VOLUME 53 | 2008/09

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Reflections on My Years as Corporation Counsel

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Ed Koch, the 105th mayor of the city of New York who appointed me Corporation Counsel, often said that the two most important positions in city government were the director of the Bureau of the Budget and the Corporation Counsel. The budget director is the more obvious of the two, especially during a fiscal crisis as in the early years of the Koch administration. The importance of the Corporation Counsel was also related to fiscal concerns. The Corporation Counsel's job was, among other things, to protect New York City from predators who wanted to pick its pockets, to recover money from those who might owe it, and to help ensure the success of the administration's growth policies.

But the reasons the Corporation Counsel played such a central role in city government went well beyond fiscal concerns. By the time I became Corporation Counsel, the law, courts, and lawyers were well established as central actors in public policy. The civil rights movement, the women's movement, the gay rights movement, the environmental movement, and other social causes all did their part in ensuring that law and policy were inextricably bound. Every policy issue, it seems, had a legal component. Most legal issues had serious policy consequences. The Corporation Counsel's office operated at the intersection of law and policy.

At the same time that law and the courts were instruments of social change, they were also instruments to limit the reach of government and to control it. Much of what the city did or wanted to do was constrained by a law or a rule or a regulation or a court decision or decree—the operation of the jails, the placement of children in foster care, the use of undercover police officers, the length of time a suspect could be held after arrest before bringing him to a magistrate, the reconstruction of the West Side Highway, building a new office tower on Columbus Circle, the provision of services to children with special needs in the public schools. And much more.

I had questions about these developments. I did not think that in general it was a good thing for the courts to have such a substantial role in the day-to-day operation of city government. I thought the elected officials and their appointees should be doing that. But I also believed that the courts played a necessary role in ensuring that government agencies lived by the laws that governed their actions, including most especially the constitutions and laws of the United States and the state of New York. One of the hardest parts of my job as Corporation Counsel was to deal with the tensions created by these conflicting perspectives.

The Corporation Counsel is the city official charged, at least in the first instance, with interpreting the laws and advising city officials what is permissible and what is not. In addition, under the City Charter, the Corporation Counsel and those he appoints are the only people authorized to represent New York City and its agencies in court. This power under the Charter has major consequences for the governance of the city. Because New York City is required to speak with only one voice, and because that voice is the Corporation Counsel's, it is incumbent on him to resolve conflicting legal positions, if there are any, among the several agencies and officers of city government.

Under the City Charter, all the city's legal business is placed in the hands of the Corporation Counsel. If the mayor disagrees with a legal position that the Corporation Counsel wants to take, the mayor can try to persuade the Corporation

Counsel that he is wrong. Ultimately the mayor can fire the Corporation Counsel. But he cannot substitute his legal judgment for the Corporation Counsel's.

It was not possible to be in the Corporation Counsel's office without feeling the weight of this responsibility. It was an article of faith that the authority vested in the office had to be exercised in a manner that gained and kept the respect of all the city officials—even when the office's decisions and actions were contrary to the desires of some. Without this continuing respect, the office could not successfully exercise its authority, no matter what the Charter said.

In operation, this meant two things for the office. First, the Corporation Counsel had to be independent. By "independent" I mean the office had to be willing to issue opinions and litigate matters without regard to the political needs or preferences of city officials. In other words, our client was the city of New York and not any of its individual officers. Second, the office had to be of the highest professional quality. Its legal analyses had to be seen as excellent—otherwise they would lose their force.

This is the office I inherited from my predecessors and the office I hoped to leave to my successors. Others will judge whether I succeeded. However, I would like to reflect on three challenges I faced during my tenure—one at the very beginning of my term, one in the middle, and one at the end. In each of these situations, the office operated at the intersection of law and policy and was an active participant in the shaping of public policy.

CAMPAIGN FINANCE REFORM

The year before I was appointed Corporation Counsel was a tumultuous one for the Koch administration. Donald Manes, the Queens borough president and head of the Queens Democratic Party, committed suicide after being linked to a scheme of accepting bribes in return for contracts with the city's Parking Violations Bureau. The Bronx democratic leader, Stanley Friedman, was convicted of bribery related to different city contracts. Anthony Ameruso, the city's commissioner of transportation, resigned and was later convicted of perjury. Geoffrey Lindenauer, an official in the Parking Violations Bureau, pleaded guilty to racketeering and mail fraud for his role in the scheme to extort money from businesses that wanted to do business with the Parking Violations Bureau. Bess Myerson, the former cultural affairs commissioner, was being investigated for trying to influence the judge presiding over the divorce proceedings of her boyfriend by giving the judge's daughter a city job. (Ms. Myerson was subsequently indicted, tried, and acquitted.)[1]

When I was appointed, one of my charges was to see how the city might respond to these corruption scandals. There were already many proposals on the table. They related, for example, to limiting the ability of campaign contributors to do business with the city or strengthening the Department of Investigations. Some of these proposals made sense. But some, I thought, would not work. For example, placing severe limitations on doing business with the city might have the unintended

1. Arnold H. Lubasch, *Myerson Wins Jury Acquittal on All Counts*, N.Y. Times, Dec. 23, 1988, at A1.

consequence of forcing it to contract with more expensive or less competent contractors; enforcing these limitations was bound to be extremely difficult. Some proposals would have required a city-wide referendum before they could be enacted. Most importantly, I did not think the measures being considered got to the heart of the matter, which, for me, was the way in which money skewed the electoral process. Enormous amounts of money were being spent on campaigns for city officials, and therefore enormous amounts of money needed to be raised. The state election law did not put any limits on the amounts of money that could be spent. It did limit the amount of money that could be donated to candidates, but these limits were so high as to be meaningless. For city-wide officials, an individual could contribute $100,000 for each election cycle (primary and general election).

Fixing the system would not be easy. Early in my tenure, our efforts to enact reform were focused on the state legislature. At first the effort was to secure a law that would apply throughout New York State. When that failed, we sought a state bill that would apply only to New York City elections. When that, too, foundered in the state senate, our attention turned to whether the city council had the authority to pass such a law.

When we first began looking at the issue, it was widely assumed that the city council could not legislate in this area. Elections were thought to be a matter of state, not local, concern. Then there was the question of whether the council could enact limits on contributions that were different from the state's limitations. How, for example, could the city make it unlawful for someone to contribute more than, say, $10,000 for each election cycle, when the state law made it lawful to contribute up to $100,000? And finally, there was the U.S. Supreme Court's decision in *Buckley v. Valeo*, which held that it was unconstitutional to mandate limits on how much candidates could spend on campaigns.[2]

The solution to these legal hurdles, it seemed to me, was to tie a system of public financing to voluntary limitations on both expenditures and contributions. With respect to contributions, the Supreme Court had already held that even mandatory limits were constitutional. State law provided for higher contribution limits than the city law would provide, but the city's limits on contributions were to be part of a voluntary program—i.e., candidates would agree to limit the amount of contributions they would accept. Therefore, there was no conflict with state law, which permitted greater contributions. As for limits on expenditures, although the Supreme Court had held these could not be mandated, the Court had also said that candidates could voluntarily agree to limit their expenditures in return for receiving public funds. And, as for the authority of the city council to adopt such a system, New York State's constitution grants localities the right to pass laws relating to their "property, affairs or government" as long as the laws were not inconsistent with the state's laws.[3]

These arguments may now seem straightforward. At the time, however, they were controversial, especially the question of whether the city council had the power

2. 424 U.S. 1, 3 (1976).

3. N.Y. Const. art. IX, § 2.

to enact such legislation. The Corporation Counsel's office prepared a lengthy memorandum analyzing the possible legal objections to the proposed legislation. The memorandum was addressed to Mayor Koch and to Peter Vallone, the vice chairman (now called the speaker) of the city council. It began with arguments about public policy:

> I have presented to you a draft of a proposed local law that would create a system of optional public financing of campaigns for candidates for New York City elective offices. In return for public funding, candidates would agree to limit their contributions from private sources and their overall expenditures.
>
> This bill bears on issues that are of critical importance to the City: the ethical conduct of its officers and the openness of its political process. Indeed, these issues lie at the very core of the City's system of government and home rule. That system is damaged when the possibility of privilege and favoritism and the appearance of impropriety give rise to apathy and cynicism by our citizens. In addition, that system fails to live up to its potential unless its citizens, regardless of their financial resources and connections, are able to compete effectively for public office by informing the City's voters of their views.
>
> There is something wrong with the current process of financing elections. State law authorizes extremely high contributions from individuals and does not limit campaign expenditures. Candidates too often must rely on their own personal wealth, the largesse of wealthy contributors or the expertise of professional or political party fundraisers to compete effectively and educate the public about their qualifications and positions on issues. Government should not be a closed club access to which is limited by one's access to private money or to the political party apparatus.
>
> The proposed bill would reduce the possibility of undue influence and increase access to elective office. It would make fundamental improvements in the government and politics of this City. The State Constitution empowers the City to enact legislation relating to its "property, affairs or government." What could be more central to the "property, affairs or government" of the City than helping to provide for an informed citizenry and bolstering the public's confidence that governmental decisions are made without undue regard to the interests of large campaign contributors?[4]

The memo then went on to discuss the possible arguments against the lawfulness of the proposal. It concluded that, although the contrary arguments were not frivolous, the city council had a legitimate basis to enact the legislation.[5]

The law ultimately proposed provided public funding for candidates who voluntarily opted into the system. In order to get these funds the candidate would

4. Memorandum from Peter L. Zimroth, Corp. Counsel, City of N.Y., to Edward Koch, Mayor, City of N.Y., and Peter Valone, City Council Vice Chairman, City of N.Y., on Possible Objections to Proposed City Campaign Financing Laws (Aug. 13, 1987) (on file with the Municipal Archives of the New York City Department of Records and Information Services).

5. *See id.*

have to agree that he or she would not spend more than a set amount on the election. Mayoral candidates would agree not to spend more than $3 million for the primary and not more than $3 million for the general election. The expenditure limits for borough-wide officers and council members were less. The candidate would also agree not to accept contributions of more than a set amount (e.g., for the mayoral candidates, not more than $3000 per contributor for the primary and the same for the general election). In return for these promises, if a candidate raised a threshold amount of contributions, he or she would receive matching funds up to $500 for each individual contribution.

There were political and policy objections from many quarters. The biggest of these stemmed from the fact that public funding of campaigns was widely perceived, correctly I think, as removing some of the natural advantages of incumbency. Incumbents almost always have an advantage in fundraising—either because of their connection to a party apparatus or because of connections to other groups or individuals who have financial interests in the city. Thus the people most directly affected, probably in a negative way, by the proposed new law were the very people needed to secure its passage—the incumbent mayor and the incumbent members of the city council.

One of the first and most important decisions in drafting the new law was which elections would be covered. There was no doubt that the election of the three city-wide officials—the mayor, the comptroller, and the president of the city council—as well as the five borough presidents, would be covered. The suggestion was made, and urged vigorously by some, that the proposal should exclude the city council. Accepting this suggestion would undoubtedly have insured a much easier passage of the law. However, I was strongly opposed to removing council elections from coverage because doing so would have undercut one of the law's major purposes: making it easier for challengers to enter the electoral arena at a more easily accessible level. In the end, with the support of Mayor Koch, council elections remained in the proposed bill.

There were also policy objections to the proposal. For example, some argued that the proposal would cost too much money. Others argued that the limits on spending or on contributions were too high—or that they were too low. These were not, I believed, serious threats to passage because they could all be dealt with as part of the ordinary and acceptable compromises that are made in securing passage of a controversial law.

Alongside the political and policy issues were the legal issues. And these were at the heart of whether the bill would pass. Was the proposed statute constitutional? Did the city council have the authority to pass such a statute? Was a referendum necessary? Some of the legal objections were sincerely held. Some were raised as a cover by those who, for other reasons, did not want to see the law passed.

The legal and policy issues coalesced. The legal analysis prepared by the Corporation Counsel's office was a catalyst. In the first place, the analysis persuaded Mayor Koch to turn his attention to possible city legislation after the state legislature had once again failed to pass meaningful campaign finance reform. Then it

persuaded Vice Chairman Vallone that the city council could lawfully enact the proposed statute. It persuaded *The New York Times* that the possibility of campaign finance reform did not die in Albany and that the Corporation Counsel's proposal was news.[6] Once the *Times* printed its stories about the proposal, the editorial board followed with several editorials that galvanized support.[7]

The office's legal analysis also played an important role in lobbying for the passage of the legislation. In the many meetings that I (and others on my staff) had with members of the council and their staffs, the legal questions were central. Because one of the important objections was that the proposed city law violated state law, it was important that we gather support of state officials. So we sent our legal analysis to, and had many meetings and conversations with, the staffs of the governor, the attorney general, and the chairs of the relevant committees in the state senate and assembly. All of the individuals were ultimately persuaded, and they announced their agreement publicly. When the legal objections collapsed, so did the opposition to the law.

The city's campaign finance law passed in February 1988, just five months after it was unveiled and in time for the mayoral election in 1989.[8] Father Joseph O'Hare, the president of Fordham University, was appointed by Mayor Koch as the chair of the Campaign Finance Board, which would administer the new system of campaign financing. Nicole Gordon, an alumna of the Corporation Counsel's office was named as the Campaign Finance Board's first executive director. Because of their leadership and that of Father O'Hare's successor (my predecessor as Corporation Counsel, Fritz Schwarz), New York City's system of voluntary campaign financing has become the model for local campaign finance reform nationwide.

The campaign finance law could not have passed without the sponsorship and support of both Mayor Koch and Vice Chairman Peter Vallone—both of whom had good political reasons to withhold their support. The bill was opposed by some important supporters of the Mayor. It was thought at the time that a system of public financing would not favor the Mayor's bid for reelection. And, as for Peter Vallone, there were members of the council who opposed the bill who had to be taken seriously.

I also believe that campaign finance reform would not have happened without the work of the Corporation Counsel's office and, more to the point here, would not have happened if the office had been more political and less independent. If our positions or analyses had been based on the political preferences of particular public officials, our proposal would probably have looked very different. And our legal analysis, which was crucial to gaining support for the bill, would not have been trusted. But the office, though deeply involved in this important policy debate, in

6. *See, e.g.*, Alan Finder, *Public Campaign Funds Proposed in a Koch Bill*, N.Y. Times, Sept. 11, 1987, at B3.

7. *See* Editorial, *A Bold Restraint for Political Money*, N.Y. Times, Sept. 16, 1987, at 30; Editorial, *For Cleaner City Campaigns*, N.Y. Times, Oct. 24, 1987; Editorial, *Topics of the Times; Campaign Finance Thaw*, N.Y. Times, Jan. 13, 1988, at A22.

8. New York City Campaign Finance Act, N.Y. City. Admin. Code §§ 3-701 to 3-720 (2008).

fact was not political. Its legal analysis was cogent, balanced and fair. It was not affected by which officials might "gain" and which might "lose" under the proposed system. Because this was so, and because the office had the well-earned reputation for being independent, we were trusted and so were our conclusions.

THE DEMISE OF THE BOARD OF ESTIMATE

By the time I became Corporation Counsel, the Board of Estimate (or its predecessor, the Board of Estimate and Apportionment) had been in existence for more than 120 years. It was created during the Civil War to calculate the expenses of a multi-community police force and then allocate those expenses among member communities that later made up part of New York City. Its powers began to grow when the modern New York City came into existence in 1898 with the consolidation of Brooklyn, Manhattan, Staten Island, parts of three other counties, plus three cities, fifteen towns, parts of three other towns, and many individual villages and districts. Each of the entities absorbed by the city during this time had previously discharged governmental functions over separate geographic areas. For the consolidation to be successful, it was necessary to accommodate the needs of these local communities with those of the larger consolidated region. The Board of Estimate and Apportionment had served to accommodate local and regional concerns in the years between the Civil War and the consolidation; and its successor continued to do so after the creation of New York City.

Although the Board of Estimate was not a legislature and did not exercise legislative powers, it nonetheless played an important role in the development of the city. It had substantial say over certain city affairs, in particular those that were of great local concern. For example, it had the final say on the use and development of land within the city; it had to approve municipal contracts not subject to public bidding; it granted franchises to operate city services or to use city land; and it had to approve the disposition of city-owned land. The Board of Estimate had a limited role in the adoption of the city's capital and expense budgets.[9]

The Board of Estimate, as it developed, was made up of three officials elected by the people of the city as a whole (the mayor, the president of the city council, and the comptroller) and five members elected respectively by the people of each of the five counties that made up New York City (the borough presidents of Brooklyn, Queens, Manhattan, the Bronx, and Staten Island). Each of the city-wide officials had two votes on the coard, and each of the borough presidents had one. This voting arrangement was seen as a way to give voice to the less populous counties while at the same time giving the most power to the representatives of the majority. (The three officials elected by the people of the city as a whole, together with presidents of the two most populous boroughs, had eight of the eleven votes on the Board of Estimate.) This arrangement permitted regional government in the southeastern part of the

9. This brief history of the Board of Estimate and its functioning as described in the text is taken largely from the city's brief in *Morris v. Board of Estimate*. Brief of Defendant-Appellant, 551 F. Supp. 652 (E.D.N.Y. 1982) (No. 81 CV 3920).

state without requiring the local units—especially the less populous ones—to give up entirely the concept of local control over essentially local issues such as where to place jails, homeless shelters, or garbage dumps, and the like. It provided a way to meld the assets of the more populous units, for example the hefty tax base of Manhattan, with the assets of the less populous units, such as the open spaces of Staten Island.

Unfortunately, the very attribute that made the board so effective also made it vulnerable to legal attack. The borough president of Staten Island (with a population in the early 1980s of about 350,000)[10] had the same vote as the borough president of Brooklyn (with a population of about 2.2 million).[11] The Supreme Court had first applied the principal of one person, one vote to the House of Representatives and to state legislatures.[12] But before long, the doctrine was applied to local governmental bodies and even to those that were not legislatures.[13] With these developments, it was almost certain that the Board of Estimate would be attacked.

The *Morris v. Board of Estimate* case began in 1981.[14] The district court ruled in favor of the city but in May 1983 the Second Circuit Court of Appeals reversed and held that any government body whose membership is determined by popular vote was subject to the principle of one person, one vote.[15] The Second Circuit remanded the case to the district court to determine whether the Board of Estimate violated this principle.[16] After a series of rulings, the district court held in November 1986 that the board violated the principle of one person, one vote, and the Second Circuit affirmed in October 1987.[17] The Supreme Court noted probable jurisdiction in April 1988.[18]

During the years leading up to the argument in the Supreme Court, the political passions ran high, especially for Staten Island residents and their representatives. They believed they had the most to lose from an adverse ruling in the Supreme Court. Mayor Koch, who was thought to favor the abolition of the board, appointed a Charter Revision Commission to consider how the Charter should be rewritten if the structure had to change because of a court ruling. Political opponents of his would try to use the *Morris* case and his appointment of the commission to harm

10. *See* The Nelson A. Rockefeller Inst. of Gov't, 1999 New York State Statistical Yearbook 8 (24th ed. 1999) [hereinafter Yearbook].

11. *See id.*

12. *See* Reynolds v. Sims, 377 U.S. 533, 554–55 (1964) (discussing the application of the one-person, one-vote principal to state legislatures); Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (discussing the application of the one person, one vote principal to congressional districts).

13. *See, e.g.*, Avery v. Midland County, 390 U.S. 474, 507–09 (1968).

14. 489 U.S. 688, 690 (1989).

15. Morris v. Bd. of Estimate, 551 F. Supp. 652, 657 (E.D.N.Y. 1982), *rev'd*, 707 F.2d at 691.

16. *Morris*, 707 F.2d at 690.

17. Morris v. Bd. of Estimate, 647 F. Supp. 1463, 1479 (E.D.N.Y. 1986).

18. Bd. of Estimate v. Morris, 485 U.S. 986 (1988).

him politically in what was perceived to be one of his strongest areas of political support, i.e., Staten Island.

Once the Supreme Court agreed to hear the case, the political forces focused their attacks on the lawyers who would be defending the Board of Estimate in the Supreme Court—the Corporation Counsel's office. The argument was advanced that I could not possibly defend the board. I had been appointed by Mayor Koch who, so it was supposed, would have been quite happy with a ruling against the board. He had appointed a Charter Revision Commission to consider a government without the board. The Mayor would certainly increase his power (as would the city council) in the absence of the board.

The board hired its own counsel to represent its interests. At first it was a matter simply of advising members of the board. That soon became a demand that the board's lawyers actually represent it in the litigation. And then came a demand that the board's lawyer file briefs and argue the case in the Supreme Court as lead counsel or, alternatively, that the board's lawyer become co-counsel with the Corporation Counsel. The Supreme Court's rules put the issue in stark relief. The Court would recognize only one lawyer as "counsel of record" for each party in the litigation.[19]

But who exactly were the "parties" in this litigation? Was the Board of Estimate a "party" entitled to its own representative in the Supreme Court? What about the presidents of the several boroughs? The Mayor? And who could or should represent them? Could the Corporation Counsel represent all these diverse interests?

On a personal level, the issue was also complicated by the fact that it would be very hard to overturn the Second Circuit's decision. There would be no glory for me or for the office in proceeding with representation if ultimately the case would be lost. I had become a passionate believer in the legal position that we would advance to support the board; but any objective observer could see the writing on the wall (or more precisely, in the Supreme Court Reports). It would be hard, if not impossible, to justify an elected government body in which an official representing 350,000 people had the same vote as one representing 2.2 million.

There were intense pressures on me to give up the representation altogether, or to permit the board's lawyer to be the lead lawyer in the case or, at a minimum, to permit the board's lawyer to be co-counsel for the city. The argument was strenuously pressed that I (and therefore the office) could not represent the diverse interests in the case especially because I was an appointee of one of the public officials who had a political stake in the outcome.

These arguments were not frivolous. There is no question that the case implicated conflicting political interests of independently elected city officials. The interests of Brooklyn's borough president were not the same as Staten Island's, the Mayor's was not the same as the comptroller's, and the Board of Estimate as an institution had different interests from the city council's.

Nonetheless, for me and the staff of the office, the issue was simply not debatable. There may very well have been differing political interests. And there may also have

19. Sup. Ct. R. 34(1)(f).

been differing policy perspectives on the best roles for different institutions of city government. But that did not mean that any of these officials or institutions had separate legal interests in the case. In my view, there was only one legal interest—that of the city of New York—and only one party—the city. The Board of Estimate and its voting structure were part of the "constitution" of the city.[20] It was the sworn obligation of the Corporation Counsel to defend that structure with every ounce of his professional being. There was no conflict about that. The suggestion (which was made more than once) that I would not defend the board vigorously was—and still is—offensive to me.

The fight over the representation in the *Morris* case became a fight over the soul of the Corporation Counsel's office. It certainly would have been more comfortable to yield to the pressure. I do not recall Mayor Koch ever suggesting to me, or even hinting, how he would like me to respond to the questions about representation. Nevertheless, it did not pass my notice that I was ignoring the entreaties of members of the Board of Estimate whose votes Mayor Koch would continue to need to do the business of government. However, if the office bowed to these arguments about "conflicts of interest" in this case, it would, I thought, go a long way towards ending the office's central position in New York City's government. And that, I firmly believed, would be bad for the city. The office was, by law, charged with melding differing legal positions into one legal position on behalf of the city. In this way, the office had become a powerful force in ensuring that the city was governed as a single legal entity and not as a series of separate and conflicting fiefdoms each overseen by separate officials.

Ultimately, after many meetings with members of the Board of Estimate and their lawyers—many of which were heated and some of which were unpleasant—the board receded from its insistence on having a separate representative in the Supreme Court. I was not privy to the deliberations that led to that decision, but I suspect that it came as a result of recognizing the clear mandates of the City Charter which said that the Corporation Counsel is the only lawyer authorized to appear in court as the city's lawyer. It also came, I suspect, because of the good sense of some members of the board—chief among whom was the borough president of Queens, Claire Shulman, and her counsel, Nick Garaufis, who is now a federal district court judge. The board's perspective on the case was presented to the Supreme Court in the form of an amicus brief on behalf of two former board members (former Mayor Abraham Beame and former Manhattan Borough President Percy Sutton) written by the lawyers who up to then had represented the board.[21]

As we know, the expected happened. On March 22, 1989 the Supreme Court unanimously affirmed the decision of the Second Circuit and held that the voting structure of the board was unconstitutional. In spite of the outcome, I think this was a proud chapter in the history of the office. Although in a losing cause, the briefs

20. *See* New York, N.Y., Charter tit. 5, § 226 (1901).

21. Brief for Abraham D. Beame and Percy E. Sutton as Amici Curiae in support of Appellants, Bd. of Estimate v. Morris, 489 U.S. 688 (1988) (Nos. 87-1022, 87-1112).

filed were among the very best professional efforts I have seen in my now forty years at the bar. And our insistence on proceeding with the representation as we did helped preserve the Corporation Counsel's office as one of the uniquely important institutions of city government.

STATEN ISLAND SECESSION

At the oral argument in *Morris*, I said that the Board of Estimate was an important element in the structure that kept New York City functioning as one city—as a regional government of many diverse parts. I noted that there had been periodic movements in Staten Island to split from New York City because, so the supporters of secession believed, in spite of the regional arrangements, this least populous county was being swallowed up by its larger neighbors. I predicted that a ruling against the city would precipitate a much more serious effort at secession. But that argument did not move the Justices.

Soon after *Morris* was decided, the Staten Island secession movement took on a new and more vigorous life. I took no pleasure that my prediction was accurate. In fact, secession was the very antithesis of what our office was fighting for in *Morris*—i.e., a unified city. Staten Island secession threatened more than a simple geographic shrinking of the city's borders. It would also be a sign that very different racial and ethnic communities could no longer live together in one local government.

The 1980s were a time of racial tension in the city. The city's population was becoming increasingly non-white; but not Staten Island's. In fact, by the end of the 1980s ninety percent of Staten Island's residents were white, while in the rest of the city a majority was non-white.[22] In November 1989 the city elected its first African American mayor, Mayor David Dinkins.[23]

I thought secession would be tragic for New York City and explained why in an article published in the New York Law Journal:

> Staten Island was part of the consolidation which, in 1898, created New York City . . . . The resulting Greater City of New York thus began what has been a largely successful experiment in regional government. The five boroughs have stayed together in good times and bad and, with struggle and compromise, have accommodated and thrived upon a profusion of races and cultures.
>
> Staten Island was different from the rest of the city—more rural and more homogeneous, slower to change. According to 1980 census data, 16 years after the Verrazano Bridge opened, almost 90 percent of Staten Island's residents were white while a majority of residents in the rest of the City were non-white. These differences led to feelings of separateness, feelings of slight, and on the part of some, a desire to become separate again.

22. *See* YEARBOOK, *supra* note 10, at 8.

23. *See* Sam Roberts, *Dinkins Defeats Giuliani in a Close Race; Wilder Seems Virginia Winner, Florio In; Voters, 5-4, Approve New York Charter; First Black Mayor*, N.Y. TIMES, Nov. 8, 1989, at A1.

> Secession has often been part of Staten Island's political life. Now, however, the movement is more serious. . . . The movement has been fueled by the Supreme Court's ruling in early 1989 that Staten Island's borough president had unconstitutionally large voting power on the Board of Estimate, Board of Estimate v. Morris 489 U.S. 688 (1989), and by the subsequent charter revision which eliminated the Board of Estimate altogether. Perhaps it has been fueled as well by the election of the City's first African-American mayor and what that might be seen to portend for the shifting political power in the City.
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> Secession would be a staggering blow to the City. It would mean the loss of almost 400,000 New Yorkers, more people than live in Rochester and Albany combined; the loss of the borough with the highest percentage of single and two-family dwellings in its housing stock; and the loss of substantial revenues from property, sales and income taxes.
>
> It would mean that substantial City properties, worth billions of dollars, would no longer be within the City's jurisdiction: its sewers, water pipes, streets, schools, parks, police precincts, fire houses, ferry terminal, and the Fresh Kills landfill. And as important as all these, would be the loss of the idea of the City as a place where a largely white population would live with an increasingly non-white population. If Staten Island can go, why not some of the other communities that were part of the great consolidation or some of the newer communities that have arisen? Why not Riverdale or Little Neck-Douglaston?[24]

Nonetheless, in spite of these consequences for the city, in the aftermath of *Morris*, the state legislature passed a bill that set up a process that could lead to the secession of Staten Island.[25] And independent of the secession itself, the process contemplated by the bill was, I thought, illegal.

The bill provided for a vote of Staten Island residents on the following question: "Shall the borough of Staten Island separate from the City of New York to become the City of Staten Island?"[26] If the vote was affirmative, a charter commission would be established, made up of Staten Island residents, to draft a charter for the new city. That charter would then be put to another vote of Staten Island residents. And if that vote was affirmative, the new city of Staten Island would be separated from the city of New York.

Under this law, the question of dissolving the city of New York was put entirely in the hands of the now 400,000 residents of Staten Island. The state legislature had no further role. The more than seven million residents of the rest of New York City had no say whatsoever—even though the separation would affect every part of New York City's life.

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24. Peter L. Zimroth, *Staten Island Secession is Illegal*, N.Y. L.J., Jan. 14, 1991, at 1.

25. *See* Elizabeth Kolbert, *Cuomo Approves a Secession Vote for Staten Island*, N.Y. Times, Dec. 16, 1989, at 1.

26. *See id.*

After this bill passed the assembly and the senate, there was some hope that Governor Cuomo would veto it. In late November 1989, I sent a memorandum to Mayor Koch that analyzed the legal issues raised by the secession legislation. Mayor Koch sent the memorandum to the Governor. The memorandum concluded that the legislation was "inadequate, discriminatory, and unconstitutional."[27]

First, and most obviously, the secession legislation violated the Equal Protection Clause of the United States Constitution.[28] Roughly 400,000 people would conclusively determine the structure of governance for 7.5 million. The courts had just ruled against the voting structure of the Board of Estimate because the borough president of Staten Island had the same vote as the borough president of Brooklyn who represented 2.2 million people. In doing so, the courts had rejected the argument that the votes of the three city-wide officials offset somewhat this voting imbalance.[29] The secession legislation did not have any such ameliorating factor. All the decision-making power was in the hands of the 400,000 Staten Island residents. It seemed inconceivable that such legislation would survive a constitutional challenge.

Second, the secession legislation, we thought, violated the state constitution's home rule provisions.[30] Home rule had a long and sometimes contentious history in New York. The home rule provisions of the state constitution give voice to two very fundamental, but often conflicting, principles of governance. First is the principle that government should be close to home. So municipalities were given broad powers to act on matters concerning their property affairs and government. At the same time municipalities are creations of the state. So it was thought that the state had to maintain its supremacy.

The compromise that melded these two principles permitted the state to legislate in areas that overlapped with the areas in which the municipalities could act; but the state's power to do so was circumscribed in ways designed to ensure that the state could not discriminate against a particular municipality or municipalities. Specifically, the state legislature could pass laws concerning the "property, affairs or government" of cities by "general law"—that is, by law that treated all cities alike. If the legislation was applicable to fewer than all cities, then the state legislature had to use the emergency procedures set forth in the state constitution. As to New York City in particular, this emergency procedure permitted the state legislature to pass special legislation only on the request of two-thirds of the city council or on the request of

27. Memorandum from Peter L. Zimroth, Corp. Counsel, City of N.Y., to Edward I. Koch, Mayor, City of N.Y., on The Secession of Staten Island 14 (Nov. 22, 1989) [hereinafter Memorandum] (on file with the Municipal Archives of the New York City Department of Records and Information Services).

28. *Id.* at 2.

29. *See Bd. of Estimate*, 489 U.S. 688.

30. Memorandum, *supra* note 27, at 2.

the mayor concurred with by a majority of the city council.[31] This request is a so-called "home rule message."[32]

It seemed apparent that the pending secession legislation did affect the "property, affairs or government" of New York City and that the home rule provision should have applied. Our memorandum to the Mayor discussed in detail the impact secession would have on the city.[33] In my subsequent *New York Law Journal* article, I summarized some of the questions that the secession legislation posed (but, irresponsibly, did not answer). Simply contemplating these questions illustrates how profoundly secession would have affected the property, affairs, and government of New York City:

> Who would own City properties located on Staten Island? If Staten Island, how would they be valued and how would Staten Island pay the City for these assets? Staten Islanders might argue that they (or their predecessors) had already paid by sharing in the costs of other assets which would remain in the new New York City. But would that be a fair trade? It might be argued that the City as a whole has invested disproportionately in Staten Island because it provided a place for future growth.
>
> With about 5 percent of the City's population, Staten Island has, measured in miles, 16 percent of its paved streets, 10 percent of its sewers, and 14 percent of its water pipes as well as 11 percent of its street lights. It has 17 percent of the City's parks of more than 10 acres and 22 percent of its park acreage. How would New York City recoup these investments?
>
> What about City employees assigned to Staten Island? Would they have any right to continued employment, and, if so, with which city? What would happen to the pension rights of someone who has worked for New York City and then goes to work for the City of Staten Island? What about New York City employees who now live on Staten Island? Would they be required to move to New York City or face the loss of their jobs?
>
> The Municipal Assistance Corporation has issued $7 billion in bonds backed by revenue streams that would be diminished by the removal of Staten Island from the City. Is that an event of default? Would the new City of Staten Island have continuing obligation for bonded indebtedness incurred prior to the secession?
>
> How would the residents of the new City of Staten Island obtain their water which is now obtained through New York City's facilities? And how would the people of New York City dispose of their solid waste almost all of which is now sent to the Fresh Kills landfill on Staten Island?[34]

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31. N.Y. Const. art XI, § 2(b)(2).

32. *See* Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study In the Dilemmas of Local Self-Determination*, 92 Colum. L. Rev. 775, 806 (1992).

33. Memorandum, *supra* note 27.

34. Zimroth, *supra* note 24, at 1 (internal footnote omitted).

Even with the best will, answering these questions would be divisive. With an overlay of racial politics it could become rancorous and destructive. (In fact, as our memorandum to the Mayor discussed, a separation of Staten Island from the rest of the city raised a serious question of diminution of minority voting rights under the federal Voting Rights Act.)[35] In short, it would be difficult to find a question that more affected the "property, affairs or government" of New York City than secession.

Although Governor Cuomo first voiced some doubts about the secession legislation, he was not persuaded by our memorandum to veto it. He signed it into law on December 15, 1989, two weeks before I was to leave office. During those two weeks, the office prepared a complaint, which I signed on my last day in office, seeking to enjoin the referendum on Staten Island from proceeding.

In response to our lawsuit, and before the courts could rule, the legislature amended the secession law.[36] Staten Islanders alone would still have the power to initiate the process and to shape the proposed new charter. But "yes" votes on the secession question and on the new charter would no longer be sufficient to accomplish the secession. The final authority was retained by the state legislature.

This change certainly blunted the city's equal protection argument (because all New Yorkers are equally represented in the state legislature) and thus made the city's case for halting the referendum more difficult. But, in the end, the change caused the secession movement to fail.

After the change in the legislation, the Corporation Counsel's office, under the leadership of my successor, Victor Kovner, pressed ahead with the attempt to halt the referendum. The case focused on the question whether a home rule message was required under the state constitution for the secession legislation to be effective. The New York Court of Appeals ultimately ruled against the city but on a very narrow and inconclusive ground.[37] In essence, it held that the city's challenge to the secession law was premature—that is, that the initiation of the secession process did not require a home rule message.[38] If, however, the process proceeded to a point where the state legislature authorized the secession, well, that might be a different matter: ". . . we expressly decline to decide as unnecessary and premature whether genuine secession legislation, if ever it were to come before the Legislature, would require a home rule message."[39]

So the process went forward. In November 1990, Staten Islanders voted overwhelmingly in favor of secession—about 80% of those voting voted "yes." A charter commission set about drafting a charter for the new city, and various

35. Memorandum, *supra* note 27.

36. Borough of Staten Island—Separation From City of New York—Referendum, 1989 N.Y. Laws 773 (amended 1990 N.Y. Law 17).

37. *See* City of New York v. State of New York, 76 N.Y.2d 479, 484 (1990).

38. *See id.* at 484, 486.

39. *Id.* at 484.

commissions set about educating the voters of Staten Island on the economic (and other) consequences of secession.

Then on November 3, 1993, the same day New Yorkers elected Rudolph Giuliani as its mayor, with Staten Island casting 84% of its vote for him, Staten Islanders also cast 65% of their votes in favor of secession—this time voting in favor of a proposed charter for their new city. Under the secession legislation passed in response to our lawsuit, the issue was now placed firmly back in the legislature.

And there it died. After reviewing the bill introduced to accomplish the secession, Assembly Speaker Silver concluded that the legislation would require a home rule message. Obviously, there would be no home rule message coming from New York City. As he was quoted in *The New York Times*, "[t]his virtually precludes state legislation."[40] So, even though the city's suit was unsuccessful, the Staten Island secession saga ended on a note that the Corporation Counsel's office played early, often, and loudly.

MAINTAINING INDEPENDENCE

In each of the three challenges I have related, independence of the Corporation Counsel's office from political influences played an important role. Independence in government law offices is something I took for granted when I was appointed by Mayor Koch in 1987. I had two prior stints as a government lawyer, both times with Robert M. Morgenthau. The first was as an assistant United States attorney in the Southern District of New York and the second was as the chief of the Appeals Bureau and then chief assistant district attorney in the Manhattan District Attorney's Office.

Reflecting back on those earlier experiences, however, I believe that independence in a prosecutor's office is much easier to appreciate and also easier to maintain than it is in an office like the Corporation Counsel's. Nobody should be prosecuted in order to further the political goals or ambitions of elected officials. Prosecutorial decisions should not be subjected to political pressure. These principles are easy to understand, they are commonly shared, and their violation, when discovered, is widely condemned.

Independence in the Corporation Counsel's office—it soon became apparent to me—is a much more complex proposition. As seen in the three stories I've told, the Corporation Counsel operates at the center of city government which, by its nature, is concerned with both policy and politics. The Corporation Counsel serves at the pleasure of an elected official who is politically accountable to the people of the city for the policies of his administration. The line between policy and politics is not always clear.

For all these reasons and others as well, independence in an office like the Corporation Counsel's is hard to establish and easy to erode. Its maintenance requires a commitment not only from the Corporation Counsel but from public

40. Robert D. McFadden, *'Home Rule' Factor May Block S.I. Secession*, N.Y. Times, Mar. 5, 1994, at 27 (internal quotations omitted).

officials both above and below him—i.e., from the mayor and also from the staff in the office. I was fortunate in this regard to serve under Mayor Koch; he not only recognized the importance of independence in the Corporation Counsel's office, he cherished it. In every way possible—the funding of the office, the protection from patronage appointments, the insistence that the Corporation Counsel meet and approve the appointment of the general counsel of each agency, his public support of decisions that sometimes displeased his political supporters—he was a fierce advocate for the independence of the office.

And from the staff—the hundreds of men and women who did the hard work of the office—maintaining its independence required a steadfast commitment to professional excellence and to serving the city as a whole. This, there was in abundance. Here again, I was fortunate to work with some of the very best men and women in our profession. Their commitment inspired me, and I hope mine reinforced theirs. And together I hope we were able to serve the people of New York City in the way they deserve to be served.