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Lawyers for Government Have Unique Responsibilities and Opportunities to Influence Public Policy

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I. INTRODUCTION

Professor William E. Nelson has written a comprehensive, useful, and interesting history of a government law office—the Corporation Counsel's office, or, as it is formally known, the New York City Law Department.[1] All the living Corporation Counsels were invited to submit any thoughts that occurred to them based upon their service to the city, including comments on Professor Nelson's book. I was fortunate to serve for five years (from 1982 through 1986) as the second Corporation Counsel in Mayor Edward I. Koch's administration, following Allen Schwartz and preceding Peter Zimroth.

Of course, the first obligation of a leader of a government law office is to try to assure that the office operates at the highest possible level of integrity and professionalism. In this sense—the paramount importance of doing professionally excellent work—good lawyers for government should, as Professor Nelson indicates in his analysis of the Koch administration, resemble being a good lawyer for a corporation (or any other private client). However, governments have different, far broader responsibilities than businesses. Therefore, the roles of a government lawyer differ as well.

In this paper, I develop this point by discussing the opportunities that government lawyers can have to influence public policy, using some of my own experiences as Corporation Counsel as illustrations. All lawyers have an obligation to uphold the law. But government lawyers have a heightened responsibility to do so. In addition, government lawyers can have opportunities to affect public policy far beyond subjects that fall within a narrow view of "the law."

Of course, if a government lawyer is satisfied just to measure out law in spoonfuls, and narrow, little spoonfuls at that, the lawyer will fail to play a significant role on public policy issues. The same is true if the lawyer is a shrinking violet. As I put it in a *New York Law Journal* article, under the sub-heading "The Risk of Being a Shrinking Violet":

> Assuming that you, the government lawyer, remember that your authority and professional expertise is limited to law, you are not very helpful if your advice is narrowly confined to black letter law. In the first place, particularly when constitutional questions are involved, there is no bright line distinguishing law from policy. History, values, and experience all shape the law. In addition, it is simply not fair to the government you serve to refrain from commenting except within a narrow and professional context. Government has too much to do, too little time to ponder. It needs to hear many diverse perspectives, many voices. And lawyers, perhaps as individuals, perhaps because of their training, may have something useful to say.[2]

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1. William E. Nelson, Fighting for the City: A History of the New York City Corporation Counsel (2008).

2. Frederick A. O. Schwarz, Jr., *Lawyers for Government Face Unique Problems*, N.Y. L.J., May 1, 1984, at 38 (on file with New York Law School's Center for New York City Law in Selected Writings and Speeches of Frederick A. O. Schwarz, Jr., at Tab 32) [hereinafter Schwarz Writings and Speeches]. (The title of the article was chosen by the *New York Law Journal*. I would have chosen a title like this article's title.)

Part II of this article asks some preliminary questions about government lawyering. These include: who is the client of a government lawyer, whether lawyers bring anything special to the table in deliberations within government, and the balance between loyalty and independence in the way in which the chief government lawyer relates to the government's chief executive. Part III develops the distinction between and relationships among law, policy, and politics. Part IV discusses the factors that create *opportunities* for government lawyers to affect public policy. Part V gives a number of examples of impacting public policy based upon my own experience.

II. WHAT DOES IT MEAN TO BE A GOVERNMENT LAWYER?

A. Who is the Client?

Government lawyers must always face questions of who their client is. The Corporation Counsel is said by the City Charter to be counsel for "the city and every agency thereof," as well as for "the people" of the city.[3] However, the Corporation Counsel is an at-will appointee of the mayor. And, like most other mayoral appointees, the Corporation Counsel is not subject to any "advice and consent" powers of the city council.

While interesting, the Charter does not definitively answer the "who is the client" question. For all government lawyers, the answer is always, it seems to me, the overall greater governmental entity that the lawyer serves: the United States, the state, or, for Corporation Counsels, "the city." That being said, a government lawyer cannot be effective—on policy issues at least—unless there is a close relationship with the chief executive—in the city's case, the mayor—who is ultimately responsible for, and accountable for, the performance of all parts of the executive branch.[4]

The Law Department's reputation is, first and foremost, tied to the quality and integrity of the Law Department's work. That reputation is also well served by city lawyers treating the city as their client. In contrast, the Law Department's reputation (and its child: recruiting) clearly would be hurt if the Law Department were seen as devoted to serving the short-term political interests of a mayor. The same holds true for relationships between, for example, attorneys general and presidents.

That a chief government lawyer represents the governmental entity and not the chief executive does not, of course, mean that the lawyer can wander off and make on his or her own all sorts of policy judgments. Often, the lawyer will represent the entity's interests as they are defined and articulated by the chief executive. The chief

3. New York, N.Y., Charter ch. 17, § 394(a) & (c) (2004), *available at* http://www.nyc.gov/html/charter/downloads/pdf/citycharter2004.pdf.

4. This subsection is written from the perspective of a chief government lawyer analyzing whether the client is the governmental entity or the chief executive. Such questions are not limited, however, to the chief lawyer. Moreover, many government lawyers face a related question: is the client the city or an agency? Ultimately, the client is the city. But in considering how to resolve an issue involving an agency, the lawyer must understand and carefully consider the position of the agency.

executive was elected. The lawyer was not.[5] This distinction is, of course, most important when the issue is more policy than law.

One can conjure up all sorts of extreme cases that present choices for a chief government lawyer when the personal interests of the chief executive seem to be both dominating and inappropriate. (Attorney General Elliot Richardson's refusal to carry out President Nixon's order to fire Archibald Cox comes to mind.) But, as Professor Nelson's book points out, and my personal experience supports, Mayor Koch, in his relationship with his Corporation Counsels, himself emphasized the interests of the city—and was remarkably deferential to the judgments of his Corporation Counsels.

Assuming that the client is the city does not, of course, automatically answer all questions of what ought be done or what advice is the soundest. There is substantial room for judgment and for debate. The "interests of the city" must be the touchstone. But the term is not self-defining. In helping to shape policy, I believe that a government lawyer plays his or her role best by persuasively articulating the broader, deeper, and more long-term interests of the governmental entity.

There is another complication. As counsel for the city, the Corporation Counsel, as with other government lawyers, has a lawyer-like relationship with not only the mayor, but all the other "branches" of city government, most importantly the city council, but also the comptroller, public advocate, and borough presidents. The Corporation Counsel defends laws passed by the city. But what should happen if, for example, the city council passes a law, which a mayor vetoes, and the council then overrides the veto. Should the Corporation Counsel support the mayor in a lawsuit challenging the law? Clearly, if the mayor's objections are to the *policy* of the law, the Corporation Counsel is obligated to support the council. But what if the mayor also claims a legal defect in the law? Here, it seems to me that the Corporation Counsel should still support the law, unless the legal defect is crystal clear. But not having faced the question,[6] my main suggestion is that this question should be the subject of a good professional debate, perhaps under the auspices of Ross Sandler's Center on New York City Law at New York Law School.

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5. In the same *New York Law Journal* article where I warned about "the Risk of Being a Shrinking Violet," I also warned government lawyers about "the Risk of Hubris," suggesting that at least post-Watergate, a rational government official would not ignore the legal advice of his or her lawyer. *See* Schwarz, *supra* note 2, at 38. This, I suggested, was good, in that it "increases the likelihood that an informed and well-advised government will comply with the rule of law." *Id.* But, I added, "a little cautionary bell should go off in the government lawyer's head. Remember you weren't elected. In your advice distinguish between what is legal and what is wise." *Id.*

6. This sort of question did not arise during my tenure; the city council was relatively supine until after the 1989 City Charter changes. *See* 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, 781–82 (1998) (Schwarz Writings and Speeches, at Tab 50).

B. How Does One Think About the Interests of the City?

Given that the client is the city, it is necessary to analyze how to think about the city's interests. The nature of the task obviously matters. Consider three different tasks: first, issuing an opinion on what the law is; second, making sensitive policy decisions in important public interest litigation; and third, giving policy advice. Law is completely controlling for the first, quite relevant for the second, and only tangentially relevant for the third—where the relationship is not strictly lawyer-client anyway. For all three, but particularly the second two, the interests of the city should provide the key.

In theory, perhaps, the same concept is true for representation of any entity, not just a government. With a corporation, for example, a lawyer is, or should be, representing the corporation, and not the personal interests of its chief executive. But for lots of reasons, the relationship is often different with a corporate client. And, most importantly, the interests of a government are far broader and deeper than the interests of a business. Teasing out those differences helps in analyzing how to think about the city's interests.

Thus, it seems to me that Professor Nelson reflects only part of the picture when he says "Mayor Koch redesigned municipal government as a business," with the Law Department being "there, too."[7] Yes, the Law Department certainly needed to be professional. And yes, it needed to help protect the city's fiscal health. But that is hardly all that lawyers for a government do, or did during the Koch administration, as I believe the examples given later in this paper, and in Peter Zimroth's paper, help to illustrate.

A business owes a duty to its stockholders. A government owes a duty to all its residents—whether or not they voted for the person(s) in power, or, indeed, whether they can vote at all. Sometimes these duties are concrete. Sometimes they touch the human spirit. Take Mayor Koch's two great early accomplishments: overcoming the fiscal crisis and restoring the city's *joie de vivre*. One highly concrete. One a matter of the spirit. Or take the importance of using leadership and words to bring races together. Not really a job for a corporate executive, but surely an important part of the job for a government leader.

Justice Louis Brandeis made a point about government that never could be made about businesses. Thus, "[o]ur government is the potent, the omnipresent teacher. For good or ill, it teaches the whole people by its example."[8] On a far less lofty level, the government is an institutional litigant and has long-term institutional interests in its reputation in the courts, as some of the examples given below illustrate. Decisions not to appeal a court decision for such reasons would seldom, or perhaps never, be mirrored in the deliberations of corporations, which are not institutional litigants in the same sense.

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7. Nelson, *supra* note 1, at 252; *see also id.* at xviii–xix (claiming that Ed Koch and Allen Schwartz understood government as a business).

8. Olmstead v. United States, 277 U.S. 438, 485 (1939) (Brandeis, J., dissenting).

A government's—our city's—interests must be seen through a long-term, as well as a short-term, lens. An example given below is the analysis of property tax exemptions for non-profits. Moreover, while government leaders do clearly pay attention to their short-term popularity, they face elections only every few years. [9] Thus, they are (or at least should be) generally somewhat more able to focus on the long-term and deeper interests of their entity than corporate leaders who are—particularly in recent years—preoccupied with whether they have met quarterly-earnings predictions.

Whatever the reason, it is clear to me that government leaders must think about the long-term. And because of the nature of government, the thinking should be broad and deep. Political considerations often push politicians, and too many government officials, toward short-term thinking. This is nicely illustrated by a saying I heard in city government: "Planning means thinking about this evening's *New York Post*." (Referring to the time when the *Post* was an evening paper.) "Long-term planning means thinking about tomorrow morning's *New York Times*." Sardonic and exaggerated, yes. But, nonetheless, reflecting more than a germ of truth.

As I develop in the next section, government lawyers, for many reasons, are particularly well-suited to help the government they serve think about long-term and deeper interests.

C. Do Lawyers Bring Anything Special to the Table?

Certainly there are plenty of examples of lawyers who fly too close to the ground and never stray beyond spooning out a narrow view of the law. Still, I believe that lawyers can bring something extra to the table.

Based upon their education and their training, lawyers are presumed to be able—and certainly aspire—to understand all sides of an issue. This is part of our craft. Beyond understanding all sides of an issue, a lawyer's craft also includes articulating long-term as well as short-term interests and consequences, and includes focusing on deeper as well as obvious interests.

Governmental decisions affect many interests that may not always be obvious, and affect the rights of many who may lack access to decision-makers. It is often the

9. In the midst, however, of Mayor Koch's 1985 re-election campaign, a highly controversial issue emerged: should children who were HIV-positive be allowed to go to the New York City public schools? Little then was understood by the public about how the AIDS virus is transmitted. To consider the schools' question, Koch appointed a panel consisting of Schools Chancellor Nathan Quinones, Health Commissioner David Sencer, and me. While Koch never tried to influence our views, it was obvious that he would have found it politically easier if we had recommended against HIV-positive children entering the schools. However, reflecting the administration's on-the-merits culture, focusing on the interests of all residents, our view was that the children should be allowed to go to school. This did cause an emotional, tabloid reaction. Nonetheless, after our decision was made, the Mayor backed it. For this story, and the story of our ultimate victory in court after the policy was challenged, see David L. Kirp, Learning by Heart: AIDS and Schoolchildren in America's Communities 94–132 (1989) (Chapter Four, Passion Play: New York City); Frederick A. O. Schwarz, Jr. & Frederick P. Schaffer, *AIDS in the Classroom*, 14 Hofstra L. Rev. 163 (1985) (Schwarz Writings and Speeches, at Tab 42). (Although dated in 1985, the *Hofstra Law Review* article did not come out until 1986 after the court's favorable decision.)

lawyer's role to articulate fairly those rights and interests. This is true whether the "ignored" interests are those of minorities, political or otherwise, or even of more well-established groups.

A lawyer also has a special tie to the Constitution—as well as to what I call its related values. The Constitution has a role outside the courts.[10] Not only judges, but all government officials, legislative and executive, have an obligation to support the Constitution. Indeed, they take an oath to do so.[11] It is, I believe, the obligation of executive and legislative leaders to proactively protect the Constitution and its values. And it is, I believe, improper for legislative and executive officials just to duck constitutional issues and leave them to the courts.

The Constitution casts a light far beyond its page. By values related to the Constitution, I mean attention to the interests of groups beyond those protected by the Bill of Rights, but whose interests are likely to be ignored. For example, increasing disparities between rich and poor, the devastation of inner cities by drugs, violence, disease, and failed school systems combine to turn poverty into a hopelessness so deep that it can stifle opportunity. These conditions are shameful and cloud our future; they are fundamentally at odds with our constitutional values and dreams. Similarly, preservation of the environment often represents a choice to defer development that might benefit today's majority for the sake of future generations—who are by definition unrepresented or underrepresented.

Thus, in both alleviating poverty and protecting the environment, constitutional *values* are involved, though no constitutional question is presented for litigation.

Part of a government lawyer's job, it seems to me, is to help assure that both the Constitution and its related values are considered. Not that those values always should be vindicated. But rather that government should remember to think about them. Vindication of values related to the Constitution may sometimes run counter to the interests of majorities in the short-term—but will often, I believe, serve the interests of society in the long-term. The values that emanate from the Constitution, while not necessarily amenable to protection by the courts, are in many ways what define and distinguish America and its public law.

D. Context and Consequences

The foregoing discussion is a bit abstract. Context brings it down to the concrete. Thus, when the city was engulfed by the fiscal crisis, it was obviously harder for

10. *See* Frederick A. O. Schwarz, Jr., The Constitution Outside the Courts, The Forty-Fourth Benjamin N. Cardozo Lecture, Address Before the Association of the Bar of the City of New York (Dec. 5, 1991), *in* 47 Rec. Ass'n B. City N.Y. 9 (1992) (Schwarz Writings and Speeches, at Tab 66).

11. The Constitution requires the president to "preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1, cl. 7. All other federal officials swear to "support and defend" the Constitution and to "bear true faith and allegiance to the same." 5 U.S.C. § 3331 (2006). New York State and City public officers are required to "solemnly swear (or affirm) that [they] will support the Constitution of the United States, and the Constitution of the State of New York." N.Y. Const. art. XIII, § 1; *see also* N.Y. Pub. Off. Law § 10 (McKinney 2008). And, so must state employees. N.Y. Civ. Serv. Law § 62 (McKinney 2008).

government, including the Law Department, to grapple with other needs of society. But, as the city began to emerge from the fiscal crisis, there was more scope to focus on the city's non-financial needs.

Professor Nelson makes an insightful big picture point when he notes that by Koch's time, "New York's nineteenth century monopoly position in the American economy was dead;" now the city had "to compete with other cities throughout the world to attract money and business."[12] But, with respect to the more immediate context, I believe that Professor Nelson sees a blurred picture when he then goes on to say that "Koch's philosophy matched perfectly with that of the Reagan Administration."[13] And I don't think that Allen Schwartz "put [Reagan's] philosophy into practice" in the Law Department.[14] Ronald Reagan had a vision and some real successes. But his policies were no boon to cities. Quite the opposite, as illustrated by several of the issues explored in Part V.

While recognizing that the Koch administration and the Law Department did appropriately increase encouragement of business development for, among other reasons, the competitive and fiscal needs that Professor Nelson highlights, the Koch administration also, at times, exercised its broader governmental responsibilities to curb business expansion or shift it to new locations. Thus, a major zoning change made by the City Planning Commission limited further building on Manhattan's East Side and encouraged it on the West Side. This was challenged as a "taking" by two East Side developers (both close to the Mayor) who were represented by Arthur Liman and Peter Fishbein, both well known and first-rate litigators in the city. The Second Circuit upheld the city's zoning change.[15]

There are many other examples of where the city, under Mayor Koch, while remaining business friendly, nonetheless opposed business when the broader interests of the city were at stake. Implementation of the *Penn Central* decision upholding the city's landmarks preservation law, which Professor Nelson correctly highlights, is another example.[16]

Recognizing that the "interests of the city" is not a self-defining term, the relevant context, as Professor Nelson points out, can be sweeping, covering wide periods of time (e.g., New York City's loss of its "monopoly position"), and can cover major national changes (e.g., Reagan's election). Also relevant to context are the interests and experiences of both the chief executive and the chief lawyer. As for me, no doubt the early mind-expanding experience of the civil rights movement partially explains how I thought about the interests of the city on some occasions. But still, a lawyer has to make the case that it is in the interests of the city to do, or not to do,

12. Nelson, *supra* note 1, at 251; *see also id.* at xviii–xix.

13. *Id.* at 267.

14. *Id.* at 267–68.

15. *See* Park Ave. Tower Assocs. v. City of New York, 746 F.2d 135 (2d Cir. 1984).

16. Nelson, *supra* note 1, at 281 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978)).

something. And on major public policy issues, a lawyer cannot cause the government to act unless the arguments are convincing.

E. Loyalty and Independence

What should be the chief government lawyer's relationship to the chief executive? Although the client is the government entity (here, the city), the lawyer's effectiveness also depends on his or her relationship to the chief executive. Both independence and loyalty are important qualities. Neither should be carried to extremes. Both, properly understood, are necessary—and indeed work in tandem.

A lawyer who is only loyal is useless. A fawning compliance with the chief executive's initial thoughts—or perceived thoughts—removes judgment and thoughtful advice. It can also risk running up against the wise restraints of our legal system. It leads to "yes men."[17] But too much independence is also unfair and improper, as well as ineffective.

It seems to me that the right mix combines independence with loyalty. Independent thinking—leading to reasoned, respectful, and tough-minded efforts to try to persuade—is, I believe, most helpful to the administration in which a lawyer plays a part. And thus, a lawyer is then most loyal both to that administration and to the government entity it serves.

III. VARYING WAYS IN WHICH GOVERNMENT LAWYERS CAN HAVE INFLUENCE

It is important to note that "policy" is not the same as "politics." This distinction is sometimes blurred. Thus, Professor Nelson's book assumes that there is "law," and then there is "politics." It says, for example: that all three of Koch's Corporation Counsels served as "political advisors," as well as heads of the Law Department; that even though, unlike Allen Schwartz, I had not had a preexisting relationship with the Mayor, I "quickly took on a similar role as a political advisor"; and, that Peter Zimroth likewise "played important political roles."[18]

The word "political" is being used too loosely. There are really not just two, but three areas: law, *policy*, and politics. And, "policy" is, I believe, the better word to describe the major thrust of the involvement of Corporation Counsels beyond their strictly legal roles—at least during the Koch administration.

As several of the specific examples discussed in Part V illustrate, however, the lines between the three categories are not sharp. Policy often breathes life into law. And policy affects politics—for the better or for the worse.

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17. *See* Memorandum from author on Your Memorandum of November 8 ("First Two Terms as Prelude") to Edward I. Koch, Mayor, City of N.Y., 7–8 (Nov. 20, 1985) [hereinafter First Two Terms as Prelude Memo] (Schwarz Writings and Speeches, at Tab 30) (warning the Mayor about "Yes People," and suggesting the need for "Cleaning House and New Blood" after eight years).

18. *See* Nelson, *supra* note 1, at 286–87. A similar assumption was made by the questioner at the start of my interview for the Columbia University Oral History Research Office's "Koch Administration Oral History Project." *See* Reminiscences of Frederick A. O. Schwarz, Jr. (1992–1993), on pages 14–17 in the Columbia University Oral History Research Office Collection [hereinafter Schwarz, CUOHROC].

What sorts of cases to bring, what arguments to emphasize, whether to appeal, whether and how to settle, all relate to law. But these choices—which often are discretionary—are sometimes based on policy priorities or concerns. Politics can sometimes be raw and untethered to either law or policy; politics can also lead to bad policies. But good policy is—or at least usually should be—good politics.

So the categories blend into each other. And the lines are fuzzy. Nonetheless, there are lines. And government lawyers ought not, it seems to me, engage in "politics" in the sense of party politics or election campaigns.[19] In running for office, a candidate is working for him or herself, not for the larger polity—in our case, the city. And given my previous point that the government lawyer's client obligation is to the city, and not to its chief executive, dabbling in political campaigns is outside the proper scope of the lawyer's job. It also potentially involves him or her in adversarial relationships with other candidates who are, or aspire to themselves be, in the government and thus are, or may be, in a client relationship with the lawyer. And, finally, being involved in electoral politics deprives the lawyer of the independence, and the reputation for independence, that is necessary to do the job well.

I believe that during the Koch administration the Corporation Counsels did not engage in "politics" in the sense of party politics or election campaigns (although

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19. However, in the midst of *policy* suggestions, there may well be arguments based upon the effect of doing something—or not doing something—upon *politics*, that is opinions of "the people" or "voters." I can illustrate this fuzzy line by two examples from memos of mine to Mayor Koch. The first urged Mayor Koch to move to focusing more on substantive programs (such as housing and education)—thus reaching beyond his great early successes in "conquer[ing] the fiscal crisis, [bringing] good management to the city, and restor[ing] our joie de vivre." Memorandum from author on Planning for Prosperity to Edward I. Koch, Mayor, City of N.Y. 2 (June 14, 1983) [hereinafter Planning for Prosperity Memo] (Schwarz Writings and Speeches, at Tab 30); *see also* Memorandum from author on The Next Seven Years to Edward I. Koch, Mayor, City of N.Y. (Oct. 24, 1982) [hereinafter Next Seven Years Memo] (Schwarz Writings and Speeches, at Tab 30). In making this policy suggestion, it seemed useful to say that, without an increased emphasis on substantive programs, "the voters may begin to say so what else is new." Planning for Prosperity Memo, *supra*, at 2.

The second example comes from one of my memos to the Mayor urging him to do more to reduce racial tension, and to bring people of different races together. *See* Memorandum from author on Racial Relations to Edward I. Koch, Mayor, City of N.Y. (Dec. 31, 1984) [hereinafter Racial Relations Memo] (Schwarz Writings and Speeches, at Tab 29); *see also* Nelson, *supra* note 1, at 286 (referencing the memorandum). I concluded that four-page memo by saying that I was not "making a 'political' argument." Racial Relations Memo, *supra*, at 4. "For all I know," I said to the Mayor, "what you are doing is good short-term politics, though I doubt it." *Id.* But then I finished with the policy point that: "Rather the argument is that by forever emphasizing your disagreements and not leading the city in a positive direction on [race] issues, you are damaging what is otherwise a remarkable record for the history books." *Id.*

"Political" points made in aid of a "policy" argument can also be mixed with psychological points. After all, political success is a mixture of policy and personality. For example, I suggested to the Mayor that in-depth concentration on major substantive program improvements would be personally "stimulating" for the Mayor. *See* Planning for Prosperity Memo, *supra*, at 2. In another memo, I warned that: "one of the greatest dangers for an administration that has been in office for a while" is that "new ideas, reforms and changes, which at the outset were welcomed, are later perceived as implicit criticisms." First Two Terms as Prelude Memo, *supra* note 17, at 1.

Professor Nelson's book does suggest that at the very end of his tenure and months after he had announced his departure, Allen Schwartz became a political advisor to Mayor Koch by advising him to run for governor).[20] In addition, during the Koch administration, the Law Department was free from hiring pressure or patronage. There was a two-stage screening process through which anybody seeking a job had to pass before a final interview with the Corporation Counsel. Never in my tenure was there even a request for favoritism. Indeed, the hiring-on-merit assumption was so engrained that a relative of Mayor Koch was turned down before the second stage in which I would participate; nobody perceived any need to seek agreement from me.

IV. WHAT FACTORS CREATE THE OPPORTUNITY FOR A CHIEF GOVERNMENT LAWYER TO HAVE A SUBSTANTIAL IMPACT ON PUBLIC POLICY?

The threshold reason government lawyers have opportunities to influence public policy is the important role that law plays in America. But whether such opportunities actually lead anywhere depends substantially upon the relationship between the chief lawyer and the chief executive, upon the characteristics of the chief executive, and upon the breadth and nature of the lawyer's vision of his or her role.[21]

A. The Centrality of Law in America

Government lawyers in America have an enhanced opportunity to affect public policy because law is so central to the American story.[22] In America, no prince, no religious creed, no caste or clan, no normative ideology dictates our lawful conduct. Unlike in most nations historically or today, law is important to the shared sense of the American story.

Our written Constitution is one important explanation. Moreover, the Constitution generally provides only broad principles of governance and relies on broad concepts like checks and balances and "equal protection." Largely because of our Constitution, but also because of our shared sense of the law, many of the government decisions that vitally affect our society are debated, and ultimately decided, on the basis of legal analysis.

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20. Nelson, *supra* note 1, at 285.

21. Because this article reflects personal experiences, it focuses on a chief government lawyer. Moreover, there are certain matters that raise sufficiently important or controversial issues that make it extremely likely that the chief lawyer will be principally responsible for engaging the chief executive. Nonetheless, many lawyers in the Law Department focus upon public policy questions. And all our lawyers recognized, or were encouraged to recognize, that government lawyers are held to the highest standards of ethics and fairness. Indeed, we tried to teach our young lawyers that they are held to higher standards than their adversaries—that you can fight hard, and still fight fair. *See* Schwarz, *supra* note 2.

22. This section borrows from thoughts expressed in Frederick A. O. Schwarz, Jr., Becoming a Real Lawyer, Keynote Address at the Convocation on the Face of the Profession II—The First Seven Years of Practice (Nov. 11, 2002), *in* 3 N.Y. St. Jud. Inst. on Professionalism L. 10, 10–23 (2003), *available at* http://www.courts.state.ny.us/ip/ jipl/JIPL-Spring2003.pdf.

One hundred and seventy years ago, Alexis de Tocqueville referred to lawyers in America as "the sole enlightened class that people do not distrust" and added that "the American aristocracy is at the attorney's bar and the judge's bench."[23] People in America today, or in New York City when I was Corporation Counsel, would not gush to that extent. But, it is still the case—actually even more so today than when de Tocqueville wrote—that the legal lens is one of the lenses used in America to examine most public policy questions. This renders us distinct from most other democracies in Europe and elsewhere.

B. Lawyers in New York City Government

Before coming to work for the Koch administration, I had next to no personal or professional dealings with municipal government. My focus had been on the federal government with its civil rights and national security responsibilities. This was a natural consequence of the era in which I came of age, and of my own experience—particularly as chief counsel for the United States Senate's "Church Committee" investigating America's intelligence agencies from Franklin Delano Roosevelt through Richard Nixon.[24]

Working for the city opened my eyes to the intimacy of the connection between city government and the people. Every day, city government touches people in the most intimate and immediate ways: their safety, their schooling, their health, their sanitation, their housing, their transportation, their daily jobs. Directly and frequently, the city affects the lives, the aspirations, and the pocketbooks of millions of people and tens of thousands of businesses. And so does the work of the Law Department.

The city is not only subject to the federal Constitution and many federal laws, but is also a "creature" of the state subject to the state constitution and many state laws. The city also has its own constitution—the City Charter—and city laws. And New Yorkers have always demanded much of their government—and are traditionally quite litigious as well. For all these reasons, the Law Department works with an amazingly broad canvas.[25]

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23. *See* Alexis de Tocqueville, Democracy in America 269 (J.P. Mayer ed., George Lawrence trans., 1969) (1835). The British jurist and historian James Bryce also remarked on the central role of lawyers in America. *See* James Bryce, The American Commonwealth (1917).

24. For the revelations of and a summary of sources relating to the Church Committee's work, see Frederick A. O. Schwarz, Jr. & Aziz Z. Huq, Unchecked and Unbalanced: Presidential Power in a Time of Terror 21–49, 210–11 n.14 (2007).

25. Examples of the breadth and variety of Law Department work in one year are shown by my cover letter to the Department's annual report for 1984. *See* Frederick A. O. Schwarz, Jr., *Letter to the Mayor*, *in* New York City Law Department, 1984 Annual Report 2–5 (July 1985) (Schwarz Writings and Speeches, at Tab 31). Another way to gauge the breadth and variety of the Law Department's work through time is to look at the walls of the Appeals Division on which hang the cover pages of, and a brief description about, all the Department's Supreme Court cases from the mid-nineteenth century to date.

The Corporation Counsel is the city's chief counsel for litigation and advice, as well as being responsible for writing opinions, for drafting legislation, and for the legal side of matters such as economic development. The scope of the job contrasts with many other important government legal jobs. Thus, while in charge of litigation, the state attorney general—who is separately elected—is not part of the governor's cabinet, and therefore is seldom in an advisory role.[26] Conversely, the governor's counsel, while substantially involved in advice, does not litigate. Corporation Counsel combines both roles. The state attorney general and the governor's counsel therefore have less potential for influence on policy.

The attorney general of the United States also has wide responsibilities. But there are two reasons why Corporation Counsels have relatively greater influence within the smaller sphere of city government. One reason is proximity: City Hall is a two-minute walk away from the Law Department. The Justice Department is about six blocks from the White House.[27]

Second, in the federal government, the White House Counsel's office now has over twenty lawyers; it is also a substantial policy office. Its leaders have often been well known Washington figures starting with Judge Samuel Rosenman (whom FDR installed as the first White House Counsel in 1943)[28] and continuing through, for example, Lloyd Cutler and Abner Mikva. The White House Counsel has often been very important to the handling of significant public policy matters—as, for example, was Alberto Gonzales on limiting the application of the Geneva Convention, opening the door to torture, and expanding warrantless wiretapping.[29] In contrast, the city hall counsel's office, at least under Mayor Koch, was small and had a narrow mission. Its occupants were first-rate lawyers, but usually were relatively junior, often coming over from the Corporation Counsel's office.

C. The Mayor and the Corporation Counsel

Key in determining the scope of a Corporation Counsel's role is the mayor's own view of the law, as well as the relationship between the two officials and the breadth

26. The same limit applies to U.S. Attorneys' offices, which only litigate, and which are also far removed from any client.

27. Being physically close to a chief executive may increase the possibilities for influence on policy matters. However, history also tells us that being too close to the chief executive in the sense of personal fealty or lack of independence can increase the chance of bad decisions being made by the government lawyer. John Mitchell's and Alberto Gonzales's relationship to Presidents Richard Nixon and George W. Bush are recent examples.

28. *See* Robert H. Jackson, That Man: An Insider's Portrait of Franklin D. Roosevelt 64–65 (John Q. Barrett ed., 2003) (published posthumously). Jackson had been Franklin D. Roosevelt's ("FDR") attorney general, and FDR appointed him to the Supreme Court. When Jackson was on the Court and on a social visit with the president, FDR asked for his views on appointing a White House Counsel to be "his always-on-hand advisor on matters of law." Jackson said he "thought very little of it," and indeed would have resigned if done when he was attorney general. The president proceeded anyway. According to Jackson, Rosenman became "the most potent of legal advisors" because of his "long association and intimacy with" FDR. *Id.* at 64–65.

29. *See, e.g.*, Schwarz & Huq, *supra* note 24, at 69–78, 85, 116, 132–33, 145, 196–98.

and nature of the lawyer's vision of his or her role. Professor Nelson correctly devotes attention to Mayor Koch as he praises the quality of the Corporation Counsel's office during the Koch administration.

As Professor Nelson notes, Koch was confident, appointing Corporation Counsels he considered smart and professionally accomplished. And for his second and third Corporation Counsels, Koch chose individuals whom he barely knew.[30]

From our first discussion at Gracie Mansion in mid-1981 about my taking the job, it was clear to me that Koch was not looking for a "yes man." Thus, in our wide-ranging talk, I told the Mayor that I did not agree with his position on the death penalty. At that same meeting, I also said to the Mayor that more healing between blacks and whites was critical for the city and was something I cared about.

In addition to being sufficiently self-confident to pick close advisors of independence and strength, Mayor Koch, in private, was not at all what one would expect from his public persona. His public persona was brash (and humorous), and almost always sharply (or humorously) dismissive of any disagreement or criticism. But in his office, Koch enjoyed dialogue, and perhaps most surprising to many, he enjoyed—or at least respected—disagreement. Based upon discussions in his office, the Mayor would frequently change his initial positions—often strongly held positions. Another remarkable fact is that I was able to bring junior lawyers to participate in meetings related to their areas of expertise. The Mayor would be genuinely interested in their views.

Finally, Koch would accept criticism—even sharp criticism on subjects where he felt strongly. Professor Nelson's book illustrates this by discussing a memo and remarks of mine on the subject of race.[31] The concerns I expressed to Koch were focused on what he said (or didn't say), not focused on what he did.[32] I was concerned

30. Nelson, *supra* note 1, at 271, 276. My own brief contacts with the Mayor before he appointed me had been representing the city on a *pro bono* basis in two cases: (i) the constitutional challenge to the systemic undercount of city residents by the U.S. Census, and (ii) defense of the Census counting undocumented aliens. Also, I had introduced the Mayor several times at the Fund for the city of New York's annual award for outstanding city civil servants. (That, despite these contacts, the Mayor did not know me well before appointing me was shown by his referring to me as "Fred," rather than Fritz, at the Fund event after he had first spoken to me about becoming Corporation Counsel.)

31. *Id.* at 286. For the full text of the memo, see Racial Relations Memo, *supra* note 19. For the context of the remarks, see Schwarz, CUOHROC, *supra* note 18, at 99, 178–89.

32. On what the Mayor did, Ben Ward's appointment as police commissioner was a breakthrough for African Americans. As with all other appointments, the Mayor wanted to see his choice as having been made on the merits, rather than on the basis of race, even though he understood the "political" advantages of diversity in hiring. This is why Herb Sturz and I, in advocating Ward's appointment, stressed his extraordinarily broad experience. *See* Schwarz, CUOHROC, *supra* note 18, at 118–22. The Mayor's appointments of female and minority judges have been a point of acknowledgement. *See* Fund for Modern Courts, The Success of Women and Minorities in Achieving Judicial Office: The Selection Process 33 (1985); Schwarz, CUOHROC, *supra* note 18, at 188–91. The Mayor delivered a very thoughtful and balanced speech on police brutality in connection with a House Judiciary Committee Hearing. (Here the Mayor was helped when we pulled together high-ranking African Americans in his administration—all of whom the Mayor liked and respected—to sit with the Mayor and recount experiences they had had with police. *See* Schwarz, CUOHROC, *supra* note 18, at 126.) Finally, on the substantive side, the Mayor did unprecedented things with housing that helped the

that the Mayor was not "leading the city in a positive direction," was doing too little along the lines of "reducing tension, healing, [and] bringing people together," and, instead was "acting more as an advocate than as a leader of all the people."[33] As I noted to the Mayor, this was "unfair to the electorate, harmful to the city, and harmful to you."[34]

There is an important footnote to the point about the Mayor being remarkably open to criticism. Koch accepted criticism from those whom he considered basically loyal. However, from others, certainly from those he would classify as "enemies," he generally would not (or could not) see any kernel of truth that might lie within a shell of vituperation or even simple disagreement. Conversely, the Mayor did let some (like Bronx Party Leader Stanley Friedman and Queens Party Leader and Borough President Donald Manes) get too close to him because of their political support, as well as, I believe, because of their facility with flattery. Then, when they turned out to be corrupt, the Mayor was hurt by that closeness—even though the Mayor was completely honest himself.[35]

Beyond Koch's personal characteristics, the Mayor favored the Law Department in terms of budget, even at the height of the city's fiscal crisis. Some could say this was because Allen Schwartz, his first Corporation Counsel, was his close friend and former law partner. While not irrelevant, I do not believe this is the explanation. The Mayor gave similar favorable treatment to the Office of Management and Budget ("OMB").[36] Moreover, the favorable treatment continued after Allen left. Finally, giving the Law Department favorable treatment in terms of budget and personnel does not necessarily translate into respect for the law or deference to legal and policy judgments made by Corporation Counsels.

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poor—who were, of course, predominantly minorities. *See generally* Alan Finder, *New York Pledge to House Poor Works a Rare, Quiet Revolution*, N.Y. Times, Apr. 5, 1995, at A1.

33. Racial Relations Memo, *supra* note 19, at 1, 4.

34. *Id.* at 1.

35. These analyses of Mayor Koch are expanded upon in parts of my four day, nearly 400-page oral history interview given to Columbia's Koch Administration Oral History Project. *See generally* Schwarz, CUOHROC, *supra* note 18. Before those interviews started, the Mayor indicated he did not want those interviewed to hold anything back. Though the Mayor did not refer to the quote, his sentiment was similar to Oliver Cromwell's remark to the portrait painter: paint me "warts and all." Of course, given his proud and self-confident nature, the Mayor would have—deservedly, in my view—expected more "all" than "warts."

Among other corrupt acts, Donald Manes had taken bribes to help steer data processing contracts with the city's Parking Violations Bureau. (Manes committed suicide before he could be tried.) Friedman was convicted of receiving bribes in connection with the same scandal and was sentenced to twelve years in prison. For the most comprehensive analysis of the corruption scandal, see Jack Newfield & Wayne Barrett, City for Sale: Ed Koch and the Betrayal of New York (1988). (Friedman blamed his initial exposure on me. *See id.* at 274.)

36. Koch's special financial support for the Law Department and for OMB was based on Koch's view that the two agencies were the most important to protecting the city's fiscal health, a subject that, because of the fiscal crisis, dominated the Mayor's attention during all of Allen Schwartz's years and remained important during my years, particularly the early ones.

So what explains Mayor Koch's extraordinary willingness to defer to the judgments of his Corporation Counsels? The fact that Koch himself was a lawyer is not the answer. That Koch was a lawyer often facilitated back-and-forth discussions with him. But the history of both our national government and our city government teaches that a law degree is no guarantee of respect for the Constitution or even the statutory laws.

In Professor Nelson's book, Koch himself says he often deferred to the judgments of his Corporation Counsels because they were smart or more knowledgeable about the law than he was.[37] But Koch was extremely smart. Moreover, the kinds of issues that are important enough to call for the mayor's participation or decision do not depend on brain power (or on arcane legal reasoning). Rather, they turn on judgment (and often are policy matters that have little to do with law).

In Nelson's book, Peter Zimroth suggests that Koch may have deferred to his Corporation Counsels in some instances because to do so might have been "self-protective."[38] Why, Professor Nelson then speculates, should Koch take "the blame for unpopular decisions that were to some extent outside his control"?[39] Sometimes, self-protection could be an explanation. But this point does not apply to decisions based on policy judgments. Moreover, with respect to decisions linked to law, it applies only to the relatively narrow set of matters where the result depends on a clear (or at least quite clear) rule of law.

So the question remains, why was Mayor Koch so often willing to rely on the judgments of his Corporation Counsels relating to public policy questions? Based upon my experience, the underlying reason was that Koch had an open mind and enjoyed debate and discussion. He was persuadable by good arguments, particularly arguments focused on understanding where the interests of the city truly lay. But beneath this explanation lies, I believe, the deeper explanation based on Koch's self-confidence. That characteristic made him more willing to accept arguments about the city's interests, even when the result may have departed from his initial positions—or even undermined his "political" interests.

* * * *

In government, as in life, it takes two to tango. Whatever the characteristics of a chief executive may be, for the chief government lawyer to play a significant role on public policy issues, that lawyer must be interested in public policy, and must not see the job as limited to spooning out law, or be a shrinking violet. I do not think that neither Allen nor Peter nor I were shrinking violets.

Upon becoming Corporation Counsel, my first hope, expressed in an address to the Law Department, was that our reputation would continue to improve[40] so that

37. Nelson, *supra* note 1, at 276.

38. *Id.* at 278.

39. *Id.* at 278–79.

40. One sign that we were doing well is that in the only instances where we and the U.S. Attorney's Office for the Southern District of New York competed on hires, we prevailed. One such hire was Rick

ours would be regarded as the best government law office in the city.[41] I understood from the outset that our client was the city of New York. I understood that this meant helping to protect the city's fiscal health—but believed that doing so, while necessary, was not sufficient. A government has deeper interests than its economic interests. I also sensed that government lawyers, more than private lawyers, have a special responsibility to understand and articulate their client's *long-term* interests. Finally, from the outset, I sensed that analysis of the city's long-term, deeper interests would require greater attention to the needs of the city's disadvantaged.

All of these initial instincts were reinforced and substantially enriched by my experience in the ensuing five years.

V. EXAMPLES OF IMPACTING PUBLIC POLICY

The examples focus on how to think about the interests of the city—the Corporation Counsel's client. I begin with examples arising from the work of the Law Department and then move on to ones not directly tied to the Law Department.[42]

A. Creating the Affirmative Litigation Division

This is an example of how an administrative change based upon a broad vision of the "interests of the city" can substantially affect public policy. Very early in my tenure, I created the Affirmative Litigation Division with Lorna Goodman as its first chief.[43] The division was created to bring cases for the purpose of "generating

Schaffer, who had been offered the job of the chief of the Southern District's Civil Division, but who thought our work was more varied and exciting, and who also thought that working in a leadership role at the Law Department would give far greater opportunities to influence public policy. The other was for an outstanding entry-level lawyer (Peter Lehner), who chose to come to us after his circuit court clerkship because of our Affirmative Litigation Division.

41. At that initial address I expressed two other hopes. First, I expressed a desire to improve the relations of the Law Department's lawyers with the non-lawyer staff. Second, I urged the Department's lawyers to restore good relations with the city council.

42. The examples that I use are matters where I personally played a major role as Corporation Counsel—to some extent in sensitive litigation and to some extent in providing public policy advice. But such experiences were not mine alone. The successes of a Corporation Counsel's office flow from its many excellent lawyers devoted to public service. Professor Nelson's book correctly emphasizes devoted and talented public servants at the Law Department. Some, such as Jeff Friedlander, Lenny Koerner, Doron Gopstein, Judy Levitt, Joe Bruno, and Lorna Goodman, and many other superb lawyers, started before the Koch administration. In addition, as its reputation was enhanced, the office began to attract first-rate lawyers with experience in private practice such as Rick Schaffer, Nicole Gordon, and Margaret King. Finally, at least during the Koch years, and I assume since, the office has attracted good lawyers fresh from law school.

As with a private law firm, at the end of the day the key to success of a government law office is the quality of the people.

43. There was already a division by that name. But it was not particularly affirmative and rarely involved meaningful litigation—rather it focused on reimbursement of medical expenses incurred by the city. I had gotten to know Lorna Goodman prior to joining the Law Department during my time at Cravath, Swaine & Moore in the course of a case stemming from our representation of Time, Inc. The case

revenues and righting social wrongs."[44] What is important for this paper is that the creation of the division and its subsequent work show that (i) the city's interests need to be looked at broadly, and (ii) the city and its Law Department often are natural allies of the poor and disadvantaged.

Administratively, there was "one absolute organizational imperative" for successfully doing affirmative work: the division had to be protected by limiting its lawyers to representing the city as *plaintiff*.[45] Based on my litigation experience, I was sure that if the division lawyers also took on defense work it would suffocate the division's affirmative work.

Substantively, what was new as a policy matter was the "righting social wrongs" part of the division's mandate. Here, what was key was to determine which cases with that objective would serve the *city's* interest.

Traditionally, such cases were often brought by the Justice Department and by legal services lawyers. But under the Reagan administration, the Justice Department seemed "openly hostile to the interests of the poor."[46] Similarly, President Reagan and Attorney General Meese sought to hamper the federally funded Legal Services Corporation, a private, non-profit organization established by Congress to provide civil legal assistance to the poor. Those efforts "subvert the proper and traditional role [of government] in ensuring access to the legal system," and had been "substantially successful in eviscerating organized efforts to sue for the poor."[47]

But, while troubling, these points would only matter to the city and to the Law Department if the city and its residents were being hurt. I thought this was the case,

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sought to admit female sports reporters to professional sports locker rooms. The defendants were the New York Yankees, Major League Baseball, and New York City. The city was added as a defendant because it owned Yankee Stadium—and having the city in the case helped get us into federal court and make a Section 1983 claim. (We were concerned that judges in state court would be more susceptible to influence by the politically powerful Yankees.) Lorna persuaded Allen Schwartz, a huge sports fan, that the city should take a neutral position in the case. We won. *See* Ludtke v. Kuhn, 461 F. Supp. 86 (S.D.N.Y. 1978). For a discussion of the case, see William E. Nelson, The Legalist Reformation: Law, Politics, and Ideology in New York 301–02 (2001). Lorna is now the Corporation Counsel for Nassau County.

44. Frederick A. O. Schwarz, Jr., *Letter to the Mayor*, *in* New York City Law Department, 1982 Annual Report i (Feb. 1983) [hereinafter Schwarz, Letter to the Mayor in 1982 Report] (Schwarz Writings and Speeches, at Tab 31); *see also* Frederick A. O. Schwarz, Jr., Keynote Address on Cities as Initiators of Affirmative Social Policy Litigation at Urban Education Seminar: Local and State Government Liability (Mar. 17, 1983) [hereinafter Cities as Initiators] (Schwarz Writings and Speeches, at Tab 33).

45. *See* Cities as Initiators, *supra* note 44, at 2.

46. *Id.*

47. *Id.* at 2–3. For a critique of another harmful policy of the Reagan administration, see Memorandum from author to Edward I. Koch et al., AIDS Related Discrimination (Aug. 1986) (on file with *New York Law School Law Review* and CUOHROC, Oral History Documents at Tab 64) (explaining that the advisory opinion of the Reagan administration's Department of Justice on AIDS discrimination failed to provide a "convincing and professional analysis of the law," and had indeed "exacerbate[d], rather than calm[ed] fears" by "encourag[ing] and reward[ing] irrational beliefs, unfounded in medical evidence, concerning the spread of AIDS."); Schwarz, CUOHROC, *supra* note 18, at 295–96 (discussing the Justice Department's "perverse" advisory opinion that concluded "federal law gave no protection" for people suffering from AIDS).

and I was certain that the Affirmative Litigation Division would find good cases to bring that served the interests of both the city and its disadvantaged residents.

One good example was the case we brought against the federal government relating to its new policies making it harder for disabled people to collect Supplemental Social Security payments. This policy hurt some sixty thousand New Yorkers and cost the city and state tens of millions of dollars as they assumed what had been a federal responsibility.

We won the case, culminating in a 9-0 victory in the Supreme Court.[48]

This is just one example of the many cases brought in the area of income maintenance, housing discrimination, and the city's quality of life, including the environment.[49]

As my speech at a seminar for state and local government lawyers concluded: "We are beginning to recognize the natural long term [alliance] between cities and protection of the rights and interests of the disadvantaged of this nation."[50]

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48. *See* Bowen v. City of New York, 476 U.S. 467 (1986). Justice Lewis Powell's line near the end of the Court's opinion ("While 'hard' cases may arise, this is not one of them." *Id.* at 487.) has been cited as an example of "how thoroughly the [Solicitor General's] credibility had eroded" with the Court during the Reagan Administration by its pushing "agenda" cases. Lincoln Caplan, The Tenth Justice: The Solicitor General and the Rule of Law 261–63 (1987). I am not sure this is fair. To me, the difference with the lawyers for the Reagan administration was simply that the city had a different policy agenda which it believed the law supported.

49. *See* Cities as Initiators, *supra* note 44, at 5–6; Schwarz, Letter to the Mayor in 1982 Report, *supra* note 44, at i–ii. The flavor of the division's many other cases is shown by: seeking Medicaid reimbursement for the cost of treating undocumented aliens in city hospitals; devising legal remedies against landlords who used harassment techniques to drive tenants out—often into the city's homeless shelters; suing unions who discriminated against minority workers; and bringing major environmental cases, as part of a wide effort in the Law Department to help improve the quality of life in the city, including a case against Exxon, based on illegal dumping of toxic waste in city landfills that (after seven reported decisions) led to the city recovering over $70 million in clean-up and restoration costs. *See* Peter Lehner, *Act Locally: Municipal Enforcement of Environmental Law*, 12 Stan. Env't'l L.J. 50 (1993).

Of course, the city cannot be on the side of legal services advocates unless the interests are common. Obviously there are occasions when they are not. One side benefit, however, of legal services lawyers recognizing that the city could sometimes be their ally was their agreement with me to notify us of any planned lawsuits against the city before they were filed. That gave the city the opportunity before lawsuits were brought to fix problems that should be fixed.

A somewhat related point is that OMB and the Law Department joined to support budget requests from other agencies that we believed would help the city fiscally while also helping poor people. One example was based on our finding that impoverished tenants facing eviction would often win with a lawyer, but without one they would usually lose—often leading to homelessness and significant costs for the city.

50. Cities as Initiators, *supra* note 44, at 8. This speech was designed to persuade other cities to emulate our Affirmative Litigation Division. I know that at least Chicago under Mayor Washington did, and I assume some other cities did as well.

B. The Mayor Changes His Mind on a Policy Denying Property Tax Exemptions to Many Non-Profit Organizations

In his first term, Mayor Koch asked all city agencies to come up with ideas to increase city revenue or reduce city expenses. The Law Department proposed denial of property tax exemptions to a substantial number of non-profits in the city. The Mayor endorsed the policy enthusiastically; the exemptions were removed by the city tax authorities.

Shortly after I took office, I heard about the policy (probably from a case where the Law Department was defending it). Sensing that the policy was contrary to the city's interests, I persuaded the Mayor to appoint a task force, which he asked me to chair, to consider whether the policy made "good sense" for the city. The Task Force Report ("Report") concluded the policy was contrary to the city's interests.[51]

The Report is an example of the need to analyze the city's *long-term* interests, and, in doing so, the importance of recognizing the breadth of a government's interests. This is also another example of Koch's willingness to change strongly-held positions. What makes this example particularly telling is that the original proponent of this proposal had been the Mayor's close friend and first Corporation Counsel, Allen Schwartz.[52]

The Task Force concluded that the benefit to the city from granting or denying the property-tax exemptions cannot be looked at "purely in terms of present dollars."[53] Short-term economics had to be balanced by an assessment of the city's "long-range economic, social and cultural interests."[54] In addition, the Task Force concluded that while the dollar loss to each of the non-profits from losing their property tax exemption would be substantial, the extra dollars for the city would be "insubstantial"—

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51. *See* City of New York, Report of City Task Force on the Exemption of Non-Profit Organizations from Real Property Tax (Oct. 4, 1982) [hereinafter Report on Property Tax Exemption] (Schwarz Writings and Speeches, at Tab 34). (The other Task Force members from the administration were primarily the highest ranking officials involved in finance and development.) The organizations that had their property tax exemptions taken away were "primarily cultural, social service, legal rights and other policy orientated, non-profit organizations." *Id.* at 2. Such organizations fell into a legal grey area between (i) non-profits that the state constitution and legislation unambiguously required to be exempt such as religious and educational institutions, hospitals and cemeteries (see N.Y. Const. art. XVI, § 1; N.Y. Real Prop. Tax Law § 420(a)), and (ii) certain other non-profits, such as social clubs, that were clearly ineligible for property tax exemptions. The report recognized that some exemption denials had been justified because they covered non-profits which, although non-profit, primarily served the economic interests of their membership. However, many other exemption denials affected organizations which served a "wider public purpose." Those organizations, just to list those whose names start with "A," included: American Academy and Institute of Arts and Letters; American Civil Liberties Union; American Field Services; American Geographical Society; American Irish Historical Society; American Jewish Committee; Anti-Defamation League of B'nai B'rith; and Asia Society. Report on Property Tax Exemption, *supra*, at 6–7.

52. This was Allen's only action that I disagreed with.

53. Report on Property Tax Exemption, *supra* note 51, at 2.

54. *Id.* at 2–3.

indeed for complicated technical reasons, could even in some years be non-existent.[55]

The report then focused on the importance of these organizations to the city: "While all cities have their schools, hospitals and churches, [which would all be automatically exempt under state law,] New York City's special spirit stems in significant part from its role as a cultural and intellectual center for the nation."[56] Organizations serving those ends (which were covered by the policy denying exemptions) were "magnets for millions of visitors," and were integral parts of the environment that "make[s] it possible to retain businesses and to attract young professionals."[57] To impose property taxes would "restrict funds available for operation . . . with a corresponding loss to this City's special and most valued characteristics."[58]

Having recommended against the policy based on an assessment that the city's interests went beyond possible short-term economic returns, the Task Force turned to a discussion of how tax-exemption for non-profits also supported "Our Democratic and Constitutional Values."[59] Property tax exemptions (as well as income tax deductions for charitable gifts) are a means by which society diverts to private decision makers a portion of its resources for public purposes. "It would be possible to conclude that only the Government should be empowered to decide what art to exhibit, what causes to promote, what ideas to research. That is not the choice this nation historically has made, and it would not be a wise choice to make now."[60] Thus, tax exemptions provided a significant mechanism for "decentralizing" choices about public purposes. And tax exemptions were "part and parcel of the traditions which [underlie] America's strength."[61]

For all these reasons, the Task Force concluded it did not make "good sense" or serve the city's interests to continue the policy of denying property tax exemptions.[62] After the report was issued and after the Mayor presided over two days of public hearings on the issue, Koch announced his agreement that the policy should be abandoned.[63]

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55. *Id.* at 2–3, 17–22.

56. *Id.* at 3–4.

57. *Id.* at 22.

58. *Id.* at 23.

59. *Id.* at 24–25. This was set up by de Tocqueville's observation that "at the head of any new undertaking, where in France you would find the Government, or in England some territorial magnate, in the United States, you are sure to find an association." *Id.* at 24 (quoting DE TOCQUEVILLE, *supra* note 23, at 513).

60. *Id. But see* NELSON, *supra* note 1, at 321–23 (discussing the Giuliani administration's position in the 1999 Brooklyn Museum case).

61. REPORT ON PROPERTY TAX EXEMPTION, *supra* note 51, at 25.

62. *Id.* at 4.

63. The hearings were suggested to me by the Mayor's chief of staff, Diane Coffey. Announcing a change of mind would be easier for the Mayor if he had had an opportunity to preside over a hearing where a number of witnesses added their testimony about harm and about the importance of the organizations

C. Consent Decrees: Wilder v. Bernstein

Professor Nelson says that Mayor Koch "opposed the City's entering [into] consent decrees."[64] On one occasion, at a press conference, the Mayor did announce that the city would not enter into any more consent decrees. I was not at the conference, but when I next spoke to the Mayor, I said what I assumed he had meant was that the city would not enter into any more consent decrees without termination and modification clauses; sometimes entering into a consent decree avoids greater risk to the city than if it were to litigate and lose. The Mayor agreed that was his position.

While consent decrees are sometimes necessary and appropriate, government lawyers should be careful in negotiating a decree, and in presenting it to a chief executive. Such decrees bind the government into the future; they may take away freedom from future executives; traditionally, and for good reasons, they are approved by the executive branch even though they have aspects akin to legislation. All these factors support the conclusion that termination and modification clauses are important. Working on consent decrees is also a good example of where it is important for a government lawyer to remember to avoid the "risk of hubris."[65]

Wilder v. Bernstein was an important case, ultimately settled by a consent decree.[66] The case was extremely interesting from a constitutional, a policy, and (for the Mayor) a political point of view. In caring for foster children, the city (and the state in general) had, for more than a century (indeed, to some extent, dating back to Dutch colonial times), used religiously-based organizations to deliver most, and generally the best, care. In the 1970s, the American Civil Liberties Union ("ACLU") sued to dismantle the system, claiming the city's use of, and payments to, religiously-based organizations violated the Establishment Clause of the First Amendment. The case also involved claims of racial discrimination as a consequence of huge demographic changes in the years since the system was created. Most city foster care children were now black. But since most blacks were Protestant and many of the better agencies were sponsored by the Catholic Church or by Jewish groups—both to

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to the city. Allen Schwartz was the only witness to testify in favor of the policy at the hearing. His testimony was an act of great courage which I admired, while disagreeing with its substance.

64. Nelson, *supra* note 1, at 277. Consent decrees are agreements used to settle litigations by addressing future behavior as opposed to the payment of money. Most often the term is used to describe settlements made by governments, though it can also be used to describe agreements made by companies who have been sued by a government. Usually they are referred to as "decrees" because of having been incorporated into a court order. For more general information about consent decrees, see the material cited in the next footnote.

65. *See* Schwarz, *supra* note 2. For more general thoughts pro and con about using consent decrees to settle public-policy cases, see Richard A. Epstein, *Wilder v. Bernstein: Squeeze Play by Consent Decree*, 1987 U. Chi. Legal F. 209 (1987); Burt Neuborne & Frederick A. O. Schwarz, Jr., *Prelude to the Settlement of Wilder*, 1987 U. Chi. Legal F. 177 (1987) (Schwarz Writings and Speeches, at Tab 40). For a general critique of consent decrees, see Ross Sandler & David Schoenbrod, Democracy by Decree (2003).

66. 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988).

varying degrees favoring admission of their own—black children had a lower chance of getting into the most desirable group homes paid for by the city.[67]

Earlier district court decisions had rejected a facial challenge to the city's reliance upon and financing of religiously-based organizations to perform a basic governmental function. But the district court had warned that the result would be different if it were shown in an as-applied challenge that the system operated in a discriminatory fashion.[68]

On the eve of trial, the three lawyers responsible for the trial and their division chief persuaded me that the extensive evidence developed over many years indicated the city was very likely to lose the case. (The evidence with respect to racial discrimination was particularly troubling.) I thought a loss would be extremely harmful; the religious agencies did good work and were important to the city; it was quite clear that care would worsen if the city took over running the foster-care group homes. On the other hand, I was troubled by the fact that some children, because of their religion (which, in turn, was highly correlated to race), had a substantially lower chance of getting into the most effective group homes financed by the city.

After convincing the Mayor that we should explore a settlement (which meant a consent decree), I worked out the essence of a settlement with Burt Neuborne, then the Legal Director of the ACLU. (The discussion was at a family dinner with our spouses.) The key terms were that (i) the ACLU would drop its Establishment Clause challenge and accept the city's continued use of the religiously-based organizations, and (ii) the city would agree that admission to the agencies would generally be on a first-come, first-served basis.[69]

A settlement was then negotiated with the participation and support of the relevant city agency. The Mayor had personally focused on how I should handle press coverage of the settlement's announcement, and expressed pleasure with how it had been covered. Two months later, however, the Mayor told me that he had changed his mind; he wanted me to withdraw the city's consent to the settlement. Koch said that on the merits, he had concluded that the agencies should be able to base their admission decisions solely on the basis of religion. It also became clear that the Mayor had been pressured extensively (and privately) by his friend and

67. For the story of the litigation and of its end with a negotiated consent decree, see Nina Bernstein, The Lost Children of Wilder: The Epic Struggle to Change Foster Care (2001). While the litigation and its settlement are well and interestingly covered, the most compelling part of the book is the Dickensian story of the travails in the foster care system of Shirley Wilder (the lead plaintiff), as well as her son and her grandson. The lengthy district court decision approving the consent decree lays out the history of the case. *See generally Wilder*, 645 F. Supp. 1292.

68. *See* Wilder v. Bernstein, 499 F. Supp. 980, 988–92 (S.D.N.Y. 1980); Wilder v. Sugarman, 385 F. Supp. 1013, 1029 (S.D.N.Y. 1974).

69. As the consent decree settlement evolved in negotiations among the parties and in the lengthy hearings before the district court, see *Wilder*, 645 F. Supp. at 1303–04, the stark simplicity of the settlement agreed to between Burt Neuborne and me became a lengthy and complex document, particularly with respect to how the placement decisions would actually be made. *See id.* at 1304–07, 1328–29. The settlement also addressed several sensitive issues with respect to "religious practices." *See id.* at 1306–07.

supporter Cardinal O'Connor and by other important supporters on behalf of some of the Jewish agencies.

I concluded that I could not continue as Corporation Counsel if the city repudiated an agreement that I had already signed and believed to be right. I let the Mayor know this indirectly through a mutual colleague.[70] But my direct response to the Mayor was in a twenty page memo that elaborated eight reasons why withdrawal of the settlement would not be in the city's interest.[71]

After reading the memo (and after a meeting with me and Chief Deputy Mayor Stan Brezenoff, with whom I had shared the memo), the Mayor withdrew his request that we abandon the settlement. This must have been hard for him because his personal instincts had probably changed to opposition and because those seeking change, like the Cardinal, were personal friends and among his most important supporters.

The Mayor agreed to disagree with the Cardinal on other matters—for example, on the litigation defending his executive order that required agencies that contracted with the city not to discriminate on the basis of sexual orientation.[72] After the Mayor's executive order was struck down on the theory that power over such matters was legislative,[73] the city council finally passed a law prohibiting discrimination against gays.[74] This law was one of many examples where the Law Department

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70. I felt that doing it indirectly was preferable because to do it directly would potentially interpose emotions on both sides, and thus might detract from discussion of the merits with the Mayor. (This colleague might have merely suggested "Fritz might feel he would have to leave if . . . .")

71. *See* Cover Memorandum from author on *Wilder* to Edward I. Koch, Mayor, City of N.Y. (May 17, 1984) [hereinafter Cover Memo to Koch on Wilder]; Memorandum from author on *Wilder v. Bernstein* to Edward I. Koch, Mayor, City of N.Y. (May 17, 1984) [hereinafter Memo to Koch on *Wilder*]; Bernstein, *supra* note 67, at 334–35 (discussing the memo). The cover memo argued that what was done was correct on the merits, that the agencies' rights would be fully protected in the district court's forthcoming hearing on the settlement, and that having made a considered judgment to sign the stipulation, we could not defend or justify attempting to withdraw. The longer memo elaborated on these and added the risk of far more drastic consequences at a trial, the *preservation* of the role of religion, and the harm to the city's general status in the courts of attempting to withdraw; moreover, withdrawal would "significantly set back [the relevant city department's] efforts . . . to strengthen its control and management of the foster care system." Also, the religious agencies had given an initial go-ahead to sign the stipulation but had waited to meet with the Mayor until after the stipulation was signed and delivered to the court. The memo closed by saying:

> For all the foregoing reasons, the City has absolutely nothing to gain by attempting to retract the settlement. What we have to lose, however, is our good standing with the Court and the public, the substantial risk of losing at trial, and a significant strengthening of [the City department's] ability to manage and improve the foster care system.

Memo to Koch on *Wilder*, *supra*, at 20.

72. *See* N.Y. City Exec. Order No. 50, N.Y. Rules, tit. 66, § 10–14 (1980).

73. Under 21, Catholic Home Bureau for Dependent Children v. City of New York, 65 N.Y.2d 344 (1985).

74. *See* New York, N.Y., Local Law No. 2 (Apr. 2, 1986) (originally codified at N.Y. City Admin. Code § 8-108 ("Unlawful discriminatory practices; sexual orientation")). The council later re-codified this provision. *See* New York, N.Y., Local Law No. 39 (June 18, 1991) (combining §§ 8-107 & 8-108; codified at N.Y. City Admin. Code § 8-107).

worked with the city council in developing legislation addressing important public policy issues.[75]

D. Decisions Not to Appeal

Many positions taken by the city in litigation have policy implications. What I cover in this section are some examples of decisions not to appeal. These again illustrate two themes that run through this paper: (i) the importance of recognizing the city's long-term, broad interests, and of being sophisticated about what those interests are; and (ii) Mayor Koch's remarkable willingness to defer to the judgments of his Corporation Counsels.

Professor Nelson's book covers the decision not to appeal to the Second Circuit a decision by United States District Judge Morris Lasker that the city must release some prisoners to remedy its substantial contempt of a consent degree requiring reduction of overcrowding in Rikers Island prisons.[76]

This was a tough recommendation to make to the Mayor. First, I had to be convinced by Len Koerner (the chief of the Appeals Division who had also been charged by Allen Schwartz with responsibility for the prisons' litigation) that the city had no respectable arguments to make on appeal. Then, that to appeal with such weak arguments would hurt the city's general reputation in the Second Circuit by appearing simply to pass the buck to the courts for what would obviously be an unpopular but inevitable decision.

The discussion in the Mayor's office was hotly contested. The city's police commissioner (Ben Ward) and its criminal justice coordinator (John Keenan) strongly resisted our recommendation. Koch, in an extraordinary decision—clearly against his own short-term political interests—sided with our argument.

Another matter on which we chose not to seek further judicial review involved a City Charter provision that the city council should have two at-large members elected from each of the city's five boroughs in addition to the usual single-member districts. For each borough, the two had to be from different parties. The idea was to increase the voices in the council by assuring that at least five members on the council were not from the Democratic Party.

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75. After the Gay Rights Bill was signed into law, the Mayor gave me the pen he used to sign it because of changes in the Bill that I had helped develop. Those changes helped lead the city council to pass the law after years of refusal. In turn, I passed the pen on to NYU Law Professor Thomas Stoddard, who was also the Director of Lambda, the leading gay rights legal organization; Stoddard had worked with me on the changes. (Peter Vallone's leadership of the council was also critical. Vallone personally opposed the bill because of his strong religious beliefs; but he allowed the council to vote on the merits—unlike the practice of his predecessor, Thomas J. Cuite.) The other law that I personally worked on was the Private Clubs Bill that resulted in the admission of women to a number of the city's most prestigious clubs. Peter Zimroth argued the United States Supreme Court case that upheld that law. *See* N.Y. State Club Ass'n v. City of New York, 487 U.S. 1 (1988).

76. *See* Nelson, *supra* note 1, at 277; Benjamin v. Malcolm, 564 F. Supp. 668 (S.D.N.Y. 1983) (Lasker, J.).

The aim was good. However, the at-large scheme ran afoul of the one-person, one-vote doctrine because (at the extreme) it gave Staten Island the same number of at-large seats as Brooklyn, which had six times Staten Island's population.

After the city lost in both the district court and the Second Circuit,[77] the Mayor agreed the city should not seek Supreme Court review. One reason was the extreme weakness of the city's legal argument. Making such arguments would harm the Law Department's reputation, this time in the Supreme Court. A further reason was that it would be better for the city to get going on its own with a remedy by appointing a Charter Revision Commission to analyze how to fix the constitutional defect.[78]

While the Mayor agreed with the recommendations not to seek review in the Supreme Court, and to appoint a Charter Revision Commission, I was not successful ++in urging the Mayor also to use these decisions to reach out to the "minority community."[79] This was a possibility because, in addition to violating the one-person, one-vote doctrine, the at-large seats presented civil rights concerns: at-large elections traditionally tend to minimize minority voting strength; and in the eighteen years of the city's at-large system only one minority member had been elected.[80] I suggested that the Mayor "should be looking for points of symbolic importance to the minority community where you can, with self-respect, be a supporter."[81] Koch agreed to the Charter Revision approach, did not press the Commission for a revised at-large system, but told me he did not agree with my "symbolic importance" proposal.

E. "Sweet Are the Uses of Adversity": The Corruption Scandal and Governmental Reform

In 1982, I suggested to Mayor Koch that he "get out-front" on pushing for "Campaign Reform," for example, pressing for "a sharp reduction in the size of allowable contributions."[82] Progress did not, however, begin to be made until 1986. The story of what happened is a good example of how timing is everything, how context matters, and how the interests of the city can ultimately coincide with the personal interests of a mayor.

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77. *See* Andrews v. Koch, 528 F. Supp. 246 (E.D.N.Y. 1981), *aff'd*, 688 F.2d 815 (2d Cir. 1982).

78. State law gave mayors power to appoint charter revision commissions. Jeff Friedlander suggested use of this provision that had not been used previously. Mayor Koch appointed Columbia University President Michael Sovern as commission chair. After its analysis, the commission voted simply to abolish at-large council members. In addition, the commission proposed a change in the city council's system for redistricting after each decennial census. City voters approved both proposals.

79. Next Seven Years Memo, *supra* note 19, at 3; *see also* Memorandum from author on City Council (At-Large) (Charter Revision Commission) to Edward I. Koch, Mayor, City of N.Y. (Jan. 10, 1983) (on file with *New York Law School Law Review* and CUOHROC, Oral History Documents at Tab 13).

80. *See Andrews*, 528 F. Supp. at 248 (explaining that the at-large system went into effect "on January 1, 1963, and thus has governed the manner of electing at-large council members for some 18 years"). The court notes that "during the entire history of the at-large system, only one ethnic minority council member at-large has ever been elected and there are none in that group now." *Id.* at 252.

81. Next Seven Years Memo, *supra* note 19, at 3.

82. *Id.* at 5.

When the corruption scandal burst forth in early 1986,[83] the Mayor went into a tailspin. Despite his personal honesty, he felt under the gun. He feared that Governor Mario Cuomo might move (as then Governor Franklin Roosevelt had done with Mayor Jimmy Walker in 1932) to oversee aspects of city government. He also felt menaced by U.S. Attorney Rudy Giuliani.[84] The Mayor was, by his own admission, deeply depressed. Perhaps, despite his personal honesty, he felt guilt at having become too close to the likes of Stanley Friedman and Donald Manes.

The strategy that I suggested to the Mayor was to take advantage of the situation by advocating good government reforms, which now might have a better chance of being realized. At the same time, advocating reforms would help with how people thought about Koch; it would help to have the public see him rise above the scandal. Thus, his ultimate view of his own self-interest, indeed his political interest, reinforced what was good for the city from a policy point of view.

In all of my memos and speeches on the subject, I used Shakespeare's "Sweet are the Uses of Adversity" as support for the concept of taking advantage of the scandal.[85]

Interestingly (and fortunately), the Mayor, while silent about campaign finance reforms in response to my recommendation a year after his 1981 reelection, had begun to suggest limiting individual campaign contributions shortly after his 1985

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83. *See generally* Newfield & Barrett, *supra* note 35.

84. We had several contacts with the U.S. Attorney. One matter led me to the conclusion that despite all his good work in fighting corruption, Giuliani in one respect actually had made it *harder* to deter corruption.

How to treat business executives who had paid bribes was a subject on which Giuliani and I disagreed. The city had power to sue those who had bribed city officials. We could seek substantial damages, as well as a bar on the companies doing business with the city. Giuliani continually pressed me *not* to bring these cases, threatening (unspecified) consequences if we did not agree with him. His argument was that he needed to make deals with the bribe givers to induce their cooperation. My answer was that: (i) he had plenty of incentives already through use of his office's power to decide whether or not to indict the executives for their criminal conduct; and (ii) failing to sanction those who paid bribes would lead to *more* corruption in the future. Thus, if Giuliani's pattern were followed, most business executives who were inclined to consider paying bribes to public officials—probably believing that they would not get caught—would conclude that, if they were caught, they could always make favorable deals with a prosecutor to avoid any real pain for themselves and their companies.

Giuliani continued to opt for the short term benefit—one I thought was unnecessary. Perhaps he had already made promises, unaware that the law gave the city the power to sue the bribe makers civilly. After discussing the issue with the Mayor—who already had developed a very powerful aversion to Giuliani—we backed down. The Mayor, probably correctly, did not want Giuliani to turn his hot breath on him more than he had already done. I continue to believe that ours was the better side of the argument, and that a renowned, and generally effective, crime fighter had, without a sufficient short-term reason, undermined the long-term fight against future corruption.

85. *See, e.g.*, Frederick A. O. Schwarz, Jr., Corruption: Stimulus for Reform, New York County Lawyers Association Charles Evan Hughes Memorial Lecture 1 (Mar. 20, 1986) (referencing William Shakespeare, As You Like It act 2, sc. 1) (Schwarz Writings and Speeches, at Tab 44); *id.* at 1–2, 25–26 (explaining how the history of corruption is really the history of reform).

reelection (and thus *before* the scandal broke).[86] In any event, a couple of weeks after the scandal broke, I sent the Mayor a thirty-page memorandum detailing twelve proposed reforms, starting with substantial changes in campaign finance laws.[87]

The day of, or the day after, getting the memo, Koch released it to the press, saying he agreed with all of it. Most of the reforms happened—some quickly and some later, as with Peter Zimroth's breakthrough solution to the campaign finance issue as described in Professor Nelson's book.[88]

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86. *See* Memorandum from author on Campaign and Government Reforms to Edward I. Koch, Mayor, City of N.Y. (Feb. 10, 1986) (Schwarz Writings and Speeches, at Tab 43).

87. *See id.*

88. Nelson, *supra* note 1, at 291–95. Under state law, permissible contributions were obscenely high. For example, up to $50,000 ($100,000 if a spouse also donated), could be donated to candidates for city-wide office. There was also at least the appearance of corruption since the largest contributions tended to come from people doing business with the city, or seeking to do so—particularly real estate developers whose major deals often required approval by the city's Board of Estimate. Because the contribution limits were set by state law, we thought, at that time, the city could not directly legislate to limit the size of contributions.

In 2003, a paper on the city's campaign finance program reviewing the 2001 elections suggested that this view of state law was not correct. *See* Paul Ryan, Center for Governmental Studies, A Statute of Liberty: How New York City's Campaign Finance Law is Changing the Face of Local Elections 41 (2003), *available at* http://www.cgs.org/ images/publications/nycreport.pdf; Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & Pol. 1 (2006); Memorandum from Richard Briffault, Professor of Law, Columbia Law Sch., on New York City's Authority to Regulate Campaign Finance in Municipal Elections (Dec. 2, 2003).

The Campaign Finance Act was subsequently amended to apply the disclosure requirements and contribution limits and prohibitions to all candidates for covered municipal offices regardless of participation in the voluntary public finance program. *See* New York, N.Y., Local Law Nos. 59 & 60 (Dec. 15, 2004). (I had the opportunity to work on these matters while serving as chair of the city's Campaign Finance Board.)

My proposed solution in 1986 had been to have the city pass a law that prohibited the city from taking any discretionary action—such as land-use approvals—that favored a contributor of more than $3,000 to a campaign. This would have had the effect of deterring the overwhelming majority of the excessive—and questionable—contributions. *See* Memorandum from author on Local Power to Address Campaign Contributions to Edward I. Koch, Mayor, City of N.Y., & Peter F. Vallone, Vice Chairman, N.Y. City Council (Aug. 21, 1986) (Schwarz Writings and Speeches, at Tab 45).

Shortly after Peter Zimroth took office, he came up with a more elegant and comprehensive solution: a program where the city would provide matching funding to candidates who agreed to accept limits on the size of contributions, as well as their total expenditures. Because the program was voluntary, it avoided any conflict with state law. By the matching formula, it also magnified the effect of smaller donors, all the more so with later amendments. *See* New York City Campaign Finance Board, Dollars and Disclosure: Campaign Finance Reform in New York City (1990). Also, because of the wide support for the city's Campaign Finance Law in the media and elsewhere, candidates found it difficult politically to ignore its limits.

But a problem remained with people doing business with the city making donations, albeit smaller ones. While I was chair of the New York City Campaign Finance Board, Mayor Michael Bloomberg and City Council Speaker Christine Quinn led a movement to further strengthen the Campaign Finance Act by implementing strong restrictions on contributions from those who do business with the city, thus after two decades meeting the goals of the 1986 effort described above. *See* New York, N.Y., Local Law No. 34 (Jul. 3, 2007) (codified at N.Y. City Admin. Code § 3-702 *et seq.*).

Another example of the sweet-are-the-uses-of-adversity idea was our proposal of a joint State-City Commission on Integrity in Government. This was both a part of our strategy of taking advantage of the scandal to build the case for reform, and an idea of the Mayor's that joining together with the Governor might alleviate the Mayor's concern that Governor Cuomo might intervene to oversee city government.

Because the Governor and the Mayor were not at ease in talking to each other, almost all of the work in setting up the commission was done by conversations between Evan Davis, the governor's counsel, and me.

The commission included three members from city government, three from state government, and nine private citizens, including Columbia University's President Michael Sovern as its chair. The commission did a lot of good analysis of the nature of the problems, and presented ideas for reform particularly on campaign finance.[89]

The commission's final recommendation was to set up a new commission with subpoena power to look at issues across the state. Interestingly, the three "state" members resisted that recommendation internally, although they did not dissent publicly.[90]

F. South Africa

By chance, at some event or party, I told David Dunlap, then a *New York Times* reporter covering city hall and now the paper's architecture critic, that many years earlier, I had worked to undermine South Africa's apartheid.[91] David then told me that Mayor Koch had recently derided efforts to take action against South Africa, saying there were many other bad countries.

After hearing Dunlap's remark, I went to see the Mayor, telling him why I thought South Africa was different, and persuading him to appoint a panel to consider the city's position. Although I do not remember more about that conversation, it seems I made some headway because Koch asked me to chair the panel. In addition, the Mayor's terms of reference for the panel (which I helped to draft) asked the panel to make recommendations about how to fulfill the city's "moral responsibility to lead the fight against discrimination here and abroad," adding that South Africa's apartheid policies make it a "pariah nation."[92] The Mayor went on to ask the panel to consider options for doing "all that is responsible, reasonable and

89. *See, e.g.*, State-City Commission on Integrity in Government, Final Report, The Quest for an Ethical Environment II (1986) (endorsing my approach to deterring large contributions from people "doing business" with the city) (Schwarz Writings and Speeches, at Tab 42); *see also* Editorial, *Good Counsel for New York City*, N.Y. Times, Jan. 1, 1987, at 26 (endorsing my approach also).

90. The new commission, chaired by Fordham Law School Dean John Feerick, produced some powerful reports. (It was also ultimately helpful in supporting various 1989 City Charter changes that it concluded would reduce opportunities for corruption.)

91. *See, e.g.*, Frederick A. O. Schwarz, Jr., *The United States and South Africa: American Investments Support and Profit from Human Degradation*, Christianity and Crisis, Nov. 28, 1966, at 265–69 (Schwarz Writings and Speeches, at Tab 9).

92. Report of the Mayor's Panel on City Policy with Respect to South Africa 3 (July 11, 1984) (Schwarz Writings and Speeches, at Tab 10).

within our power to foster change in this abhorrent system of government," while at the same time taking into account the city's "fiduciary responsibility" to its citizens and its pension fund beneficiaries to manage the city's finances "prudently."[93]

The thirty-five page Panel Report is another example of taking a broad view of the city's interests. The report first concluded that while "cities do not have the authority to conduct foreign policy, foreign events may, at some point, become a matter of civic and municipal concern," particularly where it is "reasonable to be concerned about repercussions—either immediate or in the future—in the city of New York from injustices" in a foreign country.[94] Second, South Africa was a "special case." It was appropriate to take prudent action with respect to South Africa because the apartheid system was "evil and unjust," was official government policy, had endured for many years, and showed no sign of basic change. Given that the city was "multi-racial and pluralistic," it had an "interest in asserting the fundamental importance of racial, equality, and tolerance, in avoiding connections to racial injustice and strife, and in trying, in these unusual circumstances, to use the city's financial strength to help achieve a peaceful transition to racial justice in South Africa."[95]

Given all these conclusions, the report recommended action be taken in three separate respects: (i) a phased program of divestment from companies doing business in South Africa, starting with companies that provide products to the South African military, police, and other instruments of apartheid; (ii) legislation authorizing the city to restrict purchases of goods made in South Africa; and (iii) identification of other ways to express the city's solidarity with South Africans seeking change, such as encouraging local educational institutions to offer fellowships.[96]

The panel's recommendations were accepted by the Mayor and the City Council. The end result was that the city took "responsible actions in its own enlightened self-interest and that of its citizens . . . to use its financial strength to increase the pressure for fundamental and peaceful change in South Africa."[97]

Of course, Koch's (eventual) vociferous support for the policy of putting pressure on South Africa did help him with one of his key political needs for the forthcoming mayoral election: the need to address the feeling articulated by a number of blacks that the Mayor did not care about issues important to them. Nonetheless, I know the Mayor would not have accepted the panel's recommendations if he had not been convinced they served the interests of the city. I am certain that he was proud of being an early leader in the pressure against apartheid from America, which clearly

93. *Id.* As with the task force on property tax exemption, this panel included among its members three of the administration's leading financial and development officials. *See id.* at 28–32 (discussing fiduciary responsibility).

94. *Id.* at 2; *see also id.* at 5.

95. *Id.* at 2; *see also id.* at 5–11.

96. *Id.* at 2–5, 11–34.

97. *Id.* at 34–35.

helped accelerate change in South Africa and helped assure that the change was peaceful.

G. Getting Started on Major Charter Change

While the 1989 City Charter changes ultimately went far beyond the elimination of the city's Board of Estimate, the Charter Revision Commission was initially appointed in response to a district court holding that the Board of Estimate violated the one-person, one-vote doctrine.[98] The Board of Estimate gave each borough president the same vote despite the substantial population variants among the boroughs.[99]

In 1986, after the city lost the Board of Estimate case in federal district court,[100] but when further appeals were available, I advised the Mayor to appoint a Charter Revision Commission to begin to analyze possible changes even though the city would continue to press its appeal. The reason for this was because it was clear that, if the decision stood (as was very likely even though not inevitable), it would be irresponsible for the city not to begin what would clearly be a lengthy and complex process of analyzing possible changes necessary to address the constitutional problem and all the many other changes that would have to be considered if the board were eliminated.

From a political point of view, this was a difficult decision for the Mayor to make. Establishing a Charter Revision Commission would clearly be resented by the other members of the Board of Estimate. The Mayor still needed to be able to muster majorities in votes at the board. But the Mayor accepted the judgment that the interests of the city called for appointing a Commission even though the city would continue vigorously to defend the board in court.[101]

The Charter Commission initially appointed by the Mayor had Richard Ravitch as its Chair. After the Ravitch Commission had done a substantial amount of initial preparatory work, the Supreme Court surprisingly granted certiorari in the Board of

98. Morris v. Bd. of Estimate, 647 F. Supp. 1463 (E.D.N.Y. 1986), *aff'd*, 831 F.2d 384 (2d Cir. 1987), *corrected by* 842 F.2d 23 (2d Cir. 1987), *aff'd*, 489 U.S. 688 (1989).

99. The Board of Estimate decided land-use issues and awarded discretionary contracts. Its voting structure gave two votes to each of the three city-wide officials—the mayor, the comptroller, and the city council president (now public advocate)—and one vote to each of the five borough presidents. After the Supreme Court unanimously affirmed the Second Circuit's holding that this structure violated the one-person, one-vote doctrine, those who found virtue in the board suggested that it could be kept by "weighting" the votes of the borough presidents according to their population. The 1989 Charter Commission voted 13 to 1, however, to eliminate the Board of Estimate. By this time, I had concluded not only that the board would still be unconstitutional even with weighting, but also that it was, as a policy matter, on balance bad for the city. Some of the Charter Commission members who had ties to various Board of Estimate members, or even had matters pending before the board, felt more comfortable relying on the constitutional argument, which they asked me to stress in my remarks and a paper before the vote to eliminate the board. *See* Schwarz & Lane, *supra* note 6, at 765–74.

100. *See Morris*, 647 F. Supp. 1463.

101. For the city's subsequent defense of the board, see Peter L. Zimroth, *Reflections on My Years as Corporation Counsel*, 53 N.Y.L. Sch. L. Rev 409, 416–20 (2009).

Estimate case, causing the Ravitch Commission to suspend its work considering possible fundamental changes. Ravitch later decided to run for Mayor and resigned as Charter Chair. (At this point, I was back in private practice and, in late 1988, the Mayor asked me to become the new chair.)

This is not the place to tell the story of the 1989 Charter Revision Commission.[102] However, two points further illustrate the Mayor's respect for independence and his willingness to hear critical comments.

Before the Mayor appointed me as chair, my most recent communication with him had been a letter expressing concern about the tone of his remarks about Jesse Jackson during New York's 1988 presidential primary. I had said that he should have expressed his opposition to Jackson without "heightening tensions." And that, without suggesting a new Ed Koch, all sweetness and light, insipid, restrained, dull, it was important for him to be "the Mayor of every single New Yorker of every race, religion and ethnicity."[103] As Mayor, he should use "[a]ll [his] energy, all [his] talent . . . to bringing people together, to reducing tensions, to building bridges."[104]

The other event occurred in March 1989, a few days after the Supreme Court unanimously upheld the decision that the Board of Estimate's voting scheme was unconstitutional.[105] Mayor Koch invited me to Gracie Mansion for dinner. I came with Eric Lane, the Charter Commission's Staff Director and General Counsel. The Mayor came with Peter Zimroth and Chief Deputy Mayor Stan Brezenoff. After the usual good food and drink, the Mayor told us why he had asked for the meeting. I hope, Koch said, you will not finish the Commission's work this year. Why, I asked. Because, said Koch, the Charter debate will split the city racially, and this would harm him (1989 being a mayoral election year). My response had two parts: (i) I cannot agree because the city government has been held unconstitutional in diluting the votes of large groups of citizens; therefore, our obligation is to fix it as soon as we can, and that means completing our work in 1989 *if* we can do so responsibly; and (ii) I believe our work will be done in a way that does *not* split the city on racial grounds.[106]

In the enormous amount of Charter Commission work that followed, the Mayor did not try to persuade by individual, behind-the-scenes lobbying. Rather, he

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102. For that story, see Schwarz & Lane, *supra* note 6; Schwarz, CUOHROC, *supra* note 18, at 320–81. (*The New York Times* from March through December 1989 is also a good source for Charter issues. *Times* editor Max Frankel assigned two excellent reporters, Todd Purdum and Alan Finder, to work full time on the Charter.)

103. Letter from author to Edward I. Koch, Mayor, City of N.Y. 2 (Apr. 25, 1988) (Schwarz Writings and Speeches, at Tab 29).

104. *Id*.

105. *See* Bd. of Estimate v. Morris, 489 U.S. 688 (1989).

106. *See* Schwarz & Lane, *supra* note 6, at 761–62; Schwarz, CUOHROC, *supra* note 18, at 334–35 (discussing this issue). As an initial step toward that end, upon my appointment I had asked the Mayor to fill with minorities the two other vacancies on the commission (that had been created by resignations from the Ravitch Commission). The Mayor did that, giving the new commission six minorities out of fifteen members.

submitted detailed written arguments on many points (many were persuasive; some were not). All were made public.

VI. CONCLUSION

Life opens doors to share in the action and passion of your time.[107] There are many paths through those doors. One is lawyering for government.

I am often asked to compare being a lawyer in government with being in private practice. In two respects, the similarities outweigh the differences. Thus, the thrill of a good cross examination or oral argument, or writing a powerful reply brief, are simply joyous parts of our craft wherever practiced. Also, the satisfaction of helping people in trouble is similar—whether it involves a Tom Watson of IBM or a Dr. Edwin Land of Polaroid when their company's existence was threatened, or a *pro bono* client challenging his death sentence, or an Ed Koch seeking to overcome the corruption scandal and foster government reform. But other satisfactions of a responsible high-level job in the public sector, or in the public interest generally, cannot be matched by the private sector. The subjects are more varied. And what you can do often matters much more, particularly in influencing public policy.

Professor Nelson has done a real service by his comprehensive study of one government law office. In my view, in order to be a "real lawyer," all lawyers should aspire to do public service, at least for some portion of their career. It is my hope that Professor Nelson's book, and this and the other papers from other Corporation Counsels, will bring home to a wide group of lawyers more knowledge of the extraordinary breadth of the work at the Law Department and the unusually great challenges and opportunities that await lawyers working there.

107. Justice Oliver Wendell Holmes, Jr. made this point, but in a somewhat more judgmental (and gender-limited) fashion, in a speech: "As life is action and passion, it is required of a man that he should share in the passion and action of his time, at peril of being judged not to have lived." Memorial Day Address before John Segwick Post No. 4, Grand Army of the Republic (May 30, 1884), *in* Oliver Wendell Holmes, Jr., Speeches 3 (1891); *see also* Schwarz, *supra* note 22, at 16.