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## **Promoting an Effective and Responsive City Government by Retaining and Strengthening the Office of the Public Advocate**

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LUCAS ANDERSON

## Promoting an Effective and Responsive City Government by Retaining and Strengthening the Office of the Public Advocate

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## RETAINING AND STRENGTHENING THE OFFICE OF THE PUBLIC ADVOCATE

### I. INTRODUCTION

The Public Advocate for the City of New York is an independent citywide elected official responsible for a small range of oversight functions, the limitations of which are compounded by the office's narrow substantive powers, a diminishing budget, and widespread confusion about its intended role in city government.<sup>1</sup> As a product of an evolving City Charter and the broad restructuring of New York City's government in 1989, through which the office lost much of its former administrative authority,<sup>2</sup> the Public Advocate is frequently portrayed by its critics as an archaic and vestigial waste of city resources.<sup>3</sup> While the Public Advocate's foremost critics include those officials who are subject to the office's oversight and monitoring duties,<sup>4</sup> many outside observers have also argued that the position is unnecessary, ineffectual, and should be eliminated.<sup>5</sup>

These criticisms fail to account for the important role the Public Advocate plays as an arbiter of citizens' complaints, an independent monitor of government services, and a check on the Mayor's sweeping administrative powers.<sup>6</sup> Unlike appointed officials with similar ombudsman-type duties, the Public Advocate is able to review, refer, and resolve individual service complaints with the primary purpose of achieving citizen satisfaction, and without regard to the interests of a particular government agency or program.<sup>7</sup> In addition, as a specialized office charged with monitoring government services citywide, the Public Advocate is able to recognize and reveal

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1. The Public Advocate's major duties and powers are set forth in section 24 of the New York City Charter. See N.Y.C. CHARTER § 24 (2013); see also Mark Green & Laurel 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, 1126–32 (1998); Denora Getachew & Andrea Senteno, *A Heartbeat Away—But What Is the Public Advocate?*, GOTHAM GAZETTE, Sept. 14, 2009, <http://www.gothamgazette.com/article/governing/20090914/17/3022>.
  2. See BRUCE BERG, GOVERNING GOTHAM 207 (2007); Frederick A.O. Schwarz, Jr. & Eric Lane, *The Policy and Politics of Charter Making: The Story of New York City's 1989 Charter*, 42 N.Y.L. SCH. L. REV. 723, 820 (1998); James W. Lowe, *Examination of Governmental Decentralization in New York City and a New Model for Implementation*, 27 HARV. J. ON LEGIS. 173, 175 (1990).
  3. See, e.g., Peter N. Spencer, *Mayor Bloomberg Ignites Firestorm With Comments About Value of Public Advocate's Office*, STATEN ISLAND ADVANCE, Oct. 12, 2009, [http://www.silive.com/news/index.ssf/2009/10/mayor\\_bloomberg\\_ignites\\_firest.html](http://www.silive.com/news/index.ssf/2009/10/mayor_bloomberg_ignites_firest.html).
  4. See *id.*; James C. McKinley, Jr., *Green Takes Leave of Absence for Bid as Council Chief*, N.Y. TIMES, April 13, 1993, at B3, available at <http://www.nytimes.com/1993/04/13/nyregion/green-takes-leave-of-absence-for-bid-as-council-chief.html>; Bob Herbert, *In America; A One-Man Feud*, N.Y. TIMES, June 28, 1998, <http://www.nytimes.com/1998/06/28/opinion/in-america-a-one-man-feud.html>.
  5. See, e.g., BERG, *supra* note 2, at 207; Editorial, *An Unpresident for the City Council*, N.Y. TIMES, May 12, 1989, at A30, available at <http://www.nytimes.com/1989/05/12/opinion/an-unpresident-for-the-city-council.html>; John Podhoretz, *The Unbearable Lightness of Betsy*, N.Y. POST, Aug. 9, 2002, at 29, available at <http://www.nytimes.com/1989/05/12/opinion/an-unpresident-for-the-city-council.html>; Editorial, *Ax the Advocate*, N.Y. POST, July 30, 2009, [http://www.nypost.com/p/news/opinion/editorials/item\\_1VrXkqA4ejItZujhvw06qI](http://www.nypost.com/p/news/opinion/editorials/item_1VrXkqA4ejItZujhvw06qI).
  6. See discussion *infra* Part II.
  7. See Green & Eisner, *supra* note 1, at 1127–28.

systemic administrative problems and their causes.<sup>8</sup> Finally, as a “watchdog” over an expansive city government and a counterweight to mayoral authority, the Public Advocate performs essential oversight functions that promote government transparency and accountability.<sup>9</sup>

With almost no policymaking authority, the Public Advocate is unique among elected officials.<sup>10</sup> Unfortunately, the office’s relative obscurity, combined with a perennial lack of substantive powers or resources needed to fulfill its intended role, has given rise to complaints that it is an ineffectual appendage and a drain on the city’s budget.<sup>11</sup> In response to these complaints, and in advancement of a self-fulfilling prophecy, the Public Advocate’s effectiveness as an ombudsperson and an oversight official has been gradually eroded through a series of politically motivated Charter revisions, and its operating budget has been slashed below the level of some of the smallest executive agencies.<sup>12</sup>

This article argues that the role of the Public Advocate should be clarified and strengthened through revisions to the office’s statutory powers and duties under the City Charter. Part II will recount the historical development of the Charter and the evolution of the Public Advocate from its former position as President of the City Council and a voting member of the once-powerful Board of Estimate to its present role as an ombudsperson and an oversight official. Part III will address common criticisms of the Public Advocate’s office and will illustrate the potential benefits of bolstering—rather than eliminating—the position as an independent, elected citizens’ representative. Finally, Part IV will propose revisions to the Charter that would bolster the Public Advocate’s potential and its capacity to promote an accountable and responsive city government. The Public Advocate’s independence from the city’s policymaking offices is critical to its success as an effective ombudsperson and a watchdog over public services; through several targeted Charter revisions to bolster the office’s independence and provide it with the resources it needs to pursue its mission, it would be even better positioned to assist New Yorkers and provide much-needed oversight of a powerful and centralized governing structure.

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8. See Green & Eisner, *supra* note 1, at 1129 (“A significant portion of the public advocate’s job is to identify patterns of problems and address them systematically. The Charter language reflects the understanding that handling grievances one-by-one is often inadequate . . .”).

9. See Schwarz & Lane, *supra* note 2, at 821; Michael Howard Saul, *De Blasio Wants Office Strengthened*, WALL ST. J., June 11, 2010, at A24, available at <http://online.wsj.com/article/SB10001424052748703627704575299101445481396.html>.

10. See Green & Eisner, *supra* note 1, at 1095; Getachew & Senteno, *supra* note 1.

11. See BERG, *supra* note 2, at 207; Spencer, *supra* note 3.

12. In 2012, the Public Advocate’s budget was \$2,255,477, approximately 0.0034% of the city’s entire expense budget and equal to approximately 2.46% of the budget for the Mayor’s office. The Executive Budget for Fiscal Year 2013 includes \$650,000 in additional cuts to the Public Advocate’s office, a 28% decrease from 2012. See OFFICE OF MGMT. & BUDGET, THE CITY OF NEW YORK EXECUTIVE BUDGET FISCAL YEAR 2013, at 2E, 4E, 15E, 117E (2012), available at [http://www.nyc.gov/html/omb/downloads/pdf/erc5\\_12.pdf](http://www.nyc.gov/html/omb/downloads/pdf/erc5_12.pdf).

**II. THE HISTORICAL DEVELOPMENT OF THE PUBLIC ADVOCATE AND THE OFFICE'S CURRENT ROLE IN CITY GOVERNMENT**

The New York City Charter provides a framework for the city's government, organizing the distribution of authority and defining the powers and duties of public officials and agencies.<sup>13</sup> Under the New York State Municipal Home Rule Law, cities are empowered to appoint commissions to review their local governing charters and submit revision proposals to the electorate for ratification.<sup>14</sup> In New York City, commission-based Charter revisions have transformed the powers and duties of many government entities, and it was through this process that the Office of the Council President, a position which formerly held a policymaking role in city government, evolved into the present-day Public Advocate's office.<sup>15</sup>

*A. The Development of New York City's Governing Structure*

In the years between the consolidation of New York City in 1898 and the 1989 referendum on commission-proposed revisions that broadly restructured the city's governing powers, Charter revisions have revealed three discernable trends that are particularly relevant to an understanding of the Public Advocate's current role. The first trend is a gradual promotion of local representation and citizen participation in civic life. For example, the 1936 Charter Revision Commission appointed by Mayor Fiorello La Guardia proposed the establishment of a City Council with members elected by proportional representation.<sup>16</sup> The Council's eventual growth into a large body of members from relatively small districts reflected a concern that minority communities would be better served by a power structure that provided for neighborhood-scale representation.<sup>17</sup> Similarly, the retention of the Borough Presidents' offices and the expansion of Community Boards' advisory powers each illustrate an

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13. "The City Charter is often likened to a constitution. It is similar to a constitution in that it sets forth the structure of the government; however, the City Charter is much easier to amend. . . . This establishes fundamental power relationships not envisioned under the federal or state constitutions . . . ." Ross Sandler, *Foreward: The One-Hundredth Anniversary of the Charter of the City of New York*, 42 N.Y.L. SCH. L. REV. 689, 691 (1998).
  14. N.Y. MUN. HOME RULE LAW § 36 (McKinney 2013). Charter revision commissions may be appointed by a city's Mayor, local legislative body, or by public referendum. *Id.*; see also N.Y. CONST. art. IX, § 2 (providing authority for assigning "home rule" powers to local governments). "A Charter commission's task is to provide a structure and a process for governmental decision making, not to make the governmental decisions themselves." Schwarz & Lane, *supra* note 2, at 750. Certain aspects of New York City's Charter may also be amended through local law or by public referendum. See N.Y.C. CHARTER § 40 (2013).
  15. See Lowe, *supra* note 2, at 195–200; ROBERT CARO, *THE POWER BROKER—ROBERT MOSES AND THE FALL OF NEW YORK* 744–46 (1975); Green & Eisner, *supra* note 1, at 1098–1126; Getachew & Senteno, *supra* note 1.
  16. See DANIEL O. PROSTERMAN, *DEFINING DEMOCRACY: ELECTORAL REFORM AND THE STRUGGLE FOR POWER IN NEW YORK CITY* 52 (2013); FRANCIS BARRY, *THE SCANDAL OF REFORM* 89 (2009); Lowe, *supra* note 2, at 199–200.
  17. See Schwarz & Lane, *supra* note 2, at 778; N.Y.C. CHARTER REVISION COMM'N, *SUMMARY OF FINAL PROPOSALS* 9 (1989) [hereinafter 1989 CHARTER REVISION COMM'N REPORT], available at [http://www.nyc.gov/html/charter/downloads/pdf/1989\\_final\\_report.pdf](http://www.nyc.gov/html/charter/downloads/pdf/1989_final_report.pdf).

ongoing concern with addressing local issues and providing outlets for communities and interests that may be underserved by citywide institutions.<sup>18</sup>

The second discernible trend in the Charter's development is the promotion of various mechanisms to advance government accountability and transparency. Throughout the twentieth century, as the city's government grew along with its population, Charter Revision Commissions sought to provide oversight over burgeoning government agencies through an assortment of proposals. For instance, the 1936 Commission created a complaints bureau within the city's Department of Investigation to receive public input relating to investigations of government misconduct and incompetence.<sup>19</sup> Similarly, to promote transparency in the city's fiscal management operations, the 1989 Commission created the Independent Budget Office (IBO) to provide independent budget analysis and fiscal impact statements for proposed local laws.<sup>20</sup>

The third trend affecting Charter revisions is an ongoing effort to provide effective checks on the Mayor's dominant administrative powers. Since the consolidation of New York City in 1898, Charter Revision Commissions have grappled with competing visions of a decentralized government, with administrative powers disbursed among officials at the borough and neighborhood levels, and a centralized management structure with governing power and accountability focused in the Mayor's office.<sup>21</sup> For example, the city's first Charter Commission, appointed by Governor Levi Morton in 1896, proposed retaining the Comptroller's office as an elective position to provide independent oversight over city finances.<sup>22</sup> Over ninety years later, the 1989 Commission strengthened the Comptroller's office by bolstering its auditing capabilities and its ability to review and approve city contracts.<sup>23</sup> Similarly, while their powers were diminished by Charter revisions in 1936, 1961, and 1989, the Borough Presidents' offices have endured as independent voices in budgetary, land use, and procurement decisions, and as "an intermediary buffer between the power of the city and local communities."<sup>24</sup>

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18. See BARRY, *supra* note 16, at 145; Schwarz & Lane, *supra* note 2, at 810; Richard Briffault, *The New York City Charter and the Question of Scale*, 42 N.Y.L. SCH. L. REV. 1059, 1063–64 (1998).

19. See Green & Eisner, *supra* note 1, at 1107; N.Y.C. CHARTER §§ 801–07; see also Rose Gill Hearn, *Integrity and the Department of Investigation*, 72 FORDHAM L. REV. 415 (2003).

20. See 1989 CHARTER REVISION COMM'N REPORT, *supra* note 17, at 23; see also N.Y.C. CHARTER §§ 259–60.

21. See BARRY, *supra* note 16, at 70; CARO, *supra* note 15, at 745–46; Briffault, *supra* note 18, at 1061–62; BERG, *supra* note 2, at 186–89; 1989 CHARTER REVISION COMM'N REPORT, *supra* note 17, at 23; Schwarz & Lane, *supra* note 2, at 816 ("From a structural point of view, the continuation of a strong mayor . . . favored continuing the other citywide offices as added checks on the mayor.").

22. See EDWIN G. BURROWS & MIKE WALLACE, *GOHAM: A HISTORY OF NEW YORK CITY TO 1898*, at 1234 (1999).

23. See 1989 CHARTER REVISION COMM'N REPORT, *supra* note 17, at 17–18; N.Y.C. CHARTER § 93.

24. Schwarz & Lane, *supra* note 2, at 811; see also CARO, *supra* note 15, at 745; Briffault, *supra* note 18, at 1062–63.

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Each of these trends has impacted the development of the Public Advocate's duties and powers, and they each help to explain the position's current role in city government. Because it is separate from the executive and legislative branches, the Public Advocate provides an opportunity for increased citizen representation in the face of an often-impenetrable city bureaucracy. As an independently elected official, the Public Advocate is also empowered to promote government transparency and accountability free from the influence of those officials and agencies it is charged with monitoring. Finally, as one of three citywide elected officials, the Public Advocate is uniquely positioned to provide independent checks against a powerful and centralized executive branch.<sup>25</sup>

### *B. The Board of Estimate, the Council President, and the Charter Prior to 1989*

In 1901, soon after New York City was consolidated under the 1898 Charter, a state-appointed Commission proposed revisions to enhance the Borough Presidents' authority by providing them votes on the Board of Estimate and Apportionment as well as the legislative Board of Aldermen.<sup>26</sup> In 1936, soon after the enactment of the Municipal Home Rule Law permitting cities in New York State to revise their own governing charters, the LaGuardia-appointed Commission abolished the Board of Aldermen and established the City Council as the city's primary legislative body.<sup>27</sup> The 1936 Commission also established the Office of the Council President, formerly the President of the Board of Aldermen, and provided the office with voting rights on the increasingly powerful Board of Estimate.<sup>28</sup>

In 1975, several members of a state-appointed Commission sought to abolish the Council President's office because, at the time, it held few administrative responsibilities apart from its votes on the Board of Estimate and maintained only a

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25. See Green & Eisner, *supra* note 1, at 1122 (statement of 1989 Commission Chairman Frederick A.O. Schwarz, Jr.) ("We want someone else out there . . . who has been elected by the people as a whole, who has the credibility of having been elected by the people as a whole, to stand in criticism of the Mayor . . . . Having been elected citywide, itself, creates clout.").

26. See Lowe, *supra* note 2, at 197; Andy Logan, *Around City Hall—Integrity*, NEW YORKER, Apr. 17, 1989, at 121–22, available at [http://www.newyorker.com/archive/1989/04/17/1989\\_04\\_17\\_122\\_TNY\\_CARDS\\_000350287](http://www.newyorker.com/archive/1989/04/17/1989_04_17_122_TNY_CARDS_000350287). "In 1898, New York City's first charter created a bicameral legislature, named the Municipal Assembly, to govern the newly consolidated five borough city," and in 1924 the Board of Estimate "was officially designated as the upper house of the municipal legislature." R. Alta Charo, *Designating Mathematical Models to Describe One-Person, One-Vote Compliance by Unique Governmental Structures: The Case of the New York City Board of Estimate*, 53 FORDHAM L. REV. 735, 742, 744 (1985).

27. See PROSTERMAN, *supra* note 16, at 53; Lowe, *supra* note 2, at 199–200.

28. See Green & Eisner, *supra* note 1, at 1099; Logan, *supra* note 26, at 121–22. In the following decades, the Board of Estimate's authority was second only to the Mayor's office, with the exclusive power to grant franchises, execute utility contracts, approve the city's budget, and resolve most land use issues. See BERG, *supra* note 2, at 181–82; CARO, *supra* note 15, at 746 ("[O]n the chessboard of the city's politics, the Mayor may be King, but the Board of Estimate is Queen . . . the Board [is] the single most powerful participant in the distribution of the stakes of city politics." (quoting WALLACE S. SAYRE & HERBERT KAUFMAN, GOVERNING NEW YORK CITY (1960))).



titular, ceremonial role as the presiding officer of the City Council.<sup>29</sup> However, the 1975 Commission's final recommendations struck a compromise whereby the Council President would retain its existing duties in the Council and would also be required to oversee the city's citizen information and complaint programs and investigate systemic service problems.<sup>30</sup> The city's voters approved this modification, and the Council President's office began its eventual transformation from a quasi-legislative official with limited policymaking power to its current role as a citizens' advocate with a primarily oversight-based role.

*C. The 1989 Charter Revision Commission*

In 1989, the city's governing structure was dramatically restructured when voters approved a series of Charter revisions in the wake of a constitutional challenge to the Board of Estimate's voting structure. Eight years earlier, the New York Civil Liberties Union filed suit in federal court on behalf of three Brooklyn residents alleging that, because of large population differences among the five boroughs, the Charter violated the U.S. Constitution's equal protection guarantee of "one-person, one-vote" by conferring equal voting rights on the Board to each of the five Borough Presidents.<sup>31</sup> In *Morris v. Board of Estimate*, Judge Edward Neaher of the Eastern District of New York initially granted summary judgment in the city's favor and dismissed the complaint, holding that the Board was not subject to the equal protection requirement because its powers were not strictly legislative in nature.<sup>32</sup> However, the U.S. Court of Appeals for the Second Circuit reversed, finding that because the Board "is selected by popular election and performs general governmental functions," it was required to comport with the one-person, one-vote guarantee.<sup>33</sup>

On remand, Judge Neaher found that, in light of the Second Circuit's findings, the inter-borough population disparities were so significant that the Board's voting structure violated the Brooklyn resident-plaintiffs' equal protection rights.<sup>34</sup> In reaction to this ruling, Mayor Edward Koch appointed a Commission, chaired by Richard Ravitch, to propose appropriate Charter revisions.<sup>35</sup> In 1987, the Second Circuit affirmed *Morris* and ordered the city to implement curative measures "with

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29. See Green & Eisner, *supra* note 1, at 1100–02.

30. See *id.*; Getachew & Senteno, *supra* note 1.

31. See BERG, *supra* note 2, at 181; Logan, *supra* note 26, at 122.

32. *Morris v. Board of Estimate*, 551 F. Supp. 652, 656 (E.D.N.Y. 1982).

33. *Morris v. Board of Estimate*, 707 F.2d 686, 690 (2d Cir. 1983).

34. *Morris v. Board of Estimate*, 592 F. Supp. 1462 (E.D.N.Y. 1984). According to the 1980 census figures relied upon by the court, Brooklyn's population was 2,230,936, while Staten Island's was 352,121. *Id.* at 1465. "From a representational perspective, each Staten Island resident had six times more representative power than a Brooklyn resident. Similarly, Staten Islanders had six times the access to their borough president. In real terms, this meant that geography could outweigh people as a basis for the Board's decisions . . ." Schwarz & Lane, *supra* note 2, at 740.

35. See Schwarz & Lane, *supra* note 2, at 736–37.



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all deliberate speed,” noting that “[s]ix months should be a target area, one year a deadline.”<sup>36</sup>

The following year, the U.S. Supreme Court granted certiorari and heard oral arguments in *Morris*. Before the Court issued its decision, Mayor Koch appointed a new Commission to succeed the Ravitch Commission, whose statutory two-year mandate had expired.<sup>37</sup> The new Commission, chaired by Corporation Counsel Frederick A.O. Schwarz, Jr., continued the work that had begun under Ravitch’s chairmanship with the assumption that the Second Circuit’s ruling would be upheld.<sup>38</sup> In March of 1989, the Supreme Court affirmed *Morris* as expected.<sup>39</sup>

Early in its deliberations, the 1989 Commission determined that instead of simply altering the Board of Estimate’s voting structure to comply with *Morris*, it would eliminate the Board altogether and transfer many of its powers to the Mayor and to an expanded City Council.<sup>40</sup> This decision drastically altered the distribution of governing power in the city. Several members of the 1989 Commission argued that the Council President’s office should also be eliminated because, without its votes on the Board, it would lose what remained of its former administrative authority and would thus become a position without a purpose.<sup>41</sup> However, after extensive debate, the 1989 Commission recommended that the Council President’s office be retained and that its Charter-based duties and powers be tailored to strengthen its position as an ombudsperson and a counterweight to the Mayor’s authority over government services.<sup>42</sup>

The 1989 Commission’s primary purpose was to remedy the Charter’s constitutional deficiencies in light of *Morris*. However, the commission also proposed a series of reforms that were specifically intended to promote citizens’ political representation, enhance government accountability, and provide checks against

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36. *Morris v. Board of Estimate*, 831 F.2d 384, 393 (2d Cir. 1987) (“the design of the Board, which gives equal weight to each borough’s interests, has devalued concomitantly the votes of individual residents of Brooklyn and Queens, and has grossly overvalued the votes of Staten Island residents. The result is exactly what the Equal Protection clause forbids: ‘the evaluation of a small class of ‘supervoters’ granted an extraordinarily powerful franchise.’” (quoting *Brown v. Thompson*, 462 U.S. 835, 856 (1983))).

37. N.Y. MUN. HOME RULE LAW § 36(5)(b), (c) (McKinney 2013).

38. See *Lowe*, *supra* note 2, at 174; Schwarz & Lane, *supra* note 2, at 736–37.

39. *Board of Estimate v. Morris*, 489 U.S. 688, 689 (1989).

40. Schwarz & Lane, *supra* note 2, at 765–74.

41. See BERG, *supra* note 2, at 184; Editorial, *An Unpresident for the City Council*, N.Y. TIMES, May 12, 1989, at A30, available at <http://www.nytimes.com/1989/05/12/opinion/an-unpresident-for-the-city-council.html>; Schwarz & Lane, *supra* note 2, at 818 (“[T]he issue of whether there should be a city council president was sharply disputed outside the Commission and was divisive within the Commission. So serious did these internal disputes become that two members told us, in moments of passion, that their support for the Commission’s revisions was contingent upon the preservation or abolition of the Office of City Council President.”).

42. See 1989 CHARTER REVISION COMM’N REPORT, *supra* note 17, at 19; Schwarz & Lane, *supra* note 2, at 776, 818–20.

executive authority.<sup>43</sup> The Commission was particularly concerned with promoting political representation in minority communities, and some Commissioners felt that the Council President's office provided a necessary "opportunit[y] for diversity among the city's elected officials and for aspiration of all elements of the city's diverse population."<sup>44</sup> Similarly, in an effort to provide oversight of a centralized executive branch, the 1989 Commission recommended that the Council President be given limited authority to monitor city agencies and to issue reports and recommendations for solutions to government service problems.<sup>45</sup>

Finally, while the elimination of the Board of Estimate increased the Mayor's governing authority relative to other city offices, the Commission sought to counterbalance the executive's enhanced power by proposing revisions that expanded the City Council,<sup>46</sup> bolstered the neighborhood-based Community Boards' service functions,<sup>47</sup> created the IBO,<sup>48</sup> and retained both the Council President and the Comptroller as independent citywide oversight offices.<sup>49</sup> Reasoning that "additional checks on the City's service delivery performance help, not hurt the City," the Commission determined that the Council President and the Comptroller should each "have a sphere, but a somewhat separate sphere, in which to check and balance the mayor—the comptroller for fiscal issues and the council president for service issues."<sup>50</sup>

In November 1989, the city's voters approved the Commission's recommendations by fifty-five to forty-five percent, and five weeks later the U.S. Department of Justice approved the new City Charter.<sup>51</sup> Then, soon before a new Council President was

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43. The "Objectives of the Proposed Charter Revisions" provided in the Commission's summary of final proposals included "build[ing] opportunity for greater public participation in policy debates and decisions," "fix[ing] accountability for government by clarifying responsibility," and "balanc[ing] power in city government by increasing competition and oversight among the institutions of government." 1989 CHARTER REVISION COMM'N REPORT, *supra* note 17, at 3; *see also* Schwarz & Lane, *supra* note 2, at 752.

44. Schwarz & Lane, *supra* note 2, at 820.

45. 1989 CHARTER REVISION COMM'N REPORT, *supra* note 17, at 9–11.

46. *Id.*; BERG, *supra* note 2, at 214–15.

47. *See* Schwarz & Lane, *supra* note 2, at 822–23; Lowe, *supra* note 2, at 175–76; Amy Widman, *Replacing Politics with Democracy: A Proposal for Community Planning in New York City and Beyond*, 11 J.L. & POL'Y 135, 146 (2002).

48. 1989 CHARTER REVISION COMM'N REPORT, *supra* note 17, at 23.

49. Herbert, *supra* note 4 (quoting 1989 Commission Chairman Schwarz) ("With a strong mayor . . . it was particularly important to have a number of checks and balances to that mayoral power. And we thought the Public Advocate was and would be an important element of the checks on that power. . . . The mayor is extremely strong and the bureaucracy of the mayoralty is very strong, so you need to have as much sunlight thrown on that as possible.").

50. Schwarz & Lane, *supra* note 2, at 816, 820.

51. *See* BERG, *supra* note 2, at 183–84. Until the U.S. Supreme Court's 2013 decision in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013), section 5 of the federal Voting Rights Act required the counties comprising Brooklyn, the Bronx, and Manhattan to submit any proposed electoral laws to the Department of Justice for pre-clearance approval. Some members of the 1989 Commission believed that eliminating the Council

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elected in 1993, the Council passed a local law to change the office's title to "Public Advocate" in recognition of the fact that "the most important duty of the President of the City Council—under the new Charter—is to serve as the public advocate for the citizens of New York City."<sup>52</sup>

### *D. The Public Advocate's Current Duties and Powers*

Unfortunately, the Public Advocate's capacity to fulfill its intended ombudsperson and oversight functions has been hampered by frequent cuts to its operating budget, repeated efforts to abolish the office, and widespread confusion about—or obliviousness to—its potential benefits or its purpose.<sup>53</sup> However, with the limited statutory powers described below, the Public Advocate has successfully uncovered many systemic problems with city administration and has fulfilled its role as an essential check on the Mayor's governing authority.

#### *1. Resolving Citizen Complaints and Monitoring Government Performance*

The Public Advocate's principal Charter-based responsibilities are to receive, resolve, or refer citizen complaints and to monitor and investigate the performance of city agencies and programs.<sup>54</sup> As a remnant of the Council President's prior duties under the 1975 Charter, the Public Advocate is also required to oversee agencies' public information and service complaint programs and to issue proposals for their improvement.<sup>55</sup> The 1989 Commission expanded the Council President/Public Advocate's oversight role by requiring the officeholder to investigate individual service complaints and to issue specific recommendations for resolution.<sup>56</sup> Then, if after a reasonable amount of time has

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President's office would have been viewed as a "negative factor" in the Justice Department's review of the Commission's final proposals. See *United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 147–48 (1977); 42 U.S.C. §§ 1973b(b), 1973c (2011); BERG, *supra* note 2, at 133.

52. N.Y.C. CHARTER REVISION COMM'N, *THE CITY IN TRANSITION: INTERIM SUCCESSION AND THE MAYORALTY* 28 (2002) [hereinafter 2002 CHARTER REVISION COMM'N REPORT], available at [http://www.nyc.gov/html/charter/downloads/pdf/2002\\_final\\_report.pdf](http://www.nyc.gov/html/charter/downloads/pdf/2002_final_report.pdf); see also N.Y.C. LOCAL LAW 19 (1993); James McKinley, Jr., *A New Job for Stein, Without a Race?*, N.Y. TIMES, Feb. 23, 1993, at B3, available at <http://www.nytimes.com/1993/02/23/nyregion/a-new-job-for-stein-without-a-race.html>.

53. A 2005 poll of "likely voters" confirmed that two-thirds of city voters could not name the sitting Public Advocate. Ben McGrath, *The Public What?*, NEW YORKER, July 11, 2005, [http://www.newyorker.com/archive/2005/07/11/050711ta\\_talk\\_mcgrath](http://www.newyorker.com/archive/2005/07/11/050711ta_talk_mcgrath); see also McKinley, Jr., *supra* note 4; David W. Chen, *Gotbaum Budget is Cut 40%; She Calls it Political Payback*, N.Y. TIMES, June 16, 2009, at A16, available at [http://www.nytimes.com/2009/06/20/nyregion/20advocate.html?\\_r=0](http://www.nytimes.com/2009/06/20/nyregion/20advocate.html?_r=0); Michael Howard Saul, *Bloomberg Takes Aim at Watchdog Agency Again*, WALL ST. J., May 12, 2010, <http://online.wsj.com/article/SB10001424052748703565804575238860902521480.html>; Michael Powell, *Relying on Celebrity and Machismo to Upend a Political Season*, N.Y. TIMES, July 9, 2013, <http://www.nytimes.com/2013/07/09/nyregion/relying-on-celebrity-and-machismo-to-upend-a-political-season.html> (describing the Public Advocate's office as "a toothless dog of a post.").

54. N.Y.C. CHARTER § 24(f) (2013).

55. *Id.*

56. *Id.* § 24(f)(3)–(4), (g); 1989 CHARTER REVISION COMM'N REPORT, *supra* note 17, at 19. See also Green & Eisner, *supra* note 1, at 1127, 1131–32.

passed “such agency has failed to respond in a satisfactory manner,” the Public Advocate may issue a report to the Mayor and the Council detailing the problem.<sup>57</sup>

The Public Advocate is also entitled to monitor agencies’ overall compliance with their Charter-based mandates.<sup>58</sup> If the office determines that an agency or official has violated the Charter, it is required to notify that agency or official and, after providing a reasonable time for a response, submit a final report to the Mayor and the Council.<sup>59</sup>

Each year, the Public Advocate is required to submit a comprehensive report to the Council detailing the office’s activities and providing a statistical summary of received citizen complaints.<sup>60</sup> This report must also include an analysis of recurring complaints, a summary of agency responses to referred complaints, and a review of agencies and officers whom the Public Advocate has determined to be chronically in violation of the Charter.<sup>61</sup> Finally, the Public Advocate’s report must provide a “summary of improvements” in city services over the preceding year and a review of the office’s recommendations for legislative, administrative, or budgetary actions to improve government performance and responsiveness.<sup>62</sup>

## 2. *A Voice in the Council and on Administrative Boards*

As a vestige of its former position as the presiding officer of the City Council, the Public Advocate continues to serve as an *ex-officio* member of all Council Committees and is authorized to introduce legislation and participate in Council debates.<sup>63</sup> Previously, the Public Advocate was also empowered to cast tie-breaking votes in the Council—an event which never took place in the fifty-one-member chamber<sup>64</sup>—but this function was revoked when the electorate approved a proposal submitted by the 2002 Charter Revision Commission, which also stripped the office of its duties as the Council’s presiding officer.<sup>65</sup>

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57. N.Y.C. CHARTER § 24(g).

58. *Id.* § 24(i).

59. *Id.* § 24(i), (k)(l).

60. *Id.* § 24(n).

61. *Id.*

62. *Id.*

63. N.Y.C. ADMIN. CODE § 3-203 (2012); N.Y.C. CHARTER § 24(e).

64. *See Green & Eisner, supra* note 1, at 1127; 2002 CHARTER REVISION COMM’N REPORT, *supra* note 52, at 35 n.18.

65. 2002 CHARTER REVISION COMM’N REPORT, *supra* note 52, at F-1 (Ballot Question Abstract); David Seifman, *Mike Wins on Charter Change*, N.Y. POST, Nov. 6, 2002, at 11, *available at* [http://www.nypost.com/p/news/item\\_qdfqRv065cnuRZKVY7k4dL](http://www.nypost.com/p/news/item_qdfqRv065cnuRZKVY7k4dL). Soon after this referendum passed, Gifford Miller, the sitting Speaker of the Council, appointed Public Advocate Betsy Gotbaum to reassume the post of presiding officer, stating that he had no “desire to sit up there and chair those meetings.” However, in 2009 Gotbaum said she would no longer preside over the Council in retaliation for recent cuts to her office’s operating budget. *See* Diane Cardwell, *Speaker Plans to Return Gotbaum to Her Role in City*

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The Public Advocate serves on several administrative and advisory boards along with the Mayor and other city officials.<sup>66</sup> Many of these boards were created or modified by the 1989 Commission to distribute the powers of the former Board of Estimate while also avoiding the problems of lopsided representation under the Board's borough-based voting structure.<sup>67</sup> For example, the 1989 Commission proposed the creation of a Commission on Public Information and Communication, chaired by the Public Advocate, to review city agencies' public information policies and educate the public about the availability of public records.<sup>68</sup>

The Public Advocate also serves on the Contract Performance Panel, which is required to hold hearings in response to complaints regarding city service contractors, and on the City Audit Committee, which controls the city's annual audit processes.<sup>69</sup> As one of eight votes on the Board of Trustees for the New York City Employees' Retirement System, the Public Advocate is also able to press for "responsible use of the [city's] pension funds for economically targeted investments."<sup>70</sup> Additionally, with the power to appoint one of the twelve members of the City Planning Commission, the Public Advocate also has a voice—albeit a small one—in "the conduct of planning relating to the orderly growth, improvement and future development of the city."<sup>71</sup> Finally, the Public Advocate, along with the Comptroller, one Council Member chosen by the Council, and one Borough President chosen by the five Borough Presidents, is co-chair of a committee to select the Director of the IBO, which the 1989 Commission proposed to provide "an independent, nonpartisan check on the Mayor's [Office of Management and Budget]."<sup>72</sup>

### 3. *Limited Authority to Initiate and Join in Legal Actions*

Although the Public Advocate does not have the power to subpoena witnesses or records, it does have limited standing to seek legal remedies in certain types of cases. Specifically, the Charter enables the Public Advocate to apply for a court order to initiate a "summary inquiry" into allegations of a "violation or neglect of duty in

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*Council*, N.Y. TIMES, Nov. 8, 2002, at B4, available at <http://www.nytimes.com/2002/11/08/nyregion/speaker-plans-to-return-gotbaum-to-her-role-in-city-council.html>; Chen, *supra* note 53.

66. See 1989 CHARTER REVISION COMM'N REPORT, *supra* note 17, at 19; Green & Eisner, *supra* note 1, at 1132–33; N.Y.C. CHARTER §§ 97, 192, 259, 333, 1061(a), 1054(a).

67. See Schwarz & Lane, *supra* note 2, at 824.

68. 1989 CHARTER REVISION COMM'N REPORT, *supra* note 17, at 19, 49; N.Y.C. CHARTER § 1061(a); see also Schwarz & Lane, *supra* note 2, at 904; Pei Shan Hoe, *Public Advocate Reboots Dormant Public Information Oversight Panel*, N.Y. WORLD, May 11, 2012, <http://www.thenewyorkworld.com/2012/05/11/public-advocate-reboots-dormant-public-information-oversight-panel/>.

69. N.Y.C. CHARTER §§ 95, 97, 333.

70. Green & Eisner, *supra* note 1, at 1151; N.Y.C. ADMIN. CODE § 13-103(b)(2) (2012).

71. N.Y.C. CHARTER § 192(d); 1989 CHARTER REVISION COMM'N REPORT, *supra* note 17, at 73.

72. Schwarz & Lane, *supra* note 2, at 901; 1989 CHARTER REVISION COMM'N REPORT, *supra* note 17, at 110; N.Y.C. CHARTER § 1054.

relation to the property, government or affairs of the city . . . .”<sup>73</sup> Through the summary inquiry process, allegations of governmental misconduct are referred to a Justice of the State Supreme Court, who may order “any officer or employee or any other person” to appear and be questioned under oath.<sup>74</sup> These compelled examinations do not violate the constitutional privilege against self-incrimination,<sup>75</sup> but are reduced to writing and become public record.<sup>76</sup>

In 2000, the State Supreme Court of New York County held that Public Advocate Mark Green was authorized to petition for a summary inquiry to compel Mayor Rudolph Giuliani to disclose how the Mayor’s office had obtained criminal history records of a man who was shot and killed by New York City Police Department (NYPD) officers.<sup>77</sup> In granting Green’s petition, the court found that the Public Advocate’s authority to petition for a summary inquiry “exists in tandem with his mandate . . . to investigate and report on complaints and mismanagement or misfeasance by City agencies.”<sup>78</sup>

The Public Advocate may initiate or join in legal actions other than summary inquiries, but the office’s standing is currently limited to cases directly implicating its investigative powers and its access to non-privileged government information. In 1997, Public Advocate Green brought an action under article 78 of the New York State Civil Practice Law<sup>79</sup> to compel NYPD Commissioner Howard Safir to disclose records of substantiated disciplinary complaints against police officers.<sup>80</sup> Green successfully argued that, by refusing to produce the departmental records, Safir had violated the Charter’s requirement that the Public Advocate be provided “timely access” to all requested agency records.<sup>81</sup> While Safir claimed that the Public Advocate lacked standing to sue, the court held that the office’s “right to bring suit to implement the power set forth in the Charter, even though not specifically set

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73. N.Y.C. CHARTER § 1109. The summary inquiry remedy is also available to the Mayor, the Comptroller, “any five council members, the commissioner of investigation or any five citizens who are taxpayers . . . .” *Id.*

74. *Id.*

75. The summary inquiry provision of the Charter specifically provides that “[a]ny answers given by a witness in such inquiry shall not be used against such witness in any criminal proceeding, except that for all false answers on material points such witness shall be subject to prosecution for perjury.” *Id.*

76. *Id.*

77. *Green v. Giuliani*, 721 N.Y.S.2d 461 (Sup. Ct. N.Y. Cnty. 2000). *See also* Thomas J. Lueck, *Mayor’s Lawyers Fight Move on Record in Police Shooting*, N.Y. TIMES, April 20, 2000, at B5, available at <http://www.nytimes.com/2000/04/20/nyregion/mayor-s-lawyers-fight-move-on-record-in-police-shooting.html>.

78. *Green*, 721 N.Y.S.2d at 467.

79. Under article 78, a special proceeding may be initiated to determine whether a government officer or employee has “failed to perform a duty enjoined upon it by law.” N.Y. C.P.L.R. 7803 (Consol. 2013).

80. *Green v. Safir*, 664 N.Y.S.2d 232, 234 (Sup. Ct. N.Y. Cnty. 1997) (quoting N.Y.C. CHARTER § 24(j)); *see also* Dan Barry, *Court Grants Office Access to Police Files*, N.Y. TIMES, Nov. 7, 1998, at B1, available at <http://www.nytimes.com/1998/11/07/nyregion/court-grants-office-access-to-police-files.html>.

81. *Safir*, 664 N.Y.S.2d at 234–35; N.Y.C. CHARTER § 24(j).



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forth therein, is implied from the functional responsibility of the petitioner to perform the tasks [of his office].”<sup>82</sup>

This holding was dramatically narrowed in 2005 when the State Supreme Court of New York County held that Public Advocate Betsy Gotbaum lacked standing to seek an injunction against the Metropolitan Transit Authority for its anticipated sale of Manhattan rail yard property to the New York Jets.<sup>83</sup> In a constricted reading of the Public Advocate’s role, the court held that the office’s capacity to sue could only be inferred “within the context of efforts to gain access to information, consistent with that office’s investigatory and public reporting function.”<sup>84</sup>

While the Public Advocate’s ability to represent citizens’ interests in state court remains restricted,<sup>85</sup> the office has joined in federal cases involving matters other than access to government information. In 2009, Public Advocate Gotbaum joined as a plaintiff in a federal challenge to a local law that amended the Charter to extend term limits for city offices.<sup>86</sup> The Public Advocate’s standing to join as a plaintiff in that case was not addressed by Judge Charles Sifton of the Eastern District of New York or by the Second Circuit Court of Appeals.<sup>87</sup>

The Public Advocate’s office has also lent its voice to litigation efforts by filing amicus briefs or otherwise supporting litigation efforts affecting city residents. For example, in approving a 1998 settlement arrangement between New York State and the Philip Morris tobacco company, the State Supreme Court of New York County noted that it had received and given “serious consideration” to a letter sent from the Public Advocate’s office regarding the proposed settlement.<sup>88</sup> The following year, when Mayor Giuliani attempted to cut funding for the Brooklyn Museum and eject it from its building, Public Advocate Green filed a joint brief along with two Borough Presidents and several members of the City Council in support of the museum’s

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82. *Safir*, 664 N.Y.S.2d at 235.

83. *Madison Square Garden, L.P. v. N.Y. Metro. Transp. Auth.*, 801 N.Y.S.2d 236 (Sup. Ct. N.Y. Cnty. 2005).

84. *Id.* Recently, Mayor Bloomberg and Public Advocate Bill de Blasio settled a suit brought by the Public Advocate’s office in state court seeking to compel the Mayor’s office to disclose information about fines levied against small business in the outer boroughs. *See De Blasio v. Bloomberg*, No. 103374-2012 (Sup. Ct. N.Y. Cnty. July 26, 2012); *see also* Kate Taylor, *De Blasio to Sue City for Data on Soaring Fines*, N.Y. TIMES, July 25, 2012, at A20, *available at* <http://www.nytimes.com/2012/07/26/nyregion/public-advocate-de-blasio-to-sue-city-for-data-on-soaring-fines.html>; Michael Barbaro, *3 City Leaders Squabble Over Fines for Businesses*, N.Y. TIMES, Feb. 22, 2013, at A18, *available at* <http://www.nytimes.com/2013/02/22/nyregion/3-city-leaders-squabble-drawing-fault-lines-in-mayoral-race.html>.

85. *See De Blasio v. State Univ. of N.Y.*, No. 13007/13 (Sup. Ct. Kings Cnty. Sept. 12, 2013) (ruling in Public Advocate de Blasio’s favor, but holding that the Public Advocate did not have standing to challenge the state’s decision to close Long Island College Hospital); *see also* Andrew J. Hawkins, *De Blasio Booted from Hospital Lawsuit*, CRAIN’S N.Y. BUS. (Sept. 17, 2013, 2:43 PM), <http://www.crainsnewyork.com/article/20130917/BLOGS04/130919887>.

86. *Molinari v. Bloomberg*, 596 F. Supp. 2d 546 (E.D.N.Y. 2009).

87. *Id.*

88. *State v. Philip Morris, Inc.*, 686 N.Y.S.2d 564, 565 n.1 (Sup. Ct. N.Y. Cnty. 1998).



successful First Amendment suit for an injunction against such penalties.<sup>89</sup> More recently, Public Advocate Bill de Blasio joined with others in planning a lawsuit to block cuts to the city's child welfare programs<sup>90</sup> and filed an amicus brief supporting a challenge to a state law governing taxi service in the boroughs outside of Manhattan.<sup>91</sup>

#### 4. *First in Line of Succession to the Mayor's Office*

The Charter currently provides that if the Mayor is unable to serve because of resignation, removal, death, or permanent inability, the Public Advocate will assume the mayoralty until a special election is held within approximately sixty days.<sup>92</sup> Until 2002, the Charter required that, upon a vacancy in the Mayor's office, the Public Advocate would serve as Mayor until the next scheduled general election.<sup>93</sup> In 1999, during the lead-up to his anticipated race for the U.S. Senate, Mayor Giuliani appointed a Charter Revision Commission for the purpose of completely removing the Public Advocate from the line of succession and, more specifically, preventing Mark Green from assuming the mayoralty if Giuliani were to win the Senate race.<sup>94</sup> However, in the face of widespread political opposition to this effort, the 1999 Commission instead submitted a watered-down proposal that would not have taken effect until the next mayoral term.<sup>95</sup> In the end, the overtly political and personal

89. *Brooklyn Inst. of Arts and Sciences v. City of New York*, 64 F. Supp. 2d 184 (E.D.N.Y. 1999).

90. See Erin Durkin, *Public Advocate Bill de Blasio Plans Lawsuit to Halt City Child Care Cuts*, N.Y. DAILY NEWS, June 18, 2012, <http://www.nydailynews.com/news/politics/public-advocate-bill-de-blasio-plans-lawsuit-halt-city-child-care-cuts-article-1.1097452>; see also David W. Chen, *Hoping to Replace Mayor, and Taking Him to Court*, N.Y. TIMES, Sept. 20, 2012, <http://www.nytimes.com/2012/09/21/nyregion/mayoral-hopefuls-are-suing-bloomberg.html> (“A lawsuit is never a first resort,” [de Blasio] said in a written response to questions. “But if you’re serious about forcing City Hall’s hand, you have to keep it on the table.”).

91. While the trial court held that the challenged law violated the State Constitution’s “home rule” provision because the issue of outer-borough taxi service was “not a matter of substantial state interest or concern,” the New York Court of Appeals reversed, noting that “transportation services in the State’s largest City and international center of commerce is important to the entire State.” *Taxicab Serv. Ass’n v. State*, Nos. 102553-2012, 102472-2012, 192783-2012, 2012 WL 3767147 (Sup. Ct. N.Y. Cnty. Aug. 17, 2012), *rev’d sub nom.* *Greater New York Taxi Ass’n v. State*, 21 N.Y.3d 289 (2013).

92. N.Y.C. CHARTER § 10(a), (c)(6) (2013). Since the President of the Board of Aldermen—which later became the Council President and then later the Public Advocate—was created in 1831, the office has been first in line of mayoral succession. See Green & Eisner, *supra* note 1, at 1098–99. In light of the Public Advocate’s current role as a counterweight to the Mayor’s office, this is perhaps the most incongruent of the office’s Charter-based powers. See discussion *infra* Part III.B.

93. 2002 CHARTER REVISION COMM’N REPORT, *supra* note 52, at 23.

94. See Elizabeth Kolbert, *Around City Hall: The Mayor Takes a Machiavellian Approach to Charter Revision*, NEW YORKER, Aug. 9, 1999, at 27–28, available at <http://archives.newyorker.com/?iid=15483&startpage=page0000029#folio=026>; Jonathan P. Hicks, *Green Musters Forces to Fight Charter Panel*, N.Y. TIMES, July 6, 1999, <http://www.nytimes.com/1999/07/06/nyregion/green-musters-forces-to-fight-charter-panel.html>.

95. See Elisabeth Bumiller, *The 1999 Elections: Charter Revision; New York Voters Strongly Reject Charter Revision*, N.Y. TIMES, Nov. 3, 1999, at A1, available at <http://www.nytimes.com/1999/11/03/>

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motives behind the Commission's initial appointment sank the proposal's chances for ratification at the polls.<sup>96</sup>

Two years later, another Charter Revision Commission appointed by Mayor Giuliani briefly debated the role of the Public Advocate and its place in the line of succession. In its final report, the 2001 Commission noted that although it "[would] not recommend that voters consider a change in mayoral succession or the Public Advocate's role generally during this election season, it recommend[ed] strongly that this important issue be further explored, and a reform proposal made, by another commission."<sup>97</sup>

Upon taking office in 2002, Mayor Bloomberg appointed a Charter Revision Commission and requested that it consider removing the Public Advocate from the line of succession.<sup>98</sup> While the 2002 Commission ultimately refrained from issuing such a proposal, it did recommend that the Charter require a special election to be held within approximately sixty days of a mayoral vacancy, limiting the time that the Public Advocate could serve as Mayor without being personally elected.<sup>99</sup> This proposal, along with the proposed revision to strip the Public Advocate of its role as the presiding officer of the City Council, was ratified by the voters in a sixty-one to thirty-nine percent landslide.<sup>100</sup>

### III. THE PUBLIC BENEFIT OF AN INDEPENDENT AND EFFECTIVE PUBLIC ADVOCATE

Because the Public Advocate possesses very few administrative powers, its ability to discharge its intended functions as an ombudsperson and a monitor of government services remains limited. Unfortunately, rather than bolstering the office's potential by providing it with the powers and resources it needs to fulfill its mandate, critics have instead argued that it should be abolished altogether.<sup>101</sup> However, despite

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nyregion/1999-elections-charter-revision-new-york-voters-strongly-reject-charter-revision.html; Douglas Muzzio, *Bloomberg Moves to Change the City Charter, But How?*, GOTHAM GAZETTE, Mar. 8, 2010, <http://www.gothamgazette.com/index.php/topics/environment/467--bloomberg-moves-to-change-the-city-charter-but-how>.

96. See Bumiller, *supra* note 95.

97. N.Y.C. CHARTER REVISION COMM'N, MAKING OUR CITY'S PROGRESS PERMANENT: AN OVERVIEW 111 (2001) [hereinafter 2001 CHARTER REVISION COMM'N REPORT], available at [http://www.nyc.gov/html/charter/downloads/pdf/2001\\_final\\_report.pdf](http://www.nyc.gov/html/charter/downloads/pdf/2001_final_report.pdf).

98. See Michael Cooper, *Mayor Calls Charter Panel's Rejection of His Plan Proof of Its Independence*, N.Y. TIMES, Sept. 4, 2002, <http://www.nytimes.com/2002/09/04/nyregion/mayor-calls-charter-panel-s-rejection-of-his-plan-proof-of-its-independence.html>.

99. See 2002 CHARTER REVISION COMM'N REPORT, *supra* note 52, at 1, 50–53. In a public hearing before the 2002 Charter Revision Commission, Public Advocate Gotbaum testified that she "would support a change in the Charter that allowed a special election to take place at some point after a successor takes office, whether it's 45, 60, or 90 days." *Id.* at 39.

100. *The 2002 Elections; Charter Modified on Succession of the Mayor*, N.Y. TIMES, Nov. 6, 2002, at B16, available at <http://www.nytimes.com/2002/11/06/us/the-2002-elections-charter-modified-on-succession-of-the-mayor.html>.

101. Before Mark Green ran for Public Advocate in 1993, shortly after the position was renamed from its former title as City Council President, Mayor David N. Dinkins accepted Green's request for a leave of absence from his post as Commissioner of the Department of Consumer Affairs, but wrote that "[t]he

constant efforts by officials in the Mayor's office and others in city government to eliminate or undermine the Public Advocate through budget cuts and further restrictions to its Charter-based powers, the office has survived as an important resource for New Yorkers and has retained its potential to provide effective and independent citizen representation and to promote good governance.

*A. A Centralized and Specialized Ombudsperson*

As an elected official whose primary duties are to resolve citizen complaints and propose improvements to government services, the Public Advocate plays a unique but essential role in city government. Because New York City provides many services that other large municipal governments do not, retaining a strong and specialized ombudsperson-at-large who is able to recognize and propose solutions to widespread public service problems is especially important.<sup>102</sup> The 1998 Charter Revision Commission, which preceded the Commission appointed by Mayor Giuliani the following year to consider removing the Public Advocate from the line of succession, recognized the benefit of retaining an independently elected ombudsperson, noting that although there was “no other city or state in the United States with a similar elected official, it may be that New York City's size and complexity requires more ombudsman-type help than anywhere else[.]”<sup>103</sup>

Furthermore, while many state and local governments have ombudsperson offices similar to that of the Public Advocate, those officials are generally appointed by the executive or legislative branches and are therefore primarily accountable to those branches rather than to the public.<sup>104</sup> Unlike an internal agency ombudsperson or solicitor, the Public Advocate is able to independently serve as a “watchdog” over city services with the primary goal of serving the citizens to whom the office is ultimately accountable.<sup>105</sup>

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position you are seeking has made, at best, only minimal contributions to our efforts to improve city services[.]” In response, Green stated that while “[s]ome people see [the Public Advocate's] office as an underachieving boondoggle . . . I see it as an underperforming asset.” McKinley, Jr., *supra* note 4. More recently, Mayor Bloomberg described the Public Advocate's office as a “total waste of everybody's money,” arguing that “[n]obody needs another gadfly” and that the office “should be looked at by a [Charter revision] commission to see whether or not it really provides enough value for the public dollars that we spend [on it].” Spencer, *supra* note 3.

102. See generally BERG, *supra* note 2, at 64.

103. N.Y.C. CHARTER REVISION COMM'N, REPORT OF THE NEW YORK CITY CHARTER REVISION COMMISSION 35 (1998) [hereinafter 1998 CHARTER REVISION COMM'N REPORT], available at [http://www.nyc.gov/html/charter/downloads/pdf/1998\\_final\\_report.pdf](http://www.nyc.gov/html/charter/downloads/pdf/1998_final_report.pdf).

104. See e.g., ALASKA STAT. § 24.55.020 (2010) (Alaska Office of the Ombudsman, appointed by Committee composed of members of the State Legislature); DEL. CODE ANN. tit. 29, § 8716 (2013) (Delaware Division of the Public Advocate, appointed by Governor with advice and consent of majority of State Senate); HAW. REV. STAT. § 96-2 (LexisNexis 2013) (Hawaii office of the Ombudsman, appointed by State Legislature); IOWA CODE ANN. § 2C.3 (West 2013) (Iowa Office of Citizens' Aide, appointed by State Legislature); NEB. REV. STAT. § 81-8,241 (LexisNexis 2012) (Nebraska Office of Public Counsel, appointed by State Legislature).

105. See Green & Eisner, *supra* note 1, at 1096; Schwarz & Lane, *supra* note 2, at 821.

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Finally, as a centralized office responsible for monitoring service programs throughout city government, the Public Advocate is able to address citizen complaints better than a diffuse system of internal inspectors. By receiving complaints of all types from citizens across the city, and by remaining accountable to a citywide electorate, the Public Advocate is uniquely positioned to recognize and promptly address systemic service problems and to propose effective solutions. Indeed, in its final report to voters, the 1998 Commission noted that the Public Advocate's office "seems to be functioning well for some New Yorkers who could not otherwise find help in resolving bureaucratic problems," and that "[t]he Public Advocate's election by a citywide electorate apparently strengthens the office's ability to help individual citizens resolve problems that are perhaps unsolvable by a city council member representing a smaller district[.]"<sup>106</sup>

### *B. An Independent Monitor of Government Performance*

The Public Advocate has successfully uncovered a litany of problems in city administration, including poor sanitary conditions in welfare offices, faulty hospital inspection procedures, no-bid construction contracts, contaminated food in homeless shelters, and patterns of child abuse and neglect in the city's child welfare system.<sup>107</sup> Without the benefit of an independent oversight office, these and many other government service problems might otherwise never have been brought to the attention of the public, the media, or those officials with the power to remedy them.

The Public Advocate's independence from the policymaking branches of city government sets it apart from other oversight offices. The 1989 Commission expanded the former Council President's oversight powers while retaining its character as an elected office, rather than an appointed one, because the Commission believed that responsiveness to the "public's good sense" would encourage the officeholder to formulate constructive proposals for service improvements.<sup>108</sup> While other states and cities have oversight officials who perform similar monitoring and reporting functions, those officials' interests are inherently conflicted by virtue of their positions as appointed, rather than independently elected officials. For example, the New York State Inspector General is charged with investigating allegations of government fraud, corruption, and criminal activity.<sup>109</sup> However, the Governor alone has the power to appoint the Inspector General and set the position's salary level.<sup>110</sup>

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106. 1998 CHARTER REVISION COMM'N REPORT, *supra* note 103, at 35.

107. *See, e.g.*, Robert Polner, *Green Slams City Welfare Landlords*, NEWSDAY, July 23, 1997, at A26; Robert Polner, *Report Faults City Hospitals/Inspection Scheme is Alleged*, NEWSDAY, Jan. 21, 1998, at A22; Dan Janison, *New Bids for Window Contract/Agency Got Protest About a \$1.4M Deal*, NEWSDAY, June 30, 1997, at 19; Jo Craven McGinty, *Sobering Report Describes Trends in Deaths of Abused and Neglected Children*, N.Y. TIMES, Jan. 20, 2012, at A21, *available at* <http://www.nytimes.com/2012/01/21/nyregion/report-describes-trends-in-deaths-of-abused-and-neglected-children.html>.

108. Schwarz & Lane, *supra* note 2, at 821.

109. N.Y. EXEC. LAW § 53 (McKinney 2006).

110. *Id.* § 52.

Similarly, the Ombudsman of Detroit, who is charged with investigating misconduct stemming from “any official act of any agency *except elective officers*,” is appointed by, and may be removed by, a two-thirds vote of Detroit’s City Council.<sup>111</sup>

When officials with administrative powers can appoint, re-appoint, or set the salaries of those who monitor their performance, the independence of those monitoring entities is necessarily compromised. On the other hand, as an elected official, New York City’s Public Advocate is uniquely positioned to conduct investigations and provide independent analysis of city government performance without undue influence from the officials and agencies it is charged with monitoring.<sup>112</sup>

*C. An Essential Check on Executive Authority*

As a counterweight to the Mayor’s office, the Public Advocate has also proven to be an effective bulwark against executive overreach. For example, after successfully suing to obtain access to information that was unlawfully withheld by the NYPD, Public Advocate Green was able to bring to light that, in a two-year period, only twenty-nine percent of all substantiated charges of police misconduct had led to disciplinary sanctions.<sup>113</sup> More recently, after filing suit to obtain information about city revenue generated from fines on small businesses outside of Manhattan, Public Advocate de Blasio gained access to the information through a legal settlement and presented a comprehensive report on the issue to the public.<sup>114</sup>

It is unsurprising that the Mayors who have served concurrently with an active Public Advocate have been among the office’s most vocal critics.<sup>115</sup> The desire to provide independent checks on mayoral power was a “crucial issue” affecting the 1989 Commission’s deliberations, and the decision to retain an independent citywide office as a monitor of government services was an essential aspect of the Commission’s attempts to promote accountability and transparency while also centralizing administrative power in the Mayor’s office.<sup>116</sup>

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111. DETROIT CITY CHARTER §§ 4-302, 4-307 (2012), [http://www.detroitmi.gov/Portals/0/docs/legislative/cityclerk/calendar\\_2011/Charter%20Commission/Charter%20Word%20ver%20in%20pdf%20file\\_%2012\\_1Word.pdf](http://www.detroitmi.gov/Portals/0/docs/legislative/cityclerk/calendar_2011/Charter%20Commission/Charter%20Word%20ver%20in%20pdf%20file_%2012_1Word.pdf) (emphasis added).

112. See discussion *supra* Part III.A. Although the Mayor and City Council cannot appoint or set the salary of the Public Advocate, they are able to control the office’s operating budget. See discussion *infra* Part IV.B.

113. See Juan Gonzalez, *Abusive Cops Run Free*, N.Y. DAILY NEWS, Feb. 26, 1999, at 20, available at <http://www.nydailynews.com/archives/news/abusive-cops-run-free-article-1.825988>.

114. See Taylor, *supra* note 84; Barbaro, *supra* note 84.

115. See Spencer, *supra* note 3; Herbert, *supra* note 4.

116. See Schwarz & Lane, *supra* note 2, at 820; Transcript of N.Y.C. Charter Revision Comm’n Pub. Hearing 45 (June 10, 2010) [hereinafter June 10, 2010 Public Hearing] (testimony of Eric Lane), available at [http://www.nyc.gov/html/charter/downloads/pdf/transcript\\_0610.pdf](http://www.nyc.gov/html/charter/downloads/pdf/transcript_0610.pdf). Although the Public Advocate is intended to serve as a counterweight to the Mayor, its role is not limited to that of a full-time critic or habitual opponent of the Mayor’s actions or policies. Indeed, the Public Advocate’s investigative and reporting capabilities can lend independent credibility to the Mayor’s work. For example, when Mayor Giuliani claimed that the New York-New Jersey Port Authority was spending a significantly disproportionate sum of construction money on projects in New Jersey, Public Advocate Green issued a ninety-two page study

**IV. PROPOSED CHARTER REVISIONS TO CLARIFY AND STRENGTHEN THE PUBLIC ADVOCATE'S ROLE**

In 2010, Mayor Bloomberg appointed a fifteen-member Charter Revision Commission, chaired by City University of New York Chancellor Matthew Goldstein.<sup>117</sup> The 2010 Commission heard testimony and arguments in favor of abolishing the Public Advocate<sup>118</sup> and in favor of maintaining the office while also clarifying and strengthening its duties or powers.<sup>119</sup> Ultimately, the Commission did not propose any major changes to the Public Advocate's role, but recommended that "future commissions that wish to address these issues focus on more thoroughly defining and clarifying the character of that office and its place within the scheme of separation of powers in city government."<sup>120</sup>

Much of the contemporary criticism of the Public Advocate's office can be attributed to widespread confusion about its purpose and the perception that it exists only because of past political compromises.<sup>121</sup> However, rather than abolishing the position, future Commissions should instead remedy the Charter-based limitations that have impacted its effectiveness and provide it with the statutory powers and resources it needs to fulfill the role of an independent ombudsperson and "watchdog" over city government.<sup>122</sup>

First, in its capacity as an ombudsperson and investigator of citizen complaints, the Public Advocate should be empowered to subpoena witnesses and records from city agencies. In addition, as an independent citizens' representative, the Public

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which proved Giuliani's claim and found that while seventy-one percent of the Port Authority's service region population lived in New York, New Jersey received fifty-two percent of the agency's spending for construction and services. See Thomas J. Lueck, *Report on Port Authority Says It Favors New Jersey*, N.Y. TIMES, Feb. 16, 1996, at B5, available at <http://www.nytimes.com/1996/02/16/nyregion/report-on-port-authority-says-it-favors-new-jersey.html>; Bob Liff & Don Gentile, *Pol: PA Takes Its Toll on N.Y.-N.J. Garden Greener*, SEZ REPORT, N.Y. DAILY NEWS, Feb. 16, 1996, at 4, available at <http://www.nydailynews.com/archives/news/pol-pa-takes-toll-n-y-n-garden-greener-sez-report-article-1.715943>.

117. Press Release, Office of the Mayor of N.Y.C., Mayor Bloomberg Announces Appointment of Charter Revision Commission (Mar. 3, 2010), available at <http://www.nyc.gov/portal/site/nycgov>; Muzzio, *supra* note 95.

118. See, e.g., Transcript of N.Y.C. Charter Revision Comm'n Open Pub. Meeting & Panel Discussion 113–15 (May 17, 2010) [hereinafter May 17, 2010 Public Meeting] (testimony of Dr. Frank Macchiarola), available at [www.nyc.gov/html/charter/downloads/pdf/transcript\\_0517.pdf](http://www.nyc.gov/html/charter/downloads/pdf/transcript_0517.pdf); June 10, 2010 Public Hearing, *supra* note 116, at 149 (testimony of Council Member Ignizio).

119. See, e.g., May 17, 2010 Public Meeting, *supra* note 118, at 37 (testimony of Frederick A.O. Schwarz); June 10, 2010 Public Hearing, *supra* note 116, at 65–67 (testimony of Professor Douglas Muzzio); *id.* at 130–34 (testimony of Public Advocate Bill de Blasio).

120. See N.Y.C. CHARTER REVISION COMM'N, FINAL REPORT OF THE 2010 NEW YORK CITY CHARTER REVISION COMMISSION (2010) [hereinafter 2010 CHARTER REVISION COMM'N REPORT], available at [http://www.nyc.gov/html/charter/downloads/pdf/final\\_report\\_of\\_the\\_2010\\_charter\\_revision\\_commission\\_9-1-10.pdf](http://www.nyc.gov/html/charter/downloads/pdf/final_report_of_the_2010_charter_revision_commission_9-1-10.pdf).

121. See BERG, *supra* note 2, at 206; 2002 CHARTER REVISION COMM'N REPORT, *supra* note 52, at 28; June 10, 2010 Public Hearing, *supra* note 116, at 45 (testimony of Eric Lane, Professor, Hofstra Univ. Law School).

122. Schwarz & Lane, *supra* note 2, at 821.



Advocate should be provided statutory authority to pursue legal remedies beyond those involving the office's access to public information.

Second, as an effective monitor of government services and programs, the Public Advocate should be completely independent from the executive and legislative branches of city government. Specifically, the office's duties and powers should be consolidated under a separate chapter of the City Charter, its operating budget should be protected from outside interference, and it should be completely removed from the line of mayoral succession.

Third, as a counterweight to the Mayor's office, the Public Advocate's required reporting functions should be incorporated into the city's annual performance review process, and the executive and legislative branches should be required to investigate and respond to the Public Advocate's reported findings and suggestions.

Fourth, as an elected official whose role is not to implement policy but to promote effective service delivery and Charter compliance, the unique nature of the Public Advocate's role should be further defined by making the office a nonpartisan position elected during off-year cycles. Finally, because the Public Advocate's effectiveness in promoting good governance is largely dependent on its performance of discretionary tasks, the Charter should be revised to promote the office's accountability and its responsiveness to the public by clarifying and expanding the office's mandatory duties.

#### *A. Needed Enforcement Mechanisms*

The Charter currently requires that "the public advocate shall have timely access to those records and documents of city agencies which the public advocate deems necessary" to perform its oversight role.<sup>123</sup> However, the Public Advocate is only able to enforce this provision by initiating a lawsuit or by requesting that a City Council committee issue a subpoena to require compliance with the office's demands for information.<sup>124</sup>

While the New York State Inspector General and similar offices across the country are empowered to issue subpoenas in the course of their investigations,<sup>125</sup> the Public Advocate's ability to effectively investigate citizen complaints and monitor government services remains severely limited by its lack of independent subpoena power.<sup>126</sup> The City Charter imparts subpoena power on numerous boards and offices, including the Tribunal for Tax Appeals, the Police Investigation and Audit Board,

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123. N.Y.C. CHARTER § 24(j) (2013).

124. *Id.* §§ 24(j), 29(b).

125. N.Y. EXEC. LAW § 54 (McKinney 2006); *see also* U.S. OMBUDSMAN ASS'N, MODEL OMBUDSMAN ACT FOR STATE GOV'TS § 11(f) (1997); DETROIT CITY CHARTER, *supra* note 111, § 7.5-408; ALASKA STAT. § 24.55.170 (2010); DEL. CODE ANN. tit. 29, § 8716 (2013); HAW. REV. STAT. § 96-10 (LexisNexis 2013); IOWA CODE ANN. § 2C.9 (West 2013); NEB. REV. STAT. § 81-8,245 (LexisNexis 2012).

126. *See generally* Green & Eisner, *supra* note 1, at 1158 ("No administration, however right-minded, will happily open its books to an institutional auditor unless there are sanctions for refusing to do so."); Jason Horowitz, *Public Advocate Candidates Clamor for Gotbaum's Diminished Office*, N.Y. OBSERVER, Aug. 8, 2005, <http://observer.com/2005/08/public-advocate-candidates-clamor-for-gotbaums-diminished-office/> ("[The Public Advocate's] financial dependence on the very agencies it is called on to monitor makes it more of a mutt looking for scraps than a watchdog. Its lack of subpoena power renders it a fangless one at that.")



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the Commissioner of the Department of Buildings, the Human Rights Commission, and the Conflicts of Interest Board.<sup>127</sup> As a centralized ombudsperson who performs a “general oversight function” over city services, the Public Advocate should also be given independent subpoena power to enforce its requests for government information without the need for the permission and cooperation of a City Council Committee.<sup>128</sup>

Furthermore, as an arbiter of citizen complaints, a “Charter cop,”<sup>129</sup> and a counterweight to the executive branch, the Public Advocate’s ability to pursue legal remedies should be expanded beyond the narrow summary inquiry procedure in cases that do not involve public information requests.<sup>130</sup> Specifically, the Charter should include a standing provision that would enable the Public Advocate to initiate a special proceeding and sue for injunctive relief in any matter relating to its broader role as an ombudsperson and an oversight official.<sup>131</sup>

### *B. Promoting the Office’s Independence*

Because the Public Advocate’s independence from other city officials is critical to its success, its character as a separate entity should be clarified in the Charter. Currently, as a remnant of its prior role as President of the City Council,<sup>132</sup> the Public Advocate’s duties and powers are enumerated under chapter 2 of the Charter, which governs the Council and states that “[t]he council shall consist of the public advocate and of fifty-one other members[.]”<sup>133</sup> While the Public Advocate’s remaining authority to participate in Council debates and introduce legislation should be retained as a means of providing a citywide perspective on legislative issues,<sup>134</sup> its position as a distinct office should be

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127. N.Y.C. CHARTER §§ 170(e), 452, 646, 905, 2602.

128. See CITIZENS UNION OF THE CITY OF N.Y., 2010 CITY CHARTER REVISION RECOMMENDATIONS: INCREASING AVENUES FOR PARTICIPATION IN GOVERNING AND ELECTIONS IN NEW YORK CITY 27 (June 30, 2010), available at [http://citizensunion.org/www/cu/site/hosting/Reports/0610CU\\_Charter\\_Revision\\_Report&Recommendations.pdf](http://citizensunion.org/www/cu/site/hosting/Reports/0610CU_Charter_Revision_Report&Recommendations.pdf).

129. Green & Eisner, *supra* note 1, at 1131.

130. See *supra* Part II.D.3.

131. See generally MODEL OMBUDSMAN ACT, *supra* note 125, § 11(h). The Charter currently provides that the City Corporation Counsel, who is appointed by the Mayor, “shall be the attorney and counsel for the city and every agency thereof and shall have charge and conduct of all the law business of the city and its agencies and in which the city is interested.” N.Y.C. CHARTER § 394(a). Therefore, without the Mayor’s support, the Public Advocate—and any other official outside the Mayor’s office—must generally rely on pro bono counsel to pursue legal remedies. See Green & Eisner, *supra* note 1, at 1158.

132. The Charter has yet to fully internalize the office’s change of title. Under section 82, which governs the duties of the Borough Presidents, the Charter provides that reports of recurring complaints must be issued to “the mayor, *council president* and the public . . .” N.Y.C. CHARTER § 82(13) (emphasis added). Similarly, state law provides the “president of the city council of the city of New York” the power to appoint five members to the New York City Transit Authority Advisory Council. N.Y. PUB. AUTH. LAW § 1204-e(2) (McKinney 2013).

133. N.Y.C. CHARTER § 22.

134. David M. Herszenhorn, *The 1998 Campaign: The Green Record; Green Running on His History of Handpicked Consumer Causes*, N.Y. TIMES, Sept. 12, 1998, at D7, available at <http://www.nytimes.com/1998/09/12/nyregion/1998-campaign-green-record-green-running-his-history-handpicked-consumer-causes.html>.

spelled out in the Charter, with its duties and powers consolidated under a separate and coherent chapter.

In addition, the Public Advocate's operating budget should be shielded from further meddling by the Mayor or the Council. When the 1989 Commission proposed the creation of the IBO to counterbalance the Mayor's authority in fiscal matters, it also proposed a Charter provision to protect the agency's budget from outside interference by requiring that its annual appropriations remain equal to at least ten percent of the budget provided for the Mayor's Office of Management and Budget.<sup>135</sup> However, the Charter provides no similar protection for the Public Advocate's budget leaving the office open to a series of politically motivated acts intended to starve it into irrelevance.<sup>136</sup>

Although the Public Advocate, like the IBO, was intended to serve as an independent counterweight to the Mayor's office, it remains financially dependent upon those whom it is charged with monitoring.<sup>137</sup> Thus, the Charter should be revised to insulate the Public Advocate's budget against interference by the Mayor or the Council by prohibiting the office's annual appropriations from falling below a defined percentage of the Mayor's expense budget.<sup>138</sup>

In addition to providing a statutory protection against further budgetary attacks, the Charter should also bolster the Public Advocate's independence from the Mayor's office and clarify its separation from the policymaking realm of city government by removing it from the line of mayoral succession.<sup>139</sup> Currently, the Public Advocate is the only elected official whose purpose, in part, is to monitor and critique the Mayor's administrative performance while also serving as a "vice-Mayor," an inherently awkward arrangement that owes more to the office's former administrative roles—as President of the Board of Aldermen and then as City Council President—than to common sense.

It should not be the responsibility of an independent Public Advocate, whose priorities and policy preferences may be drastically at odds with the Mayor's, to assume the Mayor's powers and duties at a moment's notice. Moreover, the qualifications for

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135. See 1989 CHARTER REVISION COMM'N REPORT, *supra* note 17, at 23; Schwarz & Lane, *supra* note 2, at 903 ("We added this provision because we could foresee a future mayor and speaker, each jealous of their monopoly on budget information and analysis, seeking to eliminate an independent and respected rival source."); N.Y.C. CHARTER § 259(b). The 1989 Commission also empowered the City Council to override a mayoral veto of the Council's operating budget. See 1989 CHARTER REVISION COMM'N REPORT, *supra* note 17, at 11.

136. See CITIZENS' UNION, *supra* note 128, at 29; Editorial, *Undercutting the Public's Advocate*, N.Y. TIMES, July 4, 1994, at 1:18, available at <http://www.nytimes.com/1994/07/04/opinion/undercutting-the-public-s-advocate.html>; Chen, *supra* note 53; Herbert, *supra* note 4; Saul, *supra* note 53.

137. See CITIZENS' UNION, *supra* note 128, at 30 ("It undermines honesty and integrity in our elected officials if they feel the need to couch their remarks and opinions for fear of having their budget cut."); June 10, 2010 Public Hearing, *supra* note 116, at 45–46 (testimony of Eric Lane).

138. See OFFICE OF MGMT. & BUDGET, *supra* note 12.

139. See 2002 CHARTER REVISION COMM'N REPORT, *supra* note 52, at 28 (noting that "while the provision empowering the Council President, now the Public Advocate, to succeed the mayoralty has remained constant, the nature of the Public Advocate's office has been radically transformed").

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an effective Mayor are not necessarily the same as those of an effective Public Advocate, and an individual who assumes the mayoralty during an unexpected transition of power should be well-versed in the minutiae of executive operation.<sup>140</sup> Therefore, the Charter's current scheme, which inappropriately affects the intended relationship between the Public Advocate and the Mayor's office, should be revised to remove the Public Advocate from the line of succession.<sup>141</sup>

### *C. Requiring a Response to the Public Advocate's Annual Report*

The Charter requires the Public Advocate to submit an annual report to the Council providing a statistical summary of citizen complaints received by the office, an analysis of recurring complaints, a summary of chronic Charter violations, and recommendations for solutions to underlying service problems.<sup>142</sup> The Public Advocate's annual report must be sent to the Council by October 31 of each year.<sup>143</sup> However, once this report has been prepared and submitted there is no requirement that any city official with administrative or legislative authority read, consider, investigate, or otherwise respond to any of the issues presented therein.

The Mayor is also required to prepare an annual "preliminary management report" detailing the performance record of each city agency along with proposals for the upcoming fiscal year's performance goals.<sup>144</sup> The Mayor's report must be submitted to the Council each year by January 30.<sup>145</sup> The Council is then required to conduct hearings on the Mayor's preliminary management report and prepare its own report summarizing its findings and recommendations by April 8 of the same year.<sup>146</sup> Then, by September 17, at the beginning of the following fiscal year, the Mayor is required to submit a final management report with an updated summary of each agency's performance record and a final statement of program goals.<sup>147</sup>

To summarize, the Charter currently provides that the Public Advocate's annual report is due to the Council the month *after* the Mayor's final management report for the year has already been issued. This arrangement prevents the one public office that is most familiar with current citizen complaints and service problems from voicing his or her findings during the annual management review process.

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140. See generally CARO, *supra* note 15, at 787–88; 2002 CHARTER REVISION COMM'N REPORT, *supra* note 52, at 24–25, 42.

141. See 2002 CHARTER REVISION COMM'N REPORT, *supra* note 52, at 42 (noting that "the Public Advocate's ombudsperson role may put the office institutionally at odds with the mayoralty; in the event of succession, this fact may create a blurring of institutional separation of powers").

142. N.Y.C. CHARTER § 24(n) (2013).

143. *Id.*

144. *Id.* § 12(a), (b).

145. *Id.* § 12(a).

146. *Id.* § 12(e).

147. *Id.* § 12(a), (c).

The Charter should be revised to require that the Public Advocate's annual report be sent to the Council and to the Mayor's office *after* the publication of the Mayor's preliminary management report and *before* the Council's review process begins. Furthermore, the Council should be required to conduct public hearings on issues raised in the Public Advocate's annual report and include its own findings as to those issues in its response to the Mayor. Finally, the Mayor's office should be required to address and provide a substantive response to all major issues presented in the Council's report, including those initially raised by the Public Advocate's office.

A responsive city government should not be permitted to ignore the findings of an elected official whose purpose, in part, is to monitor, review, and report on service delivery problems. Even if the Council or the Mayor, or both, were to entirely refute the findings contained in the Public Advocate's annual report, a formal response requirement would at least put the policymaking branches of government on record as to the issues or problems raised by the Public Advocate's office, and would give teeth to a reporting process that otherwise amounts to an executive-branch review of executive-branch performance.

*D. Electoral Reforms to Reflect the Public Advocate's Unique Purpose*

One of the major impediments to the Public Advocate's success in promoting an open, responsive, and accountable government is that very few New Yorkers are even aware of the office's existence, much less its intended purpose.<sup>148</sup> Under the current Charter, the Mayor, Public Advocate, Comptroller, Borough Presidents, and all City Council Members are elected to four-year terms in the same election cycle.<sup>149</sup> With this uniform campaign schedule, quadrennial media coverage and public attention to city government is primarily focused on the race for Mayor, with little attention given to other campaigns.<sup>150</sup>

Because the Public Advocate is responsible for monitoring and reviewing the Mayor's administrative performance, the election schedules of those two offices should be staggered. By holding Public Advocate elections in off-year cycles—either halfway through the Mayor's term or during even-year federal elections—the office and the electorate would both benefit from a vibrant public debate about the incumbent officeholder's performance and the priorities of the office under the current mayoral administration.

The Public Advocate should also be elected on a nonpartisan basis. With an electorate dominated by Democrats,<sup>151</sup> most New York City elections are decided during a closed primary process in which only those voters with a registered party

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148. McGrath, *supra* note 53; Getachew & Senteno, *supra* note 1.

149. N.Y.C. CHARTER §§ 4, 24(a), 25(a), 81(b), 91.

150. *See generally* Transcript of N.Y.C. Charter Revision Comm'n Open Forum 57 (Aug. 2, 2010) (testimony of Prof. John Mollenkopf), available at [www.nyc.gov/html/charter/downloads/pdf/transcript\\_080210.pdf](http://www.nyc.gov/html/charter/downloads/pdf/transcript_080210.pdf).

151. As of November 1, 2012, sixty-eight percent of New York City voters were registered as Democrats. *See Enrollment by County as of November 1, 2012*, N.Y. STATE BD. OF ELECTIONS, [www.elections.ny.gov/NYSBOE/enrollment/county/county\\_nov12.pdf](http://www.elections.ny.gov/NYSBOE/enrollment/county/county_nov12.pdf) (last visited Sept. 17, 2013).

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affiliation are allowed to vote.<sup>152</sup> In 2003, Mayor Bloomberg appointed a Charter Revision Commission that proposed nonpartisan elections for all city offices. However, the measure was voted down by forty points, largely due to a concerted opposition campaign by Democratic officials and party leaders.<sup>153</sup>

One of the principal arguments in favor of nonpartisan municipal elections is that party labels are more relevant to policy preferences at the state and federal levels than to issues affecting city administration.<sup>154</sup> This argument is especially applicable to the Public Advocate's office. Because the Public Advocate does not hold any real policymaking powers—aside from its minority votes on several administrative boards—the officeholder's positions on traditionally partisan issues should not affect the performance of his or her job, and there is no reason that voters' choice of an ombudsperson and oversight official should be based on anything other than candidates' competence, resourcefulness, and responsiveness.

### *E. Expanding the Public Advocate's Mandatory Duties*

Because the Charter imparts few mandatory duties on the Public Advocate, the office's effectiveness is almost entirely dependent on the ambitions and abilities of the individual officeholder and his or her performance of discretionary functions.<sup>155</sup> For example, while the Public Advocate is required to receive citizen complaints and refer them to appropriate city agencies, the office “may,” but is not required to, follow up on such complaints after the initial referral phase.<sup>156</sup> Similarly, in its role as a monitor and investigator of city services, the Public Advocate is allowed, but is not required, to conduct reviews of city programs and hold public hearings.<sup>157</sup>

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152. See David W. Chen, *2013 New York Primary Voting Requires Any Party Changes by Oct. 12*, N.Y. TIMES, Oct. 4, 2012, at A21, available at <http://www.nytimes.com/2012/10/05/nyregion/2013-new-york-primary-voting-requires-any-party-changes-by-oct-12.html>; ANTHONY CROWELL ET AL., NONPARTISAN ELECTIONS: PRELIMINARY OPTIONS AND RECOMMENDATIONS, STAFF REPORT TO THE NEW YORK CITY CHARTER REVISION COMMISSION (2003) (“In a bow to reality, it is not uncommon for Republicans and others who may not feel at home in the Democratic Party to register as Democrats nonetheless, recognizing that the Democratic primary provides the only real opportunity to participate meaningfully in the City's electoral process.”).

153. BARRY, *supra* note 16, at 4, 122–24; CROWELL ET AL., *supra* note 152, Summary of Public Testimony on Nonpartisan Elections, at B-2 (“Generally, elected officials and members of the public disagree on whether nonpartisan elections should be put to the ballot. A majority of public officials who testified opposed the idea, while a majority of the public who testified supported it.”); Jonathan P. Hicks & Michael Cooper, *The 2003 Election: City Charter; City Votes Down an Effort to End Party Primaries*, N.Y. TIMES, Nov. 5, 2003, at A1, available at <http://www.nytimes.com/2003/11/05/nyregion/the-2003-election-city-charter-city-votes-down-an-effort-to-end-party-primaries.html>.

154. CROWELL ET AL., *supra* note 152, at 28 (“Just as voters may feel compelled to register as Democrats so that their voices may be heard, candidates who hope to win office may run as Democrats even if they have little interest in party ideology.”).

155. See generally 2010 CHARTER REVISION COMM'N REPORT, *supra* note 120, at 80 (“Different commentators, and indeed different persons who have served as Public Advocate, see the role of the office in different ways.”).

156. N.Y.C. CHARTER § 24(g) (2013).

157. *Id.* § 24(h), (f), (m).

To promote the office's responsiveness and ensure that its potential is not hampered by idle or uninspired leadership, the Charter should hold those who are elected as Public Advocate responsible for fulfilling the job's intended functions. Specifically, the Public Advocate's duties to review and resolve citizen complaints should be brought into line with those provided in the U.S. Ombudsman Association's Model Ombudsman Act for State Governments,<sup>158</sup> which requires that ombudspersons "conduct a suitable investigation" of complaints that are appropriate for investigation, and "shall, if requested by the complainant, suitably report the status of his or her investigation to the complainant."<sup>159</sup> The Public Advocate's discretionary power to investigate city government services should also be revised to include a mandatory reporting function akin to that of the City Comptroller, who is required—not simply permitted—to audit the city's financial transactions and investigate agencies' compliance with the Charter's procurement rules.<sup>160</sup>

By clearly stating that the Public Advocate is required, not merely permitted, to provide capable oversight of city agencies and services, these Charter revisions would hold the office accountable for its own responsiveness to citizens and would provide a clear basis upon which voters could judge the officeholder's performance. Furthermore, by providing a broader base of mandatory duties, the Charter would preclude an overly narrow reading of the Public Advocate's role by the officeholder, by other officials, or by the public to whom the office is ultimately responsible.

## V. CONCLUSION

As an unplanned and obscure product of prior governing structures and political compromises, the Public Advocate's character as an elected official with no real governing power has bred widespread criticism of the office's continuing existence and confusion about its intended purpose. However, these unique qualities have also enabled the office to develop inventive and effective means to address problems in city government and to serve as an essential counterweight to a powerful and centralized executive branch. Through future Charter revisions to bolster the Public Advocate's oversight powers, reinforce its independence, and clarify its role and its responsibilities to the public, the only elected government watchdog in the country would be even better positioned to serve as an exemplar of good government and an effective advocate for New Yorkers.

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158. While the Model Ombudsman Act is "designed for use at the state government level, it can also be adapted for local government." MODEL OMBUDSMAN ACT, *supra* note 125, Prefatory Note. For example, the Detroit City Ombudsman has committed to adopting the standards recommended in the model act in order "[t]o ensure that the City of Detroit gets the most benefit from its Ombudsman and that operations are consistent with Ombudsmen in other cities and states . . ." See THE CITY OF DETROIT, OMBUDSMAN, <http://www.detroitmi.gov/CityCouncil/LegislativeAgencies/Ombudsman.aspx> (last visited Sept. 17, 2013).

159. MODEL OMBUDSMAN ACT, *supra* note 125, §§ 12, 13.

160. N.Y.C. CHARTER § 93(e).