

**Testimony of Michael A. Cardozo
Corporation Counsel
City of New York**

**Before
New York City Council, Governmental Operations Committee**

Thursday, October 16, 2008

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Chairperson Felder and members of the Governmental Operations Committee, good afternoon, and thank you for giving me the opportunity to testify before you today. As you know, I am Michael Cardozo, and since the beginning of the Bloomberg Administration I have had the honor to serve as the City's Corporation Counsel. Together with Mr. Crowell, I am here to give brief testimony on Intro. Number 845, a bill that would amend the term limit provisions of the City Charter to provide that elected officials serve no more than three, rather than two, full consecutive terms. In particular, I am here to stress to you and to the public-at-large that the representative legislative body of this City – the City Council – has clear legislative authority to enact this bill.

In general, in accordance with the home rule provisions of the State's Constitution and Section 10 of the Municipal Home Rule Law, the authority of the City to amend its Charter to adopt term limits (and, in turn, to amend or repeal them) is well settled. When term limits were originally proposed as a petition initiative, the question arose as to whether the City could enact term limit provisions by local law or whether State action was required. In a decision upheld by the state's highest court, the New York State Supreme Court held that the City

possessed the authority to enact term limits locally without any further State action.¹

Given this general authority, the law is crystal clear that the City can enact, amend or repeal the term limit provisions of the City Charter in three different ways – by petition initiative approved by the voters, by action of a charter revision commission subject to approval of the voters, or by action of the City’s elected representatives in the City Council. It is important to stress, however, that no one of these means of amending the Charter is somehow inherently “better” or more appropriate. Pursuant to Section 10 and Article 3 of the Municipal Home Rule Law, the City Council *regularly* amends the City Charter. Indeed, amendments to both the Charter and the Administrative Code are carried out in the normal course by the City Council, acting on behalf of the City’s residents.

Thus, the only remaining question is whether the City Council, which normally has the authority to amend the City Charter, lacks the authority to change provisions that were initially enacted as a result of a referendum. The courts have spoken to this issue, and the answer is clear – the Council has authority to enact Charter amendments regardless of whether a prior local law enacted those

¹ See *Roth v. Cuevas*, 158 Misc. 2d 238 (N.Y. Sup. Ct. New York County 1993), *aff’d*, 197 A.D.2d 369 (1st Dep’t 1993), *aff’d*, 82 N.Y.2d 791 (1993).

provisions or whether such provisions were enacted by referendum. This very question was at issue in the *Golden* case, which I personally argued on behalf of the City in the Appellate Division, Second Department, which concerned the City Council's authority to change the City's term limit provisions to address an anomaly that had arisen as a result of the original passage of term limits. Under the original term limit language, certain council members would have been term-limited at 6 years, even though other council members could have served for 8 years. In 2002 the Council addressed this issue by amending the Charter to define a "full term" as two two-year terms for purposes of the term limit provisions.

The appellate court ruled that State law did not require that the change be put to a mandatory referendum. Perhaps more importantly for purposes of our discussion today, the Court held that the Council could amend a Charter provision even if it had been enacted first by referendum because, as the court noted, "laws proposed and enacted by the people under an initiative are subject to the same constitutional, statutory and charter limitations as those passed by the Legislature."²

² *Golden v. New York City Council, et al.*, 305 A.D. 2d 598, 600 (1st Dep't 2003), *appeal denied*, 100 N.Y.2d 504 (2003) (emphasis added) (citing *Matter of Caruso v. City of New York*, 136 Misc. 2d 892, 895-896 (N.Y. Sup. Ct. New York County 1988), *aff'd*, 134 A.D.2d 601 (1st Dep't 1989), *aff'd*, 74 N.Y.2d 854 (1988)).

This decision interpreted Section 23 of the Municipal Home Rule Law and relied primarily on two decisions of the State's highest court. In the earlier of the two, the Court of Appeals had upheld the action of the City Council of Buffalo when it abolished a one-term limit on the Mayor of Buffalo, even though the original term limit provision had been enacted by referendum.³ My colleague Mr. Crowell already discussed the second decision, which was quoted in *Golden* and held that the City Council could amend by local law without a referendum provisions of the Charter relating to the Civilian Complaint Review Board that had been adopted by a petition initiative in 1966.⁴

Given these precedents, it should come as no surprise that the City Council has on numerous occasions amended provisions of the Charter that were originally enacted by referendum, including many provisions adopted by the voters upon the recommendations of the 1988 and 1989 charter revision commissions. Thus long-standing legal authority, recently re-enforced in the *Golden* case, as well as historical practice, remove any possible doubt that the City Council has the authority to enact the change proposed by Intro. No. 845 even though term limits were originally enacted by referendum.

³ *Benzow v. Cooley*, 12 A.D.2d 162 (4th Dep't 1961), *aff'd*, 9 N.Y.2d 888 (1961).

⁴ *See Caruso*, 136 Misc. 2d at 895-896.

I want to also briefly address Intro No. 850, which was not covered by my colleague's testimony, because I believe it raises serious legal questions. That bill purports to amend provisions of the City Charter by making any change to term limit provisions subject to a mandatory referendum. However, Section 23 of the Municipal Home Rule Law already specifies types of local laws that subject such laws to mandatory referenda, and the City's ability to augment that list by local action only is, as a long line of decided state cases suggest, at best highly doubtful. I recognize that Section 38 of the Charter contains a provision specifying additional grounds for a mandatory referendum, but note that much of that provision originates in the work of charter revision commissions that were specially created by the State Legislature.

Finally, if Intro. No. 845 is enacted into law, the City will submit the bill to the Department of Justice for a process known as "preclearance", during which the Department of Justice would review the bill to confirm that it would not adversely affect the voting rights opportunities of certain racial or ethnic groups. The original enactment of term limits was pre-cleared by the Justice Department, as was the 2002 amendment I described earlier. Based on these precedents and the federal law governing pre-clearance questions, I am confident that the Justice Department will find nothing objectionable about the amendment proposed in Intro. No. 845. In short, the proposed term limits change will not diminish the

opportunities the City's diverse racial and ethnic groups currently have to nominate and elect the candidates of their choice, whether or not such candidates are incumbents.

Thank you once again for your time, and I am happy to take any questions you may have.