

On Being a Framers: The Los Angeles Charter Reform Commission

Erwin Chemerinsky

SO YOU WANT TO BE a framer? For a time, do you want to escape the quiet halls of academia or the battles of the courtroom and try your hand at constitution drafting? Does it excite you to think of designing a government and putting your proposal before the voters for their approval? Well, be careful what you wish for.

I am now three-fourths of the way through a two-year term as a member of an elected commission to rewrite the Los Angeles City Charter. It truly is an exercise in constitution drafting. The Charter creates the institutions of city government, divides power among them, and prescribes many aspects of how they will operate. The Commission faces major issues of separation of powers, in terms of how to allocate executive and legislative tasks and how to build in appropriate checks and balances. One of the most important issues is whether to decentralize power through a sys-

tem of neighborhood councils, an issue much like federalism. A heated battle has erupted over whether the Charter should have a bill of rights, since the Charter can provide rights greater than those accorded by federal or state law.

The breadth of topics contained in the Charter is staggering. In addition to sections about the Mayor and the city council there are provisions concerning other elected officials, such as the city attorney and the controller, and appointed officials, including the treasurer, the city administrative officer, the city purchasing officer, and the city engineer. The Charter prescribes the timing and manner of elections. It creates numerous city departments, including police, fire, libraries, parks and recreation, ethics, and public works, and defines the manner of their governance. Additionally, the city owns three businesses – the airport, the harbor, and the Department of

Erwin Chemerinsky is the Sydney M. Irmas Professor of Law and Political Science at the University of Southern California, and is currently serving as the Chair of the Elected Los Angeles Charter Reform Commission. The Commission's web site is www.LACharter.com, and includes the current draft Charter.

Water and Power – each of which is governed by detailed provisions of the Charter. The Charter describes in detail how two different civil service and pension systems operate, one for police and fire officers and one for all other city employees.

The goal of the Charter reform process is to design a government for Los Angeles for the next century, draft the document, and then place the proposal before the voters. The current Charter was written in 1925 for a vastly smaller city, and has been amended over 400 times by initiative. The document is several hundred pages long and is very unwieldy, filled with conflicting provisions and inexplicable gaps. There is consensus that it needs to be replaced.

Unfortunately, as I have learned in the last 16 months, that is the only thing about which there is consensus. Of the myriad issues involved in the Charter reform process, there is agreement about virtually none and intense disagreement about many. There are strong arguments for competing approaches on almost every topic and interest groups ready to press for each. Every aspect of the process is extensively reported in the press.

The Commissioners serve without compensation, for a two-year term. Rewriting the Charter truly would be a very busy full-time job, but the Commissioners each have other employment. Nonetheless, we have met at least once a week since being sworn in, with meetings usually lasting five or six hours. We additionally have each served on committees and task forces that sometimes meet several times a week, and have spent countless hours attending staff meetings, supervising the staff, in informal conversations with staff and commissioners, and in meetings with city officials, labor leaders, homeowner leaders, and other constituents.

This essay is a description of this process so far, with no pretense of objectivity or perspective. It has been a unique legal experience –

one of legislative drafting, albeit in an unusual context. I have never done anything that has taught me so much, but I also have never done anything that constantly seems so overwhelming. Among other things, I have learned a great deal about constitutions – including the United States Constitution – from this experience, lessons I describe in this essay.

Part I describes the background: how the process got started, how I got involved, and how the Commission chose to proceed. Part II details some of the substantive issues and the battles over them. Part III then considers the lessons that I have learned from the process and experience. I offer some thoughts about being a framer, and comment on the ways in which the experience is likely similar to, and different from, that of 1787.

I. GETTING STARTED

How did all of this come about and how did I, a law professor with no political aspirations, come to run for public office? The answers to these questions are important to understanding the context of the process and its often bizarre political landscape.

California law makes a city's charter quite important. Pursuant to home rule, a charter city can define its own government and, in many ways, even trump state law. The California Constitution requires that a city's charter be approved by its voters and it provides two alternative ways for a new charter to be proposed. The City Council may put a proposal on the ballot for a new charter or revisions to the existing charter. Typically, the Council appoints a committee to draft a new charter, which the Council then reviews, revises, and places before the voters. Alternatively, the voters, by passing an initiative, can create an elected charter reform commission that can put its proposal directly to the voters.

In the fall of 1996, Mayor Richard Riordan and several members of the Los Angeles City

Council proposed Charter reform. There is widespread dissatisfaction with city government, and with the Charter in particular. In fact, several areas of the City were (and are) considering seceding. The Valley, a sprawling area that occupies the northern part of the City and includes communities such as Encino, Sherman Oaks, Pacoima, Chatsworth, and Woodland Hills, long has had many residents who feel underrepresented in, and underserved by, city government. San Pedro and Wilmington, communities at the southern tip of Los Angeles, are separated from the rest of Los Angeles by many miles and several other cities; only a freeway connects them to other parts of the City. The California legislature's passage of legislation prescribing a mechanism for secession helped pave the way for Charter reform as an alternative.

Unfortunately, while the Mayor and the City Council agreed as to the need for a charter reform commission, they totally differed on how to proceed. To make a long story short, the City Council preferred an advisory commission that would make recommendations to it, after which the Council would decide what proposal to put before the voters. Mayor Riordan, who often has had a stormy relationship with the City Council (and that's an understatement), wanted an elected commission that could place its proposed new Charter directly before the electorate.

The City Council decided to go ahead and created an appointed commission, with each of the fifteen Council members appointing a member and the Mayor, the City Attorney, and the City Controller each appointing two members. (The Mayor chose not to exercise this appointment authority and those members were selected by the President of the City Council.) The result was the creation, in the fall of 1996, of a 21-person appointed Charter reform commission.

Mayor Riordan was not happy with this, and decided to advocate an initiative for the

voters to create an elected commission. The necessary signatures were gathered for an initiative to appear on the ballot in April 1997. The City Council, however, refused to place it on the ballot, and it took a lawsuit in federal district court to compel its inclusion.

Under state law, the proposal of an elected Charter reform commission is accompanied by the election of its members. In other words, voters need to vote both whether to create the commission and who they want to represent them on it. If the voters reject the initiative for the commission, then the races for commissioner are obviously rendered meaningless. There are 15 City Council districts in Los Angeles and each would elect one commissioner.

In late 1996 and early 1997, Mayor Riordan raised a great deal of money from business groups to back his slate of candidates for the elected charter reform commission. According to articles in the *Los Angeles Times*, more than \$2 million was raised to elect what was perceived to be a pro-business slate of prospective commissioners. The Mayor failed to anticipate that labor groups would be terribly worried about Charter reform, especially by a commission dominated by Riordan's selections, because the current Charter contains protections for city workers, including limits on contracting out work and the civil service and pension systems. Labor leaders, together with some progressive members of the City Council, decided that they needed to recruit their own slate of candidates to oppose the Mayor's choices.

In January 1997, I received a call from Los Angeles City Councilwoman Jackie Goldberg. Jackie is perhaps the most progressive member of the City Council. A former school teacher, she served with great distinction on the board of the Los Angeles Unified School District. I had appeared on several panels with Jackie over the years, especially in recent months in opposition to California Proposition 209, which eliminated affirmative action

in California. Jackie began the call by saying that there was something she needed me to do. I naively answered, "Of course, anything." The most I could ever recall her asking me for was \$100 or so as a donation to an election campaign. She said, "I want you to run for the Charter Commission."

I expressed enormous reservations. I explained that I did not have time to run. That semester, in addition to teaching at USC, I was teaching Constitutional Law at UCLA because of an emergency need created by the illness and death of my dear friend Julian Eule. I also was serving as the president of the University-wide faculty senate at USC Jackie replied that it did not matter, so long as I had time to serve starting in July. I explained that I really did not want to do any fundraising and had little time to campaign. Jackie said that she would take care of everything.

With some trepidation, I raised the issue with my family. My oldest two sons, then 11 and 14, were very excited about it. I think that they envisioned television commercials and bumper stickers. (Later, they were terribly disappointed when they discovered that several of my opponents had lawn signs and I had none.) With my family's blessing, I became a candidate for political office.

Seven candidates collected the necessary signatures to run in my district. I was labor's candidate, a second was the Mayor's choice, and a third was a Valley activist who had recently run unsuccessfully for the City Council. It was a low-key election, the race consisting primarily of the candidates appearing at several forums sponsored by community groups. There also were countless mailings, mine paid for and sent by labor groups. My favorite was one that had two burly police officers, one black and one white, standing with arms folded and with stern expressions, with the statement that the Police Protective League endorsed Erwin Chemerinsky. I found it amusing that its summary of my biography

notably omitted mention of my spending a decade on the board of directors of the American Civil Liberties Union of Southern California.

To make a long story short, I won without a run-off, getting 57% of the vote. It was a strange feeling seeing people coming out of the polling place and wondering whether they had voted for me. I attribute my victory to endorsements from newspapers, such as the *Los Angeles Times* and the *LA Weekly*, and from name recognition I had gained as a media commentator during the O.J. Simpson case.

After run-off elections in June, the selection of the Commission was complete. It consisted of 10 candidates endorsed by labor, three candidates backed by the Mayor, one candidate supported by both, and one independent. It had nine whites, three African-Americans, and three Latinos. There were nine men and six women. The commissioners included three other lawyers; two former members of the California Assembly who had recently lost their seats due to term limits; two aides to City Council members; an architect; a junior high school science teacher; a police sergeant; a college psychology professor; a public relations executive; and two community activists.

It was unclear how we would begin. Who would call us to meet and where? The City Attorney solved this by calling a meeting for July 7, 1997, a week after we were sworn in. The initial meeting was attended by over 200 onlookers and 15 baffled commissioners. We elected temporary officers, formed some committees, and talked about working with the appointed commission. The problem, though, was that we had no staff and no office, nor any budget to get either.

We began meeting once a week. Our initial fight was over whether to request City funding. A few Commissioners felt strongly that we should not ask for public money, but instead turn to private sources. None of us, however, had any idea of who might want to subsidize

Charter reform. Other Commissioners, including me, felt that we were a government body, created by the voters, and that we should be funded by the City. After several heated discussions, we overwhelmingly passed a resolution to request government funds.

Deciding to ask, however, did not mean that money would be forthcoming; the City Council seemed determined not to fund us. The Council had its own Appointed Commission, and several Council members publicly proclaimed that they would never vote to fund the Elected Commission. This stalemate continued for almost three months. Meanwhile, the Commission continued to meet once a week and tried to function without staff or office. Meetings were spent on organizational details because there was nowhere else and no one else to do them. Everyone was frustrated that we were spending our time trying to figure out how to get letterhead and business cards, rather than reforming the Charter.

Amidst all of this, we decided to search for an Executive Director based on the faith that somehow we would get funded. We were stunned that over 100 people applied for the position. A committee screened applicants, and brought six finalists to the Commission for final interviews and consideration. Although the interviews and selection were done in closed session, the next day a newspaper reported in detail how the Commission voted and who voted each way.

The Commission chose to offer the position to Eric Schockman, a political scientist at the usc who specializes in urban issues. Eric, though, had recently accepted an administrative position in the dean of students office. The hope was that he could arrange a leave of absence or a significant reduction in his duties so as to serve as Executive Director. When that proved not to be the case, Eric declined the position; there was no way to reconcile a full-time position serving the Charter Commission with his usc responsibilities, and he did not

want to leave a promising new position for a Commission that would exist for a maximum of two years.

Again, the Commission met to choose an Executive Director, but this time tensions were high due to the leaks of the earlier confidential deliberations to the newspapers. The Commission, in executive session, chose a lawyer specializing in municipal law, Ed Dilkes, to be our Executive Director. Again information from the closed door meeting was in the papers the next day.

Frustrations at this point were great. We had no money; we had an Executive Director, but no funds to pay him; we had been meeting for over two months and had hardly discussed the Charter. There was open tension among some Commissioners, though not along the predictable split between the Mayor's candidates and labor's.

In late August, the Interim Chair, Gloria Romero, decided that she was going to run for the California Assembly and that the demands of a new campaign were incompatible with chairing the Charter Reform Commission. Gloria had done an excellent job under the hardest of circumstances, but felt that she could not continue to serve as chair, run for the Assembly, and hold her full-time job as a college psychology professor. Several Commissioners called and asked me to run for chair. I agreed, and was selected.

In late September and early October, many things began to change. First, we finally got some funding and office space. The Mayor promised to raise \$300,000 for the Commission from private funds. The City Council initially tried to block the Commission from taking this money, which unleashed a barrage of criticism of the Council from every newspaper in the City. The most colorful was an editorial in the *Daily News* that called the City Council, "14 snakes and an accused felon" (the latter referring to a Councilman who had been arrested on cocaine charges). Ultimately, the

Council relented, allowed the Commission to accept the donated money, and approved an additional \$300,000 from government funds. This was far less than the \$1.4 million given to the Appointed Commission, but it was money for a staff and operating expenses. The Mayor also arranged for donated office space.

Second, we devised and approved a work plan. Amazingly, we have adhered closely to it for the past 16 months. Phase one of the work plan called for us to study the Charter and city government, both in sessions for the entire Commission and through committees. The committees were to examine particular areas in depth and then make reports and recommendations to the Commission. This phase was to last from September 1997 through January 1998.

Phase two, extending from February through June, was to be a time of deliberations and initial decision-making. Committees would present their reports, the Commission would discuss them, and tentative decisions were to be made. The issues were divided into 14 parts, and each Monday was to be devoted to considering a particular set of topics. Additional special meetings would be called to make decisions.

Phase three, which was to begin in July and run into December, was to be a time for reconsideration of tentative decisions and examination of additional issues not yet resolved. The goal was to be sure that all of the choices were made so that staff, and interested Commissioners, could draft Charter language. The process was to take an outline of a proposed Charter and literally start at the top with the first topics and work our way to the bottom to the last issues. The goal was a draft of a new Charter by early November. Ultimately, the Commission completed this phase of its work on December 17 and released its draft Charter on December 28.

Finally, phase four would be a time of getting public comments on a draft Charter, re-

considering earlier choices, and making final decisions. If we were to be on the April 1999 ballot, we needed to be done by January 8, 1999; to be on the June ballot, work had to be completed by March 5.

In addition to getting funding and devising a workplan, the Commission approved a committee structure in September 1997. We created five committees to examine substantive issues, and an additional five administrative committees. The five substantive committees were:

- Committee on Improving the Structure of City Government, to examine issues such as the allocation of authority between the Mayor and the City Council, the commission system that manages city departments, and the City Attorney's office.
- Committee on Improving Financial and Managerial Accountability, to consider issues concerning budget and finance, including the Controller's office, financial aspects of the proprietary departments (airports, harbor, and Department of Water and Power), pensions, and contracts and procurement.
- Committee on Improving the Delivery of City Services, to review matters including civil service, police and fire protection, public works, and ways to improve city services.
- Committee on a More Responsive Government with an Involved Citizenry, to deal with some of the most controversial issues of Charter reform, including whether to expand the size of the City Council and whether, and how, to create a system of neighborhood councils.

- Committee on Improving the Quality of Life, to look at issues such as whether to have a bill of rights in the Charter, planning, and improving the aesthetic and cultural aspects of the City.

Committees were initially staffed by volunteer lawyers recruited from local law firms and eventually replaced by paid full-time staff. The committee system certainly caused problems, but it also was instrumental in turning around the morale of the Commission. The main problem was that there were turf wars, with committees at times becoming possessive about issues. At one point, four of the five committees were looking at issues concerning neighborhood councils. Yet, the committees had the Commissioners focus their energies on substantive issues concerning Charter reform. They also produced many superb reports and presentations that were integral to the Commission's deliberations and decision-making.

I do not mean to imply that everything went smoothly administratively after October 1997. Quite the contrary, there is a sense that almost everything that could go wrong did go wrong in our initial months. By December, many Commissioners expressed dissatisfaction with the administrative skills of the Executive Director and he resigned in mid-month. Countless hours were spent on figuring out how to proceed. A new structure was proposed and accepted by the Commission: Instead of an Executive Director, we were to have an Administrative Director to manage our operations and a Policy Director to supervise a policy staff that would research issues, write reports, and ultimately draft the new Charter.

Geoffrey Garfield was hired to be our full-time Administrative Director and Eric Schockman (our initial choice to be Executive Director) agreed to volunteer part-time as Policy Director. In hindsight, these were ter-

rific moves – both have worked tirelessly and effectively. Garfield came in and immediately set up our office, hired a staff, and relieved Commissioners of the crushing burden of countless administrative details. Schockman provided knowledge of city government and a wealth of ideas on how to proceed.

Another constant problem has been how to manage our meetings. The Commission decided that beginning in February, each weekly meeting would occur in a different Council district. The first of these meetings was on February 9 in the Valley. Over 300 people attended. The problem was that most of them wanted to speak. We immediately recognized the difficulty of trying to hold a public hearing and a business meeting at the same time, a problem with which we have constantly struggled. Every meeting has dozens – or more – people who want to talk, and there is also always a long agenda of issues for the Commission to discuss and decide.

The result is meetings that are sometimes ridiculously long. Usually we begin at 6:00 p.m. and go until 10:30 or 11:00 p.m. But we also have had meetings start at 3:00 and go to midnight. We have had many special day-long Saturday meetings. Some weeks, we have met two or three times. Often the public comment is enormously valuable, and on several occasions it has caused me to change my mind about an issue. Sometimes, though, it is repetitive, with the same people saying the same things over and over again week after week.

For me, one of the most surprising aspects of the public testimony is the rude and insulting tone of many of the comments. Countless individuals have come before us – some every single week – and personally attacked us. They accuse us of incompetence, stupidity, selling out, and all sorts of other unflattering things. It constantly astounds me that people think that insults and threats can be persuasive rhetoric. I wonder what it is that causes people to think that once individuals are

elected to office it becomes permissible to do away with basic civility.

Other significant problems have plagued us throughout. Most important, there is the Appointed Commission which has continued its work. Only Los Angeles would have two Commissions doing the same thing at the same time. From the outset, both Commissions recognized that the odds of Charter reform would be infinitely greater were the Commissions to agree and put one proposal before the voters, rather than two competing proposals. The grave danger is that the supporters of the Elected Commission's proposal will automatically oppose the Appointed Commission's proposal and vice versa.

In January 1998, the two Commissions agreed to create a conference committee to try and mediate differences between them. Unfortunately, the two Commissions disagree about almost everything. It is fascinating that two groups of well-intentioned individuals, both of which have worked very hard, could come to opposite conclusions on almost every issue. The Appointed Commission generally is keeping the current system, but rewriting the Charter to make it clearer and leaner. The Elected Commission is changing almost all major aspects of the system. The Appointed Commission is taking the existing Charter and, to a large extent, lining out old language to be discarded and inserting new wording. The Elected Commission is writing a new document on blank paper, beginning with the premise that we are writing a new Charter, though reusing provisions in the current Charter that are worth retaining.

Tensions between the two Commissions are compounded by the reality that each wishes that the other did not exist. Officials of each have said negative things about the other in the media. Each feels that the other looks down on it. Each believes that its decisions are superior to those of the other. Perhaps it is that members of the Elected Commission

ran for office on platforms and wanted to make changes accordingly; in contrast, the Appointed Commissioners did not need to campaign for office. Perhaps it is that many members of the Elected Commission are planning to run for other public office (three already have) and want to make a visible mark. Perhaps it is the processes used. The Appointed Commission relies heavily on reports and recommendations from staff; the Elected Commission depends on reports and recommendations from Commissioners. Whatever the reason, the Commissions disagree on virtually every issue.

The Conference Committee process broke down in August, but was revived in late November 1998 in the hope that a single Charter proposal might still be forged. The chair of the Appointed Commission, George Kieffer, and I decided that the only hope for a compromise was for the two of us to work out a comprehensive proposal covering most of the areas of disagreement, present it to the Conference Committee, and ultimately to the two Commissions. As a result of many hours of negotiations, George and I came to agreement on a proposal for a unified Charter initiative.

We presented this proposal to the Conference Committee at several meetings in late November and early December. On December 21, 1998, the Conference Committee unanimously sent this proposal to the two Commissions for their consideration. Although the compromise has the support of both business and labor groups, Mayor Riordan strongly opposed the compromise and lobbied aggressively against it. On January 5 the Elected Commission rejected the proposal for a Unified Charter by a 9-6 vote. The following day, the Appointed Commission unanimously approved it. There then ensued intense discussions and negotiations and the following Monday, January 11, the Elected Commission reversed itself and approved the document that it had rejected

just six days earlier. The additional areas of disagreement between the two Commissions appear to have been worked out and it now seems likely that there will be a single initiative on the ballot in June. There still remains the tasks of completing the draft of the new Charter, getting both Commissions to agree to its language, and securing the approval of the City Council. Thus, it is likely that the process will remain intense up until the March 5 deadline for submission of the proposal for inclusion on the June ballot.

Even this detailed description of the Charter reform process does not begin to capture the time, energy, and emotions that so many people are investing in it. Every week seems to bring its own crisis. It has been an amazing process and an exhausting one. Suffice it to say that although I have always been busy, I never have experienced anything like the past year-and-a-half of Charter reform.

II. THE SUBSTANTIVE ISSUES

Part I described the process; this section discusses the key issues in Charter reform, their similarity to matters of United States constitutional law, and the absence of any consensus about any of them within Los Angeles. The Charter Commission has made literally hundreds of decisions concerning the content of the future Charter. I will focus here on several of them that have been particularly significant and are especially revealing.

One thing that has continually surprised me is the extent of external pressure and its importance in our decision-making. On every issue, there are always officials or interest groups with strong feelings. Mayor Riordan, members of the City Council, the City Attorney, the Controller, Board of Education members, business leaders, homeowner leaders, and labor leaders all have lobbied the Commissioners, at times intensely. Having been a professor for 19 years, I am used to a level of

faculty politics – but that is always internal to the institution. What is new to me is external pressure and how often it can be decisive, having more impact on the outcome than arguments or persuasion.

A single example is illustrative. The current Charter contains several provisions concerning the Los Angeles Unified School District's Board of Education. Specifically, it covers the size of the Board, how its members are chosen (such as whether elections are by district or at large), the terms of its members, and their salaries. I became convinced that changing any of these things was likely to produce significant controversy without really doing anything to improve the schools. I thought that the way in which we might have the most impact would be for the new Charter to create a commission to study every aspect of the school system and present its recommendations to the City Council for future Charter reform and to the California legislature for areas requiring statutory change.

Unfortunately, the issue was scheduled to come before the Commission on a night when I was going to be out of the country. I wrote a memo to my fellow Commissioners explaining the idea and spoke to several about it. Additionally, the Mayor supported the idea and the head of labor seemed agreeable so long as labor was represented on the new commission. An initial straw vote at the meeting was 9-1 in favor of the idea. After discussion, the vote on the tentative decision was 7-3. It takes eight votes – a majority of the 15 commissioners – to pass a motion so the matter was automatically continued to the next week.

I would be present at that meeting and could cast the eighth vote in favor. In the meantime, however, members of the school board and the teachers' unions decided that they did not like the idea of a study commission. I am still not sure why. Their arguments against it at that meeting seemed weak. They said that study commissions never accomplish

anything; this is certainly not true in Los Angeles, where the Christopher Commission's study of the Los Angeles Police Department had enormous impact. They said that a study commission would be costly; but there was no explanation for why the expenses were not justified by the value of what was to be learned. There was great pressure from union leaders and members of the board of education; as a result, several Commissioners switched their votes. The motion for a study commission, which had seemed a sure thing, failed.

The other notable aspect of the external pressure is the rhetoric of threats that has come to dominate the process. As discussed below, the issue of neighborhood councils has been the single most controversial question. In the spring of 1998, the Los Angeles Business Advisors, a group comprised of the heads of two dozen of the largest businesses in Los Angeles, issued an ultimatum: it would organize to defeat any Charter that provided for elected neighborhood councils with decision-making authority. This produced a predictable response from homeowners' groups that want such entities: they threatened that they would kill Charter reform if it did not create such community councils with control over land use decisions in their areas.

One group after another came before the Commission and made its own threat. Some labor leaders testified that they would defeat Charter reform if it provided for a significant increase in the Mayor's power. But supporters of a stronger Mayor argued that they would oppose a Charter that did not do so. Others said that they would kill Charter reform if the new Charter proposed a bill of rights.

At this writing, it is uncertain how much these threats are rhetorical posturing and how much they foreshadow opposition to come. It is clear, though, that the process has not been dominated by a spirit of consensus and conciliation, but instead one of anger and attempts

at intimidation. The reality is that virtually everyone has much to gain from Charter reform in Los Angeles, and everyone will have to compromise in order for it to happen. But that certainly has not been, at least thus far, widely spoken of or seemingly recognized.

The following four issues are illustrative of all of this and also indicative of the many similarities between the issues concerning the Charter and the United States Constitution.

1. Allocation of responsibility between the Mayor and the City Council

Under the current Charter, the City Council is, in many ways, much more powerful than the Mayor. The Mayor, for example, cannot fire the heads of departments unless the Council consents. The Chief Legislative Analyst, an employee of the City Council, has primary responsibility for representing the City in intergovernmental matters, not the Mayor. The City Council is designated by the Charter as the "governing body" for the City and handles not just legislative matters, but countless administrative and executive tasks as well.

The Elected Commission's first decision was to redefine the relationship between the Mayor and the Council, so that the Mayor was in charge of the executive branch and the Council was primarily a legislative body. Although this hardly seems controversial since it is such a familiar allocation of authority, it is a profound change from the current Charter and a key disagreement between the elected and appointed commissions.

The most important aspect of this is the issue of the Mayor's authority to fire general managers. Under the current Charter, both the hiring and the firing of a general manager to head a department requires the approval of the City Council. Mayor Riordan has expressed the view that the empowering the Mayor to remove general managers without needing Council consent is the most important change the Commission could make.

Members of the City Council have been equally adamant that this is one reform that they never could accept.

The underlying concern is a tension between accountability and independence that occurs in many areas of the law. Allowing the Mayor unilateral authority to fire general managers enhances accountability within city government. If a department is performing poorly, the Mayor can fire its head and, with Council consent, put in a new leader. This would change the widespread perception that no one is in charge of city government. On the other hand, giving the Mayor such authority lessens the independence of department heads; they might be much more timid if they knew that they could be so easily fired and replaced. City Council members worry that general managers will have no need to respond to them, or the needs of their constituents, if the Mayor has unilateral authority to fire.

As of now, the Elected Commission has decided that department heads should be appointed by the Mayor with the consent of the Council, but that they can be fired by the Mayor alone. The Appointed Commission, in contrast, has continued the current system of allowing removal only with approval of the City Council. It is an issue that is unlikely to have great popular appeal, but it is of intense interest to those in city government. Business has lined up for the Mayor's position; the city employees' union supports the status quo.

To me, what is most interesting is that this is exactly the same issue that arises in discussing presidential removal of Cabinet officials, or even judicial independence. The issue is a familiar one for students of constitutional law. President Andrew Johnson was impeached for firing a Cabinet official, the Secretary of War, in violation of a federal statute. There have been several major Supreme Court cases dealing with the ability of Congress to limit firing of executive officials. Whether at the city or the federal level, the question is the same:

what is the proper balance between accountability and independence?

2. The office of the City Attorney and control over litigation

The current Charter creates an elected City Attorney who prosecutes misdemeanor crimes and handles all civil matters involving the City. Additionally, the Charter provides that the City Council manages and controls all litigation concerning the City. One of Mayor Riordan's highest priorities in Charter reform has been placing the City Attorney under the Mayor's control. Specifically, Mayor Riordan proposed that the elected City Attorney handle only criminal matters and that there be a separate City Attorney, appointed by the Mayor, to handle civil matters. Additionally, Mayor Riordan wanted the Charter to say that it is the Mayor who manages and controls civil litigation.

Although Mayor Riordan lobbied the Commissioners hard on this issue, the City Attorney, James Hahn, did so as well. Again, the underlying issue is strikingly like that concerning the desired level of independence for the United States Justice Department and the Attorney General. Mayor Riordan complained the City Attorney often was unresponsive to the needs of departments and that the Mayor should ultimately be in charge of how they are represented. The reply was that an independent, elected City Attorney is a key check on the Mayor. If a Mayor or a department is doing something against the law or in violation of city policy, there is a separate individual to say no.

Despite significant pressure from the Mayor, the Commission voted overwhelmingly to keep an elected City Attorney for both criminal and civil matters. This is an area where the elected and appointed Commissions agree. But there is also the question of who speaks for the client. The law of professional responsibility provides that the City

Attorney represents the entity and not any individual. But who speaks for the fictional entity, the City of Los Angeles?

The Commission decided that, apart from the authority to settle lawsuits, the Mayor should speak for the City in matters in which the client traditionally makes decisions in an attorney-client relationship. However, in suits challenging ordinances or City Council actions, the Council should speak for the City. The Commission also proposed that a claims board be created to handle settlements for an amount greater than that specified in an ordinance. Although all of this seems simple and straightforward, it was the product of countless hours spent trying to negotiate an agreement between the Mayor and the City Attorney.

As the Commission has debated the office of the City Attorney, the country has focused on the Independent Counsel in Washington. Again, there are striking similarities in the issues. How much should prosecutorial power, criminal or civil, be independent of control by the executive?

3. Neighborhood councils

The most divisive issue in Charter reform is whether to create a system of neighborhood councils. More precisely, the questions are how should they be selected and what tasks should be assigned to them. This is the issue that has attracted the most media attention, and it is the one that has galvanized the public and special interest groups. When the Elected Commission scheduled a meeting to make its tentative decisions on the topic, several hundred people attended and 55 wanted to speak before the Commission began deliberating.

The ultimate issue is quite similar to debates over federalism at the national level. Should power be decentralized to a more local level? Los Angeles is a huge city; it is large enough that Milwaukee, St. Louis, and Cleveland could all fit within its boundaries with

room to spare. There is a widespread sense that city government, headquartered in downtown Los Angeles, is too far away and too unresponsive to the needs of the communities. Neighborhood councils seem, to some, the answer.

There is, however, intense disagreement over the issue. Homeowner groups want to see elected neighborhood councils with meaningful decision-making authority. They especially want them to have the power to make land use decisions, such as the authority to grant zoning variances and conditional use permits. Leaders from the Valley, San Pedro and West Los Angeles all argue for the creation of these new, elected bodies.

In sharp contrast, business groups vehemently oppose elected neighborhood councils in any form, and especially object to giving them any decision-making authority. Business fears that neighborhood councils will block development. Unions representing the construction and building trades oppose neighborhood councils for the same reason. Non-profit groups engaged in activities that communities might not welcome, such as providing services to the homeless, also strongly oppose such decision-making for neighborhood councils.

In June 1998, the Elected Commission decided in favor of creating elected neighborhood councils, and decided that the Charter should provide that a small percentage of city funds be divided among them to spend to purchase additional city services. One neighborhood might buy additional librarians' time, another might choose to use its money for more road repairs, and so on. The front page headline in the *Daily News* on the day following this meeting was, in large type, "Power to the People."

The Commission, however, made no decision about the role of these councils in the land use process. One Commissioner suggested getting all of the relevant interest

groups around the table and seeing if they could work out a compromise. The other Commissioners thought that this was a great idea. I therefore called the leaders of groups representing business, homeowners, labor, and others to a meeting. I asked retired Ninth Circuit Judge Bill Norris to serve as a mediator. Neither I, nor any Commissioner, was to be present. It was for the group to see if it could agree on a proposal concerning neighborhood councils.

The group met three times. Unfortunately, little came of the meetings. Business remained adamantly opposed to elected neighborhood councils and homeowner leaders were equally resolved in favor of them. Those not invited to the meetings felt slighted. If a compromise had emerged, it would have been worth it; but, in the end, all it did was generate bad press and harden positions.

A committee of the Commission spent six months working on the issue and then it was replaced by a task force to examine the topic. No consensus ever developed among the Commissioners or the interest groups. After several long and, at times, very acrimonious meetings, the Commission arrived at its own compromise. The Charter would propose self-selected neighborhood councils with no decision-making authority. Anyone, citizen or non-citizen, community resident or business owner, would be eligible to serve. The ballot also would propose an alternative: elected neighborhood councils. In other words, the voters would have a choice: they could select either elected neighborhood councils, with some decision-making authority, or councils chosen by a caucus-type system with no decision-making role. After much debate, the Commission rejected giving either type of council any authority to make decisions concerning land use.

Not surprisingly, this unleashed a barrage of criticism by those supporting elected neighborhood councils with land use decision-

making power. Valley leaders angrily denounced us and decried Charter reform as a sham. Many threatened to boycott the process and organize against the new Charter. The Commission spent several long meetings working out the details and no one seems satisfied with the outcome. Between now and March, when the final proposal must be submitted to the City Council, further revisions are certainly possible.

My own views on neighborhood councils have changed greatly over the course of the process. When I campaigned, I said that I supported elected neighborhood councils with decision-making authority, including for local land use matters. As I have heard testimony from countless witnesses, I have become increasingly troubled by the likelihood that communities would use this authority to block unpopular uses, such as shelters or senior citizen homes, and to stop development.

Some propose that the solution is to allow neighborhoods to keep a portion of the proceeds from additional developments; this is intended to give an incentive for allowing more projects. At the very least, this would fail to provide an incentive for communities to permit unpopular non-profit uses. Moreover, it would create a terribly inequitable situation. Areas preferred by developers, likely the wealthier west side and Valley communities, would have more to spend on social services. Poorer areas, including the east and south-central neighborhoods, would have less. The result is that those who need more would end up with even less. To me, this is unconscionable and I never could support a Charter that institutionalizes such wealth inequalities.

The result is that I changed my mind, and now oppose giving neighborhood councils control over land use matters. Not surprisingly, I have been yelled at and threatened by more than one angry resident from my district. The *Daily News* ran an editorial criticizing me for caving into pressure from

business and labor. But what the editorial didn't recognize is that I became convinced that allowing communities so much control over development just doesn't seem in the best interests of the City.

There are obvious parallels to, and differences from, the division of power between the federal and state governments. Ultimately, both revolve around the desirability of decentralizing decision-making for particular decisions.

4. The proposed bill of rights

No single issue generated more heat than the proposal for a bill of rights to the Charter. I am largely responsible for this and believe in hindsight that I badly mishandled the issue.

The law is clear that the Charter can provide more rights than federal and state law but not fewer. Early on, I spoke to several of my fellow Commissioners about the possibility of placing a bill of rights in the Charter. In areas where federal and state law seem insufficient to protect rights, the Charter could provide safeguards against city infringement. For example, neither federal nor state law adequately protects against discrimination based on sexual orientation. The Charter could do this by, for example, guaranteeing benefits for domestic partners. I was a member of the committee that was assigned the issue. We held hearings and heard predictable testimony: Groups like the American Civil Liberties Union and the American Jewish Congress thought that it was a great idea; the City Attorney's office saw it as an invitation to endless lawsuits against the City. The committee voted, 4-0, to create a bill of rights and it decided, 3-1, that the statement of rights should be inclusive; it should be a full statement of the basic rights that all in Los Angeles should possess. In other words, in some areas it would provide greater rights than current federal or state law, but in other areas it would be duplicative. The thought was that someday protections under federal and

state law might lessen, but at least there would be limits on the City.

Because we did not have staff, I took responsibility for drafting the committee's report. The committee presented it to the Commission at a meeting that attracted relatively few members of the public; it was held on the night of the Academy Awards and we did not account for that day's holiday status in Los Angeles. The following Sunday, however, the *Los Angeles Daily News* ran a front page story about it under the headline, "Charter Reform Goes Crazy." It especially focused on the provision which concerned the right to reproductive choice. The article said that the issue was to be discussed the next night at a meeting in a Valley neighborhood.

The meeting actually was supposed to be on a different topic entirely, but it was packed by anti-abortion activists. Almost three dozen people spoke; virtually without exception they were against the idea of the bill of rights and vehemently against abortion rights. The Commission was treated to pictures of dead fetuses and called baby killers. The audience was unruly and most of the meeting was spent listening to testimony that was largely irrelevant to Charter reform.

Every newspaper then ran editorials attacking the idea of a bill of rights. The *LA Weekly* and *New Times*, the City's two alternative papers, ran full page articles focusing on me and my misguided quest for a bill of rights. The *New Times* article, titled, "Erwin's Brave New World," began by making fun of my glasses, my voice, and my mannerisms. It included a caricature of me, sitting at a school desk and holding a document with a six-pointed Star of David on it. I'm not sure what my religion had to do with this, but including a Jewish star in the drawing was really offensive. The *LA Weekly*, a generally liberal paper, ran an article saying that the proposal was a reflection of my being an out-of-touch academic. The *Daily News* said that my proposal for the bill of

rights “had all but killed any hope for Charter reform.” The *Los Angeles Times* called it unnecessary, divisive, and misguided.

When the Commission ultimately voted, the tally was 7-3 in favor of a bill of rights. Because it takes eight votes to pass a motion, the bill of rights was neither accepted nor rejected. The *Los Angeles Times*, however, ran an article the next day saying that the Charter Reform Commission had rejected the bill of rights. The issue then disappeared. At this stage, no Commissioner seems inclined to raise the idea again. It just doesn't seem to offer enough benefits for all of the negative energy that it generates.

If I had to do it all over again, I would handle the matter very differently. I made the mistake of making the bill of rights one of the first issues taken up by the Commission. I was enthusiastic about it and thought to get the report done relatively quickly at a time when other topics were still in committee. In hindsight, I wish that I had left the bill of rights until much later in the process. I also wish that I had separated the question of whether there should be a bill of rights from the specific rights that it should contain; we should have dealt with the former question and only then considered the latter.

Also, I tremendously underestimated the vehemence of public opposition to the concept of the bill of rights, particularly one which assures protection of reproductive freedom. I still believe that most in Los Angeles would support the idea of a bill of rights, but there is no doubt that it also would generate a great deal of opposition and provide a basis for mobilizing the opposition against a new Charter proposal.

III. LESSONS

I have learned a tremendous amount from serving on the Charter Reform Commission and I am sure that I will not fully appreciate it

until the process is over and I have had time to reflect. I certainly have learned a great deal about municipal law and government, about being an administrator, and about politics. I've definitely come to the conclusion that it is liberating to be in political office with the knowledge that I will not be seeking another elected position.

More surprisingly to me, I also have learned a great deal about constitutions from this experience. First, I have come to realize that a relatively short document like the United States Constitution requires tremendous trust in those who will be governing under it. The Los Angeles Charter is hundreds of pages long and is much more like an operations manual than a constitution. If there is no trust in those who are likely to be the future government, there is a desire to be as specific as possible to minimize their discretion. A document such as the Constitution, which is more of an outline, requires faith in those who will serve under it.

This, however, is a time of great cynicism about government and government officials. If the Constitution were rewritten today, would the framers have the trust needed for an outline rather than an operations manual? The lack of trust in, and even respect for, many government officials in Los Angeles makes it difficult to write a constitution-like document.

Second, the availability of judicial review under the United States Constitution makes including details within it less necessary. Courts can interpret the broad language to deal with specific problems. The Supreme Court and the federal judiciary have, at least today, a central mission of interpreting the Constitution. No court has that role with regard to the City Charter, though courts often will interpret it in the course of litigation. Without a judiciary to construe the document, there is a sense of a need for it to include much more detail and specificity.

The traditional explanation for judicial re-

view is to ensure the enforcement of the Constitution. Government could violate and even ignore the Constitution unless the judiciary were there to enforce it. I have come to see another, often overlooked, function of judicial review: it makes a relatively short document possible. There is the knowledge that its gaps can be filled in by experience and judicial review.

Third, I have come to have a greater appreciation for the importance of symbols in a constitution. Some parts of the United States Constitution, like the preamble, are clearly symbolic. Other provisions, which have never been enforced, have been rendered symbolic. There is a tendency to deprecate that which is purely symbolic, but symbols matter, often greatly. For example, there are sections of the current Charter that guarantee a minimal level of funding for libraries and for parks and recreation. The amounts were set in 1925, when the current Charter was passed, and are minuscule. The temptation to remove these provisions was overwhelming; no other departments are guaranteed funding, why these? More important, the amount of money actually spent on these functions far outstrips the requirement in the Charter.

On reflection, though, I realize that these provisions – though anachronistic in amount – should remain in the Charter. Including a minimal level of funding for libraries and for parks and recreation is a way of saying that these things matter; omitting this is likely to be inter-

preted as a symbol in the opposite direction. That the Charter provisions long ceased to matter for the city budget is irrelevant.

Finally, being in the role of framer has made me ever more skeptical of reliance on framers' intent in constitutional interpretation. I always have been dubious about originalist theories of interpretation. My experience on the Charter Reform Commission has intensified these doubts. Often Commissioners voting in favor of a particular provision have quite different thoughts about what it means. Sometimes we think we are in agreement about the meaning of a decision only later to realize that we have widely divergent understandings of what we voted for. Most of all, I realize that if the Charter is adopted, it must stand on its own and will gain meaning from experiences under it.

CONCLUSION

The Elected Los Angeles Charter Reform Commission will place its proposal before the voters in June 1999. We have until March to finish our deliberations and drafting, and then three months to educate the public and participate in the campaign for the Charter's adoption. If the voters approve the new Charter, we truly will have been framers. Even if the voters reject our proposal, it has been an amazing ride. It has been an experience in law that nothing in law school, practice, or law teaching remotely prepared me for. *EC*