NEW YORK LAW SCHOOL

NYLS Law Review
Vols. 22-63 (1976-2019)

Volume 53
Issue 3 *Corporation Counsel: A History of the New York City Law Department*

Article 6

January 2008

The Giuliani Years: Corporation Counsel 1994–1997

Paul A. Crotty

VOLUME 53 | 2008/09

THE HONORABLE PAUL A. CROTTY

The Giuliani Years: Corporation Counsel 1994–1997

ABOUT THE AUTHOR: Paul A. Crotty has served as a United States District Judge since August 1, 2005. He served as Corporation Counsel for Mayor Giuliani (1994–1997) and previously served as Commissioner of the Office of Financial Services; Commissioner of Finance; and Commisioner of Housing, Preservation and Development (1984–1988) for Mayor Koch. He practiced law with Donovan Leisure Newton & Irvine (1969–1984; 1988–1993); and was also Group President for New York and Conneticut at Verizon, Inc. (1997–2005). He gratefully acknowledges the assistance of his former law clerk, David Feder (2007–2008) in the preparation of this article.

I. INTRODUCTION

When Mayor Rudolph W. Giuliani offered me the position of Corporation Counsel in early December 1993, I recognized the high honor he was conferring on me and accepted right away. As I said at my resignation ceremony four years later, I acted quickly because I was afraid he would change his mind. The Corporation Counsel, who heads the New York City Law Department, has one of the most challenging and exciting legal positions in the United States, a position enlivened not merely by the size of the office and the broad range of issues within its jurisdiction, but also because of the unique, litigious nature of New Yorkers.

Some think that politics is the art of the possible, but in reality, it would be better to say that politics is the art of making what is necessary possible. In January 1994, the city was laboring under a crime wave, rising numbers on the welfare rolls, a falling economy and mounting budget deficits. Clearly, the city had to change. But almost every decision the city makes, whether it is implementing a federal or state directive, or implementing a policy or program of its own, is subject to litigation. Many of Mayor Giuliani's changes in policing, zoning, welfare, labor negotiations, and the allocation of powers between the mayor and the city council, to name but a few, broke the existing consensus on governance in the city and ushered in a new era. It is not surprising that many of these decisions were litigated.

II. THE EVOLUTION OF THE CORPORATION COUNSEL'S OFFICE AND THE INFLUENCE OF ALLEN SCHWARTZ

I had previously served in the Koch administration, as the Commissioner of the Offices of Financial Services (1984), Commissioner of Finance (1984–1986), and Commissioner of Housing, Preservation and Development (1986–1988). During that time, I came to know the New York City Law Department. It had an impressive array of dedicated, talented lawyers who were highly professional and deeply motivated to achieve the greatest public good.

Those qualities were a perfect reflection of Allen Schwartz, the Corporation Counsel who brought sweeping change to the Law Department, making it the conscientious and dedicated place it is today. That is not to suggest that the Law Department did not have talented leadership before his arrival, nor to suggest that it did not attract able lawyers. The Law Department has always had a reservoir of able, hardworking attorneys. Indeed, the greatest strength of the Law Department today is its executive leadership, many of whom started their public service careers prior to Allen Schwartz becoming the Corporation Counsel in 1978.

Physically, Allen Schwartz's greatest contribution was the relocation of the Law Department from its antiquated offices in the Municipal Building to 100 Church Street, its home for the last three decades. The move to new offices that were modern and efficient was a vote of confidence in the Law Department and gave its attorneys and staff a sense that their work was both important and highly valued. It was even more significant at the time because the city had not yet emerged from the doldrums of the early 1970s financial crisis.

Allen Schwartz also made more subtle, but no less significant, changes. He led the fight to give the Law Department the resources it needed to provide legal services

to New York City. Measured against the city's financial crisis, these simple, sensible decisions had a profound impact on the Law Department. Before his tenure, pads and pencils were rationed. A new pad would not be issued unless the lawyer turned in the spine from his old pad. (Sorry, only one pad per lawyer.) Similarly, new pencils were issued when the stub of the old pencil was produced and the supply clerk was satisfied that there was no useful life left in the pencil. While hard to imagine now, the opportunity to get the basic supplies a lawyer needed to do a professional job must have been a real boost to confidence.

Finally, and perhaps most importantly, Allen Schwartz succeeded in removing the Law Department from the grasp of the civil service laws. Once conceived as a barrier to the influence of politics in city employment, the civil service system restricted motivation and efficiency in the Law Department.[1] Allen Schwartz implemented a merit-based system for hiring, promoting, and retaining lawyers. With this change, a young lawyer's appointment no longer depended on a score on an examination or a reference from a political leader. Further, his continued employment no longer depended on civil service status. Lawyers had to perform and could not rest on prior accomplishments. The sole determinants for advancement and retention were merit, qualification for the position, and success and achievement once employed. The system is still in place today, and each succeeding Corporation Counsel during the last three decades has continued to implement the policies initiated by Allen Schwartz.

Mayor Giuliani was also familiar with the Law Department. He had previously served as the United States Attorney for the Southern District of New York, where Emory Bruckner established a merit-only hiring system in the mid-1920s. It remains a source of pride that the office has maintained that tradition for more than eight decades. Thus, Mayor Giuliani certainly recognized the impact that the merit-only selection process had on the Law Department. While his election as mayor prompted wholesale changes at a number of city agencies, no such changes were made at the Law Department. Given the favorable experiences the Mayor and I had with the Law Department during our years of public service in New York City, we were convinced that the Law Department was highly professional, competently structured, and dedicated to public service.

During my tenure as Corporation Counsel, the Law Department hired over three hundred lawyers. Newly hired lawyers had to make a three-year commitment to public service, and almost all honored that commitment. The commitment was exclusive because outside law practice is forbidden. Many younger lawyers choose to leave at the end of the three-year commitment to pursue more lucrative opportunities

1. The civil services laws had the original goal of insulating state and city employees from the arbitrary exercise of political power. Public employment was to be based on merit and fitness, as determined by written examination. With the growth of public employee unions, however, the civil services laws were used to shield public employees from legitimate oversight, and appropriate management scrutiny. The housing police union, for instance, attempted to use the civil services laws to preserve their own union, rather than have their members merged with the NYPD, even though the civil services laws were never intended to frustrate the accomplishment of a municipal initiative to improve public safety.

in the private sector. But during my tenure, the Law Department was expanding so there were not only replacement positions to be filled, but new opportunities as well.[2]

One of the primary tasks of the Corporation Counsel is to find competent young lawyers eager to fill these positions. To that end, the Law Department began recruiting on campus at both local and national law schools, where applicants met with multiple interviewers. These interviewers passed along their impressions, along with grades, writing samples, and any letters of recommendation, to a panel consisting of the Law Department's executives and division chiefs. The best applicants eventually interviewed with me. I saw at least two applicants for every position, without exception. While the Law Department received numerous recommendations from city hall, the city council, and various elected and community leaders, these recommendations were put into the normal hiring process. Those that emerged from the process were hired; those that did not were not. The various power-brokers recognized our firm commitment to merit-based hiring and transparency. While some applicants were disappointed, I never received a complaint from city hall concerning a decision not to hire a recommended applicant.

We hired candidates at the Law Department based on the candidate's interview, grades, extracurricular activities (especially pro bono activities), success in college, and an analysis of the applicant's writing sample. The sample was used to ascertain the applicant's ability to organize facts and to find and apply the correct law. The Law Department was a signatory to the Association of the Bar's plan to achieve diversity, and diversity of legal talent was a hiring objective. No one was hired for their ideology or their party affiliation. Instead, we considered the applicant's competence, willingness to work, and ability to cooperate, to learn, to respect the law, and to be professional in every respect. That process, applied consistently over the last thirty years, has imbued the Law Department with the unique strengths and abilities that the Corporation Counsel draws upon to provide advice to the city's elected leadership.

III. LITIGATING THE GIULIANI AGENDA

As already indicated, the Law Department is at the center of a litigation storm. As a litigator, I decided that I would try to handle, wherever I could, the major litigation battles that were critical to accomplishing city goals.

2. As Corporation Counsel, I also interviewed candidates for the general counsel position of every municipal agency. No one could occupy one of those positions without prior interviews and consent by the Corporation Counsel. During my tenure, we also reexamined the legal work of the agencies, and recaptured some of the positions to insulate the Law Department's budgets from cuts that the city agencies were experiencing. For every two legal positions cut at an agency, the Law Department was allowed to add one legal position.

A. Consolidating the Police Functions

The first such battle grew out of Mayor Giuliani's plan to integrate the city's three separate police forces—the New York City Police Department ("NYPD"), the Housing Authority Police Department ("HAPD"), and the Transit Authority Police Department ("TAPD")—into a single New York City Police Department. In 1994, each police agency had its own structure, including command and related administrative units for recruitment, training, and personnel. This duplication was very wasteful of scarce resources, and went so far that each police service had its own bagpipe band. If combined, those overhead units could be redeployed as forces available for fighting crime. Additionally, each of the separate forces had its own territorial imperatives and individual fiefdoms that made inter-departmental cooperation difficult and—at the very least—inconsistent. If a crime did not occur in public housing, by and large, the HAPD was less concerned; the same held true for the TAPD, who concentrated its efforts in the subways. On the other hand, the NYPD was less concerned with crime in the territorial domains of the other two departments. Surely a better way to police New York City could be achieved if the three forces, with three separate missions, were integrated into a single command structure.

Mayor Giuliani's goal was not a new one. Mayor Koch had tried to merge the TAPD with the NYPD, and, before that, Mayor Lindsay had tried to do the same with the HAPD. The double-merger plan raised significant civil service, pension, labor, and government funding issues, as well as the institutional reluctance of the Housing Authority and the Transit Authority to cede control of their own police force. It was clear that change was going to be resisted. The Law Department conducted significant research on these issues and determined that the Civil Service Law—the most significant legal impediment to the merger—did not stand in the way of the police merger plan.

In early 1994, Mayor Giuliani went forward with his plan to merge the HAPD into the NYPD. For the next nine months, the Law Department worked with city hall, the NYPD, and the Housing Authority to enter into the appropriate agreements to transfer the HAPD functions to the NYPD. We also sought the approval of the city council. The agreement required the approval of the U.S. Department of Housing and Urban Development ("HUD"). HUD indicated its initial approval of the plan, but requested a public hearing that took place before Congress on September 15, 1994. HUD's commitment, which Mayor Giuliani obtained, was critical because HUD funded the housing police; a loss of that federal funding would cripple the merger.

On the very day of the congressional hearing, the housing authority police union sued to enjoin the merger, arguing that the city lacked the authority to merge agency functions under the Civil Service Law. An acting supreme court justice sitting in

Manhattan agreed and enjoined the merger in *Nickels v. New York City Housing Authority*.[3]

The Law Department appealed to the Appellate Division, First Department, where Mr. Justice Williams wrote for a unanimous court and reversed the decision below. As with so many city actions, the question turned on the appropriate interpretation of a statute, here, Civil Service Law section 70, which governs civil service transfers. Generally, the section prohibits transfers, except where certain specified conditions are met. Civil Service Law section 70(2), however, provides that where entire functions are transferred between agencies, rather than piecemeal staffing or limited operational shifts, the sole requirement is the preservation of the employees' civil service classification and status, without further examination or qualification. The statute's listing of approved functional transfers, however, did not include a transfer from an authority (such as the Housing Authority) to an agency (such as the NYPD). Accordingly, the Housing Police union argued that Civil Service Law section 70(2) did not authorize the merger of the Authority's police force into the NYPD.[4]

The Law Department found statutory support for its argument that Civil Service Law section 70(2) did authorize the merger in Public Housing Law sections 32 and 402(5). Those provisions made clear that by imposing the statutory requirements of civil service on HAPD officers, a benefit the officers had sought years ago, the Authority became a civil agency for the purposes of the Civil Service Law. Accordingly, the function of the HAPD was eligible for transfer under Civil Service Law section 70(2).[5]

The housing police union made a final stab at blocking the merger under Civil Service Law section 70(5). That section provides for the consolidation of police departments, but not in cities of "one million or more persons"—a clause that, in Albany's parlance, means "New York City." The Law Department's research turned to the legislation's bill jacket, and found that the purpose of Civil Service Law section 70(5) was to protect police officers where their public employer was disbanding its police force. The bill jacket made it clear that the new law would have no application where the transferee department had assumed responsibility for the transferred function(s) under Civil Service Law section 70(2).[6]

The housing police union also argued that their members' pension rights were being violated. But Mr. Justice Williams brushed these arguments aside, holding that the pension benefits for housing police and city police were essentially equal.

3. 621 N.Y.S.2d 782 (Sup. Ct. N.Y. County 1994), *rev'd*, 622 N.Y.S.2d 718 (1st Dep't 1995), *aff'd,* 85 N.Y.2d 917 (1995).

4. *Nickels*, 622 N.Y.S.2d at 718–22.

5. *See id.* at 722–23.

6. *Id.* at 722–23 (citing N.Y. State Conference of Mayors, Bill Jacket, L. 1989, ch. 483, at 19; N.Y. State Assoc. of Counties, Bill Jacket, L. 1989, ch. 483, at 31); *see also* N.Y. Civil Service Law § 70(5) (1958) (stating in the Memorandum of State and Civil Service Department on 1958 Revisions that the bill "expressly provides that no employee shall be transferred without his consent except under the transfer of functions").

Since there would be no loss of benefits (only enhancements), there could be no injury.[7] After argument in the New York Court of Appeals, that court unanimously affirmed, adopting the opinion of Mr. Justice Williams.[8]

While the litigation battle with the housing police union was going on, the city locked horns with the Transit Authority over the second step in the police merger plan. Here, the configuration of the litigants was different. In the housing police merger, the Authority and New York City agreed to the merger, but the housing police union objected. With the Transit Authority ("TA"), the situation was just the reverse. The transit police union agreed to the merger, but the TA objected, insisting that the city continue to provide its subsidy so that the TA could maintain the transit police.

Most New Yorkers do not realize that the city owns the subway system, but leases it to the TA for operation. The lease is a long and complicated document, which governs how the system is to be operated and paid for. One of the lease obligations calls for the city to provide a direct subsidy to the TA for transit police services. As it had with the Housing Authority, the city attempted to negotiate a voluntary amendment to the lease, which would provide for a merger of the TAPD and NYPD functions. The TA refused. This was not exactly a surprise, as the TA had previously rejected Mayor Koch's attempts to merge the transit police with the NYPD in the mid-1980s.[9]

When it became clear that the TA would not negotiate a voluntary merger, the Law Department recommended that the city exercise its rights under the lease, giving the required ninety days notice of its intent to terminate the reimbursement of transit police costs. The TA responded publicly that the city was putting "a gun to its head." Indeed, if the city went through with its cancellation of funds, none of the TA's choices were to its liking. If the TA wanted to maintain the transit police, without the city paying for it, the TA would have had to either cut back other services, obtain state aid, or raise transit fares to generate the funds necessary to maintain the transit police. The other choice was to lay off the police, though this final option was not as much of a threat as it would seem, because the city had publicly promised to hire any laid-off transit police officers.

Faced with these undesirable choices, the TA chose to litigate and demanded arbitration before the American Arbitration Association ("AAA"). The lease's arbitration provision, however, was not typical. It did not provide that "all disputes are subject to arbitration." Instead, the arbitration clause provided for arbitration of any fact question before the AAA, but questions of law were to be arbitrated by the Appellate Division, First Department.

---

7. *Nickels*, 622 N.Y.S.2d at 723–25.

8. *Nickels*, 85 N.Y.2d at 919.

9. It is worth noting that the Law Department did substantial work on Mayor Koch's proposed transit merger in the 1980s, and that the research was the backbone of the Law Department's work ten years later to justify the housing police merger. It is a vivid demonstration of the value of continuity in the Law Department.

The Law Department moved, pursuant to C.P.L.R. section 7503(b), to stay or dismiss the arbitration demanded by the TA on the grounds that there was no valid basis for arbitration. There were no questions of fact. It was clear what the city had done and why it was doing it. Nor were there any legal questions, because the lease gave the city the unilateral right to cancel on ninety days notice. In other words, the city had the clear right to cancel the police funding lease term on ninety days notice, and the exercise of that right was non-arbitrable. When the Law Department made its motion, the appellate division had not yet made its decision in the housing police case. The only legal opinion was that of the acting supreme court justice in the *Nickels* case, which held that the proposed merger was not authorized by the Civil Service Law.[10]

The TA maintained that there was a factual question about whether the city had exercised its rights under the lease in bad faith and intentionally brought unfair pressure to bear on the TA Board. The court rejected these arguments and found no factual question for arbitration. Instead, Mr. Justice Ramos pointed out that the TA did not have a right to have its own police force funded by the city. As to the TA's argument concerning bad faith, the court rejected it. The city's goal was to control the police services it was paying for. "Since the act of termination is specifically permitted in the lease and is not motivated by an ulterior motive, exercising that right to facilitate merger or consolidation of police functions cannot be an act of bad faith."[11]

The TA also argued, based on the lower court's decision in the Housing Authority case, that the merger of police functions was not authorized by the Civil Service Law.[12] Justice Ramos rejected this argument as well. He recognized that, despite certain lingering legal technicalities, nothing barred the expansion of NYPD jurisdiction to provide police services to the transit system.[13]

The court granted the city's motion to stay arbitration. While the TA filed a notice of appeal, and said it would appeal to the appellate division, the notice was withdrawn on the same day it was filed, or shortly thereafter. Instead, the TA and the city proceeded to renegotiate the lease along the lines the city initially proposed to the TA. The amended lease permitted the merger of the two police functions in accordance with police service standards. The revised lease was approved by the TA Board.

On June 19, 1995, at One Police Plaza, Mayor Giuliani presided over a ceremony that retired the flags of the HAPD and the TAPD. By successfully unifying police services in New York City, the Giuliani administration achieved the goal of every mayoral administration for the prior thirty years. There were ancillary civil service and pension challenges, but each was dealt with in turn. The Law Department had

10. *Nickels*, 622 N.Y.S.2d at 723–25.

11. City of New York v. N.Y. City Transit Auth., N.Y. L.J., Jan. 25, 1995, at 28 (Sup. Ct. N.Y. County 1995).

12. *Id.*; *see also Nickels,* 622 N.Y.S.2d at 718.

13. *N.Y. City Transit Authority*, N.Y. L.J., Jan. 25, 1995, at 28.

provided critical legal assistance through five of its divisions: Legal Counsel Division (which prepared the Civil Services Law memo used for the proposed transit police merger in 1986); General Litigation and Appeals (which worked on all litigation aspects); Pensions (which resolved intricate questions of how the transit and housing police pensions—a part of the New York City Employee Retirement System—would be accommodated in the NYPD's separate Police Pension System); and Contracts and Real Estate (advising the lease aspects of the TA-city transit leasing agreement and its amendments).

B. Reviving the Home Rule Requirements

Shortly after the merger was implemented, the city faced a new police challenge. This time, it came from the NYPD's Patrolman Benevolent Association ("PBA"). Here, rather than trying to alter the existing order, the Law Department was charged with preserving the status quo for handling collective bargaining impasses. The PBA had successfully lobbied Albany to obtain legislation that provided a new procedure for handling collective bargaining impasses for New York City police.[14] Mayor Giuliani had objected to the legislation and Governor Pataki vetoed it, but the state legislature overrode the veto.

As with so many questions about the city's powers, this case turned on the correct interpretation of a complicated statutory scheme. Public service employees in New York State are forbidden to strike under the state's Taylor Act.[15] As something of a relief valve for this strict prohibition on strikes, the legislature created a mandatory arbitration procedure before the Public Employment Relations Board ("PERB"), a state tribunal designed to adjust and resolve collective bargaining impasses.[16] When this mandatory arbitration provision was added in 1974, New York City was exempted from its coverage because the city already provided for police and fire impasse bargaining with its own Board of Collective Bargaining.[17] State legislation authorized local governments to create their own "mini-PERBs," provided they were "substantially equivalent" to the PERB, and PERB approved the local law.[18] With regard to New York City, however, the procedures were deemed effective by the legislature, and the legislation provided that they would remain so, unless and until they were challenged by PERB and found by a state court to be *not* substantially equivalent to the PERB procedure.[19]

14. *See* 1996 N.Y. Sess. Laws S. 5779, A. 8482 (McKinney).

15. N.Y. Civ. Serv. Law § 210(1) (McKinney 2008).

16. N.Y. Civ. Serv. Law §§ 205(5), 209(4) (McKinney 2008).

17. *See* 1974 N.Y. Laws 1882–89.

18. N.Y. Civ. Serv. Law § 212(1) (McKinney 2007). A number of cities and counties, including Syracuse and the counties of Westchester, Nassau, and Suffolk, had taken advantage of this option. When the populations of New York City, Nassau, Suffolk, and Westchester are combined, it is clear that more than two-thirds of New York State's population had opted for coverage under a locally authorized mini-PERB, rather than the state PERB.

19. N.Y. Civ. Serv. Law § 212(2) (McKinney 2007).

The PBA was dissatisfied with the results it achieved before the city's mini-PERB, and it decided to seek legislation to change the forum for mandatory arbitration of its salary disputes. The legislation it sought was embodied in Chapter 13 of the Laws of 1996 ("Chapter 13"), which provided in section 1: "Notwithstanding any other provision of law to the contrary, the public employment relations board may invoke procedures to be followed in the event of disputes which reach an impasse in the course of collective negotiations between the public employer and the New York City Police."[20] Section 2 removed the exemption of the New York City police and fire department members from PERB's binding arbitration process.

After considerable research, the Law Department found a way to challenge Chapter 13 and preserve the city's stewardship of its public employee arbitration mechanism. Article 9 of the New York State Constitution guarantees that local government shall have authority over matters of local concern. The state government must act by general law, but it may enact a special law, of local application only, where the local government requests the legislature to do so by way of a "home rule message."[21] The key question is whether a law is "general" as opposed to "local" or "special." In most cases, the distinction is clear. Whereas municipal taxes and local transportation are matters of general application and are routinely subject to state legislation, Albany very rarely deals with issues such as zoning or landmarks preservation, which are considered matters of local concern.

The Law Department argued that Chapter 13 was a "special law" that required a home rule message from the New York City Council, because it applied only to police in New York City. Since the local governing body—the New York City Council—had neither adopted a home rule message nor had the Mayor asked for one, the Law Department saw an opportunity to challenge the constitutionality of Chapter 13.

The New York Court of Appeals held that Chapter 13 was a special law and required a home rule message. Accordingly, for the first time in over sixty years, the court found that the home-rule provisions of the state constitution had been violated.[22] Judge Levine held that the law was a special law and applied only to New York City, and only to police within the city.[23] Indeed, "only New York City, among all units of local government throughout the state, is prohibited from providing for a local public employment relations board with jurisdiction over binding arbitration procedures when an impasse is reached in negotiations with its police force."[24]

While the legislature claimed it was establishing a uniform policy for dealing with impasse procedures, in reality, it had created a unique, one-of-a-kind process.

---

20. 1996 N.Y. Sess. Laws 43, 43 (McKinney).

21. N.Y. Const. art. 9, §§ 1, 2(b)(1). Per the state constitution, a home rule message is sent to the state legislature "on the request of two-thirds of the total membership . . . or on request of its chief executive officer concurred in by a majority of such membership." *Id.* § 2(b)(2)(a).

22. City of New York v. Patrolmen's Benevolent Assoc. of the City of N. Y., 89 N.Y.2d 380 (1996).

23. *Id.* at 393–94.

24. *Id.* at 389.

It did so when it was clear that the local mini-PERBs were substantially equivalent to PERB, and further, that PERB had never challenged New York City's mini-PERB. Indeed, the sole object of the legislation was to create a forum for the PBA to pursue its claim for higher pay.

An exception to the state constitution's requirement of obtaining a home rule message from the local governing body exists where the legislation is of sufficient general importance to the state to justify state legislation.[25] Judge Levine relied on Judge Cardozo's framing of the issue in *Adler v. Deegan*: "has the State surrendered the power to enact local laws by the usual forms of legislation *where subjects of State concern are directly and substantially involved*, though intermingled with these [local concerns]?"[26] Judge Levine found that Chapter 13 did not "directly and substantially" involve or serve a supervening state concern.[27]

The PBA and the state attorney general argued that police compensation was substantially involved with public safety, which was a legitimate matter of general, and therefore state, concern. Judge Levine rejected the argument out of hand. He said it would be

> absolutely inconsistent with the sensitive balancing of State and local interests . . . to allow the State to justify legislation inimical to the constitutional values of the home rule article based purely on the considerations having no apparent role in its enactment, no matter how plausibly conceived as an afterthought.[28]

A brief review of the debates on the floor of the legislature showed a complete absence of discussion of public safety. The debate concerned the need for uniformity. But as previously pointed out, the legislation interrupted a harmonious scheme, which had worked well for years, and created in its place a procedure applicable only to New York City and its police department. As there was no general, supervening state concern, there was no exception to the state constitution's home rule requirement. The city was able to preserve its mini-PERB as the body, which would deal with collective bargaining impasses, as it had for the previous two decades.

C. Overcoming Consent Decrees

In 1994, when I became Corporation Counsel, I found that much of the city's discretion to run its affairs in the manner its elected officials deemed best had been bargained away in a series of consent decrees, which state and federal courts enforced. Those decrees covered human resources, corrections, education, police, homeless services, and environmental protection, among others, removing vast areas of the city budget from the democratic process. The actions of a city agency were not determined by the mayor, or the commissioner, or the city council, but rather by litigation and negotiations between advocates, city lawyers, and a judge. This process would dictate

25. *Id.* (citing Kelley v. McGee, 57 N.Y.2d 522, 538 (1982)).

26. *Id.* at 390 (citing Adler v. Deegan, 251 N.Y. 467, 489–90 (1929) (Cardozo, J., concurring)).

27. *Id.* at 392.

28. *Id.* at 391.

what an agency could or could not do. As a result, a disproportionate share of scarce municipal resources were devoted to satisfying consent decree requirements, which were quite often unrelated to the most serious and pressing problems confronting the city. The city's mandates were growing at a time when budgetary resources were shrinking, skewing the city's ability to properly allocate resources to tackle its most fundamental problems.

One of my chief goals as Corporation Counsel was to avoid signing any further consent decrees. Additionally, I tried to extricate the city from these extraordinary procedures wherever possible to return these agency functions to the city's ordinary processes for budget, administration, and day-to-day control. In the latter regard, the city achieved modest success. For example, the city acted quickly to obtain relief after the congressional enactment of the Prison Litigation Reform Act of 1996. Until that point, the federal court oversaw management of the city's prison system, including such details as the frequency with which prison windows had to be washed and the composition of the washing solutions. The Act, however, required the termination of consent decrees affecting prison management in the absence of a finding that inmates' constitutional rights had been violated. The city was granted some modest relief.[29]

In the human resources area, the city had litigated the appropriate method for the placement of foster children, regardless of their race, starting in 1973. In 1986, it entered into the *Wilder* consent decree, which governed the procedures for placement.[30] By the time of the decree, however, the grievances of the original complaint had changed into something substantially different. *Wilder* covered a great variety of ensuing litigation, but never finally resolved the parties' disputes, if only because the nature of the dispute kept changing.[31] Mayor Giuliani decided to

29. Benjamin v. Jacobson, 172 F.3d 144 (2d Cir. 1994). The difficulties inherent in consent decrees are ably covered in Ross Sandler & David Schoenbrod, Democracy by Decree: What Happens When Courts Run Government (2003). I agree with Sandler and Schoenbrod. Judge Harold Baer, who succeeded Morris Lasker as the United States District Court Judge who supervises the jail consent decrees, has a much different view. His views on the value of the federal court's supervision of the city jail system and the positive outcomes achieved because of the consent decrees supervision by the court are summarized in an article he prepared with Arminda Bepko. Harold Baer, Jr. & Arminda Bepko, *A Necessary and Proper Role for Federal Courts in Prison Reform: The Benjamin v. Malcolm Consent Decrees*, 52 N.Y.L. Sch. L. Rev. 3 (2007).

30. *See generally* Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986).

31. The original lawsuit alleged that Catholic and Jewish foster care agencies discriminated against Protestant children who were African American. Over the course of the next quarter century, the parties litigated over how children should be tested and evaluated, how the quality of foster care agencies should be evaluated, how children should be placed, and how foster care children should be given access to abortion services. Whatever else may be said of these issues, they are far afield from the original allegations of discrimination in the placement of African American children. For a detailed history of the *Wilder* litigation, see Wilder v. Sugarman, 385 F. Supp. 1013 (S.D.N.Y. 1974) (three-judge court); Wilder v. Bernstein, 499 F. Supp. 980 (S.D.N.Y. 1980); Wilder v. Bernstein, 645 F. Supp. 1292 (S.D.N.Y. 1986), *aff'd*, 848 F.2d 1338 (2d Cir. 1988); Wilder v. Bernstein, 725 F. Supp. 1324 (S.D.N.Y. 1989), *rev'd,* 944 F.2d 1028 (2d Cir. 1991), *vacated,* 965 F.2d 1196 (2d Cir. 1991), *cert. denied*, 506 U.S. 954 (1992); Wilder v. Bernstein, No. 78 CIV. 957 (RJW), 1994 WL 30480 (S.D.N.Y. Jan. 28, 1994); Wilder v. Bernstein, 153 F.R.D. 524 (S.D.N.Y. 1994), *appeal dismissed,* 49 F.3d 69 (2d Cir. 1995);

remove the foster care function from the Human Resources Department, and create the Administration for Children's Services whose primary mission was the care of children, especially those in foster care. When the new agency adopted a plan for these children, it opened up the opportunity to finally end the *Wilder* consent decree. That relief was granted in *Marisol A. ex rel. Forbes v. Giuliani*.[32]

In the area of environmental protection, the Law Department worked from 1995 to 1997 to help the city avoid what might have been a consent decree. The federal government demanded that the city filter its water from its watershed, west of the Hudson. This would have cost the city billions of capital dollars and taken years to implement. A far less expensive, but equally effective way was to enter into a long-term arrangement to maintain the city's upstate water reservoir system by purchasing upstate property to buffer the city's remote, but pristine, water supply. The city commenced negotiations with the various federal, state, and local government entities to achieve its goal. The city entered into a series of agreements with the federal Environmental Protection Agency and the state Department of Health to establish standards for overseeing and maintaining water quality. The most pivotal agreements forged environmental and economic development partnerships with upstate communities, which included the construction of new water treatment plants and significant upgrades to existing plants. Of course this effort was led by the Environmental Law Division, but its work would not have been successful without the assistance of the Legal Counsel, Condemnation and Certiorari, and the Municipal Finance Division.

During my tenure, the city moved for relief from a decree entered in the United States District Court for the Eastern District of New York embodying the Supreme Court's decision in *Aguilar v. Felton*.[33] In 1965, Congress enacted, and President Johnson signed, Title I legislation that provided funds for the city's Board of Education.[34] The city used Title I funds to provide remedial English and math instruction by public school teachers to poor children on parochial school premises.[35] The program continued for twenty years until the Supreme Court determined that the presence of public school teachers on parochial school premises could no longer be permitted. The Court found that the monitoring of the public school teachers on parochial school premises constituted an entanglement, proscribed by *Lemon v.*

Wilder v. Bernstein, 975 F. Supp. 276 (S.D.N.Y. 1997), *reconsideration denied,* 982 F. Supp. 264 (S.D.N.Y. 1997); Wilder v. Bernstein, No. 78 Civ. 957 (RJW), 1998 WL 323492 (S.D.N.Y. Jun. 18, 1998); Wilder v. Bernstein, No. 78 Civ. 957 (RJW), 1998 WL 355413 (S.D.N.Y. Jul. 1, 1998).

32. 185 F.R.D. 152, 167 (S.D.N.Y. 1999), *aff'd*, Joel A. v. Giuliani, 218 F.3d 132, 144 (2d Cir. 2000).

33. 473 U.S. 402 (1985).

34. *See id.* at 404.

35. Initially, the city experimented with a number of alternate plans. For instance, needy parochial school children were permitted to attend public schools at the end of the school day. Later, the city provided computer-assisted training on parochial school property. Neither method proved effective in achieving appropriate pedagogical results. The city then opted for sending public school teachers onto parochial school premises.

Kurtzman,[36] thereby violating the Establishment Clause of the First Amendment. After the decision, a decree was entered in the United States District Court for the Eastern District of New York banning public school teachers from providing remedial education to needy children on the premises of parochial schools.

The city continued to provide remedial instruction to eligible, parochial school children. Instead of using parochial school sites, however, the city developed a mobile instructional unit—a classroom on a bus. The bus would park near the parochial school and the eligible children would be walked from the school onto the bus. This approach avoided "entanglement," but it was not as sound as classroom instruction, and it was unnecessarily expensive. For several years, Congress provided additional funds for the buses, but eventually the city was directed to provide the school bus funds from Title I funds. This drained valuable and scarce resources from the city's education budget and posed a threat to the future of remedial education for New York's children.

In *Kiryas Joel v. Grumet*, the Supreme Court indicated its intention to reexamine its Establishment Clause precedents.[37] In 1995, the Law Department moved for relief from the *Aguilar* decree, pursuant to Federal Rule of Civil Procedure 60(b)(5), arguing that it was no longer just that the *Aguilar* decree be given prospective effect. The problem with this approach was that while *Kiryas Joel* questioned *Aguilar*, *Aguilar* had not been overruled. The city was really asking the Supreme Court to reverse itself in the very case in which it had adopted the rule, a direct assault on *stare decisis*, indeed the law of the case.

Of course, the United States District Court and the Second Circuit dismissed the city's case. They had no choice but to do so under prevailing precedent. The Supreme Court granted certiorari and the city argued its case to the Supreme Court in April 1997. In *Agostini v. Felton*, the Court overruled *Aguilar* in a 5-4 decision.[38] It held that monitoring public school teachers in parochial schools in order to ensure that they were teaching only remedial English and math did not constitute an excessive entanglement.[39] Title I funds could be used, as they had been from 1965 to 1985, to once again provide on-site remedial education. It was a significant victory for New York City's children.

D. The Line Item Veto Act

My final act as Corporation Counsel was to institute an action challenging the Presidential Line Item Veto Act of 1996, which authorized the president to nullify specific provisions of a bill, usually budget appropriations, without vetoing the entire legislative package. In 1997, President Clinton exercised his authority under the Line Item Veto Act to delete various funds earmarked for New York City's medical

36. 403 U.S. 602 (1971).

37. 512 U.S. 687 (1994).

38. 521 U.S. 203 (1997).

39. *Id.* at 205–06.

education hospitals. The Law Department prepared the city's complaint to challenge the bill. Senator Moynihan joined the lawsuit, as did Local 1199 of the Hospital Workers Union, two hospital associations, and a private hospital. In *Clinton v. The City of New York*, the Supreme Court held by a 6-3 majority that the city and its co-litigants had standing to raise the issue because they suffered an injury in fact—the loss of funding.[40] Next, the Court held that the president's exercise of the powers conferred by the Line Item Veto Act violated the Constitution's Presentment Clause. Article I, Section 7 of the Constitution, provides that, after a bill is approved by both Houses of Congress, it must be presented to the president who "shall sign it," if he approves, or veto it.[41] The Court held that the Constitution does not allow the president to unilaterally amend or repeal any portion of a bill presented for signature.[42] Thus, the cancellation provisions of the Line Item Veto Act gave the president a power in direct violation of Article I, Section 7. This was a significant victory for the city, not only in securing actual funding for the city, but also in maintaining the balance of power set forth in the Constitution.

E. Charter Battles

The Law Department had several disputes with the city council over the City Charter's allocation of power. The council contended that it had certain Charter powers. The Law Department had done extensive research of the City Charter of 1989. In 1990, the Law Department published its opinion on the new Charter's allocation of powers. Based on this 1990 opinion, the Law Department had no difficulty in concluding that the council did not have the powers it purported to assert. One such battle dealt with council's role in the fight against police corruption. In 1995, after the Mollen Commission filed its report, the council established the Independent Police Investigation and Audit Board and gave itself power to appoint several of the officers who would serve on the Board.[43] At the height of the controversy in March 1995, New York Law School held a forum on the topic where the speaker of the city council warned that the mayor was not above the law—or at least the council's version of it.[44] While some suggested that the Law Department

40. 524 U.S. 417 (1998).

41. U.S. Const. art. I, § 7.

42. *Clinton*, 524 U.S. at 420.

43. In 1992, Mayor Dinkins appointed his deputy mayor, Milton Mollen, to examine police corruption. Mollen issued his report in July 1994, seven months after Mayor Giuliani had taken office. The report found that an overwhelming number of police officers were honest and conscientious, but there were some officers who engaged in a new form of corruption: brutality and abuse of authority, as opposed to bribe-taking and gift-giving. Accordingly, the Mollen Commission recommended that vigorous oversight of the NYPD be continued and that a group, not unlike the Mollen Commission, be tasked with this assignment. While Mayor Giuliani was contemplating the appropriate course of action to follow, the city council decided to act on its own, without the authority to do so. Mayor Giuliani eventually appointed a Police Oversight Board.

44. The Law Department's response to the city council speaker's arguments is reported in Paul A. Crotty, *The Corporation Counsel's View of Independent Oversight of the Police*, 40 N.Y.L. Sch. L. Rev. 23, 33–34

was only doing the mayor's bidding, the fact of the matter is that the Law Department had reached an independent conclusion, which it published in an opinion four years earlier stating that there was no basis in the Charter for the council's position.

Eventually, the scholarly debate ended in state supreme court. The court held that by creating an independent police panel and giving itself appointment powers, the council had infringed upon the City Charter's allocation of the power to appoint city officers exclusively to the city executive. The appellate division affirmed, and the New York Court of Appeals declined permission to appeal.[45]

The council's effort to reallocate funds in the city's budget during mid-year was also rejected in a separate lawsuit. Here, too, the Law Department was clear that while the council had the right to appropriate new funds (that is, new funds not previously appropriated), that power did not include the power to reallocate existing funds. The supreme court found that the council was without the power it purported to assert.[46]

F. Organized Crime

The Law Department played a significant role in the efforts of Mayor Giuliani and Deputy Mayor Randy Mastro to rid the Fulton Street Fish Market of organized crime elements. It drafted legislation requiring the licensing of all workers at the fish market.[47] Companies that used the market sought an injunction against the regulatory regime in both state and federal court, but the courts refused to interfere with the legislation or the regulations implementing the licensing scheme.

The Law Department was also a key player in eliminating organized crime influences from the Trade Waste Industry. The Law Department drafted legislation, which, upon enactment, was promptly challenged as a taking under the Fifth Amendment. United States District Judge Milton Pollack found the city's legislation was constitutional. The Second Circuit affirmed in *Sanitation & Recycling Industry v. City of New York*.[48] The Trade Waste Commission then proceeded with its effort to root out the illegal and anti-competitive practice of a mob dominated cartel.

G. Economic Development

No report of my tenure as Corporation Counsel would be complete without mentioning the Law Department's role in clearing away impediments to economic

(1995).

45. Mayor of N.Y. v. Council of N.Y., Nos. 402354, 95-001, 95-003, 1995 WL 478872 (Sup. Ct. N.Y. County 1995), *aff'd*, 651 N.Y.S.2d 531 (1st Dep't 1997), *appeal denied*, 89 N.Y.2d 815 (1997).

46. Council of N.Y. v. Giuliani, 621 N.Y.S.2d 832, 836 (Sup. Ct. N.Y. County 1994).

47. The Law Department is the key drafter for almost all local legislation. It routinely drafts legislation, which it proposes to the state legislature and the city council. The legislation, which addressed the Fulton Street Fish Market and the Trade Waste Industry was based on the city's right to regulate and license workers who are employed on city property (the fish market employees) or who work on city franchises (the trade waste employees).

48. 107 F.3d 985 (2d Cir. 1997).

development. Generally, the Law Department provides counsel to the city's Economic Development Corporation in its numerous economic development transactions. The Law Department also advises the City Planning Commission on development. The Law Department was called upon to litigate an interesting First Amendment issue in the city's effort to attract Fox Television to New York City. After Fox decided to relocate to New York City, it found that Time Warner refused to carry its TV programs as part of it local cable package.

Without access to the New York City market, it did not make economic sense for Fox to locate its headquarters facility here. The city determined to use one of its Public, Education, and Government ("PEG") channels to carry Fox News.[49] The city believed that those channels belonged to it and were not subject to prior clearance by the franchisee. In retrospect, it may have been better for the city to have instituted a declaratory judgment action to vindicate what the city believed to be its right to use its PEG channels for a bona fide city purpose. Instead, the city unilaterally placed the Fox News service on one of its PEG channels.

Time Warner sued claiming a violation of its First Amendment rights. The city believed that Time Warner had only an economic interest, which had to be weighed against the city's governmental purpose. The city's arguments were rejected.[50] While the city did not prevail in the litigation, Time Warner eventually agreed to carry Fox News on its cable system; and today, Fox News headquarters is located on Sixth Avenue in New York City.

The Law Department also participated in the revitalization of Forty-second Street by helping to amend the city's zoning ordinance to regulate adult uses. While some in New York feign nostalgia for the way the "Deuce" used to be, few sensible New Yorkers pine for a return of open-air drug bazaars, street crime, prostitution, and adult uses that prevailed on Forty-second Street. The threat of crime and sense of lawlessness—indeed, residents and tourists alike avoided the area for fear of a hostile confrontation—constituted a major deterrent to the area's economic development. With the reduction of crime due to targeted police enforcement, the restriction of adult uses, and the commercial success of the Forty-second Street development (a process twenty years in the making), Times Square reclaimed its ability to attract and entertain New Yorkers and an increasing number of tourists. This was good and effective government for New York City and its residents.

The Law Department worked closely with City Planning to adopt the adult use zoning ordinance. The ordinance was based on a study, which demonstrated the

49. PEG channels were allocated to the city as a condition for the franchise to provide cable service in New York City. The Law Department had previously opined that off-track betting could run horseracing programs on a PEG channel to facilitate its business in New York City. Time Warner had not objected.

50. *See* Time Warner Cable v. City of New York, 943 F. Supp. 1357 (S.D.N.Y. 1996), *aff'd*, 118 F.3d 917 (2d Cir. 1997); Symposium, *Current Issues in Media and Telecommunications Law*, 7 Fordham Intell. Prop. Media & Ent. L.J. 533, 533–97 (1997) (providing a fuller explanation and rationale for the city's position and Time Warner's response; symposium covers a debate between David Goldin, who was one of the leading city lawyers on the case, and Robert Joffe, a partner at Cravath, Swaine & Moore, who represented Time Warner).

deleterious effects of the profession of so-called adult uses. The City Planning decision to adopt the new measure was ratified by the city council. Naturally, the club owners sued, claiming First Amendment protection, but the courts have consistently rejected the owners' claims and sustained the city's right to regulate adult uses.[51]

IV. CONCLUSION

In focusing on these accomplishments of the Law Department, I do not mean to minimize the Law Department's other significant accomplishments. The list is extensive and continues to grow because of the hardworking lawyers at the New York City Law Department. The fundamental changes instituted by Allen Schwartz, and embraced and expanded upon by each of his successors, provide the city with access to excellent legal advice and legions of able, dedicated attorneys who represent the city and its elected leadership in their efforts to provide for the common good under the laws of the United States, New York State, and New York City.

51. *See* Stringfellow's of N.Y., Ltd. v. City of New York, 653 N.Y.S.2d 801 (Sup. Ct. N.Y. County 1996), *aff'd*, 663 N.Y.S.2d 812 (1st Dep't 1997).