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1989

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Recommended Citation

Eric Lane, *The Practical Lessons of Charter Reform*, 37 Proceedings of the Academy of Political Science 31 (1989)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/595

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The Practical Lessons of Charter Reform

ERIC LANE

In November 1986, a federal district court judge declared the scheme of voting on New York City's Board of Estimate to be in violation of the constitutional doctrine of one person, one vote.¹ Mayor Edward I. Koch immediately appointed a charter revision commission, which defined its task broadly. It decided not only to examine alternative voting plans for the Board of Estimate but also to study whether other institutions could better perform the board's myriad powers, which include all final land-use and franchising decisions, the approval of certain types of contracts, and joint responsibility with the City Council for passing the budget. Richard Ravitch, then chairman of the Bowery Savings Bank and formerly head of the Metropolitan Transportation Authority and earlier the New York State Urban Development Corporation, was named chair of the commission by the mayor, who then added fourteen members, representing much of the city's geographic, demographic, and political diversity.

I was named the commission's executive director and counsel after several meetings with its chair, during which we discussed the extensive powers granted the commission by state law and the special opportunity it was being given to rewrite the city's governing document, or what was regularly referred to by some as the city's "constitution." Indeed, during the early proceedings, many members of the commission and its staff were infected by what one commissioner characterized as the "constitutional spirit" of our undertaking.

Now, however, more than two years have passed since the commission postponed its major reform efforts to await a decision of the United States Supreme Court, which took jurisdiction in the initiating case. Time has not dampened my enthusiasm for the task or diminished my sense of its importance (in fact, this sense has been enhanced by what I have learned), and it has forced me to refocus my attention from the hoped-for clean path of constitutional reform to a much

This essay, first published in 1988, does not reflect events since it was written. Reprinted, with minor stylistic changes, from *Urban, State and Local Law Newsletter* 11 (Summer 1988): 1, 17-18. Used with permission.

more thorny route of legal brambles and political prickles. From this focus I draw a series of lessons.

First, before you begin, know your limitations. Municipalities, for better or worse, continue to be legal dependencies, subject to numerous and frequently illogical state constitutional and statutory restraints. New York State's constitution, for example, contains home-rule provisions that are mandated to be read liberally but are interpreted narrowly. Furthermore, the state has adopted a local government bill of rights that promises much but delivers little. Thus, while the written law provides for municipalities "to have powers to adopt local laws" at least "relating to its property, affairs or government," and the state is constrained from regulating in these areas, except through general law, the power granted the state under this exception is, with judicial approval, frequently and liberally exercised. This leaves the municipality far less discretion in its affairs than may at first glance be imagined. This is particularly true for New York City, which everyone in state government wants to govern from afar. Examples abound, but a few will demonstrate the point.

The commission intends to reform New York City's arcane and inefficient procurement practices. Under the charter, all contracts over \$15,000 have to be let under a system of competitive sealed bids (unless a different method is approved under special circumstances by the Board of Estimate). This is of particular significance in New York City, where \$5 billion – one-quarter of the city's annual expenditures – is made through contracts. Three billion dollars is bid competitively. Many members of the commission consider this reliance on competitive sealed bids to be far too restrictive and wish to modernize the process through the introduction of other forms of competitive procurement and a reduction in the powers of the Board of Estimate. However, despite these exigencies and a consensus for reform, the commission must still contend with a state law that (except where a grandfather clause applies, as it does now for New York City) requires competitive sealed bidding for amounts substantially lower than currently in the charter.

A second example of our limitations is the state-imposed restriction on municipalities that seems to prevent them from restructuring their legislative bodies more than once a decade. This restriction potentially placed some limitation on the commission's goal of increasing the size of the council by reducing the size of each district. In New York City each council district has a population of 212,000, the largest in the United States, and the commission generally thinks that smaller districts will create more responsive representation and afford more election opportunity to the city's racial and political minorities. The pitfalls of this statute may be avoided by having the effective date of any such change fall in the next decade. Other examples were found in almost every substantive area of commission attention and even permeated the procedures for the commission's operations.

Second, while you are concerned about state law, do not forget to consider federal law. Early in the life of the commission, we became aware that any proposal

the commission might adopt to change the structure of the Board of Estimate, its voting scheme, or its powers would have to be subject to U.S. Justice Department preclearance under section 5 of the Voting Rights Act of 1965. Moreover, we were concerned that many of the proposals before the commission might not receive such preclearance, nor be sustained in an action under section 2 of that act. Additionally, questions were raised under section 2 about the present board. A particular concern was whether weighted voting plans for the Board of Estimate submerged minority voting power in New York City, thus frustrating minorities' ability to participate in the political process and to elect representatives of their choice. Members of the commission were initially skeptical that the prohibitions of the act could apply to our work. After the presentation of opinions of five different legal experts, countless discussions on the matter, and a rending public debate with affected political figures, the members finally accepted the view that the adoption of any such plan would create an unacceptable risk. Nevertheless, at the time the commission postponed its consideration of alternatives to the Board of Estimate, it was still examining the impact of the Voting Rights Act on a series of alternatives that transferred the powers of the board to various other governmental institutions and officers.

Third, while you are considering state and federal law, do not forget to take into account politics. Changing the structure of a municipal government means affecting the power of its elected and appointed officers. Whether such change enhances or diminishes the power of such officials, it will generally disturb them, requiring enormous time, effort, and finesse to secure support or neutrality – if you want either. At the time the commission postponed its deliberation on structural reforms, all the proposals of its chairman were under assault by at least some elected officials, and his proposals were often found troublesome by many officeholders. This is particularly unpleasant because in New York City, at least, such matters quickly get personalized and also because charter proposals must be approved at a referendum.

Additionally, charter issues are frequently part of the agendas of those vying for political power (a perfectly legitimate and appropriate effort) and always part of the agendas of civic groups advocating their views of good government. Thus, many resources must be directed to considering all their interests and demands, the moderation of which is an exact art, recognized only in hindsight.

Fourth, while you are concerned about state law, federal law, and politics, do not forget to take into account the need for good government. The term *good government* reminds me of Oliver Wendell Holmes's apt phrase "delusive exactness." All the many groups and individuals who appear before, talk with, or lobby the commission, its members, and staff are for good government. Most of them are persuasive, and most of them disagree. While some of their positions, as well as the commissioners', cannot withstand research or logical reasoning, others – often competing ones – frequently make good sense. This leaves the question of how a commission's judgments are to be formed. Exhaustive research and analysis, experience,

instinct, intuition, faith in the deliberative process, and the ability to tolerate a residuum of self-doubt seems a good place to start. There is, of course, also the assurance that the electorate will make the final decision.

NOTE

1. *Morris v. Board of Estimate*, 647 F. Supp. 1463 (1986). This case was subsequently affirmed by the United States Court of Appeals for the Second Circuit, 831 F.2d 384 (1987) and by the United States Supreme Court, 489 U.S. 103 (1989).