

**THE ASSOCIATION OF THE BAR
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August 20, 2003

Frank J. Macchiarola, Esq.
President
St. Francis College
180 Remsen Street
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Re: Charter Revision Commission

Dear Frank:

The Association of the Bar of the City of New York (the "Association") is pleased to submit the preliminary comments herein with respect to the deliberations of the Charter Revision Commission (the "Commission"). The Association will publish a lengthier and more formal report in or about early October 2003 assuming the Commission decides to submit formal propositions for referendum in November 2003.

The Association designated a Special Committee composed of members of its Committees on New York Governmental Affairs, Government Ethics, and Election Law to prepare its comments and Report.

The members of the Special Committee wish to thank you very much for the time you took to meet with the Special Committee to discuss the work of the Commission and to respond to questions. Given the tight and full schedule of Commission meetings, fora and hearings, your willingness to spend several hours with the Committee was very gracious and we are very appreciative.

The Special Committee also wishes to acknowledge the cooperation and courtesies of Alan Gartner, the Executive Director of the Commission, and Anthony Crowell, Counsel to the Commission. They have been quite helpful and their work admirable.

Finally, the Special Committee wishes to acknowledge the dedication of the Commission members, and to express its appreciation of the Commission's efforts to involve the interested public thoroughly at each step of its work. The Association endeavors to provide its comments in the same spirit of professionalism and intellectual honesty, and with the utmost respect for the Commission's work.

I. Nonpartisan Elections

At this writing the Association understands the Commission will propose that there be nonpartisan elections for all city elected executive and legislative offices. The Association also understands the Commission will propose that there should be two rounds of nonpartisan elections with the first being on the second Tuesday of September involving all qualified candidates, and the second being on the first Tuesday of November involving only the two highest vote getters for each elected office.

The Association further is aware that the Commission proposes that candidates' party affiliations may be listed on the nonpartisan election ballots, and that nonpartisan elections are proposed not to be effectuated until after 2005.

The Association does not support the Commission's nonpartisan elections proposals. The fundamental reason is that the Association believes the Commission has the burden of persuasion to demonstrate that the problems it perceives can be solved by the solutions it proposes. The Commission has not met that burden. Other reasons for the Association's opposition include potential negative consequences visited by nonpartisan elections on the City's Campaign Finance Program, unnecessary abridgements of First Amendment rights of political speech, and possible harm to the governance of New York City.

a. The Burden of Persuasion

The Association is mindful that the Commission's proposals ultimately will be determined in the court of public opinion (i.e., the electorate), and that there is no legal standard of proof in that circumstance. The Association acknowledges that the Commission lawfully may propose the changes that it advocates.

The Commission recommends a dramatic and wholesale change in the manner that municipal elections occur in New York City. The Commission offers only anecdotal evidence and supposition in support of its proposals. Just as the Commission finds that the opponents of nonpartisan elections do not present convincing evidence that nonpartisan elections will lead to the adverse consequences the opponents suggest either as actual, possible or plausible, the Commission also acknowledges that there is no dispositive proof that a change to nonpartisan elections

will produce the benefits that many proponents claim, and that the Commission seeks to achieve.

It is the proponent of dramatic change that must make the case, not the opponent. While the maxim "When it is not necessary to change, it is necessary not to change", has no legal force and often has been interpreted to be suggestive of a certain political ideology, it is a guide to the apportionment of the burden of persuasion on public policy matters. The Association asserts that the Commission has not demonstrated in any convincing manner that it is necessary to change New York City's political structure as comprehensively as proposed. No electoral system is without fault and New York City's system has many anomalies and serious problems. But the system itself can produce reform as witnessed by the recent adoption of term limits, the usefulness of the Voters Guide, the creation of the Voters Assistance Commission, the maturing of the Campaign Finance Program, the fact that of the last six mayors, the division between Republicans and Democrats is 50% (with the traditional "Party Bosses" rarely able to affect the outcome of mayoral elections), the fact that there were in excess of 250 candidates in the most recent City Council elections, and the history of reform movements in New York City politics where internal political party power has shifted significantly as a result of primary election contests. And while wider reforms are desirable, e.g., eased ballot access, and less restrictive registration requirements, they are a function of judicial and legislative action.

The Association believes it is fair to assert that the Commission's fundamental argument can be succinctly stated, to wit: There are approximately 1.3 million voters who by virtue of their registration as Independents or in parties other than the Democratic Party do not participate in the elections that count the most - the Democratic Party primaries. Accordingly, the non-participant voters are effectively denied their franchise. Nonpartisan elections would obviate the Democratic Party primaries and thereby franchise the voters that choose not to be Democrats. A corollary to this argument is that young New Yorkers, perhaps disproportionately people of color, and immigrants who recently have become citizens, are not registering to vote at all, or are not enrolling in the Democratic Party in the same percentages as they have in the past. Thus, the argument extends, nonpartisan elections would attract these individuals into the political process, and remedy their apparent disaffection.

The factual predicates of these arguments do not necessarily support the conclusions the Commission draws. There are other equally compelling facts that have weight including, without limitation, that: those who choose not to register Democratic do so of free will; lack of participation in elections is a nationwide phenomenon that includes the jurisdictions that have nonpartisan elections*; young

* It is also a nationwide phenomenon that incumbents, especially legislative incumbents, overwhelmingly tend to be re-elected.

citizens in the U.S. traditionally do not register to vote, or vote, until their latter twenties when their adult responsibilities and the impact of governmental policies on them become more salient; and the attraction of voters to elections, candidates, and parties is very much a function of the contexts, positions, skills and appeals of the particular issues, candidates, and parties.

Important facts specific to New York City Mayoral elections also cast doubts on the Commission's predicates. For example, the 1989, 1993 and 2001 mayoral elections were extremely competitive general elections where literally every vote counted. In the 1997 mayoral election the Republican incumbent won by a landslide and the Democratic Party primary was not determinative. The significance of this is that non-Democratic voters have cast meaningful votes in at least the last four mayoral elections.

It is also significant that despite the growing ranks of independent registered voters and parties other than the Democratic Party, there is no evidence presented that the interests of those voters are being ignored.

This substantiates the point that while greater participation in New York elections is a desirable goal, it is not demonstrable that a partisan election system causes reduced participation, or that a nonpartisan election system would cause increased participation. In the absence of such proof, change is not compelling and the risk of adverse consequences should not be embraced.

b. Campaign Finance

One such possible adverse consequence of nonpartisan elections was brought to the attention of the Commission by Nicole Gordon, Esq., the Executive Director of the New York City Campaign Finance Board ("CFB"). On behalf of the CFB she advised the Commission that were there to be nonpartisan elections, organized political parties could provide financial support more substantially to Campaign Finance Program participating candidates they favor than if the elections were to be partisan. In part, this is because the attribution rules of the CFB are a function of the presumption that political parties support the candidates that they nominate. The expenditures the parties make are presumed to be coordinated with their candidates and, therefore, are contributions which the CFB can limit. In the absence of party nominations, there may not be presumptions, and without presumptions, there could not be attributions. Thus, the power and effectiveness of the CFB could be reduced, and the power of the political parties could be enhanced.

The Association takes no position with respect to the relative value of political party strength and power, but the Association finds great value in New

York City's Campaign Finance Program and opposes change that could frustrate that program.

Remedying this possible anomalous result is beyond the purview of the Commission. Nevertheless, the Commission has suggested a two-part remedy that the Association finds troubling. As the Association understands, the Commission proposes that the voters adopt a directive to the CFB to craft a solution to the problem the CFB has identified. The Commission does not offer guidance as to the solution other than to require adoption of a ban on any contributions (and certain related expenses directly or indirectly benefiting candidates) by political parties and political committees to any candidate that participates in the voluntary campaign finance program. Little if any legal or political analysis is offered by the Commission in support of the incursions on political speech that might be occasioned by the proposed restraints on contributions. In the absence of such analyses and the assurance that the Commission's suggested restrictions do not impair First Amendment rights, or serve a compellingly valid purpose^{**}, the Association opposes the proposal. Nor does the Association find the directive to the CFB to solve a problem the CFB has identified to be an acceptable response. The risk of weakening the Campaign Finance Program is not a prudent one to assume. A practical, constitutional and wise solution should be assured before nonpartisan elections are adopted. This is especially so since there can be no assurance that other undesirable consequences will not result from a nonpartisan election regime.

c. Governance

The Association is concerned that there has not been adequate analysis of the effect nonpartisan elections may have on governance. Unlike most cities that employ nonpartisan election regimes, New York City has a very strong mayor system and, following the 1989 Charter Amendments, an increasingly powerful legislature. New York City also has a strong labor movement, vibrant and well organized advocacy groups, a vigorous and diverse press, and a continuing rich pattern of immigration. Political parties reflect and react to these power centers. Political parties are vehicles of governing and the exercise of power. Parties provide recruitment pools for government positions, encourage loyalties that are essential to policy implementation, greatly assist in the assemblage of policy and issue coalitions necessary to formulate and vet government decisions, provide checks on the exercise of government power, enhance intergovernmental dealings and interaction, provide practical barometers and measurements of effectiveness, induce dialogue between constituent and servant, and ensure intra-term contest and debate. Much of government is politics: bureaucratic, administrative, legislative, budget, and the ongoing

^{**} The Association has very serious reservations with respect to limitations on the ability of political parties and political clubs and committees to participate fully in municipal elections.

process of selection and priority setting. Political parties are integral to these politics and particularly to the necessary process of compromise. While the power of political parties is frequently weakened (víz: campaign finance restrictions) to serve overreaching policy objectives, the governmental consequences to a further weakening of the political parties should be assessed. This has not been done.

II. Procurement

As of this writing the Commission had proposed a variety of Charter changes with respect to Procurement (although not with respect to the registration of contracts). While the Association has not been able to review these proposals, it supports the thematic approach of the Commission to propose changes that make the procurement practices of the City of New York more efficient and fair with particular reference to not-for-profit service providers who are dependent on a regularized and timely cash flow from City agencies with whom they contract. Increasingly, not-for-profit entities are providing government type services, and are doing the work of government. This creates an obligation on government to ensure that its not-for-profit contractees are capable, competent, honest, effective and not hampered by inefficient governmental contracting processes that deny them the means to deliver services properly or to retain talented personnel. There is a substantial public interest that the not-for-profit service sector be able to attract highly motivated and accomplished individuals as employees and directors.

III. Agency Reorganization

On August 13, 2003 the Commission approved for further hearings certain matters of Agency Reorganization. Among them is the proposal that the Mayor be required to appoint an Administrative Justice Coordinator to promote, in part, a uniform training program and professional standards for administrative hearing officers or trial judges. The Association supports these concepts although at this writing it has not had an opportunity to review the written propositions that the Commission approved. The Association applauds the Commission's efforts to further professionalize, improve and standardize the City's administrative law procedures, particularly to ensure that the rights of respondents, often individuals who are not represented by counsel and are confused and intimidated by the City's administrative law mechanisms, are protected.

Lastly, in its October report and in light of the fact that there have been five Charter Revision Commissions appointed since 1998, the Association will elaborate on its previously stated concern that Charter Revision Commissions are not intended to be and should not be employed as a convenient and compliant legislature to bypass the City Council (or to resolve certain inherent adversarial relationships with separately elected Citywide officials).

Frank Macchiarola, Esq.
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The Association welcomes a Commission response. These preliminary comments are subject to fuller information and continued review.

Best regards.

Very truly yours,

Peter J. Kiernan
Chair

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Members of the Special Committee

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