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IS A “HEARING OFFICER” REALLY A JUDGE?: THE PRESUMED ROLE OF “JUDGES” IN THE UNCONSTITUTIONAL NEW YORK HOUSING COURT

*Harvey Gee**

The Civil Court. . . includes the Housing Part, which disposes of hundreds of thousands of matters annually yet isn't even a constitutional court. –Chief Judge Judith Kaye¹

I. INTRODUCTION

Since its creation in 1972, the New York Housing Court (hereinafter “housing court”) has been “widely regarded as an ineffective institution that has not fulfilled its mandate of preserving the City’s housing stock.”² “Despite the Legislature’s broad delegation of power to the housing court, it has never been accorded the stature or resources essential to fulfill its vital role.”³ This fact has not escaped the attention of legal scholars who have recently addressed problems of the housing court. In her article entitled “The Housing Court’s Role in Maintaining Affordable Housing,” New York University Law Professor Paula Galowitz acknowledges that “the Court has had little influence on the housing maintenance code, a task that the Court was specifically designed to accomplish.”⁴ Furthermore, Professor Galowitz states that “the court has failed to serve as an effective forum for adjudicating landlord and tenant

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¹ Testimony of Chief Judge Judith S. Kaye before Joint Legislative Hearing on Court Restructuring (Oct. 7, 1997), *available at* <<http://www.courts.state.ny.us/hctprg.htm>> [hereinafter Testimony of Chief Judge Judith S. Kaye].

² PAULA GALOWITZ, *THE HOUSING COURT’S ROLE IN MAINTAINING AFFORDABLE HOUSING IN HOUSING AND COMMUNITY DEVELOPMENT IN NEW YORK CITY: FACING THE FUTURE* 177 (Michael H. Schill ed. 1999).

³ *The Housing Part of the New York City Civil Court: The “Housing Court”* (visited August 6, 2001), *available at* <<http://www.courts.state.ny.us/hctprg.htm>> [hereinafter housing court].

⁴ GALOWITZ, *supra* note 2.

disputes.”⁵ In her article, Professor Galowitz also describes the contemporary problems plaguing the housing court. Unfortunately, her analysis fails to expand upon the core problems of the court.

Professor Galowitz’s reasons for limiting her thorough work to the normative issues to the exclusion of the legal issues are largely historical: “In New York City, the housing stock was (and still is) comprised of two-thirds of rental housing and one-third of owner-occupied housing, nearly the reverse proportion of any other larger city.”⁶ As a result, the number of cases processed each year in the housing court steadily increased, according to Professor Galowitz:

In 1995, approximately 300,000 new cases were filed in the clerk’s offices. The most common type of action filed was a “nonpayment case,” in which a landlord sues a tenant to collect overdue rent in a residential apartment. In 1995, there were 266,259 nonpayment cases, which is approximately 90 percent of the cases in Housing Court. There were also 20,641 cases, or approximately 7 percent, in which a landlord sues a tenant in a holdover action, a proceeding in which a landlord attempts to evict a tenant for reasons other than a failure to pay rent (such as violating the lease, subletting the apartment without the landlord’s permission, committing a nuisance). During the same year, final judgments were entered in 198,120 cases in residential apartments (of which 148,351 involved an appearance by a tenant prior to the court entering a judgment for the landlord). Warrants of eviction (which allow a marshal to evict a tenant) were issued in 96,795 cases.⁷

Professor Galowitz emphasizes that “[t]he small number of cases brought to enforce the housing maintenance standards is surprising, given that the Housing Court was specifically created as a mechanism for providing safe, decent, and habitable housing.”⁸ The housing court has become, in practice, a forum for collecting rent and displacing tenants.⁹ She observes that “approximately 90 percent of the cases are nonpayment actions, while only 3 percent are brought to enforce the housing maintenance code.”¹⁰

To say that the problems of the housing court center only on the immense caseloads and deviation from its original purpose

⁵ *Id.*

⁶ *Id.* at 179-80.

⁷ *Id.* at 180.

⁸ *Id.* at 180-81.

⁹ *Id.* Possession results from these judgments.

¹⁰ *Id.* at 181.

misses a more important and fundamental problem: the constitutionality of the court. Rather than increasing the number of judges, as Professor Galowitz would suggest, the more important and fundamental question of whether housing court judges are even constitutional must first be answered. At the outset, housing court judges are not judges in the constitutional sense, but rather court-appointed referees. Interestingly enough, housing court judges, although called "judges," are in reality nonjudicial officers of the court who are appointed for five-year terms.

This essay expands Paula Galowitz's work beyond the obvious problems of the housing court and evaluates her analysis in a more specific context. In the end, this article is much less a critique than an affirmation of Professor Galowitz's central thesis. It affirms for additional reasons and analyzes with the hope that Professor Galowitz's core contribution will be recognized in the broader context of understanding the housing court as an unconstitutional court of law.

This essay is divided into five sections. Part I introduces the role of the housing court. Part II explores the issues plaguing the housing court, as perceived by Professor Galowitz. Part III examines the history of the development of the New York Housing Court. Part IV examines the constitutional issue of the housing judges. In Part IV, I argue that the present structure of the housing court does not comport with the state constitution. I proceed to suggest that having housing court judges preside over housing cases creates unconstitutional violations of: (1) a separation of powers; (2) due process; and (3) a right to counsel. In sum, this section argues that the provisions of the 1972 amendments to New York Civil Court Act that relate to the power of housing court judges are unconstitutional because they authorize a legislative change of legal rights and obligations by means other than those specified in the New York State Constitution for the enactment of laws. In addition, housing judges have exceeded their powers as officers of the court appointed to assist in the performance of its judicial function. Part V concludes that the housing court, as it functions in its present form, is doctrinally and functionally incompatible with traditional notions of due process, and explains why the New York Legislature should rethink the use of the housing court to adjudicate housing cases.

II. THE NORMATIVE SIMPLIFICATION OF AN OVERBURDENED COURT

The city's Housing Courts, with more than 300,000 new cases a year, have always been chaotic; judges deal with multiple cases simultaneously, repeated adjournments are the rule, and much of the business between landlords and tenants get hashed out in the halls.¹¹

Professor Galowitz aptly begins her discussion of the problems facing the housing court by observing that the court has been inundated with administrative problems and is overwhelmed by an immense caseload.¹² She provides the concrete example of the huge back-log of over 3,000 cases (primarily eviction proceedings for nonpayment of rent) that are to be handled by the thirty-five judges who sit on the court.¹³ Significantly, housing court judges in New York City handle more cases than their counterparts in federal district courts and more than eight times as many cases as New York State Supreme Court judges.¹⁴ Even if housing court judges wished to mediate on behalf of indigent tenants, the massive volume of cases these officials must dispose of prevents any meaningful attention that might benefit the disadvantaged.¹⁵ Equally troubling is the fact that there are not enough court attorneys, *pro se* attorneys, housing inspectors, translators, or other personnel to handle the court's case load.¹⁶

Despite the systematic problems, hundreds of thousands of self-represented litigants, both landlords as well as tenants, appear in housing court each year where many lack the knowledge necessary to navigate the complexities of the court.¹⁷ Although it is an overwhelming "*pro se* court," the housing court lacks the resources to assist self-represented litigants adequately.¹⁸ Basic deficiencies

¹¹ *Bloody Legislation Against the Poor, Attorneys: Housing Court Reform No Help to Tenants* (visited June 27, 2001), available at <http://www.interactivist.net/housing/h_court.html>.

¹² See generally GALOWITZ, *supra* note 2.

¹³ See *id.* at 181.

¹⁴ See Housing Court, *supra* note 3.

¹⁵ These judges hear and determine the majority of cases that come before the housing court. Each judge has an average caseload of almost 7,000 cases each year, which is higher than judges in the Civil Court. Often, the judges are rushed through their insurmountable calendars. GALOWITZ, *supra* note 2, at 181.

¹⁶ *Id.* at 181.

¹⁷ See Housing Court, *supra* note 3. See also Jonathan L. Hafetz, *Almost Homeless*, LEGAL AFFAIRS, 12 (July, 2002), available at <http://www.legalaffairs.org/July_August2002/July_August2002_scenes.html> (describing the typical harsh consequences that a *pro se* tenant faces in matters heard in the housing court).

¹⁸ *Id.*

have consequences for the court and its litigants, including significant delays in proceedings; and the potential for public distrust.¹⁹ First, courthouse decorum is noticeably lacking with facilities ill-equipped to accommodate the large number of litigants that appear daily. Second, landlords and tenants come to the courthouse either to commence a proceeding or to respond to a petition, forming long lines in the clerk's offices and seeking out the *pro se* attorneys for assistance.²⁰ Third, because of such crowded dockets, litigants who usually appear *pro se* generally receive less than five minutes of attention from the housing court judge. As a result, facts of cases are reviewed in a cursory manner, if at all.²¹

To alleviate these problems, Professor Galowitz is quick to advocate for additional procedures to be implemented to expand the role of judges, including increasing the number of judges. In her opinion:

These changes would require additional Housing Court judges. Because the current number of Housing Court judges is inadequate to handle the current caseload, the number of judges should be increased to fifty from the current thirty-five pursuant to the Office of Court Administrator. More judges than the fifty recommended by the Office of Court Administrator would be required to fulfill the additional roles of giving more serious consideration to breach-of-warranty defenses and a more active role in advising *pro se* litigants of their rights and available remedies.²²

These problems of the housing court and the need for more judges, as discussed by Professor Galowitz, reveal that something more onerous is occurring in this court. Before entertaining the idea of alleviating the problems of housing courts with the quick-fix of adding additional judges, I would suggest that the constitutionality of the housing court judges themselves should first be reviewed.

In her careful analysis of the housing court, Professor Galowitz devotes much of her analysis to examining how, since the housing court's inception, the judges have applied formal procedures to judicial review in housing cases, thereby preventing litigants from bringing their claims in state trial courts. As a result, because of the emergency "judicial authority" of housing judges, a growing number of litigants have been denied the opportunity to have their

¹⁹ See *id.*

²⁰ See *id.*

²¹ See also Hafetz, *supra* note 17.

²² GALOWITZ, *supra* note 2, at 195.

day in court and to vindicate important legal rights. My discussion below bolsters Professor Galowitz's discussion and offers an additional layer of analysis of housing court judges on top of the general critique made in her article, addressing the generalized assumption that housing court judges are acting with constitutional authority.

III. ORIGINS OF THE UNIFIED COURT SYSTEM

The combination of massive caseloads, litigants largely unfamiliar with the legal process and limited judicial resources has resulted in an environment that more closely resembles a hospital emergency room than a court.²³

The twentieth century was a time of tremendous change for the New York State courts. During the early 1900's, the legislature embraced the goal of simplifying the courts and their administration.²⁴ A 1905 amendment enabled the legislature to set specified ratios on supreme court justices in relation to population and increase the number of judges in the appellate division.²⁵ "In 1917, the legislature made major changes to the jurisdiction of the court. A Judicial Convention was convened in 1921 and its recommendations were adopted by the people in November 1925. The Convention retained the existing structure of the court."²⁶ In addition to these measures of expansion promulgated by the legislature, in 1953 Governor Thomas Dewey and the legislature formed the Temporary Commission on the Courts to study problems facing the judiciary, especially the tremendous caseload volume.²⁷

Following the study, which led to the establishment of the Unified Court System, a major reorganization of the judiciary took place in 1961.²⁸ The passage of the new Judiciary Article for the State Constitution implemented many of the Tweed Commission recommendations, which were approved by the Legislature and voters. This article created the "Unified Court System," establishing the various courts, the Administrative Board of the Judicial Conference, and conferring on the Appellate Divisions various ad-

²³ Housing Court, *supra* note 3.

²⁴ *History of the New York State Unified Court System* (visited May 15, 2001), available at <<http://www.courts.state.ny.us/6jd/internet/homepage/history.html>>.

²⁵ *See id.*

²⁶ The Court Through the Decades 1847-1997: The First Court of Appeals, available at <<http://www.courts.state.ny.us/1847coa.htm>>.

²⁷ *See id.*

²⁸ *See History of the New York State Unified Court System, supra* note 24.

ministrative powers.²⁹ Since the court established a Unified Court System, this New York modern court structure has remained largely unchanged.³⁰ The New York Unified Court System was organized pursuant to constitutional amendments and statutes enacted by the New York Legislature,³¹ which became effective in 1962 pursuant to the State Constitution.³² Central administration of the court system was further specified by constitutional amendments and through the passage of laws in 1974 and 1978.³³ The primary objective of this newly established court system was to provide a forum for fair resolution of civil matters.³⁴ By statute, two specific parts were established within the New York City Civil Court for: (1) determining small claims; and (2) hearing actions and conducting proceedings involving the enforcement of State and local laws for the establishment of housing standards.³⁵

Later, the Housing Part of the Civil Court was created when New York became concerned about the amount of housing cases and litigation in the state civil court system concerning housing issues. "The New York Housing Court was created by the New York State Legislature as a mechanism for providing safe habitable housing."³⁶ The New York City Housing Court was established by the

²⁹ See *New York State Unified Court System*, available at <<http://www.nysl.nysed.gov/ils/judicial/court-admin/descript.htm>>.

³⁰ The New York State court structure resembles that of most large-population states and the federal system. It consists of a series of trial courts, intermediate appellate courts, and the New York Court of Appeals, its highest court. Courts of inferior jurisdiction such as the New York City Civil Court, New York City Criminal Court, and other city courts, district courts, town courts, and village courts, hear matters that are deemed less serious matters. See GALOWITZ, *supra* note 2, at 178. See also Quintin Johnstone, *New York State Courts: Their Structure, Administration and Reform Possibilities*, 43 N.Y.L. SCH. L. REV. 915, 915 (2000).

³¹ The Unified Court System is comprised of trial courts, which hear cases in the first instance, and appellate courts, which hear and determine appeals from decisions of trial courts. Trial courts of limited jurisdiction adjudicate misdemeanors, violations and minor civil matters and preside over arraignments and other preliminary proceedings in felony cases. New York City Civil Court Act § 102 (McKinney 2001). Article VI, establishing a unified court system, was revised and amendments adopted by the Constitutional Convention of 1938 and approved by the vote of the People on November 8, 1938. See *New York State Unified Court System*, *supra* note 29; See also *N.Y. State Constitution*, available at <<http://assembly.state.ny.us/leg/co=1>>.

³² NY. CONST. art VI, § 15.

³³ See *New York State Unified Court System*, *supra* note 29.

³⁴ The Housing Court also provides a forum for family matters, juvenile and criminal charges, and citizen-State disputes; supervise administration of estates, consider adoption petitioner, and pursue over divorce matters; provide legal protection for children, the mentally ill, and others unable to manage their own affairs; and regulate admission to the bar and the conduct of lawyers. See *id.*

³⁵ N.Y. Civil Court Act § 110 (McKinney 1983).

³⁶ Because the Court has a central role in handling housing conditions and in

New York State Legislature in 1972 to hear actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing, building, and health codes of the City of New York.³⁷ "This measure was designed to halt the deterioration and abandonment of buildings, preserve existing housing stock and encourage new construction."³⁸

"Prior to 1972, jurisdiction to enforce the laws concerning housing maintenance standards and summary proceedings to recover possession of real property was divided between the Civil and Criminal Courts of the City of New York."³⁹ For example, the City Civil Court had jurisdiction over housing eviction cases but lacked the authority to enforce the housing maintenance code. Likewise, because violations of the code that gave rise to criminal sanctions were under the jurisdiction of the Criminal Court. Therefore, "[r]ecognizing a need to consolidate authority in one forum for effective enforcement of housing maintenance laws, the legislature created the Housing Part as a division of the New York City Civil Court and gave it wide-ranging jurisdiction over property located in New York City."⁴⁰

Subsequently, the legislature passed and voters approved a constitutional amendment (essentially a formal constitutional acknowledgment of the 1974 arrangement) that created a fully centralized system of court management under the direction of the Chief Judge and through daily control of the Chief Administrator.⁴¹ This Court "combined jurisdiction over violations of the housing maintenance code and the Civil Court's traditional caseload of eviction cases."⁴² The dissatisfaction with the manner in

managing the immense number of litigants who appear before it, the Court plays a major role in shaping housing patterns in New York City. *Id.* at (a); *See* GALOWITZ, *supra* note 2, at 177.

³⁷ Paula Galowitz asserts that "The Legislature created the Court in order to remedy a jurisdictional gap that hampered enforcement of the housing maintenance code. . . The primary mandatory of the new court was to address maintenance and repair issues and to create a more flexible mechanism to preserve the city's declining housing stock." GALOWITZ, *supra* note 2, at 179.

³⁸ Housing Court, *supra* note 3.

³⁹ *See id.*

⁴⁰ GALOWITZ, *supra* note 2, at 178.

⁴¹ *See New York State Unified Court System*, *supra* note 29.

⁴² *See* GALOWITZ, *supra* note 2, at 178. "A part of the [Civil] court shall be devoted to actions and proceedings involving the enforcement of state and local laws for the establishment and maintenance of housing standards, including, but not limited to, the multiple dwelling law and the housing maintenance code, building code and health code of the administrative code of the City of New York." *See* N.Y. Civil Court Act § 110(a). In the legislative findings and the policy statement underlying the enabling legislation, the Legislature articulated the purposes of the court:

which the existing courts handled serious housing issues and the desire to create courts with expertise in housing matters was the impetus for this specialized Court.⁴³ Remarkably, the housing court was established with no prior notice or public input. The State Legislature created a "referee" designation, which are incidental to the legislature's powers. It, therefore, by statute, set a special housing court consisting of housing judges, and gave the court exclusive jurisdiction to hear housing cases in New York.

Today, the New York Legislature has the power to delegate rule-making authority to an independent court administrator. It likewise has the power to limit or expand that rule-making authority and to change rules by legislation. "The administrative organizational structure of the New York State courts consists of a complex network of administrative officials, headed by the Chief Judge of the Court of Appeals, who in addition to her responsibilities for deciding cases also has substantial administrative responsibilities for the entire court system that are very demanding."⁴⁴ The chief judge oversees court operations and . . . makes recommendations for needed reforms in the court system, in addition to deciding cases.⁴⁵

The legislature finds that the effective enforcement of state and local laws for the establishment and maintenance of proper housing standards is essential to the health, safety, welfare and reasonable comfort of the citizens of the state. . . The legislature finds that the effective enforcement of proper housing standards in the City of New York will be greatly advanced by the creation of a housing part of the civil court of the City of New York with jurisdiction of sufficient scope (i) to consolidate all actions related to effective building maintenance and operation, (ii) to recommend or employ any and all of the remedies, programs, procedures and sanctions authorized by federal, state, or local laws for the enforcement of housing standards, regardless of the relief originally sought by the plaintiff, if it believes that such other or additional remedies, programs, procedures or sanctions will be more effective to accomplish and protect and promote the public interest and compliance, and (iii) to retain continuing jurisdiction of any action or proceeding relating to a building until all violations of state or local law as for the establishment and maintenance of proper housing standards have been removed and until it is satisfied that their immediate recurrence is not likely.

See N.Y. Civil Court Act § 110 legislative findings at (a), (b).

⁴³ "In New York, at the time that the Housing court was created, there was widespread abandonment of residential buildings; the court was created to 'retard the deterioration and subsequent abandonment of residential buildings' and encourage critically needed housing investment." GALOWITZ, *supra* note 2, at 178.

⁴⁴ Johnstone, *supra* note 30, at 932.

⁴⁵ *Id.*

IV. INTERPRETING THE COMPLEX RELATIONSHIP BETWEEN THE HOUSING COURT JUDGES AND THE N.Y. CONSTITUTION

Although the title of Hearing Officer has been changed to Housing Judge, the nature of the position has not changed.⁴⁶

A. *Housing Court Trilogy*

The issue of whether housing judges are actual constitutional judges or merely "hearing officers" is not a new issue. Instead, it has become a forgotten one. There have been previous lawsuits challenging the constitutionality of the housing judges. In what may be termed the "Housing Court Trilogy," three foundational cases together express the affirmance of the judge by the New York Court of Appeals and the State Supreme Court in upholding the constitutionality of these housing court judges.

*Glass v. Thompson*⁴⁷ was the linch-pin case which held that housing judges, then called hearing officers, were "non-judicial officers of the court."⁴⁸ There, the plaintiffs contended that the appointment of hearing officers to hear and determine summary proceedings violated section 15 of article VI of the New York State Constitution, which established the Civil Court of the City of New York as a constitutional court consisting of a number of judges with certain qualifications. The *Glass* court held that the Chief Administrator had the power to appoint housing judges. "Under the New York State Constitution this power is derived from the Chief Judge and is virtually without limit in this area. Furthermore, due to the supremacy of the New York State Constitution over New York statutes, the proper reading of the New York Civil Court Act and the amendments thereto require an overriding supplementation by the applicable amendments to the New York Constitution."⁴⁹

The New York Court of Appeals in *Corkum v. Bartlett*⁵⁰ also interpreted Section 28 of Article VI of the New York Constitution to give a very broad delegation of power to the Chief Administrator.⁵¹

⁴⁶ *Met Council, Inc. v. Crosson*, 84 N.Y. 2d 328, 335, 642 N.E.2d 1073, 1077, 618 N.Y.S.2d 617, 621 (1994).

⁴⁷ *Glass v. Thompson*, 51 A.D.2d 69, 379 N.Y.S.2d 427 (2d Dept 1976).

⁴⁸ *Id.* at 74.

⁴⁹ *Power of the Courts*, 11 *TOURO L. REV.* 1009, 1014 (1995).

⁵⁰ *Corkum v. Bartlett*, 46 N.Y.2d 424, 386 N.E.2d 1066, 414 N.Y.S.2d 98 (1970) (involving opposition to proposed public hearings, to be held by the Chief Administrator, about classifications of non-judicial employees and stating that the Chief Administrator has the power to hold such public hearings).

⁵¹ The Office of Court Administration was created in 1974 (Chapter 615) as the

The court noted that the apparent limitations placed on the Chief Administrator's power, requiring it to flow from the Chief Judge, is actually an asset. The court explained that, in the area of supervision and management, "the Constitution places no limitations on the duties the Chief Judge may delegate to the administrator. Neither consultation with the Administrative Board nor approval by the court of appeals is a prerequisite to the exercise of supervisory powers by the Chief Administrator."⁵² According to *Durante v. Evans*,⁵³ this broad grant of power includes appointment power over non-judicial personnel.⁵⁴

The *Glass* court also held that the provisions for trial before a hearing officer are substantially the same as proceedings before a court-appointed referee. However, the court concluded on the narrower issue that to compel parties to have their case adjudicated by a hearing officer would violate the aforementioned constitutional provisions.⁵⁵ In *Glass*, the New York Appellate Division addressed two issues on appeal: (1) whether the appointment of hearing officers to hear and determine summary proceedings in the Housing Part of the Civil Court of the City of New York pursuant to section 110 (subd.(e)) of the New York City Civil Court Act ("NYCCCA"), violates section 15 of article VI of the New York Constitution and (2) whether the constitutionality of the statutes in questions may be sustained by analogizing hearing officers to referees to hear and determine housing cases.⁵⁶ The *Glass* court reasoned that the appointment of housing judges was covered by the

state-wide administrative office for the courts. A law of 1978 (Chapter 156) assigned to the chief judge of the court of appeals responsibility for the administrative supervision of the court system and, with the Administrative Board, for establishing statewide standards and policies. The chief judge was to appoint a chief administrator of the courts (called the chief administrative judge of the courts if the incumbent is a judge) to direct the Office of Court Administration and supervise the administration of the trial courts. See *New York State Unified Court System*, *supra* note 29.

⁵² Corkum, 46 N.Y.2d at 429, 386 N.E.2d at 1068, 414 N.Y.S.2d at 100.

⁵³ *Durante v. Evans*, 94 A.D.2d 141, 464 N.Y.S.2d 264 (3d Dept 1983), *aff'd*, 62 N.Y.2d 719, 465 N.E. 2d 367, 476 N.Y. S. 2d 828 (1984) (in this case, the New York City county clerks claimed they had full power to appoint counsel and deputy clerks. The court disagreed and held that the "Chief Administrative Judge has the exclusive power of appointment" according to the pertinent amendments in the New York State Constitution).

⁵⁴ *Id.*, 94 A.D.2d at 144 ("[T]he power granted thereby is 'complete,' and has been interpreted to embrace 'the power to deal with all personnel matters'.") (quoting *Corkum v. Bartlett*, 46 N.Y.2d 424, 429, 386 N.E.2d 1066, 1068, 414 N.Y. S.2d 98, 100 (1979) and *In re Blyn v. Bartlett* 39 N.Y. 2d 349, 357, 348 N.E.2d 555, 559, 384 N.Y. S.2d 99, 103 (1976)).

⁵⁵ *Glass v. Thompson*, 379 N.Y.S.2d 427 (4th Dept 1976).

⁵⁶ *Id.*

New York State Constitution. Therefore, even though the section on appointment powers in the NYCCCA conflicts with the New York Constitution, the constitutional amendment prevailed.⁵⁷

Several years later, the court in *Babigan v. Wachtler*,⁵⁸ upheld the constitutionality of NYCCCA §110(f) which authorizes the Chief Administrator of the Court to appoint housing judges. In *Babigan*, an unsuccessful candidate for housing judge challenged the constitutionality of NYCCCA §110(f).⁵⁹ In that case, plaintiff sought to declare NYCCCA §110(f) unconstitutional and void, and to enjoin the determination of the constitutionality of NYCCCA §110(f). Plaintiff claimed that housing judges of the Housing Part selected pursuant to Article 6 §15(a) of the New York State Constitution by Branch were non-constitutional judges, and along these same lines, plaintiff argued that NYCCCA §110(f), which delegates the authority to judges, was itself unconstitutional.

In each of his legal attacks on NYCCCA §110(f), plaintiff claimed that the additional powers granted to housing court judges demonstrated that they were clearly de facto fully-fledged judges. However, the court reasoned that the change in title from "hearing officer" to "hearing judge" and the designation of housing court judges as "judicial officers" was not a material enlargement of authority subsequent to the decision in *Glass v. Thompson*. The *Babigan* court concluded that none of these changes, including those alleged in this action, has actually materially expanded the authority of housing court judges, and, at no time, has plaintiff claimed or had a basis for claiming that the subject matter jurisdiction of housing court judges has been expanded. The Court of Appeals further held that post-1976 amendments to the statute relating to appointment of housing judges did not materially enlarge authority of housing judges for the purpose of determining whether the provision violated doctrine of separation of powers. The court assumed the correctness of the *Glass* decision and relied on the reasoning by the court in *Glass v. Thompson*, determining that there were no material enlargement of authority made by the post-*Glass* amendments.

These court holdings may have been shaped by political patronage. Professor Quintin Johnstone asserts that the New York

⁵⁷ See Met Council, 84 N.Y.2d 328, 642 N.E. 2d 1073, 618 N.Y.S. 2d 617 (1994) (the court went into great detail about how the amendments to the New York Civil Court Act in 1978 and 1984, which changed the title from Hearing Officer to Housing Judge, did nothing more than simply change the name, not the position and powers).

⁵⁸ *Babigan v. Wachtler*, 126 A.D.2d 445, 69 N.Y.2d 1012 (1987).

⁵⁹ *Id.*

State Courts are subjected to external political controls and pressures that may influence the kinds of reforms that the court administration eventually adopt.⁶⁰ Johnstone says that "[u]nder the constitutional concept of separation of powers, the courts are a separate branch of government that share power with the [legislative and executive branches]."⁶¹ However, in reality, the courts to a great extent are beholden to the state legislature for all of their funding, the establishment of judge's salaries, and decisions about the court organization and administration. Likewise, the government controls the budget of the courts.⁶² Conversely, administrators of the court have political influence over the legislature, especially concerning legal changes affecting the courts. Many of these changes are in the form of proposals that promulgated by the Chief Judge or the Chief Court Administrator.⁶³ According to Johnstone:

Many of these legislative proposals are drafts of recommended legislation prepared by the court system's Office of Counsel, and representatives of that office are in frequent contact with legislators and the governor's counsel on possible new legislation. Stated more tersely, representatives of the court system regularly lobby the legislature and the governor on court-related matters. Other examples of efforts by representatives of the court system to influence the legislature are speeches, published reports, and press releases by recent chief judges intended in large part to generate public support for legislative action favored by the court leadership.⁶⁴

Here, I would suggest that this political influence exerted by the courts, explains, at least in part, the reluctance by the New York trial courts and Appeals Courts to enter an adverse decision against the court itself in any of the challenges made by the litigants in the line of cases challenging the authority of housing court judges. If nothing else, by placing the housing court cases in its appropriate political/legal context, a more complete understanding of the decisions and the interplay between the three branches of New York state government can be achieved.

Law Professor Russell Engler, who has litigated against the Chief Administrator of the New York Courts, has argued that "the only true way to understand the case law [arguing against the con-

⁶⁰ See Johnstone, *supra* note 30, at 948.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 949-50.

⁶⁴ *Id.* at 950.

stitutionality of the housing court judges] is to view these cases as political, not legal decisions.”⁶⁵ Professor Engler suggests that in all of the cases against the court, the legal analysis seems to be guided by political views. He is especially critical of the reverent use of semantics employed by the Court of Appeals in *Metropolitan Council v. Crosson*.⁶⁶ Engler has recently reflected on his participation in the case, and suggests that:

[O]ur claims about the validity of reappointment of Housing Court judges turned on the facts that the statute used the words ‘Judicial Officer’ and ‘Administrative Judge’ at key points. In its decision, the Court of Appeals concluded that Judicial Officer meant nonjudicial officer, and that Administrative Judge did not mean Administrative Judge, but instead meant Chief Administrator (a different position). . . in lawsuits such as these, all bets are off, and the legal seems to be political.⁶⁷

Assuming the validity of Professor Engler’s theory, the court in *Crosson* disingenuously sides with the Chief Administrator of the New York Courts in affirming the legitimacy of the Housing Court Judges. By centering its framework of analysis on historical judicial interpretation of the legislative amendment to CCA 110 and simplifying its discussion to the issue of title change of “Hearing Officer” to “Housing Judge,” it never directly addressed the constitutionality issue. Rather, the Court of Appeals manages to sidestep the issue and decidedly rules on the on the grounds of semantics and literary interpretation. In doing so, the court allowed the New York Courts to bypass the normal judicial selection process, and allowed incumbent housing judges to circumvent the appointment process, and to succeed to another term without scrutiny of any sort.

Likewise, legal scholar Jack Chin questions the constitutionality of the New York Housing Court and, in particular, the validity of “the N.Y. constitutional amendment which took away from the legislature the authority to create courts and created instead a defined and limited unified court system.”⁶⁸ Professor Chin contends that under the Unified Court System the housing court is afforded too much power for its own good. He warns that the judges presently

⁶⁵ E-mail from Russell Engler, Professor, New England Law School, to Harvey Gee (Sept.17, 2001)(on file with the author).

⁶⁶ *Met Council v. Crosson*, 191 A.D.2d 1052, 595 N.Y.S.2d 680 (1st Dept 1993).

⁶⁷ *Id.*

⁶⁸ E-mail from Jack Chin, Professor, University of Cincinnati School of Law, to Harvey Gee (Sept.4, 2001)(on file with the author).

have the same authority as civil court judges.⁶⁹

This same issue was addressed in *Met Council*,⁷⁰ where appellants Met Council, Inc. et al., brought an action in the New York Supreme Court, seeking to force respondents⁷¹ to go through the regular process of appointment to their positions as housing judges. At issue was "whether Housing Court Judges may hold over after the expiration of their five-year term and . . . whether Housing Court Judges are subject to the reappointment authority of the Chief Administrator of the Courts."⁷² The New York Court of Appeals affirmed the judgment of the lower court by holding that the relevant provision in the New York Constitution takes precedence over the conflicting statutory provisions in the NYCCCA, wherein the Court of Appeals held housing court judges may hold over after expiration and are subject to reappointment through the authority of the Chief Administrator of the Court.⁷³ The court also held that "although the title of Hearing Officer has been changed to housing judge, the nature of the position has not changed," thus rejecting appellant's contention that housing judges serve "judicial functions."⁷⁴

With this in mind, we should ask ourselves: Was it mere convenience or coincidence that housing judges as "judicial officers" can hold over into another term after the expiration of their five-year term, while "hearing officers" cannot? It would only be a slight simplification to say that the Court of Appeals merely treated housing judges as hearing officers, to enable the Administrative Judge of the Civil Court to extend their terms, thereby avoiding the formal reappointment process. Under the court's reasoning, the amendment to Section 110 providing that housing judges are "duly constituted judicial officers" was not intended to grant any additional powers to them, but was only done in an effort to foster respect and establish the decorum needed in a judicial proceeding.⁷⁵ Even

⁶⁹ E-mail from Jack Chin, Professor, University of Cincinnati School of Law, to Harvey Gee (Jan. 26, 2001) (on file with the author).

⁷⁰ *Met Council v. Crosson*, 191 A.D.2d 1052, 595 N.Y.S.2d 680.

⁷¹ *Id.* (respondents were Matthew Crosson, Chief Administrator of the Courts of the State of New York, and Silberman, Administrative Judge of the Civil Court of the City of New York).

⁷² *Met Council*, 84 N.Y.2d at 330.

⁷³ N.Y. Civ. Ct. Act §110(f) (McKinney 1972) (The section states in relevant part: "[T]he hearing officers shall be appointed by the administrative judge. . ." The section further states in pertinent part: "Reapportionment shall be at the discretion of the administrative judge. . .").

⁷⁴ *Met Council*, 84 N.Y.2d at 335.

⁷⁵ *Met Council*, 84 N.Y.2d at 332-33.

though CCA 110(1) expressly states that the decision to reappoint housing judges is to be made by the Administrative Judge, the court remarkably found that under the State Constitution VI Sec 28, the broad power is vested to the Chief Administrator, acting on behalf of the Chief Judges, to appoint and reappoint housing judges. The court held that "although the New York City Civil Court Act provides that the Administrative Judge has the power, it is the Chief Administrator who in a fact has the ultimate power."⁷⁶

After *Met Council*, housing judges were widely perceived by courts, and probably the general public as well, to be constitutional. Pursuant to NYCCA §110(e), as originally enacted, actions and proceedings before the Housing Part were to be tried before Judges and appointive hearing officers. Under such an interpretation, the Laws of 1978 (ch310) modified the term "hearing officer" to "hearing judge" throughout NYCCA §110. In addition, subdivision (e) was amended to provide that actions and proceedings before the Housing Part would now be tried before civil court judges, acting civil judges, or housing judges. These judges who adjudicate the majority of cases before the courts represent the judicial aspects of the housing court.⁷⁷

Further, the term "judge," in its broadest definition, included all officers appointed to decide litigated questions.⁷⁸ The term is statutorily defined to include "every judicial officer authorized, alone or with others, to hold or preside over a court of record."⁷⁹ The term "judicial officer" includes any person who exercises functions relating to the judicial branch of our tripartite form of government, but is more properly applicable to those persons who exercise judicial functions by way of adjudicating controversies and interpreting laws.⁸⁰ Judicial hearing officers have such powers as may be provided by law. Statutes provide that such an officer may serve as a referee in civil proceedings with the same powers as referees and may be assigned to perform the same functions and with the same authority as referees.⁸¹

Undoubtedly, the history of these cases complicates the normative paradigm and suggests that more foundational problems must first be addressed. The common strand running through

⁷⁶ *Met Council*, 84 N.Y.2d at 334.

⁷⁷ *Miller v. Silberman*, 951 F. Supp. 485, 488 (S.D.N.Y. 1997).

⁷⁸ See *Matter of Wheelock*, 205 A.D. 654, 656, 200 N.Y.S. 157 (1st Dept 1923).

⁷⁹ N.Y. Gen. Constr. Law §26 (Cons. 1921).

⁸⁰ 18A N.Y. JUR. 2d, Civil Servants, 22.

⁸¹ *Schanback v. Schanback*, 130 A.D.2d 332, 519 N.Y.S.2d 819 (2d Dept 1987); *Lipton v. Lipton*, 128 Misc. 2d 528, 489 N.Y.S.2d 994 (N.Y. Sup. 1985).

these cases is the nascent conflict inherent in the determination of whether housing judges, nominally being "referees," currently appointed by the chief court administrator, are considered as judges of the branch of the Civil Court in the City of New York.⁸²

As described earlier, the state courts have held that the legislature has the power to authorize the trial of summary proceedings before a hearing officer.⁸³ In *Glass*, the court observed that the power of courts of law to direct a "reference" was based on long-standing statutory recognition in New York. According to the court in *Glass*, "history thus demonstrates that the purpose of references has been to remove complicated and intricate issues of fact, as in a long account, from an ordinary court and jury so that such issues may be more effectively and expeditiously determined in a hearing before persons specifically qualified by expertise and competent to deal with the area in question."⁸⁴ *Glass* also established that there is a strong need for the legislature to be partially comprised of decision makers with special experience in the housing area, and that "[n]o provisions of our State Constitution are cited which have curtailed the power of the legislature. . . except that compulsory references may not violate rights guaranteed to the parties by the Constitution."⁸⁵ Similarly, in *Babigan*, the court declared that it is the duty of the courts to adopt a construction of a statute that will bring it into harmony with the constitution if the statutory language will permit. The terms of a statute are to be interpreted in light of its legislative history.⁸⁶

Notably, in the *Glass* and *Babigan* cases, neither court applies its own announced standards. Rather than pay deference to the clear statutory language of the constitution and the legislative history to support its decisions, the court in both cases merely accepted the judgement of the New York City Civil Court that changing "hearing officer" to "housing judge" and denominating "housing judge" duly constituted "judicial officer" was only done to invest housing judges with as much authority and dignity as possible.⁸⁷

Nevertheless, in *Glass*, *Babigan*, and *Met Council* it appears that

⁸² Chief Administrative Judge Jonathan Lippman, *Proposal to Reform New York State Court System Submitted to Legislature*, Mar. 19, 1997 (visited June 27, 2001), available at <<http://www.courts.state.ny.us/reform.html>>.

⁸³ *Babigan*, 126 A.D.2d 445, 69 N.Y.2d 1012.

⁸⁴ *Glass*, 51 A.D.2d at 74, 379 N.Y.S.2d at 434.

⁸⁵ *Babigan*, 126 A.D.2d at 509.

⁸⁶ *Id.*

⁸⁷ *Id.*

the New York Courts would have deferred to the authority of the Chief Administrator of the Courts to appoint housing "judges" to serve as "referees" on the ground that they have such power to do so. The institution behind this reasoning is easy to understand: In civil cases, a judicial hearing officer has the same powers as a referee. Pursuant to NYCCCA §110 (e):

Actions and proceedings before the housing part shall be tried before civil-court judges, acting civil-court judges, or housing judges. Housing judges shall be appointed pursuant to subdivision (f) of this section and shall be duly constituted judicial officers, empowered to hear, determine and grant any relief within the powers of the housing part in any action or proceeding except those to be tried by jury. Such housing judges shall have the power of judges of the court to punish for contempt. Rules of evidence shall be applicable in actions and proceedings before the housing part. The determination of a housing judge shall be final and shall be entered and may be appealed in the same manner as a judgement of the court; provided that the assignment of actions and proceedings to housing judges, the conduct of the trial and the contents and filing of a housing judge's decisions, and all matters incidental to the operations of the housing part, shall be in accordance with rules jointly promulgated by the first and second departments of the appellate division for such part.

With the consent of the parties, a judicial hearing officer may "hear and determine" any issue referred. But are housing judges considered "hearing officers" or "judges" who serve "judicial functions?"

At a minimum, the factual basis to support the argument that housing judges are acting as actual judges, but are merely hearing officers, has been undermined considerably by an analysis of the amendments along with the legislative history and intent. Given the *Glass* court's extensive reference to judicial authority, the court's assertion that housing judges serve as referees and not constitutional judges seems incredible on its face. However, the line of reasoning created by *Glass* and its progeny has been weakened over time.

These earlier cases, which have bought into question the validity of the housing court policies, when considered as a group, may have also addressed the issue of the authority of housing judges as hearing officers, and determined that housing judges are constitutional. But since those cases were ruled upon, the functions of the housing judges have been expanded considerably. In light of the

court's present problems, the time has come to readdress this increase of judicial authority of housing judges, and it is my belief that if the same claims of unconstitutionality were brought today, reviewing courts would likely hold that the housing judges are not constitutional judges, and are not properly vested with due authority prescribed by the New York Constitution. I base my claim on the fact that these judges wield as much power and influence in their daily calendar as their constitutional counterparts.

Most significantly, under the 1972 legislation, housing court judges were not made constitutional judicial officers, but rather were designated as non-judicial referees appointed by the Administrative Judge of the New York City Civil Court for terms of five years.⁸⁸ As a court that dramatically affects the lives of so many New Yorkers, I believe that the housing court should be raised from the level of an administrative tribunal to a level with constitutional significance similar to other judicial forums in the State.⁸⁹

To begin, civil court judges sit in housing court in each of the boroughs handling trial parts in housing cases.⁹⁰ Under the NYCCCA §110(a), housing judges are granted jurisdiction over a wide range of legal issues including the enforcement of state and local laws for "the establishment of housing standards, including but not limited to, the multiple dwelling law, the housing maintenance code, building code and health code of the administrative code of the city of New York." Next, housing judges may preside over actions for the imposition and collection of civil penalties for violation of laws, actions for the collections of costs, expenses and disbursements incurred by the city for the elimination or correction of nuisances, actions for the demotions of any dwelling, establish or enforce the foreclosure of liens upon real property and on rents, issue injunctions and restraining orders for the enforcement of housing standards, recovery possession of residential premises, render judgements for rent due, actions and proceedings for the removal of housing violations, special proceedings or vest title in the city of New York to abandoned multiple dwellings, and make any recommendations or the employment of any remedy, programs, procedure or sanction authorities for the enforcement of housing standards.⁹¹

⁸⁸ Housing Court, *supra* note 3.

⁸⁹ *Id.*

⁹⁰ See Edward A. Adams, *Housing Court Urged to Adopt IAS System to Reduce Delays*, N.Y.L.J., Mar. 6, 1991, at 1.

⁹¹ N.Y. CITY CIV. CT. ACT §110(a)-(c).

The judicial powers given to housing judges have continued to widen due in large part to legislative statutes that have offered little guidance as to what precise powers housing judges have. There seems to be some contradictions between what the Congressional intent is, and what the actual authority actually wielded by these judges. However, if we take seriously the premise that housing judges are acting in contravention of the constitution, then, at the very least, these judges cannot, without further justification, enter binding judicial decisions.

Here, the analysis shifts from the original intent behind the creation of the housing court to their contemporary function as an unconstitutional court of law. Arguments about the necessity and wisdom of some government policy, however strong they may be, are not enough to abrogate a constitutional right. In theory, even if housing court judges perform many or most of the functions of judges of the Unified Court System, housing court judges are empowered only within the very narrowly defined and limited jurisdiction of the housing court, and their powers should be limited with this end in mind.

In particular, the NYCCCA §110(f) which provides for the appointment of housing judges of the New York City Civil Court by the administrative judges rather than by the executive branch as would be the case with full-fledged civil court judges, is unconstitutional as violative of the doctrine of separation of powers since housing judges are not essentially referees. Though they purport to serve as officers of the court appointed to assist in the performance of its judicial functions, and are appointed as such officers by a member of the judiciary, they are, nonetheless, not endorsed by the courts.

Unlike New York City Civil Court judges, who are elected by popular vote to 10-year terms, housing judges are appointed by the Chief Administrator of the Court to 5-year terms.⁹² The N.Y.C.C.C.A. §110(f), states in pertinent part that: "the Housing judges shall be appointed by the administrative judge from a list of persons selected annually as qualified by training, interest, experience, judicial temperament and knowledge of federal, state and local housing laws and programs by the advisory council for the housing part."⁹³ These wide-ranging powers that the chief administrative judges have in appointing housing judges have meant that they were effectively doing the work of the legislature.

⁹² 20th Annual Report of The Chief Administrator of the Courts at 16 (1997).

⁹³ N.Y. CTRY. CIV. CT. ACT §110(f).

It should be noted that the Act was, in effect, a legislative effort to transfer the duties of elected, constitutional judges to administratively appointed functionaries. Housing judges were assigned what historically have been the non-delegable and exclusive duties of constitutional judges. The legislative motive was to alleviate the tremendous back log in the civil court and expedite housing matters through the system. Yet, the end result in establishing the housing court does not comport with constitutional standards because the legislature cannot pass its lawmaking function to another administrative body. Thus, as "hearing officers" and not constitutional judges, a housing court judge, according to the legislative intent and explicit language of the amendments, does not and should not possess any independent, constitutionally mandated judicial power or authority. Instead, these judges are reappointed at the discretion of the administrative judge on the basis of performance review and competency and are completely shielded from any oversight.⁹⁴ In fact, until 1994, housing judges were not subjected to the same disciplinary review processes as state supreme court justices. Prior to these review measures being established, there were no means by which to bring charges of incompetency or misconduct against any housing judge.⁹⁵

The only way that the constitutionality of statutes authorizing appointment of hearing officers to hear and determine summary proceedings in the housing part of the Civil Court of the City of New York may be sustained, in absence of a demand for a jury trial, is by analogizing hearing officers to referees as the only court officers, aside from judges, who exercise the judicial function.⁹⁶

More to the point, judicial hearing officers in civil proceedings possess, with few exceptions, the same powers as referees and may therefore be assigned to perform the same powers as referees.⁹⁷ A judicial hearing officer has the authority and jurisdiction to conduct a hearing with respect to an application to set aside a stipulation of settlement entered into before him or her based on fraud or other grounds.⁹⁸ After a hearing, the officer has the authority, if appropriate, to vacate the subject stipulation of settlement. Many

⁹⁴ City-Wide Task Force on Housing Court, Inc., *The Appointment and Reappointment of Housing Court Judges*, Nov. 1993 (visited June 1, 2001), available at <<http://www.tenant.net/court/Howcourt/appoint.html>>.

⁹⁵ See Matthew Goldstein, *New Procedure Adopted For Discipline, Dismissal of Housing Court Judges*, N.Y.L.J., April 11, 1994, at 1.

⁹⁶ N.Y. CITY CIV. CT. ACT §110(e).

⁹⁷ 92 N.Y. Jur.2d *References* §23 (1991).

⁹⁸ *Id.*

of the actions taken by judicial hearing officers or referees to decide legal issues are similar to those taken by Supreme Court officers or referees.⁹⁹ The Supreme Court lacks the authority to review substantive determinations and decisions of a judicial hearing officer, as it has no authority to review those decisions of any other justice of co-ordinate jurisdiction.¹⁰⁰ However, the Supreme Court can make determinations concerning jurisdiction or authority of a judicial hearing officer when particular powers of jurisdiction of the officer have been circumscribed by the order of reference.¹⁰¹

Furthermore, a hearing officer cannot enter an order after he or she hears a matter, nor can he or she hold a person in contempt of court for misconduct during the proceeding that would be generally be contemptuous had the conduct occurred before a constitutional judge. But, the housing court judges arguably have more power than hearing officers have to adjudicate and enforce criminal contempt applications arising out of the civil proceedings commenced in the Housing Part of the New York City Civil Court, given the Housing Part's expansive jurisdiction over proceedings to adjudicate and enforce proper housing standards and the legislature's unrestricted conferral of contempt power on housing court judges.¹⁰² The hearing officer completes his or her duties by filing and serving a recommended order, which generally contains findings of fact, conclusions of law, and recommendations. In contrast, the constitutional judge should have the ultimate authority, with certain limitations, to approve or disapprove the report of recommended order. Despite the previous court ruling in *Babigan v. Sol Wachtlar* which concluded that "[t]he change in terminology in the statute from 'hearing officer' to Housing Judge, 'a duly constituted officer,' was only designed to invest Housing Judges with as much authority and dignity as possible in order to improve the stature and effectiveness of the entire court was not meant to confer any additional jurisdiction or powers on Housing Judges,"¹⁰³ the evidence supports the alternative conclusion, that the New York City Housing Court is unconstitutional and its "housing judges" are not mere assistants to the Civil Court, but are really judges.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² Dep't of Hous. Preservation & Dev. of the City of New York v. 24 W. 132 Equities, Inc., 137 Misc. 2d 459, 524 N.Y.S.2d 324 (N.Y. App. Term 1987), *aff'd without opinion* 150 A.D.2d 181, 540 N.Y.S.2d 711 (1st Dept 1989).

¹⁰³ *Babigan v. Sol Wachtlar*, 133 Misc. 2d 111, 506 N.Y.S.2d 506 (N.Y. Sup. Ct. 1986).

Certainly, this contradicts the original intent of the legislature. In fact, housing judges issue binding and reviewable judgments, which go beyond legislative restrictions. With this in mind, the legislature exceeded its authority by enacting such an Act, though apparently constitutional on its face, is a violation of the state principle of separation of powers as applied. The laws promulgated by the legislature pursuant to that delegation of power are subject to review to determine whether they comport with the requirements of the state Constitution. While it is true that the legislature only intended to empower hearing officers with the status and authority of city court judges, housing court judges have effectively expanded beyond their powers and now have broad powers and wide-ranging jurisdiction.

If one puts *Babigan v. Sol Wachtler*, the landmark housing court case, side by side with the New York Constitution and asks whether the former can be said to derive by a reasonable process of interpretation from the latter without the assistance of the "appointment" provision of the New York constitution, the answer would be "no." The conclusion would be that the housing judges had indeed violated the Constitution.

The "manner" of appointing New York housing judges prescribed in the *Babigan v. Sol Wachtler* opinion was not the manner that the New York legislature had prescribed when it enacted the amendment. For example, the court held that there was an implicit delegation of power to the Chief Administrator to interpret the amendment where it is unclear. The court applied the standard of the voter's unclear intent and the principles of natural law to determine appointment.¹⁰⁴ The amendment does not grant the Chief Administrator the power to do this. The only explicit delegation of authority is given to voters. What the Chief Administrator did with the statute was so freewheeling as to raise a serious question of conformity with the New York Constitution, which places the authority to detriment the manner of appointment of a state judges in the hands of the state legislature.

Section One of the New York State Constitution states in pertinent part that "[t]he legislative power of this state shall be vested in the senate and assembly," and the legislature cannot cede its functional policy-making responsibility to an administrative agency.¹⁰⁵ The New York statute is also about what relief that the court can order. The statute merely states that the terms are not defined; it

¹⁰⁴ *Id.*

¹⁰⁵ N.Y. CONST. art VI § 15.

has been left to the courts to work out on a case-by-case basis. But even a term as vague as "appropriate" does not give a court carte blanche. The New York State Constitution is not a brooding omnipresence, or the New York Supreme Court a council of revision that sits to ensure that every state statute will reflect the "spirit" of the Constitution. By approving a constitutional provision that will be interpreted by the courts, the legislature no longer authorizes those courts to use the provision or amend the legislature's statute. The courts can invalidate a statute or interpret it reasonably, but they are not free to interpret it unreasonably merely because it does not embody the aspirations of the courts' fine-lined and vague constitutional language.¹⁰⁶

B. Separation of Powers

At issue is whether the legislature in creating housing judgeships violated New York's separation of powers doctrine and exceeded their authority when the legislature promulgated Section 15 of Article VI of the New York State Constitution. An additional issue concerns the constitutionality of the statute authorizing the appointment of hearing officers to hear and determine summary proceedings in the housing part of the Civil Court of the City of New York. The appointment of judges can only be sustained if the hearing officers are analogized to or referred as court officers who, aside from judges, have the power to exercise judicial functions.¹⁰⁷ Here, I argue that the State legislature cannot delegate this legislative function to New York State's Chief Judge Judith Kaye.

This issue of nondelegable legislative duties was addressed by the New York Court of Appeals in *Levine v. Whalen*.¹⁰⁸ That court set forth the following view of the separation of powers doctrine as it relates to defining the boundaries between the legislature and administrative agencies:

Because of the constitutional provision that "[t]he legislative power of this State shall be vested in the Senate and the Assembly" (N.Y. Const., Art III, Sec. 1), the Legislature cannot pass on its law-making functions to other bodies. . . , but there is no constitutional prohibition against the delegation of power, with reasonably safeguard and standard, to an agency or commission to administer the law as enacted by the Legislature. . . The delegation of power to make the law, which necessarily involves a dis-

¹⁰⁶ See generally Paul R. Verkuil, *Separation of Powers, The Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301 (1988-1989).

¹⁰⁷ Glass, 51 A.D.2d at 70.

¹⁰⁸ *Levine v. Whalen*, 39 N.Y.2d 510, 349 N.E.2d 820, 384 N.Y.S.2d 721 (1976).

cretion as to what it shall be, can not be done, but there is no valid objection to the conferring of authority or discretion as to a law' discretion, to be exercised under and in pursuant of it.¹⁰⁹

Housing judges are not within the statutory definition of the term, "judge" despite the fact that the New York City Civil Court is a court of record¹¹⁰ and housing judges are "duly constituted judicial officers."¹¹¹ The legislative intent in changing "hearing officer" to "housing judge" and nominating housing judges "duly constituted judicial officers" undermines any assertion that the legislature merely wanted to invest housing judges with as much authority and dignity as possible. Thus, notwithstanding the legislature's constitutional power to prescribe procedural rules to govern the practice in the housing court, an understanding can be had about the basic principle that Section 15 of article VI of the New York State Constitution establishes a bedrock of inalienable judicial authority and duty. It must be stressed that the delegation of such an important judicial function to nonjudicial officers represents a substantive constitutional infirmity and not a mere technical objection.

It is my belief that by adopting Section 15 of article VI of the New York State Constitution, the people of New York have indicated that their wish is to have matters within the jurisdiction of the County Courts determined by judges who are county residents and are chosen by the county's electors every ten years. Presumably, the provision for election to a ten-year term represents the peoples' chosen method of preserving a measure of judicial independent while, at the same time, ensuring a degree of judicial accountability. The housing court was never approved by a majority vote of each house of the legislature in two successive sessions and then followed by majority approval of the people in a statewide vote. Therefore, causing the balance to be upset, the accountability and independence mechanism is circumvented, when substantial decision-making functions are transferred from county court judges to administratively designated hearing officers.

There should be great concern with the replacement of constitutional judges with hearing officers as a means of alleviating the overcrowded dockets in the courts. Under CCA §110(e), "hearing officers" appointed from a list by the local Administrative Judge have the power to try and determine litigated, non-jury controver-

¹⁰⁹ *Id.* at 515 (citations omitted).

¹¹⁰ N.Y. JUD. CT. ACT §23 (2002).

¹¹¹ L 1984, ch. 528.

sies in the Housing Part of the New York City Civil Court. Hearing officers may also enter final, appealable judgements and may punish for contempt. In my view, the court has violated and abridged the constitutional due process rights of many tenants. For example, the constitutionality of the housing court procedures themselves may be attacked on several grounds. The denial of a valid tenant remedy through such an abuse of discretion by a housing court is a violation of the due process right of tenants to that remedy, and it should not be permitted. While the housing court proceedings are private civil proceedings and therefore not covered by the due process clause of the New York State Constitution, this distinction, however, is not constitutionally significant given the broad interpretation afforded the due process clause of the New York Constitution.

C. *Due Process*

Perhaps the strongest argument to support my belief that the housing judges do not have constitutional authority to issue binding and appealable judgments rests with the fact that due process requires that there be an avenue to appeal to a state civil court. While the state legislature may legislate the jurisdiction of the housing part, it may not restrict appeals completely. Due process requires that any case or controversy brought forth in a housing court may be appealed to a state civil court. Arguably, there exists a significant doubt that parties are afforded due process under the Fourteenth Amendment of the United States Constitution since the binding decision of any single housing judge may not be appealable to the state civil court. A "pattern and practice" of due process violations¹¹² result since "[t]enants [] have only five days to satisfy a non-payment judgement, which it takes up to five years for the state Division of Housing and Community Renewal to decide a rent-overcharge complaint, meaning thousand of families are evicted every year for failing to pay what is actually an illegal rent."¹¹³ Tenants are especially burdened, given the difficulties

¹¹² The Housing Court constitutes state action, and there is due process protections. The due process rights of the Fourteenth Amendment is triggered because the state acts to deprive a person of guarantee right. There is state action, so there is a right to a hearing. *See also, id.* ("[A]dvocates have long wondered whether a case can be made that the ones denies due process in Housing Court are tenants who represent themselves they are deprived of a valuable property and liberty interest in faction eviction without access to counsel.").

¹¹³ Kenny Schaeffer, *Landlord Attack on Housing Court Dismissed* (visited June 11, 2001), available at <<http://www.tenant.net/Tengroup/Metcounc/Feb97/resasuite.html>>.

that they have of understanding the complex formal court rules and since the majority of tenants appear *pro se*.¹¹⁴

The appeals process is also limited to appealable decisions issued by housing judges. Plaintiffs denied due process cannot appeal their claims in federal court.¹¹⁵ In *Johnson v. Birnbaum*, the District Court for the Southern District of New York, held that housing court decisions are not appealable, because its court lacks subject matter jurisdiction pursuant to the *Rooker-Feldman* doctrine.¹¹⁶ That doctrine stems from two Supreme Court cases, *Rooker v. Fidelity Trust Co.* and *District of Columbia v. Feldman*, states in pertinent part that inferior federal courts have no subject matter jurisdiction over cases that effectively seek review of judgments of state courts and the federal review, if any, can occur only by way of a *certiorari* petition to the Supreme Court.¹¹⁷

According to the *Birnbaum* Court, "[l]ack of subject matter jurisdiction under *Rooker-Feldman* can be raised at any time by the court *sua sponte* 'Any finding that the trial violated due process rights would violate the *Rooker-Feldman* doctrine.'"¹¹⁸ Plaintiff in *Birnbaum* sought to vacate a judgment of dispossession issued by a housing court judge in the City of New York.¹¹⁹ Plaintiff claimed that he was barred from entering a single witness in his behalf, including one on telephone standby.¹²⁰ Despite the fact that the plaintiff was clearly denied due process rights in housing court proceedings, the court dismissed plaintiff's appeal anyway.

Housing court judges as hearing officers are failing to provide adequate procedural protections. By analogy, in *Escalera v. New York Housing Authority*,¹²¹ public housing tenants brought a constitutional challenge to the Housing Authority's procedures for terminating tenancies on the grounds of non-desirability or for violating the Housing Authority's rules and regulations, and to the procedures for the imposition of "additional rent" charges under

¹¹⁴ "The courts are still battling for unrepresented tenants. . . the new system encourages all the other judges to quickly push cases to trial and out of their courtroom . . . Holloway deals are still rampant, court-employed attorneys don't inform tenants of their rights." City Limits, *Attorneys: Housing Court Reform no Help to Tenants* (visited June 27, 2001), available at <http://www.interactivist.net/housing/h_court.html>.

¹¹⁵ *Johnson v. Birnbaum*, No. 98 Civ 2326 (MBM), 1998 WL 156713 (S.D.N.Y. April 3, 1998).

¹¹⁶ *Id.*

¹¹⁷ *Rooker v. Fidelity Trust Company*, 263 U.S. 413 (1923); *District of Columbia v. Feldman*, 460 U.S. 462 (1983).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Escalera v. New York City Hous. Auth.*, 425 F.2d 853 (2d Cir. 1970).

the lease for undesirable acts by the tenants.¹²² The *Escalera* court reversed the district court's grant of judgement on the pleadings and remanded for further proceedings. The court found that the Housing Authority's procedures were inadequate because they failed to provide procedural protections including, among other things, (1) adequate notice of the grounds for termination before the pretermination hearing and (2) opportunities to examine the tenant's owner file and to confront or cross-examine the witnesses upon whose testimony the allegations of non-desirability or rule-making breaking were based.

The policies and purposes underlying the requirement of judges to be elected by the people are not similarly well-served and in some cases are substantially undermined. The New York Legislature has revealed no intent to promote comprehensive assertion of legal issues and arguments through the housing court process. Quite to the contrary: It is apparent that (a) the New York Legislature granted to the Chief Judge the power by regulation to establish hearing procedures; (b) strict rules of evidence, applicable in the courtroom, are not to operate a court hearing so as to bar the admission of evidence otherwise pertinent; and (c) the conduct of the hearing rests generally in the examiners' discretion. There emerges an emphasis on the informal rather than the formal. This administrative procedure and these hearings should be understandable to the lay litigant, should not be comfortable only for the trained attorney and should be liberal and not strict in tone and operation. This is the obvious intent of the New York Legislature so long as the procedures are a fundamental basis. The process forum of the housing court would create additional technical hurdles in the adjudication process, and pose obstacles to judicial review, if it were more formal than the legislature intended it to be.

The housing court lacks defensible prudential justification; its application also violates principles of equity and procedural due process by denying litigants proper notice and a meaningful opportunity to raise and preserve issues in the housing court proceedings. Housing court regulations explicitly provide that the housing court will conduct the administrative review process in an informal, non-adversarial manner. The absence of prudential justifications supporting the housing court, coupled with equitable and procedural due process problems generated by the agency's misleading and deceptive conduct, support a rethinking of the housing court. On a more basic level, the courts should view the housing court as

¹²² *Id.* at 857.

an oxymoron — a distinctive formal procedural bar for decidedly informal remedial proceedings.

Yet, for thousands of housing litigants, the Housing Court has become a dangerous entity, undermining important judicial review right and hindering access to the courts. Emboldened by judicial expediency, the Housing Part seeks to truncate the judicial review process, and, in so doing, it risks introduction of procedural formation into an adjudicative process geared toward simplicity and efficiency. Litigants must now confront a new formal procedural bar, but without the formal procedural safeguards that protect parties in adversarial settings. In essence, the housing court "sandbags" claimants by punishing on judicial review their reliance on the putatively informal nature of the adjudicative proceedings.

The housing courts are ill-suited and were never designed to embrace formal judicial proceedings. None of the recognized prudential purposes underlying the creation of the housing court provide adequate notice and a meaningful opportunity to raise and present issues and arguments in housing court proceedings. In addition, the housing court should be barred from having exclusive jurisdiction to judicial review under applicable equitable and procedural due process principles.

The housing court has often eschewed fully judicialized procedures in adjudication from sheer bureaucratic necessity due to the imposing volume of cases adjudicated. The trial courts have begun to limit access to judicial review of housing court adjudication by refusing to consider any legal issues that the claimant has not specifically raised and preserved in housing court proceedings.¹²³

Because of the emerging application of the housing court to enter binding decisions, a growing number of litigants are being denied the opportunity ever to have a day in court to vindicate their legal rights on the basis of a procedural technicality—the failure to have formally raised and preserved legal issues and arguments in the previous adjudicative proceedings before the housing judge.

Unfortunately, when the cases are then presented on appeal, important constitutional, statutory, and regulatory issues remained unidentified during the housing court proceedings. Because tenants have neither identified nor raised these issues before the agency, their legal claims are thereby precluded from judicial consideration—in large part, as a result of the absence of law school

¹²³ Johnson v. Birnbaum, No. 98 Civ. 2326, 1998 WL 156713 (S.D.N.Y. April 3, 1998).

trained counsel during the housing court adjudication. Litigants whose appeals are denied due process because of the courts' refusal to consider potentially meritorious, yet unpreserved issues will at best, lose their apartment, and at worse will be precluded from even filing a claim in state court due to the operation of *res judicata*.

D. *Right to Counsel*

In housing court adjudication, the judge not only decides the case, but also has both the authority and the responsibility to investigate the facts and develop the record. The housing judges' duty to develop the record also exists where claimants are represented by attorneys, but it is magnified when the claimant is hindered by lack of counsel, limited education, mental illness, homelessness, or inadequate language skills. The housing judge performs an active investigatory role and shoulders an obligation to obtain evidence. The housing judge should conduct questioning of the litigants and all witnesses. Professor Russell Engler explains that:

In the Housing Court, tenants are regularly instructed by the court to talk to the landlords' lawyers to try to settle the case. . . in most instances the tenant has no one else from whom she can seek guidance about her case. . . tenants may even initiate a conversation with the landlord's lawyer, the only expert at hand, in order to obtain information or advice. If a tenant feels badly treated by the landlord's attorney, she may write off the misconduct as 'just the way lawyers behave.' Even if a tenant believes that improper behavior has occurred, she likely faces more urgent problems such as eviction or the need to deal with various governmental agencies. The likelihood that she would at the same time be willing and able to file, and follow through with, a disciplinary complaint is slim.¹²⁴

In most cases in New York City's Housing Courts, the landlord is represented by counsel, while the tenant is forced to appear without counsel. Landlords are represented in approximately ninety percent of the cases. In contrast, tenants are unrepresented in close to ninety percent of the cases, and by some estimates, in greater than ninety percent of the cases. . . [T]he typical case in housing court pits a represented landlord against an unrepresented tenant. Often, the landlord does not actually appear in court, leaving the landlord's lawyer and the unrepresented tenant as the sole participants in the proceeding.¹²⁵

¹²⁴ Russell Engler, *Out of Sight and Out of Line: The Need for Regulation of Lawyers' Negotiations with Unrepresented Poor Person*, 85 CAL. L. REV. 79, 134-35 (1997).

¹²⁵ *Id.* at 107.

These same issues have not escaped the attention of Professor Ken Karas, for he assures that:

While the resources of a landlord may not be as great as [those] of the state, the imbalance in legal representation similarly jeopardizes the ability of economically disadvantaged tenants to represent themselves in complex housing court proceedings. This imbalance threatens constitutionally protectable liberty and property interests and constitutes a violation of due process.¹²⁶

Professor Karas further argues "that indigent tenant facing eviction in New York have a constitutional right to counsel in housing proceedings."¹²⁷ "By providing counsel for such tenants, New York's courts would fulfil their longstanding obligation under the due process clause of the New York State Constitution and minimize the displacement of thousands of families from their homes to the streets."¹²⁸ "The right to counsel, then, while specifically mandated in the criminal context, has been recognized as a critical component of the due process rights afforded each person threatened with the loss of colorable liberty and property interests."¹²⁹

Infusing Galowitz's careful analysis of the problems facing the housing court is a deeper concern for its future. Presently, the tenant is inadequately represented, and forgoes any opportunity to rely on lawyers to frame the issues and to explain procedures and rulings.¹³⁰ Due to time constraints, the parties are pressured to settle their cases quickly, sometimes "in the hallways outside the courtroom without adequate judicial supervision."¹³¹ The system is also characterized by immense pressures to settle, lack of judicial involvement and cursory examination of the claims of both parties.¹³² The physical conditions of the housing court have been condemned as inadequate, and the hallways are crowded with *pro se* litigants waiting, sometimes all day before seeing the judge.¹³³ Waiting litigants "are unable to observe the proceedings in the courtroom and learn from watching other cases."¹³⁴ This shortage of space, noise, and lack of adequate personnel to answer ques-

¹²⁶ Ken Karas, *Recognizing A Right to Counsel for Indigent Tenants in Eviction Proceedings in New York*, 24 COLUM. J. L. & SOC. PROBS. 527, 543-44 (1991).

¹²⁷ *Id.* at 527.

¹²⁸ *Id.*

¹²⁹ *Id.* at 540.

¹³⁰ GALOWITZ, *supra* note 2, at 182.

¹³¹ *Id.* at 182.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

tions contribute to the confusion at the court.¹³⁵

According to Galowitz, increasing the availability of counsel is a crucial long-term solution, while the short term solution is to develop procedures to ensure that the rights of underrepresented are addressed.¹³⁶ "Judges can advise pro se litigants of their statutorily granted substantive and procedural remedies."¹³⁷ With such a large percentage of the tenants," many of whom are African American and Hispanic whom are unrepresented, Galowitz believes that, "the role of the court and that of the judge must be different than in other courts. The *pro se* litigant is silenced because they do not understand the proceedings in the hallways and courtroom."¹³⁸ To the growing immigrant population in New York, with more than one hundred forty-six different languages and dialects being spoken in New York City, these administrative hurdles are compounded. "The judge should be more of a translator and protector of the rights of the unrepresented."¹³⁹ Judges should be given training, guidelines, and peer support for alternative methodologies that give support to pro se litigants."¹⁴⁰ The court should also provide plain language documents that explain the court process and the basic elements of the various defenses.¹⁴¹ According to Galowitz, "[t]he Housing Court can and must prevent reductions in the supply of low-income housing by enforcing housing maintenance codes and serving as an effective forum for the adjudication of landlord-tenant disputes."¹⁴²

For those tenants brave enough to appear before one of New York City's dozen housing court judges, the story is bleak. Professor Galowitz argues further that:

New York's landlord-tenant law represents a 'patchwork' effort by the state legislature to combat 'decades of social, economic and political pressure'.¹⁴³ The result has been an 'impenetrable thicket confusing not only to laymen but to lawyers'.¹⁴⁴ The morass of New York housing statutes covers every conceivable topic from health and safety regulations to confusing rent control,

¹³⁵ *Id.*

¹³⁶ *Woodruff Corp. v. Lacrete*, 154 Misc. 2d 301, 308 (N.Y. Civ. Ct. 1992).

¹³⁷ GALOWITZ, *supra* note 2, at 182.

¹³⁸ *Id.* at 182.

¹³⁹ *Id.* at 195.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Karas, *supra* note 126, at 549.

¹⁴³ *Id.* at 549.

¹⁴⁴ *Id.*

rent stabilization and rent subsidy provision.¹⁴⁵ Without mastering the relevant statutory provisions or case law, no tenant can conceivably hope to raise an effective defense against eviction, particularly when the opposition is represented by competent counsel who is experienced in the field.¹⁴⁶

In addition to learning sophisticated substantive landlord-tenant law, tenants must also cope with numerous procedural issues and rules. For example, if tenants were knowledgeable about service requirements and motion practice, they could rightfully avoid eviction without even going to trial by challenging service of process, filing meritorious summary judgment motions or arguing that the landlord's actions should be dismissed for failure to state a claim. Once at trial, tenants are confronted with evidentiary requirements and trial practice rules, thus leaving them little time to learn effective trial strategy and tactics.¹⁴⁷

An analysis of the various interests at stake and the right of erroneous deprivation reveals that unrepresented indigent tenants facing eviction are currently denied a meaningful opportunity to be heard. The result in housing court is that the various substantive and procedural provisions designed to protect defendants are virtually meaningless for the tenant being evicted without benefit of counsel.¹⁴⁸

V. CONCLUSION

There is much room for concern about this gradual replacement of the traditional judicial system, with all its rigidities and awkwardness, in favor of one that is more efficient and flexible but rests heavily on the use of non-judicial personnel. With chronic logjams in the courts, the threat of inundation and breakdown in some of the most critical parts of the justice system and insistent public pressure to "process" cases more swiftly make this a tempting option, the great cost could be the sacrifice of principles in the name of expediency. Chief Judge Judith Kaye quoting Chief Judge Charles Breitel in reference to the judicial article of the New York Constitution stated:

There shall be a unified court system for the state: 'The reality is otherwise. New York has no unified court system. It is a constitutional fiction. New York has an inheritance of a colorful but confused and sprawling mass of 11 trial courts. . . Of course, there are historical, political, and even sentimental force which

¹⁴⁵ *Id.* at 550.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Testimony of Chief Judge Judith S. Kaye, *supra* note 1.

militate against [restructuring. . . But] unless we overcome the institutional resistance and traditionalism, the idea of a unified court system will remain, as it is today, a noble-sounding but lifeless sentence tucked away in the Constitution.”¹⁴⁹

Chief Judge Kaye proposes a two-tier court system consisting of the Supreme Court “with divisions for criminal, commercial, family, probate and public claims matters,” and another tier “which would hear matter, now heard by the New York City Civil and Criminal Courts.”¹⁵⁰ Whether Chief Judge Kaye’s proposal or similar reforms of the unified court system will be adopted and implemented remains in doubt.

In the end, my call to expand the discussion about the New York Housing Court is a commentary much less on Galowitz’s essay than on the general conversation about the court. “The Housing Court’s Role in Maintaining Affordable Housing” does not intend to speak to broader questions of the constitutionality of the housing court. But, even in her circumscribed discussion of the normative issues, Galowitz, nonetheless, offers a springboard for further analysis of the underlying foundational constitutional issues. This examination of the New York Housing Court has demonstrated that the housing judges have exceeded their powers as officers of the court, appointed to assist in the performance of their judicial functions and simplify the trial court structure. While the New York Housing Court was specifically designed to enforce the housing maintenance code, it has become an unconstitutional court which deprives the tenants of due process of law. By having housing court judges presiding over housing cases, there exists a continual constitutional violation that has yet to be adequately addressed by the New York State Legislature or the courts.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*