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Implementing a New City Charter: Thoughts on My Tenure as Corporation Counsel in a Time of Transition

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I became Corporation Counsel in September 1991, and remained in that office until the end of Mayor Dinkins' administration twenty-seven months later. At the time I became Corporation Counsel, I had well-informed notions regarding the work of a large government law office; the kinds of matters handled and the type of staff needed to do the important work of representing a unit of government such as the city of New York. For seven years prior to joining the city Law Department, I had served as deputy solicitor general and then as solicitor general of New York State. The solicitor general is an appointee of the attorney general and oversees all of the appellate work of the attorney general's office. As solicitor general, I had the opportunity to handle every type of case a government law office may encounter—tax, environmental, constitutional law, including Commerce Clause issues, First Amendment, Fourteenth Amendment, Eleventh Amendment, and even original jurisdiction matters. I also dealt with appeals involving areas such as consumer fraud, New York labor law, antitrust, municipal finance, municipal law, appropriation, known in New York City as condemnation, and much more.

Any mayor can be expected to select as his Corporation Counsel a lawyer whose views are aligned with his policy perspectives. The Corporation Counsel should be prepared to manage the office consistent with the mayor's priorities. I suspect that Mayor Dinkins' decision to appoint me reflected his judgment that my views would be aligned with his on matters of policy.

The election of David Dinkins as the city's 106th mayor was a momentous event for the city. Mayor Dinkins was elected mayor by a broad, multi-racial coalition that the city had not seen in quite some time. He was the first African American to be elected mayor of the city. One of the central themes of his administration was to have the richly diverse population of the city reflected in city government.

Mayor Edward Koch, who preceded Mayor Dinkins, was a provocative mayor, especially on matters of race. As solicitor general, I had witnessed first-hand the impact of his views on the positions taken by the Law Department. In 1985, the United States Supreme Court agreed to hear an appeal from a decision of the Second Circuit upholding a remedial goal of 29.23% minority membership in the Local 28 of the Sheet Metal Workers' International Association, a union that represents sheet metal workers employed by contractors in the New York City metropolitan area.[1] Judge Werker, of the Southern District Court of New York, had imposed this remedial goal in a case brought by the city, the state, and the Equal Employment Opportunity Commission against New York City based Sheetmetal Workers Union Local 28 and its apprenticeship committee.[2] Prior to the time the case reached the Supreme Court, for over twenty-one years, the union had resisted fifty-five court orders and had preserved a deeply entrenched tradition of favoring the relatives of union members. As a result of this favoritism, minorities were excluded from well-paying construction jobs.

With the backing of the United States Department of Justice, the union argued before the Supreme Court that the numerical remedy imposed by the lower courts

1. Local 28 of the Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Comm'n, 478 U.S. 421 (1986).

2. Equal Employment Opportunity Comm'n v. Local 638, 401 F. Supp. 467, 489 (S.D.N.Y. 1975).

violated Title VII of the Civil Rights Act of 1964 and the Fourteenth Amendment of the United States Constitution.[3] Shortly after the Supreme Court agreed to hear the case, I spoke with Fritz Schwarz, then Corporation Counsel. We agreed that the city and the state would collaborate and argue for affirmance of the decision of the Second Circuit. On the day before the briefs of the city and state were due to be filed, Fritz told me that the city would not be arguing for affirmance. Although he did not say so, it was clear that the Law Department's original plan to argue for affirmance of the numerical goal had been overruled by Mayor Koch.[4] As a result, the city's brief concluded that the judgment below should be affirmed, except for the numerical goal imposed by the lower courts. Thus, the state was the only party before the Supreme Court arguing for affirmance of the numerical goal.[5]

David Dinkins inherited a racially divided city and a deteriorating economy from Mayor Koch. Racial incidents in Howard Beach, Queens and in Bensonhurst, Brooklyn, in which African Americans were beaten by whites, symbolized the racial tensions at the time. It fell to Mayor Dinkins to manage the city during a period of economic decline and to heal racial wounds.

Perhaps the biggest challenge I faced was managing the Law Department in a deteriorating economy. The poor health of the city's economy had resulted in layoffs of lawyers, the first such layoffs since the city's fiscal crisis in the 1970s during the Beame administration. At the same time, the caseload handled by Law Department lawyers was increasing. Shortly after my arrival, the Mayor imposed salary cuts for managers in all agencies. Other city agencies took far deeper cuts than the Law Department. Throughout, the Law Department needed to address court and legislative mandates regarding the homeless, special education, police hiring, and a host of other matters.

Prior to my appointment, Victor Kovner had served as Corporation Counsel for twenty-one months, after which he returned to private practice. Upon taking office, Victor took charge of the Law Department's responsibility to implement a new City Charter. That Charter was made necessary by a 9-0 decision of the United States Supreme Court in *Board of Estimate of City of New York v. Morris*,[6] which held that the composition of the Board of Estimate,[7] where the roughly 250,000 Staten Island residents enjoyed the same voting power as the 2.5 million Brooklyn residents,

3. *See Local 28 Sheet Metal Workers*, 478 U.S. at 440.

4. I learned recently that the city's draft brief was changed four times as city hall debated the position to take in the Supreme Court.

5. The Supreme Court ruled that the lower courts have authority to impose non-victim-specific numerical goals to remedy identified racial discrimination and upheld the goal ordered in the case. *See Local 28 Sheet Metal Workers,* 478 U.S. 421.

6. 489 U.S. 688 (1989).

7. The Board of Estimate was widely viewed as the center of power in the city. Its members were the mayor, the comptroller, and the five borough presidents. Its powers included responsibility for zoning regulation, concessions and franchises, and city contracts.

violated the one-person, one-vote requirement of the Constitution.[8] Under the new Charter, which was adopted by referendum in 1989, the Board of Estimate was abolished and its powers redistributed between an enhanced city council and the mayor. The new Charter, however, left a wide range of issues unresolved, and it fell to the Law Department, under Victor Kovner's leadership, to sort out the jurisdiction of authority lines and to attend to the details of the new allocation of power.

Work to implement the new city charter was a key initiative of the Law Department during Victor's tenure. That work was far from complete when I arrived. One important and complex area concerned city procurement practices. The Charter provided for creation of a Procurement Policy Board, comprised of three mayoral and two comptroller appointees, who were to set and oversee city procurement policy, a function formerly exercised by the Board of Estimate. Mayor Dinkins appointed John Grubin, a lawyer in private practice and former chief of the Law Department Division of Commercial Litigation, as chair of the Procurement Policy Board. I was appointed to the board and in that capacity helped to shape the policies and regulations governing procurement.

In a related area, Mayor Dinkins proposed, and the city council enacted, legislation intended to substantially increase the participation of minority-owned and female-owned businesses in city contracts. The Law Department guided the preparation of a "disparity study," which served as the basis for the remedial, race, and gender conscious elements of the law.[9] The Law Department also drafted the ordinance and implementing regulations. Together with Deputy Mayor for Finance and Economic Development Barry Sullivan, the Law Department actively monitored city departments' performance. By the end of 1993, the value of city contracts won by minority-owned and female-owned businesses had increased from under five percent to seventeen percent.[10]

A reduction of the political power of Staten Island was an intended consequence of the Supreme Court's ruling in *Morris*, and the new Charter was adopted as a result of that decision. Unhappy with the new regime, residents of Staten Island, led by then Borough President Guy Molinari, commenced a campaign for Staten Island to secede from the city and to create an independent city of Staten Island. Mayors Koch and Dinkins opposed the plan.

The Law Department assumed the lead role in opposing the secessionist movement. Among other things, the Law Department challenged the constitutionality

8. *Morris*, 489 U.S. at 690–91.

9. Under *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), where a state law or local ordinance purports to use race or gender-based criteria in awarding public contracts that are intended to eradicate the effects of prior discrimination, the law or ordinance must be supported by particularized evidence of that prior discrimination in the affected community sufficient to satisfy the requirements of the Equal Protection Clause. The "disparity study" undertaken by the city was conducted to address this requirement.

10. Mayor Giuliani opposed the city's minority-owned and female-owned business law and allowed its implementing regulations to lapse. Thereafter, city contracts awarded to such businesses fell to levels below those at the end of the Koch administration.

of a state law that purported to prescribe procedures for evaluating the interest of Staten Islanders in seceding from New York City and the basis on which Staten Islanders wished to accomplish such secession.[11] The law provided for a referendum of Staten Island residents to establish a charter commission composed of only Staten Island residents and legislators, and for Staten Island legislators to draft a proposed charter for a new city of Staten Island. The commission was expected to conclude its work by 1992. The Law Department's efforts in court to bar secession and prevent the establishment of the secessionist charter commission were unsuccessful. The Court of Appeals of New York, in *City of New York v. State*, ruled that the city's home rule powers had not been violated because the legislation authorizing the creation of the commission did not authorize secession.[12] Rather, the law merely allowed voters to express their views on the subject. Actual secession would require further legislative action. What followed was a series of hearings on the question of secession, in which the Law Department provided testimony on why secession was bad policy, impractical, and unconstitutional. Nevertheless, secessionist fever raged on in Staten Island and for a time spread to eastern Queens, where a member of the state assembly held hearings on the possible secession of eastern Queens from the city. Throughout, the issue of race ran just below the surface. The Staten Island secession commission produced a charter, but the state legislature declined to approve it.

In the face of shrinking city revenues, Mayor Dinkins lobbied the legislature and secured a tax increase in order to fund the hiring of police officers. The Mayor sought to restore the police department numbers to levels that existed prior to the onset of the fiscal crisis of the middle 1970s. Despite his commitment to public safety and to an enhanced police department, the Mayor and the police unions remained at odds through much of his administration.

Thanks to the work of my predecessors, probably dating back to the administration of J. Lee Rankin during the Lindsay administration, and in no small measure to the leadership of Alan Schwartz, I inherited a professional Law Department of some 550 lawyers and a merit-based hiring and promotion system that I believe resulted in one of the finest government law departments in the United States. In this sense, the Law Department was similar to the office of the New York Attorney General, with which I was familiar. The staffs were not drawn from traditional civil service lists, and membership in a political club carried no sway in hiring or promotion

11. *See* City of New York v. State, 146 Misc. 2d 488 (1990) (challenging the constitutionality of Staten Island's succession under Chapter 773 of the Laws of 1989).

12. City of New York v. State, 76 N.Y.2d 479 (1990). The New York Court of Appeals held:

> Chapter 773 does not authorize secession; it does not authorize the voters of Staten Island to decide the secession issue; it does not initiate secession, or commit the State to support it; it does not represent any relinquishment by the Legislature of any power it may have with respect to secession; and it in no way circumscribes whatever protections exist in the State Constitution home rule provision with respect to an act formally triggering secession.

Id. at 486.

decisions. Instead, lawyers were selected much in the way they are selected at law firms. The important factors were academic performance, quality of work experience, writing and reasoning abilities as exhibited in writing samples, and oral communication skills as demonstrated in a rigorous interview process.

A relatively high percentage of the executives and senior managers in both offices were graduates of prestigious undergraduate colleges and law schools. The attorney general's office tended to hire its executives directly from the private sector and institutions outside of government. When I arrived at the Law Department, virtually all of its top executives were accomplished career city employees who had been promoted up through the ranks. A substantial number were hired upon law school graduation or shortly thereafter into an honors program developed two decades earlier by J. Lee Rankin and Norman Redlich, who headed the office during the Lindsey administration. Most had been promoted to the jobs they held during the Koch administration.

In both offices, the line lawyers, supervisors, and some managers were drawn largely from regional and local law schools. These excellent lawyers tended to have been at or near the top of their law school classes. They represented the best tradition of the Department. Due largely to low salary structures, both offices suffered from high turnover rates, especially among junior lawyers. Layoffs, delayed hiring, and pay cuts for managers further contributed to staff turnover during my tenure.

Within the Law Department, I took the challenge of persuading career executives and managers of the importance and urgency of increasing diversity. In a city where African Americans and Hispanics constituted over fifty percent of the population, few members of either group could be found in the Law Department. As of 1991, there was only one non-white executive in the Law Department. She was hired by Victor Kovner and was the only non-white person to hold an executive level position since Harry Dodds left the Law Department in 1973. Dodds reports that there were no minority persons heading an operating division during his tenure and that only one non-white person held a line management position since his departure.[13]

As of 1991, none of the seventeen division chiefs were minority persons. Of the ten borough branch offices, one was headed by a minority person. The same pattern existed at the deputy division chief level.

Although women represented half of the lawyers hired, a much smaller percentage occupied executive or managerial positions.[14] As of 1992, four of thirteen executives were women. Two women held the position of division chief; one woman headed a borough office.

More disturbing than the absence of minorities in senior positions was the fact that very few minorities held positions that were likely to lead to promotion to supervisory and other leadership positions in the Department within a reasonable number of years. Women were present in these ranks, but were underrepresented.

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13. Lew Necco, who is Hispanic, was a division chief. He later became general counsel for the police department.

14. There were several women in supervisory jobs.

In my view, these dismal statistics were the result of a lack of attention by senior management to recruiting and hiring minority lawyers, and a failure to ensure that minority and female lawyers receive challenging work assignments that provided opportunities for professional growth. I saw no evidence of conscious discrimination by senior management.

In the last two years of the Koch administration, only eight percent of the lawyers hired were African American or Hispanic. This rate of hiring was not due to an absence of available talent. Over twenty percent of the lawyers hired during the following two years under Victor Kovner were African American or Hispanic. Furthermore, African American or Hispanic lawyers represented almost forty percent of all lawyers hired during my tenure. Women constituted over fifty-five percent of all lawyers hired during the same period.

The lack of minority lawyers posed a number of problems for the Law Department. First, the profile of Law Department personnel stood in stark contrast with the diversity of New York City itself, and with Mayor Dinkins's vision of the government of a city whose population he regularly described as a "gorgeous mosaic." Second, diversity was essential for preserving the Law Department's role as counsel to the city, city agencies, commissioners, and the city council. An absence of diversity in the Department, given the diversity within other city agencies, could have threatened the confidence and trust of agencies the Department represents. I was aware of two commissioners who lacked confidence that the Law Department could be counted on to support all of their policies and the Mayor's policies. Although this lack of confidence was not justified in my view—Law Department lawyers were zealous advocates for the city and its leadership—we could not ignore these sentiments. Finally, the Law Department traditionally has trained and supplied a pool of talented men and women who successive mayors have tapped to fill leadership positions. The Law Department needed to preserve its standing as a go-to source of talent for the city, including diverse talent.

It did not take me long to gain a sense of the reasons why there was such a glaring lack of minority lawyers in responsible positions within the Law Department. The Law Department was not perceived as a place of opportunity by minority lawyers. Over the years, the Law Department had hired superbly talented young lawyers, a number of whom were members of minority groups. Some of our well-regarded African American lawyers, who were in the Law Department when I arrived, told me they saw little opportunity for advancement and were seeking jobs elsewhere. Several minority lawyers who had left the Law Department told me they left for the same reason. It appeared to me that the Department had missed opportunities and had failed to identify, train, and challenge minority lawyers because it had not made the retention of diverse lawyers a priority.

I determined to make diversity a priority for the Law Department. Within months of my arrival, I held a retreat for senior managers. We discussed areas of weakness that needed attention, including the need to improve morale in an environment of continuing low compensation, to enhance training opportunities, and to recruit, hire, and retain diverse lawyers. To my surprise, some felt that the

retreat was a precursor to a house cleaning and replacement of senior lawyers with minorities and women from outside the Department. Before leaving the retreat, I reassured the staff that there was not a plan to terminate anyone. I urged the staff to recruit and to challenge promising young lawyers so that the Department could sustain and refresh itself with a cadre of new and upcoming leaders.

In addition, I discontinued the practice of promoting almost exclusively from within divisions. I expanded the pool of potential candidates for promotion by recruiting across division lines for all vacancies. This system was used in the Office of the Attorney General, and it enabled that office to identify and promote the most promising candidates. I also expanded recruitment for line management positions to candidates outside the Law Department.

By the end of my tenure, there were tangible signs of progress. The percentages of minorities and women hired and promoted increased measurably. Several now hold supervisory or managerial positions. These lawyers continue the Law Department's historic role as a critical participant in governance of the city.