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## THE CORPORATION COUNSEL'S VIEW OF INDEPENDENT OVERSIGHT OF THE POLICE DEPARTMENT

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## SPEECH

### THE CORPORATION COUNSEL'S VIEW OF INDEPENDENT OVERSIGHT OF THE POLICE DEPARTMENT\*

PAUL CROTTY\*\*

With the Speaker of the City Council<sup>1</sup> coming before this audience today, I thought it would be important to have another point of view on the topic of separation of powers in the City government. This is an important issue. In the press it is portrayed as acrimonious and divisive, but it is not.

Between the two branches of government, the legislative branch and the executive branch in the city of New York, there is, I think, a healthy tension. This tension is inherent in the division of power and produces a dynamic that is beneficial to all.

Our "separation of powers" in City government is not quite as clear as that under the Federal Constitution, but we have a Charter,<sup>2</sup> and the phrase I like to use with Deputy Mayor Powers<sup>3</sup> is: Is it "chartertutional" or "unchartertutional"?

In addition to our Charter, we have the state Municipal Home Rule Law,<sup>4</sup> we have the state Finance Law<sup>5</sup> and we have various local laws; so it is not always clear where power lies for a particular purpose in the City. But it is clear that, in the last analysis, power always exists someplace—and for it to be properly exercised it has to be accountable.

As part of the healthy tension I have described, there arise from time to time some especially contentious issues. We have one of those issues

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\* Mr. Crotty delivered these remarks extemporaneously at a symposium sponsored by the New York Law School Law Review in conjunction with the New York Law School Center for New York City Law on March 30, 1995 entitled *Police Corruption, Municipal Corruption: Cures at What Cost?* [hereinafter Symposium]. The footnotes accompanying these remarks were added by the editors of the New York Law School Law Review.

\*\* Corporation Counsel for the City of New York.

1. Peter F. Vallone, Speaker of City Council. Mr. Vallone spoke at the Symposium advocating the City Council's Independent Police Investigation and Audit Board.

2. N.Y. CITY CHARTER (Williams Press 1986 & Supp. 1995).

3. Peter J. Powers, First Deputy Mayor under Mayor Rudolph W. Giuliani.

4. N.Y. MUN. HOME RULE LAW art. 1, *et seq.* (McKinney 1994).

5. N.Y. STATE FIN. LAW art. 1, *et seq.* (McKinney 1989 & Supp. 1995).

before us right now. This particular issue arises from an assertion of power by the Council<sup>6</sup> where we believe no power exists.<sup>7</sup>

I was lucky enough to hear some of the remarks that the Speaker of the City Council made here earlier. He said that Mayor Giuliani was at risk of creating a misimpression that he is above the law.<sup>8</sup> The Speaker said that the Mayor's actions send a chilling message to all citizens who expect elected officials to not only uphold laws but to obey them as well.<sup>9</sup> And I must tell you that the Mayor, of course, takes his oath of office very, very seriously. He has pledged to uphold the law.

And just as the law is binding on the Mayor, it is binding on the City Council as well. For example, in November the Council tried to adopt its own budget in mid-year.<sup>10</sup> We had to ask a court to remind the City Council that it was not empowered to enact its own budget in the middle of the year.<sup>11</sup> It can do that at the beginning of the fiscal year, but in the middle of the fiscal year its powers are more limited.<sup>12</sup> As you probably know, the court annulled the Council's actions.<sup>13</sup>

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6. In January, 1995 the Council enacted Local Law No. 13 which created the Independent Police Investigation and Audit Board. This Board was to be made up of five members, two of whom would be appointed by the Council, two by the Mayor, and the fifth member to be jointly appointed by the Mayor and the Speaker of the City Council. N.Y., N.Y., Local Law 13 §§ 1, 450 (Jan. 19, 1995).

7. Because the Council, under Local Law 13, is empowered to appoint two of the five members of the Independent Police Investigation and Audit Board, the Council attempted to curtail the Mayor's power under the New York City Charter to appoint "the heads of administrations, departments, all commissioners and all other officers not elected by the people, except as otherwise provided by law." *Compare* N.Y., N.Y., Local Law 13 § 450 (Jan. 19, 1995) with N.Y. CITY CHARTER ch.1, § 6 (Williams Press 1986 & Supp. 1995).

8. See Peter F. Vallone, Speech: *The City Council's View of Independent Oversight of the Police Department*, 40 N.Y.L. SCH. L. REV. 13 (1995).

9. *Id.* at 17.

10. See *Council of New York v. Giuliani*, 163 Misc. 2d 681, 691-92. (N.Y. Sup. Ct. 1994) (holding that the Council's attempt to adopt budget modifications mid-year was unlawful).

11. *Id.* (holding that the City Council can only enact a budget in the middle of the year if the Mayor initiates a budget modification proposal).

12. *Id.* at 684-85. The court stated that at the beginning of the fiscal year, the Council has the authority to "increase, decrease, add or omit any unit of appropriation for personal service or other than personal service" and may override a mayoral veto of those changes within ten days. *Id.* at 685. In the middle of the fiscal year, the Council's power is limited to disapproval of budget modifications within thirty days of the stated meeting following the receipt of notice. *Id.*

13. *Id.* at 691-92

The division of power between the Mayor and the Council is important, and it is important to maintain that division of power if we want to have a system of government that is wise and can survive the test of time.

With regard to the independent commission which the City Council has created, I think that it is important to remember that the five District Attorneys—the five elected District Attorneys in New York City, one from each county—and the two U.S. Attorneys, have all gone on public record to state that the City Council's legislation is not the best exercise of the City Council's power. The Speaker of the City Council passes that off as a parochial concern about funding and resources and suggests that they are just concerned about who is going to have power.<sup>14</sup> However, the fact of the matter is that when seven prosecutors, each of whom is independent, say that there is something wrong,<sup>15</sup> I think all of us ought to stand back and say, maybe they are right. This is part of a dialogue that ought to go on in public.

It is not necessarily divisive to allow for debate, and I think that the City Council ought to listen to such objections. However, rather than deal with those objections, the City Council's bill has simply proposed a series of protocols to be executed after the law takes effect.<sup>16</sup> Protocols are designed to instill cooperation. But the fact of the matter is that you cannot legislate cooperation in order to resolve the complicated law enforcement issues raised by the prosecutors.<sup>17</sup> We ought to have a careful construct and—rather than just saying, "We can't think this out, go figure it out yourself and adopt a protocol," which is essentially what the legislation does—we would prefer to pursue this matter on a more careful basis.

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14. See Vallone, *supra* note 8.

15. Leonard Levitt, *Police Actions Speak Volumes*, N.Y. NEWSDAY, Oct. 17, 1994, at 20.

16. Local Law 13, which created the Independent Police Investigation and Audit Board, recommends that protocols with the Police Department, District Attorneys and Civilian Complaint Review Board be established, whereby information shall be exchanged and cooperation facilitated between the Board and the various law enforcement agencies. N.Y., N.Y., Local Law 13, § 457(a)-(c) (Jan. 19, 1995).

17. Levitt, *supra* note 15, at A20 (stating that the District and U.S. Attorneys fear that investigations by the Independent Police Investigation and Audit Board will interfere with their own investigations). In his message accompanying the veto of Local Law 13, Mayor Giuliani explained that the common concern of the prosecutors is that the broad investigative powers of the Board will pose serious conflicts among the police, the City, and others combatting and investigating corruption, as well as present safety risks. *Mayor's Veto Message, excerpted in* N.Y. TIMES, Dec. 24, 1994, § 1, at 28.

Now, I think that there is substantial agreement between the Mayor and the Council on a number of important aspects of this issue. First of all, we believe, as the Mollen Commission<sup>18</sup> believed and as the City Council says it believes in its legislative findings, that a large majority of the members of the Police Department are decent men and women who are pledged to the rule of law, and who believe in carrying out their functions with honesty, honor, valor and integrity. We agree with that.

We also agree that the hazards of corruption are great and that there has to be a vigilant monitoring of those efforts to ensure that corruption is nipped in the bud. I think the Mollen Commission, the Mayor, and the City Council acknowledge that in the past there have been some deficiencies and that there has to be a renewed commitment from time to time to make sure that there is a vigorous, ongoing anti-corruption effort in the Police Department.

After all, as Commissioner Murphy suggested earlier today,<sup>19</sup> it is vital to our democracy to have a well maintained police force which represents the community view as to how its laws, democratically adopted, should be enforced.<sup>20</sup> Integrity is critical, and I am glad that the Council, the Mayor, and the Mollen Commission agree on this important point. The question now is, how is that to be served? We believe that it is best served by the terms of the Mayor's Executive Order 18.<sup>21</sup>

The Speaker of the City Council quoted from that portion of the Executive Order which says the Police Department remains responsible for conducting investigations of specific allegations of corruption made against the Department,<sup>22</sup> and that the Commission

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18. The Mollen Commission was created in July, 1992, pursuant to Executive Order 42 of then-Mayor David N. Dinkins, to investigate the nature and extent of corruption in the Police Department, to evaluate the Department's procedures for preventing and detecting corruption, and to recommend changes and improvements. N.Y. CITY COMM'N TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROC. OF THE POLICE DEP'T, COMM'N REP. 1 (July 7, 1994) (Milton Mollen, Chair) [hereinafter MOLLEN COMM'N REP.].

19. Patrick V. Murphy was New York City Police Commissioner from 1970 to 1973. Mr. Murphy spoke at the Symposium on March 30, 1995. See Patrick V. Murphy, Speech: *Police Corruption and the Need for Leadership*, 40 N.Y.L. SCH. L. REV. 65 (1995).

20. See *id.*

21. N.Y., N.Y., Exec. Order 18 (Feb. 27, 1995) (establishing a five-member commission, appointed by the Mayor, to investigate possible corruption within the Police Department).

22. Vallone, *supra* note 8, at 19-20 (quoting N.Y., N.Y., Exec. Order 18, § 3(b)).

shall not investigate such matters except where the Commission and the Commissioner of the City Department of Investigation, with the approval of the Mayor, determine that exceptional circumstances exist in which the assessment of the Police Department's anti-corruption systems requires the investigation of an underlying allegation of corruption made against Police Department personnel.<sup>23</sup>

And, I think, the Speaker of the Council, after having read those provisions said, "Come on." Well, I will agree with him. I say, "Come on" too. "Come on and let's get real." "Come on and let's analyze the facts."

The fact of the matter is that in the division of power that exists, power has to be accountable. And while the Speaker of the Council talks about the independence of this commission that he has created, the fact of the matter is that it is independent of the Mayor, it is independent of the City Council, it is independent of everyone, and therefore is not accountable.

If we look back at the successes of the Mollen Commission, I think all of us will recognize that it was appointed by the Mayor and it was independent of the Police Department—but it was not independent of the Mayor.<sup>24</sup> Unlike the Mollen Commission and the commission that the Mollen Commission suggested ought to be continued,<sup>25</sup> the Independent Police Investigation and Audit Board,<sup>26</sup> with members evenly appointed by the City Council and the Mayor,<sup>27</sup> is independent of the Mayor and independent of the City Council.<sup>28</sup> It exists on its own.

It is fine to have the Board independent of the Police Department; no one quarrels with that. However, should it be independent of the Mayor? It is the Mayor who under the Charter is charged with ensuring efficiency

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23. N.Y., N.Y., Exec. Order 18, § 39(b) (Feb. 27, 1995).

24. N.Y., N.Y., Exec. Order 42, § 2 (July 24, 1992) (establishing the Mollen Commission, in which the five members of the Commission were appointed by then-Mayor David N. Dinkins).

25. MOLLEN COMM'N REP., *supra* note 18, at 152-154 (recommending the creation of a permanent external police commission independent of the Police Department, while still remaining accountable to and appointed by the Mayor).

26. *See* N.Y., N.Y., Local Law 13, § 450 (Jan. 19, 1995).

27. *Id.*

28. *See generally* N.Y., N.Y., Local Law 13 (Jan. 19, 1995) (enumerating the powers of the Independent Police Investigation and Audit Board and specifically granting the Board the power to undertake independent investigations of possible police corruption).

and integrity in government.<sup>29</sup> It is the Mayor who appoints the Police Commissioner.<sup>30</sup> The Independent Police Investigation and Audit Board, appointed in part by the City Council<sup>31</sup> is in derogation of those duties and responsibilities.<sup>32</sup> It is in derogation of the Mayor's powers.

Under the City Charter, and under the state Municipal Home Rule Law,<sup>33</sup> a local law which would curtail the power of the Mayor or of another elected office-holder requires the approval of the electorate.<sup>34</sup> In other words, it must be approved by referendum.<sup>35</sup> So our objection to this bill enacted by the City Council, and a key reason for the Mayor's

29. N.Y. CITY CHARTER ch. 1, § 8(a) (Williams Press 1986 & Supp. 1995):  
The mayor shall be responsible for the effectiveness and integrity of city government operations and shall establish and maintain such policies and procedures as are necessary and appropriate to accomplish this responsibility including the implementation of effective systems of internal control by each agency and unit under the jurisdiction of the mayor.

*Id.*

30. *See* N.Y. CITY CHARTER ch. 18, § 431(a) (Williams Press 1986 & Supp. 1995) (empowering the Mayor to appoint a Police Commissioner).

31. N.Y., N.Y., Local Law 13, § 450 (Jan. 19, 1995).

32. *Compare id.* (allowing the City Council to appoint two members to the Independent Police Investigation and Audit Board) *with* N.Y. CITY CHARTER, ch. 1 §§ 6(a), 8(a) (Williams Press 1986 & Supp. 1995) (empowering the Mayor to establish policies and procedures in order to uphold his responsibility for the effectiveness and integrity of City government operations, and to appoint the heads of administrations, departments, all commissioners, and all other unelected officials).

33. N.Y. MUN. HOME RULE LAW art. 1, *et seq.* (McKinney 1994).

34. *See* N.Y. CITY CHARTER ch. 2, § 38 (Williams Press 1986 & Supp. 1995) Section 38 states that:

[a] local law shall be submitted for the approval of the electors at the next general meeting . . . and shall become operative as prescribed therein only when approved at such election by the affirmative vote of a majority of the qualified electors of the city voting upon the proposition, if it:

. . .

5) Abolishes, transfers or curtails any power of an elective officer.

*Id.* *See also* N.Y. MUN. HOME RULE LAW art. 3, § 23(2) (McKinney 1994) ("Except as otherwise provided by or under authority of a state statute, a local law shall be subject to mandatory referendum if it . . . (f) Abolishes, transfers or curtails any power of an elective officer.").

35. *Id.*

veto,<sup>36</sup> is that the Mayor's power under Charter section 6 to appoint all officers of the City would be curtailed.<sup>37</sup>

In addition, the power of the Mayor to run the Police Department would be curtailed. The power of the Police Commissioner, a mayoral appointee,<sup>38</sup> to be responsible for corruption would be curtailed—notwithstanding statements of legislative intent in the bill to the contrary.<sup>39</sup> While all these forms of curtailments may be lawful if submitted to a referendum, they cannot be accomplished by the City Council alone without the approval of the electorate.<sup>40</sup>

The Speaker of the Council talked about Council appointments to the Board of Correction<sup>41</sup> as a precedent for the type of appointment structure set forth in the Council's bill.<sup>42</sup> Well, I would just like to point out two things. First of all, the Council's power to appoint members of the Board of Correction was established pursuant to the 1975 Charter amendments,<sup>43</sup> which were submitted to the vote of the electorate.<sup>44</sup>

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36. Jonathan P. Hicks, *Mayor Vetoes Bill Creating a Panel to Monitor Police*, N.Y. TIMES, Dec. 24, 1994, at 1 (noting Mayor Giuliani's opposition to Local Law 13 which established the Independent Police Investigation and Audit Board).

37. See N.Y. CITY CHARTER ch. 1, § 6(a) (Williams Press 1986 & Supp. 1995). Section 6(a) empowers the Mayor to appoint the heads of administrations, departments, all commissioners and all other officers not elected by the people except as otherwise provided by the law. Under Local Law 13, the City Council would be entitled to appoint two of the five members of the Independent Police Investigation and Audit Board. *Id.*

38. N.Y. CITY CHARTER ch. 18, § 431(a) (Williams Press 1986 & Supp. 1995) (empowering the Mayor to appoint a Police Commissioner).

39. See N.Y., N.Y., Local Law 13, § 456 (Jan. 19, 1995) (stating that "[t]he provisions of this chapter shall not be construed to limit or impair the authority of the police commissioner to investigate corruption within the department, or to discipline members of the department.>").

40. See *supra* note 34.

41. Vallone, *supra* note 8. In the transcript of his Symposium remarks, Mr. Vallone responded to a question by saying that the "City Council [does] have the authority to make direct appointments [and that they] already make appointments" to the Board of Correction. Peter F. Vallone, Symposium Transcript: *Police Corruption, Municipal Corruption: Cures at What Cost?* 168-69 (Mar. 30, 1995) (copy on file with the *New York Law School Law Review*).

42. N.Y. CITY CHARTER ch. 25, § 626(a) (Williams Press 1986 & Supp. 1995) (giving the City Council the power to appoint three members to the Board of Correction). See Annette Gordon-Reed, *Watching the Protectors: Independent Oversight of Municipal Law Enforcement Agencies*, 40 N.Y.L. SCH. L. REV. 87 (1995) (comparing the Board of Corrections to the City Council's and the Mayor's proposals for independent oversight boards for the police).

43. See N.Y. CITY CHARTER ch. 25, § 626 (Williams Press 1986 & Supp. 1995).

Second, the Board of Correction does not exercise executive powers.<sup>45</sup> By contrast, the Council's oversight commission would exercise important executive powers with regard to corruption prevention.<sup>46</sup>

These issues of curtailment probably would not arise if the City Council felt that the Police Commissioner was not doing a good job on narcotics and sought to remove narcotics enforcement from his jurisdiction or wished to create an independent panel to examine narcotics law enforcement and deployment strategies. None of those actions would involve the Council directly in the performance of an executive function. But here the City Council apparently believes it is empowered under the Charter to make direct appointments to a body which would fight police corruption through on-street investigations.<sup>47</sup> The limitations on the Council's power in this area are expressly set forth in the Charter<sup>48</sup> and are important because they reflect the fundamental principle that it is the Mayor, as the City's chief executive, who is accountable for the performance of City officers and City agencies.<sup>49</sup> The issue is thus vitally important to the proper governance of the City of New York.

I would also like to talk a little bit about the allocation of resources. This new commission, if it comes into existence, will have a five-member

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44. See N.Y. CITY CHARTER ch. 2, § 38(5) (Williams Press 1986 & Supp. 1995).

45. See N.Y. CITY CHARTER ch. 25, § 626 (Williams Press 1986 & Supp. 1995) (empowering the Board of Correction to inspect facilities, inspect records of the department, propose improvements, evaluate performance, report findings and recommendations to the Mayor, establish standards and procedures and conduct public or private hearings and investigations within the jurisdiction of the department).

46. N.Y., N.Y., Local Law 13, § 451 (Jan. 19, 1995) (empowering the Independent Police Investigation and Audit Board to assist the Police Department to formulate and implement policies and programs to detect and eliminate corruption, and the power to undertake independent investigations of possible corruption within the Police Department); see also *id.* § 450(a) (giving the City Council power of appointment to the Independent Board).

47. See *id.* § 451(a)(3) (describing the Independent Police Investigation and Audit Board's power to "undertake independent investigations of possible corruption within the police department"); see also *id.* § 451(a)(4) (giving the Board further power to "undertake investigations of possible corruption within the police department at the request of the mayor or the police commissioner.").

48. N.Y. CITY CHARTER ch. 2, § 29 (Williams Press 1986 & Supp. 1995) (listing the City Council's powers of investigation and oversight and excluding any mention of the power to make appointments); see also *id.* ch. 1, § 6(a) (giving the Mayor the power to appoint the heads of administrations, departments, all commissioners and all other unelective officials).

49. *Id.* ch.1, § 8(a) (which states that the Mayor is responsible for the effectiveness and integrity of City government).

board.<sup>50</sup> It will also have a staff.<sup>51</sup> How large will that staff be? Well, it may have ten, it may have fifteen, perhaps it is even going to have twenty-five staff members.

As you know, the City does not have an awful lot of money to spend. I think it is fair to say that our resources are somewhat depleted these days. I think it is also fair to say that the resources allocated to the Independent Commission created by the City Council will never be as large as the resources in the possession of the five District Attorneys, the U.S. Attorneys for the Southern and Eastern Districts of New York, and the Police Department, which has over five hundred police officers assigned to the Internal Affairs Bureau and a vast network of agents who monitor corruption on an ongoing basis.

I would also like to point out that over the last eighteen months the city of New York has had a remarkable record of reducing crime.<sup>52</sup> The Speaker of the City Council is correct in saying that the Council played a major role in providing the resources for the hiring of additional cops—and they are to be commended for that.<sup>53</sup> However, the Council cannot claim any credit, and it does not in fact seek to claim credit, for how those resources are deployed. That is a matter peculiarly within the power of the Police Commissioner.<sup>54</sup>

New York City Police Commissioner William Bratton, utilizing the powers that he has, has done a terrific job in deploying the manpower he has on hand to produce a more effective crime control strategy. There is nothing to suggest that he is not going to be just as vigorous in this area of corruption—corruption monitoring and educating the men and women in the Police Department about corruption hazards.

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50. N.Y., N.Y., Local Law 13, § 450 (Jan. 19, 1995).

51. *See id.* § 453 (stating that “[t]he board is authorized, within appropriations available therefor, to appoint such employees as are necessary to exercise its powers and fulfill its duties.”).

52. *See Clifford Krauss, Bratton Builds His Image As He Rebuilds the Police*, N.Y. TIMES, Nov. 19, 1994, at 1 (stating that homicides were down 18% that year from last, while robbery and auto thefts are down 15%. Shooting incidents dropped 16% citywide and 780 fewer people had been killed or wounded by gunfire).

53. *See Vallone, supra* note 8, at 14 (stating that the City Council legislated the “Safe Cities, Safe Street” program that put more than 6000 cops on the streets).

54. N.Y. CITY CHARTER ch. 18, § 434 (1986 & Supp. 1993) (empowering the Police Commissioner to have control of the government, administration and discipline of the Police Department, and of the police force, and to be the chief executive officer of the police force).

Commissioner Bratton has already begun important initiatives in this area,<sup>55</sup> and we believe that they ought to be given time to be carried out. The responsibility for fighting corruption is now and will always be a matter for the Police Department. After all, when you think about it, a commission with five members and a staff of fifteen to twenty-five cannot be nearly as effective as a diligent and vigorous Police Commissioner.

The Mayor's Executive Order recognizes this.<sup>56</sup> The Independent Commission appointed under the Executive Order has as its primary function to make sure that the Police Department has an effective, ongoing anti-corruption effort.<sup>57</sup> This will be accomplished through vigorous monitoring and periodic investigations.<sup>58</sup> The City Council's bill provides for just the reverse. It does not focus so much on the monitoring function. Instead, it emphasizes active ongoing investigations.<sup>59</sup>

Compare for a moment the resources that are available to the Council's independent oversight board and the Police Department.<sup>60</sup>

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55. See Krauss, *supra* note 52, at 1 (describing new initiatives introduced by Police Commissioner Bratton, such as replacing existing commanders, revamping uniforms and computer systems, and giving his precinct commanders responsibilities previously left to citywide units).

56. Pursuant to Executive Order No. 18 § 3(b), the Police Department remains responsible for investigating specific allegations of corruption made against Police Department personnel. The Commission shall not investigate such matters except where the Commission and the commissioners of the City Department of Investigation, with the approval of the Mayor, determine that exceptional circumstances exist in which the assessment of the Police Department's anti-corruption systems requires the investigation of underlying allegations of corruption made against Police Department personnel. N.Y., N.Y., Exec. Order 18 § 3(b) (Feb. 27, 1995).

57. *Id.* § 2 (describing the Police Commissioner's duties to monitor both the performance of anti-corruption systems and agency conditions).

58. *Id.*

59. In addition to empowering the Independent Police Investigation and Audit Board to "perform assessments and audits of the police department's internal systems for detecting, investigating and preventing corruption among uniformed and civilian members of the police force and make recommendations for the improvement of those systems" and to "assist the police department to formulate and implement policies and programs to detect and eliminate corruption," Local Law 13 also empowers the Board to "undertake independent investigations of possible corruption within the police department; and undertake investigations of possible corruption within the police department at the request of the Mayor or the Police Commissioner." N.Y., N.Y., Local Law 13, § 451(1)-(4) (Jan. 19, 1995).

60. See *A Useful Deterrent to Corrupt Cops*, N.Y. TIMES, Dec. 1, 1994, at A32 (stating that "[t]he Police Department's Internal Affairs Division is a gargantuan operation, with enormous resources and a staff of approximately 500. The Audit Board is envisioned as a modest shop, with a staff of 13 and a budget of only \$1 million a

Consider also the potential for difficulties with other law enforcement agencies. This is why the District Attorneys and the U.S. Attorneys have all criticized this proposal<sup>61</sup>—they say it is going to be a land mine for potential squabbles, for ongoing jurisdictional battles, and for potentially great conflict.<sup>62</sup>

I do not think you could run a proper investigation under the City Council's proposal. The Council's commission would conduct an investigation without necessarily informing the Police Commissioner and without knowing whether the Police Commissioner himself, through the Internal Affairs Bureau, might already be conducting an investigation in that particular area. This is not a matter that can be straightened out by directing that the District Attorneys enter into protocols. Long before there is a referral to the District Attorney, the Internal Affairs Bureau may be conducting its own investigation. Unless there is disclosure, there is real potential for a dangerous clash between investigations.

Let me emphasize: Without letting the Internal Affairs Bureau or the Police Commissioner know of an investigation, and without some prior notice to the Department of Investigation, you may very well have this Independent Commission created by the City Council having their investigators going out against sworn police officers who are armed. The potential here for difficulty is very, very great. This is an important reason why the Mayor has opposed the City Council's initiative.

I think that the Speaker also suggested that the Mayor is acting on his own here.<sup>63</sup> I would like to think that after the years that I have spent in public service and in private practice, I can examine a piece of legislation and come to an independent determination as to whether or not it passes muster under the City Charter; whether it is "chartertutional" or "unchartertutional." The Law Department,<sup>64</sup> without any urging from the Mayor other than to look at the bill and give it our best opinion, has come to an independent conclusion that this bill, as enacted by the City

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year.").

61. Levitt, *supra* note 15, at A20.

62. See *Mayor's Veto Message*, *supra* note 17.

63. See Vallone, *supra* note 8, at 17 (stating that "[u]nfortunately the Mayor . . . chose to ignore the law and replaced the independent panel with one under his control. By doing this, he risks giving the impression that he is above the law.").

64. The Law Department was created under chapter 17 of the N.Y. City Charter and is empowered to "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." N.Y. CITY CHARTER ch. 17, § 394 (Williams Press 1986 & Supp. 1995).

Council, curtails mayoral powers<sup>65</sup> and therefore cannot take effect as part of the Charter of the city of New York without approval by the voters at referendum.<sup>66</sup>

We would hope that the conversations, to which the Speaker of the City Council referred, will continue.<sup>67</sup> But if we are not successful in those discussions, then we will have to resort to the courts.<sup>68</sup> It is a by-product of the healthy tension I described and battles between the legislature and the executive, whether at the federal, state, or local level, are sometimes resolved this way. And we, of course, will abide by the court's decision.

But I think that before it goes forward, the City Council ought to reconsider its bill, reconsider how appointments are made and reconsider how it proposes that investigations are to be conducted. They will find that, first of all, they do not have the power to make these appointments, and secondly, that the bill contemplates an investigation structure which is not the wisest and best use of resources.

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65. See *Mayor's Veto Message*, *supra* note 17 (where the Mayor acknowledged that he had been advised by the Corporation Counsel that the provisions of the bill would intrude on the operations of the executive branch).

66. See *supra* note 34.

67. According to a telephone interview with Richard Weinberg, Chief Counsel to the New York City Council, the City Council and the Mayor are negotiating to amend the Council's proposal in order to address the Mayor's concerns. Telephone Interview with Richard Weinberg, Chief Counsel of the New York City Council (Oct. 11, 1995).

68. Since this speech was delivered, the issue has been litigated. In *Mayor of New York v. Council of New York*, the New York State Supreme Court invalidated Local Law 13 because it would otherwise serve to curtail the Mayor's appointment power. *Mayor of New York v. Council of New York*, No. 402354, 1995 WL 478872 (N.Y. Sup. Ct. June 30, 1995), *appeal docketed*, No. 95-3710 (1st Dep't N.Y. App. Div. Nov. 16, 1995).