RECOMMENDATIONS ON GOVERNMENTAL STRUCTURE AND ELECTION ISSUES FOR THE 2010 CHARTER REVISION COMMISSION

The New York City Bar Association

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 WEST 44TH STREET, NEW YORK, NY 10036

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The New York City Bar Association is grateful for this opportunity to offer its recommendations regarding important issues currently under consideration by the New York City Charter Revision Commission.

While we recognize that this Commission has made efforts in outreach to the communities throughout the five boroughs and has solicited expert panelists to discuss some of the myriad of issues facing this Commission, we reiterate our concern with the timetable set forth by this Commission. While certain issues have been exposed to thorough deliberation and public comment, a comprehensive review of the entire City Charter has not been achieved. The City Charter is a detailed blueprint of New York City's government, involving the intricate inter-relationships among the branches of government, elected officials and numerous agencies. In many instances, changing one section of the Charter will have ramifications affecting other sections, which might tilt the various checks and balances that have been established. We urge the Commission to extend its schedule in order to fully address all potential changes to the City Charter, and to focus on placing a comprehensive set of charter revisions on the ballot in 2012.

In April, 2010 we transmitted to the Commission our suggestions as to issues to consider in the areas of Government Structure, Election Law, Land Use and Administrative Law. Now, in the interest of addressing the matters that seem to be at the forefront of the Commission's agenda at present, we provide specific recommendations that address key issues facing this Commission with regard to governmental structure and the conduct of elections. In the report that follows, we present positions on term limits, the budgetary independence of the offices of the Borough Presidents and the Public Advocate, and election reforms that would increase ballot access, and make it easier to vote. We plan to continue our examination of charter-related issues regarding land use, government structure, administrative procedure and other important aspects of the City Charter.

We appreciate the thoughtfulness and dedication this Commission has exhibited in its approach to the enormous task at hand and offer any assistance the Association can give to assist in the Commission's work.

GOVERNMENT STRUCTURE RECOMMENDATIONS

I Term Limits

The New York City Bar Association has not previously taken a substantive position on term limits. However, the Association has repeatedly voiced its opposition to proposals to legislatively change the term limits law which has twice been voted on in City wide referendums. Consistent with that view, the Association urges the Charter Revision Commission to give thoughtful consideration to the term limits, but whatever proposal that is made should respect the prior votes on the topic and once the voters have spoken again, that determination should be legislatively protected from future legislative or mayoral change without a referendum.

This Charter Revision Commission has a clear mandate to address term limits. That was the promise to New Yorkers in 2008 when the New York City Council changed the Charter term limits provision from two terms to three to enable Mayor Bloomberg to run for a third term.[1] Given the extraordinary nature of that action, there is no question that term limits needs to be at the top of this Commission's agenda.

The Association recognizes that there is a fair ground for debate on all sides of term limits. What is the right limit, and whether limits should be applied equally, differentially or at all to the legislative and executive branches of government are difficult questions on which there is abundant literature and much difference of opinion among the public, good government organizations and civic groups in New York.[2]

A. The Particular Importance of Term limits With Respect to the City Council

The Association believes that the term limits issue has particular relevance for the City Council— both in terms of the Council's diversity and also in terms of its ability to serve as an effective counterweight to the Mayor. We recognize that since term limits have been in place, there has been the positive development of increased racial and ethnic diversity in the City Council (although little change in the overwhelming Democratic Party dominance). However, we also recognize that there are some potential negative effects of a two term limit applied to the Council. We recommend that should term limits be retained, the ideal design would entail extending the Council's limitations by at least one term longer than the

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[1] *Term Limit Guru Lauder, Bloomberg Reach Deal*, wcbstv.com, October 9, 2008 (http://wcbstv.com/politics/bloomberg.third.term.2.835987.html); Chris Bragg, *Course of Bloomberg's Charter Commission Still Uncharted*, cityhallnews.com, December 15, 2009 (http://www.cityhallnews.com/newyork/article-1064-course-of-bloombergs-charter-comission-still-uncharterd.html).

[2] See e.g. Mayraj Fahim, *The Arguments For And Against Term Limits*, City Mayors Government, November 10, 2008 (http://www.citymayors.com/government/term-limits.html); Henry Stern, *The Case For Term Limits*, New York Civic, January 11, 2010 (http://nycivic.blogspot.com/2010/01/case-for-term-limits.html); Mark Berkey-Gerard, *Term Limits Revisited*, Gotham Gazette, March 14, 2005 (http://www.gothamgazette.com/article/20050314/200/1348).

Mayor's. We urge the Commission to give particular attention to this facet of the term limits debate. Specifically:

•A two term limit applied to the Council raises the risk of depriving the Council of the benefit of elected institutional knowledge, i.e., a body of legislators who have gained expertise in substantive areas, familiarity with the particulars of the legislative process and budget, and seasoned political skills. As a result, there is a concern that the staff will grow disproportionately influential as a result of the staff's longer-term expertise.

•In addition, it has been observed that a two-term limit applied to the Council has created pressure on individual Council members to "make their mark" as early and as often as possible. There is therefore a potential danger that the two-term limit leads to a disproportionate number of "attention-grabbing" legislative proposals, and an inadequate number of fully deliberated or necessary, but less high-profile, legislative work. As a corollary to this, a two-term limit on the Council may force the early end to otherwise promising careers in public-service, given the limited number of other elected positions available to Council members who have served their limit.

•Finally, there is a significant argument that a two-term-limited City Council cannot effectively check, or even somewhat counter, the power of New York City's extremely strong Mayoral authority. Without seasoned legislators and the luxury of time, the City Council simply is not a strong enough body to serve as a legitimate counterweight. Therefore, should term limits be retained, the ideal design would entail extending the Council's limitations by at least one term longer than the Mayor's.

B. Protecting the Voters' Term Limits Decision from Legislative and Mayoral Change

As the Commission is well aware, the voters of New York City have twice considered these issues and voted that their elected officials should be limited to two terms. The 2008 legislative change to the term limits charter provision now being considered by the Commission was the exact measure that the voters of this City rejected in 1996. This Association, along with many civic, good government, and academic groups,[3] opposed the 2008 legislative change. At that time we issued a statement[4] which made the following conclusion:

> It is critically important that voters have confidence that when they vote on a matter, it counts. Taking the decision on a change in term limits away from the voters who have twice voted on them can only serve to engender cynicism for the political process, derogate the referendum process and potentially serve to discourage voter participation in the future. This is particularly so

[3] See e.g., Press Release *Citizens Union Reaffirms Its Opposition to City Council Action On Term Limits*, September 5, 2008 (http://www.citizensunion.org/www/cu/site/hosting/Statement/09_05_08_term_limits.html).
[4] New York City Bar Association, *Statement on Proposals to Change New York City's Term Limits Law*, (http://www.nycbar.org/pdf/report/20071632.pdf).

here where a majority of the Council members who would vote on the change are personally affected. It would be a tall order to convince New Yorkers that in taking this matter unto themselves after having been twice affirmed by the voters, that the Council had only the public interest in mind. In short, a change in term limits by legislative action would be bad policy, contrary to principles of good government and potentially damaging to our City institutions.

The Association has some concern that the mayoral/legislative reversal of voter-approved term limits undermined the confidence of New York City voters in the system. We cannot know if the legislative change was the cause of the historic lows in voter turnout observed during the 2009 Mayoral and City Council elections that followed it, [5] but the numbers are troubling, and we hope not a sign of enduring voter disaffection. Critically important to the restoration of voter confidence in the system is that whatever the voters decide on term limits as a result of this Commission's work, that it be legislatively protected—ideally both in the Charter and as a matter of State law—from any future legislative and mayoral change without a public referendum.

II Budgetary Independence for Borough Presidents and the Public Advocate

In addition to the Council, the Borough Presidents are another important structural counterweight to the City's mayoral authority. The Association believes, however, that the Borough Presidents cannot effectively perform this function without budgetary independence.

Borough Presidents often play a critical mediating role, most often in controversial land-use issues. In these as well as other situations, the Borough Presidents serve as necessary problem solvers who must navigate a resolution acceptable to both local interests—the community, community boards and individual Council members—and the Mayor's office, which takes a citywide perspective. This is an extremely valuable function, and one the Charter should ensure can be performed effectively.

Under the current version of the Charter, however, the Borough Presidents must negotiate their office budgets with the Mayor and City Council each year. This requirement necessarily reduces the independence of the office. In addition, the fact that the Mayor and City Council can always reduce the resources of the Borough Presidents gives the Mayor and Council the ability to undermine a Borough President's ability to perform his/her duties in the event the Borough President disagrees with the Mayor or Council on critical policy matters. This certainly undercuts the ability of the Borough Presidents to serve as an effective check on Mayoral power.

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[5] David Chen & Michael Barbaro, *Mayor Wins 3rd Term in Unexpectedly Close Race*, The New York Times, November 4, 2009 (http://www.nytimes.com/2009/11/04/nyregion/04mayor.html) ; *The Audacity of Bloomberg*, The Wall Street Journal, November 5, 2009 (http://online.wsj.com/article/SB10001424052748704013004574517690958033958.html); Russ Buettner and Ray Rivera, *Incumbency Fails to Hold Off Challenges From Cast of Newcomers to Council*, The New York Times, September 16, 2009.

The Association therefore agrees with those who have recommended that budgets of the Borough Presidents should be set out, ex ante, through a predetermined formula that is tied to an independent measure. For instance, the budgets could be set as a fixed percentage of the City's budget, or the Council's budget, in the same way that the Independent Budget Office's budget is fixed as a percentage of the Office of Management and Budget's budget.

For the same reasons, there is an argument that that the Public Advocate's budget should similarly be independent. However, that argument cannot be evaluated without also considering the role of the Public Advocate generally in City government and whether that office's authority should be strengthened or diminished. To the extent the Commission makes recommendations aimed to strengthen the office of Public Advocate, and so enhance its ability also to contribute to the balance of power in City government, including budgetary independence would be an important piece of such a recommendation.

ELECTION LAW RECOMMENDATIONS

I Timing of Municipal Elections

The New York State Constitution provides that municipal officers are to be elected on the Tuesday succeeding the first Monday in November in odd-numbered years.[6] The Charter Commission cannot change the timing of our elections to have municipal elections separate and apart from elections for other offices. The Commission can, however, revise the political calendar so that primary elections for our city officials are held in the spring. The purpose would be two-fold: (1) increase voter participation in the all-important primary elections; and (2) provide sufficient time between the primary and general elections for the electorate to become better informed as to their choices on Election Day.

Until the 1970s, New York often had June primaries. This permitted candidates to campaign during the spring and more easily attract voters' attention. In September, voters are either returning from vacation, focused upon the beginning of the school year, or preparing for religious holidays; and no matter the economic status of the voter, very few of them seem to pay attention to the candidates until after Labor Day. Thus, a September primary ensures a relatively low turnout for a primary election that is often tantamount to winning office.

A June primary, on the other hand, affords the opportunity for a more focused electorate, and higher turnout.[7]

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[6] This provision was enacted so that the timing of municipal elections, specifically for New York City officials, would not coincide with statewide elections. *See "GOP Acts to Bar City-State Tickets,"* New York Times, Jan. 18, 1951.

[7] A spring primary has been supported by the City Bar's Election Law Committee for almost twenty years. *See "Statement on Spring Primaries,"* Special Committee on Election Law, June 1992.

Furthermore, it would enable New York City to hold primary elections in a manner that is consistent with a new federal law that permits overseas military personnel to have forty-five days to receive and submit their ballots for the general election. September primary elections would thwart compliance with this statute. Although this timetable pertains to federal elections, there is a great likelihood that future primaries in New York will have to be moved back at least several weeks, not later than mid-August.[8] Obviously, that would decrease voter turnout; the State Legislature, therefore, is likely to consider a spring primary in any event.

However, irrespective of if and how the State Legislature responds to the military voting law, the City of New York can be responsive to the issue by moving the primary. After all, overseas military voters, while not yet having the same legal protection in a municipal election, can be supported by this Commission.

On both scores, then, in the interest of increased voter turnout as well as for the sake of overseas military voters, the Commission ought to consider moving the municipal election primaries to June.

II Making it Easier to Run for Office.

Although ballot access laws have been periodically liberalized over the years, there is still far too much election law litigation in New York, estimated to constitute more than fifty percent of the nation's. In addition to limiting litigation, liberalized ballot access rules make it easier to run for office. The current system of petitioning is meant to show that there is significant support for a candidate; however, the Charter Commission has the authority to dramatically reform ballot access requirements so that petitioning is not the sole avenue of getting on the ballot for a legitimate candidate.[9] We recommend two changes that would further liberalize ballot access: allowing any candidate who has qualified to receive public matching dollars to be placed on the ballot and in a non-competitive race allowing a notice of intent to run by a singular candidate to suffice for entry on the ballot.

A. Automatic ballot access for anyone qualified for public matching dollars

Any candidate who has qualified to receive public matching dollars in New York City's Campaign Finance Program ought to be placed on the ballot automatically. Rather than be required to petition, a candidate who has raised *x* amount of dollars from *y* number of contributors from within the political district she is running to represent has already proven that she is a "legitimate" candidate. Meeting those criteria entitles the candidate to public matching dollars; there is no reason this cannot also be used as a barometer of sufficient support to run. Indeed, contributions are easily understood as more indicative of support than a signature from a stranger who may or may not eventually vote for the candidate.

[8] *See "New York's 2010 Primary Could Arrive a Little Early,"* New York Times, Aug. 29, 2009.
[9] Constitutional jurisprudence provides that even where there are other methods of ballot access, petitioning is required as an alternative.

Were this method to be adopted, then the time-line for which a candidate qualifies for matching funds, and also the ballot, would have to be moved up. This is because candidates must still have the option to petition if they desire to do so, or if they have failed to meet the matching fund threshold.

B. Notice of Intent to Run

A second approach is to institute a "Notice of Intent to Run."[10] This procedure would allow a candidate to file with the Board of Elections a Notice of Intent two weeks prior to the first day of scheduled petitioning. If no competitor files such a Notice, then the candidate is automatically placed on the ballot. If a competitor does, then both must petition.

While this would permit a candidate to avoid the petitioning process, it might appear that the candidate who files a lone Notice has not demonstrated that she is a "serious" candidate. On the other hand, the fact that no one else files a Notice to run against her surely evidences that the candidate has substantial support. The only downside to this reform is that very few races are non-competitive.

Either of these reforms would be a vast improvement over the current system.

III Reforming the Petitioning Process

Whether the avenue to the ballot is radically reformed or not, in that petitioning one's way onto the ballot always must be an alternative option, there are numerous reforms to ease that process as well.

A. Signing more than one candidate's petition

Voters should be able to sign a petition for more than one candidate running for the same office. The present law permits only one signature, and if a voter mistakenly signs a petition for a competitor, the earlier signature counts; if the voter signs two on the same day, neither counts. In that a candidate often appears on petitions with several other candidates, the voter can easily make such a mistake, leading to an invalidation of the signature. This mistake has become great fodder for election lawyers attempting to knock a candidate off the ballot. Moreover, the requirement has no serious rationale. Prior to 1977, the petition required that a signer intended to support the candidate on the petition. On the other hand, for the last thirty-five years, a signature only evidenced that a voter would like a candidate to get on the ballot. And as we know anecdotally, voters prefer to have multiple candidates on the ballot. Thus, there is no legal or practical reason to maintain the prohibition that a voter may sign only one petition.

B. Easing Correction Requirements

[10] This approach was previously advocated by the City Bar's Election Law Committee twenty-five years ago and reiterated this past month, *See* Special Election Law Committee of the Association of the Bar of the City of New York, *Ballot Access in New York: The Petition Process* (Vol. 41 No. 6 *The Record* 1986), at p. 20.

Corrections to the information on the petition should be allowed without the circulator's initials. The law used to require that any and all alterations on the petition sheet required the circulating witness to place her initials next to the change. The law was modified to permit corrections to the signer's address to be made without any initials; and case law has allowed a correction of an address or the tally of signatures on the subscribing witness statement to be made without initials if it is explained by the circulating witness in court. Most of election law litigation revolves around this nitpicking procedure – even when, as is usually the case, the voter's signature on the petition is not claimed to be forged or fraudulent. In other words, many candidates have been thrown off the ballot not because they did not have sufficient number of *bona fide* signatures of registered voters, but because corrections have been made to a date or address without the circulator's initials. This requirement serves no purpose, and we recommend that it should be eliminated to ease the petition process.

C. Elimination of party membership as prerequisite for petition circulator

The requirement that only members of a political party should be able to circulate a petition to obtain signatures for a party nomination should be eliminated. It used to be the law that only members of the political party who resided within the political district from which a candidate was seeking office could circulate designating petitions. That law was challenged and the courts held a party enrollee living anywhere in the state may obtain signatures for any candidate seeking her party's nomination for public office. The requirement of party enrollment is currently being challenged as well. In that Notaries Public and Commissioner of Deeds can circulate petitions on behalf of any candidate for the nomination of any party within the state, there is no logical reason to restrict those who are not notaries or commissioners. Eliminating this requirement was advocated by the City Bar's Election Law Committee twenty-five years ago,[11] and it is a reform still worth adopting. This change would increase exponentially the pool of witness circulators and reduce election law litigation. And it would have no impact upon the requirement that voters who sign petitions to place a candidate on the ballot must be enrolled party members from within the relevant political district.

D. Reduction of Number of Signatures

The number of signatures required on a petition should be reduced. Currently, a candidate running for City Council is required to obtain either 900 signatures, or 5% of the enrollees of the relevant party from the district, whichever is fewer; a candidate for Borough President must obtain 4000 signatures, or 5% of her party's enrollees of the borough; and a candidate for city-wide office must obtain 7500 signatures, or 5% of the enrollees of the party in the city. While these requirements are not prohibitive, there is no reason why the numbers should not be decreased. Election lawyers routinely advise that a candidate obtain at least three or four times the required number; after all, there are numerous ways to invalidate a signature or a page. Reducing the required number, therefore, would decrease the time, effort and money a candidate must expend on petitioning. The reduction of these

[11] *Id.*, at p. 21.

required numbers of signatures by one-half would still preserve the rationale of petitioning while mitigating the dubious effort involved.

While the petition process has improved since the City Bar first addressed these issues a quarter-century ago, the above recommendations would reduce the burdensome, frivolous litigation that now accompanies every campaign season and give the electorate the wider choice of candidates to which it is entitled.

IV Making it Easier to Vote

Reforming when political party primaries are scheduled, establishing alternative means for candidates to get on the ballot, and further liberalizing the basic petitioning process all would open the electoral process. More people would be able to be engaged in campaigns, and more voters would have an opportunity to focus upon the issues between and among the candidates.

There are other structural changes that would enhance voter participation that should be reviewed by the Commission.

A. Early Voting

We have seen throughout the country a move toward early voting, whereby voters can choose to cast their ballot a week or two prior to a primary or general election. As a result of a Consent Decree entered into by the parties in a Voting Rights Act lawsuit brought against the Village of Port Chester, New York, that village has recently employed early voting for the first time in New York.[12] On June 15th, Port Chester voted for new village trustees, and there was early voting a week before. The Commission should evaluate its feasibility for New York City. During the last decade, we have witnessed throughout the country how early voting has enabled more people to vote, and to do so more easily.

B. Instant Runoff

Pursuant to state law, city-wide officials must receive forty percent of the vote in a primary election to advance to the general election. If the winning candidate's plurality is less than 40%, then we have a run-off two weeks later. This procedure is an administrative nightmare for the Board of Elections, the candidates and the public. The votes must be canvassed accurately; all absentee, affidavit and military ballots must be counted; candidates in close races have the right to challenge results in court; and all the voting machines need to be re-set (*after* the court cases) and re-delivered. Two weeks for this process is an exceedingly short period of time for all of these important tasks to be implemented accurately.

The better procedure would be to employ "instant runoff," whereby a voter can indicate her first and second choice at the primary election. This would avoid a run-off, and

[12] Port Chester will also be employing "cumulative voting" in the upcoming election in order to address the Voting Rights Act issue of alleged discrimination against its Hispanic population.

can be enacted in a manner to avoid the express provision of the Election Law. Instant run-offs are used in other jurisdictions around the country, and are even used by the Academy Awards.

C. No-Excuse Absentee Voting

The current law permits voters to vote by absentee ballot under certain circumscribed conditions. In New York City, a person must be out of the city, or unable to vote at her polling place due to disability or illness.[13] The City Bar's Election Law Committee issued a report last month advocating a change in the law to permit absentee voting for any reason.[14] There is some dispute among advocates whether or not a New York State constitutional amendment is required, but the state legislature has "solved" this problem on several occasions by allowing for "special ballots" that essentially permit absentee voting for reasons other than those indicated by the state constitution.[15] In other words, rather than calling these absentee votes "absentee ballots," they are referred to as "special ballots," and allow certain voters to vote absentee even if they are not physically outside of their county on election day, or physically disabled or ill. These include Board of Elections personnel, those whose religious beliefs prevent them from entering a particular polling place and certain victims of domestic violence.

Given this framework, New York City can institute special ballots for those who simply wish to vote for their city officials by absentee. The Charter can include a provision for "Special Municipal Election Ballots." We believe this would pass muster under the constitutional and case law, and it would have the affect of increasing turnout in our municipal elections.

D. Same Day Registration

Just as there is a constitutional provision relating to absentee voting that has been circumscribed through the use of "Special Ballots," the New York State Constitution's prescription that registration must be effected on or before ten days prior to an election[16] can also properly be overcome. The Charter can provide for Municipal Election Registration, which would allow for new registrants to vote in a primary and general municipal election. (this registration would not apply to those who wish to switch parties, only to new registrants.) The value of doing so is to increase voter participation. There are many would-be voters who "wake up" to the fact that there is an election being held and that they wish to vote. That is why there are various states in our country that permit same-day registration, and one state (North Dakota) that does not even require any pre-election day registration.

Although we know of no examples of fraudulent voting in New York by those who are not registered or who are pretending to be someone else, we can put certain ID controls

[13] *See* N.Y. Const. art. II, § 2.
[14] Election Law Committee of the New York City Bar Association, *"Instituting No-Excuse Absentee Voting in New York,"* May 2010.
[15] *See* N.Y. Elec. Law §§ 11-300, *et seq.*
[16] N.Y. Const. art II, § 5.

into place to disincentivize a misuse of same-day registration. Same-day registrants would vote by Affidavit Ballot, and their applications and ID material would be scrutinized by a bipartisan team of election inspectors prior to the vote being canvassed.

The benefits are great; the risks are minimal. We recommend that the Charter Commission review the legal and logistical issues. Same-day registration could significantly increase voter participation in the New York City.