
Volume 58

Issue 1 *Process, Powers, and Lessons for the
Future: 25 Years of New York City Charter
Revisions*

Article 7

January 2013

Learning from Washington: A New Approach to Analyzing the Structure of New York City's Government

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Recommended Citation

DAVID S. YASSKY, *Learning from Washington: A New Approach to Analyzing the Structure of New York City's Government*, 58 N.Y.L. SCH. L. REV. (2012-2013).

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Learning from Washington: A New Approach to Analyzing the Structure of New York City's Government

58 N.Y.L. SCH. L. REV. 71 (2013–2014)

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EDITOR'S NOTE: This article is an edited version of the speakers' remarks. The video of the full panel discussion is available at: <http://www.youtube.com/watch?v=OHkcyagQ4A>. *New York Law School Law Review* has provided citations for some of the information referenced herein.

LEARNING FROM WASHINGTON

New York City has been very well governed—extraordinarily well governed—certainly for the last eleven years. But having said that, of course, there is room for improvement. Sometimes in politics, people, when talking about the possibility of room for improvement, feel driven to say, “If it ain’t broke, don’t fix it.” But I think we can say both that New York City’s Charter¹ has worked quite well and that, with the benefit of experience, there is room for improvement. I would like to first set a “resolved” for this panel discussion about the separation of powers. My “resolved” is that the balance of powers is off: there is an imbalance of power, I would say, in the way the current Charter works.

In terms of New York City’s “strong mayor” system, I think that it is not widely appreciated just how strong of a Mayor New York City has. What the current Charter sets up is a system in which the Mayor largely is the government. People think of the immediate cause of that system as being the U.S. Supreme Court decision in *Board of Estimate v. Morris*,² but it really must have been the legacy, in part, of the fiscal crisis of the late 1970s and of the Ed Koch mayoralty and Koch’s charismatic and thoroughly competent leadership in guiding the city out of the fiscal crisis. That, maybe, set the stage for a strong mayoral approach to city governance. I am just offering that as a hypothesis; I have not researched that.

I will use the budget process as an example of what we have today. The city’s budget process follows a pretty familiar routine, which is that the Mayor puts out a proposed budget—over \$70 billion in 2012, for example³—and a little later the New York City Council adopts the budget, having changed maybe \$200 million to \$300 million of it. Three hundred million dollars out of \$70 billion is a half of one percent. How likely is it that the spending priorities of the Council and the Mayor are off by a half of one percent? I would say that it is not likely.

So I think that tells us something right there. It is also interesting to note that the way the process plays out, typically, is that the Mayor proposes the budget, and then the Council does not even change that proposal by \$300 million, but simply adds \$300 million to it. Now, smart journalists might ask—and I am wondering when one will—where did that new \$300 million come from? Did it materialize out of nowhere?

I guess if they ask that question and follow that train of thought, they realize what really happened was that the Mayor said, “Here’s a budget; I’m going to keep a little bit in reserve so that the Council can add some things.” So the budget process is not so much a debate about spending priorities as it is a kind of guessing game in which the Council tries to guess how much the Mayor is really comfortable adding before he risks the New York State Financial Control Board taking over.

That is not a process that I think generates a healthy public debate about priorities—for example, should there be more police or more homeless shelters?

1. N.Y.C. CHARTER (2013).

2. 489 U.S. 688 (1989).

3. N.Y.C. OFFICE OF MGMT. & BUDGET, EXECUTIVE BUDGET FISCAL YEAR 2014: BUDGET SUMMARY (2013), available at http://www.nyc.gov/html/omb/downloads/pdf/sum5_13.pdf.

Budgets really are choices, of course. You see plenty of people saying, “Spend more on X,” but not so many saying, “X is more valuable than Y.” Concomitantly, there is not a whole lot of scrutiny about the efficacy of spending. Of course, as an agency head myself, I am not necessarily encouraging greater scrutiny of agency spending and how effective it is—be careful what you talk about with something like this. But I think a budget process that forced people to make choices would lead to much more rigorous inquiry into the value of different spending initiatives.

So how would such a change come about? You would have some member of city government—the Comptroller, for example—specify how much revenue is coming into the city over the next year, and then the Mayor and the Council would adopt a budget that spends no more than that. That is just one way to do it. You could do it in different ways, but you need to change the process so that it forces a genuine debate on priorities and on the efficacy of programs.

And I think it is not just with respect to the budget that the balance of powers is out of whack. I think you see the same in terms of legislation and oversight.

I made some notes for this presentation and I titled them “Learning from Washington.” When we study New York City government, we often look to other city governments as models, and the concept of a “strong mayor” comes from the whole literature of municipal government. But New York City deserves to be looked at in the broader context of the great governments of the world. We are the fourteenth largest economy in the world and we have a budget larger than that of most countries, I have to assume.

I think we should look to the federal government for lessons. People often say that Washington is broken. But if you step back, our nation’s founders got it right. A separation of powers that encourages healthy conflict over policy priorities between two branches of government does result in a better, fuller debate, and better decisions for the people. So I think we would be well served by a city government that worked more along those lines. I hope we have a chance to go into that in more depth.

I. DISCUSSION OF THE BALANCE OF POWERS UNDER THE NEW YORK CITY CHARTER

A. Using the Federal Government as a Model

John Avlon: I think it is audacious to suggest being more like Washington as a solution. But let us use that as a kickoff. I will start with Elizabeth Fine. From a City Council perspective, let us go to the heart of this and what David was saying. Does the City Council, in general, acknowledge that the 1989 Charter Revision, with its “strong mayor” system, has benefited the city? Secondly, what are the particular political constraints that are adding to a diminished City Council power?

Elizabeth Fine: Let me begin my answer by noting that President Obama will give the 2013 State of the Union Address soon. And he will deliver with great fanfare his budget up to Congress, and Congress will put it over in a corner and probably will not even look at the budget. What really matters is what the appropriations

LEARNING FROM WASHINGTON

committees for the House and Senate do in Congress. I had the benefit of working for the House Judiciary Committee and for the Justice Department in the White House. I learned that when you are in the Justice Department, your authorizers at the House Judiciary Committee who oversee you are not nearly as important as are the appropriators who are writing, line by line, what your budget will be, or how many lawyers there will be in the Department's Office of Legislative Affairs or in its Antitrust Division.

I am not saying that should be the answer here, but there is something in between. So your question is: How does the City Council view the 1989 Charter? I think that, as we noted, the Charter strengthened the role of the City Council, recognizing, as the Supreme Court did in *Morris*, that the system prior to that was undemocratic. The City Council is a very democratic institution.

We have friendly battles all the time with the administration over power, and I think we would love to eliminate any possibility that the Council could ever curtail the Mayor's power. Curtailment has always been a chokehold for us—that is, we cannot do A, B, or C because it would curtail the Mayor's power under the Charter. We cannot pass a law that requires the Police Chief to have been a police officer, because that would curtail the Mayor's power. There are a lot of things we cannot do, even though Council Members may see a need for them, because of this curtailment. And the Charter is very specific regarding the respective powers that are assigned to the Mayor and to commissioners and agencies. I think that more flexibility would certainly be something that many Council Members would appreciate and that this is a worthwhile discussion to have.

Anthony Crowell: In support of what Liz is saying, oftentimes there are things that the Mayor's Office wanted to do as between the executive and legislative branches, but that could not be done absent a referendum or state law, because the local legislative process would not permit it due to this curtailment of our powers. It does hamstring both sides.

David Yassky: A perfect example, in terms of selection of agency heads and personnel: Congress has the power to confirm federal agency heads, and this results, as we are seeing today, in healthy policy debates. When a would-be secretary goes before Congress and has to explain the administration's policy on drone strikes, or tax policy, or whatever the case may be, it enables a healthy debate. Giving the Council the power to confirm commissioners would have that same result.

Elizabeth Fine: We at the Council actually recommended, in our proposal to the 2010 New York City Charter Revision Commission, that at least one additional commissioner be appointed with the advice and consent of the Council.

John Avolon: Elizabeth, I cannot help but wonder: If Council Speaker Christine Quinn were to be elected Mayor, would she advocate for a stronger Council?

David Yassky: That is not really a fair question. The founders understood that people, including elected government officials, operate out of self-interest. The whole point was to create a structure in which their pursuits of their own political interests and ambitions yield better results for the public. If I worked for the Mayor, as Anthony did, I would advise against any of the things I have said here.

Elizabeth Fine: Christine Quinn is fiercely protective of the institution, and I think that the lawyers who are here from the New York City Law Department would attest to that. She loves the City Council and has been a phenomenal Speaker of the City Council. She has raised both the profile and the integrity of the Council, and her initiatives are all about strengthening the Council. So I can say without hesitation that she, in a very principled way, has defended the powers of the Council.

Dick Dadey: Citizens Union,⁴ in looking at the City Charter a couple of years ago, did not think that it was a good idea to have the City Council approve certain appointments. But we did believe that the City Council should have a larger role in the budget-making process. What David referred to earlier was a problem that we identified as well. The Mayor would never actually give the Council a final figure on income until the final days of the city budget negotiations. We urge that the Mayor be required, upon the submission of the budget, to actually settle on a final number, so that the Council has a sense of how much is available.

One of the other reforms that we advanced was that the city budget be presented in greater detail around units of appropriation. I think that today there are some sixteen agencies—and David, I think, was a champion, when he was on City Council, of getting the Mayor's Office to provide greater detail on how agencies spend their money, but not necessarily in a way that allowed the City Council much more leverage.

Right now, I believe, the city's Department of Education, which is the largest agency in our government, submits a budget to the City Council that is no more than three or four pages long. Can you imagine the City Council trying, based on just four pages, to do justice to evaluating the performance of the Department of Education and determining how well or not well city money is being spent?

The Police Department, which is a significant but much smaller agency than the Department of Education, is one agency that provides more detail, and I think it provides thirty pages of information detailing its expenses. But again, it is not in units of appropriation that would be very helpful to the City Council. So one of our recommendations was that the budget that is provided to the City Council be much more detailed along the lines of these units of appropriation, and that the City Council be allowed to make recommendations and negotiate how that money is spent in each of those agencies.

Anthony Crowell: I would add, on the issue of whether the appointment of commissioners should go through an advice and consent process, that it would

4. More information on Citizens Union is available at: <http://www.citizensunion.org/>.

LEARNING FROM WASHINGTON

change the entire dynamic of what a municipal government needs to be, and it would make it overly political. One of the best things we have been able to achieve, certainly since the 1989 Charter, is to professionalize the population from which occupants of those commissionerships are selected in a way that is often, we hope, without a lot of political motivation. So to put a process in place that would add a level of political wrangling and dialogue, I think, would disserve the city's interests. Right now, of the major agency heads, only the Commissioner of the Department of Investigation is subject to advice and consent.

David Yassky: I do recognize the point you are making and I do agree with you. To be sure, there are costs, and one of the things I have always admired about your service, Anthony, is that you do not fall prey, as many people do, to thinking that there are things that are all benefits and no costs. Almost every decision has pluses and minuses and, to be sure, confirmations do get politicized. That can expose the ugly side, in which people use the tools of personal destruction to achieve their ends, and that would be problematic for sure.

B. Defining the Role of New York City's Public Advocate

John Avlon: One of the perennial debates about the Charter and the legacy of the 1989 revisions has been the nature of the role of the city's Public Advocate.⁵ The question is, is this just a vestigial organ—a compromise that was created after the position of City Council President was eliminated, and thus something that can be done away with—or is this an institution that should be strengthened, for example, with a budget that the Public Advocate's Office controls, as opposed to one that is perennially being cut?

Dick Dadey: Citizens Union is not a big fan of how the current Office of Public Advocate is constructed, and we argue that the office actually be given an independent budget, based on some percentage of the larger citywide budget. Our belief is that the city's government should not have these independently elected officeholders who depend upon the interest or the desires of the Mayor and the City Council with regard to how large a budget they have; we think that this diminishes their voice and disempowers them.

One way to give the Public Advocate greater power and oversight would be to allow that office to have appointees on the Conflicts of Interest Board and the Franchise and Concession Review Committee—to give it more authority by enabling it to make a greater number of appointments to some of the important city committees.

5. For a written analysis of the history of this position, see generally Mark Green & Laurel W. Eisner, *The Public Advocate for New York City: An Analysis of the Country's Only Elected Ombudsman*, 42 N.Y.L. SCH. L. REV. 1093 (1998–1999) (discussing the anomalous nature of New York City's Public Advocate's Office). For additional insight on this position, see Lucas Anderson, *Promoting an Effective and Responsive City Government by Retaining and Strengthening the Office of the Public Advocate*, 58 N.Y.L. SCH. L. REV. 165 (2013–2014).

John Avlon: Anthony, now that you are no longer in the Mayor's Office, I am going to put you on the spot. Has your perspective on the Public Advocate changed?

Anthony Crowell: No. I understand the origins of the office, but I think the question is whether, and how, you can give the Office of the Public Advocate some new dimension and perspective in the city's governmental structure. You have a Council of fifty-one members. You have a Comptroller. You have Borough Presidents. They are all public advocates. So certainly, when it comes to the Council and the Comptroller going up against the Mayor, they serve as very effective checks. The question is what a Public Advocate should be in light of that. The Public Advocate serves as a check against all of those branches, of course, but what is its true role? I know that there is the obvious intention that it be an ombudsperson for city government. But I think all those other branches are as well.

So I think we have yet to see what the promise of that office is. That is not to say that it could not have a role, but I am not sure that its intended role has played itself out. Its effectiveness seems to depend more upon who the officeholder is, rather than the functions of the office itself. So it is a very personality-driven office in many respects, which concerns me because that begs the question of what its proper role in governance is.

John Avlon: David, how would you make the Office of the Public Advocate more relevant? How would you seek to strengthen it?

David Yassky: You can take any platform and find good things to do with it. I certainly share some of the concerns that have been expressed here. As I said before, you have to respect James Madison and Alexander Hamilton. I understand the instinct to have more separation, to have more checks and balances. But I do not think the structure of that office enables it to play that role, and I think we have certainly seen that. That is what experience has shown.

I think that you are correct to say that there is latent opportunity in some of the checks and balances in this Charter that have not been taken advantage of. But not in the Public Advocate's Office and not in the Council. And I think the Council could do even more with its tools. It is not only a Charter problem; it is part of the problem of the Council not yet having grown into the role that the Charter envisioned for it as a true counterweight.

I think part of that is a matter of internal structure. Congress is set up internally to be effective, in that committee chairs hire their own staff, they set their own agendas, and they are able to hold hearings and pursue their own initiatives without the permission of the House Speaker.

The structure of the Council that makes its internal operation dependent entirely on its Speaker, I think, really functions to limit the Council quite extraordinarily, because it identifies the institutional interests of the Council with the immediate personal interests of whoever holds the speakership. I also think—and I am going to say the dirty words here—that term limits are a big problem for the Council.

LEARNING FROM WASHINGTON

I have disagreed with some on this panel before on this topic, but I believe that you will never see a wholly effective City Council, fulfilling its role as counterweight, with a two-term limit in place. Think back to Congress. There are people there who know their whole career is going to be in the Congress. They are willing to build the institution, and willing to invest in building the power of the institution, because it serves them and it serves their interests.

Nobody in the Council can think that way, or would think that way. It would not be rational for anybody on the Council to think, “I am going to invest in building up this institution over a five- or ten- or fifteen-year period,” because they are not going to be there that long.

Elizabeth Fine: I agree with that. In addition, a lot of the best initiatives and the best laws take years and years to enact. They do not happen in two years or four years or even six years. Members of Congress such as Senator Ted Kennedy persevered over decades to achieve what they did; you do not have that option at the local level. You have nobody who can have a dream of what could be ten years from now, and be there to work on it year by year until they see it through to fruition.

C. The Case for Nonpartisan Citywide Elections

John Avlon: I would like to steer our discussion toward the issue of nonpartisan elections and the democratic and representative nature of New York City government. If we have around three or four percent total turnout for citywide elections other than for Mayor, is that a problem that could be resolved by opening up the franchise? And why do you think the Democratic Party in the city is so strongly resistant to that form of elections?

David Yassky: I support the idea of nonpartisan elections, and I was not a supporter until recently. When the Mayor put it on the ballot roughly a decade ago, I spoke vigorously against it many times and in many places. I was wrong. Of course, you look at things through your own personal experience. Consider the number of people who voted for Comptroller and Public Advocate in 2009. There were about 240,000 votes in the decisive election, which was the Democratic Party runoff between myself and John Liu.⁶ Only 240,000 people voted.

Nearly one million people—approximately 975,000—voted in the general election. So 240,000 in the actual, important election, and 975,000 in the practically insignificant general election. By “practically” I mean that the general election is, in practice and in reality, insignificant. And by the way, for people like me who are proud Democrats, ideological Democrats, knowing what we know about composition, surely more registered Democrats voted in that general election, not just more people. Probably three times as many registered Democrats voted in that general election as in the runoff.

6. John Liu was elected New York City Comptroller in November 2009.

On the one hand, we should assume that voters are smart, and we should respect voters. On the other hand, they are also human beings. The actual mechanics of voting do matter. Think of the butterfly ballots in Florida in the 2000 presidential election.⁷ You want to have structures that enable voters to express their preferences and that make it as likely as possible that elected outcomes truly reflect the popular will. There is actually great academic work on this, a law review article showing that partisan elections for local government offices are almost doomed to fail because people vote according to party identity and party registration, and that identity is based on national politics—people affiliate with a party based on national issues, not local issues.⁸

So while the two-party system does work well at the federal level to foster competition—meaning that parties are fighting in the middle for that median voter and fighting over real issues—there is no two-party system here or at most local-government levels. So there is no reason to preserve a two-party system in the local political ecosystem. We should structure the system so that more people vote and the true public voice is heard.

Anthony Crowell: The motivation behind nonpartisan elections is twofold: one, it gives a broader base of candidates access to the ballot; and two, it gives a broader base of voters the ability to vote for the best candidate. It needs to be looked at. While we can look at studies about how nonpartisan elections play out nationally, the push to bring nonpartisan elections to New York City was never about the Republican Party taking control of New York City government; it was about opening up the franchise, and giving voters the ability to choose candidates who were not necessarily handpicked by party bosses. New York City is a different place. We will always be a heavily Democratic city, but that does not mean there are not still legions of independent voters, and voters affiliated with other parties, who need to have a broad choice. We can talk about creating offices that provide stepping stones for minorities to participate in higher office, but that goes hand-in-hand with giving everyone who has the best ideas and the best strengths an opportunity to be in any office that serves as a stepping stone to those citywide offices.

Elizabeth Fine: I cannot really speak for the Council on this issue because the Council has not, I believe, taken a formal position on this issue, and I am not here to defend partisan elections. But I would note that we have had two Republicans out of the last four Mayors. And, because of our system of campaign finance, it really is an open system. Candidates can run and can have six-to-one matching funds.

So there is such wide opportunity for candidates to participate in the electoral process at the Council level, as well as at the citywide or the borough level. We do

7. For an overview of the ballot-design problems that were said to have affected certain Florida voters during the 2000 U.S. presidential election, see, for example, Frank Pellegrini, *The Death of the Butterfly Ballot*, TIME, Dec. 1, 2000, <http://www.time.com/time/nation/article/0,8599,90411,00.html>.

8. David Schleicher, *Why Is There No Partisan Competition in City Council Elections? The Role of Election Law*, 23 J.L. & POL. 419 (2007).

LEARNING FROM WASHINGTON

sometimes have special elections and I am not sure that those special elections, which are nonpartisan elections, produce any different results. But I think that party politics—and participation in party politics—is something that people in this city value.

There is a very vibrant system of strong Democratic and Republican action at the local level, and I know that there is a strong opposition to the nonpartisan-election proposals. So I will put that out there, but I am not advocating.

John Avolon: A final discussion topic for the panel: If you were to chair a future Charter Revision Commission, what would you front-load? What do you think are the urgent changes that we should consider for the Charter?

David Yassky: I would push for a stronger City Council and a somewhat stronger Comptroller. And, in the ways that I described earlier, I would restructure the budget process so that it involves a fair fight, if you will, between the Council and the Mayor. I think Liz is right that the curtailment jurisprudence has made it, if not impossible, then close to it, for the Council to legislate on a lot of really important issues. I think the Council should have confirmation power, notwithstanding the points that Anthony made, and something about internal Council structure to yield a more vigorous body.

Elizabeth Fine: I think the key details that I would highlight would involve the budget: clarifying that the Charter requires the Mayor to elaborate very plainly how city funds are being spent; and limiting the Mayor's empowerment authority because, while the Council has the ultimate authority to approve the budget, the Mayor has spending authority and empowerment authority that is quite broad and can essentially undo what the Council has done if the Mayor disagrees with the Council.

So that is a big problem, and I think that we would also advocate for additional independence of certain agencies in a way that would strengthen the separation of powers and tilt the balance of powers a little more toward the Council.

Dick Dadey: Obviously, nonpartisan elections would be at the forefront, in addition to—while preserving the strong mayoral form of government that we have—giving greater power to City Council, but not necessarily to the Speaker. The Speaker has had to seize that power in order to make the Council as effective a counterweight as possible against a strong mayoral form of government, but I think that has come at the expense of the active engagement of the fifty-one diverse individual City Council Members.

Also, I would do away with the Office of Public Advocate, and with Borough Presidents,⁹ if they are not given any additional powers. Those offices, functioning as they currently do, really do not deserve the amount of city resources that are being spent on them.

9. For a discussion of the debate over the role of the Borough President, see Gregory Perrotta, *A Case For and Against the Borough President in Twenty-First Century City Politics*, 58 N.Y.L. SCH. L. REV. 193 (2013–2014).

Anthony Crowell: I would similarly advocate for a full-throated discussion about the powers that are delineated under each of the citywide offices, and about the need for the Borough Presidents to seek a better and more rational allocation of power and relationship between them. I also think that we should take every measure we can to open up access to our election system for candidates and voters alike, and understand the modern realities of what this city is and what this city needs to be—to be competitive, attractive, and the sort of vibrant force it has been globally.

So we have to take a global view of how we govern and how we are looked at, because I think that is what gives New York City our unique strength. We need to be sensitive to that as we go forward.

II. QUESTION AND ANSWER SESSION

Question: New York State has strong municipal home-rule provisions, so you have a lot of local control over zoning, policing, and so on, whereas in the city, you have this very strong, centralized government. I did not hear too much talk about what the proposals would be to shift some power back into the boroughs themselves—the Community Boards and the Borough Presidents. Could the panel discuss what ideas have been floated around and whether they agree or disagree with those ideas?

Dick Dadey: As to the Borough President issue: if we keep the Offices of the Borough Presidents, we would actually require that the city agency heads for each of those boroughs make monthly reports or hold monthly public meetings with the Borough Presidents, so that the Borough Presidents have a venue to hold city government accountable, and we would make budgets independent of the current legislative process. Also, we should provide Community Boards with full-time community planners so that they can participate more fully in the land use review process and therefore empower local communities and the Borough Presidents.

David Yassky: I think it would be a mistake to decentralize any more than has already been done. I think our last major experience with decentralization was in the schools, and I think that that showed very clearly that distributing power away from the center of government frustrated not only effectiveness but also accountability. People should be able to look at the central government and hold it responsible for results, whether good or bad.

Question: We have talked about accountability, voter participation, and democracy, yet the discussion has not addressed the diversion of power to quasi-public authorities, which is a popular form of institution both in New York State and in the city. We have the Economic Development Corporation, libraries that operate semi-independently, the Transit Authority, and so on and so on. All of these entities are essentially not accountable to the public and not representative of the public.

David Yassky: I am really glad this question was asked, because I think it is a good one and I think that it raises an important point. I think that the proliferation of authorities is destructive of accountability. I think the government does need to be

LEARNING FROM WASHINGTON

centrally focused so that voters can hold people accountable—I made the same point a moment ago with respect to decentralization.

But you also need to be able to act. My own agency, the Taxi and Limousine Commission, which is almost unique in the city as an example of shared power, has nine Commissioners, five of them appointed by the City Council, and four by the Mayor. I think that actually results in less effective day-to-day operations. It is a holdover from the Progressive Era that you have these commissions. Any agency created after the New Deal within the federal government has a unitary head—the Environmental Protection Agency, the Department of Education, the Department of Energy—and I am not afraid of centralized day-to-day governing authority because then you can hold people accountable for it.