IMPORTANCE OF PRESERVING THE ROLE OF THE CITY ATTORNEY AS AN INDEPENDENT ELECTED OFFICIAL

SAN DIEGO CITY ATTORNEY

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7 SEPTEMBER 2007

I.

INTRODUCTION

The San Diego City Attorney is an independent, elected official with a duty to protect the interests of the people of San Diego. The City Attorney's Office provides civil counsel, pursues and defends civil litigation and prosecutes misdemeanor offenses that occur within City limits. The City Attorney is "the chief legal adviser of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties." S.D. Charter § 40.

San Diego's City Attorney has been an elected officer answering directly to the people for 76 years. The City Attorney thus has had the independence to serve as a "watchdog" over City government and "the conscience of the community."[1] This independence has been critical to the constitutional balance of powers and the goal of ensuring honesty in City government. (See Section V.) Yet the issue of whether the City Attorney should remain an elective office has been debated repeatedly by panels considering reform of the San Diego City Charter. The panel presently serving the Mayor seeks a similar Charter revision, arguing the City Attorney should be appointed and that other officials should control the City's litigation. This memorandum provides missing historical context and offers practical arguments for why the City Attorney must remain an independent, elected official.

II.

THE SIGNIFICANCE OF THE SAN DIEGO CITY CHARTER

The San Diego City Charter is its "constitution" or "supreme" law. See *Brown v. City of Berkeley*, 57 Cal. App. 3d 223, 231 (1976); *City Council v. South*, 146 Cal. App. 3d 320, 326-27 (1983). As the City's governing document and expression of the will of its citizens, it must be afforded great deference and cannot be rewritten absent a vote of the people.

Although a city charter by itself cannot ensure good government, a well-designed charter can provide a structure that reduces opportunities for corruption and mismanagement while reinforcing efficient and responsible practices.[2] A charter provides the framework for the conduct of City government, gives the governing body flexibility to deal effectively with problems and contains necessary safeguards to protect citizens against the abuse of power. (*See*, Explanatory Statement to the People in Proposed City Charter from Elected Charter Commission of Kirkwood, Missouri, 1983.)

The California Constitution empowers charter cities like San Diego to control their own affairs, allowing them to make and enforce all ordinances and regulations with respect to municipal affairs, subject only to the restrictions and limitations their citizens have written in

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[1] See comments of former City Attorney John Witt, June 26, 1973, to a panel contemplating Charter amendments.

[2] *See*, Christopher T. Gates and Robert Loper, *Renewing the Model City Charter, The Making of the 8th edition,* 85 PM (Public Management) Magazine, No. 3, April 2003.

their charter. *Johnson v. Bradley*, 4 Cal. 4th 389, 396-397 (1992). This doctrine is based on "'the principle that the municipality itself knew better what it wanted and needed than the state at large, and to give that municipality the exclusive privilege and right to enact direct legislation which would carry out and satisfy its wants and needs.'" *Id.*, quoting *Fragley v. Phelan*, 126 Cal. 383, 387 (1899). *See,* Cal. Const. art. XI, § 5(a).

City charters thus "supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith." *Id.* Because of the Charter's paramount importance, any proposals for Charter reform must result from a deliberative process and necessarily should be the product of extensive public input.

III.

CHARTER SECTION 40 AND ITS LEGISLATIVE HISTORY

The San Diego City Attorney's role is set forth in Charter section 40, which states in relevant part that the City Attorney is "the chief legal adviser of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties."[3] S.D. Charter § 40. The City Attorney is elected for a four-year term.

To understand the intended role of the City Attorney we look to the legislative history surrounding the drafting of the charters put to a vote of the people in 1929 and 1931. The 1929 freeholders' board recommended a charter that would include a council-manager form of government and an appointed city attorney. This draft charter was defeated by a narrow margin.[4] In a September 12, 1930 letter, attorney James G. Pfanstiel, who served on the 1929 Board of Freeholders, attempted to detail the "various objections and criticisms" he heard during the campaign for the proposed 1929 city charter. Pfanstiel wrote the letter to the chairman of the Board of Freeholders, Nicholas J. Martin, at Martin's request.

Regarding whether the city attorney should be appointed or elected, Pfanstiel wrote of the 1929 campaign:

> Some advocated with considerable degree of force that the city attorney should be elected by the people. The argument is that the city attorney is the attorney for the entire city and each and every elective and appointive officer thereof upon all questions pertaining to the municipality, and he should **occupy an independent position so that his opinions may be uninfluenced by an appointive power.**[5]

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[3] The only exception is for the Ethics Commission, which has independent legal counsel.

[4] *San Diego's Home Town Page*, San Diego Sun, 1930 edition.

[5] September 12, 1930 Letter from James G. Pfanstiel to Nicholas J. Martin at 4 (emphasis added).

Ray Mathewson, the labor union representative on the Freeholder Board, also described the role of the independent city attorney in a proposal he submitted to the board:

> The duty of the city attorney is to give legal advice to every department and official of the city government on municipal matters. He also must act as the representative of the various departments before the courts. He should occupy an independent position so that his opinions would not be influenced by any appointive power. For this reason he should be elected by the people. **If elected, the city attorney is in a position of complete independance (sic) and may exercise such check upon the actions of the legislative and executive branches of the local government as the law and his conscience dictate.**[6]

On November 11, 1930, motions before the Board of Freeholders to elect or appoint a City Attorney failed on 7-7 tie votes. The Board then solicited input from San Diego's legal community. On November 12, 1930 the board adopted a motion "that the city attorney be elected by the people,"[7] rejecting the idea the City Attorney was "only the council's lawyer."[8] Minutes of the meeting recorded the fact that several San Diego attorneys attended the meeting and advocated for the idea of an elected city attorney.

IV.

AN ELECTED CHARTER COMMISSION IS THE BEST MODEL FOR CHARTER REFORM

Any attempt to rewrite the City Charter and propose amendments for voter consideration must be a deliberate and considered undertaking, keeping in mind the document embodies the will of the people as to how its government will work. As one San Diego editor, A.R. Sauer of *The Herald*, wrote after voter defeat of a poorly conceived draft Charter proposed in 1929:

> We must demand a charter committee which will work WITH the people and not AGAINST them. We want a charter committee which will begin its work by sitting back and doing only one thing – ASKING THE PEOPLE OF SAN DIEGO TO SEND THEM SUGGESTIONS. . . They need to incorporate in the charter WHAT THE PEOPLE WANT IN IT – and then they can rest assured that their charter will be accepted, that they will win instant and lasting commendation, and that they will accomplish something for the continuing good of the community.[9]

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[6] Ray Mathewson, rough draft of a proposed "Strong Mayor-Council Form of Government" at 2 (emphasis added).

[7] Board of Freeholders meeting minutes, November 12, 1930, at 2.

[8] *Lawyers Are Asked To Aid Freeholders: 7 to 7 Deadlock On City Attorney Will Be Put to Attorneys*, news article.

[9] A.R. Sauer, *People Take Rule Into Own Hands and Should Keep It*, undated 1929 article in *The Herald* after defeat of the proposed 1929 Charter. Sauer also wrote that he hoped defeat was a

Sauer described those who drafted the 1929 Charter as an "infamous clique" and a "gang which has been in secret but unassailable control" of the City, but who did not represent the City at large.[10] After the 1929 draft Charter was defeated by the voters, Sauer was among those optimistic that a new elected panel would be able to craft a suitable City constitution – which they later did.

In 1931, with the elected panel's draft Charter going before the voters, Sauer wrote,

> Today I believe that there is not a citizen of this city who is not glad that this (1929) charter was defeated. We got a new board of freeholders who were willing to profit by the mistakes of their predecessors, and the result is a piece of work which is all that it is intended to be.
>
> That the new charter is a good charter is due primarily to the fact that the freeholders who composed it are business men who are also men who take pride in their city. They gave heavily of their time, patience and energy to perfect the new charter; they went exhaustively into every problem with which they were confronted; they accepted suggestions graciously; and they made decisions firmly.[11]

In describing the chairman, Nicholas J. Martin, Sauer wrote, "His tact, diplomacy, courtesy and an earnest desire to write an acceptable charter won the confidence of his associates and of the people with whom he had to deal in bringing the work to a successful culmination."[12]

The editor's words some 76 years ago underscore that Charter revisions should not be made because they are politically motivated by any one group, but rather should arise from inclusive, deliberative debate and a deep understanding of the content of the City's constitution. Charter revisions need to respect the constitutional balance of powers. Just as importantly, efforts to draft new Charter language should involve the public's input.

The panel of 13 men and 2 women elected in August 1930, Sauer wrote, "succeeded in drawing up a basic law for San Diego which far outbalances the old one" and which was "a vast improvement over anything of the kind we have had in this city."[13]

The elected panel that crafted that 1931 charter – much of which remains in that form today – is distinguishable from the group seated today. Although the City is once again engaged in discussion about Charter reform, the 15-person panel now proposing Charter provisions consists solely of political appointees of the Mayor and City Council. The panel was created by

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sign "the voice of the people is going to be heard, with a consequent silence on the part of the high-hatted Charlie boys who have been making fools out of the rest of us since Father Horton staked out the town." *Id.*

[10] *Id.*

[11] A.R. Sauer, *The New City Charter Should Be Adopted*, 1931 newspaper article.

[12] *Id.*

[13] *Id.*

the Mayor's office to consider revisions related to the Strong Mayor form of governance. The panel is not inclusive of the City at large and has been largely ignored by the public, with few members of the public attending their meetings.

To the extent the Charter should be rewritten today, an elected panel such as that seated in 1930 and 1931 is the best model, drawing upon the historical experience of this successful group of Charter drafters. These drafters were not operating out of self-interested positions and not dedicated to an agenda of increasing the powers of any one public official. An elected panel also could help ensure that those drafting Charter proposals are reflective of the population at large and not beholden to any special interest groups doing business at City Hall.

V.

THE CITY ATTORNEY MUST BE AN ELECTED OFFICIAL TO ENSURE THE INDEPENDENCE OF THE OFFICE

As set forth above, San Diego's City Attorney has been an elected officer answering directly to the people for 76 years. This has given the City Attorney the independence to serve as a "watchdog" over City government and "the conscience of the community."[14] This independence has been critical to the constitutional balance of powers and the goal of ensuring honesty in City government. Now, as has happened throughout the City's history, some have suggested amending the Charter so the City Attorney becomes an appointed servant, responsive not to the public but to other elected officials. Others have proposed revising section 40 to reduce and compromise the City Attorney's control over litigation decisions and place more control in the hands of the Mayor and City Council, compromising the City Attorney's independence and ability to serve the People's needs.[15]

Given the new consolidation of power in the Mayor's office under the Strong Mayor form of government, and recent federal investigations involving City council members, there is significant evidence of a need to strengthen the independence of the City Attorney's Office, not to weaken it. Some seek to change the structure or powers of the City Attorney's office as a reaction to the person presently holding the office. But to do so misses the mark, ignoring the office as an institution and the fact that it has worked well, as presently structured, for eight decades.

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[14] See comments of former City Attorney John Witt, June 26, 1973, to a panel contemplating Charter amendments.

[15] The City Attorney was not afforded an opportunity to nominate representatives to the current Charter Review Committee and therefore, lacks representation on the Committee with respect to any Charter section 40 recommendations that would change the structure or duties of his office. In fact, the City Attorney was the only elected official not given the opportunity to nominate members to the Committee. The City Attorney is elected City-wide and commensurate representation on the Committee would have been appropriate. The Committee lacks credibility in considering the structure, duties and responsibilities of the City Attorney's office as set forth in Section 40.

As Professor John Rawls expressed in his landmark work, *A Theory of Justice*:

> The principles of justice for institutions must not be confused with the principles which apply to individuals and their actions in particular circumstances. These two kinds of principles apply to different subjects and must be discussed separately.
>
> Now by an institution I shall understand a public system of rules which defines offices and positions with their rights and duties, powers and immunities and the like. . .
>
> An institution may be thought of in two ways: **first as an abstract object, that is, as a possible form of conduct expressed by a system of rules; and second, as the realization in the thought and conduct of certain persons at a certain time and place of the actions specified by these rules.**[16]

In the context of Charter reform, it is thus inappropriate to engage in a wholesale restructure of the institution of the City Attorney's Office out of a reaction to the person "at a certain time and place" operating within those rules. Charter revisionists should view the institution "as an abstract object" when considering any changes that may be made to it. If one does not approve of the way in which the present office holder is operating within the rules of the office, the answer is at the voting booth -- to change the person holding the office, not to change the institution's rules of operation.

When they have failed to view the institution as an abstract object, Charter Review Committees have periodically considered wresting control away from the voters over who serves as City Attorney. In fact, the debate as to whether the City Attorney should be elected or appointed is cyclical. The concept of an appointed city attorney has been proposed on at least four occasions, in 1939, 1953, 1965 and 1968, and rejected by those analyzing the possible charter revision at every turn.

Consider the following argument made by one who previously held the office:

> My views as to the necessity to maintain the office of City Attorney as an elective office take into account what might be said to be some homespun philosophy about the nature of government itself. I believe that local government should be so organized as to take into account the natural apathy of most of our citizens. The freeholders who developed our present form of government were, I think, wise men. The 1931 Charter resulted from the determined efforts of San Diego citizens to rid the city of a form of government that had been subjected to graft, corruption and political machines. They developed a system of checks and balances and a careful distribution of powers amongst the various agencies of government. Thus,

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[16] Rawls, A Theory of Justice, at 54-55 (1971) (emphasis added).

the City Council was limited to a legislative field; the city manager was given broad executive and administrative power; and **the City Attorney, as the only full-time elected official, filled the role of watchdog, and perhaps the "conscience of the community."**

Relieved of pressures arising out of appointment, and responsive only to the electorate at the polls every four years, the founding Fathers considered that an elected City Attorney could best protect and represent the public interest through an independent office in which he could function as legal counsel without fear or favor, or concern about losing his job on account of the rendition of an unpopular opinion.

We require to build into any system of local government a system of checks and balances to assure that the business of government can be conducted openly, and that there will be independent voices that can speak to the people concerning their affairs. In theory and in practice the office of City Attorney in San Diego has, in my opinion, so acted since at least 1931; but attacks upon the independence of the office continue to be made. . . .

We must also consider strong words between the two men (Council member Jack Walsh and City Attorney Ed Butler) when the City Attorney offered his legal opinion to the Council and media in response to a councilman's inquiry on a Planning Department matter. . . Mr. Walsh reminded the Attorney that only his legal opinion was sought and Mr. Butler reiterated his duty "to the people" as well as the Council. "If Mr. Butler wishes to set policy and be a champion of the people, he should resign from the city legal office and seek a council seat."

These latter-day observations confirm the fears of the founders of the 1931 Charter that an appointive lawyer would serve the interests of the few and would not be able to serve the interests of the city. **Today, as in 1931, our city is under continuous pressure from groups that seek to profit at the expense of the public. An independent, elective City Attorney safeguards the public good because he is responsive to the electorate. To reduce him to the status of servant to the City Council or to the City Manager[17] disregards the bitter lessons of our past and opens a door to those who would feather their nests at the expense of the people."[18]**

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[17] Although these comments were made during the Council-Manager form of government, they apply with equal – if not increased – force to the Strong Mayor form of government, in which the Mayor assumed the duties of the City Manager.

[18] Excerpts from remarks of former City Attorney Edward T. Butler to Charter Review Committee on May 1, 1969 (emphasis added).

These words could have been delivered to a present Charter Review Committee to describe today's political environment. But the speech was delivered to a committee considering Charter reform assembled in 1969. The statements were made May 1, 1969 by former City Attorney Edward T. Butler, who served five years in the position and strongly believed the office should remain an elected position.

Four years later, then-City Attorney John Witt quoted Butler's remarks to another Charter Review Committee, stating:

> I am told that once again, with a regularity which might be characterized as forlorn persistence in the face of compelling adversity, there are a few people who, upon learning of charter review, rush forward to propound that San Diego should have its chief legal advisor appointed by someone, rather than elected, as now, by our community's citizens. Once more the tired arguments are dusted off pertaining to the City Attorney's responsiveness, not to the public he serves, but to the political interests of other elected officials.
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> ... Indeed a return to a form of government which includes an appointed city attorney is a long step backwards, moving us toward the form found in small, general law cities, where elected officials are principally part-time legislator-squires.
>
> . . . Usually the limp rationalization for the proposal that the City Attorney's position become appointive begins with a glibly glittering but strikingly shallow analogy sought to be drawn between municipal government and a private corporation. . . .
>
> . . . Our cherished American institutions are established on the concept that government derives its powers from the governed. This is true at every level of government. The citizens of San Diego have consented to the delegation, by way of the city charter, of certain limited powers to the various agencies of city government. Not among those powers delegated through our present charter is the power to select the city attorney. That power is retained, and properly so, by the people.
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> **The people, and not the mayor and council, are the government under our system. The city attorney is counsel not to part of the government; and the mayor and council are only a delegated part. Instead, he is attorney for <u>all</u> of the government, which flows from and includes the people as a body politic. He must be independent so that he may exercise his office free and independent of the pressures which might be exerted by any other part of the government. Thus it is the people**

> **of San Diego, as in other big cities, who must retain their power to choose their city attorney.**[19]

The committee heard these words during the Council-Manager form of government, but at a time when a proposal for a strong mayor form of governance was being discussed. City Attorney Witt's testimony regarding how increased power for the mayor would affect the role of the City Attorney applies with equal force today. Invoking the lessons of Watergate, former City Attorney Witt said,

> **. . . Consider, however, that, if you choose to strengthen the role of the mayor, the check that resides in the office of an independent, elected city attorney will become all the more necessary.** It is the same check that exists in an independent judiciary and in an elected state attorney general. Watergate, on the other hand, only suggests a few of the frightening possibilities when a government's chief legal officer considers his loyalty to the executive greater than his responsibility to the people.[20]

One need only look to recent events involving U.S. Attorney General Alberto Gonzales and his relentless dedication to the President's agenda for executive power for another illustration. Gonzales came under scathing criticism for loyalty to the President that overcame his duties and responsibilities to the law. Gonzales' legally precarious contentions regarding the President's ability to waive anti-torture laws, engage in eavesdropping on Americans without warrants and dismiss prosecutors whose politics were disfavored by the administration illustrate what can occur when an appointed attorney answers to the executive and not to the people.[21]

VI.

CONCLUSION

As the brochure supporting San Diego's proposed new Charter stated 76 years ago, "The city attorney is to be elected by the people. This is a guarantee that the legal head of the

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[19] Excerpts from former City Attorney John Witt's comments to the City's Charter Review Committee, June 26, 1973 (emphasis added).

[20] *Id.*

[21] Others would suggest that each branch of government should have its own attorney at the City. But only one attorney can speak for the City as an entity. Charter section 40 provides that it is the City Attorney. By having an elected City Attorney, the people have said they want one elected official to speak to the law. This prevents any argument between a "council attorney" who has one opinion and a "mayor's attorney" who may have another opinion. As a 2003 memorandum from San Francisco's elected City Attorney stated, "a single City Attorney allows the City to speak with one voice on legal issues, and avoids the chaos, as well as tremendous taxpayer expense, that would result if each City department could hire its own counsel to represent its view of the City's interests." Memorandum from City Attorney Dennis J. Herrera to then-Mayor-Elect Gavin Newsom, December 12, 2003 at 1.

government will be able to fearlessly protect interests of all San Diego and not merely be an attorney appointed to carry out wishes of council or manager."

In this political climate, there can be no credible argument for changing the structure of San Diego's government to have an appointed City Attorney that does not answer to the people. Similarly, any effort to compromise the City Attorney's powers and responsibilities, by taking away control of litigation and placing it more squarely in the hands of the Mayor and Council, could erode the City Attorney's independence and contradict the public good. Charter revisionists are urged to respect the institution as an abstract object and not politicize the process of amending the City's constitution.

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