

The Association of the Bar of the City of New York
Committee on New York City Affairs

Report on Ballot Proposals
of the
2003 New York City Charter Revision Commission
October, 2003

Introduction

On the November 4, 2003 municipal election ballot New York City voters will vote on three propositions that would introduce significant change to the City Charter as proposed by the 2003 Charter Revision Commission ("the Commission"). By far the most important proposed change is the creation of a nonpartisan election regime eliminating political party primaries in municipal elections, and limiting the general election ballot to two candidates for each office. A second ballot question would alter City procedures for purchasing of goods and services. A third grouping of changes relates to matters of government administration including the City's administrative justice system.

The Association of the Bar of the City of New York (the "Association") recommends a NO vote on all three Charter ballot proposals (questions 3, 4, and 5 on the New York City ballot). The Association opposes the principal change recommended by the Commission, the adoption of nonpartisan elections for City offices. The other two questions, which address procurement and administrative changes, combine positive improvements with other proposals that raise serious questions. These proposals should not be adopted, but rather should be the subject of interchange with the City Council to allow the refinement of the proposals and passage of those most acceptable to both the Mayor and the City's legislature.

An additional reason to oppose each question is the Executive's inappropriate use of the charter revision process to bypass the City Council. For the fifth time in six years, New York City's mayors have handpicked a commission that has asked the voters to approve charter or administrative changes, some of which arguably should not be in the Charter at all, without the valuable vetting process provided by the legislative branch, a co-equal branch of government.

I. Nonpartisan Elections

The Commission proposes that there be nonpartisan elections for all city elected executive and legislative offices after 2005. The Commission proposes that there should be two rounds of nonpartisan elections with the first being on the second Tuesday of September involving all candidates qualified to be on the ballot for the offices they seek, and the second being on the first Tuesday of November involving only the two highest vote getters for each elected office.

The Commission also proposes that candidates may choose to list their party affiliation on the nonpartisan election ballots.

The Association does not support the Commission's nonpartisan elections proposals. The fundamental reason for our opposition is that the Association believes the Commission has the burden of persuasion to demonstrate that the problems raised by the proposal and discussed by the Commission can be solved by the solutions proposed by the Commission. 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 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. The Commission argues 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, but the Commission acknowledges that there is no dispositive proof that a change to nonpartisan elections will produce the benefits that many of its 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, 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 implementation of term limits, the usefulness of the Voters Guide, the creation of the Voters Assistance Commission, the success 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 2001 City Council elections spending about \$42 million in public funds, 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 Commission's fundamental argument can be succinctly stated, to wit: There are approximately 1.2 million voters who by virtue of their registration as Independent 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 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 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 conclusions. 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

* A reform some advocate is open primaries. In the matter known as Van Allen v. Democratic State Committee, Supreme Court, Albany County reported at NYLJ, September 15, 2003, Justice McNamara upheld the Independent Party's decision to open its primaries.

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

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 voters registered in parties other than the Democratic Party, there is no evidence 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.

One such adverse consequence that is inevitable is that in the absence of the nomination of political parties and the information about candidates that nomination and party embrace convey, incumbency, celebrity, and other information about candidates such as their race, gender and ethnicity become more important. Moreover, nonpartisan elections may tend to depress turnout because without the information provided by party nominations some voters would have no identifiable reason to prefer one candidate over another and may not vote. This would be especially so in the circumstance when media coverage is limited as it generally is in lesser elections.

The absence of party nominations and party primaries also, incontestably, favors self-financed candidates. This adverse consequence would be aggravated by the Commission's proposal to prohibit completely all contributions by political parties and political committees to candidates receiving public financing; the Commission should encourage participation in public campaign finance programs rather than create an incentive for candidates to opt out of such financing. (See below)

Presumably to ameliorate undesirable consequences (and not just to enhance the chances of electoral acceptance), at the relative end of the Commission's deliberations and in response to a written suggestion of Mayor Bloomberg, the Commission proposed that candidates could choose to include party affiliation on the ballot. This is the opposite of a nomination where it is the party's voters who choose which candidate may carry the party's designation. There can be no assurance that a candidate that chooses to affiliate itself with a party actually reflects that party's principles or has the support of that party.

Another adverse effect of nonpartisan elections that is logically likely is a blurring of general election contest between truly distinct programs and principles. With the elimination of primaries, and the premiums placed on name recognition, wealth, and single issue candidacies, it is very plausible that the two highest vote getters in a first round nonpartisan election may be members of the same party or adherents of the same views. Thus, in the general election there will not be a

choice between parties and there may not be a choice between distinct points of view or political philosophies. This possibility was articulated by the Commission Chair at a meeting with the Association when he noted that had there been nonpartisan elections in 2001, the Mayoral general election contest would have been between Fernando Ferrer and Mark Green. That irony should be considered in the context of the Commission's argument that nonpartisan elections should be adopted because the Democratic Party primary is the only election that counts.

b. Campaign Finance

Another possible adverse consequence of nonpartisan elections was brought to the attention of the Commission by the New York City Campaign Finance Board ("CFB"). The CFB advised the Commission that were there to be nonpartisan elections, political parties could provide more financial support to candidates participating in the voluntary campaign finance program 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 or reasonable imputations, and without presumptions and reasonable imputations, there can not be attributions. That would deny the CFB the ability to limit political party spending for participating candidates. Thus, the power and effectiveness of the CFB could be reduced, and the amount of political party spending could be increased.

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 it.

The Commission suggests a remedy to this problem that the Association finds troubling. The Commission proposes 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 prohibition on party spending. 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.

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. It is anomalous that in pursuit of the objective to encourage participation in municipal politics, the Commission would limit substantially

the participation of political parties and committees -- entities formed for the purpose of participating in municipal politics in an organized manner.

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 presented to the voters. This is especially true as 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 analysis of the effect nonpartisan elections may have on governance. Unlike most cities that employ nonpartisan election systems, New York City has a very strong mayor system and, following the 1989 Charter Amendments, an increasingly powerful City Council. 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, hold elected officials accountable to their campaign promises, and ensure intra-term contest and debate.

Much of government is politics: bureaucratic, administrative, legislative, budget, and the ongoing 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 (viz: campaign finance restrictions) to serve overreaching policy objectives, the governmental consequences of a further weakening of the political parties should be assessed. This has not been done. Rather, in its stated objective to neutralize the importance of the Democratic Party primary in municipal elections, the Commission adopts the ironic stance of seeking to weaken the Democratic Party in order to strengthen democracy.

II. Procurement

The Commission proposes a variety of Charter changes with respect to procurement. The Association supports the thematic approach of the Commission to 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.

However, as part of its procurement ballot question the Commission proposes that security-related contracts should be exempt from public disclosure and public bidding. The exemption is too vague for support or informed decision by the voters. No guidelines are suggested for mayoral determination of what contracts involve the security of the City or its citizens. Definition properly would be a product of legislation, not charter revision.

III. Agency Reorganization

The Commission proposes 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. The Association applauds the Commission's efforts to 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.

There have been legitimate questions raised, however, regarding the proposal to permit the Department of Consumer Affairs to adjudicate violations of non-licensed entities rather than seeking enforcement through the courts. There may be a gain in efficiency, but some observers question whether the agency will provide the same level of protection to those accused of violations as do the courts. As this ballot question again combines a variety of proposals into a "take-it-or-leave-it" package, we recommend the voters "leave it" to the legislative process, where the preferred proposals can be culled from this package and enacted.

IV. The Charter Revision Process

There have been five Charter Revision Commissions appointed since 1998. Each was appointed and staffed by the Mayor. No other City elected official was invited to make appointments to the Commission. The Commission agendas were set by the Mayor. The Commissions were short lived and worked primarily in the summer months. The appointment of these Commissions brought objections from separately elected municipal officials whose governmental prerogatives arguably were being bypassed.

Charter Revision Commissions are a means of having referenda. But too many referenda exalt participatory democracy over representative government to the detriment of the latter. When the referenda process is solely controlled by the Mayor, and overused, it is abused.

The current Commission continues and emphasizes a troublesome trend. There was no public outcry for electoral change; no demand for nonpartisan elections. And while certain of the Commission's proposals with respect to procurement and reorganization have merit, they could be achieved by regulation, executive order, bureaucratic agreement and local legislation. They do not require a Charter Revision Commission.

The 2003 Charter Commission held extensive hearings but it ordered no independent analyses with respect to nonpartisan elections. It criticized as inconclusive the arguments, analyses and data of opponents to its propositions, but acknowledged that little data supported its proposals. Perhaps most egregiously, the Commission's chair, upon the announcement of his appointment, and before the appointment of any other member of the Commission, stated the question was not whether the Commission would propose nonpartisan elections but how. That speaks not to an open minded process, but to a scripted one, tainting the results.

In prior reports with respect to other recent Charter Revision Commissions the Association decried the use of mayoral appointed and dominated Charter Revision vehicles which permit a Mayor to supercede the City Council. The Association warned that any proposals emanating "from a flawed political process would have to clear a presumption of raw political motivation." That presumption has not been cleared by the current Commission, particularly in light of the widely reported and not denied 2001 promise of then mayoral candidate Bloomberg to the Independent Party to promote nonpartisan elections in exchange for the Independent Party nomination. The Association noted in prior reports, and emphasizes in this report, that Charter Revision Commission proposals should be evaluated in the context of maintaining the balance of power between the executive and legislative branches of government^{***}, as well as providing for meaningful public accountability^{****}. 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).

Section 36 of the Municipal Home Rule Law permits a mayor to establish a commission of associates to place questions on the ballot formulated in the manner of

*** And within the executive branch, i.e., as among the Mayor, Comptroller and Public Advocate.

**** In 1999 the Association noted that the claim that the City Charter has been amended more than 100 times since the 1989 Charter Revision Commission is not relevant. Most of those changes were made through the routine legislative process.

the commission's choice that would promulgate laws the legislature may choose not to enact. Lack of restraint in using such power could allow mayors to circumvent the representative legislative processes. Four mayoral commissions in the last five years evidences a lack of restraint that diminishes rather than enhances democracy in New York City. This testifies to a compelling need to revisit the Municipal Home Rule Law.

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