



TESTIMONY BY JERRY H. GOLDFEDER

2019 NEW YORK CITY CHARTER COMMISSION

**City Hall-Council Chambers
City Hall Park
New York, NY, 10007**

September 27, 2018

I want to convey my best wishes to Chair Gail Benjamin and members of the City Council's Charter Revision Commission. In that this is the first time the New York City Council has exercised its authority under the state's Municipal Home Rule Law to create such a Charter Commission, you have an historic role for our city's future.

We have had numerous mayoral commissions in our history, but at no other time have we had one whose membership was required to and did represent all the elected officials of New York City. Public Advocate Tish James and Borough President Gale Brewer are to be congratulated for conceiving of a commission such as this, and, of course, Speaker Corey Johnson and the Council for creating it. Further, most mayoral commissions are created with specific, narrow goals in mind, and those commissions rarely if ever stray from such direction. This Commission, on the other hand, has received no such assignment, and has not been directed to focus on any particular issue to the exclusion of others. Indeed, your mandate is what the law requires: to review the entire Charter and to revise it as substantially as you see fit. In this respect, your task is very much like the commissions of the late 1980s when a fundamental

review of the Charter was undertaken under the leadership of Richard Ravitch and Fritz Schwarz. I have every confidence that you will acquit yourselves admirably in your historic opportunity.

I testify tonight as a representative of the New York City Bar Association. I have had the privilege of serving as Chair of its Committee on New York City Affairs for the last three years. During that time, as well as during the last thirty five years in a variety of professional roles, including as an election law practitioner and Adjunct Professor of Law at Fordham Law School, I have studied the Charter and Charter revision. In fact, as far back as the mid-1980s, I participated in a group called Citizens for Charter Change, led by then-Councilperson Ruth Messinger, and I led a group to initiate a Citizens Charter Revision Commission pursuant to the Municipal Home Rule Law.¹ I also have testified at various Charter Commission hearings over the last number of decades, and have written and lectured extensively on a variety of proposed Charter amendments.²

So I am especially pleased to have the opportunity to talk with you tonight about your historic opportunity.

The City Bar offers what I call our “Democracy Agenda for New York City”. This includes taking the bold, but wholly warranted, step of enhancing voting opportunities in New York City elections. As everyone on this Commission knows, the New York state legislature has failed or refused to enact meaningful voting reform for many years. We have a woefully restrictive set of election laws. Thirty seven states have early voting;³ New York does not.

¹ Bruce Lambert, *Political and Civic Group Calls for Second Panel on Charter*, N.Y. Times, June 15, 1987.

² See, e.g., Jerry H. Goldfeder, *Two Powerful Weapons in de Blasio’s Arsenal to Take On Albany*, City and State, January 1, 2014.

³ <http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx>

Twelve states and the District of Columbia have enacted automatic registration;⁴ New York should at least provide the opportunity to register on the eve of elections. Twenty six states and Washington D.C. allow no-excuse absentee voting;⁵ we should permit it. There are many states that allow open primaries;⁶ New York voters should not have to wait almost a year to change political party affiliation. And Instant Run-off Voting, used in fifteen cities and the State of Maine, would eliminate an extra trip to the polls and save taxpayer dollars; this was used in New York City School Board elections.⁷

New York City need not wait for Albany to act. This Commission can – in one dramatic move – embrace these voting procedures for our municipal elections. Each of these reforms, and all of them taken together, would be a giant step for democracy in New York City. Both the City Bar Report and my proposed § 1057-g of the Charter provide a set of specific goals and procedures to implement enhanced registration and enrollment opportunities, early voting, instant run-offs and no-excuse absentee voting. With one comprehensive stroke, this Commission can create more robust elections by making it easier to register and vote.

The City of New York has the authority to enact such reforms in municipal elections, as articulated by various experts and disinterested parties, including the courts,⁸ a former New York Attorney General,⁹ and a former New York City Corporation Counsel.¹⁰ Thus, for example, over

⁴ <https://www.brennancenter.org/analysis/automatic-voter-registration>

⁵ http://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#no_excuse

⁶ <https://www.openprimaries.org/>

⁷ See Press Release, Fairvote, May 1, 2018.

⁸ See *Roth v. Cuevas*, 82 N.Y.2d 791(1993); *McDonald v. New York City Campaign Finance Board*, 117 A.D.3d 540 (1st Dep't. 2014).

⁹ *Letter from Attorney General Robert Abrams to Mayor Edward I. Koch*, October 21, 1987 (on file with the Municipal Archives of the New York City Department of Records and Information Services).

¹⁰ *Memorandum from Corporation Counsel Peter L. Zimroth to Mayor Edward I. Koch and City Council Vice Chair Peter Vallone*, August 13, 1987 (on file with the Municipal Archives of the New York City Department of Records and Information Services).

the years we have established in our municipal elections a highly regarded campaign finance program; term limits; reduced petition signature requirements for ballot access; and non-partisan elections for vacancies.

The Democracy Agenda we are proposing would be implemented using a municipal ballot on which candidates for municipal offices would appear.¹¹ Candidates for all other public offices (*e.g.*, District Attorney, Supreme Court Justice) or party positions (members of a party committee, elected at the primary elections) would be listed on a separate ballot. The City's Board of Elections would have to update its voter database to indicate who is eligible to vote at a specific election, but we do not believe the required administrative work is unduly burdensome. In fact, this procedure would be no different from the Board's current practice of indicating on its database which voters must present an ID or which voters have been challenged.¹² Logging in additional information relating to enhanced registration or new party affiliation seems easily and readily manageable. Moreover, since the proposed reforms are contemplated as taking effect in the 2021 municipal elections, the Board has at least two years to consider and adopt necessary procedures to implement these proposals, a period of time we believe should be sufficient to effectuate these reforms.

Of course, we acknowledge that the better course would be to have Albany enact this Democracy Agenda for all public offices and party positions throughout the state. That would be administratively easier and avoid the necessity of educating voters as to the separate procedures for municipal elections. But you should not be deterred from enacting these reforms because

¹¹ Municipal offices are Mayor of the city of New York; Public Advocate of the city of New York; Comptroller of the City of New York; Borough President of the Borough of Manhattan; Borough President of the Borough of Brooklyn; Borough President of the Borough of Queens; Borough President of the Borough of Staten Island; Borough President of the Borough of the Bronx; and Member of the City Council of the City of New York.

¹² N.Y. Elec. Law §8-302.

you are waiting for a more perfect solution. Indeed, if this Commission adopts the Democracy Agenda for New York City, it may very well incentivize Albany to enact such reforms statewide for all elections.

I trust that the Commission will seriously consider this proposal, and, on behalf of the City Bar, we appreciate all your efforts to make New York City government more responsive to the needs of our eight million people.



NEW YORK
CITY BAR

COMMITTEE ON NEW YORK CITY AFFAIRS

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CHAIR
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July 10, 2018

Hon. Cesar Perales
Chair
New York City Charter Revision Commission
1 Centre Street
New York, NY 10007

Hon. Gail Benjamin
Chair, New York City Charter Revision Commission
c/o Office of the Speaker
City Hall
New York, NY 10007

Re: Election-Reform Related Proposals for Consideration in the City Charter Revision Process

Dear Chairs Perales and Benjamin:

The New York City Bar Association (“City Bar”) intends to establish a Task Force on the City Charter for the purpose of commenting upon various proposals submitted to your respective Commissions, and, ultimately, those that you recommend to be placed on the ballot. In anticipation of this, the City Bar’s Committee on New York City Affairs writes to express its immediate and longstanding support for certain election reform-related proposals.¹

As you are well aware, for many years, voter participation in New York has ranked far below most other states in both national and local elections.² The City Bar has consistently – and

¹ The New York City Affairs Committee established a subcommittee to research and draft a report on the issues herein. The subcommittee was chaired by John Owens; other members included Mary Bruch, Michelle Grady and Laura Wood. A draft version of this letter was approved by the full committee and endorsed by the Committee on Government Ethics and State Affairs

² In 2016, with two New Yorkers at the top of the presidential ballot, our state still ranked 41st out of 50 in terms of turnout. See Matthew Hamilton, “Report: New York ranks 41st in voter turnout in 2016,” Times Union, March, 19, 2017, <https://www.timesunion.com/local/article/Report-New-York-ranks-41st-in-voter-turnout-in-11009879.php>; see also *N.Y. State Bar Assn. Special Committee on Voter Participation, Final Report* (2013), available at <http://www.nysba.org/voterreport/> (“In both national and local elections voter participation in the State of New York has for over a decade been far below that of most other states. New York also compares unfavorably to other states in the percentage of its eligible citizens who are registered to vote[.]”) (citations omitted).

persistently – supported election reform, advocating for a variety of proposals, including, for example (1) enhanced registration procedures, with more flexible deadlines; (2) “no excuse” absentee voting; (3) early voting; (4) instant run-off voting; and (5) felony re-enfranchisement.³

The state legislature has failed or refused to enact these reforms. However, pursuant to the state constitution,⁴ the New York State Municipal Home Rule Law (MHRL)⁵ and other home-rule statutory provisions, the law permits localities to enact their own reforms, provided they are neither preempted by a directly contradictory state statute or a state constitutional prohibition. Specifically, MHRL permits local law-making as it relates, *inter alia*, to

- (1) The powers, duties, qualifications, number, mode of selection and removal, terms of office, compensation, hours of work, protection, welfare and safety of its officers and employees....
- (2) In the case of a city, town, or village, the membership and composition of its legislative body.
- (3) The transaction of its business....
- (12) The government, protection, order, conduct, safety, health, and well-being of persons or property therein.⁶

In fact, when the City’s exercise of these powers has been questioned, the courts, the New York State Attorney General and the Corporation Counsel of the City of New York have upheld the power of the City to enact such reforms. Court decisions include *Roth v. Cuevas*, 82 N.Y.2d 791(1993)(term limits); *McDonald v. New York City Campaign Finance Board*, 117 A.D.3d 540 (1st Dep’t. 2014)(campaign finance law); *Matter of Blaikie v. Power*, 13 N.Y.2d 134 (1963)(at-large elections for certain city council seats); and *Johnson v. City of New York*, 274 N.Y. 411, 430 (1937) (proportional representation). See also Opinion Letters from Attorney General Robert Abrams and Corporation Counsel Peter L. Zimroth: *Letter from Attorney General Robert Abrams to Mayor Edward I. Koch*, October 21, 1987 (on file with the Municipal Archives of the New York City Department of Records and Information Services); *Memorandum from Corporation Counsel Peter L. Zimroth to Mayor Edward I. Koch and City Council Vice Chair Peter Vallone*, August 13, 1987 (on file with the Municipal Archives of the New York City Department of Records and Information Services).

Thus, the City of New York has the authority to “adopt and amend local laws not inconsistent with the provisions of the Constitution or not inconsistent with any general law relating to its property, affairs or government[.]”⁷

³ See *Recommendations on Governmental Structure and Election Issues for the 2010 Charter Revision Commission*, New York City Bar Association. (June 2010), available at <http://www.nycbar.org/pdf/report/uploads/20071967-RecommendationsonGovernmentalStructureandElectionIssues.pdf>.

⁴ N.Y. Const., art. IX.

⁵ N.Y. MHRL § 10(1)(i).

⁶ N.Y. MHRL § 10(1)(ii)(a).

As such, in recent history, the City has adopted various laws changing the manner by which municipal public officials are elected, including its public campaign finance matching program, non-partisan special elections, term limits, and reduced petition signature requirements for ballot access. These reforms were effected pursuant to the City's power under the state constitution and the MHRL by amending its City Charter. Additional reforms can be enacted in the same manner.

In that the Mayor of the City of New York has appointed a Charter Revision Commission pursuant to his authority under MHRL § 36(4), and the City Council has likewise done so pursuant to MHRL § 36(2), we wish to preliminarily weigh in on certain proposals already before you. Specifically, we urge each Commission to seriously consider the following changes in municipal elections which the Bar Association has previously endorsed. If enacted, these reforms would make it easier for eligible New York City voters to exercise their fundamental right to vote, which would, we hope, facilitate more robust campaigns and improved voter turnout.

Expanded Registration and Enrollment Procedures

A proposal to extend a new voter's opportunity to register until ten days before an election has been submitted to the Mayoral Commission. Currently, state law provides that a new voter must register twenty-five days in advance of the election.⁸ However, the state constitution requires only that registrations must be effected by the tenth day preceding an election.⁹ Thus, similar to New York City's enactment of its own ballot access, campaign finance and candidate eligibility requirements, it may permit potential voters to register to vote in municipal elections as it sees fit, provided, of course, that the cut-off date is consistent with the state constitution. Extending the registration cut-off to ten days prior to an election would undoubtedly allow more potential voters to cast a ballot.

In addition, the City Charter may also be amended to extend the time for voters to change their enrollment to vote in a primary election. One proposal would allow a New York City resident who is otherwise eligible to vote in a primary election but is enrolled in a different political party or is unaffiliated with any party to change enrollment and vote in his or her new party's primary if such change of enrollment is effected no later than thirty days before such primary election. This reform for municipal elections would be a significant liberalization of state law, which requires a change of enrollment to have been effected twenty five days prior to the previous year's general election. The proposal would obviously permit voters to have greater choice of enrollment, while still protecting political parties from last-minute, wholesale "party raiding."

Expanded voter registration and enrollment procedures would allow greater participation, and have the potential to improve turnout.

⁷ N.Y. MHRL § 10(1)(ii).

⁸ N.Y. Elec. Law § 5-210 (3).

⁹ N.Y. Const., art. II, § 5.

No-Excuse Absentee Voting

New York allows absentee ballots for registered voters who cannot make it to the polls on Election Day because of occupation, business, studies, travel, imprisonment of non-felons, illness, disability, and hospitalization or residency in a long-term care facility.¹⁰

Although there is a state law that addresses this issue, this fact does not prevent the City from “supplementing the general law” in a reasonable manner. The provision on absentee voting in the Election Law does not bar additional provisions of law.¹¹ A local law that “covers the same subject matter as a State law by supplementing the general law with additional reasonable requirements is not void for inconsistency.”¹² Thus, just as New York City has supplemented state law relating to contribution limits, petition signature requirements and the manner by which vacancies are filled, it may also enact its own version of absentee ballot requirements.

Early Voting

New York’s Election Law does not provide for early voting, and a proposal for early voting sites in each of the fifty one council districts and the borough boards of elections has been submitted. Currently, some three dozen states permit it, and New York’s Election Law is silent

¹⁰ N.Y. Elec. Law § 8-400:

“1. A qualified voter may vote as an absentee voter under this chapter if, on the occurrence of any village election conducted by the board of elections, primary election, special election, general election or New York city community school board district or city of Buffalo school district election, he or she expects to be:

“(a) absent from the county of his or her residence, or, if a resident of the city of New York absent from said city; or

(b) unable to appear personally at the polling place of the election district in which he or she is a qualified voter because of illness or physical disability or duties related to the primary care of one or more individuals who are ill or physically disabled, or because he or she will be or is a patient in a hospital; or

(c) a resident or patient of a veteran’s health administration hospital; or

(d) absent from his or her voting residence because he or she is detained in jail awaiting action by a grand jury or awaiting trial or confined in jail or prison after a conviction for an offense other than a felony, provided that he or she is qualified to vote in the election district of his or her residence.”

¹¹ See N.Y. Elec. Law § 1-102:

“This chapter shall govern the conduct of all elections at which voters of the state of New York may cast a ballot for the purpose of electing an individual to any party position or nominating or electing an individual to any federal, state, county, city, town or village office, or deciding any ballot question submitted to all the voters of the state or the voters of any county or city, or deciding any ballot question submitted to the voters of any town or village at the time of a general election. Where a specific provision of law exists in any other law which is inconsistent with the provisions of this chapter, such provision shall apply unless a provision of this chapter specifies that such provision of this chapter shall apply notwithstanding any other provision of law.”

¹² *Id.*

on this issue. In that “[s]ilence on an issue should not be interpreted as an expression of legislative intent,”¹³ the City may enact its own version of the procedure.

Early voting in so many states has proven to invigorate campaigns and increase voter turnout. This reform has the added benefit of facilitating voting on Election Day by reducing waiting time and generally improving voting procedures in the polling place.

Instant Run-Off Voting

Currently, under state law, candidates for New York City city-wide office (mayor, public advocate, comptroller) must receive 40% of the vote in a primary election to be nominated by a political party and advance to the general election. If no candidate for such office receives at least forty percent of the vote in the primary election, the two leading candidates will participate in a run-off election to determine their party’s nominee for the general election.¹⁴ The run-off election must take place two weeks after the primary election,¹⁵ except there has been already been one instance when the run-off has been postponed because of insufficient time to administer such election.¹⁶

The legislative history of the statute contemplates nomination of a candidate with broad support by voters in his or her political party. Instead of conducting run-off primaries if no candidate receives forty percent, an Instant Run-off Voting provision for our municipal elections is designed to show such support for the winning candidate. A detailed proposal, modeled upon Council Member Brad Lander’s bill in the City Council, has already been submitted to the Mayoral Commission.¹⁷ This reform would eliminate the need for a separate run-off election, alleviate the challenges faced by the Board of Elections in administering a separate run-off election, and save the city millions of dollars. Currently, about a dozen cities and the state of Maine use this procedure.

* * *

These reforms would be implemented using a municipal ballot on which candidates for only municipal offices appear.¹⁸ Candidates for all other public offices (*e.g.*, District Attorney, Supreme Court Justice) or party positions (members of a party committee, elected at the primary elections) would be listed on a separate ballot. We acknowledge that the City’s Board of

¹³ *Roth v. Cuevas*, 603 N.Y.2d at 968.

¹⁴ N.Y. Elec. Law §6-162.

¹⁵ N.Y. Elec. Law §8-100(1)(b).

¹⁶ Kate Taylor, *High-Cost Runoff for Public Advocate’s Post Prompts Calls for Reform*, New York Times, (2013) <https://www.nytimes.com/2013/09/30/nyregion/high-cost-runoff-for-public-advocates-post-prompts-calls-for-reform.html>

¹⁷ Int. 0130-2018, <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3331744&GUID=C3185645-9437-40A8-B334-B72CA18DD21D&Options=ID|Text|&Search=130>.

¹⁸ Municipal offices are Mayor of the city of New York; Public Advocate of the city of New York; Comptroller of the City of New York; Borough President of the Borough of Manhattan; Borough President of the Borough of Brooklyn; Borough President of the Borough of Queens; Borough President of the Borough of Staten Island; Borough President of the Borough of the Bronx; and Member of the City Council of the City of New York.

Elections would, therefore, have to update its voter database to indicate who is eligible to vote at a specific election. However, we do not believe the required update is unduly burdensome. In fact, this administrative procedure is no different from the Board's current practice of indicating on its database which voters must present an ID, or which voters have been challenged.¹⁹ Logging in additional information relating to enhanced registration or new party affiliation seems easily and readily manageable. Moreover, since the proposed reforms are contemplated as taking effect in the 2021 municipal elections, the Board has at least two years to consider and adopt necessary administrative procedures to implement these proposals, a period of time we believe should be sufficient to effectuate this change.

On behalf of the members of the New York City Affairs Committee, thank you for your consideration and please do not hesitate to reach out if we can be of assistance.

Respectfully,

A handwritten signature in black ink, appearing to read "Jerry H. Goldfeder", with a long horizontal line extending to the right.

Jerry H. Goldfeder
Chair, New York City Affairs Committee

¹⁹ N.Y. Elec. Law 8-302.