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THE PUBLIC ADVOCATE FOR NEW YORK CITY: AN ANALYSIS OF THE COUNTRY'S ONLY ELECTED OMBUDSMAN

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THE PUBLIC ADVOCATE FOR NEW YORK CITY: AN ANALYSIS OF THE COUNTRY'S ONLY ELECTED OMBUDSMAN

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> I don't know if there's another city in America that has an elected public advocate. But think about what that means. What would it mean for you to be a public advocate? Someone who is standing up for people at large, right? For the public . . . . I'm sort of the country's public advocate.
>
> -President William Jefferson Clinton[1]

INTRODUCTION

On January 2, 1994, Mark Green was sworn in as the first public advocate for New York City, a citywide elected position that is more than a century-and-a-half old. The holder of this office, formerly known as the "President of the City Council,"[2] historically presided over the New York City Legislature, represented citywide rather than borough or local interests in the City's governing bodies, and served as a counterweight to the powerful mayor. In response to the political upheavals of the 1960s, the council president in 1975 also became New York City's official "ombudsman"—responsible for addressing citizen complaints about government waste and abuse. When the new City Charter was adopted in 1989, the office's ombudsman powers were expanded significantly to include a mandate to identify and address systemic problems in City agencies.[3]

While there are many kinds of government and private ombudsman offices,[4] the Office of the Public Advocate is unique. A quirk in New York City's history has made it the only elected ombudsman in the world.[5] All

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1. President William Jefferson Clinton, *Remarks on Kick Butts Day in Brooklyn, New York*, 33 WKLY. COMP. PRES. DOC. 521 (Apr. 15, 1997), *available in* LEXIS, News Library, Presidential Documents File.

2. The name was changed to public advocate. *See* NEW YORK, N.Y., LOC. L. NO. 19 and LOC. L. NO. 68 (1993). For clarity, we refer to the position by the name it was given during each of the time periods discussed.

3. *See* N.Y. CITY CHARTER ch. 2 § 24 (1989).

4. *See infra* note 108 (list of general governmental ombudsmen).

5. This conclusion is based on a review of the known United States ombudsman offices, a survey of the members of the United States Ombudsman Association and the International Association of Ombudsmen, and correspondence with the leadership of ombudsman organizations and prominent scholars of ombudsmanship. *See* Letter from Stanley Anderson, Professor Emeritus, University of California, Santa Barbara, to Laurel W. Eisner, General Counsel for the Public Advocate (Jan. 7, 1997) (stating that he "know[s] of no other directly elected Ombuds [sic]"); Letter from Donald C. Rowat, Professor Emeritus of Political Science, Carleton University, Ottawa, Canada, to Laurel W. Eisner, General Counsel for the Public Advocate (Jan. 10, 1997) ("I have not heard of any ombudsman office in the world that is directly elected [ ]other than governors or lieutenant governors . . . I know of no literature that discusses the idea of an elected ombudsman.

the others are appointed by—and thus dependent on—the executive or the legislature. The public advocate is the only popularly elected government official whose primary role is to be an ombudsman.[6]

The elective nature of the office also makes the public advocate a player in the City's partisan political fray. That, along with the office's unusual structure, its mandate to function as a critic-at-large, and its lack of line responsibility,[7] has made the position the target of periodic proposals to eliminate or radically restructure it. The elective nature of the position has also protected it, however, by insulating it from critics and enabling the office holder to function independently of the sectors of government he or she is mandated to oversee. This independence permits the City's ombudsman to be responsive to the concerns and complaints of otherwise powerless communities and sub-groups in this multiracial, multiethnic, and economically heterogeneous city. The citywide election of the public advocate grants the office a popular mandate that City bureaucrats, other elected officials, and the media cannot easily ignore.

The public advocate's work, in fact, has been of significant interest to the press and the public and has led whistle blowers, advocacy groups, and concerned citizens to seek the office's intervention.[8] During Mark Green's

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The classical office is always assumed to be an agency of the legislature to monitor the administration."); Letter from Bernard Frank, American Friends of The International Ombudsman Institute, to Laurel W. Eisner, General Counsel for the Public Advocate (Jan. 16, 1997) ("I know of no other state or municipal Ombudsmen in the United States elected to office by popular vote. I doubt there are any such elsewhere in the world. Therefore, the New York City Public Advocate is unique in that respect.") [hereinafter Letter from Bernard Frank].

6. The handful of lieutenant governors who have taken on some ombudsman role are not elected as ombudsmen but rather as second-in-command to the chief executive. The ombudsman role is secondary—at best—and largely discretionary rather than statutory. In New York, in 1979, Governor Carey designated Lieutenant Governor Mario Cuomo to serve as the state's ombudsman. *See* Mario Cuomo, Editorial, *New York Needs an Elected Ombudsman*, N.Y. TIMES, Mar. 5, 1981, at A22. The states of Colorado, Illinois, South Carolina, and New Mexico also established ombudsman functions in the lieutenant governors' offices in the 1970s. *See* Alan J. Wyner, *Lieutenant Governors as Political Ombudsmen*, *in* EXECUTIVE OMBUDSMEN IN THE UNITED STATES 135 (Alan J. Wyner ed., 1973) [hereinafter EXECUTIVE OMBUDSMEN IN THE UNITED STATES].

7. Like classic ombudsmen, the public advocate is mandated to handle complaints and identify systemic problems but has no authority to overrule executive decisions or implement proposed recommendations. *See* N.Y. CITY CHARTER ch. 2 § 24 *passim* (1989, as amended through 1997).

8. Unfortunately, the requests sometimes exceed the office's limited resources, which consisted, between 1994 and 1998, of only 45 staff members and a budget of $2.3 million, which is nearly 40% lower than the budget of the office during the Dinkins administration. *Compare* CITY OF NEW YORK, OFFICE OF THE MAYOR, MESSAGE OF THE MAYOR: THE CITY OF NEW YORK EXECUTIVE BUDGET FISCAL YEAR 1997, at 234, *with* CITY OF NEW YORK,

first four and one-half years as public advocate, his office received nearly 80,000 complaints from the public and a steady stream of requests for the 115 investigative reports, budget analyses, and consumer guides issued by the office.[9] Two of Green's predecessors in the office—Andrew Stein and Carol Bellamy—also handled large numbers of individual complaints and issued reports about system-wide problems.[10]

Many of the investigative reports have provoked considerable controversy, as well as the enmity of the targeted entities, and the mayoral agencies have largely refused to cooperate with the office's investigations—particularly during Mayor Rudolph Giuliani's administration.

This article chronicles the historical evolution of the Office of City Council President/Public Advocate over the past 100 years—focusing on the events that led to the establishment of the office as a citywide elected ombudsman. It then summarizes the debates about the office during the 1989 New York City Charter revision proceedings and describes the office's powers under the resulting Charter and how they have been implemented during Mark Green's tenure. Finally, the article analyzes the position's strengths and weaknesses and proposes some changes to the Charter to clarify the position's powers and increase its effectiveness in future administrations.

OFFICE OF THE MAYOR, MESSAGE OF THE MAYOR: THE CITY OF NEW YORK EXECUTIVE BUDGET FISCAL YEAR 1993, at 266.

9. Between January 1994 and June 1998, for example, the Public Advocate's Office (a) issued more than 100 investigative reports, (b) wrote dozens of analyses of the City's budget and letters to government officials identifying problems or recommending policy changes, (c) initiated and introduced, as prime sponsor, legislation in the City Council (including bills to overhaul New York City's commercial carting industry, to reform the City's campaign finance system, to make the Department of Investigation more independent of the mayor, to strengthen the City's laws for protecting whistle blowers, and to ban workplace discrimination against victims of domestic violence), (d) published several comprehensive consumer guides to health maintenance organizations and hospitals and a detailed research study of New York City's uninsured population, and (e) created a specialized ombudsman unit for individuals and families who deal with the City's child welfare system. The reports are on file at the Municipal Reference and Research Center Library located at 31 Chambers Street, New York, New York (hereinafter the "Municipal Reference Library"). A partial list and description of some of these publications is contained in *infra* notes 224-51, 255.

10. *See infra* notes 106-07 and accompanying text.

I. THE HISTORICAL EVOLUTION OF THE OFFICE FROM 1831 TO 1989

A. *1831 to 1975: The City Council President, the Mayoralty, and Borough Politics*

The Office of Public Advocate dates back to 1831, long before the unification of the five boroughs into a single city. It began as the president of the Board of Aldermen, a legislative body of the borough of New York and a portion of the Bronx, who was first-in-line of succession to the mayor under the 1830 City Charter.[11] The survival of the office in various forms for over a century and a half is a testament to the deep-seated resistance by the City's political leadership and voters to placing excessive, or unchecked, power in either the mayor or the borough officials.

In 1898, the five boroughs were consolidated into one City, but power in the new unified entity was dispersed among numerous officials.[12] The president of the Board of Aldermen was designated to sit with the mayor and other citywide officials on the Board of Estimate and Apportionment, a separate entity which managed the City's budget.[13] In 1901, the City Charter was revised to weaken the new mayoralty's powers. The amended Charter strengthened the Board of Estimate and Apportionment and added the borough presidents as members, thus institutionalizing the pattern of governance that continues in modified form to this day. It provided some electoral representation to each of the boroughs but offset the centrifugal force of borough interests by vesting the balance of power in three citywide elected officials, who also checked each others' powers.[14]

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11. *See* REBECCA B. RANKIN, MONOGRAPH, HISTORY OF THE OFFICE OF THE PRESIDENT OF THE BOARD OF ALDERMEN OF THE CITY OF NEW YORK (1920). The City Council replaced the Board of Aldermen in 1938. *See* Laurence Arnold Tanzer, Annotation, N.Y. CITY CHARTER, at 27 (1937).

12. *See* 1896 N.Y. Laws 488; *see also* 1897 N.Y. Laws 378; *The Reemergence of Municipal Reform*, *in* RESTRUCTURING THE NEW YORK CITY GOVERNMENT: THE REEMERGENCE OF MUNICIPAL REFORM 1 (Gerald Benjamin & Frank J. Mauro eds., 1989). *See generally* WALLACE S. SAYRE & HERBERT KAUFMAN, GOVERNING NEW YORK CITY: POLITICS IN THE METROPOLIS 13-17 (W.W. Norton & Co. 1965) (1960); R. Alta Charo, *Designing Mathematical Models to Describe One-Person, One-Vote Compliance by Unique Governmental Structures: The Case of the New York City Board of Estimate*, 53 FORDHAM L. REV. 735, 742 (1985); Joseph P. Viteritti, *The New Charter: Will it Make a Difference?* *in* URBAN POLITICS, NEW YORK STYLE 413-28 (Jewel Bellush & Dick Netzer eds., 1990).

13. The other members were the corporation counsel, the president of the Department of Taxes and Assessment, and the comptroller. *See* R. Alta Charo, *supra* note 12, at 742-43.

14. *See id.*; *see also* Viteritti, *supra* note 12, at 415-16.

Between 1901 and 1989, the City Charter was revised four more times,[15] and each time, the position that ultimately became the public advocate was retained as first in line of succession to the mayor and as an integral part of the governing structure. With each revision, various powers over budget, legislation, and land use were redesigned and reallocated, but the basic outlines of power remained constant. The increasingly important mayoralty was balanced by at least two other citywide elected officials, including the presiding officer of the legislature and five chief borough officers. Each Charter revision, including the latest in 1989, represented a compromise between competing visions of good government for the growing and unwieldy metropolis, that is, between centralizing City government and ensuring sufficient borough representation and other checks on mayoral power.[16]

In 1936, a new Charter replaced the Board of Aldermen with a City Council as the sole legislative body of the City of New York. The president of the Board of Aldermen became the city council president.[17] The council president remained first in line of succession to the mayor in the event of a vacancy, disability, or other absence from office.[18] The Charter modified the powers to be more akin to the role of the vice president in the United States Senate. The council president presided over the City Council and could participate in the discussions but only voted in the case of a tie.[19]

The 1936 Charter once again placed significant power in three citywide elected officials—the mayor, the comptroller, and the president of the Council, each of whom remained on the newly renamed Board of Estimate. Each citywide official cast three votes in that chamber: the Manhattan and Brooklyn borough presidents were entitled to two votes each, while the borough presidents of the Bronx, Queens, and Staten Island cast only one apiece.[20] Council members were elected for two years,[21] while the citywide officials, including the council president, served for four.[22]

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15. *See* Gerald Benjamin, *Charter*, *in* THE ENCYCLOPEDIA OF NEW YORK CITY 202-08 (Kenneth T. Jackson ed., Yale Univ. Press 1995) (stating that the City Charter was actually changed 14 times during this time period, however, in only 1936, 1961, 1975, and 1989 were the changes made by referendum or by proposals from a charter revision commission).

16. *See generally* R. Alta Charo, *supra* note 12, at 742-43 (describing changes to the structure of the Board of Estimate, including the five borough presidents).

17. *See* Tanzer, *supra* note 11, at 28. *See generally* List of Presidents of the Board of Aldermen (1831-1937) and Presidents of the City Council (1937-1975) (on file in the Municipal Reference Library archives).

18. *See* N.Y. CITY CHARTER ch. 1 §§ 10(a)(1), (2) (1936).

19. *See id.* ch. 2 § 29.

20. *See id.* ch. 3 § 62(a).

21. *See id.* ch. 2 § 24.

22. *See id.* ch. 1 § 3, ch. 2 § 23(a).

In the 1961 revised Charter, the council president continued to preside over the City Council and to be next-in-line to the mayor.[23] The three citywide elected officials, including the council president, continued on the Board of Estimate with equal voting power[24] and remained as trustees of the New York City Employees' Retirement System.[25]

B. *The 1975 Charter Revision—the Debate over the Council Presidency*

The City Charter was revised once again during the fiscal crisis of the mid-1970s which nearly brought the City to bankruptcy. In 1972, the New York State Legislature established a commission,[26] chaired by State Senator Roy M. Goodman,[27] to study the City Charter and propose reforms. In an effort to find an appropriate role for the Office of the City Council President, the Commission contracted with the Urban Analysis Center at the City University of New York ("the Center") to study that office. The Center issued a report[28] which noted the office's limitations—no administrative authority over City services, no access to the mayor's inner circle, and restricted influence in the Council —but concluded that it served an important function as a citywide "critic at large."[29]

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23. *See* N.Y. CITY CHARTER ch. 2 §§ 10(b), 23(d) (1961).

24. Their votes, respectively, were increased from three to four. Each of the five borough presidents was given two votes. *See id.* ch. 3 § 62(a).

25. The City Retirement System created in 1920 designated the members of the Board of Estimate and Apportionment as the trustees of the system. *See* 1920 N.Y. Laws 427 § 1706. An independent Board of Trustees, including the council president, was established by state law in 1969. *See* 1969 N.Y. Laws 866.

26. *See* 1972 N.Y. Laws 634. This law created the Temporary State Commission on the Revision of the New York City Charter.

27. The Commission members in 1975 were Edward N. Costikyan (attorney and vice chairman), Richard Aurelio (former deputy mayor), Albert H. Blumenthal (Assembly majority leader), Charles Carreras (attorney), Albert V. Maniscalco (former Staten Island borough president), Maurice J. McCarthy, Jr. (former chair of the City Council Finance Committee), Robert J. Milano (industrialist), Basil A. Paterson (former state senator), Zelia P. Ruebhausen (former board member of the League of Women Voters), and Leonard P. Stavisky (chair of the Assembly Committee on Education). An additional member, General Lucius D. Clay, resigned in 1973 and was replaced by John F. Haggerty (counsel to the Senate majority leader). *See* URBAN ANALYSIS CTR., CITY UNIV. N.Y., THE CITY COUNCIL OF NEW YORK AND THE PRESIDENT OF THE CITY COUNCIL (1973) [hereinafter URBAN ANALYSIS CTR. REPORT]; STATE CHARTER REVISION COMM'N FOR N.Y. CITY, RECOMMENDATIONS: CITY COUNCIL BOARD OF ESTIMATE (Apr. 10, 1975) [hereinafter CITY COUNCIL RECOMMENDATIONS].

28. *See* URBAN ANALYSIS CTR. REPORT, *supra* note 27, at 13, 15.

29. *Id.* at 15.

> [T]he ability of an incumbent Council President to influence city policy depends less on the formal powers deriving from the charter, and more from his personality, his ability to anticipate issues and to articulate them in the news media, and to use adroitly his Board of Estimate membership and available staff resources.[30]

> [It is] important also to have within the top echelons of the government the potential, if not the reality, of a critic-at-large of executive bureaucracy and performance, whether at the central city, borough, or local level.[31]

> Within the government, there are few city-wide foci of criticism to counterbalance the executive branch . . . . This supports the case for a critical "presence" with a city-wide perspective, removed from the daily chore of producing the goods and services of the government.[32]

Several of the commissioners were unpersuaded. In April 1975, the Commission issued a preliminary report which proposed eliminating the city council presidency, making the speaker the presiding officer of the Council, and creating a vice mayor who would be elected independently of the mayor and serve as chair of the Board of Estimate.[33] The vice chairman of the Council would be eliminated as well, to be replaced by the speaker.[34] Four commissioners, however, proposed a novel alternative:

> Perhaps the President of the City Council should be given some additional responsibilities. Conceivably the President of the Council should be vested with the functions of an *ombudsman*, since he is elected City-wide and does not exercise line responsibility. Perhaps he should be Chairman of the City's citizen information and complaint service, where he could rely upon an existing network of district City Council members and

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30. *Id.* at 8.

31. *Id.* at 9.

32. *Id.* at 12-13. The Center also discussed the importance of the position as a vehicle for insuring representation of diverse populations—a hot button issue again in 1989. *See id.* at 15.

33. *See* CITY COUNCIL RECOMMENDATIONS, *supra* note 27, at 34-36.

34. *See id.* The Commission stressed the importance of a third citywide elected position to "provide[ ] balance between the Comptroller and the Mayor, traditional rivals, and also contribute[ ] a City-wide perspective unencumbered by the administrative constraints of the two other City-wide officials and the five Borough Presidents." *Id.* at 9.

> Community Boards to be his officers in the field. Unfortunately, such options have not even been discussed in the reports.[35]

This latter view ultimately prevailed in modified form. The Commission's final report, issued four months later, retained the Office of City Council President but tied it to the mayor by requiring the mayor and council president to be "chosen jointly by the casting by each elector of a single vote applicable to both offices."[36] However, for the first time since the office was created in 1831, the Commission also proposed the addition of a new, quasi-ombudsman role for the city council president.[37]

> In addition to his other duties and responsibilities, the president of the council shall (1) oversee the coordination of city-wide citizen information and service complaint programs, and (2) review complaints of a recurring and multi-borough or city-wide nature relating to services and programs, and make proposals to improve the city's response to and processing of such complaints.[38]

The Commission did not use the word "ombudsman," as the four dissenters had suggested,[39] and by linking the council presidency to the mayoralty, it apparently did not envision an independent overseer of executive agencies. Rather, the Commission intended "to make information about the City government readily available to the public and to secure prompt attention to all complaints" by creating an "information and complaint network in the City's service agencies with the aim of

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35. *Id.* at 40 (statements from Charles J. Carreras, Albert V. Maniscalco, Maurice J. McCarthy, Jr., and Leonard P. Stavisky, entitled *Concurring and Additional Views of Commissioners*) (emphasis added). The debates among the commissioners also reflected the historic disagreements over the extent to which power should be centralized. Commissioner Costikyan urged strengthening the Board of Estimate as a "balance wheel" between the central government and the locals districts. *See id.* at 33 (statements from Edward N. Costikyan, entitled *Additional Views of Vice-Chairman Edward N. Costikyan*) (emphasis added). Commissioner Ruebhausen argued that the Board was an anachronism and should be abolished. *See id.* at 43 (statements from Zelia P. Ruebhausen, *entitled Dissent of Commissioner Zelia P. Ruebhausen*).

36. STATE CHARTER REVISION COMM'N FOR N.Y. CITY, PROPOSED AMENDMENTS TO THE CHARTER FOR THE CITY OF N.Y. at 12 (Aug. 5, 1975) [hereinafter 1975 PROPOSED AMENDMENTS]; *see also* Maurice Carroll, *Symmetry Is One of the Goals of the Charter Revision*, N.Y. TIMES, Aug. 6, 1975, at 40.

37. *See* 1975 PROPOSED AMENDMENTS, *supra* note 36, at 13.

38. N. Y. CITY CHARTER ch. 2 § 23(e) (1976, as amended through 1977).

39. The Urban Analysis Center study had discussed the city council president as "a sort of Ombudsman for the city as a whole," but made no such recommendation in its report. *See* URBAN ANALYSIS CTR. REPORT, *supra* note 27, at 13.

directing the attention of responsible authorities to the complaint and getting back word to the complainant within a reasonable time as to what is being done about it."[40]

The Commission's proposals for revision of the Charter were submitted to the electorate on November 4, 1975. The ballot contained ten separate propositions, each to be voted up or down on its own merits. The Commission unanimously recommended the first six, but, due to differences of opinion among the members, took no position on the final four, including the proposal to link the election of the mayor and the council president.[41]

The voters defeated the proposition linking the mayor and council president but approved the enhancement of the council president's position by adding an information and complaint oversight role.[42] Under the resulting Charter, in 1977, the city council president remained completely independent of the mayor, remained the presiding officer of the Council, retained the four votes on the Board of Estimate, and gained the new—albeit narrowly defined—role concerning citizen complaints. The addition of the new responsibilities, despite the very constrained Charter language, transformed the office and set the stage for its current incarnation as a full-fledged ombudsman.

C. *The Council President, the Battles of the 1960s, and "Ombudsmania"*

In 1989, when the subsequent Charter Revision Commission was debating what to do with the city council president's position once the Board of Estimate was eliminated,[43] only the incumbent, Andrew Stein, cited the tens of thousands of citizen complaints received by his office as a primary—indeed sufficient—reason for retaining the office.[44] Everyone took this public service for granted. But during the 1960s and 1970s, the proposal to create an ombudsman for New York City with the authority to

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40. STATE CHARTER REVISION COMM'N FOR N.Y. CITY, A MORE EFFICIENT AND RESPONSIVE MUNICIPAL GOVERNMENT: FINAL REPORT TO THE LEGISLATURE 14 (Mar. 31, 1977).

41. *See* STATE CHARTER REVISION COMM'N, THIS NOVEMBER 4, THE MOST IMPORTANT CANDIDATE ISN'T A POLITICIAN: IT'S A PIECE OF PAPER (1975) (informational flier for voters highlighting proposed changes in the City Charter).

42. *See* Frank Lynn, *City Vote Apparently Bars 4 Amendments to Charter*, N.Y. TIMES, Nov. 5, 1975 at, A1.

43. *See* discussion *infra* Part II.

44. *See Charter Revision Hearings Before the New York City Charter Revision Commission,* 202 (Apr. 6, 1989) (testimony of Andrew Stein) [hereinafter "Stein Testimony"].

hear and resolve citizen complaints was surprisingly controversial.[45] The idea was widely touted but only reluctantly implemented.

1. The Swedish Concept of Ombudsman in the United States

"Ombudsman," the Swedish word for intermediary or "go-between," is an idea that originated in Sweden in the early 1700s. Originally appointed by the king to oversee his ministers and other officials, by the 1800s the Swedish Ombudsman had evolved into an administrative body appointed by the Parliament to protect individuals against the excesses of the bureaucracy.[46]

The idea spread to other parts of Scandinavia and to Europe and Asia[47] but did not catch on in the United States until the 1960s, apparently in response to the social and political turmoil of that decade. The movements to empower ordinary citizens[48] (especially poor people and minorities), the political reform movements, and the profound racial conflicts around the country[49] provoked mainstream media and political leaders to propose citizen grievance offices—or ombudsmen—as a mechanism for defusing public anger at government.

The idea of an ombudsman as a solution to political discontent and bureaucratic abuses became, for a period of approximately twenty years,

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45. To this day some legislators continue to be hostile to the idea of their constituents turning to a citywide elected official for help with problems. The legislators are correct to note that constituent service is an important building block of political power. *See* David R. Eichenthal, *The Other Elected Officials*, *in* URBAN POLITICS: NEW YORK STYLE, *supra* note 12, at 86, 98-100.

46. UNITED STATES OMBUDSMAN ASSOCIATION, PUBLIC SECTOR OMBUDSMAN (1997) (information brochure); *see also* Douglas Ivor Brandon et. al., *Self-Help: Extrajudicial Rights, Privileges & Remedies in Contemporary American Society*, 37 VAND. L. REV. 1031 (1984). The Swedish ombudsman's office continues to this day.

47. *See generally* THE OMBUDSMAN: CITIZEN'S DEFENDER 7 (Donald C. Rowat ed., 2d ed. 1968) (citing numerous ombudsman offices throughout the world); *see also* Donald C. Rowat, *The Spread of the Ombudsman Idea*, *in* OMBUDSMAN FOR AMERICAN GOVERNMENT? THE AMERICAN ASSEMBLY (Stanley V. Anderson ed., 1968).

48. *See, e.g.*, Richard A. Cloward & Richard M. Elman, *Poverty, Injustice and the Welfare State*, *in* EHRENSAFT & ETZIONI, ANATOMIES OF AMERICA, SOCIOLOGICAL PERSPECTIVES 133-35 (1969) (discussing the idea of an ombudsman for poor people); Rowat, *supra* note 47, at 7.

49. *See* WILLIAM GWYN, BARRIERS TO ESTABLISHING URBAN OMBUDSMEN: THE CASE OF NEWARK 1 (1974); *see also* Eugene Garaventa, *Urban Ombudsman Barriers Detailed*, NAT'L CIVIC REV., Dec. 1974, at 603-04.

the subject of much debate—part of the wave of "ombudsmania"[50] that swept the United States. This is reflected in hundreds of articles in academic and legal journals and dozens of federal, state, and local legislative initiatives during that period.[51] Most proponents of the idea envisioned a non-partisan, appointed officer of the executive branch or the legislature who would handle complaints of administrative injustice and be empowered to investigate, criticize, and publicize, but not to reverse or implement, an administrative action. That is the classic definition of ombudsman, based on the Swedish model,[52] but it differs considerably from the version ultimately established in New York City.

In theory, because the classic ombudsman has neither a partisan position nor elective ambitions, he or she is non-threatening to other government officials. In practice, however, at least in the United States, there was strong resistance to creating even such "non-political" ombudsmen. Many efforts to establish ombudsmen offices failed or were short-lived during that period.[53] Legislators and executives alike agreed in principle that grievances should be addressed, but they objected to the creation of a new and independent locus of power—even if its only function was to serve as a forum for citizen complaints. Executives predictably opposed creating an institution that could highlight bureaucratic abuses, and

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50. The term "ombudsmania" was coined by Donald Rowat, one of the key writers in the field during the 1960s. *See* Rowat, *supra* note 47; *see also* Paul Verkuil, *The Ombudsman and the Limits of the Adversary System*, 75 COLUM. L. REV. 845 (1975).

51. In addition to those cited so far, see, e.g., H.R. 6265, 89th Cong. (1965); STANLEY V. ANDERSON, OMBUDSMAN PAPERS: AMERICAN EXPERIENCE AND PROPOSALS (1969); WALTER GELLHORN, OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES (1966); WALTER GELLHORN, WHEN AMERICANS COMPLAIN: GOVERNMENTAL GRIEVANCE PROCEDURES (1966); Stanley Anderson, *Ombudsman Research: A Bibliographic Essay*, 2 OMBUDSMAN J. 33 (1982); Alan J. Wyner, *Complaint Resolution in Nebraska: Citizens, Bureaucrats and the Ombudsman*, 54 NEB. L. REV. 1 (1975); SAM ZAGORIA, THE OMBUDSMAN: HOW GOOD GOVERNMENTS HANDLE CITIZENS' GRIEVANCES (1988); Bernard Frank, *State Ombudsman Legislation in the United States*, 29 U. MIAMI L. REV. 397 (1975); William B. Gwyn, *Justice and the Ombudsman*, 15 TUL. STUD. IN POL. SCI. 95; Robert D. Miewald & John C. Comer, *Complaining as Participation: The Case of the Ombudsman*, 17 ADMIN. & SOC. 481 (1986); Terry L. Rosen, *Office of Citizen Response: The Denver Experience*, 37 PUB. ADMIN. REV. 528 (1977); *A State Statute to Create the Office of Ombudsman*, 2 HARV. J. ON LEGIS. 213 (1965).

52. *See* Verkuil, *supra* note 50, at 847.

53. *See, e.g.*, GWYN, *supra* note 49; Bernard Frank, *The Ombudsman Concept Is Expanding in the U.S.*, 61 NAT'L CIVIC REV. 235 (1972) (discussing a short-lived experimental project in Buffalo).

legislators were fearful of a competitor for the attention of their constituents.[54]

2. New York's Ombudsman Battles

In New York, bills were introduced in the state legislature in 1966 and 1967 to create a state ombudsman office,[55] and a similar resolution was introduced at the 1967 constitutional convention.[56] All of these proposals were dropped without any further action.[57] A proposal by Nassau County Executive Eugene Nickerson to create a county ombudsman was met with

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54. *See* Paul Dolan, *Pseudo-Ombudsmen: Political Conditions and Traditions Preventing Full Use of Concept by City Complaint Offices*, NAT'L CIVIC REV., July 1969, at 298 (writing at the height of ombudsmania, Dolan noted that even when ombudsmen offices were created, legislators tended to keep their budgets low); *see also* Paul Dolan, *Creating State Ombudsmen: A Growing Movement*, NAT'L CIVIC REV., May 1974, at 250. The legislative fear of a competitor for constituent service was expressed openly in 1993 and 1997 by some supporters of bills introduced in the New York City Council to eliminate the Public Advocate's Office. *See Introduction No. 643* to N.Y. CITY CHARTER (1993); *Introduction No. 927* to N.Y. CITY CHARTER (1997). In 1993, one of the bill's sponsors argued that handling thousands of complaints each year was no big deal because every elected official in the city is an ombudsman. *See* COUNCIL OF THE CITY OF NEW YORK, MINUTES OF THE COMMITTEE ON GOVERNMENTAL OPERATIONS, Jan. 29, 1993, at 11-12; *see also* Memorandum to *Introduction No. 927* to N.Y. CITY CHARTER (1997) (insisting, contrary to the evidence, that the Public Advocate's Office does not perform any constituent services).

55. *See* Bronston, *Introduction No. 428* and Roger Green, *Introduction No. 1134* to EXECUTIVE LAW (1966); *see also* Dunne, *Introduction No. 2684* and Jonas, *Introduction No. 4013* to LEGISLATIVE LAW (1967); S. Res. 675, Pr. 189, Leg., 1967 N.Y. Sess. Law Serv. S. Res. 675, Pr. 189 was introduced in the New York City Council on Jan. 31, 1967, calling upon the state legislature to pass a bill introduced by New York Senator Brennan amending the General City Law to create an "Office of Public Redress" in cities with populations over 1,000,000.

56. *See* N.Y. City Council, Proposition No. 271-A, May 22, 1967. This proposition called for the creation of an "Office of Legislative Ombudsman." Three similar proposals, Nos. 200, 261, and 827, were introduced, but none of these proposals were included in the proposed constitution.

57. The only initiative in New York that succeeded was in the City of Jamestown, which created an ombudsman office early on. Local Law of the City of Jamestown, No. 3-1970, was signed by then-Mayor Stanley Lundine, who was later elected lieutenant governor of the state. One-half of Jamestown's population at the time apparently was of Scandinavian descent. The Jamestown ombudsman was appointed by the mayor, subject to the approval of the majority of the Council, and exists to this day. *See* ZAGORIA, *supra* note 51, at 42.

a barrage of partisan invective, and Nickerson eventually created the office by executive order in 1966.[58]

New York City officials were equally resistant to the idea, although executive complaint units had been established in prior years. In 1934, the City Department of Investigation ("DOI"), which was responsible for investigating fiscal abuses and other problems in government,[59] established a complaint bureau to receive complaints from the public. The 1936 Charter codified the complaint function in a new section 804.[60]

In January 1961, Mayor Robert F. Wagner created a "Box 100" program. Residents were invited to write to this special mailing address with complaints and comments on the efficiency of City agencies, including any evidence of corruption.[61] The first several months produced thousands of letters, and in 1963, Mayor Wagner turned his "key" to Box 100 over to the Department of Investigation,[62] where it resides to this day.[63]

DOI's efforts, however, did not satisfy the desire for an ombudsman who would be insulated from the control of City Hall.[64] Then, as now, the

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58. *See* Philip J. Hannon, *The Nassau County Ombudsman*, *in* EXECUTIVE OMBUDSMEN IN THE UNITED STATES, *supra* note 6, at 111.

59. *See* NEW YORK, N.Y., LOC. L. NO. 1 (1924).

60. *See* RICHARD S. WINSLOW & DAVID W. BURKE, ROGUES, RASCALS & HEROES: A HISTORY OF THE DEPARTMENT OF INVESTIGATION, 1873-1993, at 48 (1993); *see also* N.Y. CITY CHARTER § 804 (1936).

61. *See* William H. Angus & Milton Kaplan, *The Ombudsman and Local Government*, *in* OMBUDSMEN FOR AMERICAN GOVERNMENT? THE AMERICAN ASSEMBLY, *supra* note 47, at 104-05.

62. *See* RICHARD S. WINSLOW & DAVID W. BURKE, ROGUES, RASCALS, & HEROES: A HISTORY OF THE NEW YORK CITY DEPARTMENT OF INVESTIGATION, 1873 to 1993, at 48 (1993). In November 1966, the Commissioner of the DOI reported that his department had handled 3,000 complaints that year from Box 100 mail; he subsequently predicted 9,000 would be received in 1967. *See* Angus & Kaplan, *supra* note 61, at 104.

63. Box 100 is still used as a City Hall mailing address—but only for complaints of suspected corruption. *See* Letter from Kevin R. Ryan, Public Information Office, The City of New York Department of Investigation, to Peter Wallis (Mar. 21, 1997). The DOI asserts that an average of 800 letters and 200 phone calls are received each month. The letter did not indicate whether the DOI compiles any statistical reports or summaries of its operations or procedures.

64. DOI's closeness to the mayor, particularly under the administration of Rudolph Giuliani, has undermined its reputation as an independent investigatory agency. During the 1996 scandal over the City's collusive contracting arrangement with the Hellenic American Neighborhood Association, the FBI decided to force the DOI out of the investigation. *See* David Firestone & Don Van Natta Jr., *Corruption Watchdog Has Become Mayor's Tool, Critics Say*, N.Y. TIMES, Aug. 4, 1996, at 33. Further, DOI's refusal to grant public access to its final reports—overturned by the court in *Lewis v. Giuliani*, Index No. 116214/96 (Sup. Ct. N.Y. County, Apr. 21, 1997)—raises additional questions about its independence from the mayor. For this reason, Public Advocate Mark Green introduced a bill in the City Council in 1994 (co-sponsored by Council members Stanley Michels and

close relationship between the mayor and the commissioner of DOI constrained DOI's ability to be completely independent of the executive agencies subject to its investigatory jurisdiction.[65]

In 1965, City Council member at-large, Paul O'Dwyer, began a series of initiatives to create a truly independent, classic ombudsman office in New York City. He proposed an amendment to the Charter to create an "Office of Citizen Redress."[66] O'Dwyer envisioned a powerful non-partisan office that would be above the political fray.[67] The ombudsman would be appointed by the mayor for a term of six years from a choice of nominees submitted by a prestigious board composed of the heads of all the major universities in the city.

The idea apparently provoked as much apprehension as the idea of an elected ombudsman similar to the Public Advocate's Office. The bill languished.[68] The following year, in March of 1966, City Council President Frank O'Connor introduced a similar bill, this time granting the City Council, rather than the mayor, the power to appoint the Director of the Office of Citizen Redress.[69] This too failed to garner political support.

Lucy Cruz) to change the method of appointing the DOI Commissioner to make the DOI more independent of the mayor. *See* Mark Green, *Introduction No. 401* to N.Y. CITY CHARTER (1994) (amending the New York City Charter, in relation to the appointment and removal of the Commissioner of Investigation).

65. *See* Angus & Kaplan, *supra* note 61, at 107; Dolan, *Pseudo-Ombudsmen*, *supra* note 54, at 279, 301.

66. *See* Paul O'Dwyer, *Introduction No. 766* to N.Y. CITY CHARTER (1965) (amending the Charter in relation to creating the Office of Director of Citizen Redress).

67. Under O'Dwyer's bill, the director of that office would have had the power "to receive complaints by any person in regard to the conduct of any agency or any officer or employee thereof" and "to investigate the conduct and affairs of any agency and the official conduct of any officer or employee thereof." *Id.* §§ 11(d)(1), (2). The Director also was authorized to "inspect and examine the papers, records and documents of any agency" and "to issue subpoenas compelling witnesses to appear and the production of records." *Id.* § 11(d). Finally, the Director was authorized, at his sole discretion, to issue reports of his investigations or surveys, to make them public, or submit them only to the mayor or the agency head. He was required, however, to issue an annual report about the activities of his office. *See id.* § 11(e).

68. It was re-introduced in the following year by Council member Diggs but fared no better. *See Introduction No. 5* to N.Y. CITY CHARTER (1966) (amending the Charter in relation to creating the Office of Director of Citizen Redress).

69. *See* Frank O'Connor, *Introduction No. 70* to N.Y. CITY CHARTER (1966) (amending the Charter in relation to creating the Office of Director of Citizen Redress). See also O'Connor's February 17, 1966, press release that summarizes the bill in the Municipal Reference Library ombudsman files.

3. The Police Oversight Referendum and the Ombudsman Idea

All of these proposals were introduced in the midst of an extremely heated and acrimonious battle over the extent to which civilians could challenge and control abusive police conduct—an issue that continues to roil the City to this day.[70] When John Lindsay became mayor in January 1966, he attempted to fulfill his campaign promise to create a Civilian Complaint Review Board to consider complaints against the New York City Police Department.[71] His initiative was met with powerful resistance. In November 1966, a proposal to ban the implementation of Lindsay's plan was submitted to the voters in a referendum.[72] After a fierce battle for public opinion, the referendum passed by a wide margin.[73]

Ironically, the defeat of the civilian oversight effort gave the notion of an ombudsman for New York City a big boost of support. A week after the referendum, the *New York Post* published an editorial titled *An Ombudsman for New York?*[74] The *Post* pointed to Paul O'Dwyer's 1965 bill:

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70. *See, e.g.*, Green v. Safir, 664 N.Y.S.2d 232 (Sup. Ct. N.Y. County 1997) (detailing the public advocate's lawsuit against the police commissioner for resisting the office's right, under the Charter, to review records of the police department's handling of substantiated complaints of police abuse), *aff'd as modified*, 679 N.Y.S.2d 383 (App. Div. 1998); *see also* Mayor of New York v. City Council of New York, 640 N.Y.S.2d 951 (Sup. Ct. N.Y. County 1995), *aff'd*, 651 N.Y.S.2d 531 (App. Div. 1997) (concerning the City Council's abortive effort to create an independent police oversight board, successfully challenged by the mayor); Peter Vallone, *Introduction No. 961* to N.Y. CITY CHARTER (1997) (amending the City Charter in relation to the establishment of an independent police investigation and audit board).

71. *See* Angus & Kaplan, *supra* note 61, at 104-05.

72. The wording of the proposition was so broad as to arguably exclude any oversight of the police under any circumstances. Its expansive language was referred to later as "the sleeper clause":

> Neither the Mayor, the Police Commissioner, nor any other office of the City of New York shall have the power to authorize any person, agency, board or group to receive, to investigate, to hear or to require or to recommend action upon civilian complaints against members of the Police Department.

Homer Bigart, *Liberties Union Invites Friends and 'Responsible' Foes of Review Board to Ombudsman Talks*, N.Y. TIMES, Nov. 15, 1966, at 47.

73. The referendum, held on November 6, 1966, passed by a vote of 1,307,738 to 768,492. *See* Angus & Kaplan, *supra* note 61, at 105.

74. *See An Ombudsman for New York?*, N.Y. POST, Nov. 15, 1966, at 47.

> A useful discussion has emerged with surprising speed in the aftermath of last week's citywide referendum vote rejecting the Police Dept.'s Civilian Complaint Review Board.
>
> The question under discussion is: assuming there will be continuing citizen complaints about police and about city government generally, how should the city handle them?
>
> Despite the bitter referendum battle, . . . there is growing support for a city "ombudsman."
>
> . . . This poses the questions how to appoint an ombudsman, how to insure his absolute political independence, how to define his duties?
>
> . . . .
>
> There is a real opportunity at hand to develop a mature, modern mechanism for handling citizen complaints.[75]

The editorial noted that the Commissioner of Investigation considered himself "a kind of ombudsman" and was "resisting appointment of another."[76]

According to press reports, an unlikely coalition of former enemies favored the ombudsman idea as a substitute for the Civilian Complaint Review Board, including, on one side, groups that had fought to abolish the Review Board, the Patrolmen's Benevolent Association, and former Police Commissioner Vincent L. Broderick, and, on the other side, several organizations that had fought for the Review Board, including the National Association for the Advancement of Colored People ("NAACP"), the Civil Liberties Union, and several labor unions.[77] A New York Citizens Committee for an Independent Office of Public Complaints was subsequently formed, with Vincent Broderick as its chair, to press for Council legislation establishing an ombudsman. The following June, the unlikely duo of William F. Buckley, Jr., New York Conservative Party leader and editor of *The National Review*, and Michael Harrington, socialist

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75. *Id.*

76. *Id.*

77. *See Lindsay Favors Independent Ombudsman Idea,* N.Y. TIMES, Nov. 14, 1966, at A1.

activist and author of *The Hidden Poor*, were named as associate chairmen of the committee.[78] Buckley commented:

> It is strange and heartening that out of the bitterness in New York City over the Civilian Complaint Review Board for the Police Department, an idea has been given impetus which seems to have got the backing of liberals and conservatives alike.[79]

Mayor Lindsay, however, gave the idea only mixed and lukewarm support. He was unwilling to relinquish the complaint-handling role of his Commissioner of Investigation, and questioned whether a citywide ombudsman would be "overwhelmed" and inaccessible to people in outlying areas of the city.[80] Lindsay opted instead for a proposal to establish twenty-seven "Neighborhood City Halls,"[81] which City Council Democratic leader David Ross opposed as "an extension of the Mayor's political club."[82] Ultimately, no agreement was reached on either approach.[83]

The interest in a mechanism for citizen redress did not disappear from the public agenda, however. In May 1967, City Council President Frank O'Connor introduced a bill drafted as a model ombudsman statute by the Administrative Law Committee of the Association of the Bar of the City of New York.[84] It proposed the creation of an Office of Public Complaint, headed by an ombudsman to be appointed for five years by the mayor with

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78. *See Ombudsman Group Names 2 Members*, N.Y. TIMES, June 19, 1967, at 32.

79. *Id.*

80. *See Ombudsman Drive Picks Up Steam*, LONG ISLAND PRESS, Nov. 15, 1966; *see also* Bigart, *supra* note 72, at 47.

81. *See* Angus & Kaplan, *supra* note 61, at 105-06.

82. *Ombudsman Drive Picks up Steam*, *supra* note 80 (citing the lineup of lawmakers supporting or opposing the idea); *see also* Bigart, *supra* note 72, at 47.

83. Note that the two proposals—for an ombudsman and for little City Halls—reflected the continuing tension in New York City politics between solving problems through citywide versus neighborhood-based mechanisms. The various City Charters over the years reflect the uneasy compromises: Borough presidents are retained and community and district boards are established, but three citywide elected officials are also retained. Current City politics also keep the issue alive: while the City is struggling to reform the child welfare system by *decentralizing* it, see Nicholas Scoppetta, Protecting the Children of New York: A Plan of Action for the Administration of Children's Services, Dec. 19, 1996, the school system is being reformed by *re-centralization*, see 1996 N.Y. Laws 720.

84. *See* The Committee on Administrative Law, *Proposed Local Law for a New York City Ombudsman*, 22 REC. OF THE ASS'N OF THE BAR OF THE CITY OF N.Y. 484, 486 (1967).

the advice and consent of two-thirds of the City Council.[85] The policy section articulated a broad public mandate for the office:

> It is hereby found to be in the public interest to establish an office of public complaints in New York City, headed by a person of distinguished accomplishments in the field of law or administration, whose main functions would be (a) to investigate and ameliorate grievances arising out of allegations of . . . maladministration, unfairness, unreasonableness, arbitrariness, arrogance, rudeness, oppressiveness, inefficiency, improper motivation, unwarranted delay, clear violations of laws or regulations, or other abuse of authority, and (b) on its own initiative, to investigate, study and make recommendations with regard to agency acts, practices and procedures.[86]

The Bar Association report explained why such an office is needed in a democratic society:

> The fact that there are such "grievances" is not necessarily due to deliberate acts on the part of city agencies or employees . . . . Many of the cases stem from the size and proliferation of the bureaucracies, the skyrocketing of costs of governing well, insufficient personnel, the lack of means of informing people about available services and procedures, especially for the poor and even those of modest means, and the enormous pressures on urban life today resulting from inadequate housing, conflicts in community relations, dilapidated transportation and the like.[87]

Like the 1965 O'Dwyer bill, the Bar Association model gave the ombudsman broad investigatory authority, including subpoena power. It also granted the ombudsman the right to inspect all City agencies (except elected officials and the courts), immunized the ombudsman from judicial

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85. *See id.* at 487. The Bar Association had studied the O'Dwyer and Diggs bills as well as models drafted by Professor Walter Gellhorn of Columbia University, the most prominent ombudsman scholar of his time, and another published by the Harvard Journal on Legislation.

86. *Id.* This construct has all the elements of the classic notion of an ombudsman: wide discretionary authority, headed by a "distinguished" person who is appointed, and not elected, and authorized to address both the micro (individual complaints) and the macro (broad patterns); *see also* Proposed Local Law for a New York City Ombudsman, Sec. I, § 1170; The Committee on Administrative Law, *supra* note 84.

87. *Id.* at 484.

review of any findings and reports, and made it a misdemeanor to obstruct any such investigation.[88] The model bill also repealed DOI's authority to handle complaints under Charter section 804, but required the ombudsman to refer criminal investigations to that agency—a concept ultimately adopted by the 1989 Charter Revision Commission.[89]

Despite the scholarship and non-partisan spirit that produced the Bar report, the O'Connor bill, like the 1965 O'Dwyer bill, was largely ignored. However, these defeats in the Council between 1965 and 1967 did not end interest in an ombudsman for the City. Neither the so-called "ombudsmania" nor the social and political turmoil of that era had run its course. Upon assuming office in January 1969, City Council President Francis Smith announced that he was forming an ombudsman bureau and calling for public hearings on a bill to formally establish such an office. Smith commented on the great need citizens feel for such an office which "can help our citizens deal with a bureaucracy which often seems inaccessible and whose actions on occasion seem arbitrary and capricious."[90]

Smith named Abraham N. Goodman, his legislative assistant and former special assistant to the Commissioner of DOI, to head the volunteer-staffed unit.[91] Smith had been elected in January 1969 to serve out the term of Frank O'Connor, however, and he only held the office until the end of the year. Sanford Garelik, who previously had served as police commissioner, was elected that fall to succeed him, and there is no record of Garelik continuing Smith's ombudsman work.[92]

In 1973, Paul O'Dwyer was elected president of the City Council. When he took office in January 1974, he renewed his campaign to pass a bill like the one he had introduced as a Council member eight years earlier. This time he campaigned for months to enlist support from civic and labor groups, bar associations, and individuals. O'Dwyer held an all-day public

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88. *See id.* at 487-489 (Model Bill §§ 1172, 1175, 1180, and 1181).

89. *See* N.Y. CITY CHARTER ch. 2 § 24(k) (1989).

90. Alfred Miele, *Smith Names Ombudsman to Aid Public*, DAILY NEWS (N.Y.), Jan. 26, 1969, at 44.

91. *See id.* In November 1969, Mr. Goodman reported a complaint by a Bronx man who had dialed 911 after being held up but waited an hour and 20 minutes for the police to arrive. Goodman was quoted as saying, "We have asked the Police Department for the files on this case . . . and we are also planning to survey the entire emergency police communications system." *Ombudsman Puts in Heavy Day's Work*, LONG ISLAND PRESS, Jan. 28, 1969, at 4B. We have not found any record of whether Goodman received the files, or any results of the proposed survey. History is repeating itself in the current dispute between the public advocate and the police commissioner in *Green v. Safir*, 664 N.Y.S.2d 232 (Sup. Ct. N.Y. County 1997), *aff'd as modified*, 679 N.Y.S.2d 383 (App. Div. 1998).

92. There is a lack of information for 1969-1974 in the "Ombudsman" files of the Municipal Reference Library.

hearing at City Hall in September 1974,[93] and distributed a flier describing the concept and urging people to write in and to testify.[94] Despite support from a majority of the Council members, both the mayor, Abraham Beame, and the Council leadership opposed the idea.[95] Once again, the bill failed.

4. Paul O'Dwyer—New York City's First Ombudsman

Paul O'Dwyer was still the city council president in November 1975, two years after the defeat of his last bill, when the new complaint oversight provision in the City Charter was adopted, creating a toe hold for him and other advocates of a full-fledged office of citizen redress. The narrow ombudsman-like obligations specified for the city council president in the 1976 Charter[96] were a far cry from the broad powers recommended by O'Dwyer, O'Connor, and the Bar Association. The new Charter did not authorize the council president to receive individual complaints and also failed to articulate any mechanisms, such as subpoena power, for fulfilling the responsibility to "oversee" and "review" other agencies' efforts.

But O'Dwyer was a great people's advocate.[97] To his everlasting credit, he saw the window of opportunity and moved swiftly through it. Pursuing the spirit, if not the letter, of the new Charter language, he established an ombudsman office under his jurisdiction to deal with "any and all" complaints and sought an annual budget appropriation of $750,000

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93. *See* Steven Marcus, *Ombudsman: O'D Trying Again*, N.Y. POST, Sept. 19, 1974. Among those who testified in favor of the bill were the Swedish Ombudsman Bertil Wennergren. *See id.* Norman Adler, then a Hunter College professor and now a political consultant, opposed the bill just as he later opposed retaining the Office of the City Council President. *See* Edward Ranzal, *Parade Of Witnesses Backs City Ombudsman*, N.Y. TIMES, Sept. 20, 1974, at 79.

94. *See* The "Ombudsman Project" flier; *see also* Memorandum from Joe Esposito, Assistant to the Council President, to all staff members (July 23, 1974) (regarding the "Ombudsman Bill"). The memo clearly articulates the arguments for creating an ombudsman and analyzes the reasons legislators and courts are insufficient resources for citizen grievances. Both documents are in the ombudsman file in the Municipal Reference Library.

95. *See* Marcus, *supra* note 93. O'Dwyer also speculated that some Council members were covertly uncomfortable with the bill that could, arguably, supplant their own efforts to gather political support with their constituents by assisting with complaints about the City bureaucracy.

96. The 1976 Charter reads as follows: "(1) [to] oversee the coordination of city-wide citizen information and service complaint programs, and (2) review complaints of a recurring and multi-borough or city-wide nature . . ." N.Y. CITY CHARTER ch. 2 § 23(e) (1976, as amended through 1977).

97. *See* Francis X. Clines, *Paul O'Dwyer, New York's Liberal Battler For Underdogs and Outsiders, Dies at 90*, N.Y. TIMES, June 25, 1998, at B9.

to support it.[98] He hired Bernard Frank, a widely published scholar of ombudsman systems and the Chair of the Ombudsman Committee of the International Bar Association, as a consultant to "develop[ ] an appropriate set of regulations for the establishment of a New York Ombudsman."[99]

O'Dwyer's aggressive approach did not sit well with Roy Goodman, chairman of the Charter Revision Commission, whose mandate had been extended until March 31, 1977, to oversee implementation of the new Charter.[100] Goodman harshly criticized O'Dwyer in an "acrimonious" exchange reported in the *New York Times*:

> In more than an hour of testimony at a commission hearing in City Hall, [O'Dwyer] . . . clashed repeatedly with State Senator Roy M. Goodman, the commission chairman, who accused him of attempting to set up an 'elaborate bureaucracy' that was not mandated by the revised Charter adopted by the voters a year ago.
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> . . . .
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> Goodman said the commission had envisioned the Council President's function as an 'overseer and coordinator' of city-wide services that provide information and receive complaints from citizens. Neighborhood service complaints are to be handled by the new district service managers serving under local community boards, while borough-wide service matters are to be dealt with by borough supervisors.
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> . . . .
>
> Mr. O'Dwyer, visibly angered by [Goodman's question about his budget request], retorted: 'You created this office and now you're trying to reduce it to a small function. You can't set me up as an ombudsman, expect me to make government responsive to the people and then blame me when I fail to do so for lack of adequate staff.'[101]

Using his role on the Board of Estimate, which had extensive power over the budget under the 1976 Charter, O'Dwyer made a citywide ombudsman office a *fait accompli*. He obtained a $400,000 appropriation

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98. *See* Glenn Fowler, *O'Dwyer's Concept of His Position Under Charter Assailed at Hearing*, N.Y. TIMES, Dec. 1, 1976, at B2.

99. Letter from Paul O'Dwyer to Bernard Frank (Oct. 18, 1976) (forwarded to the Public Advocate's Office by Bernard Frank); *see also* Letter from Bernard Frank, *supra* note 5 (stating that he served as a consultant to Paul O'Dwyer in 1976 when the new City Charter was adopted).

100. *See* STATE CHARTER REVISION COMM'N FOR N.Y. CITY, *supra* note 40, at 1.

101. Fowler, *supra* note 98.

and by January 1977, recruited assistants who addressed citizen complaints.[102] Columnist Murray Kempton, the recently deceased great chronicler of the City, memorialized the historical moment as well as its irony:

> [O'Dwyer] has been honored and cursed with an entire missing of his point, which had been that the ombudsman should first of all be someone who, unlike himself, was not a politician.[103]

O'Dwyer was the trail blazer, but he was not the City ombudsman for long. Like Winston Churchill, who won the war but was rejected by voters to lead the peace, O'Dwyer was defeated by State Senator Carol Bellamy in 1977 in a vigorously contested Democratic primary.[104] Bellamy won the election and became the new city council president. She took on the role of ombudsman and expanded it well beyond O'Dwyer's—not to mention Goodman's—concept. Bellamy retained the citizen grievance function and gave space to a group of volunteer senior citizens operating out of Hunter College to assist other seniors who phoned in their complaints. This became an effective "Senior Action Line," which continues to this day.[105] She began issuing investigative reports on aspects of City services, including the child welfare system, transportation, health care, highway construction, and park maintenance. She also published a research analysis of the complaint handling systems, aptly titled "Go Fight City Hall."[106]

Andrew Stein, who succeeded Bellamy in 1985 when she gave up her seat to run unsuccessfully in the Democratic primary for mayor, continued

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102. *See* Murray Kempton, *The Ombudsman Tries His Wings*, N.Y. POST, Feb. 5, 1977, at 4.

103. *Id.* Despite his historic role as the architect of the council president's ombudsman role, Paul O'Dwyer continued to believe that the job ideally should be held by a non-political appointee, not an elected official. He argued that position publicly during the Charter Revision debates in 1989. *See* Todd S. Purdam, *Stein Proposes A Stronger Oversight Role For His Office*, N.Y. TIMES, Apr. 6, 1989, at B2.

104. O'Dwyer ran ahead of Bellamy (30% to 25%) in a five-way primary which included Assembly member Leonard Stavisky, businessman Abraham Hirschfeld, and City Council member Carter Burden, but Bellamy defeated him in the subsequent run-off. *See* Pranay Gupte, *Carol Bellamy Wins A Place In Runoff*, N.Y. TIMES, Sept. 9, 1977, at A1.

105. It is now called the "Public Advocate's Senior Action Line." *See* THE GREEN BOOK: OFFICIAL DIRECTORY OF THE CITY OF NEW YORK 22 (1994-95).

106. Bellamy's reports are in the Municipal Reference Library, catalogued under "City Council President."

the tradition of handling individual complaints and doing investigative reports.[107]

By the time the 1989 Charter Revision Commission convened, the interest in ombudsmen had subsided and the idea had become less controversial. A handful of state and municipal government general ombudsman offices had been created, and several more have been established since that time.[108] Most are now entrenched institutions in their jurisdictions but have fairly low public profiles.[109] They focus largely on handling individual grievances and specific complaints rather than investigating systemic problems and policy concerns.[110] Many specialized, single-issue ombudsman offices have also sprung up, such as ombudsmen for long-term care, children, the mentally ill, etc.[111]

The individual complaint-handling function in the Council President's Office had similarly ceased to be controversial; however, it also ceased to be highly valued. The other ombudsman role of identifying systemic problems and issuing reports and exposés continued to create political

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107. *See* Stein Testimony, *supra* note 44, at 200-03. More than 30 of Bellamy's investigative studies are on file at the Municipal Reference Library. Unfortunately, only four of Stein's documents were deposited there, and the others can be gleaned only from press reports. Stein's record of complaints handled is contained in Annual Reports issued by his office between 1990 and 1993, but only the 1990 Annual Report is on file at the Municipal Reference Library.

108. The best list of current general governmental ombudsmen (as distinguished from speciality ombudsmen such as children's or long term care ombudsmen) can be found in the membership lists of the United States Ombudsman Association, located at 215 East 7th Street, Des Moines, Iowa 50319 <milosec@legis.State.ia.us>. The list includes the states of Nebraska (legislative); Iowa (legislative); Alaska (legislative); Arizona (legislative); Hawaii (legislative); Montana (executive); Ohio; Oregon (partial jurisdiction/executive—not statutory); Puerto Rico (legislative); Rhode Island (nonstatutory executive agency in governor's office); the cities/counties of Jamestown, N.Y. (the first city ombudsman in the United States); Atlanta, Ga.; Aurora, Ill. (executive, not defined in law); Detroit, Mich. (legislative); Flint, Mich. (legislative); Kansas City, Mo. (legislative); Cleveland (Cayuga County), Ohio (County Executive agency not in statute); Portland, Or.; Dayton, Ohio (nonprofit corporation with general jurisdiction in city and county); Seattle (Kings County), Wash. (legislative); Anchorage, Ala. (legislative); and Lexington, Ky. (Fayette County) (legislative).

109. Several, however, have subpoena power which they use to bring in witnesses for investigation of individual complaints. *See, e.g.*, NEB. REV. ST. §81-8,245(5) (1995); IOWA CODE ANN. § 601G.9(4) (West 1995); ANCHORAGE, ALA., MUNICIPAL CODE § 24.55.170 (West 1995).

110. *See* Conversation with Marie Ferguson, former president, U.S. Ombudsman Association (Sept. 12, 1997). Ms. Ferguson confirmed that, to the best of her knowledge, most ombudsman offices do not issue investigative and research reports. An excellent source of information about government ombudsman offices is now available via e-mail at <omb_gov@staff.legis.state.ia.us>.

111. *See, e.g.*, Brandon, et al., *supra* note 46, at 1032, n.1238.

sparks. In testimony before the 1989 Charter Revision Commission, Stein argued that his office provided a powerful check on the mayoral agencies.[112] He pointed to his exposé of the emergency medical services, his proposal to use the fire department as a first responder in cases of cardiac arrest, and his efforts in support of reforming the school custodian contract.[113]

Both Bellamy and Stein, in fact, faced uphill battles in their efforts to perform their investigative audits. Despite the power that flowed from the council president's votes on the Board of Estimate, the absence of express authority to obtain information from reluctant mayoral agencies posed serious problems and delays in their work.[114] The tension between the council president's mandate to identify and expose problems in City government and the mayoral agencies' resistance to oversight continues to be a constant theme in the public conflicts between council presidents and mayors. It was also an issue that the 1989 Charter Revision Commission was well aware of, and which it addressed in the new Charter.

II. THE 1989 CHARTER REVISION COMMISSION DEBATES AND THE COUNCIL PRESIDENCY

The members of the 1989 New York City Charter Revision Commission,[115] set out to revise the Charter to comply with the Supreme Court's ruling in *Board of Estimate v. Morris*,[116] and, in so doing, overhauled the entire system of City governance.[117] Among the many challenges they faced was the question of what to do with the Council President's Office—this unique New York City institution that belongs in no one branch of government but has deep roots in the City's history.

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112. *See* Stein Testimony, *supra* note 44, at 199.

113. *See id.*

114. *See id.*; *see also* Legislative Hearing, Mar. 9, 1989, at 131-34 (testimony of Susan Wiviott).

115. The New York City Charter Revision Commission, appointed by Mayor Edward I. Koch on January 19, 1989, was chaired by Frederick A. O. Schwarz, Jr., former corporation counsel of the City of New York. The other members were Aida Alvarez, Amalia V. Betanzos, Fred Friendly, Simon Gourdine, Judah Gribetz, Nathaniel Leventhal, Harriet R. Michel, Theresa M. Molloy, Patrick J. Murphy, Archibald R. Murray, Mario Paredes, Bernard Richland, Joseph P. Sullivan, and David Trager.

116. 489 U.S. 688 (1989) (holding that the Board of Estimate—the upper house of the City's bicameral legislature—violated the constitutional principle of one-person, one-vote by giving equal voting power to boroughs with large differences in the size of their populations).

117. The new Charter was adopted by the voters in a referendum on November 4, 1989.

Under the 1976 Charter, as explained above, the council president, who presided over the City Council, was first to succeed the mayor,[118] and had a narrowly defined role in overseeing agency complaint-handling systems.[119] The council president's votes on the upper legislative body, the Board of Estimate, however, were the fulcrum of its power. The Commission was thus faced with the question of whether to eliminate the office and break with the century-and-one-half-old tradition of maintaining at least two citywide elected officials other than the mayor,[120] or to maintain and redesign the office. Three of the Commission's fifteen members—Judah Gribetz, David Trager, and Fred Friendly—argued strenuously and repeatedly during the deliberations that the office should not survive the demise of the Board of Estimate.[121]

This minority argued that because the office had no direct governmental authority, it would be a useless layer of bureaucracy and a mere launching pad for higher elected office.[122] Fred Friendly asserted that the council president would "have his own agenda" and would be running for mayor from the moment he or she took office. He thought this would be terribly divisive and "make the Mayor's life miserable from the beginning . . . [by being] a political gadfly."[123] Moreover, some

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118. This order of succession is mandated by N.Y. GEN. CITY LAW § 2-a(2) (McKinney 1980).

119. *See* N.Y. CITY CHARTER ch. 2 § 23(e) (1976, as amended through 1977). Both Stein and Bellamy used the ombudsman function in far broader fashion than the actual 1976 Charter language had specified. In this sense, they followed O'Dwyer's lead. *See* Fowler, *supra* note 98.

120. *See* R. Alta Charo, *supra* note 12, at 742 (discussing the role of the council president on the Board of Estimate).

121. Several editorial boards, political pundits, and even former city council presidents agreed, and some predicted, that the Board of Estimate would not survive as an institution of government. *See, e.g.*, *About Politics; Chart a Course for Boroughs*, NEWSDAY (N.Y.), May 30, 1989, at 42, in which former City Council President Carol Bellamy, in an article co-authored with William Josephson, Chairman of a subcommittee of the Association of the Bar of the City of New York, gave the Charter Revision Commission an "F" for retaining the office; Robert F. Wagner, Jr., *Recommendations of the Citizens Union to the New York City Charter Revision Commission*, 33 N.Y.L. SCH. L. REV. 591, 591-95 (1988); Sam Roberts, *Campaign Matters; Call Him Provost or Chamberlain or Just Employed*, N.Y. TIMES, May 29, 1989, at 25 (quoting former holders of the office).

122. *See* Public Meeting, May 6, 1989, at 234 (statement of Commissioner Friendly); Public Meeting, June 20, 1989 at 188 (statement of Commissioner Trager); Public Meeting, July 31, 1989, at 249 (statement of Commissioner Gribetz).

123. Public Meeting, May 6, 1989, at 235. In fact, Friendly's concerns were not supported by the historical record. Since 1901, only seven of the 32 individuals who have held the office of the president of the board of aldermen/city council have run for mayor (including Andrew Stein, who dropped out before the primary). Of these seven, only Carol Bellamy ran against an incumbent mayor—and even that occurred when the incumbent sought a third term, something now impossible under term limits. *See* ENCYCLOPEDIA OF

commissioners, most notably Alvarez, wanted to replace the elected office with an appointed City ombudsman modeled after that used in other cities and states,[124] and create a vice mayor instead, which could facilitate the election of minority candidates to citywide office.[125]

Other voices in the Commission, however—whose views ultimately prevailed by a substantial margin—insisted that it was essential to retain a citywide elected official as an alternate voice to that of the powerful and centralized mayor. Commission Chairman Frederick A. O. Schwarz, Jr., former City corporation counsel under Mayor Edward I. Koch,[126] was a persistent and persuasive advocate of that view.[127]

Several organizations and individuals testified in favor of maintaining the office while others urged eliminating or restructuring it.[128] Andrew

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THE CITY OF NEW YORK, *supra* note 15, at 230, 737-44.

124. *See* Public Meeting, May 6, 1989, at 241.

125. This diversity issue generated a lot of controversy, including strenuous opposition by some Commission members and prominent black and Latino spokespersons who argued that a minority vice mayor would merely be "window dressing." Congressman Major R. Owens, for example, wrote that a vice mayor on the mayor's ticket "would lack the independence or the constituency to be truly heard and have any effect on government policy. Inevitably the position would be regarded as impotent by all New Yorkers—and thus as tokenism by the minority communities it is supposed to empower." Letter from Major R. Owens, Congressman, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (May 8, 1989) (Charter Revision Commission Proceedings, Exh. 56-e); *see also* Letter from Hazel Dukes, President of the New York State NAACP, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (May 9, 1989) (Charter Revision Commission Proceedings, Exh. 56-d) (expressing similar views).

126. Notably, three of the commissioners who had served in high positions in City government strongly supported retention of the office as a watchdog, including former Corporation Counsels Fritz Schwarz and Bernard Richland, and former Deputy Mayor Nat Leventhal. Judah Gribetz was the only former City official who disagreed.

127. *See* Public Meeting, May 6, 1989, at 205; Public Meeting, May 13, 1989, at 300; Public Meeting, June 20, 1989, at 227; Public Meeting, July 31, 1989, at 257.

128. *See* New York City Charter Revision Commission Appendices IX and X. One notable supporter of the office was Richard Emery, the civil rights attorney who successfully litigated *Board of Estimate v. Morris* before the Supreme Court. *Letter to the Editor*, N.Y. TIMES, May 19, 1989, at 34, col. 5; *see also Pols and Politics; A Word From Mom and Keeping It All in the Family*, NEWSDAY (N.Y.), May 26, 1989, at 18; Letter from Stanley Hill, District Council 37, American Federation of State, County, and Municipal Employees (AFSCME), to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (May 5, 1989) (Charter Revision Commission Proceedings, Exh. 56-a) (urging retention and strengthening of council presidency); Letter from Herman Badillo, of Fischbein Badillo, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (May 9, 1989) (Charter Revision Commission Proceedings, Exh. 56-b) (opposing vice mayor idea and supporting retention of city council president as next-in-line to mayor); Letter from Calvin O. Butts III, Executive Minister of

Stein, the incumbent, lobbied heavily for keeping the office. He pointed to his investigative reports and exposés and the thousands of citizen complaints his office handled each year.[129] Stein and his staff also identified what they regarded as a key impediment to the effectiveness of the office—recalcitrant agencies and the Charter's failure "to require that [they] comply with [his] requests for information."[130] Citing several examples,[131] he urged the Commission to strengthen the council president's power to obtain information and suggested extending the City Council's power to issue subpoenas to the council president.[132]

Friendly's concern about the office holder's possible political ambitions was discussed extensively during these proceedings. Several members did not agree that political ambition would be detrimental to the effectiveness of the office. Schwarz's response, for example, was that "the very political ambition that you worry about, ought to serve not as something that causes the person to misbehave, but that causes the person to want to demonstrate that they are capable of being positive and affirmative."[133] Schwarz continued:

> I think if the public heard four years of someone being just a gadfly, just saying, you stink, without coming forward with workable and affirmative ideas, I think they'd say well, you make a good gadfly, but you wouldn't make a good Mayor.[134]

Commissioner Gourdine took the argument even further:

> I think that there is a value in having that Citywide official be elected even though we recognize that person has political ambitions. I think it's the political ambitions that are important, you know, to that mix, that the person is, in fact, questioning the Mayor, challenging policies and putting those policies under the spotlight.[135]

The Abyssinian Baptist Church, to Frederick A. O. Schwarz, Jr., Chairman, 1989 New York City Charter Revision Commission (May 9, 1989) (Charter Revision Commission Proceedings, Exh. 56-c).

129. *See* Stein Testimony, *supra* note 44, at 198-202.
130. *Id.* at 200.
131. *See id.*
132. *See id.* at 201.
133. Public Meeting, May 6, 1989, at 236.
134. *Id.*
135. *Id.* at 221.

The commissioners also addressed the related question of whether it was appropriate for an ombudsman to be elected. David Trager argued against it:

> The theory being advanced is the notion we need a Citywide office to act as a counter-poise to the Mayor, and I can accept that premise. But I cannot accept the premise that the function of that office, at least the way it's being touted now, is consistent with the role of an ombudsman, because that role has traditionally, as it developed in Scandinavian countries, the notion was, essentially, of a person who would rise above politics . . . otherwise it just becomes a nice job to advance one's career, because it's easy to recommend proposed changes . . . that's a recipe with [sic] a job with power and no responsibility.[136]

Trager was right about the Scandinavian model, but several members of the Commission thought it absolutely essential that New York City's ombudsman be elected, not appointed.[137] Chairman Schwarz noted:

> [W]e want someone else out there . . . who has been elected by the people as a whole, who has the credibility of having been elected by the people as a whole, to stand in criticism of the Mayor . . . . *Having been elected Citywide, itself, creates clout.*[138]

Commissioner Bernard Richland agreed:

> The ombudsman position works only if you have power, independent power, and that is what [O'Dwyer] discovered. He discovered that because he was a member of the Board of Estimate, and, by God, they had to pay attention to him. An ordinary ombudsman, appointed by somebody, even with a term of office, would have nothing like that kind of power or standing.[139]

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136. Public Meeting, May 13, 1989, at 325-26.

137. Commissioner Gribetz—agreeing with Commissioner Trager that an ombudsman should not be elected—suggested at one point that the Commission look at other ombudsman models. *See* Public Meeting, May 6, 1989, at 212. Apparently this did not occur—at least in any systematic fashion. *See supra* note 46.

138. *See* Public Meeting, May 6, 1989, at 205-06 (emphasis added).

139. *Id.* at 200.

> I think that his activity as an ombudsman is enormously improved by the circumstance that he is a separately elected person with some muscle . . . . Without muscle in this city you can't get anywhere . . . .[140]

Commissioner Theresa Molloy concurred as well:

> We talked about an elected ombudsman who would do two things: It would, first of all, somehow, be, in my words, a court of appeals; someplace where citizens or groups had no place else to go there would be a court of appeals or a place they could go to. But more importantly, as a watchdog over all of the delivery of services and what came out.[141]

The discussions about the office were complicated by the proposal to create a vice mayor to supplement or replace the council president. As a result, the Commission debated the future of the office on at least five occasions,[142] took three separate votes, and finally decided 9 to 4 (with one abstention) to retain the office substantially in its historic form with some added responsibilities, described *infra* in section III.[143] Just prior to the final vote, Commission Chairman Schwarz articulated his vision of the *raison d'etre* for the office:

> This is an issue which we properly spent a lot of time on because it's important, and I will try and summarize for myself why I believe the job is one of continuing value to the city.

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140. Public Meeting, May 13, 1989, at 321.

141. *Id.* at 312.

142. The major discussions can be found in the transcripts of Public Meetings that took place on May 6, 1989; May 10, 1989; May 13, 1989; June 20, 1989; June 26, 1989; and July 31, 1989 (when the final vote was taken). An article in the *New York Times* stated that it was one of the few subjects that provoked significant rancor among the Commission members. *See* Alan Finder, *What Gets Charter Panel All Riled Up?*, N.Y. TIMES, July 5, 1989, at B1.

143. The first vote, on May 6, 1989, was nine to four; Chairman Schwarz and commissioners Michel, Betanzos, Gourdine, Murphy, Molloy, Richland, Murray, and Leventhal voted "yea"; Commissioners Trager, Gribetz, Alvarez and Friendly voted "nay." *See* N.Y. CITY CHARTER, Exhibit 58 (1989). The second vote, on June 20, 1989, was ten to four. *See* Public Meeting, June 20, 1989, at 279. The final vote, on July 31, 1989, was nine to four with the same voting patterns as those on May 6, except that Commissioner Molloy abstained. *See* Public Meeting, July 31, 1989, at 273.

> The first two reasons have to do with, in the good sense, the political structure of the government, and this is a complex, huge city with many different aspirations and views among its people, and with great variety among its people.
>
> It seems to me, after weighing all the arguments for that there be not just one citywide official who stands as an alternate to the Mayor, but two alternates in the sense of serving in government as a citywide official and being able to present from a citywide perspective disagreement or concurrence.
>
> . . . .
>
> In the broadest sense, I think there is a balance . . . conceptually between the comptroller and the council president in the sense of oversight of city programs from the executive branch.
>
> The one concentrating on the fiscal cost efficiency elements of the programs, the other concentrating on the service implications of the programs, . . . I think that balance has attractiveness when you think about the twin aspects of government, that you deliver things effectively fiscally and deliver things effectively . . . humanly.[144]

Schwarz's comments echoed those in the Center report to the 1975 Commission fifteen years earlier: balance, counterweight, and citywide presence—all the historic roles for the council president.[145]

The lengthy debates in 1989, however, did not put to rest the controversy over the council presidency. In late 1992, Mayor David Dinkins and Speaker Peter Vallone discussed placing a referendum on the November ballot to eliminate the office, but they could not agree on how to divide up the office's limited powers—in particular, the succession to the mayor and the appointment of a Planning Commission member.[146] In January 1993, one bill to eliminate the office through a referendum,[147] and

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144. Public Meeting, July 31, 1989, at 257, 259-60.

145. *See supra* Part IB. There is no evidence that any of the commissioners realized they were breaking new ground by creating the only elected ombudsman in the United States, and possibly the world.

146. *See* James Bennet, *Aides to Dinkins and Vallone in Talks to Abolish Stein's Job*, N.Y. TIMES, Aug. 16, 1992, at B39; Bob Liff, *Ax Spares Stein's Job*, NEWSDAY (N.Y.), Aug. 22, 1992, at 10.

147. *See* Council Members Fusco, Pagan, Harrison, and Sabini, *Introduction No. 643* to N.Y. CITY ADMIN. CODE (1993) (amending the New York City Charter in relation to repealing section 24 of the Charter and abolishing the office of the president of the City

one to change the name to public advocate,[148] were introduced in the Council. Both bills were considered at a public hearing on January 29, 1993,[149] and several public officials testified for and against the proposal.[150] Speaker of the City Council Peter Vallone urged keeping the office but changing its name.[151] The good government groups that weighed in were divided: Citizen's Union urged the abolition of the office,[152] but the New York Public Interest Research Group ("NYPIRG")[153] argued against altering the 1989 Charter without more studies and a clear mandate from the electorate.[154]

In the end, the City Council resolved simply to change the name of the office to "Public Advocate"[155] to more accurately reflect its Charter roles and to dispel the impression that the holder exercised a predominant role

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Council).

148. *See* Council Member Vallone, *Introduction No. 624-A* to N.Y. CITY ADMIN. CODE (1993) (changing the title of the president of the council to the public advocate).

149. *See generally* Council of the City of New York, The Transcript of the Minutes of the Committee on Governmental Operations, Jan. 29, 1993; *see also* Douglas Feiden, *Many Vying to Fill Stein's Council Shoes,* CRAIN'S N.Y. BUS., Feb. 15, 1993, at 9; Editorial, *Let the Ax Fall,* NEWSDAY (N.Y.), Feb. 3, 1993, at 48; Sheryl McCarthy, *Does Anyone Really Care If We Scrap Stein's Job,* NEWSDAY (N.Y.), Feb. 1, 1993, at 8.; Selwyn Raab, *"President" Is Confusing; Council May Alter Title,* N.Y. TIMES, Jan. 30, 1993, at 25.

150. Council members Israel Ruiz and Stephen DiBrienza, State Senator Donald Halpern, and Police Benevolent Association President Ron Reale—all of whom had expressed interest in running for the position—urged its retention. *See generally* Transcript of the Minutes of the Committee on Governmental Operations, Jan. 29, 1993.

151. *See id.* at 3-7.

152. Henry Stern, speaking as president of the organization, said the city council presidency was "the vermiform appendix of city government [which] should be excised from the body politic." *Id.* at 68. He argued that the office was obsolete, used primarily as a bully pulpit for those seeking other elective office, and the advocacy role could be done better by the comptroller. *See id.* at 67-72.

153. *See id.* at 42-51.

154. During these debates, City Council President Andrew Stein cited the steady flow of demands for help from his ombudsman unit. His 1991 Annual Report cited responses to 19,416 requests for help, and he again provided the figure of 19,000 in an interview in 1993. *See* McCarthy, *supra* note 149. The 1991 report, required by the New York City Charter chapter 2, section 24(n), was 10 weeks late, see Bob Liff, *Did the Dog Eat Andy Stein's Report?,* NEWSDAY (N.Y.), Jan. 11, 1992, at 11, thus adding fuel to the argument that the office was a waste of taxpayer money. During the past four years, the Public Advocate's Office has taken the October 31 deadline very seriously, and Green has delivered a completed Annual Report to the speaker each year on or before that date.

155. *See* NEW YORK, N.Y., LOC. L. NO. 19 (1993). The bill to eliminate the office was re-introduced in 1997 by Republican Council Member John A. Fusco but was ignored by most Council members and the press.

in the City Council.[156] The Charter Revision Commission had discussed the same idea, and even created a subcommittee to suggest a new name, but it never reached a decision.[157] Some thought the 1993 name change diminished the office's status and prestige, but others, including Mark Green—who by then was considering running for the office—thought it was a great improvement since it clearly identified the officeholder as the public's voice in government.

III. THE PUBLIC ADVOCATE FOR NEW YORK CITY: THE OFFICE CREATED BY THE 1989 CHARTER

A. *The Charter Revision Commission's Handiwork*

The office ultimately created by the 1989 Charter is a political and historical anomaly, with one foot in the legislative branch (presiding officer of the City Council), one in the executive (next-in-line to the mayor)[158] and an eye on the City bureaucracy (ombudsman). Elected for a term of four years at the same time as the mayor[159] and on a separate ballot line, the public advocate has five major areas of responsibility and several subsidiary ones.

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156. There was considerable speculation in the press that the bill to eliminate the office was defeated in part because the incumbent, Andrew Stein, was planning to run for mayor in the Democratic primary, and abolishing his job during the campaign would have been viewed as a political attack by the mayor. *See* James C. McKinley, Jr., *A New Job For Stein, Without a Race?*, N.Y. TIMES, Feb. 23, 1993, at B3.

157. It appears that the name "Public Advocate" was discussed informally during the 1989 Commission Meetings. At one point Commissioner Schwarz refers to the office by that name. *See* Public Meeting, July 31, 1989, at 260.

158. The New York City Charter notes:

> In case of the suspension of the mayor from office, the mayor's temporary inability to discharge the powers and duties of the office of mayor by reason of sickness or otherwise, or the mayor's absence from the city, the powers and duties of the office of mayor shall devolve upon the public advocate or the comptroller in that order of succession . . . .

N.Y. CITY CHARTER ch. 1 § 10(a) (1989, as amended through 1997).

159. *See id.* ch. 2 § 24(a).

1. Legislative Roles in the City Council

The public advocate is the presiding officer of the City Council but may vote only in case of a tie,[160] which apparently has rarely, if ever, occurred in the modern history of the Council.[161] A tie is not likely to occur in an odd-numbered Chamber dominated by one party and its speaker.[162] The public advocate may also sit *ex officio* on committees[163] and introduce and sponsor legislation.[164]

2. The Bureaucracy Beat

The public advocate serves as the City's ombudsman on both the macro and micro levels. The 1989 Charter added a considerable amount of new language to the limited ombudsman provision in the 1976 Charter.[165] The public advocate is responsible for processing individual grievances,[166] investigating and reporting on recurring and citywide problems,[167]

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160. *See id.* § 24(e).

161. Interviews with Richard Weinberg, General Counsel, New York City Council, and Herbert Berman and Stanley Michels, New York City Council members, in New York, N.Y., Dec. 16, 1998.

162. During Mark Green's first term as public advocate, the Council consisted of 45 Democrats and six Republicans, and was led by a very powerful speaker, Peter F. Vallone. Vallone usually did not bring matters to a vote on the Chamber floor unless he had the votes to prevail. However, since a two-term limit went into effect as of January 1994, there will be significant turnover in membership by 2001. Ten new Council members took office in January 1998, and by January 2002, 40 of the members in office as of mid-1998 will have been "termed out." The current power relationships, as well as the imbalance between Democrats and Republicans, could change significantly as a result.

163. *See* N.Y. CITY ADMIN. CODE ch. 2 § 3-203 (1985).

164. *See* N.Y. CITY CHARTER ch. 2 § 22(a) (1989, as amended through 1997) (identifying the public advocate as a member of the Council).

165. *See* N.Y. CITY CHARTER ch. 2 § 23(e) (1976, as amended through 1977).

166. As to these grievances, "[t]he public advocate shall establish procedures for receiving and processing complaints, responding to complainants, conducting investigations, and reporting findings, and shall inform the public about such procedures." N.Y. CITY CHARTER ch. 2 § 24(g) (1989, as amended through 1997).

167. As to these problems:

> [t]he public advocate . . . shall (1) monitor the operation of the public information and service complaint programs of city agencies and make proposals to improve such programs; [and](2) review complaints of a recurring and multiborough or city-wide nature relating to services and programs, and make proposals to improve the city's response to such complaints . . . .

performing discretionary reviews of City agencies,[168] and monitoring the public information and service complaint programs of City agencies.[169]

The commissioners' intent, articulated in their deliberations, was to ensure multiple sources of oversight of the executive agencies, with the comptroller doing fiscal oversight and the public advocate doing the parallel "service" oversight.[170]

After some debate and research by staff, the Commission also decided to give the office wide berth in the scope of its jurisdiction.[171] The final language restricted the scope of the officeholder's powers in only a small number of circumstances, for example, when an individual grievance is one that a City agency "is mandated by law to adjudicate" or is covered by a collective bargaining agreement.[172] In addition, if the public advocate obtains evidence of violations of criminal law, the matter must be referred immediately to an appropriate law enforcement agency and the public advocate may "take no further action."[173] The same rule applies to evidence of conflicts of interest, which must be referred to the Conflicts of Interest Board established by Charter chapter 68.[174]

Id. § 24(f).

168. *Id.* § 24(h).

169. The Charter reads:

> Except for those matters which involve conduct which may constitute a violation of criminal law or a conflict of interest, the public advocate may, on the request of a resident, taxpayer, community board, council member or borough president, or on his or her own motion, inquire into any alleged failure of a city officer or agency to comply with any provision of the charter.

Id. § 24(i); *see also id.* § 24(h).

170. *See* Public Meeting, July 31, 1989, at 257, 259-60.

171. *See id.*

172. *See* N.Y. CITY CHARTER ch. 2 § 24(f)(4)(i) (1989, as amended through 1997). An opinion by corporation counsel, given to the Charter Revision Commission, stated that the four agencies covered by the "mandated adjudication" provision are the Civil Service Commission, the Human Rights Commission, the Taxi Commission, and the Board of Standards and Appeals. *See* Memorandum from Paul Refren, Chief of the Division of Legal Counsel, Corporation Counsel, to Eric Lane, Counsel and Executive Director, 1989 New York City Charter Revision Commission (June 21, 1989) (on file with the *New York Law School Law Review*); *see also* Public Meeting, June 26, 1989, at 361-68.

173. *See* N.Y. CITY CHARTER ch. 2 § 24(k) (1989, as amended through 1997).

174. *See id.* ch. 68 § 2602(a) (1989).

> If the public advocate receives a complaint alleging conduct which may constitute a violation of criminal law or a conflict of interest, he or she shall promptly refer the complaint regarding criminal conduct to the department of investigation or,

The commissioners discussed, and rejected, proposals to further narrow the agencies and circumstances subject to the public advocate's review.[175] The Commission also decided to make only a handful of the public advocate's oversight responsibilities mandatory or required on an annual basis.[176] The selection and timing of the others[177] is left to the officeholder's discretion.[178] A significant portion of the public advocate's job is to identify patterns of problems and address them systemically. The Charter language reflects the understanding that handling grievances one-by-one is often inadequate and, for that reason, it authorizes, and in some cases mandates, a variety of investigations as well as the power to hold hearings.[179]

Troubled by the difficulty encountered by Stein's staff in obtaining documents, but reluctant to place a power as weighty as the issuance of a

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> as applicable, to the appropriate prosecuting attorney or other law enforcement agency and shall refer the complaint regarding conflict of interest to the conflicts of interest board . . . . Unless otherwise provided by law, all complaints received and any investigative file prepared or maintained by the public advocate regarding matters covered by this subdivision, shall be confidential.

See N.Y. CITY CHARTER ch. 2 § 24(k) (1989, as amended through 1997).

175. *See* Public Meeting, June 20, 1989, at 240-52.

176. *See, e.g.*, N.Y. CITY CHARTER ch. 2 § 24(f) (1989, as amended through 1997) ("[T]he public advocate shall . . . review complaints of a recurring and multiborough or city-wide nature . . . ."); *Id.* § 24(n) ("Not later than the thirty-first day of October of each year, the public advocate shall present to the council a report on the activities of the office during the preceding fiscal year.").

177. *See, e.g.*, *id.* § 24(f)(1) ("monitor the operation of the public information and service complaint programs of city agencies"); *id.* § 24(f)(2) ("review complaints of a recurring and multiborough or city-wide nature"); *id.* § 24(f)(4) ("resolve . . . individual complaints); *id.* § 24(h)(1) ("the public advocate may review . . . the implementation of the requirements for coterminality of local services"); *id.* § 24(h)(3) ("the public advocate may review . . . the responsiveness of city agencies to individual and group requests for data or information regarding the agencies' structure, activities and operations").

178. The reasoning behind this language is explained in colloquies among commissioners. Some Commission members were concerned that the Charter language not be phrased to require the council president to do an annual audit of every City agency. *See* Public Meeting, June 20, 1989, at 256-61; N.Y. CITY CHARTER ch. 2 §§ 24(g)-(h) (1989, as amended through 1997) (using the discretionary "may" language).

179. *See* N.Y. CITY CHARTER ch. 2 § 24(f)(2) ("[T]he public advocate shall . . . review complaints of a recurring and multiborough or city-wide nature . . . ."); *id.* § 24(g) (stating that the public advocate may conduct investigations of unsatisfactory agency response to complaints and issue reports and recommendations for administrative, legislative or budgetary actions); *id.* § 24(h) (stating that the public advocate may review the programs of City agencies); *id.* § 24(m) (stating that the public advocate has the power to hold hearings).

subpoena in the hands of a single individual,[180] the Commission created a compromise. It added a provision to the Charter that requires City agencies to respond to the public advocate's requests for documents "in [a] timely fashion."[181] It also authorizes the public advocate to go to a committee of the City Council if he or she wishes to obtain a subpoena. The text reads as follows:

> The public advocate shall have timely access to those records and documents of city agencies which the public advocate deems necessary to complete the investigations, inquiries and reviews required by this section. If a city agency does not comply with the public advocate's request for such records and documents, the public advocate may request an appropriate committee of the council to require the production of such records and documents pursuant to section twenty-nine of the Charter.[182]

The Charter Revision Commission added this section to the Charter to give the public advocate some leverage in dealing with mayoral or other agencies and to ensure tht the problems encountered by city council presidents before 1989 were not repeated.[183] It also added the provision about the City Council to make clear that the public advocate, although not a voting member of the Council, could obtain a subpoena from that body.[184] The Commission also left intact Charter section 1109, an anti-corruption provision that has been in every Charter since 1873. This unusual

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180. *See* Public Meeting, May 6, 1989, at 192-95.

181. N.Y. CITY CHARTER ch. 2 § 24(j) (1989, as amended through 1997). The Commission *did not*, however, make the public advocate's authority to go to the Council the sole and "exclusive" remedy for the mayoral agencies' violation of § 24(j). *See* Green v. Safir, 664 N.Y.S.2d 232 (Sup. Ct. N.Y. County 1997), *aff'd as modified*, 679 N.Y.S.2d 383 (App. Div. 1998); *infra* note 272 and accompanying text. The Charter transcripts contain no hint that the Commission, by extending the Council's subpoena power to the council president, intended to bar the latter from turning to the courts for relief. Indeed, the Commission left intact another provision of the Charter, chapter 49, section 1109, discussed *infra* at notes 185-86 and accompanying text, which has long permitted the council president to go directly to court on certain matters.

182. N.Y. CITY CHARTER ch. 2 § 24(j) (1989, as amended through 1997).

183. *See, e.g.*, Public Meeting, May 6, 1989, at 199-201; Legislative Hearing, Mar. 9, 1989, at 25-27, 115-20, 122, 131-34.

184. *See* Stein Testimony, *supra* note 44, at 201. There is no definitive Charter history on the reason for the "subpoena" clause in § 24(j), but Commission staff, including Eric Lane, who was executive director/counsel, and Frank Mauro, who was director of research, remember that as its likely purpose.

provision, which has never been used by an elected official,[185] authorizes the public advocate (and certain other elected officials, or any five taxpayers) to go to court and seek a summary judicial inquiry "into any alleged violation or neglect of duty in relation to the property, government or affairs of the city . . ."[186]

3. The Public Advocate as "Charter Cop"

The Charter designates the public advocate as the official responsible for ensuring enforcement of the provisions enacted in 1989, for investigating violations of the Charter,[187] and for reporting annually on the progress of its implementation.[188] Consistent with this Charter oversight role, the public advocate chairs a new information oversight body, the Commission on Public Information and Communication ("COPIC").[189]

COPIC's purpose is to oversee, encourage, and improve public access to government information. It is authorized to hold hearings and required to "render advisory opinions" in response to elected officials or members of the public on aspects of the Charter or "other laws which require public access" to information[190] on the model of the State Committee on Open Government.[191] Finally, the public advocate holds several other *ex officio*

185. A number of reported cases have been brought since the provision was first enacted, but all of these cases have been efforts by taxpayers to challenge alleged misconduct by government officials. *See, e.g.*, Jones v. Beame, 382 N.Y.S.2d 1004 (Sup. Ct. N.Y. County 1976); *In re* Larkin, 295 N.Y.S.2d 113 (Sup. Ct. N.Y. County 1968); *In re* City of New York, N.Y. L.J., Feb. 5, 1964, at 14 (Sup. Ct. N.Y. County).

186. N.Y. CITY CHARTER ch. 49 § 1109 (1989, as amended through 1997).

187. *See id.* ch. 2 § 24(i).

188. *See id.* § 24(n).

189. *See id.* ch. 47 § 1061.

190. *Id.* § 1061(d)(5).

191. *See* N.Y. PUB. OFF. LAW § 100 (McKinney 1988). Unfortunately, since the mayor and the City Council have never provided any funding for COPIC, it has not been possible to appoint an executive director or other staff to fulfill the plan envisioned by the Commission. Public Advocate Green's office has provided modest staffing to fill the gap, but far more could—and should—be done with even a modestly funded COPIC. In July 1998, the Public Advocate staff prepared for COPIC a comprehensive consumer guide to the New York State Freedom of Information Law and how to use it in New York City, including a list of the Records Access Officers of both City and State agencies. *See* COMMISSION ON PUBLIC INFORMATION AND COMMUNICATION, LET THE SUNSHINE IN: HOW TO USE THE FREEDOM OF INFORMATION LAW AND THE OPEN MEETINGS LAW IN NEW YORK CITY (1998).

positions, including membership on the Audit Committee,[192] and the Voter Assistance Commission.[193]

4. Pension Trustee

The public advocate is one of eleven trustees of the New York City Employees' Retirement System ("NYCERS"),[194] a pension fund valued at $37.7 billion as of June 30, 1998.[195] He casts one of the seven votes on the governing board, which makes investment decisions, hears employee appeals of disability pension denials, comments on and proposes legislative changes to state pension laws, and generally oversees the proper budgeting and administration of the NYCERS system.

5. Appointment Powers

The public advocate appoints one member of the City Planning Commission,[196] and, with other elected officials, the director of the Independent Budget Office ("IBO")[197] and the ten-person Advisory Board that screens and recommends candidates for the IBO directorship.[198] Under state law, the public advocate also recommends to the governor five appointees to the New York City Transit Authority Advisory Council.[199]

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192. *See* N.Y. CITY CHARTER ch. 5 § 97(a) (1989, as amended through 1997).

193. *See id.* ch. 46 § 1054(a). Under the by-laws of the Queens Borough Public Library, the public advocate also designates one of that institution's trustees. *See* BY-LAWS OF THE QUEENS BOROUGH PUBLIC LIBRARY art. I, § 1 (1996).

194. *See* N.Y. CITY ADMIN. CODE § 13-103(b)(2) (1994). The three citywide officials and three union representatives cast one vote each. The five borough presidents each cast one-fifth of a vote.

195. *See* CALLAN ASSOCS. INC., INVESTMENT MEASUREMENT SERVICE QUARTERLY REVIEW, NYC EMPLOYEES' RETIREMENT SYSTEM 7 (1998).

196. *See* N.Y. CITY CHARTER ch. 8 § 192(a) (1989, as amended through 1997). Andrew Stein appointed Amanda Burden in 1990, and Mark Green re-appointed her for a second five-year term effective July 1, 1995.

197. *See id.* ch. 11 §§ 259-60.

198. *See id.* The public advocate and the comptroller jointly appoint the 10 Advisory Board members, who must meet specified categories of expertise and experience, for staggered five-year terms. The selection of a director is made from the Board's recommendations by the public advocate, the comptroller, a Council member selected by the Council, and a borough president selected by the five borough presidents.

199. *See* N.Y. PUB. AUTH. LAW § 1204-a (McKinney 1982).

B. *The Public Advocate's Office Under Mark Green*

Thus, the Office of Public Advocate is an odd amalgam of roles and responsibilities, powers, and limitations. The following is a description of how the first public advocate used the authority granted by the Charter. It not only chronicles the co-author's work but also sets the stage for addressing the question posed at the beginning of this article—what changes, if any, would increase the office's effectiveness and its value to the residents of New York?

1. The Council Role

Although the public advocate wields the gavel, the speaker, who is the chosen Democratic majority leader, is the *de facto* official who controls the agenda of Council meetings. The public advocate has never been called on to break a tie in this fifty-one member body, and it is highly unlikely, although not inconceivable, that such a situation would ever arise.

The public advocate's most important role in the Council, arguably, is the power to introduce legislation—which is unusual if not unique for an ombudsman. Green has actively exercised this authority to implement the results of his investigations and his ideas for reform. Most significant of these during Green's first term was the "Giuliani-Green" bill to clean up the $1.5 billion commercial carting industry, enacted as Local Law 42 of 1996.[200] During the first months of his second term, the public advocate introduced a series of reforms of the City's campaign finance law[201] designed to reduce the power of large contributors and corporations and to enable a broader spectrum of candidates without access to large donors to

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200. *See* NEW YORK, N.Y., LOC. L. NO. 42 (1996). In January 1994, shortly after taking office, Green introduced legislation aimed at creating "managed competition" within the waste-hauling industry as a way to break the mob-influenced carting cartel and save city businesses the equivalent of a half a billion dollars per year in overcharges. *See* Mark Green, *Introduction No. 127* to N.Y. CITY ADMIN. CODE (1994). The bill established "competition zones" in which the City would use a competitive bidding process to select one or two carters that would be authorized to pick up the commercial waste in each of the designated zones. Each carter in the zones would be required to hire an Independent Private Sector Inspector General ("IPSIG") to identify problems and prevent corruption. Both the demonstration districts and the IPSIG idea were incorporated, in modified form, into Mayor Giuliani's 1995 bill to establish rigorous screening and enforcement procedures for carting licenses. The resulting joint effort led to Local Law 42 being signed into law on June 3, 1996.

201. *See* N.Y. CITY ADMIN. CODE tit. 3 ch. 7 (1996).

compete for public office.[202] The package of three bills, co-sponsored by Speaker Vallone, became law in the fall of 1998.

Green has also introduced legislation to ban workplace discrimination against victims of domestic violence,[203] to increase whistle blower protection for City workers,[204] to create a New York City False Claims Act modeled on the federal law,[205] to create a Department of Investigation that is more independent of the mayor,[206] to create a Licensing Review Commission to overhaul and rationalize the City's regulations (and create "one stop-shopping" for businesses),[207] and to prohibit businesses such as

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202. *See* NEW YORK, N.Y., LOC. L. NO. 48 (1998) (amending "the administrative code of the City of New York in relation to raising matchable contributions for participating candidates in the [c]ampaign [f]inance program who do not accept corporate contributions and lowering the contribution limits for such programs"); NEW YORK, N.Y., LOC. L. NO. 39 (1998) (amending "the charter of the City of New York and the Administrative Code of the City of New York, in relation to donations accepted and expenditures made on behalf of candidates elected to certain local offices for purposes of such candidates' transition or inauguration into office"); NEW YORK, N.Y., LOC. L. NO. 40 (1998) (amending "the New York City Charter in relation to prohibiting an officer or employee of the city or of any city agency who is a candidate for an elective city office or the spouse of such officer or employee to appear or otherwise participate in any television, radio or printed advertisement or commercial or by electronic means on the Internet which is funded, in whole or in part, by governmental funds or resources on or after January first in the year an election for such office shall be held"). New York City Local Law No. 48, passed by the Council over the mayor's veto by a vote of 44 to 4 on Oct. 22, 1998, makes major reforms in New York City's campaign finance law by providing four-to-one public matching funds for contributions up to $250 for those candidates who join the campaign finance system, lowering the maximum individual contribution from $8,500 to $4,500 (for candidates for citywide office) and banning contributions from political action committees that fail to register with the campaign finance board.

203. *See* Mark Green, *Introduction No. 400* to N.Y. CITY ADMIN. CODE (1998) (amending "the administrative code of the city of New York, in relation to employment discrimination against domestic violence victims").

204. *See* Stanley Michels & Mark Green, *Introduction No. 726* to N.Y. CITY ADMIN. CODE (1996) (amending "the administrative code of the city of New York, in relation to the enhancement of protections for whistle blowers").

205. *See* Mark Green & Stanley Michels, *Introduction No. 666* to N.Y. CITY ADMIN. CODE (1995) (amending "the administrative code of the city of new [sic] York in relation to authorizing the imposition of a civil penalty against anyone who files a false claim for payment with the City and to permit private persons to bring actions for such penalties on behalf of the City and to share in the awarded damages"). Both the whistle blower and false claims bills were developed cooperatively with co-sponsor Council member Stanley Michels.

206. *See* Mark Green, *Introduction No. 401* to N.Y. CITY CHARTER (1994).

207. *See* Mark Green, *Introduction No. 652* to N.Y. CITY CHARTER (1995) (amending "the New York City charter, in relation to the creation of a License Review Commission," as well as "the powers and membership" of the License Review Commission).

dry cleaners and hair salons from charging women more than men for equivalent services.[208]

2. Individual Grievances/Ombudsman

This is, paradoxically, one of the most important and the least publicized of the public advocate's responsibilities. Under Public Advocate Green, a ten-person ombudsman unit has continued the tradition established by his predecessors in office, beginning with Francis X. Smith and Paul O'Dwyer, of providing assistance to thousands of individuals who contact the office each year in person, by letter, and by phone.[209] They bring a wide array of complaints and frustrations about the City bureaucracy. Between January 1994, and July 1998, the office responded to some 80,000 complaints, which are documented in a computer system and analyzed by agency and type of complaint in the office's annual reports.[210]

In the majority of cases, the ombudsman staff refer people to the appropriate government agency for assistance, as required by Charter sections 24(f) and (g);[211] in other cases they advocate on their behalf to correct a bureaucratic error; in yet another percentage of cases—such as private financial or personal disputes or legal battles—staff must help the complainants understand that, for a variety of reasons, they may try to

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208. *See* Mark Green, *Introduction No. 804* to N.Y. ADMIN. CODE (1996) (amending "the administrative code of the city of New York, in relation to the prohibition of discriminatory pricing"). This introduction, co-sponsored with Council member Eristoff, was signed by the mayor after its language was moderated at the mayor's insistence. It was enacted as Local Law 2 of 1998.

209. The requests for assistance from the ombudsman unit continue to grow—and it is a challenge to keep up with the workload.

210. The extent of interest in the office's services and the success of the ombudsman unit belie the prediction of one well-known political advisor, Norman Adler, who was quoted in 1993 as saying the office could not have much impact. "People focus on the politicians who have helped them . . . . And when you're City Council President, it's hard to make that impression." James Bennet, *Question No. 1 in the City Council President Race; Why Would Anyone Want the Job of Mostly Sitting Around Waiting to Break a Tie?*, N.Y. TIMES, Mar. 28, 1993, at 29 (internal quotation marks omitted). Adler was proven wrong by the outpouring of support for the office during the 1998 Charter Revision Commission Hearings by constituents who had received assistance and organizations who were pleased with the office's investigative reports. *See* discussion *infra* at notes 297-98 and accompanying text.

211. Such referral is mandatory in three types of cases: where another City agency is required by law to adjudicate the grievance, see N.Y. CITY CHARTER ch.2 § 24(f)(4)(i) (1989, as amended through 1997); where a collectively bargained grievance procedure governs the matter, see *id.* § 24(f)(4)(ii); and where the complaint alleges "conduct which may constitute a violation of criminal law or a conflict of interest," *Id.* § 24(f)(4)(iii).

mediate the disagreements but may not be able to resolve them. As a matter of policy, the office does not intervene where a case is already in litigation. Some of the individual grievance work is repetitious and unremarkable. The daily challenge to the ombudsman staff is to make their best efforts to help distressed grievants suffering from bureaucratic errors or injustice who are desperate for a place to get a polite hearing (sometimes, even if there's no way to help). The great reward for the ombudsperson occurs when he or she successfully untangles the proverbial red tape and helps a citizen obtain his or her due from the government or a business. The office's files are replete with letters of gratitude from such clients. Some typical examples of the ombudsman unit's efforts over the past four-and-a-half years follow:

- assisted a 28-year victim of mistaken identity—who had lost his job and was subject to a warrant for his arrest—by persuading the child welfare authorities that he was *not* the deadbeat dad of a 14-year-old they had been pursuing;
- obtained restored phone service for a 91-year-old whose home care aide had secretly run up hundreds of dollars worth of overseas calls;
- responded to a "Dear Santa" letter from a child by arranging for a homeless family to be reinstated in the section 8 housing subsidy program to which it was entitled;
- obtained an emergency inspection and repair of an elevator that had been boarded shut, in response to a complaint from a terminally ill, wheelchair-bound client who lived in a 6th-floor apartment;
- persuaded the Buildings Department to rescind an elevator inspection bill wrongly sent to the owner of a one-story building;
- arranged for a Bronx mother to get $1,420 in back child support that had been "stuck" in the Human Resources Administration bureaucracy;
- obtained a refund of garnished wages of a constituent who had already paid off his debt to the City Marshal;
- worked with the Bureau of Pupil Transportation Services to get a new bus for a public school in Manhattan that was using a dangerously overcrowded school bus;

- worked with the Police Department to expedite issuance of accident reports for insurance purposes to victims, scores of whom complained of waiting more than six months for such reports;
- assisted a constituent who had been trying unsuccessfully for five weeks to obtain copies of his parents' death certificates so he could claim his inheritance of securities.[212]

In some instances a single complaint reveals a pattern of serious government mismanagement rather than mere bureaucratic bungling or private consumer fraud or abuse. The ombudsman unit's work in those cases has a broader impact. To cite a few examples:

- In 1994, in response to nearly 150 complaints of erroneous water bills, the ombudsman staff met with City officials and private utilities and won refunds ranging from $250 to $2,500 for 40 complainants. The Department of Environmental Protection promised to reduce errors and improve customer services through a centralized billing system (which apparently is not yet in place as of this writing).
- In response to a single complaint, the ombudsman unit learned that thousands of single family homeowners were being fined for failing to file a low-pressure boiler inspection report, even though one-family homes are exempt from the local law requiring such reports. The office succeeded in getting many of the violations removed.
- In 1996, in response to the complaint of an 85-year-old Queens resident who was conned out of $240, the ombudsman unit identified a pattern of complaints of fraudulent sales of purported water-saving devices to senior citizens and referred the matter to the District Attorney.
- In 1996, a young couple with a newborn baby turned in desperation to the office because a defective dry cleaning machine on the ground floor of their residential building was emitting large and illegal amounts of toxic perchloroethylene ("perc") fumes into their apartment. The office's intervention and publication of the

212. These are only a sampling of the thousands of cases contained in the ombudsman unit's computerized data base that records all complaints received, the dates and types of follow-up, and the resolution. The monthly reports by each staff member also record victims assisted successfully and amounts of money returned or saved.

dry cleaner's violations led to a speedy shut down of the machine.[213]

- In 1997, a complainant brought in a home video of police cars secretly rolling over a sensor to switch a traffic light in front of the Bronx Zoo from flashing yellow to red, and then, when motorists failed to make an abrupt stop, slapping them with $125 traffic tickets. The office assisted the complainant to obtain media coverage; the trap was confirmed by many other community members when aired on TV and published in the *Daily News*.[214]

The office's success with complaints like these is partly a function of the expertise and persistence of the ombudsman staff members. It is also a reflection of the potential power of the public advocate as an elected official to embarrass a sluggish bureaucracy by reporting the problem to City Hall or exposing it through a report to the media.[215]

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213. The office issued two in-depth studies of the health dangers of perc fumes. *See infra* note 247 and accompanying text. The public advocate also introduced a resolution in the City Council calling for restrictions on dry cleaning equipment in residential buildings. *See* Mark Green, *Resolution No. 974*, PROCEEDINGS OF THE COUNCIL OF THE CITY OF NEW YORK (1995) ("calling upon the Pataki Administration to expeditiously promulgate rules restricting hazardous perchloroethylene emissions generated by dry cleaning equipment . . . to protect the health of people who live and work in buildings containing dry cleaning establishments and workers in dry cleaning establishments" as well as protecting the environment).

214. *See* James Rutenberg, *Cops' Tricky Light Show: Signal Switcheroo Turns Off Drivers*, DAILY NEWS (N.Y.), Aug. 26, 1997, at 3. Unfortunately, the New York City Police Department's response was to arrest the whistle blower that afternoon for a thirteen-year-old outstanding traffic violation. The Public Advocate's Office won his release within hours, and a judge ruled the violation too stale to pursue. *See* Dan Barry, *Giuliani Is Said to Consider Stronger Police Review Board*, N.Y. TIMES, Aug. 27, 1997, at B2. The mayor and the police commissioner continued their attack on the hapless whistle blower, however, by publicly releasing and distorting his rap sheet, in apparent violation of New York Criminal Procedure Law section 160.55. The man's past history was irrelevant, of course, to his right to complain about the traffic trap; the administration's *ad hominem* attack on him sent a clear message to potential whistle blowers: "[T]hink twice before challenging City Hall." In August 1998, the whistle blower filed a federal lawsuit against the administration alleging retaliation for exercise of his First Amendment rights. *See* Schillaci v. Giuliani, 98 Civ. 5583 (S.D.N.Y. 1998) (complaint filed Aug. 6, 1998; Answer filed Nov. 16, 1998)).

215. This political reality is articulated in one of the dozens of thank-you letters the office receives from grateful complainants: "Your avocation [sic] on my behalf worked wonders when you interceded . . . . The mear [sic] mention of your name jolted these people into imediate [sic] action . . . ." Letter to Mark Green, Public Advocate (May 14, 1995) (name withheld to protect complainant's identity) (on file with author).

Some cases that reflect a broad pattern or practice are referred by the ombudsman unit to the research and investigations unit, discussed later, which may undertake a broader investigation and publish a report, as it did in the case of the water meter billing errors.[216]

Finally, in response to the large number of complaints the Public Advocate's Office receives about the child welfare system—and the frequent heartbreaking and horrifying reports of fatalities among children known to the system—the office under Green created a model specialized child welfare ombudsman project. Child Planning and Advocacy Now ("C-PLAN"), a public-private partnership,[217] was established in May 1995, to assist families and children who are dealing with the child welfare system and to investigate and document recurring problems in that system.[218] C-PLAN has a forty-member advisory board of advocates, government officials, and service providers. In its three-and-a-half years of existence, it has provided individual assistance and advocacy to more than 1,400 clients, including foster parents, birth parents, foster children, foster care agencies, and relatives of children in the system. All told, close to 4,000 children have been affected by its work.

In addition, C-PLAN is now operating a *pro bono* legal assistance network, which recruits and trains private attorneys—some from large law firms—to handle Family Court cases referred by C-PLAN social work advocates, and a "Family Court Initiative" that addresses systemic problems in that venue.[219]

3. The Bigger Picture—Research and Investigation of Systemic Problems

The public advocate's individual grievance-handling work can usually be done effectively with limited cooperation from the higher-ups in City

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216. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, EXPENSIVE WATER: WRONG WATER METER BILLS FLOOD CITY RESIDENCES (1995); *see also* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, NEW YORKERS KEEP GETTING "SLAMMED" (1996) (responding to complaints of fraudulent switching of long-distance telephone carriers without the customers' permission).

217. C-PLAN is funded by grants from private foundations to a not-for-profit corporation, the Accountability Project, which supports municipal reform efforts generated by the Public Advocate's Office.

218. In January 1996, C-PLAN issued a report recommending the establishment of a separate agency to deal with child-welfare programs. Later that month, in response to the death of Elisa Izquierdo—a child long known to the system—Mayor Giuliani announced that he would remove the Child Welfare Agency from the Human Resources Administration and establish a new and independent agency, the Administration for Children's Services.

219. The *pro bono* legal assistance project is operated in conjunction with a training component provided by Professor Martin Guggenheim at the New York University Law School.

Hall, so long as agency line staff respond professionally to individual problems, which is usually the case. The investigative studies of systemic problems are, however, far more difficult to accomplish in the face of a resistant or hostile mayor.[220] The public advocate has aggressively pursued the role envisioned for the office by the Charter Revision Commission and has sought to exercise his right under Charter section 24(j) to obtain documents and information in furtherance of his investigations of City services. However, section 24(j), at least as drafted, has proven an inadequate mechanism for dealing with an administration that is intent on resisting oversight.[221] The scope of the public advocate's authority to

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220. Mayor Rudolph Giuliani has been openly hostile to the existence of the Public Advocate's Office, and to Green's work, since they both took office in January 1994. The mayor began his first term by proposing a 23% budget cut for the Office of the Public Advocate—far beyond that sought for any other elected official. *See* Allison Mitchell, *For Giuliani and Green It Might As Well Be 1997*, N.Y. TIMES, June 11, 1994, at A1. This proposed cut was in addition to a 30% cut already enacted in outgoing Mayor David Dinkins' final budget modification in the fall of 1993. *See* Jonathan P. Hicks, *6 Candidates Contend for a Chance to Define the Retitled Position of Public Advocate*, N.Y. TIMES, Sept. 12, 1993, § 1, at 48. Under the leadership of Speaker Peter F. Vallone, the City Council restored nearly half of the mayor's proposed cut. This left the new office with a $2.3 million budget for FY 1995, down from Andrew Stein's budget of $3.7 million for FY 1994. The mayor's effort came perilously close to interfering with the public advocate's ability to perform the Charter responsibilities, which would have been an illegal attempt to amend the Charter without a referendum. Charter section 38 and State Municipal Home Rule Law section 23(2)(f) both require a referendum for any law that "abolishes, transfers or curtails any power of an elective officer." *See* New York Pub. Interest Research Group v. Giuliani, 644 N.Y.S.2d 38, 39 (App. Div. 1996) (invalidating a local law that delayed, by two years, the establishment of the Independent Budget Office because it curtailed the powers of the elected officials, including the public advocate, who appoint the director and receive information from the agency). The mayor's campaign to undermine or eliminate the office was taken up once again in July 1998, when he appointed a Charter Revision Commission consisting of his close colleagues and supporters. The Commission members briefly considered eliminating the office. *See infra* notes 294-95 for further discussion.

221. The vast majority of the requests the Public Advocate's Office has made over the past four years have been denied, ignored, delayed, or challenged outright as beyond the office's purview. As a general policy, mayoral agencies have refused to acknowledge the public advocate's authority under Charter section 24(j), and often have responded by treating requests for information from the public advocate as Freedom of Information Law ("FOIL") requests—the state law designed for the general public—and then denying the requests anyhow. In addition, mayoral agencies frequently refuse to respond unless the public advocate identifies, in advance, the nature, scope, and purpose of the request—in other words, permits the agencies to pre-screen each inquiry. Under Mayor Giuliani, City Hall is widely known to retain centralized control over the release of information to other public officials as well as the general public. *See* Editorial, *A Stonewall at City Hall*, N.Y. TIMES, Apr. 14, 1998, at A18; *see also* Public Meeting, N.Y. CITY COMM'N ON PUB. INFO. AND COMMUNICATION, July 10, 1997, at 17-73 (where advocacy groups testified about their difficulty in obtaining information from mayoral agencies). The courts invalidated this

obtain documents has been a source of constant conflict between the public advocate and the Mayor's Office and will most likely be resolved in the end by the courts.[222]

Notwithstanding these obstacles, the office has continued to investigate problems in City government. The public advocate has a skilled research staff which identifies problems—many flagged by complaints to the ombudsman unit or in meetings with community groups. During Mark Green's first term four-and-a-half years in office, he issued 115 reports, including in-depth studies of major City policy and budget matters and investigations of bureaucratic bungling, corruption,[223] inefficiency, and

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mayoral policy toward the public advocate in *Green v. Safir*, 664 N.Y.S.2d 232 (Sup. Ct. N.Y. County 1997), *aff'd as modified*, 679 N.Y.S.2d 383 (App. Div. 1998). A unanimous appellate division agreed with the lower court's ruling that the public advocate is entitled to review the requested documents to fulfill the public advocate's official functions. The Giuliani policy of challenging the right of other officials and news media to obtain information through FOIL has been rejected by the courts in several cases, including *Lewis v. Giuliani*, Index No. 116214/96 (Sup. Ct. N.Y. County, Apr. 21, 1997); *Messinger v. Giuliani*, Index No. 402236/97 (Sup. Ct. N.Y. County, Aug. 11, 1997); *New York Times Co. v. City of New York*, 673 N.Y.S.2d 569 (Sup. Ct. N.Y. County 1998); and *Criscitello v. Giuliani*, Index No. 105621 (Sup. Ct. N.Y. County 1998).

222. The dispute between the public advocate and the mayor over the intent and meaning of the public advocate's Charter powers was decided in Green's favor. In *Green v. Safir*, 664 N.Y.S.2d 232 (Sup. Ct. N.Y. County 1997), Justice Edward Lehner granted the public advocate's Article 78 petition challenging the police commissioner's refusal to permit the Public Advocate's Office to review (with names redacted) records of the police department's handling of substantiated complaints of police abuse referred by the Civilian Complaint Review Board ("CCRB"). The public advocate requested the review because of the many complaints about police misconduct and the CCRB's own data, which showed between 30% and 50% of substantiated complaints resulted in no disciplinary action by the New York police department. *See* NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD, SEMIANNUAL STATUS REPORT, Jan.-Dec.1995, VOL. III, No. 2, at 29; NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD, SEMIANNUAL STATUS REPORT, January-June 1996, VOL. IV, No. 1, at 51; NEW YORK CITY CIVILIAN COMPLAINT REVIEW BOARD, SEMIANNUAL STATUS REPORT, January-December 1996, VOL. IV, No. 2, at 47; *see also* NEW YORK CIVIL LIBERTIES UNION, A FOURTH ANNIVERSARY OVERVIEW OF THE CIVILIAN COMPLAINT REVIEW BOARD, JULY 5, 1993-JULY 5, 1997, at 9. The appellate division unanimously affirmed the lower court decision and modified the ruling to grant the public advocate's counsel attorneys' fees. On Dec. 22, 1998, the appellate division denied Commissioner Safir's motion to appeal to the New York Court of Appeals.

223. Green's office has referred numerous matters to the Department of Investigation, and a few to the United States Attorney or an appropriate district attorney. Unfortunately, the DOI is unnecessarily and inappropriately secretive about the conclusions of its investigations, and has never notified the public advocate of the results of any of the matters referred. In *Lewis v. Giuliani*, brought by the *Daily News*, the court ruled against the DOI's refusal to report on its work, but the practice has not improved, at least with respect to the Public Advocate's Office. *See* Lewis v. Giuliani, Index No. 116214/96 (Sup. Ct. N.Y. County, Apr. 21, 1997).

squandering of public funds. These included, among others, extensive reports on:

- the City's denial of assistance to (a) desperate homeless families,[224] (b) low-income elderly people seeking rent increase exemptions,[225] and (c) disabled or mentally ill adults needing protective services;[226]
- the City's arcane and poorly enforced procedures for licensing plumbers and the resulting high costs and shoddy work;[227]
- poor training, testing, and supervision in the City's lifeguard program;[228]
- favoritism and lack of standards in granting government contracts for everything ranging from food for foster care programs[229] to contracts for services to immigrants;[230]
- interfering with democracy: the Human Resource Administration's failure to comply with the federal "Motor Voter

224. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, EMERGENCY HOMELESS HOTLINE: ACCOUNTS OF RESPONSES TO "EMERGENCY" CALLS BY A CALLER IN THE OFFICE OF THE PUBLIC ADVOCATE TO THE DIVISION OF HOMELESS SERVICES EMERGENCY ASSISTANCE HOTLINE (1995); *see also* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, THE HOMELESS SERVICES HOTLINE: WHEN A HOTLINE BECOMES A BRICK WALL (1996) (following up on a study that was done one year earlier).

225. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, SENIORS ON HOLD-WAITING FOR SCRIE: PROBLEMS WITH THE SENIOR CITIZEN'S RENT INCREASE EXEMPTION PROGRAM (SCRIE) AND WAYS TO FIX THEM (1995).

226. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, INVESTIGATION OF HRA'S OFFICE OF PROTECTIVE SERVICES FOR ADULTS (PSA) (1996).

227. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, ENFORCEMENT DOWN THE DRAIN: HOW THE CITY TOLERATES FLAGRANT VIOLATIONS OF LICENSING LAWS SUPPOSED TO PROTECT THE PUBLIC FROM ILLEGAL PLUMBING WORK (1996). Green introduced comprehensive legislation to improve regulation of the industry. *See Introduction 302 to* N.Y. CITY ADMIN. CODE (1998).

228. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, PRELIMINARY INVESTIGATION INTO THE PARKS DEPARTMENT LIFEGUARD PROGRAM (1994).

229. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, FOOD FIGHT: A PRELIMINARY INVESTIGATION ON HOW THE CITY MIS-SPENDS MILLIONS TO FEED "GREEN MEAT BALLS" AND "GOLDEN APPLES" TO THE HOMELESS AND FOSTER CARE CHILDREN (1994).

230. *See* Letter from Mark Green, Public Advocate for the City of New York, to Diane McGrath-McKechnie, Commissioner, Community Development Agency (Mar. 25, 1996) (on file with author) (requesting information regarding alleged tampering with scores in rating of proposals for utilizing federal immigration funds).

Law"[231] and the Board of Elections' mishandling of the September 1996 primary, which resulted in the disenfranchisement of hundreds of Brooklyn voters;[232]

- the City's failure to assist mothers on welfare to locate safe, affordable child care,[233] or to establish an efficient welfare bureaucracy equipped to meet its administrative responsibilities under the federal welfare laws;[234]
- the unresponsiveness of City agencies to calls from the public;[235]
- the City's failure to study the environmental impact of the Fresh Kills Landfill;[236] and
- the deadly impact of lead paint in City housing, schools, and day care centers.[237]

Because of his broad view of the Charter mandate, the public advocate has focused not only on investigations of mayoral agencies but also on the various public benefit corporations that receive taxpayer dollars,[238] such as the Port Authority of New York and New Jersey,[239] the Health and

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231. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, A VOTE OF NO CONFIDENCE: HOW NYC IS VIOLATING THE "MOTOR VOTER LAW" (1995). The public advocate is a prime sponsor with Council member Gifford Miller of Introduction 450 of 1998, which extends the motor-voter law to more City agencies and strengthens the enforcement mechanisms.

232. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, A PRELIMINARY REPORT ON THE INVESTIGATION OF THE SEPTEMBER 10, 1996 PRIMARY ELECTION IN KINGS COUNTY (1996).

233. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, WELFARE AND CHILD CARE: WHAT ABOUT THE CHILDREN? (1997).

234. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, FROM WELFARE TO WORK: GETTING LOST ALONG THE WAY (1997).

235. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, HURRY UP AND WAIT: AN EVALUATION OF HOW NYC AGENCIES RESPOND TO CALLS FOR INFORMATION OR ASSISTANCE (1997).

236. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, UNHEALTHY CLOSURE: THE NEED FOR A FULL ENVIRONMENTAL IMPACT STATEMENT ON DOS'S LONG-TERM PLAN TO CONTROL POLLUTION FROM FRESH KILLS (1997).

237. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, LEAD & KIDS: WHY ARE 30,000 NYC CHILDREN CONTAMINATED? (1998).

238. *See* N.Y. CITY CHARTER ch. 52 § 1150(2) (1989) (defining "agency" as an entity funded in whole or in part from the City treasury).

239. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, FOLLOW THE MONEY: HOW THE PORT AUTHORITY OF NY AND NJ HAS FAVORED NEW JERSEY OVER NEW YORK (1996) (documenting how the Port Authority is biased against New York, which generates 60% of the revenue but receives only 48% of the capital spending).

Hospitals Corporation,[240] the Transit Authority,[241] and the Board of Education,[242] as well as government-regulated industries and programs that have a major impact on city residents' lives.[243]

The office focused particular attention between 1994 and 1998 on two of the thorniest and most costly service delivery systems: health care and child welfare. In the area of health care, the office issued sixteen major investigations, including a 160-page, year-long study of and guide to

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240. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, AFTERSHOCK: RAPE SURVIVORS IN HHC EMERGENCY ROOMS (1994) (reporting on how Health and Hospital Corporation hospitals treat rape survivors, with recommendations for change. A Summer 1996 follow-up study found significant improvements); *see also* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, FOR WHOM THE "BELL" TOLLS (1994) (investigating the failure of public and private hospitals to comply with the 1989 state regulations—the "Bell regulations"—limiting resident hours and working conditions). In 1998, the State finally took note and began issuing hefty fines against violators.

241. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, UNEASY RIDER: HOW THE TRANSIT AUTHORITY VIOLATES FEDERAL BUS ACCESSIBILITY RULES (1995) (documenting how City buses failed to comply with federal laws requiring access for people with disabilities); *see also* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, THE T.A. IS DRAGGING ITS FEET ON SUBWAY DRAGGINGS (1995) (documenting the T.A.'s failure to implement its own task force's 1988 safety recommendations to reduce subway draggings). In April 1998, the public advocate also filed an administrative complaint with the Federal Transit Authority, alleging that the Metropolitan Transportation Authority ("MTA") and the Transit Authority are violating the Americans With Disabilities Act by denying disabled paratransit riders services comparable to public transportation. *See* Richard Weir, *No Easy Ride for Disabled*, N.Y. TIMES, Sept. 20, 1998, § 14, at 7. In December 1998, the MTA announced that it would spend significant funds to correct the primary problem identified in the public advocate's federal complaint. *See* James Rutenberg, *TA Maps Upgrades*, DAILY NEWS (N.Y.), Dec. 3, 1998, at 4.

242. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, CONSTRUCTION VS. CHILDREN: THE NEED TO IMPROVE ENVIRONMENTAL SAFETY DURING RENOVATION OF SCHOOLS AND PUBLIC HOUSING (1996) (reporting on safety problems in Housing Authority and Board of Education construction projects).

243. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, COMPETITION IN SANITATION: HOW TO REDUCE COSTS AND IMPROVE SERVICE FOR BUSINESSES AND RESIDENCES (1994) (proposing to end the "mob tax" in the private carting industry); PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, THE POOR PAY MORE . . . FOR LESS (1994) (reporting on how banks have abandoned poor neighborhoods and have been replaced by expensive check-cashing services); PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, DON'T BANK ON US: TELLER MACHINE AVAILABILITY AND BANK BRANCH HOURS IN URBAN NEW YORK (1994) (documenting the absence of automated teller machines, weekend hours, and bank branches in low-income neighborhoods and proposing the installation of automated teller machines at police stations to improve security). City Hall agreed with the proposal but, as of the date of this writing, has not taken steps to implement it.

HMOs,[244]two detailed exposes of how HMO's override doctors' prescription choices;[245] a comprehensive demographic and statistical study of New Yorkers without health insurance;[246] two detailed investigations of the serious health hazards of dry cleaning emissions in residential buildings in the City;[247] a comprehensive consumer guide to New York City's public and private hospitals;[248] an exposé of nursing homes' poor compliance with public disclosure requirements regarding their health and safety records;[249] an analysis of the State's poor enforcement of nursing home standards of care;[250] and a study of the legal barriers to holding HMOs responsible for medical decisions.[251] In June 1997, the office won an important legal victory when a judge ruled that the State Department of Health is required to turn over statistical data on adverse incidents in public and private hospitals.[252]

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244. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, WHAT AILS HMOs—A CONSUMER DIAGNOSIS AND RX (1996). The office has done several related studies of problems in HMOs. *See, e.g.*, PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, TWO LISTS: COMMERCIAL AND MEDICAID MANAGED CARE PROVIDERS (1995) (reporting on how six leading HMOs discriminate against Medicaid patients by limiting their choice of doctors to a smaller, separate list); PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, MANAGED CONFUSION : HOW HMO MARKETING MATERIALS ARE TRICKING THE ELDERLY AND THE POOR (1995).

245. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, COMPROMISING YOUR DRUG OF CHOICE: HOW HMOs ARE DICTATING YOUR NEXT PRESCRIPTION (1996).

246. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, WHO ARE THE UNINSURED? (1997); *see also* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, WHO WILL TAKE CARE OF MOM? WHO WILL TAKE CARE OF ME?: THE NEW YORK STATE PARTNERSHIP FOR LONG-TERM CARE DOES NOT DELIVER ON ITS PROMISES (1995) (reporting on the private long-term care program endorsed by the State).

247. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, CLOTHED IN CONTROVERSY: THE RISK TO NEW YORKERS FROM DRY CLEANING EMISSIONS AND WHAT CAN BE DONE ABOUT IT (1994); PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, CLOTHED IN CONTROVERSY II: THE URGENT NEED TO PROTECT NEW YORKERS FROM TOXIC DRY CLEANING FUMES (1997).

248. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, THE CONSUMER GUIDE TO NEW YORK CITY HOSPITALS (1997). The publication took more than a year to produce. It includes a handbook with detailed explanations of the indicators listed in the report, a separate guide for the hospitals in each major area of the City, and a comparative analysis of the factors to consider in locating the best hospital. *Id.*

249. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, NURSING HOME SAFETY: THE HIDDEN REPORT CARD (1998).

250. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, RESIDENTS AT RISK: THE COLLAPSE OF NURSING HOME ENFORCEMENT IN NEW YORK CITY (1998).

251. *See* PUBLIC ADVOCATE FOR THE CITY OF NEW YORK, NO DAY IN COURT: HOW HMOs IN NEW YORK ESCAPE LEGAL RESPONSIBILITY FOR THEIR CONDUCT (1998).

252. *See* Green v. DeBuono, No. 1746-97, mem. op. (Sup. Ct. Albany County, June 4, 1997).

The office has also focused on child welfare.[253] In cooperation with C-PLAN,[254] which analyzes problems in the child welfare system based on the pattern of complaints of those who seek its assistance, the public advocate issued several studies of problems in the City and State child welfare bureaucracies.[255]

All of the public advocate's studies[256] contain extensive recommendations for change, and, in many instances, the advice has been followed.[257]

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253. In April 1997, C-PLAN held a conference in cooperation with Fordham University Stein Center for Ethics and Public Interest Law, *Starting from Scratch*, in which leading researchers and practitioners in the child welfare field explored ways to improve the system.

254. *See supra* notes 217-18 and accompanying text (describing C-PLAN).

255. *See* BEYOND ELISA'S LAW: THE NEXT STEPS (1996) (proposing a twelve-step "Agenda for Safer Children"; issued with Comptroller Alan Hevesi, Assembly member Roger Green, and Council member Stephen DiBrienza); C-PLAN ANALYSIS: INDIVIDUAL AND SYSTEMATIC ADVOCACY (1995) (analyzing complaints received and troublesome trends in service delivery); CREATING A CHILD WELFARE SYSTEM FOR THE 21ST CENTURY (1996) (listing recommendations for the new Administration for Children's Services); CUTS THAT CO$T II: CHILD WELFARE PROGRAMS (1995) (discussing early predictions of the likely fiscal and social impact of the governor's and mayor's proposed $237 million in cuts to child-welfare programs); *see also* ANNUAL REVIEW OF NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES CHILD FATALITY REPORTS (1996); SECOND ANNUAL REVIEW (1996); THIRD ANNUAL REVIEW (1997) (analyzing reports on child fatalities by the New York State Department of Social Services); CHILD WELFARE SCORECARD (1998) (providing a comprehensive look at how the system has fared since 1995).

256. All of the reports have been deposited in the Municipal Reference Library, indexed under "Public Advocate."

257. For example: (1) C-PLAN's January 1996 recommendation that a separate agency be created to deal with child-welfare issues was adopted by the mayor shortly thereafter with the announcement of the creation of the Administration for Children's Services; (2) the public advocate's August 1996 recommendation to the mayor and the state attorney general that they sue the tobacco companies for tobacco-induced Medicaid costs was adopted by the mayor in October 1996 and former Attorney General Vacco a few months later; (3) in January 1997, the public advocate successfully urged the Federal Reserve Board to withdraw a proposal to give banks an extra day to credit customers' accounts for deposits of local checks; (4) citing safety and fiscal problems in other jurisdictions, the public advocate joined state legislators in a successful effort to persuade the mayor not to privatize City jails and prisons; (5) an inspection of the Frederick Douglass Houses in March 1994 by the public advocate uncovered asbestos in gaping holes; following a meeting with 500 tenants, the New York City Housing Authority accepted responsibility and agreed to take corrective measures; (6) the public advocate's exposé on hospital violations of the "Bell Regulations" led to stepped up enforcement by the Department of Health. *See supra* note 240.

4. Citizen Access

The public advocate has focused on ideas and suggestions from communities as well as individual complainants. Calling the office "a socket for citizens to plug into," Green has tried to link his own bureaucracy to his constituents. He designed the staffing and scheduling of the office not only to receive complaints at the central location, by phone and in person, but also to make the office's information and services available to people in their homes and neighborhoods. This was accomplished through several mechanisms:

a. Public Information

In 1995 the Office published *The People's Green Book, 1995-1996: Your Guide to New York City Government Services*, a user-friendly guide organized by type of service rather than agency name (as found in the standard City-issued *Green Book*), and *A People's Guide to New York City Agency Publications*, a survey of the materials available from City agencies. The Public Advocate's Office was the first City agency to go online when it established an e-mail address[258] and a Web page[259] in April 1995. The Web site was credited by *New York Magazine* as "The Best of New York"[260] and in May 1997, in conjunction with the Baruch College School of Public Affairs, the Public Advocate's Office announced the establishment of a public policy discussion area attached to its Web site. "Vox New York: A Public Policy Forum for the City" is designed to

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258. The office's e-mail address is <mgreen@pubadvocate.gov>.

259. The web site homepage can be accessed at <http://www.pubadvocate.nyc.gov/~advocate/index.html>.

260. *See* Sarah Bernard et al., *The Best of New York,* N. Y. MAG., Apr. 14, 1997, at 109.

> Mark Green's New York City Public Advocate's Home Page . . ., a virtual advertisement for the man's Good Government virtuousness, *does* deliver. While this well-organized site never lets you forget that the PA's office is a bastion of civic benevolence, we can think of no better place to find out everything you need to navigate the thicket of the city bureaucracy. Noisy neighbors? Suckered by a fly-by-night electronics store? Streetlight out on your block? This searchable cyber version of the *Green Book* (an occasionally updated compendium that's hard to get your hands on) delivers, with just a few mouse clicks, the goods—the names of the appropriate city agencies and commissioners, their phone numbers, plus sundry advice on the best ways to seek redress for your ills.

Id. at 109-10 (first emphasis omitted).

encourage New Yorkers to become more informed about important legislative and public policy issues and to join in online discussions of them.[261]

In 1996, 1997, and 1998, the Public Advocate's Office co-sponsored, along with the national "Campaign for Tobacco-Free Kids," special school events designed to discourage young teenagers from smoking. Green's April 15, 1997, national "Kick Butts Day"[262] was broadcast by closed circuit from Hudde Junior High School in Brooklyn to an estimated 2 million youth in conjunction with events in 75 cities and towns. President Clinton, who has made teens and tobacco one of the priorities of his administration, joined the public advocate in addressing the students.[263]

b. Community Outreach

Providing information services is one way to communicate what is going on in the City and to learn what concerns people. Going to neighborhoods is another. During his first term, Green held a Town Hall meeting in each of the City's 59 community board districts. These Town Halls were cable-cast citywide by Crosswalks, New York City's government-operated cable TV station. Co-sponsored by local elected officials, the meetings drew between 75 and 125 participants. Public Advocate staff with particular areas of expertise attended the meetings to field questions and follow up on specific complaints. In the great American

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261. Vox New York can be accessed at <http://www.baruch.cuny.edu/voxnewyork>.

262. Kick Butts Day is sponsored by the Public Advocate's Office in collaboration with the Accountability Project. *See supra* note 217.

263. The President, in his speech to the teens, stressed the essential features of the office:

> I want you to think about Mark Green's title a minute . . . . Mark Green's title is the public advocate. I don't know if there's another city in America that has an elected public advocate. But think about what that means. What would it mean for you to be a public advocate? Someone who is standing up for people at large, right? For the public. Now, it was in that connection that Mark Green created this day, Kick Butts Day, all across the United States.

President William Jefferson Clinton, *Remarks on Kick Butts Day in Brooklyn, New York*, *supra* note 1.

In conclusion, the President explained to the students that, in his job, he was "sort of the country's public advocate." *Id.*

tradition of "town halls," the meetings often became open-ended (and unpredictable) forums where people spoke their minds about government.[264]

The Public Advocate's Office also organizes special events focused on particular issues or constituencies, including Federal-City Budget and Legislative Briefings,[265] a forum in December 1994 on the impact of budget cuts on the Latino Community, an annual Gay and Lesbian Pride Award Event, and "Shop & Vote" campaigns to register voters at shopping locations.[266] In addition, the office established five special units to work with local community activists and concerned residents to address and correct local problems. These so-called Citizen Action Teams ("CAT"), located in the Rockaways, the Northeast Bronx, Bay Ridge, the South Bronx, and Harlem, grapple with a whole host of neighborhood issues including health care delivery, police brutality, job training, and public safety.

5. The "Charter Cop" Role

In this capacity, the public advocate joined with the petitioners in the landmark case that forced the mayor and the City Council to establish and fund the Independent Budget Office—an agency designated in the 1989 Charter to provide independent fiscal analyses of the City budgets and expenditure and revenue projections.[267] Green is also a plaintiff in a

264. Each year, the office schedules a few town hall meetings during the daytime at senior centers, since many seniors do not attend evening meetings. In August 1995, Mayor Giuliani—working with the commissioners of the Department for the Aging ("DFTA") and the New York City Housing Authority—attempted to bar the public advocate from holding these meetings. The mayor charged falsely that the events were "partisan" and thus barred by federal, state, and city laws governing public housing and programs for seniors. After ten prominent civil liberties attorneys wrote a letter of protest to the mayor, and the public advocate threatened to sue, the DFTA quietly reversed itself. The senior center town hall meetings, and other such meetings, proceeded without incident thereafter.

265. The forums were held in October 1994 at City Hall and September 1996 at the U.S. Customs House. Speakers included staff from federal agencies and the City Congressional delegation.

266. The campaigns were held in June of 1996 and 1997 in 700 New York City supermarkets, record stores, and bookstores in collaboration with the New York City Board of Education, the Food Industry Alliance of New York State, and the United Food and Commercial Workers Union.

267. Both the Dinkins and Giuliani administrations declined to fund the Independent Budget Office ("IBO"), which provoked a five-year legal battle led by the New York Public Interest Research Group. *See* New York Pub. Interest Research Group v. Dinkins, 83 N.Y.2d 377 (1994). As one of the officials responsible under the Charter for appointing the IBO Advisory Board and the director, City Council President Andrew Stein initially was named as a respondent in the suit brought in 1991. After Mark Green took office, he petitioned the court for permission to switch sides in the lawsuit. He joined the petitioners

lawsuit filed in April 1998 by the IBO against Mayor Giuliani for interfering with the IBO's work by systematically withholding information.[268]

Green also weighed in with amicus curiae briefs on several important "constitutional" disputes over the powers of the mayor under the 1989 Charter. In 1994, the public advocate supported the City Council's interpretation of its power to amend the mayor's proposed mid-year budget modifications.[269] The following year, Green supported the Council's effort to establish an Independent Police Investigation and Audit Board.[270] In 1997, the public advocate joined Borough Presidents Ruth Messinger and Fernando Ferrer on amicus briefs in the U.S. District Court and the Second Circuit Court of Appeals opposing the mayor's decision to permit commercial programming by Fox News Network and Bloomberg News on New York City's government-access cable channels.[271] In a similar vein, the public advocate's most recent significant effort to uphold the drafters' intent is his own lawsuit,[272] *Green v. Safir*, in which Green challenged the Police Department's refusal to permit him to review redacted records of the department's handling of substantiated complaints of police misconduct referred by the Civilian Complaint Review Board.

Green also submitted an amicus letter brief urging the court to deny the administration's request for the sealing of three independent reviews of the performance of the Administration for Children's Services. The court

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(as did Borough Presidents Ruth Messinger and Fernando Ferrer) and played a leading role in the final legal strategy that resulted in a victory for petitioners. In November 1995, the court ordered an expedited schedule for choosing an Advisory Board and a director, and the public advocate's staff spearheaded the process. In February 1996, Douglas A. Criscitello was appointed the first director of this office, which has issued several highly regarded fiscal analyses.

268. *See* Criscitello v. Giuliani, Index No. 105621/98 (Sup. Ct. N.Y. County 1998). The court granted plaintiffs summary judgment at oral argument on Dec. 17, 1998.

269. *See* Council of New York v. Giuliani, 621 N.Y.S.2d 832 (Sup. Ct. N.Y. County 1994).

270. *See* Mayor of New York v. Council of New York, No. 402354, 95-001, 95-003, 1995 WL 478872 (Sup. Ct. N.Y. County 1995), *aff'd mem.*, 651 N.Y.S.2d 531 (App. Div. 1997), *lv. to app'l denied*, Slip. Op. Mo. No. 232 (May 6, 1997). The Council lost this case and the one over the budget modification process, but the legal disputes raised important questions about the balance of power in the 1989 Charter.

271. The District Court's decision in *Time Warner Cable v. City of New York*, 943 F. Supp. 1357 (S.D.N.Y. 1996), enjoining the mayor's action, was affirmed by the Second Circuit Court of Appeals on July 3, 1997. *See* Time Warner Cable v. Bloomberg, 118 F.3d 917 (2d Cir. 1997).

272. The trial court ruled in Green's favor on October 14, 1997. *See* Green v. Safir, 664 N.Y.S.2d 232 (Sup. Ct. N.Y. County 1997), *aff'd as modified*, 679 N.Y.S.2d 383 (App. Div. 1998).

ruled that the City could not keep the studies secret.[273] And in September 1998 the public advocate submitted an amicus brief supporting the City's Council's legal challenge to the validity of proceedings of the Charter Revision Commission appointed by Mayor Giuliani to bump the Council's proposed referendum on Yankee Stadium.[274]

6. Pension Trustee

This is an important part of the public advocate's historic role as one of the three citywide elected officials and is codified in City law.[275] Green has used his vote on the NYCERS board to press for improved management of the NYCERS system and responsible use of the pension funds for economically targeted investments. In view of the extreme volatility of tobacco stock and its vulnerability to new and restrictive regulations and tort liability, beginning in May 1997, Green began urging his fellow trustees to move toward divestment of NYCERS' $360 million holdings in that industry.[276] The public advocate also cast the deciding vote in 1996 in favor of "corpus funding," *i.e.*, to fund NYCERS' administrative operations from the corpus of the pensions funds—which the trustees control—rather than from the mayor's executive budget. Severe mayoral budget cuts in the past had led to insufficient staffing and serious backlogs in processing member and retiree applications. The proposal was adopted that year by the state legislature.

In sum, the Public Advocate's Office has a limited Charter mandate, a very small budget, a powerful adversary who keeps a tight rein on the executive agencies, and no line authority to compel change. Despite these obstacles, an aggressive and creative "people's advocate" can do a great deal with these limited powers to reform public policy and to fulfill the 1989 Charter Revision Commission's expectation that it serve as a *vox populi*.

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273. *See* Marisol A. v. Giuliani, No. 95 Civ. 10533, 1997 WL 630183 (S.D.N.Y. 1997) (mem. decision).

274. *See* Council of New York v. Giuliani, No. 2496, 1998 N.Y. App. Div. LEXIS 11001 (Oct. 16, 1998).

275. *See* N.Y. CITY ADMIN. CODE § 13-103(b)(2) (1994).

276. In June 1998, the trustees voted to freeze tobacco holdings in NYCERS' passive portfolios.

IV. THE HONOR AND THE CURSE OF BEING AN ELECTED OMBUDSMAN: LESSONS FOR THE FUTURE OF THE OFFICE

As columnist Murray Kempton wisely predicted in 1975 when Paul O'Dwyer became the City's first ombudsman, being an elected ombudsman is both an honor and a curse.[277] It is an honor because it is a citywide elected position to which tens of thousands of New Yorkers turn each year for help and to which numerous politicians aspire. It is a curse, however, because of the fierce resistance of the executive agencies to the ombudsman's mandate and the limited powers provided by the Charter to change government policy.

The theme running through the battles in New York City and elsewhere over the past several decades was how to create a truly effective, independent ombudsman that other appointed and elected officials will accept as a legitimate oversight body and complaint-handling agency. The dominant view, propounded by the Bar Association and all the ombudsman scholars was that the ombudsman should not be elected or aspire to elective office because the taint of electoral politics necessarily would undermine the ombudsman's usefulness and credibility.

We respectfully disagree. In the real world, the mandate to oversee and investigate mayoral agencies has inescapable political overtones, no matter how "above the fray" the ombudsman may wish to be. Serving as a check on the official exercise of power is fundamentally a political process (even if not a partisan one), and the ombudsman cannot be both insular and effective. If the ombudsman is doing a good job, toes will be stepped on.

No little-known appointee, especially if ultimately accountable to politicians—be it a mayor or a City Council—can have the impact or effectiveness of one who is elected citywide and hence accountable to the public. The battles in New York City during the 1960s and 1970s prove the case. The fear of establishing an office that would favor one faction, party, or political institution over another paralyzed the legislators and rendered them unable to create *any* effective system for redressing citizen complaints. In the end, none of the carefully crafted proposals to create an "independent" appointed ombudsman of "high stature" allayed the fears of the elected officials about the potential for political competition and reduction in their own power.

New York City was not alone in this respect. Most ombudsman offices created during that period were either executive ombudsmen, and thus

277. *See* Kempton, *supra* note 102.

insufficiently independent,[278] or legislatively appointed ombudsmen who maintained a relatively low public profile. The reports issued by these offices indicate that most of the work focuses on resolving individual complaints. Some ombudsman offices also initiate reviews of agencies with repeated patterns of complaints and attempt to correct them through quiet advocacy.[279] The Iowa ombudsman, for example, reports that it initiates a separate investigation when it discovers that a complaint evidences a systemic problem or general practice or policy warranting more extensive review.[280] On occasion, that office makes recommendations for change, proposes legislation or monitors the agency's response to the criticisms.

It appears, however, that none of the governmental ombudsmen are in a position to issue extensive and hard-hitting investigative research and whistle-blowing reports like those prepared by the Public Advocate's Office. In part, this is because none of those other ombudsman offices evolved in the unique way that New York's ombudsman did—as a player on the political scene for over a century—and in part it is because they must avoid excessively antagonizing the officials who appointed them, even when they have set terms of office.[281] One of the most powerful ombudsman offices created over the past two decades—the New Jersey Department of the Public Advocate—was highly effective and pro-active, but ultimately fell victim to the political wars. Established by state law in 1974 as a cabinet-level department, the office was eliminated entirely in January 1994, when the Republicans won control of both the statehouse and the legislature.[282]

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278. *See* EXECUTIVE OMBUDSMEN IN THE UNITED STATES, *supra* note 6, at 2. Alan J. Wyner notes that the "clear disadvantage" of the executive ombudsman is that his "allegiance to the person who appointed him may prevent him from assuming an impartial attitude when investigating complaints that may prove damaging to the chief executive." *Id.*

279. Some good examples are contained in the annual reports issued by the ombudsmen of Puerto Rico and Hawaii. The ombudsman of Puerto Rico, Dr. R. Adolfo de Castro, has made an interesting proposal to extend his jurisdiction to cover "any business, enterprise or person . . . contracted by the State to provide services to the citizenry or that has acquired from the State a majority interest over the public entity which formerly provided those services." R. ADOLFO DE CASTRO, THE OMBUDSMAN AND THE PRIVATIZATION OF GOVERNMENTAL SERVICES 2 (Aug. 6, 1997) (emphasis omitted) (on file with the *New York Law School Law Review*).

280. *See* Letter from Duncan C. Fowler, Deputy Citizens' Aide/Ombudsman of Iowa, to Laurel W. Eisner, General Counsel for the Public Advocate of the City of New York (Apr. 28, 1995) (on file with author).

281. *See* ZAGORIA, *supra* note 51, ch. 4.

282. N.J. STAT. ANN. § 52:27E-31 (West 1982-1983) (repealed 1994). For a history of the department and its powers, see Martin A. Bierbaum, *On the Frontiers of Public Interest Law: The New Jersey State Department of the Public Advocate—the Public Interest*

That is why the New York City public advocate's position as an elected ombudsman, established by popular referendum in the City Charter, is the better model.[283] Without the popular mandate provided by an election, it would be far harder, if not impossible, to stand up to a mayor predictably annoyed by someone overseeing his performance.

The fact that the public advocate is elected rather than appointed strengthens the public advocate's position in disputes with the mayor. The elective nature of the position also sparks the interest of both the public and the media in the office's work. As an elected official, the public advocate can use the office as a bully pulpit, which is the office's most important tool for making an impact—far more important than the power found in the technical language of the Charter. This was true of Paul O'Dwyer, Carol Bellamy, and Andrew Stein, and it has been true of Mark Green.

When the voters elect a public advocate by a strong majority, the public advocate's pulpit power carries greater strength.[284] Public support is critical to the office's ability to make positive changes in City government.[285] It means that bureaucrats take notice when the office calls and consider possible press exposure when they resist the office's efforts. They realize that the public advocate may use access to the electorate and the media to expose their errors. As H.L. Mencken aptly said: "Conscience is the sense that someone may be watching."[286] That, after all, is the *raison d'être* of the office.

Bernard Richland, who had served as City corporation counsel, often provided the historical view during the 1989 Charter Revision Commission deliberations. On the subject of the elected ombudsman, he noted that he wrote the bill O'Dwyer introduced into the Council for an appointive ombudsman.

> It was received by the Council with hollow silence, and nothing happened to it.

Advocacy Division, 13 SETON HALL L. REV. 475 (1983). Bierbaum foresaw the dangers to the office in his 1983 article, noting the legislature could abolish it at any time, and, in addition, that the public advocate himself served at the pleasure of the governor and was thus vulnerable to political pressure. *See id.* at 489.

283. Unlike the New Jersey office, the Public Advocate's Office cannot be eliminated except by referendum of the voters.

284. Mark Green received 60% of the vote in 1993 and 73% in 1997.

285. 1989 Charter Revision Commission Members Schwarz, Richland, Betanzos, Gourdine, and Leventhal expressly noted that the power of the office comes from having been independently elected to stand in criticism of the mayor. *See* Public Meeting, May 6, 1989, at 198; Public Meeting, May 13, 1989, at 303.

286. Michael Moncur, *Michael Moncur's Collection of Quotations* (visited Dec. 4, 1998) <http://www.starlingtech.com/quotes/qsearch.cgi>.

> It wasn't until O'Dwyer became Council President and a member of the Board of Estimate, with real power that he was able to do something . . . . He did a splendid job of keeping tabs on what the Mayoral bureaucracy was up to, what kind of mischief was going on.[287]

Richland was right.[288] Without the threat of public exposure,[289] agency bureaucracies would be less concerned about the public advocate's findings.[290] The glare of publicity has benefitted the public and proven Justice Brandeis' axiom that "[s]unlight is said to be the best of disinfectants."[291]

Despite the original skepticism about the value of the office, by the end of Green's first term as public advocate, the office had fulfilled the mandate created by the 1989 Commission. Green used the hybrid nature of the office and its lack of line administrative authority not as a limitation but as a license to investigate and innovate in pursuit of more democratic and user-friendly government.

During the 1993 electoral campaign, when six candidates sought the party nominations for the office, several commentators predicted that "once the first Public Advocate proves the value of the job, . . . the City Council leadership and the Mayor will stop trying to eliminate it."[292] Unfortunately, this prediction has not yet come true. Although the office's services have been in heavy demand by the public, and its reports have received wide public notice, the office is not safe from attack by those annoyed by its independence and its critiques.

In June 1998, Mayor Giuliani appointed a Charter Revision Commission to block the City Council from placing a referendum on the

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287. Public Meeting, May 6, 1989, at 199.

288. He spoke strongly in favor of retaining the office in the new Charter, but he believed that "the ombudsman position works only if you have power, independent power . . . ." *Id.* at 200.

289. Commissioner Gourdine articulated the point well when he said that the political ambition of the officeholder keeps a constant spotlight on his or her policies. *See supra* note 135 and accompanying text.

290. The accident of politics that brought Green into office as a Democrat during the administration of a Republican mayor may have intensified the conflict, but Green's role would be hardly different in a Democratic administration. He promised during the 1993 campaign for the job to "blow the whistle when a mayoral agency is falling short." Sam Roberts, *It's More Than Words: Race In Election Year*, N.Y. TIMES, Sept. 13, 1993, at B2. Many of the problems the office has exposed have been longstanding and have cut across both Republican and Democratic administrations.

291. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 89 (Melvin I. Urofsky ed., 1995).

292. *See* Bennett, *supra* note 210.

November 1998 ballot on whether to move Yankee Stadium from the Bronx to Manhattan.[293] Before holding a single public meeting, the twelve-member Commission, comprised largely of the mayor's close colleagues and political supporters,[294] announced its interest in eliminating the Public Advocate's Office, as well as the other mayoral oversight agency which has criticized the mayor, the Independent Budget Office.[295]

The Commission met with a barrage of criticism and within two weeks dropped both of these ideas. The Commission was responding to harsh press reports and opposition from many community organizations, good government groups, and ordinary New Yorkers. The *New York Times* ran an editorial supporting the office's retention: "Some City Hall officials want the commission to shut down the advocate's office and the Independent Budget Office entirely. Both provide independent assessments that are burrs under the Mayor's powerful mantle, institutional reason enough to keep them both alive."[296] Fritz Schwarz reiterated his belief in the office designed by the 1989 Commission that he had chaired.[297] Additionally, many private citizens and advocacy groups sent in powerful testaments to the value of the Public Advocate's Office.[298]

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293. Under New York Municipal Home Rule Law section 36(5)(e), a Charter amendment placed on the ballot by a mayoral charter revision commission automatically preempts any referendum initiated by the City Council or by citizen petition.

294. The *New York Times* opined that the commission appointed by the mayor was "stacked . . . with his cronies . . . ." Editorial, *A Rush to Charter Revision*, N.Y. TIMES, June 26, 1998, at A22.

295. *See generally* Letter from Peter Powers, Chairman, 1998 New York City Charter Revision Commission (June 19, 1998) (on file with the *New York Law School Law Review*) (This Powers Commission letter went to hundreds of people, usually addressed as "Dear Friend." It stated that the functions of City offices including the public advocate would be reviewed by the Charter Revision Commission).

296. Editorial, *A Rush to Charter Revision*, N.Y. TIMES, June 26, 1998, at A22.

297. Mr. Schwarz wrote: "Nor should you recommend the elimination of independent offices such as the Public Advocate and the Independent Budget Office that, among other things, serve as a check on and balance to the enormous powers of the mayoralty and its huge bureaucracy." Letter from Frederick A. O. Schwarz, Jr., Cravath, Swaine & Moore, to Peter Powers, Chairman, 1998 New York City Charter Revision Commission 6 (June 29, 1998) (on file with the *New York Law School Law Review*). Schwarz's comment was contained in a seven-page critique of the 1998 Charter Revision Commission's lack of representativeness, lack of independence, and poor processes. *See id.*

298. A Queens resident wrote: "Please do not abandon the people. Please do not take away our only course of action when we have problems with bureaucracies—and can't afford legal fees or larger contributions to people in office. It gives us a great sense of security and peace of mind to know that there is a Public Advocate in government looking out for, and defending, the 'little people' of New York City." A letter from a Manhattan resident praised the public advocate's annual *Ranking Banking* surveys. The Urban Justice Center opined: "The office of the Public Advocate offers one of the most effective voices for the forgotten and disenfranchised in the City." Letter from Douglas Lasdon, Executive

On August 20, the Commission issued its final report, which contained a much scaled-down series of modest campaign-finance reform proposals for the ballot, some of which did not require a referendum or Charter revision. The report describes the Commission's change of opinion about the Public Advocate's Office:

> The Commission considered amending Charter § 24 to eliminate the Office of Public Advocate. The Public Advocate, formerly known as the Council president, had been retained by the 1989 Charter Revision Commission by a split vote . . . . Nonetheless, a number of people testified at the public hearing in favor of retaining the Public Advocate. The office seems to be functioning well for some New Yorkers who could not otherwise find help in resolving bureaucratic problems. The Public Advocate's election by a citywide electorate apparently strengthens the office's ability to help individual citizens resolve problems that are perhaps unsolvable by a City Council member representing a smaller district. The Commission, therefore, unanimously resolved at the July 16, 1998, meeting to continue studying whether the City Council or another City official or agency could be as effective a trouble shooter for New Yorkers.[299]

It is evident from the events of 1998 that despite the office's long history, its successes in recent years, and its meager budget, as long as the public advocate continues to function as a thorn in the bureaucracy's side, challenges to its existence are likely to re-emerge from time to time.[300] There is also reason to believe that it will survive the attacks as it has for 167 years.

It would be worthwhile some time in the future, however, to correct three serious structural limitations that impede the ability of any occupant of the office to accomplish his or her goals in the most efficient manner:

Director of Urban Justice Center, to the 1998 New York City Charter Revision Commission (June 30, 1998). According to the National Committee to Prevent Child Abuse, the public advocate's child welfare ombudsman project, C-Plan, "provides an essential and tremendously valuable service." Letter from Christine S. Deyss, Associate Director of the National Committee to Prevent Child Abuse, to Jane Golden, of C-PLAN (June 24, 1998). In a poignant version of the letters the office receives on a regular basis, even without a Charter crisis, one Brooklyn resident wrote to the Commission: "I'd like to tell you about how the Public Advocate's office saved my life." (June 30, 1998).

299. N.Y. CITY CHARTER REVISION COMM'N, FINAL REPORT, Aug. 20, 1998, at 35.

300. The *Daily News*, which covers many of the office's studies, has repeatedly printed editorials attacking the office. *See, e.g.*, Editorial, *Advocate This, Mark Green*, DAILY NEWS (N.Y.), Feb. 18, 1997, at 30.

(1) *The absence of subpoena power*: At the very least, the public advocate needs a clearly defined mechanism to compel compliance with requests for information under Charter section 24(j). No administration, however right-minded, will happily open its books to an institutional auditor unless there are sanctions for refusing to do so. The Giuliani Administration, in fact, has elevated the practice of withholding information from actual or potential critics to the level of a policy and does not hide the fact that it does so intentionally.[301]

(2) *The absence of a fixed bottom line in the budget*: Without a fixed budget, the public advocate is at the mercy of the very official whose agencies he must, by law, investigate, as well as the City Council, which may regard him as a rival for attention.[302]

(3) *The lack of access to independent legal advice*: The public advocate (and the City Council, the comptroller and the borough presidents) do not have access to independent counsel from the City Law Department, because the corporation counsel is appointed by the mayor and serves at the mayor's pleasure.[303] None of these other elected officials, has the benefit of the hundreds of lawyers on the corporation counsel's staff unless the mayor decides, in his discretion, to champion the other official's cause.[304]

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301. *See supra* note 221 and accompanying text; *see also* Clyde Haberman, *Once Again the Mayor Hogs the Ball*, N.Y. TIMES, Apr. 7, 1998, at B1.

302. Speaker Peter Vallone has protected the Public Advocate's Office from the worst blows of the mayor's budget ax, but the office's dependence on the outcome of negotiations between the mayor and the Council creates inappropriate limits on its ability to function independently. *See supra* note 220 and accompanying text (discussing the conflicts between Mayor Giuliani and Public Advocate Green over the size of the office's budget). There also may come a time when a hostile mayor and City Council will agree to sharply reduce the public advocate's budget. One legal safeguard against any excessive cut in the budget is the requirement in the City Charter text that only a popular referendum can "abolish[ ], transfer [ ] or curtail[ ]" the power of the office. *See* N.Y. CITY CHARTER ch. 2 § 38(5) (1989).

303. N.Y. CITY CHARTER ch. 17 § 391 (1989), establishes the law department to be headed by a corporation counsel, but does not, in fact, expressly state that the corporation counsel shall be appointed by the mayor. The mayor's power here apparently is inferred from his power under New York City Charter, to appoint "all commissioners and all other officers not elected by the people, except as otherwise provided by law." *Id.* ch. 1 § 6.

304. Where these officials disagree with a mayoral agency, they have no source of independent public legal advice. In April 1997, for example, the Public Advocate's Office was barred from observing a license-revocation hearing convened by the Taxi and Limousine Commission. *See* Letter from Diane McGrath-McKechnie, Commission Chairperson of the New York City Taxi & Limousine Commission, to Mark Green, Public Advocate (Apr. 25, 1997). This decision to exclude the public advocate's representative was contrary to the Charter mandates of the office and clear legal precedent requiring such proceedings to be open to the public. *See* Matter of Herald Co. v. Weisenberg, 59 N.Y.2d

Nor can the public advocate or any of the other non-mayoral officials go to court without the mayor's approval,[305] because the Charter places the corporation counsel in charge of "all the law business of the City."[306] The courts have long interpreted that provision, and others like it in localities around the state, as restricting an official's power to appear in court without corporation counsel, unless the latter has a conflict of interest, e.g., where the mayor is on the other side of the versus, as in the case of *Green v. Safir*,[307] or the power the official seeks to enforce is one that is "necessarily implied" from the powers of the office.[308] Even in those circumstances, the other officials must search for counsel willing to take the case *pro bono*, until such time as the court ultimately orders the City to pay attorneys' fees;[309] any firm that takes on the mayor takes a big risk by lining up with a government office like the public advocate's against the enormous power of the mayor.[310]

None of these three structural problems is difficult to remedy. The Charter Revision Commission's concern about placing subpoena power in one individual can easily be addressed by authorizing the public advocate to seek prior judicial approval for a subpoena. This could be done through a Charter amendment that either adds the necessary requirements to section 1109, which grants the public advocate the power to seek a judicial

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378 (1983). The public advocate was not able to rely on the assistance of the corporation counsel to notify the Taxi and Limousine Commission ("TLC") of its error. After a very long delay, the TLC impliedly conceded that it could not keep the proceeding secret and produced the tape of the hearing to the public advocate.

305. N.Y. CITY CHARTER ch. 17 § 394(a) (1989), states: "Except as otherwise provided in this chapter or other law, the corporation counsel shall be attorney and counsel for the city and every agency thereof and *shall have charge and conduct of all the law business of the city and its agencies and in which the city is interested.*" (emphasis added).

306. *Id.*

307. 664 N.Y.S.2d 232 (Sup. Ct. N.Y. County 1997); *see also supra* note 70 and accompanying text.

308. *See* Hevesi v. Pataki, 643 N.Y.S.2d 895, 899 (Sup. Ct. N.Y. County 1996) (holding that the comptroller's right to go to court to enforce a settlement between the City and the State was "'necessarily implied' by his power to agree to the settlement in the first place").

309. *See, e.g.*, Lamberti v. Metropolitan Transp. Auth., 565 N.Y.S.2d 111 (App. Div. 1991). The appellate court ordered fees to the public advocate's lawyers in *Green v. Safir*, 664 N.Y.S.2d 232 (Sup. Ct. N.Y. County 1997), *aff'd as modified*, 679 N.Y.S.2d 383 (App. Div. 1998), relying on *Lamberti*.

310. A number of potential *pro bono* counsel have stated off-the-record that they or various partners in their firms were not willing to take a case where the mayor is on the other side for fear of loss of favor or business in other matters. *Cf.* David Firestone, *Giuliani Backs Aide Who Asked Firms to Shun Watchdog*, N.Y. TIMES, Dec. 20 1997, at B1.

"summary inquiry,"[311] or by a provision that authorizes the public advocate to seek a judicial subpoena under New York Civil Practice Law and Rules section 2302.[312]

With regard to the public advocate's funding, a solution is also obvious. Charter section 259 pegs the budget of the Independent Budget Office at ten percent of the executive branch's Office of Management and Budget, thus permitting the IBO to issue independent analyses without fear of fiscal reprisal. The Public Advocate's Office should similarly have a budget that is a specified percentage of another agency, perhaps the Mayor's Office.

Finally, the right to independent legal advice is as essential to good government as it is to citizenship. In our view, the Charter should be amended to require the City Council's advice and consent for a position as essential and powerful as Corporation Counsel and to expressly mandate that this official serve all City elected officials with equal independence and objectivity.[313]

CONCLUSION

At some point in the next year, or the next decade, a new charter revision commission may consider, once again, the allocation of powers in New York City's government. No doubt, the questions addressed by the 1975, 1989, and 1998 Charter Revision Commissions will be revisited: Does the Office of Public Advocate make institutional sense? Does it serve an important and useful function in the City's governance?

We submit that the answer to both questions is "yes." The office continues to meet its historic function of being a counterweight to—and a watchdog over—the mayor. Through the groundbreaking efforts of O'Dwyer, and the expansion by Bellamy, Stein, and Green of the

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311. *See supra* note 185 and accompanying text.

312. During the 1989 Charter Revision Commission proceedings, Commissioner Bernard Richland argued that the public advocate was already authorized to issue a subpoena under the Civil Practice Law and Rules, since section 2302(a) permits issuance of a subpoena without court order by "any member of a board, commission or committee authorized by law to hear, try or determine a matter *or to do any other act, in an official capacity, in relation to which proof may be taken or the attendance of a person as a witness may be required.*" N.Y. C.P.L.R. § 2302(a) (McKinney 1995) (emphasis added). Richland argued that the public advocate's authority to hold hearings necessarily implied his right to issue subpoenas. The Commission never addressed the issue further. Without going that far, the Charter arguably could be amended to expressly state that the public advocate is authorized to get prior approval of a court before invoking that authority.

313. *See also* William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 How. L.J. 539 (1986).

individual grievance-handling to include broad research, investigation, and oversight of the City bureaucracy, the office has truly evolved into a "people's advocate." The cost of sustaining the public advocate— a minuscule $2.4 million of the $34 billion New York City budget (or thirty cents per person per year)—is a very small price to pay for the office's role in maintaining a more open, accountable, and efficient government in New York City.

As a city already sixty percent "minority" becomes more racially and ethnically diverse, there will likely be a backlash against any attempt to eliminate a citywide office that, as the Charter drafters intended, could be a rung on the ladder of government power for a minority candidate.

Thus, because of its long history, its cost-benefit ratio, its obvious record of accomplishments, and its appeal to citywide minority aspirants, the only elected ombudsman in the United States will and should endure as an institutional and political presence in New York City for generations to come.