

CITY COUNCIL
CITY OF NEW YORK

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TRANSCRIPT OF THE MINUTES

Of the

COMMITTEE ON COURTS AND LEGAL SERVICES

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April 19, 2017

Start: 1:10 p.m.

Recess: 2:53 p.m.

HELD AT: 250 Broadway - Committee Rm.
14th Fl

B E F O R E: RORY I. LANCMAN
Chairperson

COUNCIL MEMBERS: Andrew Cohen
Vanessa L. Gibson
Ben Kallos
Carlos Menchaca
Paul A. Vallone
Barry S. Grodenchik

A P P E A R A N C E S (CONTINUED)

Henry Berger
Special Counsel to the Mayor

Jeffrey D. Lebowitz
Retired Supreme Court Justice
Attorney, Jaspan Schlesinger

[sound check, pause]

CHAIRPERSON LANCMAN: [gavel] Good

afternoon, everyone and welcome to this hearing of
the Committee's—Committee on Courts and Legal

Services on the Mayor's Judicial Selection process.

We are joined by Council Members Eric Grodenchik from
Queens, Andy Cohen from the Bronx and Carlos Menchaca

from Brooklyn and I know we have Ben Kallos for a few
minutes from Manhattan. Last year in September 2016

at Party Judicial conventions held in each borough,
[coughs] sitting—New York City Civil Court Judges

were nominated as candidates in the November General
Election for the State Supreme Court. They won as

those nominated in New York almost always do, and
took office thus vacating the civil court positions

on January 1, 2017, nearly four months ago. State
law charges the mayor with the responsibility for

appointing judges to fill these civil court vacancies
to serve on an interim basis until new civil court

judges can be elected at the following general
election in November and take office the following

January 1st. In other words, it's a one-year gig,
but one that can be, and often has been rolled over

year-to-year to fill the new vacancies that arise

every year. This responsibility of the Mayor so crucial to the maintenance of a well functioning judicial system cannot by law be shirked. Specifically, the New York City Civil Court Act, a state statute provides that civil court vacancies "shall be filled by the Mayor." Further, Mayor de Blasio's Executive Order No. 4, which lays out the process by which the Mayor makes his judicial plans is even clearer, "Judicial vacancies shall be filled within 90 days unless a longer period is required in the public interest." [coughs] The importance of this responsibility and the reason for filling it is mandatory is obvious in the general sense, but even more so in the context of the overwhelming backlog of cases, and the unavail-unavailability of judges to conduct trials in particular. Almost invariably interim civil court judges are actually assigned to sit in criminal court, which arraignments in all criminal cases and handles all the misdemeanor cases to the conclusion. Hundreds of thousands of cases a year, and our criminal courts are starving for judges. This committee conducted a hearing last year on the speedy trial crisis in New York City Criminal Court. The numbers are shocking. Citywide in 2015,

the last full year for which data is available, it took misdemeanor and other low-level defendants on average 564 days to get before an actual jury, or 474 days if the case was tried by a judge. The wait in some boroughs was much longer. In the Bronx, the average wait for a jury trial in 2015 was 897 days. A class action suit has been filed alleging that defendants in the Bronx due process rights are being violated. Such delays warp the administration of justice in this city as defendants take plea just to get out of Rikers Island or because they must take days off work to return to court dozens of times and wait countless hours as their case proceeds. Delay also frustrates victims and witnesses, and impedes the ability of prosecutors to press cases to a fair conclusion. One of the significant drivers of delay [coughs] is a lack of judges. At our hearing last year we heard testimony that a shortage—a shortage of judges from both district attorneys and public defenders. For example, the Queens District Attorney's Office testified, "We can't give the defendant a speedy trial if we can't give him a trial periods." They told the committee that during an eight-month span there were more than 500 cases where

both defense and prosecution were ready to proceed to trial or hearing, but in 64% of those instances, a number that Queen's DA's called astronomical, the case had to be adjourned because there was not trial parts available to conduct the proceedings. The Executive Director of Queens Law Association a public defender office testified, "The shortage of Criminal Court judges is really a travesty." And yet, where we are April 19th and the Mayor has still not filled eight of the interim civil court judgeships almost all of whom would certainly be assigned to-by the Office of Court Administration to sit in Criminal Court. This hearing is about why. The Mayor has apparently decided that no longer will interim civil court judges be considered for rollover appointments for fear of compromising their independence. Meaning unless an upcoming appointment to a ten-year official Criminal Court or Family Court judgeship is available, the interim court judgeship is truly a one-year team, and on those terms we are told it is difficult to find qualified candidates willing to give up their practices for a one-year stint in Criminal Court. I have found no member of the bench or bar that agrees with this policy. Just last month

at a Public Safety Committee hearing I put the question to all five district attorneys' offices. They all lamented the lack of judges. [coughs] Manhattan District Attorney Cy Vance testified: 1,500 cases in 2015 in Manhattan where prosecution--where prosecution defense showed up and there was no court to go to. It could be they needed more court officers or judges, but I don't mean to be flip, but this is not rocket science. If you have judges, cases will move fast. For years prosecutors said trial is starting next week, and they decide if that moves forward. If you only have a couple of judges, the system is like a pond that is backed up, and what happens when that pond is backed up and stale is inadequate, an unfair justice system where people lose witnesses and not fair to the defendants. A representative of the Queens District Attorney's Office testified, "It is a very bad situation. Criminal Court is a ward of attrition. Whoever gives in first is going to wing. We need to get more cases tried. There have been improvements. We do not want to discount that, but we have to understand where we came from. Eight Criminal Court jury trials in 2015, 20 something last year. Nowhere near enough. We

need more focus on the court that deals with 90% of criminal cases in Criminal Court, and it gets about 10% of the attention. We need those judges and we need them right away." In testimony submitted today's hearing, written testimony, the executor—the Executive Director of the Brooklyn Defender Services states, "We believe there is a need for more Criminal Court judges in Brooklyn. Each courtroom has enormous caseloads and the adverse effects to justice are clear." She goes on to acknowledge that there are many reasons that justice is delayed in our Criminal Court, but explicitly states, "The lack of a sufficient number of judges and available court parts compounds these problems. Additionally, one of the most well respected and oft cited scholars of legal ethics Professor Steven Gillers of NYU Law School has submitted written testimony to the effect that where there might be a concern about judges worried that a district attorney or a defense lawyer might put in a bad word with the Mayor over an unfavorable ruling, this is easily remedied—remediable by the Mayor's express commitment to not entertain any commutation—Communication from the DAs asking him not to reappoint a judge on the ground of the judge's

discretionary rulings have favored the defense generally or in a particular case and to do likewise for defense lawyers. Because as Professor Gillers states, "The public's interest in reducing a criminal case backlog is very strong." Moreover, even if the Mayor's refusal to reappoint interim civil court judges was a sensible policy, there are many capable lawyers working in big firms, in government, and the judiciary itself as court attorneys, referees and other staff positions who no doubt would be very happy--would very happily and capably serve a year as a judge sitting in Criminal Court. Which begs the question why is that three years into this Administration there hasn't been the outreach necessary to these potential applicants if that is going to be the administration's policy. We look forward to hearing the Administration's positions on these issues, and its plan for fulfilling its responsibilities to appoint judges in a timely manner so that our city has a functioning judicial system. We're also particularly interested in whether, Mr. Berger, our first witness has stated, it is, in fact, the policy of this Administration not to appoint interim civil court judges unless there is a full

tenure Criminal Court or Family Court vacancy they can fill the following year, or whether, as Corporation Counsel Zach Carter has stated, Zachary Carter has stated, the reason eight judicial vacancies remained nearly seven months after their existence became known to the Administration is because "There is an unusually high number of civil court vacancies this year." Okay, Mr. Berger, you're up first for the Administration. If you'd raise your right hand so we can swear you in. Do you swear or affirm the testimony you're about to give is the truth, the whole truth and nothing but the truth?

HENRY BERGER: I do.

CHAIRPERSON LANCMAN: Thank you.

HENRY BERGER: My name is Henry Berger, the Special Counsel to the Mayor. First, let me state that the authority of--of the Mayor to appoint judges in Family and Criminal Court have to fill interim vacancies on the Civil Court derives from the New York State Constitution in Article 6, Sections 13, 15 and 21. That authority is unconstrained and limited solely by the requirements that judicial appointees be residents of the city and admitted to the bar's attorneys in New York for at least ten

years. Because this constitutionally constructed mandate for Mayor provides no limitations on his power to appointment other than that the candidates meet the rest of this—the requisite residence and experience requirements. The City Council has no oversight jurisdiction over the Mayor’s exercise of his appointment of judges. Nevertheless, as a—as a courtesy to our partners in the City Council we are the part—we are appearing to provide testimony before you today. The Mayor considers the appointment and reappointment of individuals to judicial office to be one of the most important duties. During his tenure, the Mayor has filled more than 100 judicial positions including 35 Family Court seats and 43 Criminal Court seats. In the past year in preparation for judicial vacancies and completion of terms occurring at the end of the year, dozens of candidates have been reviewed, interviewed and designated. Prior to the end of the 2016, the filled by reappointment or appointment all 17 vacancies occurring on January 1, 2017 on the Criminal and Family Courts including one reappointment to the Family Court occurring in mid-January. In addition, the Mayor appointed five individuals to interim Civil Court vacancies created

by the election of Civil Court judges to the Supreme Court in November 2016. Moreover, because there was an unusually large number of interim Civil Court vacancies, 13 created in—in the November 2016 election. Additional candidates have been reviewed by the Advisory Committee and designated by the Mayor for appointment, subject to consideration by the New York City Bar Association. That consideration is currently pending, and outside of the Administration's control. It is, therefore, inaccurate to say that the Mayor has not acted on outstanding appointments. The Administration has, in fact, designated nine candidates during the last three months including a candidate for Criminal Court—for a Criminal Court seat that recently became vacant. Thus, the only vacancy for which the Administration has not designated a candidate is an interim Civil Court seat resulting from the unexpected retirement of a judge on March 31, 2017. The process to fill that seat is nearly completed. Once the New York City Bar Association finished—finishes its review and consideration, all of these nine appointments will be immediately placed and finalized. I note that while the Mayor's power to

make such appointments is unconstrained, he has continued the practice adopted by mayors for nearly 40 years of limiting his selection to candidates whose qualifications have been reviewed and passed upon by a screening panel, the Mayor's Advisory Committee on the Judiciary, established by Executive Order No, 4 as well as by the Judiciary Committee and the Bar Association for the City of New York. The evaluation and consideration of candidates for those positions is both extensive and intensive. After completion of a lengthy application, each candidate whether for appointment or reappointment is reviewed by a subcommittee of the Mayor's Advisory Committee on the Judiciary including extensive outreach to the references provided as well as other members of the legal and lay community within the candidate is interacted. The candidate is subsequently interviewed by the subcommittee, and if-if approved is then referred-referred to the full committee for additional vetting and interviews. If approved by the full committee, the candidate is the interviewed by the Executive Committee comprised of the Corporation Counsel, the Counsel to the Mayor, the Special Counsel for the Mayor and the Executive

Director of the Advisory Committee. Civil Court All candidates approved by the Advisory Committee are then interviewed by the Mayor who decides which of the candidates will be appointed or reappointed. The candidates approved by the Mayor are then reviewed by the Judiciary Committee of the New York City Bar Association, and this process is necessarily time consuming, but essential to ensure that the people the Mayor appoints will meet his high standards for the—for these positions. Filling interim Civil Court vacancies presents a unique set of challenges. These appointments are for only one year. The assignment of candidates who go through the Mayor's non-partisan screening process whether to Civil, Family or Criminal Court are determined solely by the Office of Court Administration. Unless there will be a Family or Criminal Court suite available at the—at the end of the appointment there is no assurance that they will continue to have a position. Nor is it in the best interest of the justice—of justice to simply reappoint interim Civil Court judges to another interim Civil Court seat. Judges should have the security of a fixed term to assure the independence of the judiciary. The Advisory Committee has done

remarkable and commendable work over the last several months to recruit and reevaluate candidates to enable the Mayor to continue his duty to continue to appoint highly qualified individuals to the Judiciary. I may add here that there is no refusal to roll over a candidate into a Civil Court—into an additional interim Civil Court seat, but there is a reluctance to do so, and I think only of what happened in—with the Seattle Federal Court Judge who had to rule on President Trump's Immigration Order. If he was on a one-year term, he would be looking over his shoulder while making that decision as to whether the executive would reappoint him. Our judges may not deal with presidential executive orders, but they deal with issues such as whether to incarcerate or set bail for an individual to take away that person's freedom, whether to remove a child from his or her family or to place—or to place a child back with a family where there is the possibility of harm, and our—our Journals unfortunately seem to always place—always place the blame on the judge whenever there is an unfortunate outcome as a result of one of these decisions. Judges should not have to look year—year after year over their shoulders to see what the

publicity and possible repercussions, public repercussions of the decisions even those—even thought those decisions are entirely appropriate and legally required. So we have a reluctance to continue to roll over, and that's a—that's a reluctance that we will continue I think to maintain. It must be noted that after no indication that the current appointment process is playing a role in access—in exacerbating the processing time of cases. As Judge Lippman noted in his recent report, delays in processing criminal cases are large the results of a lack of non judicial resources. The process of filling vacancies is an ongoing process and to assure that only the most highly qualified individuals are appointed by the Mayor to serve the people of New York in the Judicial Branch, the Mayor will continue in conjunction with his Advisory Committee and the New York City Bar Association to regular—rigorously review the qualifications of candidates and to appoint only those candidates who meet those exacting standards.

CHAIRPERSON LANCMAN: Thank you. Yeah, let's address this issue briefly of the Administration's the Administration's position that

the Council does not have jurisdiction in any way to conduct oversight over the Mayor's process of appointing Family Court, Criminal Court or interim Civil Court judges. I don't think it deserves much time, but since you've raised it, we're going to address it. Under the City Charter Section 29 titled Power, Investigation and Oversight, the City Council including committees like this one may investigate any matters within its jurisdiction relating to the property affairs or government of the city or of any country within the city or to any other powers of the Council or to the effectuation of the purposes or provisions of this charter or any laws relating to the city or any county within the city. Now, is it your position that the Mayor's obligation to appoint Civil Court judges under the Constitution and under the New York City Civil Court Act, which is a state law, that says that the Mayor shall appoint interim Civil Court judges is not a law relating to the city, which gives the--the Council oversight jurisdiction under the Charter?

HENRY BERGER: The Constitution grants the Mayor [coughing] the sole and exclusive power to make these appointments. His appointments are made

pursuant to the Constitution. The appointees are not paid by the city. They are not responsible for the city. They are creatures of the State. The State Assembly, the State Senate would oversight jurisdiction. The City Council does not. These are not city officers. The Mayor's power is one of the few powers that is granted solely and exclusively to him. The City Council has no role in that process. Nonetheless, as a courtesy, we are--will interact with the Council on issues that they may raise concerning this matter.

CHAIRPERSON LANCMAN: So, again, I'll ask the question. The Charter gives the Council jurisdiction--oversight jurisdiction over the effectuation of laws relating to the city. Is it your view that the authority that the Mayor has to appoint Civil--the Interim Civil Court Judges under both the Constitution and the New York City Civil Court Act is a State Statute, is not a law relating to the City?

HENRY BERGER: It is our position that in matters of State concern as well as City concern, the oversight authority is limited to the State Legislature not to the City Council, and we've had

discussions with the Corporation Counsel on this, and they agree.

CHAIRPERSON LANCMAN: Let me ask something. The composition of the committee, the Mayor's Advisory Committee on Judicial appointments I understand they're unpaid. They're providing this service volunteer, on a volunteer basis, and all distinguished individuals. You do a substantial amount of work on judicial appointments do you not?

HENRY BERGER: I do.

CHAIRPERSON LANCMAN: And you are an employee of the City are you not?

HENRY BERGER: Yes, I am.

CHAIRPERSON LANCMAN: And your salary is approved in the City Budget, is it not?

HENRY BERGER: I assume so. I would hope so.

CHAIRPERSON LANCMAN: And that—and that city budget is voted on by the City Council, is it not?

HENRY BERGER: Yes, it is.

CHAIRPERSON LANCMAN: Are there other—other staff members of—the Mayor's who work on the judicial appointment process?

HENRY BERGER: There are a number of people who work for the Mayor, who work on this process, and they are designated by the Mayor pursuant to this exclusive, sole power to appoint judges.

CHAIRPERSON LANCMAN: Uh-huh, and-and it's your position-it's the Administration's position that these employees of the city including yourself who are paid by tax dollars, appropriated through the budget that the Council votes on are immune from oversight in the way that they conduct the judicial-in the way that they conduct their-their process of assisting the Mayor and making a decision of which-who to appoint to these various judgeship positions?

HENRY BERGER: You can oversight me. You can't oversight the Mayor in what he does.

CHAIRPERSON LANCMAN: Alright, I--

HENRY BERGER: [interposing] It's the Mayor who makes the appointments, and that's the only issue.

CHAIRPERSON LANCMAN: Okay.

HENRY BERGER: Whatever we do is part of-whatever we do with every issue before the Mayor,

which is to provide him with the best information we possibly can.

CHAIRPERSON LANCMAN: [interposing] That is--

HENRY BERGER: [interposing] The power here is the Mayor's and your oversight or what you claim to be your oversight is over the Mayor's appointment of judges. You don't have authority to do that. Nonetheless, we're here. WE can continue-- we can continue to discuss this. I assume the substance is more important than this issue, and I-- whatever is said here--

CHAIRPERSON LANCMAN: [interposing] Well, let me--let me--let me be--let me be clear.

HENRY BERGER: --and discuss that issue.

CHAIRPERSON LANCMAN: Insofar as the Administration was told either early this morning or late last night, took the position that it was not going to produce a witness, and the subpoenas were being drafted and now you--now you're here, and we-- we're welcome that you are here. There is this this ongoing debate apparently between the Administration and the Council as to the extent of our jurisdiction. And since you choose to include that in your

testimony—I didn't write your testimony for you, sir. Since you choose to include it in your testimony, I want to explore it just a little bit. I'll make the final observation and then I—I want to move on as well. There are many things that the Charter grants to the Mayor in his exclusive authority and his sole decision making power. A—a view of the Council's oversight authority that is limited only to those circumstances where the Council and the Mayor somehow directly share responsibility for the decision making is—would eviscerate the Council's oversight authority entirely.

HENRY BERGER: Hardly. As you said, where the Charter grants power, that's under City law, and you have oversight. Where the State Constitution grants sole and exclusive authority to the Mayor you have no oversight period.

CHAIRPERSON LANCMAN: The—the problem with that analysis that I have is that the City Charter in establishing the City Council's authority makes specific reference to state law.

HENRY BERGER: The City Charter can't overrule the State Constitution. The City is a

creature of the State. When the Constitution does something that is a limiting authority.

CHAIRPERSON LANCMAN: You know, you are aware that there's a New York City Court Act, which was passed by the State Legislature. Is it—is it your view that that is unconstitutional and that that Statute is void?

HENRY BERGER: Not at all because it's the Civil Court Act adopted by the State Legislature pursuant to their Constitutional authority. It's a state law. It's not a city law.

CHAIRPERSON LANCMAN: But the state—the City Charter expressly references any laws relating to the City. You're saying that that refers only to laws relating to the city passed by the City? That only refers to the Administrative Code and that the—the Council doesn't have oversight over the Mayor when it comes to his effectuating any of the very, very many state law requirements imposed upon New York City or—or—or—or the Mayor?

HENRY BERGER: Under your theory, almost every law that's adopted by the State Legislature affects the city. That doesn't give you oversight authority over the state budget, over a lot of other

issues. This is a sole and exclusive power of the Mayor. We're glad to be here today to talk to you, but, you know, we're here as a courtesy.

CHAIRPERSON LANCMAN: Well, I hope we have the opportunity to test that proposition one day in a court of law. So let's get down to it. I wrote to you in January about this issue, and--and your responded with a letter, which summarized the--the--which your testimony summarized. I just want to clarify. Is it this Administration's policy that the Mayor will not appoint interim Civil Court judges without an anticipated full ten-year term Criminal or Family Court judge vacancy to appoint them to the following year?

HENRY BERGER: I address that in my testimony, and it is not our policy not to. It is a reluctance, and it's a reluctance because of the importance of the independence of the judiciary. I note in that regard that you're quoting in--in the New York Ledger that that argument was ridiculous. Any lawyer who believes that an independent judiciary is ridiculous should turn in their law license. An independent judiciary is the foundation of our democracy and we will continue to defend the

independence of the judiciary. Rolling over judges year to year to year so they are always up for reappointment, as has happened in past administrations, is bad. Judges cannot be independent under those circumstances, and we are reluctant to do it, but we fill vacancies as we find qualified candidates and as we believe that there will be vacancies available in the future.

CHAIRPERSON LANCMAN: Well, we'll get into the--the--the mechanics of why in January you wrote that, "For the reasons stated above, it is unlikely that all of those seats will be filled--

HENRY BERGER: [interposing] In January it was

CHAIRPERSON LANCMAN: Yes and now--

HENRY BERGER: --it was, and unfortunately--

CHAIRPERSON LANCMAN: --and now--and now--and now in April, we're being told that oh, the Mayor has designed these folks and they're just waiting for the--for the Bar Association to approve them. Well, but we'll get to that, but I want to--no I want to focus on the independents.

HENRY BERGER: [interposing] But now you've raised the issue and let me respond to it. It's not going unanswered. In January when I wrote that letter it as unlikely. There were a huge number of those vacancies. There were 13 Civil Court vacancies, double what we usually get. The Mayor's Advisory Committee, 19 private unpaid volunteer individuals, remarkable people, did an amazing job going out and searching for candidates, recruiting candidates, reviewing them, putting them through the process. Fortunately, we are able to fill the-fill those vacancies because of the work the committee did. I-I thought it was unlikely. We all thought it was unlikely that we would have enough qualified, the highly qualified candidates to do it. It turns out that there were. Situations change over months. I set forth the situation as it was in January, and as I said in that letter, filling judicial vacancies is an ongoing process. The Committee is always working on it. We were always working on it. We were able to do it. We're working now on-on-on further anticipated vacancies.

CHAIRPERSON LANCMAN: Right, if-if you don't--

HENRY BERGER: [interposing] It is an ongoing process.

CHAIRPERSON LANCMAN: Mr. Berger, if you don't see a disconnect between telling me in late January that you're—it's unlikely that all those seats will be filled, and then the corporation counsel is saying two months later oh, we've got this. We've already—we've already made these designations. We're just waiting for the Bar Association to vet them, so be it. Let's talk about independent.

HENRY BERGER: [interposing] Well, first of all, it's three months later, and second of all, the committee works. Look, the process is a time consuming process. The New York State Judicial Nominating Committee just came out with a schedule to fill a single seat on the Court of Appeals. It's a six-month schedule. The Committee has four months. The Governor has a month. I mean it's—and—and the Legis—the Senate has a month. It's a six-month process for one seat. We were filling more than 30 seats. It's an ongoing process, and we're going to continue to do that process the way we're doing it to

make sure that we get the most highly qualified candidates for the position.

CHAIRPERSON LANCMAN: [interposing] So let's—let's get to the issue of—of judicial independence because none of the—the legal ethics professors that we consulted, none of the—the Bar associations that we consulted. I'm—I'm not aware of any [coughs] authority out there for the proposition that rolling over judges from year to year so compromises judicial independence—independence in some unique way that would justify not making appointments on that—on that—on that basis. The system in New York and you refereed to the federal judge in—in Seattle. As you know, federal judges have life tenure. As I'm sure you also know, there are no judges in New York State that have life tenure. They have 10-year terms, they have 14-year terms. Unless they either plan not to run for re-election or not to seek reappointment, or their terms—they will turn 70 years old within the span of their term and they're ineligible for reappointment or re-election. Every—isn't every judge in New York State including those appointed to 10-year terms by the Mayor in some way, shape or form compromised by

the fact that they, too, will have to at some point seek reappointment from their appointing authority or go to the electorate to get re-elected. And, in fact, from the research that we did, there are, for example, now I think [pause]—give me a moment. There are—I don't have the exact number in front of me. There are a certain number of Family Court judges and a certain number of Criminal Court judges who are in the last year of their 10-year term. So, are they, in fact—is their independence compromised? I—I don't understand this focus on the one-year interim judges especially when—when this is not some innovative policy that I'm suggesting, but prior mayors rolled judges over from year to year as they saw fit, and I'm not aware of any examples of those judges not exercising independence. What is so—what is so unique about a judge with a one-year term year to year for a short period of time until there's an opening for a long—a longer appointment, and all the judges throughout the court system who at some point in their tenure are in the last year or the next to last year or three years away from having to be reappointed or facing the electorate?

HENRY BERGER: Well, there's been so much written and--and there's so much philosophical discussion about this issue, but there's a major difference between 10-year terms and 14-year terms and rolling over one-year term after one-year term after one-year term. That's why some states have adopted a system called the Missouri system, which after a judge has been on the bench for three or four years, they get an approval and they have a continuing lifetime appointment like federal judges have lifetime appointments. We can--we can debate back and forth whether a lifetime appointment is better or worse than 10-year appointment or a 14-year appointment. 10-year appointments and 14-year appointments certainly. Now there is the need for re-election, but it's not the same thing as always being up for reconsideration year after year after year, and it's our position and yeah, it's a--it's a policy decision that that's not a good thing to do.

CHAIRPERSON LANCMAN: Do you think that the--the independences of the year-to-year folks for the few years that they are year-to-year and presumably you would only appoint them in the first place if you had a high confidence in their character

and their qualifications. You would only reappoint them and for the second year or the third year if you had a high confidence in their--their character, their integrity and their independence and--and their qualifications. Do--do you think that this concern over independence and whether the year-to-year is that much different from people in the last year or the last couple years of a 10-year or 14-year term would justify leaving a judicial seat vacant and unavailable to contribute to reducing the backlog in--in criminal court?

HENRY BERGER: Well, getting rid of the last edit--editorial comment, yes we would--

CHAIRPERSON LANCMAN: [interposing] It's not editorial comments. It's a question and I'd like you to answer it.

HENRY BERGER: There--the answer is yes because there's no indication that any of this results in delay in the Criminal Courts. Let me just note of the 13 Civil Court judges who got elected creating these 13 vacancies not one of them was sitting in the Criminal Court. None of the--none of these vacancies reduced the number of judges on the Criminal Court by a single judge. If there's a

shortage of judges on the Criminal Court, there may be two reasons for it. One, it may require legislation action to appoint more judges, but two, OCA has a tradition of taking judges from the Criminal Court and assigning them to other courts. If those judges are really needed on the Criminal Court, they should be left on the Criminal Court. None of the vacancies created by the election of these 13 judges came from the Criminal Court. They were not sitting there. It did not reduce the number of judges on the Criminal Court by a single judge. So, this has not resulted--

CHAIRPERSON LANCMAN: [interposing] But you--but you acknowledged that--that--the judges you appoint that the Mayor appoints almost all of them will be assigned to Criminal Court, correct?

HENRY BERGER: Not necessarily. OCA can assign them to the Civil Court--

CHAIRPERSON LANCMAN: [interposing] They certainly have that authority.

HENRY BERGER: --to the Criminal Court or the Civil Court.

CHAIRPERSON LANCMAN: There is no question that OCA has that authority, but let's--let's be

honest here. Almost all of these judges will be assigned to the Criminal Court.

HENRY BERGER: That's not necessarily true. In past years many of them have been assigned to the Family Court.

CHAIRPERSON LANCMAN: That was before the Family Court judges were increased by the State Legislature, right?

HENRY BERGER: That's not true. Of-of the five we appointed before January 1, either two or three of them were assigned to the Family Court.

CHAIRPERSON LANCMAN: Okay and the others were assigned to Criminal Court.

HENRY BERGER: That was—that was a decision that the Office of Court Administration made. They may go to Family Court, they may go to Criminal Court, or they may or they may actually sit in Civil Court.

CHAIRPERSON LANCMAN: So, let me address something else you just mentioned and—and then also in your testimony and I assume my colleagues have some questions. In this assertion that you made and the Corporation Counsel Zach Carter made to the effect that assigning—appointing these judges and

they're being assigned to Criminal Court is not going to make a difference in the backlog and--and the situation in the--the readiness crisis, the speedy trial crisis in--in the Criminal Court. And you I--you are a distinguished member of the Bar. Zach Carter is one of the leading members of the Bar in New York City, but I marvel at how you're willing to substitute your judgment on that from the District Attorneys and the public defenders who practice in Criminal Court. I mean Cy Vance testified within the last month "This is not rocket science. If you have judges, cases will move fast." The Queens District Attorney's Office testified, "We need those judges and we need them right away." And you heard the testimony--I--I read part of the testimony from--from Brooklyn Defenders. Why is the Administration unwilling to acknowledge that adding judges to the Criminal Court would be beneficial in reducing the backlog of case that exist in Criminal Court. It seems like you're denying the 2+2=4. What do you and Zachary Carter know that the District Attorneys and the Public Defenders don't?

HENRY BERGER: We jut don't disagree--

CHAIRPERSON LANCMAN: [interposing] More questions, right?

HENRY BERGER: We just don't disagree with former Chief Judge Jonathan Lippman.

CHAIRPERSON LANCMAN: Okay. I'm sorry.

HENRY BERGER: We do not disagree with former Chief Judge Jonathan Lippman who said in his recent report, Delays are largely the result of a lack of non-judicial resources. We don't disagree with the current Chief Judge Janet DiFiore who in moving-- in moving to eliminate delays is working not on adding more judges, but is working on reforming the system within what they have so that lawyers don't always ask for adjournments, et cetera, et cetera. You can't open a court part--you can't open a Criminal Court part unless you have two court officers, you have a stenographer, you have a court clerk, all State employees. Judge Lippman says That's what's missing, not lack of judges, and Judge DiFiore says we don't have to add judges to get rid of the delay. We have to improve the system within which the judges work. So adding a judge here or there, you know, apparently, and we're not going to disagree with this, isn't creating the delay. If it

were, the court—the Office of the Court Administration could, of course, leave Criminal Court judges on the Criminal Court to handle those cases. They have decided not to do so. So, we don't believe that within our system what we do adds to—adds to the delay. If there is a delay and they need more judges, then I think we should all go to the State Legislature and ask them to create more judicial positions. They did that in the Family Court two years ago. We got nine more Family Court judges and that was helpful.

CHAIRPERSON LANCMAN: [interposing] Well, what—what if the State Legislature came back and said we directed the Mayor to appoint to interim Civil Court judges, and he's not doing it in a timely manner.

HENRY BERGER: He is doing it and he's doing it in a timely manner.

CHAIRPERSON LANCMAN: It's April 19th.

HENRY BERGER: And he's made the designations and, you know, hopefully—hopefully they will be filled. You know, hopefully the Bar Association will act and things will move along, but

we've done our piece on an ongoing basis. We have filled since January 1--since December 31--

CHAIRPERSON LANCMAN: Right.

HENRY BERGER: --more than 30 vacancies.

CHAIRPERSON LANCMAN: Right, and--and by the way, you knew these vacancies were going to become available, open on January 1st. You knew that in September after the Judicial Nominating Conventions, right?

HENRY BERGER: Not necessarily. We still believe in the--in the election process but--

CHAIRPERSON LANCMAN: [interposing] Is it the case that after the Judicial Nominating Conventions in September you waited until the election in November just to make sure that these judges were--were actually going to win?

HENRY BERGER: That is not true.

CHAIRPERSON LANCMAN: So you knew about it in September that these vacancies would become open on January 1st.

HENRY BERGER: We knew there would be vacancies, and the Committee had been working for months at that point in recruiting and reviewing and evaluating candidates.

2 CHAIRPERSON LANCMAN: Okay.

3 HENRY BERGER: As I said, it's an ongoing
4 process. [coughing] That process goes on year-round
5 and, you know, we anticipate what's going to happen
6 in the future. You know, sometimes the answer is the
7 patients change. One of those was that we had an
8 unusually large number of interim civils this year,
9 and that changed but we continued to process, and we
10 have continued. We didn't stop on January 1 and say
11 well, we've done our job and we're going home. We
12 continued to work in December and January and
13 February and March to get these reviews done and to
14 make the designations, and the Mayor has made his
15 designations.

16 CHAIRPERSON LANCMAN: Right. We've been
17 joined by Council Member Vanessa Gibson, and we have
18 questions from colleagues on the order that they were
19 here. Council Member Grodenchik, Council Member Andy
20 Cohen, Council Member Menchaca.

21 COUNCIL MEMBER GRODENCHIK: Thank you,
22 Mr. Chair. Good afternoon Mr. Berger. It's nice to
23 see you.

24 HENRY BERGER: Good to see you.
25

2 COUNCIL MEMBER GRODENCHIK: I'm not an
3 attorney. I just want to make that clear.

4 HENRY BERGER: [interposing]
5 Congratulations.

6 COUNCIL MEMBER GRODENCHIK: I do believe
7 in an independent judiciary. My mother tried, but it
8 didn't work. I think I have never heard, and I've
9 been around the corner for 30 years in this city in
10 government and out of government. I have never heard
11 of people having a shortage of judges, and I
12 appreciate that people have to be cleared. Do you
13 advertise these positions? Are these—does the Mayor
14 take out an ad anywhere? When I'm looking of
15 employees I put an ad on Craig's List or I—I wouldn't
16 expect you would do that for a judge, but do you in
17 the Law Journal or is it word of mouth? How is it
18 done?

19 HENRY BERGER: It's more than word of
20 mouth. There is outreach at the Bar Association
21 particularly. The City Bar will do a how to become a
22 judge, which is advertised in the Bar Journal and we
23 participate in that. We reached out to virtually
24 every bar association in the city of New York to
25 community groups. We asked elected and party

officials to make recommendations to us. We ask community groups to make recommendations, and people submit applications. They're make an inquiry, and-- and they--and they submit applications. It's an extensive application and, you know, not all of them will meet our standards.

COUNCIL MEMBER GRODENCHIK: I-I appreciate that. I-I wouldn't think everybody would meet a standard. Especially to be a judge it should be a very high standard, and I know there are backgrounds checks--and the like. We can anticipate, though, that in any given year starting on January 1st there will be vacancies in the courts of the city of New York to which as you've testified, the Mayor has sole authority to appoint officials, judges. Do-- have you considered, have, I mean have your colleagues considered having like prequalified lists so that we wouldn't have to wait until April 19th, as the Chair has pointed out?

HENRY BERGER: No, I've actually thought about. You know, I don't know if--if it's institutional, but since the process is an ongoing year-round process, we're always looking for candidates. We're always qualifying candidates, and,

you know, the vacancies keep occurring. Since January 1 of this year there have been four resignations and we anticipate another one. So even as we do it, we keep filling vacancies and it's—its an ongoing process. You know, can we ever get ahead of the process? I don't know. Can we tell somebody yeah, well, next time there's a vacancy we'll appoint you to fill it, and there may be more next January 1. Now I think that's difficult. Is it impossible? No. But we're doing it on an ongoing basis and, you know, we'll fill the 30 vacancies that were existent on January 1. We'll fill the four. All of those are in process. If not, you know, at completion, very close to completion. We do it on an ongoing basis, and we're going to continue to do that.

COUNCIL MEMBER GRODENCHIK: Would you at least take back to the Mayor that at least I think it would be a good idea to pre-qualify people, and I also think-- The question that I have and I know that before you're considered to be a judge, you go, you know, when—for elective judge that people are pre-cleared by whether it's a county bar association of a city bar association would it make more sense for the Mayor to do that as well so that by the time

that they got to you, say Rory Lancman wanted to be a judge, which he swears he doesn't want to be, but just say for this instance he said he wanted to be one, would it make sense for the bar association to pre-clear him so that by the time he got to you, we wouldn't be waiting for them? Is there an ethical constraint that I'm missing here or--?

HENRY BERGER: Within the electoral system they don't pre-clear. They clear them after they've been designated in one form or another, but--

COUNCIL MEMBER GRODENCHIK: I'm pretty sure that at least in--

HENRY BERGER: [interposing] We've asked-- we've asked the Bar Association to participate in the process, and at one time, in fact, they considered the candidates before the Mayor made his or her designation, but the Mayor reviews several candidates for each vacancy, and they just did not have the capacity to do that. So they've--we've worked out the systems after the Mayor makes his designation, and then they consider it. They're considering nine right now. That's a bunch. I mean and it's going to take a few weeks to do that. To ask them to consider 18 or more, you know, they just don't believe that

they would have the capacity to do it, and we certainly want to have as much input as we can into the process to make sure that we're not missing anything to make sure that we really are getting the most highly qualified. There was a suggestion earlier, if I could just comment on, you know, well maybe, you know, if you're worried about the ethics issues and, you know, undue influence of prosecutors and defense attorneys, don't let them comment on the-- on the candidates. Well that would be an absolute disaster. These are the people who best know the candidates, and we want their input. We want to know what they think about it, and we get reports on each of these judges with the results of each of the interviews, and for each candidate there may be 25 or 30 interviews.

COUNCIL MEMBER GRODENCHIK: I know it's expensive and I've participated--

HENRY BERGER: [interposing] And they're not always uniform. Sometimes people say negative things, and then you look into well this is a--it's an attorney who represented a fine on a losing case and didn't think it was fair or whatever, and they're negative, but the other 29 comments were all

positive. We certainly want the maximum amount of input and not start eliminating whole classes of people and providing input.

COUNCIL MEMBER GRODENCHIK: We appreciate that. My last question I understand you feel pretty strongly about the security of a fixed term, and I think we all do. We—we value an independent judiciary. It's one of the most important things that—that keeps this country and the state going. Would it be prudent in your opinion to have a—a one and one situation. You know, if you make the first one maybe you get the second one? So what I'm saying is you've been appointed to a year interim term and then you could get a maximum of another year so that the Mayor would have more discretion whoever he or she may be going forward so that we wouldn't have vacancies on the court, and it would be limited just to one. You—you—you get an extra a year.

HENRY BERGER: Well, if we can avoid the extra year, we'd really try to do it. We've had a few rollovers over the past few years. You know, sometimes affirmatively decided upon. Sometimes because there just wasn't a vacancy. We would really prefer to put as many people as we can as quickly as

we can into full terms. We just think it's a better matter of policy.

COUNCIL MEMBER GRODENCHIK: I think it is a better matter of policy. I agree with you on that, but I think, you know, we also have the vacancies here and--and it does slow down the administration of justice, which we are all concerned about in this city. Thank you for your questions--for answering my questions. Thank you, Mr. Chair.

CHAIRPERSON LANCMAN: Council Member Cohen.

COUNCIL MEMBER COHEN: Thank you, Chair. I don't what it says about me, but I've actually enjoyed this hearing so far so--

HENRY BERGER: Well, so have I. Thank you.

COUNCIL MEMBER COHEN: [laughs] I just want to get a handle on--so on what the problem--if there is a problem. Maybe there isn't a problem. I'm not 100% clear myself from--from the testimony so far. Of the people that you've appointed as interim acting civils, I guess most have gone onto get appointments are all have gone onto get appointments to either the Family Court or Criminal Court?

HENRY BERGER: Over our three years of appointments, as I said, we had a few we had to roll over, but everyone of them there was one judge we didn't reappoint after a rollover. That's public knowledge. We wanted to examine the judge's credentials, but everyone of them through last year having been appointed to a civil—an interim civil ultimately got a Family or Criminal Court seat, and we're hoping that with the interim civils that we're appointing now that in short order they will get Family or Criminal Court seats. We have a small problem this year. As of the moment, there are no vacancies at the end of the year on the Family Court. It's an unusual situation. There are seven—there are seven vacancies on the Criminal Court as of now. So we know that we have at least those seven seats plus we know that there may be some vacancies. We were just told recently about a vacancy that's going to occur in June. Now, in theory, that could create another interim civil suit—seat. Do we put somebody in in June just for six months if we know there is not going to be vacancy towards the end of the year? Probably not. I mean it—it just doesn't make sense. WE—so—we know we have seven seats coming up at the

end of the year. There may be more because of resignations, and we're going to end up rolling over a very small number, but we're going to minimize the number to the extent we can.

COUNCIL MEMBER COHEN: I mean and it seems high-highly likely, though, from the number of appointments. I mean you testified that you made over 100 appointments our about 100 appointments that it's an ongoing thing that if you appointment someone to Civil Court today that there's a high likelihood that maybe not on January 1st, but at some point that they will get an appointment. Why would we just not-- you know, if you have to, you know, serve an 18-month term instead of a--a one-year? Why is that so onerous?

HENRY BERGER: Because we look back at the history, and there were judges who were being rolled over who one and two and three, in one case four times. We want to avoid that. You know, also, you know, it's--there are always new people coming into the system, and there are good people and we want to make sure, you know, we continue to have room for that. We're going to fill as many of these vacancies as we can, you know, as quickly as we can

with the constraints of making sure that we get the most highly qualified people.

COUNCIL MEMBER COHEN: Yeah, I-I-I just want to make one argument also, you know, as-you know, I was-I was a law secretary for many years. I've been a judicial delegate in New York County and Bronx County so and-but I would say that experience on-as the judicial delegate there had been occasions where, you know, I've seen people elected to the courts who I think they're not that great. And there's an argument to be made for having an audition like this is great opportunity where we could actually get better judges if we appointed them to an interim appointment, and we could say, wow, this person did not really have what it takes and it-it would give us an opportunity to-rather than blocking ourselves in for ten years or in 14 years, you have an opportunity to say, you know, and somebody and where real-what better job interview than to have somebody do the job for a year and say wow, this person, you know, can't move the docket, can't, you know particularly decisive. All the things that we've seen over the years of judges who are not that

good. It seems like we're missing an opportunity perhaps.

HENRY BERGER: Well, you know, I think you're raising an--an interesting point. As you may be aware, I testified in Federal Court on the suit that challenged nomination of judges by judicial convention because judicial conventions don't have the kind of rigorous intensive screening process before the judges get to that. And, you know, I think quite frankly that the judges we appoint to the Criminal and Family Court judge Court are more likely to be highly qualified, the candidates who come through a system where there is, in fact, kind of merit screening before they actually get to the designation process. So, you know, comparing it to Supreme Court, yeah, you know, you and I could argue about some of the judges who over the years have been appointed. I was--I've been a judicial delegate going back almost 40 years now. So it's--but, you know, we think--we believe that the judges we're appointing given the extensive review that they get are going to be successful, and it's a much more rigorous process than the election process because of the levels of review that we make our candidates go through. And

as a result, if we can avoid multiple one-year terms, we're going to continue to do that.

COUNCIL MEMBER COHEN: I-I get and I-I hear you and I'm-I'm not aware particularly, and I got to court periodically and now often with constituents who are-- You know, I can sometimes support for a variety of reasons, and I will say particularly in Criminal Court I'm-I'm often, you know, the Bar knows who I am and deluged by attorneys saying that there is an inability to get a trial particularly in Bronx County. That that's a real challenge. So anything I think that we can do to try to, you know, you know, maybe a handful of judges is not going to make a, you know, take, you know, 800 days is just, you know, offensive to us. I think to every-every lawyer in the room and, you know, making it 775 is not going to be profound, but 25 days is 25 days particularly if you're sitting in Rikers for those 25 days I suppose. So I would encourage anything that we can do to make the process as-as efficient as possible and as quick as possible, and again I-I do think that there is-while I understand keeping people on the hook for reappointments has a downside, I think that there also, you know, it could

be counterbalanced by the opportunity to kind of see these people actually perform the job. I think that's a benefit that, you know, as again as a delegate, and again even people who are highly qualified with high educations it doesn't always translate to being a good judge. You could be a very good lawyer, and not be a very good judge. In fact, you know, I mean I agree I'm sure we can all think of instances where there very good lawyers who temperamentally wise it turned out that while they were good litigators, they were not good judges. There's a variety of reasons. So I—I think in some ways having an appointment is an opportunity that maybe the Mayor should take advantage of.

HENRY BERGER: As we interview candidates for reappointment, we often get into the—into discussions about the problems in the courts and the delays, and there are two places where it's evident. One is in Queens County for some reason and the other is in the Bronx and you're, of course, very familiar with the Bronx and—and—and the Chief Judge has certainly taken that on as a major task with the perilous (sic) of something living in success within the resources that they have. I mean, you know, the

New York Times did a series of articles about what causes delay. Everybody has an interest and a journey to catch. (sic) You know, the prosecution isn't ready. The defense thinks the longer you wait, the more likely you're going to get off. The judges, you know, have huge calendars and you had see just to put it over. There are lots of reasons, and I think what the Chief Judge is doing the process saying enough of that. Set firm deadlines. People always move up to the deadline. They have set firm deadlines, and it's having a great success within the resources they have. In Queens we were told that one of the problems they were having at one point is that they didn't have enough courtrooms. You know, that's a major problem. You can't have a trial if you don't have a courtroom and, you know, the judges were sort of juggling courtrooms. There are a number of problems and, look [pause] the more resources you have, the more likely that things are going to move along, but even if you have the resources, there are lots of other things that will affect this. You know, let's keep moving.

COUNCIL MEMBER COHEN: I-I-listen, I'm not blaming the Mayor for the delays in-in Bronx

County. There is a myriad of, you know, we could write a book on all the reasons why. I—I can't tell you how many times I've sat in a courtroom waiting for, you know, there's no defending because it can't be produced from Rikers Island. Court is called for 9:30. The defendant arrives at around 11:30. We break for lunch, and then we go home. I mean that's—that's how it works. So that's—I understand that, but again, I would encourage that the Mayor do everything he can to keep these appointments as—as fast as—as they can be made. Thank you, Chair.

HENRY BERGER: We agree, too.

CHAIRPERSON LANCMAN: Thank you, Council Member and fellow judicial delegate. Council Member Menchaca.

COUNCIL MEMBER MENCHACA: Thank you, Chair Lancman and I want to thank you for this—for this hearing as well. This is a great opportunity to shed light on something that probably a lot of New Yorkers don't about. So I'm really happy that we're having this very public discussion. I want to have—I have a few sets of questions. I'm going to start really where—where I think the discussion started which was the state responsibility and oversight. I

want to get a sense from--from you all--from--from you, Mr. Berger, and really from--from the--the kind of position that you've taken on--on this as far as roles and responsibilities. Where--where has the state in the time that you've been in this role performed any oversight on this question about judicial nominations? Have they done some form of oversight, and what--what was that and when was that?

HENRY BERGER: The only oversight there is comes from the Office of Court Administration with whom we are in frequent contact and the work that the Chief Judge is doing on the State level, which is trying to, you know, figure out what causes the delays in those counties where there is delays, and we've got, you know--

COUNCIL MEMBER MENCHACA: And repeat that again. This is court--court--?

HENRY BERGER: Office of Court Administration. It's--it's the State Office of Court Administration responsible for all--all the courts in the State.

COUNCIL MEMBER MENCHACA: And so they're--they are providing some oversight. They're an

administration office. So, they report—tell me a little bit about the—the—the format here.

HENRY BERGER: The Chief Judge of the State of New York is the Chief Judge of the Court of Appeals, and the Chief Administrative Judge. In their role of Chief Administrative Judge, there exists the office of Court Administration, which takes care of all of the administrative issues in the court, which includes, among other things, hiring court officers and stenographers, and clerks, but also assigning the judges. So, the Office of Court Administration can take a Civil Court judge and assign it to the Criminal Court, the Family Court or even make them an acting Supreme Court Judge and assign them to the Supreme Court, and they do this on a regular basis. They move judges around. So they move judges out of the Criminal Court and into the Family Court or out of the Criminal Court and into the Supreme Court. They take Civil Court judges and move them around. They decide ultimately. This is how many judges working out in Criminal Court and this where they're going to stick. This is how many judges we're going to have in Family Court. This is where they're going to stick, and this is how many court—how many judges

2 we're going to have in Supreme Court, and this is
3 where they're going to stick. They make those
4 determinations.

5 COUNCIL MEMBER MENCHACA: And-and- are
6 they still in the Office of Court Administration
7 that's led by a Chief Judge and is making this--

8 HENRY BERGER: [interposing] Right.

9 COUNCIL MEMBER MENCHACA: --decision for
10 the city of New York, and I'm assuming there's a
11 jurisdiction.

12 HENRY BERGER: For the whole state.

13 COUNCIL MEMBER MENCHACA: For the whole
14 state.

15 HENRY BERGER: This is the whole state.

16 COUNCIL MEMBER MENCHACA: Got it. Okay.
17 this is--so, I'm-I'm also not a lawyer so this is--this
18 is--this is education for me as well, and--and so I
19 guess the next question, and this is now kind of
20 leading to a more broader discussion about--about
21 really studying the impacts. Is this office and in
22 coordination with you designing a--a kind of report of
23 some kind that they're really kind of outlining some
24 of those issues. It sounds like you've had
25 discussions about--about this issue, and are they--do

they-are they-are they designing some kind of report in the near future? I'm kind of really-really pointing to data. We-I'd--I'd like to kind of see some information that sounds like it might be happening.

HENRY BERGER: The Office of Court Administration collects all sorts of numbers.

COUNCIL MEMBER MENCHACA: Great. Are those available-is that available to the public

HENRY BERGER: I don't know whether it is or not--

COUNCIL MEMBER MENCHACA: Okay.

HENRY BERGER: --but they have standards and goals where every case is supposed to be dealt in a specific amount of time, and if the judge doesn't, they report that they are "over standards and goals." And they keep track of those statistics, and there are administrative judges who-who are supposed to work with judges who-who have a frequent number of case over standards and goals to try to figure out how to move them along. But they keep a variety of statistics about how long cases take, and how long each judge is taking with this number of cases.

2 COUNCIL MEMBER MENCHACA: This is all
3 data being captured on--

4 HENRY BERGER: [interposing] Yes.

5 COUNCIL MEMBER MENCHACA: --on-on-on the--
6 on the system itself. Okay. So then here's my-my
7 next question is really-and-and this is something
8 that was just brought up in-in the previous Q&A about
9 resources, and so I'm assuming that there's some-
10 things that have risen as far as resources and need
11 for courtroom and court spaces. Do these things
12 happen in city-on city property at all, or-or just
13 all state property in State Courts. I wish I knew.
14 I don't know. So I'm hoping that you do.

15 HENRY BERGER: It's a strange amalgam.
16 The City is responsible for building and maintaining
17 the courthouses.

18 COUNCIL MEMBER MENCHACA: The city and
19 say that that again. The state-I'm sorry, the city
20 is responsible.

21 HENRY BERGER: [interposing] The city is
22 responsible. Okay, but that is done in conjunction
23 with the state, which, of course, provides and pays
24 for all the personnel with the courthouses, and it's-
25 and it's, you know, when there's-you know, if

somebody decides they need a new courthouse, there's a back and forth discussion. They just opened recently a new courthouse in Staten Island for the Supreme Court, and that was a back and forth. Because ultimately, you know, it's OCA and-and the state coming to us and saying they want to build a new courthouse and then, you know, through that siting and where to do it, how much it's going to cost and whatever. We get the bill for it. They essentially make the decision, and we get the bill for it. It's how it works.

COUNCIL MEMBER MENCHACA: Got it. So there's a city--there's a city budget allocation that has to happen as well. Okay, look, it sounds like it's--there's some gray area, and there's some partnership work, but it-it's--I'm really kind of pointing to a larger question, and I don't want to take too much more time. I know there are some council members that want to ask more questions. But I think there's an opportunity for us to--while there might be some rigid lines that you've expressed today about oversight, there--there is a responsibility for the public to have information about where allocation and city--city money is going to--to assist in this--in

this process, and so there is--there is some responsibility that I think people are going to want to take as New Yorkers and--and as--as representatives of those New Yorkers I think we're going to have some--something to say about--about that. So, now I want to talk a little bit about goals, and--and actually you answered some of my questions about vacancies. Right now you have seven vacancies, is that right?

HENRY BERGER: No, at the end of the year.

COUNCIL MEMBER MENCHACA: At the end of this year?

HENRY BERGER: As of--there are seven Criminal Court judges who are reaching the age of 70 this year, and will have to retire as of December 31st.

COUNCIL MEMBER MENCHACA: Got it. Thank you for clarifying that. Thank you, and is--actually this is a--this is a general--this is off--are these--are these either vacancies published on line in some way? Is there anything that exists online that tells the story about what's happening?

2 HENRY BERGER: I don't think because
3 CMA(sic) maintains that. I'm—I'm just not sure.

4 COUNCIL MEMBER MENCHACA: Okay.

5 HENRY BERGER: I know there used to be—
6 there used to be in the Green book of listing, you
7 know, the judges when their—

8 COUNCIL MEMBER MENCHACA: I remember
9 that.

10 HENRY BERGER: -- terms are up, and if—
11 and if they were subject to retirement. I'm not even
12 sure if that's still exists any more.

13 COUNCIL MEMBER MENCHACA: Go it, but not
14 on like City-like dot.gov, nyc.gov work or—or a
15 website? None of this exists?

16 HENRY BERGER: I don't know. I don't
17 know.

18 COUNCIL MEMBER MENCHACA: Okay, great.
19 Okay, we can come back and follow up on that, and
20 then finally, you mentioned like a group of folks
21 that help—help assist the committee on either
22 nominations. What is the role—what are the roles of
23 the two—the two specific folks that I want to ask
24 about organizations and what those organizations are.
25 If there's a—if there's a clean way to talk about

you're going to go to all the legal service providers or whatever, and the county. The county. It sounds like there's county roles that are—are part of your process. I want to—I want to get a better understanding about who—who—who you're talking about, the county can you speak about the county and who those people are and how—how they assist.

HENRY BERGER: Yeah, in—in terms of—of—of recruiting--

COUNCIL MEMBER MENCHACA: Recruiting candidates, yes.

HENRY BERGER: --recruiting, we'll speak to anybody who will speak to us and, you know, we go to, you know, you know, the Committee—the Advisory Committee has 19 members, and they're all encouraged to do outreach. We all do—the corporation counsel does that the counsel to the Mayor meets with organizations and does it and anybody we speak to. You know, you know, look, if you have to have them—have them, go on the Advisory Committee website and download the application and submit it. There are no political requirements. You know, you don't have to have been a member of a club or whatever. Anybody can go on that website and download the application

2 and it will be reviewed just like all of the other
3 applications. So we do outreach. If there are other
4 organizations that anybody wants to recommend, we'll
5 reach out to them. You know, we—we affirmatively
6 seek more and more people in anyway we possibly can.

7 COUNCIL MEMBER MENCHACA: So I guess but
8 I was asking a specific question about counties and
9 what you meant in—in your earlier testimony about
10 working with counties.

11 HENRY BERGER: Yes.

12 COUNCIL MEMBER MENCHACA: What---what
13 does that mean, and can you give you me an example
14 and—and--

15 HENRY BERGER: Yeah. Among the groups we
16 talk to are all the political people.

17 COUNCIL MEMBER MENCHACA: Okay, which
18 include?

19 HENRY BERGER: Which include not only
20 electeds, but also party officials because, you know,
21 these people represent their communities, and are
22 familiar with their communities and our contacts
23 within the communities--

24 COUNCIL MEMBER MENCHACA: Uh-huh.
25

HENRY BERGER: --and, you know, whether it's, you know, you know, a Democratic county organization or a certain club, or even non-democratic political organizations, they can all make recommendations. They all have input. They have the attention for it, but they know their communities, and we treat them as we do all community groups in this. We're reaching out because you know who the people are. You can make recommendations. You can find people.

COUNCIL MEMBER MENCHACA: And--and are any of these recommendations made public of when you received applications, names from political organizations or organizations that are connected to the committee, the member--the 19-member committee, Are any of those made public to your--to your knowledge?

HENRY BERGER: That's all confidential. The--the only names that ever come out are the people who actually get appointed. So that if somebody goes in and doesn't make it, there's nobody who is going to say oh, my gosh, they didn't get it.

2 COUNCIL MEMBER MENCHACA: And what's the
3 protection--what's the protection on confidentiality?
4 Just--and--and just to say what--for what reason?

5 HENRY BERGER: It--it's a very close
6 circle. I mean, you know, the people who work on it
7 are the committee members. The staff of the Advisory
8 Committee is a grand total of three people, and then
9 there are the--and then there are the people within
10 the Administration who work on it. And, you know, so
11 far as I know, it's been a pretty secure system. I
12 mean everybody understands that what goes on in the
13 committee stays in the committee.

14 COUNCIL MEMBER MENCHACA: So, my--my final
15 question is--

16 HENRY BERGER: [interposing] It's an
17 effect.

18 COUNCIL MEMBER MENCHACA: I'm taking a
19 lot of time, and I want to--I want to respect the
20 Chair's hearing. The last question I have is if any
21 of that were to change, does the Mayor have the power
22 to change that or is there a--a kind of system that is
23 set by the Constitution that and--and all the
24 questions I have asked about reports online--online
25 dissemination of information about who's who like an

online green book version of these judges and who's terming out. All of that, and--and then potentially making some things public about where and who is nominating? Does the Mayor--does the Mayor have the power to change that system?

HENRY BERGER: The Mayor has the power to change anything that directly affects the appointments so that he's created by executive order for the mechanism by which the re--the recruitment review and evaluation has been decided.

COUNCIL MEMBER MENCHACA: [interposing]
So he has power to change that mechanism?

HENRY BERGER: Right. I mean literally the Mayor could walk down the street, walk up to somebody and say are you a resident of New York? Have you been admitted to bar ten years? I'm appointing you a judge. In theory--

COUNCIL MEMBER MENCHACA: [interposing]
That's the power he has?

HENRY BERGER: --That's the power he has, but certainly that's--

COUNCIL MEMBER MENCHACA: [interposing]
And then everything else is kind of constructed around that right now to--

HENRY BERGER: [interposing] Right.

COUNCIL MEMBER MENCHACA: --create a
system that has--

HENRY BERGER: [interposing] The Mayor
has, of course, created and it, you know, it wasn't
his originally. It goes back in one form or another
actually to John Lindsay's second term in 1969 where
there were the first sort of mayoral screening
panels, but in terms of other things, the green book
issue is something I want to look into because, you
know, I--it used to be there, and I just haven't had a
chance to look at it recently, and they still do.

COUNCIL MEMBER MENCHACA: Okay.

HENRY BERGER: But, you know, I think
that the outreach particularly to the various bar
associations enables us to let potential candidates,
members of the bar, who have been admitted ten years
know that there's a non-political system. There are
a lot of people who--who don't know that, and we
continue to do that kind of outreach, and it's always
interesting [coughs] when the city bar they have
become a judge, they will belong in seminars. (sic)
Some people said I didn't know you could become a
judge without going through a political system. And,

you know, so we keep trying to emphasize and re-emphasize that and do more reach out to more—you know there are more and more bar associations. There is, you know, there are interest group bar associations, and—and we reach out to them to let the potential candidates know, you know, all you do is submit a written application. You don't have to talk to anybody. Submit it. It's going to get reduced to review, but you fill out that application 30 some odd questions with subparts and subparts and whatever. You know, make it available. The, you know, the Mayor has created this extensive review process to make sure that the consideration in appointing judges is only that the person be highly qualified, that there aren't other, you know, requirements to get the job.

CHAIRPERSON LANCMAN: Thank you.

COUNCIL MEMBER MENCHACA: Thank you and okay we'll follow up on some of these items. Thank you.

CHAIRPERSON LANCMAN: Thank you. I want to go back to what brought us here, and what I understand you're going to characterize the current policy to be your—correct me if I'm using the wrong

term, but the-the reluctance to appoint someone to an interim Civil Court judgeship if there is not a reasonable likelihood that in following year there were will be a family court or-or-or a Criminal Court appointment. Is it the case, are there circumstances where you anticipate the committee will not make a recommendation to-to the Mayor for an appointment because there is no Family Court or Criminal Court appointment likely the next year? I want to understand just the-the--

HENRY BERGER: [interposing] That--

CHAIRPERSON LANCMAN: --scope of

HENRY BERGER: [interposing] That is not a committee consideration.

CHAIRPERSON LANCMAN: Okay.

HENRY BERGER: That is-that's not a consideration for the committee. That's a consideration once it gets beyond the committee.

CHAIRPERSON LANCMAN: Okay. So is it-is it the position of-of-of the Administration that there are circumstances where because there is not a Family Court or a Criminal Court 10-year term appointment on the horizon in the next year, that an appointment will not be made to fill that interim

Civil Court vacancy? I want to understand what you— what you mean by reluctance and the extent to which that will, in fact, be a bar in any circumstance to— to choosing somebody.

HENRY BERGER: It's not a bar, it's a consideration. This hear because the committee did such a remarkable job finding really, really qualified candidates, the last group of candidates they sent to us was very strong. The Mayor has designated candidates, reformed (sic) them, even though we know it's beyond the seven Criminal Court seats that are available and that, you know, it is likely that some of those are going to be rolled over because the committee really, you know, as I said did a remarkable job giving us some very strong candidates. But it's a consideration and, you know, it's, you know, it's something we look at, right? It's a one of the processes.

CHAIRPERSON LANCMAN: [interposing] So—so can—can you tell us that the city will not have a no rollover policy? There are many factors that go into the decision making.

HENRY BERGER: We've never had a no rollover policy. We have as I—as I expressed it, and

perhaps it could be articulated better, a reluctance to roll judges over from year to year.

CHAIRPERSON LANCMAN: Okay, that's fine.

Okay, just to—to be clear in terms of how one expressed things, and we all can express ourselves poorly or not in the way that we had intended, but we are here because on January 26 you informed us that for the reasons stated above primarily the issue of judicial independence, it is unlikely that all of those seats will be filled. I just want to be clear that at least according to your testimony today the Administration is not going to decline to fill a vacancy in the interim Civil Court slot because there is not a 10-year Family Court or Criminal Court appointment on the horizon.

HENRY BERGER: I think I've answered that.

CHAIRPERSON LANCMAN: If you could answer that question. I—I think we've—we've heard it in different ways, and I anticipate what your answer will be, but I want to get an answer to that question on the record.

HENRY BERGER: One of the considerations.

CHAIRPERSON LANCMAN: Uh-huh.

HENRY BERGER: Not—it's not a determinant, just a consider—consideration. It is a consideration.

CHAIRPERSON LANCMAN: Okay and just to be clear do you agree that such a policy would be inconsistent with the New York Civil—New Your City Civil Court Act, which is a state statute.

HENRY BERGER: No.

CHAIRPERSON LANCMAN: Which you don't believe that it would be inconsistent?

HENRY BERGER: No.

CHAIRPERSON LANCMAN: Just for everyone's understanding, the New York City Civil Court Act, Section 102-a (3): The vacancy otherwise than by the expect—expiration of the terms in the office of judge to the Civil Court of the City of New York shall be filled by the Mayor of the City of New York by an appointment, which shall continue until and including the last day December next, after the election at which the vacancy shall be filled—shall be filled by the Mayor. What in that language do you think allows the Mayor to exercise the discretion to not fill a vacancy because there will not be an available other vacancy to a different position the following year.

HENRY BERGER: You know I read the Law Journal, and almost every day, and there's a wonderful decision within the last month that discussed the meaning of shall, and whether it was absolutely mandatory or whether it provided authority, and the court in that case, you know, I-I couldn't even find it. I have to--well, it's--it's not mandatory. It's saying that this is the authority to do it. You know, we can have a long legal discussion about mandatory and preparatory and what the meaning of shall is and whatever, but I think--I think what that means is that the Mayor has the authority to do it and nobody else does.

CHAIRPERSON LANCMAN: Okay, let's look-- let me ask you about the Mayor's Executive Order. It's Executive Order No. 4. It's his Executive Order, Section 4, Appointments by the Mayor: b. Judicial vacancies shall be filled within 90 days unless a longer period is required in the public interest. Now, my reading of that, and I think a lot of people's reading of that would be the Mayor's has to fill these vacancies within 90 days unless there's some issue in the vetting or in the background process or the Bar Association. Something out of the

Mayor's control or something out of the ordinary comes up, the Mayor has to fill these within 90 days. Do you--is it--is it--is it your position that this exception for a longer period required in the public interest covers the broader policy decision that we're not going to appoint someone because there's not a Family Court or a Criminal Court judgeship available in the next year?

HENRY BERGER: Yes.

CHAIRPERSON LANCMAN: I have to say that is an extraordinarily broad definition of the public interest, and I think that, you know, we talked about what someone a lawyer. They're a leader and you had opined about people turning in their license. You seem to be stretching the plain language of both the state statute and the Mayor's own Executive Order to encompass this--this new broad policy determination, and this is the Mayor's Executive Order. I think we've talked about the foundation of democracy and all these highfalutin things, and you're a man with impeccable good government credentials. I--I think if this is going to be the Mayor's policy, he should make that clear in his Executive Order so that the public can really see what are the factors that the

Mayor is using to determine who should be elected, who should be appointed to this interim Civil Court position. The-the policy that you-that you are-are adopting or-or-or-or bringing into this strikes me as-as almost obliterating the concept of an interim civil court judge. And if that's what you're going to do, if-if that's going to be a factor and there are going to be circumstances where-where someone is not going to be appointed in the interim, a Civil Court judge, because there's a different position on the horizon and that set is not going to fill, get filled and that's going to be one less judge sitting in-in one of the Criminal Court in-in New York City, which we serve to every backlog, I think there should be more clarity on that.

HENRY BERGER: I guess we're going to disagree on that. We certainly believe that in independence-independence of the judiciary is a factor that is in the interest of the people, and as expressed there, we're going to continue to seek our and appoint the most highly qualified people we can, and we will continue to do it on an ongoing basis filling vacancies as they occur as quickly as possible and when it's appropriate to do so.

CHAIRPERSON LANCMAN: Let me ask you this before—before I let you go. If—if this is going to be part of your consideration, and I don't necessarily think that it's appropriate that it should be and it certainly should be a bar regardless. Have you contemplated doing special particular outreach to categories of laws who might more than willing to give up a year of their professional life to go be a judge assigned in criminal court being appointed interim—a Civil Court judge, and then at the end of that year go back to our life. Folks from the big firm world, or-or attorneys in the judiciary who other than judges, court attorneys, referees, et cetera, or government employees in the Law Department or in the City Council. People who don't have this private practice that they would have to disconnect from for a year and whose employers might be willing to say go be a—go be a judge for a year. It's an important public service. It seems to me that there—if this is going to be part of your consideration that—and—and then it's difficult to find people who can fill those positions for just a one-year gig, there needs to be some kind of special particular strategy to find

people who can—who can—who can fill that—that one-year gig.

HENRY BERGER: We don't think that's the work in mind. We disagree, and this year was a bit of an unusual year with 13 in terms of vacancies on—on an ongoing basis. That's just not--

CHAIRPERSON LANCMAN: So, so probably the last question then. What is your strategy for finding people who are qualified, highly qualified to fill these vacancies with the knowledge and expectation that this is a one-year assignment, and on December 31st your time as a judge and service to the City of New York has come to an end?

HENRY BERGER: Our strategy is to find the most highly qualified candidates. We even appointed a judge to serve long, you know, full—full and complete and long terms, and that the interim Civil Court seat is a—is an interim seat. You know, we're not just filling interim seats, we're appointing judges who we expect to serve long term, and we will continue.

CHAIRPERSON LANCMAN: Well, you know, again that position leads us where it seems that you have a fundamental disbelief in the—the role of an

interim Civil Court judge, and—but that is a responsibility in law, and the Mayor to fill, and in the absence of a strategy for how you are going to fill those positions when you've decided that we don't want to roll people over or we're reluctant to roll people over, and that's why here we are April 19th and we still don't have judges who are sitting and hearing cases. I—I don't think it's acceptable that you cannot adopt some kind of different recruiting strategy to meet this changing policy.

HENRY BERGER: One, it's not change in policy, two; our record does not demonstrate a change in policy; three our record does not demonstrate that we leave seats empty when they should be filled; and four, we can certainly consider where we anticipate judges to be when we appoint them, and that means that we expect that when we appoint a judge to the bench they are going to continue to serve the people of New York sitting on the bench on either the Family or Criminal Court, and that's our goal, and that's our obligation, and we continue to meet that obligation.

CHAIRPERSON LANCMAN: Well, respectfully, there's an obligation to the law to also fill the

interim Civil Court positions, and the law does not qualify that by saying only if there's a 10-year appointment at the end of that year. And you are changing the fundamental approach and structure to how vacancies are filled, and you are doing so in a way where the results speak for themselves in this circumstance where it is late April and--and we have eight judges, eight vacancies that have not been filled. They probably won't be filled at the earliest until May, and if you think that that doesn't have an impact on the lives of the people who are in our court system, then I think you're not being--then I think you're not really fulfilling your responsibility.

HENRY BERGER: I couldn't disagree with you more. Thank you.

CHAIRPERSON LANCMAN: Thank you very much. The only other witness we have--we had a witness from the Bar Association, but he had to run. Correct or wrong? [background comments] Alright is Judge Leibowitz. Judge Leibowitz, you've got to fill out a card. That's--that's how we do it in the City Council.

2 JEFFREY LEBOWITZ: [off mic] Oh, I don't
3 know because I—I was sitting down.

4 CHAIRPERSON LANCMAN: How does it feel to
5 be on the other side?

6 JEFFREY LEBOWITZ: [off mic] I've been
7 there for a couple of years already--

8 CHAIRPERSON LANCMAN: I know.

9 JEFFREY LEBOWITZ: --it's interesting.

10 CHAIRPERSON LANCMAN: Come—come take a
11 seat over there. You'll—you'll tell me (sic) a lot
12 afterwards? Is that okay?

13 JEFFREY LEBOWITZ: [off mic]

14 CHAIRPERSON LANCMAN: [coughs]

15 JEFFREY LEBOWITZ: I—I have no—My name is
16 Jeffrey Lebowitz.

17 CHAIRPERSON LANCMAN: Judge we got to do
18 this.

19 JEFFREY LEBOWITZ: Oh, swear in.

20 CHAIRPERSON LANCMAN: Yeah.

21 JEFFREY LEBOWITZ: How could a judge
22 forget that? Alright.

23 CHAIRPERSON LANCMAN: Yeah. Do you swear
24 or affirm the testimony you're about to give is the
25 truth, the whole truth and nothing but the truth?

2 JEFFREY LEBOWITZ: I certainly do.

3 CHAIRPERSON LANCMAN: Good. So why don't
4 you tell us brings you here today, and we'll hit the
5 lock for five minutes and then we can--if you need
6 more than that then we can do that--

7 JEFFREY LEBOWITZ: Okay.

8 CHAIRPERSON LANCMAN: --and start by
9 introducing yourself, of course.

10 JEFFREY LEBOWITZ: Alright, my name is
11 Jeffrey D. Lebowitz. I'm a retired Justice of the
12 State Supreme Court. I have always during my 21
13 years as a judge I was always part of the appointed
14 process first as an interim Supreme Court Judge were
15 I hold the dubious record of serving 11 interim
16 terms.

17 CHAIRPERSON LANCMAN: Criminal and Civil?

18 JEFFREY LEBOWITZ: In Civil--

19 CHAIRPERSON LANCMAN: Right.

20 JEFFREY LEBOWITZ: --but I was appointed
21 all that time to Criminal Court as is normally the
22 case, which started with the last year of May
23 Dinkins, the full administration of Mayor Giuliani,
24 the first year of Mayor Bloomberg who thereafter said
25 he would never do a policy like that, and appointed

me to the Criminal Court. Thereafter I was appointed to Court of Claims by Judge-by Governor Patterson and remained there as acting Supreme Court judge, which I had been actually while I was an Interim Civil Court Judge. The only person who has have done that until I retired from the bench in 2014, returned to private practice where I'm now the Law Firm of Jaspán Schlesinger out in Garden City New York.

CHAIRPERSON LANCMAN: And so, how many times were you rolled over, so to speak?

JEFFREY LEBOWITZ: I lost count, but I believe the record was 8 until I broke it, and I believe it was 10 or 11.

CHAIRPERSON LANCMAN: Uh-huh.

JEFFREY LEBOWITZ: Yes.

CHAIRPERSON LANCMAN: And you've heard some of the testimony here today. I know you weren't here for all of it, but the issue of your independence while you were an interim Civil Court judge being-being rolled over and then in your other experiences. Can you just talk to your experience with-with that and--

JEFFREY LEBOWITZ: Sure. I-I think that's a logical conclusion to make that people certainly

have certain concerns if they have a one or 2-year term versus a 10-year term, and I—and I'm sure that from what I heard the Mayor is also committed to not keeping people on an interim status for too long. Mayor Bloomberg told me that by the end of the second year we either knew we wanted to keep you or we didn't meaning in general. So I think that's—but I will tell you that during that time I tried to put that aside and, in fact, during three of those years I presided over the first domestic violence part as well as a combined youth part, and if—I think if people understand that can be a very, very combustible situation, orders of protection so on and forth, and it would not be the part perhaps that someone who was a year-to-year term would want to volunteer, but I did. In fact, I had the unfortunate consequence of one of those people who received an order of protection actually being killed at the hands of—of her ex-husband. So somehow, you know, we—we learn from that, and what we did perhaps wrong. Back then it was much of a collaborative effort between the DA's office and Legal Aid and—and the Court system, but I feel that I added a lot during those years, and I feel that I did my best to keep my

judicial independence intact notwithstanding that I knew that sometime in December every year I would come before the Mayor's Committee again and the City Association. Don't forget that that Mayor won't appoint anybody that's not approved by the City Association. So it's not just the Mayor's Committee, it is also a City Association, which can be a real impasse because there's anywhere from 25 to 30 people that interview you at one given time.

CHAIRPERSON LANCMAN: So you were interim civil for X number of years. Then went to--?

JEFFREY LEBOWITZ: I became a Criminal Court judge. Didn't really change anything that I was doing. By that time I was already a--an acting Supreme Court Judge doing criminal work, and then I got a Criminal Court spot, but then eventually because of my desire, I moved to--to Civil term where I remained for the last ten years of my career including four years in--six years in the matrimonial part. In 2009, towards the end of my time in the Matrimonial Department I was appointed by Governor Patterson to a--a term--10-year--9-year term at the Court of Claims, which I didn't fill out because I decided to retire and return to private practice.

2 CHAIRPERSON LANCMAN: Yeah, so-so you had
3 a number of appointments over the course of your
4 career.

5 JEFFREY LEBOWITZ: You could say that,
6 yes.

7 CHAIRPERSON LANCMAN: And at any time did
8 you feel that your independence was compromised or-
9 or-or undermined to the point where you couldn't
10 perform the functions of-of-of a judge through these
11 various different appointing mechanisms?

12 JEFFREY LEBOWITZ: No, in fact, just to
13 share with-with-with the committee and the people
14 here, there were times when I sat in arraignment and
15 I, you know, arraignment can be a tough place. You
16 can, you know, you don't know-you're making very
17 quick decisions, and you try to do the best you can,
18 and sometimes I would think am I making a decision
19 that's in anyway colored by this one-year term, and I
20 tried to put that out of my mind. But people are
21 human beings, and I don't care if you have a one-year
22 term or a five-year term, and eight-year term. You
23 know, those are issues nobody wants to see themselves
24 in the-in the front page of the Post, but I did the
25 best I could to continue to-to be judicially

independent. I will say to the credit of Mayor Bloomberg and to Mayor-Mayor de Blasio, they have not created a sane environment that existed earlier on where judges' decisions even if they turned out to be wrong, we second guessed. I think there's a lot less of that, but obviously, you raise an issue that was in my mind, and I tried to do the best I could not to be affected by it, and I don't think I was.

CHAIRPERSON LANCMAN: And when you say—say earlier on, that's a reference to the Giuliani years when he had gotten rid of the Executive Order and the—the committee and all that as I recall.

JEFFREY LEBOWITZ: Well, I'll just say this even though I never got a full term from Mayor Giuliani, he always reappointed me. He always reappointed me. He always reappointed me, but it was—it was a different period of time in terms of judges, and judges were concerned and I think judges regardless of their term, as I said, always have that in the back of their mind. It—it-it requires a certain amount of—of tenacity on your part, and strength of character to not be affected by it, and I can say that having sat three years doing domestic violence while I was on a year-to-year term that I

think I—I discharged [bell] my functions without—
without reference to the—to the fact that I was
subject to—to a one-year appointment at the end of
the year.

CHAIRPERSON LANCMAN: So-so my last
leading question for this hearing--

JEFFREY LEBOWITZ: There's nobody to
object so there you are.

CHAIRPERSON LANCMAN: It's good to be a
Councilman.

JEFFREY LEBOWITZ: Yeah.

CHAIRPERSON LANCMAN: Is judges across
the—the spectrum unless you're the federal judge
with—with life tenure although I've heard of District
Court judges who aspire to be in the Court of
Appeals, and Court of Appeals judges who aspire to be
in the Supreme Court and everyone is watching their—
their Ps and Qs and maybe there are chief judges of
the Supreme Court of the United States who would like
to be the chief one day. But judges across the
spectrum in New York whether elected or appointed
face some challenges to their independence, but if
you elect or appoint people—elect or appoint people
of integrity, and the appointing authority whether

it's the Mayor or the Governor has integrity and has a professional process in place, you should be okay.

JEFFREY LEBOWITZ: Yeah, I-I-I again I think it has to do more with the individual than the term, and that you can get people who are concerned. Because let's face it, a lot of times the Mayor will only have a three-year term to fill out not because he wants to get a little more versed in that, but that's the term they're filling out, and that person has to--

CHAIRPERSON LANCMAN: [interposing] You mean the last three years in a ten-year term--

JEFFREY LEBOWITZ: [interposing] Right.

CHAIRPERSON LANCMAN: --is that what you mean?

JEFFREY LEBOWITZ: Right, that--that you can end up picking up the term of someone who retires. Like these days these judges who are turning 70 who might likely--they're all likely--they're probably in the Supreme Court already because of how much experience they have, but--but the thing is they may retire and have only two years left or a year left or five years left. So, they can just as easily be affected by it. So, I think that at the

2 end of the day, it--again it has to do with the
3 character of the particular person and less to do
4 with the terms, though there are obviously is some
5 facile logic in the fact that if you have to come up
6 every year, that's got to affect you at some point.

7 CHAIRPERSON LANCMAN: Emphasis facile.

8 JEFFREY LEBOWITZ: Huh?

9 CHAIRPERSON LANCMAN: Emphasis facile.

10 JEFFREY LEBOWITZ: Yes, yes. Exactly.

11 CHAIRPERSON LANCMAN: Okay. Thank you
12 all very much. That concludes our hearing. [gavel]

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C E R T I F I C A T E

World Wide Dictation certifies that the foregoing transcript is a true and accurate record of the proceedings. We further certify that there is no relation to any of the parties to this action by blood or marriage, and that there is interest in the outcome of this matter.



Date April 29, 2017