staten Island, April 19 in Queens, and April 20 in Brooklyn. The Commission heard from the public on a variety of issues.

During and after the first round of public hearings, the Commission received additional public input electronically and by mail. Commission staff has also met with various good government and advocacy groups, former and current government officials and other stakeholders, reviewed the work of past Charter Revision Commissions and sought suggestions from the heads of city agencies. Suggestions and concerns fell into five general categories: term limits, low levels of voter participation, land use, government structure, and public integrity, which were formally acknowledged and adopted by the Commission at a public meeting at the Tweed Courthouse in Lower Manhattan on May 10.

The Commission began its second phase of meetings on May 17 with an unprecedented panel of former Charter Revision Commission Chairs, including Lieutenant Governor Richard Ravitch (1988 Commission); Frederick A. O. Schwarz, Jr. (1989 Commission); Randy M. Mastro (1999 and 2001 Commissions); Dr. Frank J. Macchiarola (2003 Commission); and Dr. Ester R. Fuchs (2005 Commission).

Beginning May 25, 2010, the Commission held a series of public "issue" forums, one in each borough, to hear expert testimony and public comment on each of the aforementioned topics. Charts summarizing testimony from the public at all of the hearings and forums conducted thus far can be found in Appendix A of this Report and brief summaries of the expert testimony at the issue forums can be found in Appendix B. At the first issue forum on May 25 in Brooklyn, the Commission heard testimony on term limits from: Patrick J. Egan, Assistant Professor of Politics and Public Policy at New

York University; Richard G. Niemi, Don Alonzo Watson Professor of Political Science at the University of Rochester; and Gregory Carl Schmid, General Counsel for the national organization U.S. Term Limits.

The second expert forum focused on voter participation and was held in the Bronx on June 2. Panelists and public participants discussed possible ways to increase voter participation, including non-partisan elections, open primaries, and same day registration. The expert panel included J. Phillip Thompson, Associate Professor of Urban Politics at Massachusetts Institute of Technology; David R. Jones, President and CEO of the Community Service Society; Lorraine C. Minnite, Assistant Professor of Political Science at Barnard College; Harry Kresky, an election attorney in private practice in New York City; and Jerry Goldfeder, Special Counsel at Stroock & Stroock & Lavan.

The third expert forum, on government structure, took place on Staten Island on June 10. The panelists addressed broad issues involving the relationship between the powers of elected officials and between centralized and decentralized powers. The Commission first heard testimony from City Council Speaker Christine Quinn and Councilmember Gale Brewer, chair of the Council's Committee on Governmental Operations. The ensuing panel discussion included Doug Muzzio, Professor at Baruch College; Gerald Benjamin, Distinguished Professor of Political Science at SUNY New Paltz; Brad Hoylman, Senior Executive and General Counsel at Partnership for New York City; Eric Lane, Eric J. Schmertz Distinguished Professor of Public Law and Public Service at Hofstra University; and Marc Shaw, interim Senior

Vice-Chancellor of Budget Finance and Financial Policy at the City University of New York.

The panel on issues related to public integrity took place in Manhattan on June 16. The Commission heard testimony from Mark Davies, Executive Director of the New York City Conflicts of Interest Board; Amy Loprest, Executive Director of the New York City Campaign Finance Board; Richard Rifkin, Special Counsel at the New York State Bar Association; Benito Romano, Partner at Freshfields Bruckaus Deringer; and Richard Briffault Joseph P. Chamberlin Professor of Legislation at Columbia University Law School.

The fifth and final expert forum, on land use issues, took place in Queens on June 24 and included testimony from Tom Angotti**,** Professor of Urban Affairs and Planning, Hunter College and the Graduate Center, City University of New York and Director of the Hunter College Center for Community Planning and Development; Paul D. Selver, Partner, Kramer Levin Naftalis & Frankel LLP; Vishaan Chakrabarti**,** Marc Holliday Professor of Real Estate and Director of the Real Estate Development Program, Columbia University; Christopher Collins, Vice-Chair, New York City Board of Standards and Appeals; and David Karnovsky, General Counsel to the New York City Department of City Planning.

In addition to public participation at the initial round of hearings and at each of the forums, the Commission will continue to solicit public input at another series of hearings in each of the boroughs regarding the recommendations put forth in this Report.

Introduction to Proposals

The New York City Charter has undergone many changes in the years since the major restructuring of city government accomplished by the work of the l988-1989 Charter Revision Commissions. Since then, six Charter Revision Commissions have proposed amendments to the voters; in 1993, a voter-initiated petition amended the Charter; and the City Council and State Legislature have many times amended the Charter by local law and state law, respectively.

The Mayor charged the 2010 Commission with reviewing the entire Charter and requested, in addition, that the Commission consider returning the issue of term limits to the voters. The public, too, in the first round of hearings held by the Commission this April, overwhelmingly demonstrated its expectation that a term limits proposition will be on the November ballot. Staff has reviewed the testimony at the public hearings and the expert testimony presented at the Forum on Term Limits and has extensively researched the legal and academic literature. For the reasons explained below in Part I, we recommend that the Commission solicit further public input on the three following issues: whether to retain or modify the present term limit provisions of the Charter; proposals to clarify the meaning of "full term" with respect to persons filling a vacancy in office; and whether to include a provision in the Charter limiting amendments to the term limits section to those that will not extend the terms of incumbents.

In addition to public concerns about term limits, the first round of public hearings conducted by the Commission demonstrated a good deal of public interest in voter participation and electoral reform. The public hearings and the Forum on Voter

Participation produced numerous ideas for change, including the interesting suggestion of "Instant Run-off Voting" (IRV). IRV would constitute a new form of voting for New York City and was not fully discussed by the public. Part II of this Report introduces this issue. Staff also recommends a consolidation of the Voter Assistance Commission (VAC) and the Campaign Finance Board (CFB), entities that already work closely with each other, in order to allow VAC to benefit more fully from the resources of the CFB. The final recommendation in Part II proposes easing ballot access by decreasing the number of signatures needed to get on a nominating petition.

In reviewing public testimony, researching legal and academic writings and meeting with city officials and good government groups, staff has identified several areas where change can increase transparency, enhance public participation and increase operational effectiveness. Recommendations regarding transparency and other issues of public integrity will be found in Part III of this Report. The recommendations contained in Part IV concern operational effectiveness.

In addition, the Commission has received many proposals that have not found their way into the Preliminary Recommendations. In fulfilling the Mayor's charge to review the entire Charter, staff has considered the basic structures established in 1988 and 1989, as well as the amendments to the Charter since that time. These amendments throughout the past two decades have achieved important operational, electoral and ethical reforms but have left essentially intact the basic structures of government established in 1988 and 1989. Although past Charter Revision Commissions have conducted serious analyses of proposals to change the balance of powers set forth in the Charter, they have appeared reluctant to tamper with the checks and balances governing

the roles of various elected officials, the City Council and the Community Boards. The testimony of the panelists at the Forum on Government Structures indicated that the design of city government created in the 1989 Charter has worked well.

Part V outlines some proposals related to government structure and briefly explains why staff proposes that these and other issues be reserved for future consideration. We anticipate that a more comprehensive discussion of the most significant of these proposals will be contained in the Final Recommendations.

Part I – Term Limits

Background

City-wide officeholders have been subject to term limits since 1993, when New York City voters approved a ballot initiative to prohibit persons from being elected to or serving in any elective city office for more than two consecutive full terms.[3]

Prior to the 2008 adoption of Charter § 1138 extending the number of consecutive terms to three, the City Council had considered two proposals to amend Charter § 1138 as originally enacted, but both met with failure. In 1996, the City Council unsuccessfully attempted, by ballot measure, to extend the two-term consecutive term limit by an additional term; the voters defeated the proposal by a 54% to 46% margin. And in March of 2001, with 35 of the 51 council members prohibited by Charter § 1138 from seeking re-election the following November, the Council's Governmental Operations Committee considered a bill that would repeal the applicability of Charter § 1138 to Council members; the Committee disapproved the bill by a 5-4 vote.

One proposal for amendment, however, clarifying the meaning of Charter § 1138, did succeed. In 2002, over the Mayor's veto, the City Council adopted Local

[3] The 1993 ballot measure read as follows:

> Should the New York City Charter be amended by the addition of a new Chapter 50 to provide that a person may not hold the office of mayor, public advocate, comptroller, borough president or city council member for more than two consecutive terms?

Prior to its approval by voters in November of 1993, the City Clerk had refused to certify the ballot measure on the ground that state law preempted a local law, including one adopted by initiative, that imposed term limits on city officeholders. The Court of Appeals, however, held otherwise; in *Roth v. Cuevas*, 82 N.Y.2d 791 (1993), decided less than a month before Election Day, the Court of Appeals affirmed the trial court's order compelling the City Clerk to place the initiative on the ballot. The Court based its decision on the reasoning of the trial court, which had examined whether state home rule law preempted local laws imposing term limits on its elected officials and found nothing constituting either an express or implied intent to reserve to the state the determination of a local officeholder's permissible length of service. *See Roth v. Cuevas*, 158 Misc. 2d 238 (Sup. Ct. N.Y. Cty. 1993)

Law 27. Local Law 27 added to the Charter a provision specifying that a single two-year council member term does not constitute a full term; instead, when applying Charter § 1138, two consecutive two-year council member terms are to comprise one full term. After its enactment, Local Law 27 was soon subject to challenge on the basis that, since the term limits provision was enacted by the voters, any amendment such as that in Local Law 27 needed voter approval. This litigation failed when the Court of Appeals declined to review the Appellate Division's determination, in *Golden v. New York City Council*, that Local Law 27 could be enacted without voter approval even though the charter provision it amended had itself been a ballot initiative adopted by the voters.[4] When term limits were extended by the Council in 2008 (Local Law 51), a similar challenge in federal court proved unsuccessful.

In *Molinari v. Bloomberg*, the U.S. Court of Appeals for the Second Circuit upheld Local Law 51 against claims that the law violated federal, state and local law.[5] The plaintiffs had argued that Local Law 51 violates (1) the First Amendment, by discouraging the public from utilizing the initiative process as a means of speech and by discouraging potential candidates from challenging incumbents; (2) the federal constitutional right to substantive due process, because it served the interests of those who enacted it; (3) state home rule law, because the provisions of Local Law 51 can only

[4] *Golden v. New York City Council*, 305 A.D.2d 598 (2d Dep't 2003) (app. den. by *Golden v. N.Y. City Council*, 100 N.Y.2d 504 (2003)). In *Golden*, the Appellate Division held that the enactment of Local Law 27 did not require voter approval because the law neither changed the length of any officeholder's term nor curtailed the power of any officeholder – and therefore did not trigger the mandatory voter approval provisions of state law. It also held that Local Law 27 did not require voter approval even though it amended a provision previously approved by referendum because "laws proposed and enacted by the people under an initiative provision are subject to the same constitutional, statutory and charter limitations as those passed by the Legislature and are entitled to no greater sanctity or dignity." *Id.* at 600 (quoting *Caruso v. City of New York, 136 Misc 2d 892, 895-896,* (S. Ct. N.Y. Co. 1987), *affd.* 143 A.D.2d 601 (1st Dept. 1988), *affd*., 74 N.Y.2d 854 (1989), *cert. den,*. 493 U.S. 1077 (1990).

[5] *Molinari v. Bloomberg*, 564 F.3d 587 (2d Cir. 2009).

be approved by referendum; and (4) city conflicts of interest law, because Local Law 51 was approved by council members who stood to gain personally by its approval.

The Court rejected all these claims. It found no First Amendment right to legislation by voter initiative and no unconstitutional discouragement of speech protected by the First Amendment in Local Law 51. It found no violation of substantive due process, in light of the rational relationship between Local Law 51's extension of term limits and the City's purported goal of affording voters the opportunity to retain its public officials in a time of crisis. It rejected the claim that Local Law 51's extension of officeholder term limits constituted a "change in the membership" of the local legislative body that, under the New York State Municipal Home Rule Law, would require voter approval. And it found no violation of the City's conflicts of interest law, agreeing with the City's Conflicts of Interest Board that any benefit that an incumbent council member might obtain in voting for Local Law 51 would not constitute the "personal or private advantage" prohibited under the City's conflicts of interest law.[6]

The passage of Local Law 51 drew criticism even from some opponents of term limits. In establishing this Charter Revision Commission, the Mayor asked that the voters be given another opportunity to weigh in on the issue of term limits. In analyzing the issue of term limits, the Commission has been mindful of the strong feelings in favor of allowing the voters to decide whether to return to the two-term limit that was amended by the Council in 2008. The context that led to the legislative extension of term limits in New York weighs very heavily in the assessment of whether the two-term option should be proposed on the ballot, even in light of the literature and testimony in favor of longer term limits, particularly for City Council members, as discussed below.

[6] *Id.* at 595-618.

Views on Term Limits

The arguments for and against term limits have remained basically the same since the current term limits movement began in the late 1980s and early 1990s. Those in favor maintain that term limits make government more responsive to the public interest, while opponents argue that term limits are essentially undemocratic because they limit voter choice and that they render government less effective in serving the public interest.[7] The Commission has been provided with staff research on term limits and was presented with all sides of the debate by academics, advocates, elected officials and members of the public at its Forum on Term Limits. Staff also commissioned two papers from political scientists, one from Patrick Egan and another from Richard Niemi and Kristin Rulison, evaluating the results of term limits.[8] In addition to the academic and political debate over term limits, speakers at the public hearings and the forum noted the special context of the issue in New York City and many maintained the necessity of giving New York voters the opportunity to return to the results of the original referendum. That viewpoint provides a backdrop to the more general debate outlined below.

Proponents of term limits argue that capping the length of an elected officeholder's service results in one or more of the following:

- more opportunities for "citizen public servants" (people more interested in serving the needs of the electorate than pursuing a career in politics) to serve in government;

[7] *But see* Einer Elhauge, "Are Term Limits Undemocratic?," 64 U. Chi. L. Rev. 83 (1997) (arguing, *inter alia*, that voting for term limits is a rational, democratic choice).

[8] *See* P.J. Egan, "Term Limits for Municipal Elected Officials: Executive and Legislative Branches," (hereinafter "Term Limits") (paper on file with the Commission); R.G. Niemi and K.K. Rulison, "The Effects of Term Limits on State Legislatures and Their Applicability to the Executive Branch" (hereinafter "The Effects of Term Limits") (paper on file with the Commission).

- opening the field to a broader range of people having a broader range of ideas;
- fewer opportunities for special interest groups to exert undue influence over elected officials because of their long-term relationships;
- removing the advantages of incumbency and thus opening more offices to true competition;
- achieving an equitable legislative/executive equivalence for those governments whose executives already serve under term limits.

In contrast, opponents of term limits argue that capping an officeholder's length of service results in one or more of the following:

- fewer officeholders with the experience needed to legislate and administer public policy;
- diminished incentive for officials to seek long-term solutions to chronic public problems;
- weakened capacity of the legislative branch to act as a knowledgeable and effective body;
- greater lobbyist and bureaucrat influence over inexperienced elected officials, who seek information and support from those having greater experience and knowledge about issues and process;
- creation of "lame-duck" officeholders whose final terms are spent seeking future jobs.

This debate has had a clear winner at the polls: term limits initiatives have been successful at both state and local levels—and successful here in New York City.[9] From other perspectives, however, the winner is less clear: social scientists who have appraised the effects of term limits legislation nationwide have found that governing bodies, particularly legislatures, suffer a loss of institutional governing capacity under term limits. Their studies suggest that term-limited legislators are no different in political

[9] The November 1993 New York City ballot initiative that imposed a two consecutive four-year term maximum for all elective city offices obtained the support of 59 percent of those who voted on the measure. In November of 1996, New York City voters rejected a ballot measure that sought to add a third term to the two-term maximum. The law was rejected by 54% of the voters.

career aspirations, no less dependent upon lobbyists, and no more attentive to constituent interests than their non-term-limited counterparts. The majority of current and former elected officeholders from New York City who have submitted opinions to the Commission appear to view term limits as damaging. This contrast of opinion between voter support of term limits, on the one hand, and social scientists and present and past officeholders, on the other, was conspicuous during the Commission's public hearings last April,[10] the former Charter Chairs' conversation on May 17,[11] and, in particular, the Commission's term limits forum on May 25.[12]

By their nature, the effects of term limits legislation cannot be measured immediately upon enactment but only eight or so years later, when the disqualifications they impose on incumbents take actual effect. Thus, although the term limits movement took hold in several states across the nation in the early to mid-1990s, helpful data became available only toward the end of the 1990s. Almost all of this data addresses the effect of term limits on state government and on state legislatures in particular.[13] The

[10] *See, e.g.*, Transcript of the 2010 New York City Charter Revision Commission's Public Meeting, April 12, 2010 (testimony of Alonzo deCastro) at 30 (supporting the people's right to determine the length of service for their representatives); *id.* (testimony of Council Member Oliver Koppell) at 34-39 (arguing that the people implicitly oppose term limits since they repeatedly elect the same representatives, including Mayor Bloomberg).

[11] *See, e.g.*, Transcript of the 2010 New York City Charter Revision Commission's Public Meeting, May 17, 2010 (testimony of Richard Ravitch) at 24-26 (opposing term limits on ground that they dissuade able citizens from serving and impair office holders from accumulating requisite experience); *id*. (testimony of Ester Fuchs) at 67 (taking no position); *id*. (testimony of Randy Mastro) at 92-96 (disapproving city council override of people's will as expressed in ballot referenda); *id*. (testimony of Fritz Schwartz) at 102-04 (favoring retention of current three-term limit to prevent weakening Council vis-a-vis the Mayor).

[12] *See* Webcast of the Charter Revision Commission's Public Issue Forum on Term Limits, May 25, 2010 (http://www.nyc.gov/html/charter/html/home/home.shtml) (transcript forthcoming).

[13] For at least three reasons, studies of state legislatures are relevant to the Commission's appraisal of term limits. First, many of the claims of advocates and opponents of term limits concern their effects upon the type of person choosing to run for government office and the behavior of such person when in office. Whether term limits result in the election of more "citizen public servants" and whether such officeholders behave differently than their predecessors are plausibly concerns measurable independently of the type of

data, broad with regard to geographic distribution of the jurisdictions studied and in some instances reviewing a decade of experience with term limits, appear to provide some basis to evaluate competing claims in the debate.[14] Moreover, the only two studies known to staff that specifically examine the effects of term limits on the New York City Council conclude that the City Council under term limits has exhibited effects similar to those reported in the literature on state legislatures under term limits.[15]

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jurisdiction—state or city—that establishes term limits. Second, many of the claims of term limits advocates and opponents concern the effects of term limits on the effectiveness with which government is able to address complex issues of significant impact, including the extent to which, because of such complexity and scale, the potential influence of special groups and their lobbyist representatives upon those issues rises. In this regard, the data on state governments might well be more applicable to the City than would similar data on municipalities, because the City's issues are more comparable in complexity and size to those addressed by the average state than to those addressed by the average municipality. *See* P.J. Egan, "Term Limits," *supra* note 8, at 1 ("Members of the City Council have more constituents—and on a person-for-person basis are responsible for overseeing the spending of more government dollars—than legislators in all but one of the nation's fifty states."); *id.* at 11-12; *cf.*, B. Weberg and K.T. Kurtz, "Legislative Staff," in K.T. Kurtz, B. Cain, and R.G. Niemi, eds., INSTITUTIONAL CHANGE IN AMERICAN POLITICS: THE CASE FOR TERM LIMITS, at 90, 91 (., (Ann Arbor, 2007) ("Wyoming manages its legislature business with the support of just over thirty full-time staff."). Third, the focus of analyses of the effects of term limits is on legislatures. Here too, the primary concern is with the effects of term limits on the legislative body. Whether the government is state or municipal, it is the legislative body that must identify and prioritize problems and formulate their solutions. The effective discharge of that task in a representative democracy is likely dependent upon collaborative and procedural skills acquired only with actual, on-the-job experience. The key question is, "How much time does a legislator need to acquire such skills?" The answer to this question seems more dependent upon the complexity and size of the issues to be addressed—and upon the relative power of coordinate branches of government—than upon whether they are addressed in state or municipal chambers.

[14] The two papers on term limits commissioned by the Charter Revision Commission both draw on the experience of state legislatures to shed light on the effects of term limits on the City Council. *See* RG. Niemi and KK. Rulison, "The Effects of Term Limits", at 13 ("It seems likely that the effects of term limits [upon state legislatures] would apply relatively straightforwardly to city councils, which often have procedures, organizations, and objectives similar to those of state legislatures."); P.J. Egan," Term Limits" (paper on file with Commission), at 5 ("most of the empirical scholarship on term limits focuses on the effects of term limits on state legislatures. As we consider the implications of this research for New York City, it is worth noting that the states—not other big cities—are probably the most appropriate group of jurisdictions for comparative purposes.")

[15] *See* Jeffrey Kraus, "The Circulation of Office Holders: Term Limits and the New York City Council," Paper prepared for presentation at the 66th annual meeting of the Midwest Political Science Association, April 2008 (on file with Commission) (New York City Council experience with term limits confirms indications, based on state legislative data, that term limits do not attract "citizen legislators," give rise to officeholders concerned about positioning themselves for the next race, and make it more difficult for the legislature to act as an effective counter to the executive); *id. at* 21-22; E. Lane, "The Impact of Term Limits on Lawmaking in the City of New York," 3 Election L.J. 670, 681-82 (2004)), at 684 (concluding

The data on the impact of term limits legislation across the country reveal both expected and unexpected consequences. Studies indicate that term limits may have the unintended consequence of making legislatures less able to act as an effective counterbalance to executive governmental power, consequently increasing the political power and influence of unelected persons, agency bureaucrats or, possibly, lobbyists. Term limits do sweep out incumbents at regular intervals and consequently make more races for office more competitive. They do not, however, replace incumbents with a new type of citizen-officeholder who regards political office as a temporary donation of skills and time to the public or as a way to give greater voice to constituent interests. Instead, term-limited incumbents appear to give way to a new set of politicians who may well bring new ideas to their work but who do not seem more or less likely than their predecessors to view constituent interests as their first priority.

To the extent that the results of studies outlining the effects of term limits on state legislatures apply to New York City, they must be considered in the context of the desire to allow the voters again to weigh in on term limits and the positive views that have been voiced about the New York experience with term limits. Polls indicate that city residents continue to support term limits.[16] Proponents of term limits for city officials have argued that renewed energy after the Council turnover in 1993 has led to considerable achievements. At least one good government group that previously opposed term limits now supports them in some form: Citizens Union, in its 2010 Report, writes

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that term limits in New York City "have not generated a legislature free of either special interests or self-interests [and that in] fact, such interests may well be playing a larger role in the lawmaking process than before" yet also concluding that the "shift in power [from Speaker to Members arising from term limits] has made the Council more representative and more accessible.")

[16] *See* Egan, "Term Limits," *supra* note 8, at 3.

that "in the years following the approval of term limits, the City Council became a more dynamic policy-making body in part due to the fresh perspective and energy of new Council members."[17]

In order to reconcile these sentiments with the other testimony and research regarding the effects of term limits, Commission members have informed staff that they wish to solicit public comment on whether to provide the voters with the opportunity to choose among alternative provisions.

Recommendation

In light of the above discussion, the staff recommends, first, that the Commission seek additional public discussion as to whether the following two questions should be placed on the ballot in November:[18]

- Should the Charter be amended to replace the present three-term maximum provision with a two-term maximum provision?
- Should the Charter be amended to restrict the Mayor, Public Advocate, Comptroller and Borough Presidents to two consecutive full terms and members of the City Council to three consecutive full terms?

If the options above are rejected, the current three-term limit for all elected office-holders would remain in place.

Second, staff recommends that the Commission consider proposing an amendment to the Charter restricting the Council from enacting an amendment or repeal of any term limits provision that would extend the eligibility for office of any incumbent official, *i.e.*, only a prospective amendment would be permitted. This proposal is not

[17] Citizens Union of the City Of New York, "2010 City Charter Revision Recommendations: Increasing Avenues for Participation in Governing and Elections in New York City," at __ (June 30, 2010) (hereinafter "2010 Recommendations").

[18] Under the Municipal Home Rule Law, a ballot proposition must receive at least a majority of the vote to be approved; if conflicting ballot propositions each receive a majority, the proposition receiving the greatest number of votes wins.

dissimilar from commonly found provisions in various jurisdictions prohibiting salary raises from taking effect during a current term of office. Such provisions have the advantage of permitting action on the merits of the issue while avoiding possible public perception of self-interest. The term limits options on the ballot should also include a clarification of what constitutes a full term for persons elected to fill a vacancy in office. Such a provision is necessary to address various situations involving different tenures in office. It would provide that someone who fills a vacancy for only a short period of time will not be considered to have served a full term for purposes of term limits, while someone who fills a vacancy early in the term of office will be so considered.

In response to suggestions intended to ensure some continuity of experience in the City Council in the face of term limits, such as those for five-year or staggered terms of office, staff has looked into both the legal framework and the relevant practicalities. A five-year term limit for Council members is effectively prohibited by the New York constitutional provision requiring that city offices be filled in odd numbered years and incumbency end at the conclusion of an odd numbered year.[19] Staggering terms of office at this point would present logistical (and possibly Voting Rights Act) difficulties in determining which members of the Council would be disadvantaged. An

[19] Article XIII, § 8, Time of election of city officers, provides:

> All elections of city officers, including supervisors, elected in any city or part of a city, and of county officers elected in any county wholly included in a city, except to fill vacancies, shall be held on the Tuesday succeeding the first Monday in November in an odd-numbered year, and the term of every such officer shall expire at the end of an odd-numbered year. This section shall not apply to elections of any judicial officer.

analysis of the composition of the present City Council suggests, moreover, that staggering has occurred naturally over the 17-year history of term limits.[20]

[20] With the term limits measure passed in 2008, the whole of the City Council was eligible to run for re-election in 2009, and, if elected, serve until at least 2013. Several Council Members who were initially elected after 2001 (whether in 2003 based on the mid-term redistricting election or for the first time in 2005), became eligible to run again for a third term in 2013 and, if elected, serve until at least 2017.

This staggering of Council Members has created two groups: Council Members who will be term limited out of office on January 1, 2014, and Council Members who will be term limited out of office on January 1, 2018. A headcount of Council Members initially elected in 1999 or 2001 and who are still serving reveals that there are 20 Council Members who will leave office on January 1, 2014, including Speaker Quinn. Most of the 31 other Council Members will be forced out no later than January 1, 2018 (presuming all run for reelection in 2013 and none lose). This contrasts sharply with the term limit disqualification status of Council members in 2001, when term limits first forced Council Members out of office, and only a small handful of Council Members were able to remain as officeholders. A combination of Council Members leaving for other elected or non-elected positions, losing in primary or general elections, and being forced from office due to legal actions has split the pool of Council Members between 2013 and 2017 far more evenly. *See* Appendix C (setting forth effects of term limits on current Council members).

Part II – Increasing Voter Participation

Staff has worked on the two recommendations for changes in the electoral system appearing below as well as on changes to increase the effectiveness of the Voter Assistance Commission. In addition, in the coming weeks, staff will be reviewing in depth the just-released recommendation of Citizens Union regarding non-partisan elections. At present, a brief preliminary discussion will be found in Part V of this report.

A. Introducing Instant Runoff Voting

One of the suggestions made at the Forum on Voter Participation was that the City use instant runoff voting (IRV) in primaries for nominating party candidates for the city-wide offices of Mayor, Public Advocate, and Comptroller. That suggestion has received support from Commission members and other interested parties.[21] Staff recommends public discussion of this proposal for possible placement on the ballot in November. In addition, the possibility of using IRV for other elected city officials in the future should be considered.

The IRV Proposal for Citywide Runoff Elections

State Election Law § 6-162 now provides for a runoff election, which is held two weeks after the primary, if, in a primary election for a nominee for Mayor, Comptroller, or Public Advocate, no candidate receives at least 40% of the vote.

[21] *See also* S. Roberts, "City of 8 Million Was a Ghost Town at the Polls," N.Y. TIMES, Oct. 6, 2006 (noting "growing chorus of calls for changing how runoff elections are conducted"); D. Getachew and A. Senteno, "Is New York Ready for Instant Runoffs?" GOTHAM GAZETTE, Nov. 23, 2009. State Senator Liz Krueger's bill to allow localities to experiment with IRV recently passed in the Senate, but has not been acted on by the Assembly.

In the form of IRV described here, the voters could rank up to three candidates in order of preference. If no candidate received at least 40% of the vote, there would be a runoff count between the two candidates with the greatest number of first-choice votes in the initial count. The runoff count would canvass the votes of those who did not select either of the top two as their first choice. The winning candidate would be the one preferred over the other by the majority of all the voters who expressed a preference. This IRV system simulates, in one election, the two-stage runoff that now exists for citywide officials.

IRV would prevent the drop-off in turnout that commonly occurs between the primary and the runoff and would create a winner with greater electoral support than under the current system. In the 2009 runoff elections in the New York City Democratic primary for Comptroller and Public Advocate, for example, there was a 35% drop-off in the number of votes cast in the runoff. In those states holding federal primary runoffs, between 1994 and 2008 turnout declined in 113 of 116 regularly scheduled federal primary runoffs, and the average decline was about 35%.[22]

At the same time, IRV avoids what has been called the "spoiler problem," which can occur in races with three or more candidates in which a candidate with little chance of winning siphons off votes from a potential winner, as may have happened with Ralph Nader and Al Gore in 2000. With IRV, voters can choose their favorite as their first choice while retaining the ability to have their second or third choices count in the event that their first choice is not one of the top two vote-getters.

[22] Center for Voting and Democracy (also known as FairVote), "Federal Primary Election Runoffs and Voter Turnout Decline, 1994-2008" (http://archive.fairvote.org/?page=1489).

IRV would also save the costs of a subsequent runoff. The 2009 runoff elections for Comptroller and Public Advocate cost the City an estimated $14 million in costs, including paying poll workers, police overtime, expenses of setting up and removing the voting machines, and Campaign Finance Board funding.[23]

IRV is said to reduce negative campaigning and encourage cooperation among candidates, and may also therefore reduce the campaign expenses of the candidates.[24]

There would, however, be a modest one-time cost to program the voting machines for IRV. In addition, there would likely be additional costs for a public education campaign to explain the new system to the voters.[25]

The "top two" variant of IRV proposed here is used, for example, to elect the mayors of those cities in England (including London) that have directly elected mayors. Since 2000, IRV has been adopted by 16 local governments in the United States, including San Francisco and Minneapolis.[26] Britain is expected to hold a referendum

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[23] E. Einhorn, "Runoff Candidates Collect $1.4 Million From Taxpayers" N.Y. DAILY NEWS (Sept. 18, 2009) (http://www.nydailynews.com/blogs/brawlforthehall/2009/09/runoff-candidates-collect-14-m.html#ixzz0RwDQpYPD).

[24] D. Murphy, "New Runoff System in San Francisco Has the Rival Candidates Cooperating," N.Y. TIMES (Sept. 30, 2004); A. Hampton, "Joining Forces: New Voting System Fosters Teamwork Among Challengers," SAN FRANCISCO EXAMINER (Oct. 12, 2004).

[25] IRV is said to be more resistant to so-called "strategic voting" than simple plurality elections or two round subsequent runoff elections. N. Tideman, COLLECTIVE DECISIONS AND VOTING at (Burlington 2006). Strategic voting includes voting for "the lesser evil" even though you really prefer another candidate – a tactic that is unnecessary with IRV – or helping a favorite to get elected by voting for a weak opponent in the first round. Strategic voting is difficult under IRV, because it requires very precise polling numbers concerning various candidates and control over a precisely sized block of the electorate.

[26] Two local governments, Burlington, Vermont and Pierce County, Washington, have repealed IRV. Burlington is discussed below.

next May on whether to adopt IRV (there called Alternative Vote) for elections to the House of Commons.[27]

IRV Elections for Borough Presidents and City Council Members

Under current law, there are no runoffs in the primaries for City Council members or for Borough President. Staff believes that there should be further public discussion of also using IRV in the primaries for those elections. Currently, those candidates who are chosen in the Democratic Party primary (which, in New York City, is often tantamount to victory in the general election) may have the support of only a small plurality of the voters. Of the 140 City Council Democratic Party primary elections between 2001 and 2009, 56 were won with less than 50% of the vote, 35 were won with less than 40% of the vote, and 10 were won with less than 30% of the vote. Of the six borough president primaries during that period, three were won by less than 50%, two by less than 40%, and one by less than 30%. These officials were, in effect, elected by a small plurality of the already small portion of the electorate that turns out for the Democratic Party primary. In contrast, with IRV, as with any runoff system, the candidate chosen would have a majoritarian mandate coming out of the primary.

Criticisms of IRV

Critics of IRV have argued that it is too complex for voters to understand. However, exit polls by the Public Research Institute at San Francisco State University during the 2004 and 2005 IRV elections in San Francisco showed that voters preferred

[27]"Voting Reform Ballot Planned for May," THE GUARDIAN (July 1, 2010) http://www.guardian.co.uk/politics/2010/jul/01/voting-reform-ballot-planned-for-may). IRV has also been used, among other places, in Australia since 1949 to elect the House of Representatives and in Ireland since 1922 to elect the President.

IRV to the previous runoff system by a margin of three to one.[28] In 2006, the Asian Law Caucus conducted an exit poll that found Asian voters in San Francisco to be overwhelmingly supportive of IRV in that year. Moreover, in the 2004 and 2005 San Francisco exit polls, 85% of respondents stated that they understood the system "perfectly well" or "fairly well." The percentages did not vary greatly by racial or ethnic group.[29] The same report found that there were very few uncountable votes in the San Francisco IRV elections, and that the rate of countable votes in the IRV races was virtually identical to the rate in the non-IRV races. In Burlington, Vermont, 99.9% of ballots cast in the IRV mayoral election were valid, and the turnout was significantly higher than in the preceding non-IRV mayoral election. A survey following the 2009 IRV elections in Minneapolis found that 60% of the voters stated that IRV should be used in the future.[30]

However, it is not the voting but the counting of the votes in some variants of IRV that can seem complex and lack transparency.[31] In the event there is no winner after the first count, there are two ways in which the votes can be further counted in IRV

[28] New America Foundation and FairVote, "Instant Runoff Voting and Its Impact on Racial Minorities," at 2 (June 2008) (http://archive.fairvote.org/?page=2290).

[29] *Id.* at 3.

[30] D. Schultz and K. Rendahl, "Evaluating Ranked Choice Voting in the 2009 Minneapolis Elections: A Report for the Minneapolis Elections Department." (hereinafter "Evaluating Ranked Choice Voting") (paper on file with the Commission).

Beginning this fall, New York City will use new ES&S machines to scan paper ballots. With IRV, for each candidate, voters would use a pencil or other device to fill in an oval labeled "first choice," "second choice," or "third choice." Their choices would then be scanned and tabulated by computer. To view the new paper ballot system, see the City Board of Elections website at http://www.votethenewwayny.com/faq.php.

[31] Commentators observed that it was this complexity, together with the unpopularity of the mayor elected by IRV and a campaign against IRV, that led to its repeal in Burlington, Vermont earlier this year. Ironically, the result of Burlington's mayoral election would have been the same under the two-stage runoff system that replaced IRV as under IRV.

systems. The simplest way, which we propose here, is to have an instant runoff between the top two vote-getters only. The other candidates are eliminated. The ballots of those who voted for the other candidates are then examined. The winner is the candidate who is ranked ahead of the other on more ballots. This is easy for voters to understand. It perfectly simulates the two-stage runoff that we have now.

The trade-off is that this top two version of IRV does not take advantage of all the available ranking information provided by the voters. In the more typical IRV system, the field need not be immediately narrowed to the top two, and there can be multiple rounds of counting. If there is no majority on the first count, the candidate who received the fewest first-choice votes is eliminated, and the votes of those voters who chose that candidate as their first choice are now allocated to their second choice candidate. The votes are then recounted. If there is still no candidate who has a majority of the votes cast for candidates still in the running, the process is repeated by again eliminating the candidate with the fewest votes, and redistributing that candidate's votes. The process is repeated until there is a winner.

In this multiple round version of IRV, a candidate who came third in the initial count might well win when all the rankings are considered. This is more likely to result in what is called a "Condorcet winner," *i.e.*, a winner who would win in a two-candidate election against each of the other candidates. However, the top two system is not only much simpler to understand, it may also be more consistent with United States tradition. It ensures that the winner has not only breadth, but also strength, of support, in that he or she will be one of the top two first choices of the voters.[32]

[32] A study of the 2009 Minneapolis IRV elections found mixed results. D. Schultz and K. Rendahl, "Evaluating Ranked Choice Voting," *supra* n. 30. Implementation of IRV there was done in haste as a

Another criticism of IRV is that it loses the benefits of the subsequent runoff election in allowing the top two contenders to sharpen and clarify their differences to the voters and to mobilize their supporters. Although turnout is generally lower in a subsequent runoff, the drop-off may be less in a mayoral runoff featuring two high-profile candidates.[33] On the other hand, it has also been hypothesized that wealthier and better-funded candidates do better in subsequent runoffs, because of the need to have funds on hand for a second round election just two weeks after the first.

B. Decreasing the Number of Petition Signatures Necessary to Appear on the Ballot

Among the ways to reduce the barriers to ballot access, the simplest is to reduce the number of signatures on designating petitions, which allow access to party primary ballots, and on independent nominating petitions, which allow direct access to the general election ballot.

Under the current system, both forms of petition now require candidates for New York City-wide office to obtain 7,500 signatures and candidates for borough-wide office to obtain 4,000; designating petitions require candidates for City Council to obtain 900 signatures and nominating petitions require those same candidates to obtain

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result of delays from a legal challenge to IRV, which ultimately failed. Because the machines used in Minneapolis could not accommodate IRV, counting had to be done by hand, adding significantly to costs and delay. The authors stated that based on one election, they could not say whether IRV had achieved its stated goals. However, they concluded that voter confusion was not a significant factor in the 2009 elections, and noted that a poll showed that voters were generally pleased with IRV.

[33] For example, in 1977, Ed Koch ran in a crowded primary field comprised of Koch, Mario Cuomo, Abe Beame, Bella Abzug, Percy Sutton, Herman Badillo, and Joel Harnett. A New York Times/CBS poll taken in August put Beame, Abzug, and Cuomo ahead of Koch. However, running as a law-and-order liberal shortly after the blackout and ensuing riots, Koch nosed out Cuomo to win the first round with 19.8% of the vote. In the runoff, turnout fell by 13.6%, and Koch beat Cuomo by 55% to 45%. Some feel that the runoff enabled Koch to sharpen his message and thereby win.

2,700 signatures.[34] Prospective candidates for office must meet designated signature requirements within a limited time frame: 37 days for designating petitions[35] and 42 days for nominating petitions.[36] Designating petitions can only be signed by voters who are duly enrolled in the same political party as the candidate and who are eligible to vote in that party's coming primary election for the office, and each signature must be accompanied by the signature of a witness also enrolled in that political party, qualified to vote in New York State, and residing in the office's political subdivision.[37] Nominating petitions can only be signed by voters registered in the office's political subdivision, and each signature must be accompanied by the signature of a witness registered to vote in New York State.[38] Because of these requirements, candidates need to obtain approximately three times the number of signatures that are mandated in order to ensure that their petitions will withstand legal challenges.[39]

Though this system was created in the late nineteenth century with the purpose of democratizing elections, running for office in New York is now considered

[34] Election Law §§ 6-136(2) and 6-142(2). However, the required number of signatures for a designating petition need not exceed five percent of the voters enrolled in the party in the office's subdivision, and for a nominating petition need not exceed five percent of the total votes cast for governor in the last gubernatorial election in the office's subdivision. *Id.*

[35] Election Law § 6-134(4).

[36] Election Law § 6-138(4).

[37] Election Law § 6-132. The signature of a notary public or commissioner of deeds may be used in lieu of the witness signature. *Id.*

[38] Election Law § 6-140. The signature of a notary public or commissioner of deeds may be used in lieu of the witness signature. *Id.*

[39] D. Getachew & A. Senteno, "Understanding the Labyrinth: New York's Ballot Access Laws," GOTHAM GAZETTE (June 29, 2009) (http://www.gothamgazette.com/print/2954).

"notoriously difficult because of the draconian ballot access laws."[40] Critics point out that the system now limits ballot access to those candidates who have the support and resources of a major political party or the independent means to hire a private army of signature gatherers.[41] New York's system is also particularly onerous compared to that of other jurisdictions in terms of both the details of its petition process and the fact that it is one of only a handful of states to set a petition requirement as the sole means of getting on the ballot for all candidates, including both incumbents and challengers.[42] The 37- and 42-day requirements are particularly stringent compared to the more than a year allowed in Michigan, and the unlimited time period in at least six other states, including New Jersey.[43] In addition, the number of signatures required to get on a ballot in New York is much greater than in other states: access to the gubernatorial ballot in California currently requires only 65 signatures.[44] Some jurisdictions allow candidates to bypass the petition process altogether by paying a filing fee, a far superior alternative according to some ballot access experts.[45]

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[40] Citizens Union of the City Of New York, "2010 Recommendations," *supra* at n. 17, at 64 (June 30, 2010).

[41] Getachew & Senteno, *supra* note 39.

[42] Id.

[43] D. Israel & M. Gertz, "Ballot-Bumping, NYC's Bloodsport," GOTHAM GAZETTE, July 27, 2005, http://www.gothamgazette.com/print/1492.

[44] California Secretary of State's Office, 2010 California Election Calendar, at 3-1 (2010) (http://www.sos.ca.gov/elections/2010-elections/calendar/pdfs/section-3-candidate-filing.pdf). These signatures are sufficient along with a filing fee of approximately $3,500; in lieu of the fee a candidate may provide 10,000 signatures. *Id.*

[45] Alex Kane, "Getting on the Ballot in Other Cities," GOTHAM GAZETTE, June 30, 2009, http://www.gothamgazette.com/print/2962.

Suggestions to the Commission have included providing legal assistance to help candidates through the complexities of the petition process[46] and linking ballot access to a candidate's fundraising performance,[47] but the most straightforward way to level the playing field is to decrease the number of signatures required on designating and nominating petitions. Although the numbers are governed by state election law, the Court of Appeals has indicated that the City would likely have authority to supersede such law with respect to its own officers: "The municipality is empowered to modify an election law in so far as that law affects . . . the election of the local officers."[48] Thus, staff recommends amending the Charter to reduce the number of signatures required on petitions in order to expand ballot access to a wider variety of candidates. The required number of signatures, for both designating and nominating petitions, should be reduced to half of the current level for designating petitions: 3,750 signatures for New York City-wide candidates; 2,000 for borough-wide candidates; and 450 for City Council candidates.

C. Consolidating the Voter Assistance Commission and the Campaign Finance Board

Background

The Voter Assistance Commission and the position of Coordinator of Voter Assistance were created in 1988 in order to provide a role for government to assist

[46] Statement by New York City Public Advocate Bill de Blasio: A Vision for Charter Reform in New York City (May 25, 2010) (on file with the Charter Revision Commission).

[47] Testimony of Jerry H. Goldfeder before the New York City Charter Revision Commission, (June 2, 2010) (http://www.nyc.gov/html/charter/media/video/pc060210_charter_forum_500k.asx).

[48] *Bareham v. City of Rochester*, 246 N.Y. 140, 149 (1927).

in increasing voter registration and participation.[49] VAC was originally made part of a Department of Campaign Finance and Voter Assistance.[50] CFB and VAC were separated as part of the 1989 Charter revisions, although CFB continues to produce the Voters Guide.[51] VAC consists of 16 Commissioners, including seven *ex officio* appointments, six persons appointed by the Council and three persons appointed by the Mayor. The *ex officio* appointments are the First Deputy Mayor, the Director of the Office of Management and Budget, the President of the Board of Education, the Public Advocate, the Executive Director of the Board of Elections, the Corporation Counsel and the Chair of the Campaign Finance Board.[52] VAC is responsible for taking actions to encourage voter registration and voting, while the Coordinator of Voter Assistance is responsible for encouraging and facilitating voter registration, and coordinating agencies' voter registration efforts.[53] Additionally, city agencies are responsible for distributing voter registration forms, and VAC and the Coordinator are responsible for monitoring agencies' compliance with this requirement.[54]

The Commission received testimony and comments from good government groups and others expressing concern that VAC has been hampered by structural issues and a lack of resources. VAC has also been viewed as unwieldy in light of its size.

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[49] New York City Charter Revision Commission, December 1986-November 1988, "The Report: Volume One," at 42-44.

[50] *Id*.

[51] Charter § 1053.

[52] *Id.* § 1054(a)

[53] *Id.* §§ 1054-55

[54] *Id.* §§ 1054-55, 1057-a.

Moving VAC into CFB and Restructuring VAC

Staff recommends that VAC be moved into CFB. CFB has significantly more resources than VAC. It already shares responsibility for voter education through its work in producing the Voters Guide, which provides information concerning candidates for City offices and ballot proposals, as well as where and how to register and vote.[55] CFB also works with VAC to produce the Video Voter Guide. CFB members are selected by both the Mayor and the Council in a manner designed to ensure that the CFB is non-partisan, and CFB has a reputation for non-partisanship. Both Citizens Union and the New York Public Interest Research Group support moving VAC into CFB.

In moving VAC into CFB, staff recommends that VAC be restructured as follows: VAC would consist of nine members, including two appointed by the Mayor; two appointed by the Council; one appointed by the Public Advocate; and four *ex officio* positions: the Corporation Counsel, the Director of the Office of Management and Budget, the Chancellor of the Department of Education, and the Executive Director of the Board of Elections. The Coordinator of Voter Assistance would be nominated by the Mayor and selected by the Executive Director of CFB. As is currently the case, the appointed positions would be chosen from among representatives of groups that are underrepresented among those who vote or register to vote; community, voter registration, and civil rights organizations; and the business community. Youth advocacy organizations would also be added to this list.

[55] Charter § 1053

Clarifying the Responsibilities of the Coordinator of Voter Assistance

It is further recommended that the responsibilities of the Coordinator of Voter Assistance be clarified to expressly include responsibility for implementing methods to improve voter registration, to the extent practicable, including efforts targeted at eligible voters who are limited in English proficiency.

Coordinating the Timing of VAC Hearings and Reports

The Charter currently requires that VAC conduct hearings concerning voter registration and participation at least once a year, in the time between a general election and December 21. It further requires that the Coordinator of Voter Assistance prepare an annual report on voter registration and participation by July 30 of each year that reviews, among other things, voter registration and voting processes from the previous year. We recommend that the report and the hearings be coordinated and the timeframes adjusted so the Coordinator's report can be considered at VAC's hearings, and the hearings can also consider voter registration efforts that are underway for the next election. Specifically, the report would be completed by April 30 of each year, and the hearings would commence after submission of the report.

Creating a Deputy Coordinator for Youth Outreach

Finally, staff recommends that a new Deputy Coordinator for Youth Outreach position be created in order to coordinate voter education and registration efforts targeted at people ages 18 to 25. The Deputy Coordinator would report to the Coordinator of Voter Assistance. The position would be responsible for efforts to improve civic awareness and voter registration among young people, including working with the City's public schools; the Department of Youth and Community Development;

the City University of New York; and other government agencies, undergraduate institutions, and non-profit organizations.

Part III – Public Integrity

New York City has an extensive system for preventing and prosecuting conflicts of interest and corruption in government and for ensuring transparency in government operations and the electoral process. The City has its own ethics, lobbying and campaign finance laws, enforced by the Conflicts of Interest Board, the City Clerk, and the Campaign Finance Board, respectively. The New York City Department of Investigation, along with the District Attorneys and the United States Attorneys, is responsible for investigating possible criminal activity by city employees. The COIB and CFB were established as Charter institutions in 1988, when voters approved the ballot proposal presented by the 1988 Charter Revision Commission. Operating after a series of local corruption scandals in New York, the 1988 Commission found that "[t]he issue of government integrity was of primary concern." [56]

The current Commission heard testimony at public hearings regarding several public integrity topics, including the independence of the COIB, recent controversy relating to the allocation of discretionary funds by City Council members to non-profit organizations, recent instances of corruption at the Department of Buildings, and making the city lobbying law more effective.[57] The Commission held an issues forum on public integrity and received expert testimony as well as additional comments from government officials, good government organizations and members of the public.

[56] N.Y.C. Charter Revision Commission, "The Report: Volume One," at 26 (Jan. 1989).

[57] Citizen's Union has also made recommendations concerning this issue. Staff believes that the matter warrants further consideration and recommends that the Commission hear more from Citizen's Union on the issue during the next round of public hearings.

Proposals pertaining to campaign finance and the City's conflicts of interest law are set forth below.

A. Disclosure of Independent Campaign Contributions

Currently, the Charter and Administrative Code[58] empower New York City's Campaign Finance Board to require that candidates for public office comply with comprehensive disclosure requirements. These requirements are a large part of why the City's campaign finance law has been repeatedly lauded as a national model.[59] Under existing law, however, the CFB has no power to require disclosure related to expenditures that are made independent of any candidate, but that are nevertheless made with the express intent of influencing the outcome of municipal elections and ballot proposals. This gap in the City's campaign finance system allows independent actors to spend lavishly on local elections while remaining hidden from public view and thus insulated from public scrutiny, which can potentially lead to the appearance of or actual corruption. In recent years, these types of independent expenditures have become an increasingly significant part of election-related spending in New York City. Citizens Union Executive Director Dick Dadey has described the absence of independent expenditure disclosure as "a big hole in our city campaign finance system."[60]

[58] New York City Administrative Code §§ 3-701 to -720.

[59] *E.g.*, Testimony of Prof. Richard Briffault before the New York City Charter Revision Commission (June 16, 2010) (http://www.nyc.gov/html/charter/media/video/pc061610_charter_meeting500k.asx); Testimony of Prof. John D. Feerick before the New York City Campaign Finance Board, (Dec. 2, 2009) (http://www.nyccfb.info/press/news/testimony/pdf/post-election/2009-12-02--Feerick.pdf)

[60] Courtney Gross, "Proposal Could Shed Light on Who Helps Candidates," GOTHAM GAZETTE, June 1, 2010, (http://www.gothamgazette.com/print/3283).

On a national level, the Supreme Court's recent decision in *Citizens United v. Federal Election Commission*[61] has significantly raised the profile of independent expenditures as a component of campaign related spending. In holding that no government interest could justify limiting the political speech of corporations,[62] and striking down federal law that prohibited the use of corporate and union general treasury funds for independent election expenditures,[63] the Supreme Court potentially unleashed a flood of corporate independent spending across the country that could lead to further increases in independent expenditures in local elections. In that same decision, however, the Court also explicitly upheld the components of federal law requiring such independent actors to disclose their identity, expenditures, and funding sources to the FEC.[64] In determining that a government interest did indeed justify encumbering electoral communication in this manner, even if it did not justify actually limiting such communication, the Court recognized the essential public policy purpose that underlies the disclosure of independent expenditures: "provid[ing] shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters."[65]

[61] 130 S. Ct. 876 (2010).

[62] *Id*. at 913.

[63] *Id*. at 886.

[64] *Id*. at 914. The Court did, however, acknowledge an exception in that disclosure "would be unconstitutional as applied to an organization if there were a reasonable probability that the group's members would face threats, harassment, or reprisals if their names were disclosed." *Id*. at 916 (citing *McConnell v. FEC*, 540 U.S. 93, 198 (2003)).

[65] *Id*. at 915–16.

In addition to the federal disclosure requirements endorsed by *Citizens United*, approximately 40 states also require disclosure of independent expenditures in some form.[66] Further, several other major municipalities have already passed laws mandating such disclosure, including Los Angeles, Seattle and Portland.[67] To provide the citizens of New York City with the information they need to properly assess the content of political communications intended to influence their behavior at the polls, and to maintain the City's status as a national leader in campaign finance law, the Charter should be amended to require the disclosure of independent expenditures.

The proposed Charter amendment would make three major changes to § 1052, which governs the composition, powers and responsibilities of the CFB. First, it would require any individual or entity making independent expenditures in excess of $1,000 to disclose such activities to the CFB. Second, it would empower the CFB to require any entity making independent expenditures in excess of $5,000 to disclose the sources of the funds used to make such expenditures, preventing independent actors from circumventing the disclosure requirements by masking their identities through ambiguously named shell entities. Third, it would require that certain literature or advertisements funded through independent expenditures disclose the name of the individual or entity making such expenditure. Procedurally, these changes would be implemented through rulemaking authority delegated to the CFB to prescribe the content, form and manner of such disclosures. The amendment would also make knowing

[66] Gross, *supra* note 47.

[67] Gross, *supra* note 47.

violation of such disclosure requirements punishable both as a misdemeanor and through a civil penalty of up to $10,000 for each violation.

Term Commencement

The Charter currently sets April 1 as the commencement date for new terms of the members and chairperson of the CFB.[68] In April of an election year, however, board members must already be fully able to participate in key decisions on election conduct. Indeed, in both 2005 and 2009, the CFB issued critical advisory opinions in that month.[69] To provide continuity of membership throughout an election year and to allow new members the chance to familiarize themselves with the important issues that the CFB must address, the proposed Charter amendment would change the commencement date for new terms to December 1.

Other Changes

To keep pace with evolving technology and reduce unnecessary environmental impact, the proposed amendment to §§ 1052 and 1053 of the Charter would explicitly authorize the CFB to prepare a voter guide in multiple media formats and allow voters to opt out of receiving a printed version of the guide. To improve election education outreach efforts, the proposed amendment to Charter § 1056 would expand the cooperation requirements imposed upon mayoral agencies to include cooperation with the CFB to improve public awareness of contested elections and ballot proposals. To align the Charter with changes to the Administrative Code that have rendered obsolete Charter language related to the CFB's duty to require candidates to

[68] New York City Charter § 1052(a)(1).

[69] Letter from Loprest to Goldstein, May 4, 2010.

disclose the acceptance of contributions from individuals and entities doing business with the city, the proposed amendment to § 1052(a)(12) would eliminate the existing version of that paragraph in its entirety.

B. Amendments to Chapter 68, Conflicts of Interest

The Conflicts of Interest Board, good government groups and members of the public have made a number of proposals for changes to Chapter 68 of the Charter, which sets forth the city conflicts of interest law. As discussed below, staff recommends that the Commission propose the following amendments to Chapter 68:

- Increase the penalties for Chapter 68 violations, and disgorgement of any gains from such activity;
- Mandate Chapter 68 training for city employees;
- Require written disclosure by elected officials when taking action that may benefit their personal interests; and
- Codify COIB opinion barring sponsorship by council members of budget actions that benefit their personal interest

The COIB consists of five persons who are appointed by the Mayor, subject to advice and consent of the Council, for up to two consecutive six-year terms, and can only be removed for cause.[70] The COIB's responsibilities include, among others, interpreting and enforcing the provisions of Chapter 68 and providing training to City employees. Chapter 68 includes many restrictions intended to prevent actual or apparent conflicts of interest in City government. These restrictions pertain to the following matters, among others:

- Financial interests and employment with entities that have business with the City (§ 2604(a)(1));

[70] Charter § 2602(a)-(c), (f).

- Actions benefiting entities in which a public official or employee has a financial or employment interest (§ 2604(b)(1));
- Abuse of position to obtain financial gain for oneself or for an "associated" person (§ 2604(b)(3));
- Gifts and tips (§ 2604(b)(5), (13));
- Business relationships with superiors or subordinates (§ 2604(b)(14));
- Political activity (§ 2604(b)(9), (11)-(12), (15)); and
- Post-employment restrictions (§ 2604(d)).

Proposals for change

1. Increased fines; disgorgement.

The staff recommends increasing penalties for single Chapter 68 violations from $10,000 to $25,000 and authorizing disgorgement of gains obtained as a result of any violation. The COIB has proposed these changes, and the Commission has also heard support for these proposals from good government groups.

The maximum fine for a single violation of Chapter 68 has been capped at $10,000 since 1988, without any adjustment for inflation. (Charter § 2606.) An increased penalty would make it easier to distinguish between different violations of Chapter 68 based on their severity, with greater penalties provided for more serious offenses. The increased fine, along with the disgorgement requirement, may also have a deterrent effect, and ensure that individuals will not benefit financially from activities that violate Chapter 68. Finally, disgorgement would provide for restitution to the City for any gains made by individuals through violations of Chapter 68.

2. Mandatory training

Although the Charter requires COIB to make training available for all city employees, it does not require that city agencies cooperate in providing the training or that city employees attend.[71] . In 2008, approximately 19,000 out of more than 300,000 city employees received training provided by the COIB.

Given the importance, breadth and complexity of Chapter 68, staff recommends that training in the requirements of Chapter 68 be made mandatory for all city employees. The proposed Charter amendment would not require that training be provided in person, or that all training be provided by COIB directly. Rather, training could be provided on-line, or by staff at employing agencies who receive training from COIB.

3. Limiting "safe harbor" provision and requiring written disclosure of interests

The Charter includes a so-called "safe harbor" provision that permits elected officials to take certain actions that may benefit their personal interests provided that their interests are disclosed to the COIB and on the records of the Council.[72] . Based on an opinion it issued in 2009 (COIB Opinion 2009-2), COIB proposes to amend the Charter to expressly limit the "safe harbor" provision to voting by Council members, as opposed to sponsoring or "reciprocal arrangements," while continuing to require disclosure. The staff recommends adopting this change with respect to budget actions, and in addition requiring that disclosure of interests to the COIB and the Council be made in writing.

[71] Charter § 2603(b)(2).
[72] Charter § 2604(b)(1)(a).

Part IV – Efficiencies in Government

Calls for "streamlining" the Charter have come both from Commissioners and from members of the public who view the level of detail and the many implementing requirements as inappropriate in a document meant, like a constitution, to set forth the broad contours of government. These suggestions are, however, difficult to address. One obstacle is the Commission's limited jurisdiction: because the Commission may amend the Charter, but has no authority to add to the Administrative Code, it would be necessary to explore how to preserve materials removed from the Charter. Moreover, streamlining is a long term project and, unlike many of the proposals recommended in this Report, does not implicate issues requiring voter approval and can be accomplished by local law. This problem requires further thought and will be discussed more fully in the Final Report. Nevertheless, the substantive changes described below would create efficiencies in the operation of city government, removing unnecessary requirements and consolidating functions.

A. Consolidation of Administrative Tribunals

Under current law, the Office of Administrative Trials and Hearings (OATH) and the Environmental Control Board (which is located within OATH) have the power to conduct adjudicatory hearings with respect to many types of alleged violations of city laws and regulations. However, pursuant to a patchwork of legal provisions, adjudications concerning city laws and regulations also currently occur before in-house tribunals and hearing officers at multiple city agencies. Because administrative tribunals are located in, and operated by, many of the agencies whose determinations the public

may wish to challenge, they are often said to lack the appearance of impartiality and independence. It is also believed that if the various tribunals could share back-office administration and operate pursuant to a standardized set of processes, to the extent practical, greater efficiencies and less confusion – and thus a greater sense of fairness – for the public would result. To address these issues, staff recommends considering an amendment to the Charter that would allow for the consolidation of various city tribunals into one agency.

Prior charter revision commissions have scrutinized the issue of city tribunals. In 1988, a ballot question adopted by the voters enacted procedural safeguards for city adjudications under the City Administrative Procedures Act. The 2003 Charter Revision Commission focused on increasing operational efficiency at the city's tribunals and considered the creation of the Office of the Coordinator of Administrative Justice, which has since been created by executive order. In 2005, the Charter was amended by vote of the electorate to set a code of conduct for administrative law judges mirroring the code applicable to state court judges. More recently, the Deputy Mayor for Legal Affairs and the Administrative Justice Coordinator have been leading the effort to further professionalize the City's adjudicatory system, including through potential consolidation. Consolidating many of the city's tribunals could greatly help in their efforts.

To accomplish consolidation, the Charter could be amended to authorize the Mayor to transfer the adjudicatory functions of various tribunals under the umbrella of a single tribunal/agency. The transfer could be made into OATH (which could be re-designated to reflect its enhanced role). Under this proposal, the Mayor would be

authorized to issue such an executive order or orders, including an evaluation and planning process, so that within two years many of the City's tribunals could be brought under the jurisdiction of one agency.

We also propose further amendment of the Charter to authorize the Mayor to issue any orders or directives necessary to effectuate consolidation, including those related to the functional transfer of operations from one agency to another. Such orders or directives could also include provision for the handling of matters pending at the time any transfer is ordered. The Charter should also authorize the Mayor to convene a committee to oversee consolidation, which might include a Deputy Mayor and representatives from OATH and the Law Department.

The Charter should also give flexibility to OATH to handle the appointment of administrative law judges. Judges handling current matters overseen by OATH and perhaps other transferred matters could continue to have five-year terms. In other cases, however, the Chief Administrative Law Judge of OATH may determine that functions transferred to OATH under this amendment are better served by judges with alternative qualifications or terms than those applicable to current OATH administrative law judges.

This Charter amendment could set the stage for an expedited and extensive consolidation of city adjudications into one centralized, professional and independent body. We recommend that the commission hear testimony from the public and city agencies about this issue.

B. Citywide Review of Reporting Requirements and Advisory Bodies

The 2005 Charter Revision Commission took a detailed look at the issue of reporting requirements. Currently, the Charter and the Administrative Code contain a large number of requirements for detailed periodic reports on various aspects of agency programs. These requirements have steadily increased over the years in attempts to increase agency efficiency, effectiveness and accountability. Many reports are extremely useful to the public and to city managers, providing information about what agencies are doing, how well they're doing, and how they need to improve. The most relevant and frequently updated reports enable the City to manage itself effectively and base its plans on precise performance indicators.

Many reporting requirements, however, have become outdated. Concerned that the continued production of unnecessary reports may be a waste of time and resources for strapped agencies, the 2005 Commission asked experts to examine the usefulness of 33 charter-mandated reports. These experts noted that they could not even find 13 of the reports because they were difficult to locate online, not posted or not produced; and, of the remaining, many were not widely used or familiar to either the public or city managers. The experts found that the best-known and most used reports were the Mayor's Management Report and the Preliminary Mayor's Management Report, the Executive Budget and the Adopted Budget. The experts also recommended posting the meaningful reports online in order to make them more accessible to the public. A second expert noted that there were close to 175 reports required by the Charter and Administrative Code combined, and that they do not form a coherent structure in support of performance and accountability: there is overlap and duplication, an ineffective

linkage between spending and results, and little ability to trace connections among documents so that they provide an integrated picture of city government. The same general findings apply to the plethora of advisory bodies established to further reporting requirements. An updated chart of required reports is attached to these Preliminary Recommendations as Appendix D.

Both expert reports advised the Commission that it was not feasible for the Commission itself to try to identify and excise reports that are no longer useful. Rather, they proposed amending the Charter to create a commission to study the usefulness of each report, as well as of advisory bodies that have no decision-making capacity, and to recommend elimination of those that failed to meet certain criteria of continued usefulness. The 2005 Commission drafted proposed legislation to create such a commission but ultimately did not propose it. The expert reports, as well as the Preliminary Recommendations of the 2005 Commission, which contains a long discussion of the background and theory of reporting requirements, can be found on the Charter Revision Commission's website in the Archives section. *See* http://www.nyc.gov/html/charter/downloads/pdf/preliminary_report_june10.pdf at 48 *et seq.*

Staff has re-examined this issue, reviewing the work of the 2005 Commission, particularly in light of comments from the public and Commissioners calling for "streamlining" the Charter. Staff substantially agrees, with some changes, with the approach of the 2005 Commission and recommends that the 2010 Commission seek public comment on the proposal below for a Commission on Performance Reporting, conceived of as a partnership between the city council and the administration

and empowered to examine systematically and waive superfluous and outdated requirements, and to dissolve advisory bodies charged with administering such requirements.

Preliminary Option for Public Review

The proposal would establish a 7 - member Commission on Performance Reporting charged with reviewing periodic reports required by the Charter, Administrative Code, or local law, and the advisory commissions, committees, boards and task forces required therein. The members of the Commission would be: the City Council Speaker and two other Council members chosen by the Speaker, the Corporation Counsel, and the directors of the Mayor's Office of Operations, the Office of Management and Budget, and the Department of Information Technology and Telecommunications. The Director of the Mayor's Office of Operations would chair the commission. The composition of the Commission is meant to allow the council and the relevant mayoral agencies to work together in order to increase the City's ability to govern itself and keep the people informed using the most up to date and important indicators.

The proposal charges the Commission on Performance Reporting with soliciting the views of groups and organizations that are the subject of these reports or advisory bodies or are affected by them. After reviewing a reporting requirement, the Commission could retain it, waive it in whole or in part, or dissolve an advisory body, subject to review by the Mayor and City Council. The Commission would file any decision to waive a requirement or dissolve an advisory body with the Council and the Mayor, and provide copies of the information to interested groups. The Council could

either vote to approve or disapprove the waiver; failure to act would constitute approval of the Commission's recommendation. The Mayor could disapprove the Council's action, and the Council could override the Mayor by a two-thirds vote.

The proposal requires that, in deciding whether to waive a reporting requirement, the Commission consider several criteria, including but not limited to whether the report provides useful information for evaluating the results of programs, activities and functions and their effectiveness in achieving their goals; whether the report provides useful information to assess the effectiveness of the city's management of its resources; whether the report is duplicative of any other mandated report; whether the report remains relevant in light of changing circumstances, current information needs and technological advances; and whether the report's benefits outweigh the costs to produce it. The proposal specifically exempts certain reports from the Commission's power: the Mayor's Management Report, the Comptroller's annual statement of the city's revenues and expenditures, the Comptroller's annual audit and actuarial audit, and any reports required by charter chapters concerning the Expense Budget, Capital Projects and Budget, Budget Process, and the Independent Budget Office; as well as any reports required by state or federal law.

When deciding whether to dissolve an advisory body, the Commission must consider whether the body substantially furthers the mission of its city agency; whether its function or jurisdiction duplicates the work of any other mandated body; whether its function is limited to producing reports that have been waived under this section; and whether the body's benefits outweigh the costs of supporting it.

The legislation would also empower the Commission to recommend to the Mayor and the Council the modification of reports and advisory bodies to make them more effective; this would include recommendations to modify or consolidate reporting requirements in light of technological advances and additional data needs. The Council could also repeal or limit any reporting requirement or advisory body at any time, or extend or enhance such requirements, provided that any such extensions or enhancements are subject to review by the Commission on Performance Reporting. It also imposes a three-year waiting period before the Commission may review a newly enacted reporting requirement.

Part V – Other Issues

Following are brief summaries of other significant proposals that need further study, are not within the Commission's authority or for other reasons should be reserved for the future.

A. Non-partisan ("Top Two") Elections

Five previous Charter Revision Commissions (1998, 1999, 2001, 2002 and 2003) have considered this issue. The 2003 Commission, the last to consider nonpartisan elections, submitted a proposal that generated a great deal of controversy and was, ultimately, rejected by the voters. At that time, the proposal encountered strong opposition, including by many of the good government groups submitting testimony, among them Citizens Union. In the intervening years, the climate regarding non-partisan elections appears to have changed in some respects. Citizens Union has studied the issue anew and, in its recently released report, has changed its view and come out in favor of a version of non-partisan elections, similar to the one proposed by the 2003 Charter Revision Commission, known as "top two." In its "2010 Charter Revision Recommendations," issued June 30, 2010, Citizens Union points to the further sharp decline in voter turnout in the 2005 and 2009 elections and the increasing number of voters who register as independents as reasons for supporting this system. The Campaign Finance Board has also dropped its opposition. In addition, the voters of California have just adopted this system.

The proposal presented to the voters in 2003 was also a "top two" system. Under a top two system, all candidates for an office would run against each other in a

September primary. While some non-partisan election systems prohibit candidates from listing their party identification or registration on the ballot, under the system proposed by the 2003 Commission, candidates would be permitted, but not required, to list their party registration or independent status on the ballot. Any voter, whether registered as a party member or as an independent, could vote for any candidate, including candidates who are members of different political parties than the voter or who are independent. The top two vote-getters in the primary election would compete in the November general election, regardless of their party affiliations, if any.

There is a significant body of academic research and writing concerning nonpartisan election systems. The prior Commissions did an enormous amount of work on the subject. The 2003 Commission heard and accepted testimony from persons on both sides of the issue, reviewed scholarly work and the performance and results of nonpartisan elections in the 50 largest U.S. cities, and commissioned voting rights experts who concluded that the proposal would pass the Department of Justice's Voting Rights Act pre-clearance requirements. (Because New York City is subject to the provisions of Section 5 of the Voting Rights Act, any change in its election procedures must be cleared by the Department of Justice to determine that the change does not abridge the right to vote as a result of race or color.) *See* 2003 Final Report and Appendices thereto.

While supportive of the top two proposal, the 2003 Final Report observed that, "[t]he scholarship performed and data collected by social scientists on nonpartisan elections is far from conclusive." *Id*. at 27. William Lynch, Jr., in a separate dissent forcefully presented the opposing view in an Appendix to the 2003 Final Report.

Subsequent to the voters' rejection of the 2003 Commission's proposal, there has been some additional research, but the academic research and experience remains inconclusive today. Some of the studies have questioned the assertions that nonpartisan elections depress turnout and advantage Republicans, the wealthy, and incumbents.[73] Other analysts have continued to be critical of nonpartisan elections and the top two variant.[74]

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[73] After 2003, Schaffner, Streb, and Wright presented findings that nonpartisan elections do not advantage Republicans, as the critics contend, but rather advantage the party that is in the minority. Schaffner, Streb, and Wright, "A New Look at Republican Bias in Nonpartisan Elections" (2004). However, in their view this might well be due to the fact that, in the absence of a party identifier on the ballot, a certain percentage of each party mistakenly voted for a candidate of the opposing party, a condition that would not be present in the 2003 proposal allowing party identification on the ballot. Also in 2004, Ansolabehere, Hirano, Snyder, and Ueda presented a paper rejecting the contention that nonpartisan elections give incumbents a greater advantage because in the absence of party identifiers, voters would choose the candidate whose name they knew. However, although the authors did not find that nonpartisan elections favored incumbents, they also did not find that nonpartisan elections made a difference in this regard. Ansolabehere et al., "Voting Cues and Incumbency Advantage: Nonpartisan and Partisan Elections to the Minnesota State Legislature, 1950-1988" (2004).

In 2009, Francis Barry, Research Director of the 2003 Commission, published THE SCANDAL OF REFORM (Rutgers, N.J. 2009). Barry provides an extensive review of the academic literature on nonpartisan elections. He argues that the conclusions that nonpartisan elections depress voter turnout and favor incumbents, the wealthy, and Republicans are not supported by the evidence, and indeed that the evidence points the other way. He also argues that under the particular circumstances of New York City, the effects on voter participation, minority representation, and competitiveness would be overwhelmingly positive.

[74] David Schleicher, rejecting the view that "there is no Democratic or Republican way to pave the streets," argued that the lack of competitiveness in city council elections is due to the lack of congruence between local and national political issues and the decline of local political parties. Schleicher, "Why Is There No Partisan Competition in City Council Elections?" 23 J. L. & Politics 419 (2007). Schleicher argued that the development of new municipal-level parties should be encouraged, and that nonpartisan election laws, which weaken parties, should be repealed. Similarly, in "The Oregon Constitution and the Quest for Party Reform," 87 Or. L. Rev. 1061 (2008), political scientist Richard Clucas argued that neither nonpartisan elections nor top two elections in which party identification is permitted yield the promised results. According to Clucas, the reason nonpartisan elections do not significantly increase turnout is that, while they increase turnout among independents, they depress turnout among the poor and less educated. *See also* T.E. Patterson, THE VANISHING VOTER, at 46 (New York 2002) ("[t]he weakened state of the party . . . is central to any explanation of why election participation has slipped); M.P. Wattenberg, WHERE HAVE ALL THE VOTERS GONE?, at 10 (Cambridge, Mass. 2002) (attributing low and declining turnout to the weakening of political parties). Although the Independence Party in New York supports the top two system, other third parties both in New York and elsewhere have opposed it. See, e.g., "Washington State's Third Party Leaders Issue Anti-Proposition 14 Statement," at http://www.freeandequal.org.

At the forum conducted by the 2010 Commission, two of the expert panelists, J. Philip Thompson, Associate Professor of Urban Policy at MIT and Harry Kresky, an election attorney in private practice in New York City, supported the positive view of top two elections. In addition, testimony from the public at the first round of hearings before the 2010 Commission advocated for nonpartisan elections as a means to counter apathy and disillusionment with political parties, as well as to open up the political process to new blood, enfranchise independent voters, and widen the public discourse. Young people who did not want to register with either party spoke to their feelings of disenfranchisement in a city where the Democratic nomination is most often tantamount to election. The members of the public who voiced their support for nonpartisan elections at the expert forum stressed that all registered voters and independent candidates should be included in the primaries in order to achieve more competitive elections.

The critical view of nonpartisan and top two elections was presented by three of the expert panelists, David Jones, President and CEO of Community Service Society, Lorraine Minnite, Assistant Professor of Political Science at Barnard College and Jerome Goldfeder, Special Counsel at Stroock & Stroock & Lavan. The public testimony opposed to nonpartisan elections at the June 2, 2010 forum reflected concerns that nonpartisan elections would favor incumbents and candidates with the most campaign funding.

As the discussions at the Commission's June 2, 2010 forum on voter participation show, the issue still elicits strong feelings and remains of interest to the

public. Citizens Union will be appearing before the Commission to discuss its report and the changes in its position.

B. Changes in Registration and Election Procedure

The Commission heard many suggestions designed to encourage and assist citizens to register and vote and to make elections processes easier to navigate. As set forth in the table below, some of the most significant proposals to encourage voter participation are either barred by the State Constitution and/or State general law, or are impracticable because they cannot be applied to the candidates for state judicial offices and District Attorney who appear on the ballot at the same time that voters choose their municipal officials.

Allowing Saturday and Sunday Voting	Election Law ("EL" § 8-100(4) specifically prohibits Saturday and Sunday elections; Section 8-100(1) specifies the days for holding primaries (subd. (a)) and for general elections (subd.(c)).
Allowing absentee ballots for other than the currently specified purposes, or allowing early voting or mail-in voting	The New York State Constitution (Article II, § 2) specifies that absentee ballots be given to voters who "may be *absent ...from the city*... or … unable to appear personally at the polling place *because of illness or physical disability*…. The Constitutional provision is implemented with specific criteria in EL 8-400. Moreover, even assuming that the City could institute early voting or mail-in voting for City officials, it could not do so for those State officials who are on the ballot at the same time.
Allowing registration at the general election ("Same day registration")	Article II, § 5 of the New York State Constitution provides that registration be completed at least ten days before each election; EL 5-202 requires that the last day of registration be uniform throughout the state and that the State Board of Elections must, no later than the first day of June preceding the general election in each year, set the date.
Open primaries, in which all registered voters are able to choose the party primary in which they will vote.	Open primaries have been held to violate the First Amendment rights of political parties. Additionally, EL 8-302(4) allows voting in a primary only in the party primary "in which …record shows him to be enrolled").

Some observers believe that the above are among the most effective electoral reforms that could be enacted. They will be explored more fully in the Final Report, with a view towards analyzing the possibilities for reform of municipal election procedures consistent with the City's home rule powers under state law and towards making recommendations to the State Legislature regarding necessary changes.

C. Streamlining the Charter

Many of the Commissioners, and some of the public and good government groups, feel that the Charter should be a document akin to the U.S. Constitution, setting forth the structure of government and leaving the details and implementation to the Administrative Code. This project would involve many choices and many strategic decisions as well. Creating an efficiently accessed and streamlined body of law for the City is a long-term project best undertaken by the Council, in conjunction with the Law Department, and can in large measure be achieved by local law.

D. Budget Issues

The Commission has heard calls that both certain elected officials including the District Attorney's Office and entities such as the Community Boards, the COIB and the Civilian Complaint Review Board (CCRB) be guaranteed certain levels of funding, whether calculated by a formula tied to the funding of another entity or to some other baseline. The proponents of these guarantees maintain that they would insulate the so-called "watchdogs" – the COIB, CCRB, Public Advocate and Comptroller – against possibly politically motivated budget cuts, and would allow the Public Advocate, the

Borough Presidents and the Community Boards the ability to more fully carry out their duties and serve their communities in an otherwise highly centralized system. Other commentators, among them the Citizens Budget Commission and the Office of Management and Budget, have forcefully pointed to the disadvantages of such guarantees, such as diminished accountability and flexibility. This issue requires further study and analysis to determine which entities would appropriately be guaranteed budgets and what formulas would be used to determine the budgets.

In addition to calls for "guaranteed" budgets, the City Council Speaker put forth suggestions for change in the budget process, including requiring the Mayor's revenue estimate earlier in the process and changes to the definition of units of appropriation. In particular, the Council has suggested narrowing the definition of units of appropriation in order to provide greater transparency. The Office of Management and Budget, on the other hand, points to the need for budgeting flexibility. In view of the complexity of the issues involved and the possible effects of change on the basic operation of government, staff feels that the proposals relating to budgeting should be reserved for future study and public discussion.

E. Issues Regarding Government Structure

Staff has carefully reviewed the detailed suggestions submitted by the City Council, as well as calls for increased powers for the Comptroller, Public Advocate, Borough Presidents and Community Boards on the one hand, and on the other, suggestions that the offices of the Public Advocate and the Borough Presidents should be abolished. Staff has been examining these suggestions and proposes to discuss them in the Final Report, in the hope that they will receive full consideration in the future. The

suggestions for changes in the powers of elected officials implicate important issues of structure and operation. At this point we believe it is more fruitful to focus attention on term limits and the other issues discussed in Parts I-IV of this Report. We recommend reserving consideration of substantial structural changes for further study and discussion.

F. Land Use Issues

Staff has reviewed a wide range of suggestions regarding land use issues, including enhanced roles for Borough Presidents and Community Boards, requiring standards and application processes for membership on Community Boards, mandating that each community board be provided planning services, and issues involved in "Fair Share" and "197-a Plans."

With respect to selection and training of Community Boards, staff carefully reviewed the proposals put forth by Manhattan Borough President Stringer based on practices he has implemented. Staten Island Borough President Molinaro has suggested adoption of the model he has established for enhancing coordination between borough presidents and certain service delivery agencies. He has established regular meetings with borough commissioners from the Department of City Planning, the Department of Buildings, the Department of Transportation, the Parks Department and the Fire Department in order to review land use proposals, capital projects and mapping initiatives. We recommend these proposals for future considerations for this commission

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The thoughtful submissions by entities such as Pratt, the Environmental Justice Alliance, Jobs for Justice, and the City Planning Department regarding Fair Share and Section 197-a plans discuss proposals that would make substantial changes to the balance in the system of land use established in the 1975 Charter. Staff recommends that, like other proposals that significantly implicate important structural issues, these and other such land use suggestions put forth at the hearings and in written submissions to the Commission should be reserved for future consideration, while the Commission focuses on obtaining further public input on the issues described in Parts I-IV of this Report.