

GOVERNMENT OF THE DISTRICT OF COLUMBIA  
OFFICE OF THE ATTORNEY GENERAL



ATTORNEY GENERAL



April 8, 2014

OPINION OF THE ATTORNEY GENERAL

**SUBJECT:** Whether the Local Budget Autonomy Act of 2012 is Legally Valid

The Honorable Vincent C. Gray  
Mayor of the District of Columbia  
John A. Wilson Building  
1350 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Dear Mayor Gray:

This opinion is issued pursuant to Reorganization Order 50 of 1953, as amended<sup>1</sup> and addresses your request for the legal advice of this office about the validity of the Local Budget Autonomy Act of 2012 (“Act”), effective July 25, 2013, D.C. Law 19-321, 60 DCR 1724, passed by the Council of the District of Columbia and ratified by District of Columbia voters last year.

The Act is appealing as a matter of policy in that it attempts to secure budget autonomy for the District, allowing the District government to control its expenditure of locally collected revenues, a policy goal that I wholeheartedly endorse, and a goal that this Administration, members of the Council, and supportive members of Congress have pursued and continue to pursue in Congress.

However, based on the analysis by career professionals in this Office and my review of relevant legal authorities, I have reluctantly concluded that the Act is a nullity, with no legal force or effect and that adhering to it could put officials and employees of the District government in

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<sup>1</sup> Reorganization Order 50, Part II, effective June 26, 1953, as amended. Pursuant to Reorganization Order 50, Opinions of the Attorney General operate as the “guiding statement of the law” in the District’s Executive branch. *U.S. Parole Comm’n v. Noble*, 693 A.2d 1084, 1099 (D.C. 1997). As an opinion of the Attorney General, it must be followed by all District officers and employees in the performance of their official duties” until overruled by a controlling court decision,” or as to local matters not controlled by the United States Constitution or federal law by a specific action of the Mayor or by an Act of the Council within their respective authority. See Reorganization Order 50, Part II.

legal jeopardy and risk adverse consequences from the Congress. Although we arrived at this conclusion independently, I note that this legal conclusion was also reached by the arm of Congress charged with interpreting such issues -- the Government Accountability Office -- whose extensive analysis is set forth in GAO Decision B-324987 (January 30, 2014).

Because this Act has no legal force or effect, it would be illegal for the District to establish or implement a budget that is based on the Act and that ignores the continuing need for congressional appropriation of local funds in the District's budget process. Moreover, it would be unlawful for District officers or employees to make or authorize expenditures that Congress has not approved. Doing so could expose these individuals to administrative and/or criminal penalties under the federal Anti-Deficiency Act. For the reasons detailed below, the Act is not valid, and, absent a binding judicial ruling to the contrary, it should not be enforced or followed by any official of this government.

**I. The Act is null and void because the Council exceeded its authority in enacting it and because it violates federal law.**

The Act purports to amend section 446 of the Home Rule Act (D.C. Official Code § 1-204.46)<sup>2</sup> to exempt the District's budget process for local funds from the congressional appropriations requirements established under Article I, section 9, clause 7 of the United States Constitution.<sup>3</sup> Section 446 of the Home Rule Act applies these appropriations requirements to the District by setting out the process the District must follow to obtain Congressional approval of its budget and by stating that, with limited exceptions, "no amount may be obligated or expended by any officer or employee of the District of Columbia government unless such amount has been approved by an Act of Congress and then only according to such Act." The Act also purports to amend section 441 of the Home Rule Act<sup>4</sup> to allow the Council to change the District's fiscal year.

In the absence of congressional legislation establishing budget autonomy for the District, the Council attempted to make these changes using a local Charter amendment process Congress authorized in section 303 in the Home Rule Act (D.C. Official Code § 1-203.03). Section 303 sets out a procedure that relies on Council action and voter ratification to approve changes to the District Charter.<sup>5</sup> Section 303(a) provides that, with limited but pertinent exceptions, the Charter "may be amended by an act passed by the Council and ratified by a majority of the registered qualified electors of the District voting in the referendum held for such ratification." Such an amendment must be submitted to Congress for a 35-calendar-day period of passive review.

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<sup>2</sup> District of Columbia Home Rule Act, approved December 24, 1973, 87 Stat. 798, Pub. L. 93-198, D.C. Official Code § 1-204.46 (2012 Repl.) ("Home Rule Act").

<sup>3</sup> This clause provides that "[n]o Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law...."

<sup>4</sup> D.C. Official Code § 1-204.41 (2012 Repl.).

<sup>5</sup> The Charter is contained in title IV of the Home Rule Act.

The Council's use of the section 303 Charter amendment process to take the District's local funds budget out of federal control was ineffective because it violated several statutory restrictions on this process. Section 303(d) provides that section 303(a)'s amendment procedure "may not be used to enact any law or affect any law with respect to which the Council may not enact any act, resolution, or rule under the limitations specified in sections 601, 602, and 603." The Act violates three different limitations that are specified in Sections 602 and 603 of the Home Rule Act (D.C. Official Code §§ 1-206.02 and 1-206.03). Each of these three limitations independently renders the Act invalid.

**A. The Act violates the limitations of Section 602(a)(3) because it changes the functions of the United States and because it is not restricted in its application exclusively in or to the District.**

Section 602(a)(3) of the Home Rule Act provides that the Council has no authority to "enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District." The Act violates both the "functions or property of the United States" and the "restricted in its application exclusively in or to the District" provisions of this Home Rule Act limitation.

Removing the expenditure of local funds from the federal appropriations process would affect a sea change in the "functions . . . of the United States" in the formation of the District's budget, in several ways. It would no longer give Congress, with Presidential approval, the sole right to appropriate local District funds. It would alter the functions of the federal Office of Management and Budget and the U.S. Comptroller General in the District's budget process, converting their review from active to passive with respect to the local budget. In addition, by allowing a change in the District's fiscal year, it would make it difficult, if not impossible, for Congress to review the District's finances during its regular budget cycle. This result would affect the functions of the United States and extend beyond the District's local affairs.

Further, the Act would effectively amend at least two federal laws that are not restricted in their application exclusively in or to the District. First, the federal Anti-Deficiency Act, 31 U.S.C. §§ 1341, 1342, 1349 to 1351 and subchapter II of Chapter 15, prohibits federal and District government employees, under threat of federal criminal and administrative penalties, from, among other things, obligating or expending funds in excess or in advance of an appropriation.<sup>6</sup> The federal Anti-Deficiency Act is the principal mechanism the federal government uses to ensure that the District and the federal agencies comply with federal appropriations law. Removing the District's local funds budget from the federal appropriations process would effectively amend this law by exempting District transactions involving local funds from its scope.

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<sup>6</sup> The federal Anti-Deficiency Act applies to the District by its own terms and through section 603(e) of the Home Rule Act (D.C. Official Code 1-603.03(e)), which states that "[n]othing in this act shall be construed as affecting the applicability to the District government of the provisions of §§ 1341, 1342, and 1349 to 1351 and subchapter II of Chapter 15 of Title 31, United States Code."

Second, the Act would exclude the District's local funds budget from the Budget and Accounting Act, 31 U.S.C. § 1108, which requires the Mayor and the federal agencies to submit their annual budget proposals to the President. In *McConnell v. United States*, 537 A.2d 211 (D.C. 1988), the District of Columbia Court of Appeals held that section 602(a)(3) prevents District voters from narrowing the applicability of national legislation to exclude the District. See also *Brizill v. D.C. Board of Elections and Ethics*, 911 A.2d 1212 (D.C. 2006) (District Government could not amend or repeal a federal law which barred gambling devices in certain enumerated jurisdictions, including the District). The Act's attempt partially to remove the District from the applicability of these two federal laws was therefore ineffective.

**B. The Act violates the limitations of Section 603(a) because it changes the long-standing roles and procedures of Congress, the President, and other federal entities in the formation of the District's total budget.**

The Act violates section 603(a) of the Home Rule Act (D.C. Official Code § 1-206.03(a)), which states that:

Nothing in this act shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the federal Office of Management and Budget, and the Comptroller General of the United States in the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia government.

There is no question that the Act's amendment of sections 441 and 446 of the Home Rule Act would change the long-standing roles and procedures of the stated federal entities with respect to the District's "total budget."<sup>7</sup> Rather than being subject to the federal appropriations process, the District would establish its own budget for local funds, to be authorized according to a potentially different fiscal year, subject only to passive Congressional review. This would constitute a significant change in District's budget process that would directly contradict the prohibition in section 603(a). This latter provision, through section 303(d), expressly precludes the use of the Charter amending process to accomplish this result.

**C. The Act violates the limitations of Section 603(e) by using the ratification process to establish local budget autonomy.**

Section 603(e) of the Home Rule Act (D.C. Official Code § 1-206.03(e)) prohibits the use of the ratification process to establish local budget autonomy. As noted above, section 603(e) states that nothing in the Home Rule Act shall be construed as affecting the applicability of the federal Anti-Deficiency Act to the District government. The Act directly violates this requirement by purporting to authorize District officials and employees to spend local funds, without a

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<sup>7</sup> The "total budget" includes amounts derived from local taxes and fees and federal grants and payments. The Home Rule Act defines "budget" to mean "the entire request for appropriations and loan or spending authority for all activities of all agencies of the District financed from all existing or proposed resources and shall include both operating and capital expenditures." Home Rule Act, § 103(15) (D.C. Official Code § 1-201.03(15) (2012 Repl.)).

congressional appropriation, based on the Council's approval of budget legislation. It is difficult to imagine an amendment to the Charter that would more directly contradict section 603(e) of the Home Rule Act. The Act removes local District funds from the requirements of the federal Anti-Deficiency Act, thereby violating the Home Rule Act itself, and the Anti-Deficiency Act's direct statement that its requirements apply to the District.

Even if the Council's use of the ratification process to adopt the Act were not expressly prohibited by three separate provisions of the Home Rule Act, it would still be defective under the federal laws discussed above. The federal Anti-Deficiency Act continues to apply to District government expenditures, and District employees would act at their peril if they authorized or spent funds made available only through the Council's local budget. The Mayor would still be bound under the Budget and Accounting Act to provide the District's total budget to the President for submission to Congress. The Mayor's failure to do so would place the District out of compliance with this federal requirement. Further, the fact that these federal statutes independently apply to the District further supports the conclusion that Congress intended its control over the District's budget, as expressed in the Home Rule Act, to remain intact.

As noted, the U.S. Government Accountability Office ("GAO") agrees that the Act is without legal force or effect. In a detailed, authoritative opinion dated January 30, 2014, GAO concludes that the Act violates the federal Anti-Deficiency Act and the Budget and Accounting Act, both of which require that the District's budget be federally appropriated.<sup>8</sup> GAO also agrees that, because these federal statutes apply beyond the District, section 602(a)(3) of the Home Rule Act prohibits the District from using the Charter amending process in section 303 of the Home Rule Act to change them. GAO notes that, in enacting the Home Rule Act, Congress rejected a Senate proposal to allow the Council to adopt the District budget, in favor of the current version, which maintains the then-existing system of requiring a federal appropriation.<sup>9</sup> Describing this

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<sup>8</sup> This opinion was requested by the Hon. Ander Crenshaw, Chairman, Subcommittee on Financial Services and General Government, Committee on Appropriations, U.S. House of Representatives. It concludes that the "portions of the [Act] that purport to change the federal government's role in the District's budget process are without legal force or effect." GAO Decision B-324987 (January 30, 2014).

<sup>9</sup> H.R. Rep. No. 93-703 confirms that Congress intended to leave all congressional appropriation procedures in place:

The Senate bill provided that the Mayor submit a budget to the Council in such form as he might determine, that the Council might adopt a line-item budget, and that the Mayor might transfer funds from one account to another with Council approval.

The House Amendment required the Mayor to prepare a balanced budget for submission to the Council and to the Congress, to consist of 7 specified documents; and that the Council after public hearings, approve a balanced budget and submit same to the President for transmission to the Congress, *leaving Congressional appropriations and reprogramming procedures as presently existing.*

The Conference substitute (sections 442-451, 603, 723, 743) adopts essentially the House provisions, *preserving the Congressional appropriations provisions of existing law.* Amendments are included to clarify procedural requirements as to the submission of the budget to the Council by the Mayor; the time for the Council to review the budget; the authority of the Mayor for line-item veto of budget proposals, with two-thirds of the Council required to override; and transmittal of the budget to the President for review and submission to the Congress . . . .

language, GAO noted that it “[could] think of no more specific manner for Congress to specify in the Home Rule Act that Congress would retain a firm hand in the District’s budget process.” GAO therefore concluded, correctly in my view, that because the Act was *ultra vires*, it was void *ab initio* and of no legal force or effect.

## II. The legal arguments advanced in support of the Act are unpersuasive.

Despite the Act’s patent illegality under the Home Rule Act and other federal laws, several arguments have been advanced in its support. These arguments, put forward by lawyers for either the Council or for political activists in support of the Act, draw on the language of section 303(d) of the Home Rule Act, which prohibits use of the Charter amending process for laws prohibited “under the limitations specified in sections 601, 602, and 603.” They assert that section 603(a) of the Home Rule Act does not prohibit use of the Charter amending process to change the District’s budget process because it is not phrased as a limitation on the Council’s authority. Claiming that section 603(a) merely provides direction on how the original version of the Home Rule Act should be interpreted, they maintain that this language does not “limit” the District’s future ability to amend the Charter’s budget requirements without obtaining federal legislation. This is no more than a play on words that ignores both the obvious intent of Congress and the likely reaction of a court called upon to interpret the congressional language.

In addition, it has been argued that the Act violates neither the federal Anti-Deficiency Act itself, nor section 603(e) of the Home Rule Act, which requires its continuing application to the District. These arguments claim that the federal Anti-Deficiency Act applies to the District only through section 446 of the Home Rule Act, which places District spending under the control of Congress. Further, they claim that like section 603(a) of the Home Rule Act, section 603(e) is an interpretive direction on how the original Home Rule Act should be construed, rather than a limitation on the District’s authority to amend it. Still further, these arguments assert that, because the Act takes the District’s local funds budget out from under active congressional control, the Act implicitly modifies the federal Anti-Deficiency Act’s requirement that *Congress* must appropriate funds to support District approved obligations and expenditures. Finally, these arguments maintain that Congress, in authorizing the District to spend excess revenue not included in the appropriated budget, confirmed that the District may expend unappropriated local funds without reference to the federal Anti-Deficiency Act.<sup>10</sup> From this, it is argued that the

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H.R. Rep. No. 93-703, 93d Cong., 1st Sess. 78 (1973) (emphasis added), *reprinted in* Staff of the House Comm. on the District of Columbia, 93d Cong., 1st Sess., Legislative History of the District of Columbia Self-Government and Governmental Reorganization Act at 3016 (Comm. Print 1974).

<sup>10</sup> The permanent version of this legislation is codified at D.C. Official Code § 47-369.02 (2013 Supp.), which states, in relevant part, that :

(a) Beginning in fiscal year 2009 and each fiscal year thereafter, consistent with revenue collections, the amount appropriated as District of Columbia Funds may be increased –

(1) by an aggregate amount of not more than 25 percent, in the case of amounts proposed to be allocated as “Other-Type Funds” in the annual Proposed Budget and Financial Plan submitted to Congress by the District of Columbia; and

(2) by an aggregate amount of not more than 6 percent, in the case of any other amounts proposed to be allocated in such Proposed Budget and Financial Plan.

District's compliance with Council allocations, in the absence of a federal appropriation, would not constitute an Anti-Deficiency Act violation.

The main defect in these arguments is that they badly misread section 303(a). Congress made its intent to maintain control over the District's finances clear in section 303 of the Home Rule Act, by expressly excluding changes to its role in appropriating District funds from the Charter amending process. Congress further expressed this intent by continuing to include the District in the Budget and Accounting Act and by making the federal Anti-Deficiency Act expressly applicable to District expenditures. As GAO notes in its opinion, under section 602(a)(3) of the Home Rule Act, the Council has no authority to enact legislation or amend its Charter in a manner that changes the applicability of a law that is not confined exclusively to the District. The arguments supporting the Act fail adequately to address this restriction. They blithely maintain that, in spite of the Home Rule Act and *McConnell, supra*, the District is entitled to a specially tailored application of two more generally applicable federal laws.<sup>11</sup> Notably, no legislative history has been cited to support this surprising result. The absence of such support, as well as the history of the District over the last 40 years since the enactment of the Home Rule Act, suggests that this is not the outcome Congress contemplated. Common sense reinforces the point: if Congress intended to delegate to the Council or voters of the District of Columbia the authority to unilaterally convert the role of the President and Congress in the formation of the District's budget, it can reasonably be expected that Congress would have given some indication of its intent to permit such a significant change in the federal role through local legislation. It did not give any such indication.<sup>12</sup> Nor did any Council or Mayor over the last 40 years believe the District government had such authority.

Further, arguments in favor of the Act miss the point when they observe that Congress authorized the District to spend excess revenues when it enacted D.C. Official Code § 47-369.02 (2012 Repl.). Rather than empowering the District to spend unappropriated local funds for all purposes notwithstanding the Anti-Deficiency Act, Congress authorized the expenditure of the specified revenues under certain expressly stated conditions. There is no question that Congress can approve federal and District spending that is at odds with federal appropriations requirements, and thus create an exception to the Anti-Deficiency Act. The Anti-Deficiency Act is merely another part of the federal law governing the budget process. In fact, Congress could clearly under its Article I authority amend both the Home Rule Act and the Anti-Deficiency Act to provide the District with full budget autonomy over local funds. Indeed, Congress may well eventually do so, as it has recently been requested to do by President Obama. Congress has not

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It then goes on to specify the conditions associated with their expenditure.

<sup>11</sup> GAO responds persuasively to this position by noting that "the applicability of the Antideficiency Act to the District, both by its very terms and by the terms of the Home Rule Act, 'reflects Congress' decision . . . to expressly limit District spending to amounts *Congress* appropriates." (emphasis in original) (quoting GAO Decision B-262069).

<sup>12</sup> See *In Re Crawley*, 978 A.2d 608, 617 (D.C. 2009) ("Judges, as well as detectives, may take into consideration that a watchdog did not bark in the night") (quoting *Harrison v. PPG Indust., Inc.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)).

done so *yet*, however, and the Council may not arrogate to itself authority over portions of the District's budget process that Congress, in the Home Rule Act, clearly specified would remain firmly within congressional control.

Congress' own actions with respect to the Act since its effective date are further evidence of Congress' view of the Act's invalidity and its intention not to allow the District to have budget autonomy. Although Congress did not enact a joint resolution disapproving the Act according to section 303(a) of the Home Rule Act, congressional inaction is importantly different from affirmative approval.<sup>13</sup> A more likely interpretation of this inaction is that Congress found it unnecessary to disapprove the Act because it was so obviously beyond the scope of the Council's and the voters' authority. After the Act sat for passive review by Congress, the Financial Services and General Government Subcommittee of the U.S. House of Representatives' Committee on Appropriations expressly found the law to be no more than a non-binding expression of District residents' "opinion" that does not change the District's responsibility to submit to the federal appropriations process. Fiscal Year 2014 Financial Services and General Government Committee Report, p. 38.

Congress has also made it perfectly clear that it views its fiscal relationship with the District as unchanged since January 1, 2014, the Act's applicability date. On January 15, 2014, Congress enacted the Consolidated Appropriations Act, 2014, Pub. L. 113-76, in which it appropriated the District's entire Fiscal Year 2014 budget, including local funds. As part of the General Provisions applicable to the District, Congress also enacted section 816, a District government shutdown avoidance provision that authorizes the District to use local funds, as stated in the District's FY 2015 Budget Request Act, in the event that Congress fails to enact an appropriations act or continuing resolution for the District.<sup>14</sup> In doing so, it expressed its will

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<sup>13</sup> See, e.g., *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 209 (1928) ("The inference of an approval by Congress from its mere failure to act at best rests upon a weak foundation. And we think where the inference is sought to be applied, as here, to a case where the legislation is clearly void as in contravention of the Organic Act, it cannot reasonably be indulged. To justify the conclusion that Congress has consented to the violation of one of its own acts of such fundamental character will require something more than such inaction upon its part as really amounts to nothing more than a failure affirmatively to declare such violation by a formal act.").

<sup>14</sup> Section 816 reads as follows:

Sec. 816. (a) During fiscal year 2015, during a period in which neither a District of Columbia continuing resolution or a regular District of Columbia appropriation bill is in effect, local funds are appropriated in the amount provided for any project or activity for which local funds are provided in the Fiscal Year 2015 Budget Request Act of 2014 as submitted to Congress (subject to any modifications enacted by the District of Columbia as of the beginning of the period during which this subsection is in effect) at the rate set forth by such Act.

(b) Appropriations made by subsection (a) shall cease to be available--

(1) during any period in which a District of Columbia continuing resolution for fiscal year 2015 is in effect; or

(2) upon the enactment into law of the regular District of Columbia appropriation bill for fiscal year 2015.

(c) An appropriation made by subsection (a) is provided under the authority and conditions as provided under this Act and shall be available to the extent and in the manner that would be provided by this Act.

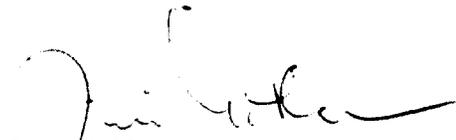
that both section 446 of the Home Rule Act (D.C. Official Code § 1-204.46) and the federal Anti-Deficiency Act shall continue to apply to local funds and require congressional appropriations. This legislation makes clear that Congress views the Act as having no legal force or effect. I share that legal conclusion, for the reasons explained above.

### III. Conclusion

Given the Act's patent invalidity, I recommend that you decline to implement it and recommend that you advise Executive Branch officials and employees not to do so absent a binding judicial decision to the contrary. Implementation of the Act would violate multiple provisions of the Home Rule Act, the federal Anti-Deficiency Act, and the Budget and Accounting Act. It could also expose District employees to administrative and criminal penalties. Further, it would be in the District's interests for you to urge the Council to comply with the budget process defined in the version of the Home Rule Act that continues to be in effect – the one Congress enacted prior to the Act's applicability date – and to advise the Council that Executive Branch officials have no intention of abiding by the Act's void and ineffective provisions. Only Congress can provide autonomy to the District government for the processes of forming the District budget. As you and others have repeatedly urged, Congress should do so. When Congress does so through appropriate legislation, budget autonomy will be achieved. Until it has done so, the Council and the citizenry of the District have no authority to take this power from the Congress.

For the foregoing reasons, it is the opinion of this Office that the Local Budget Autonomy Act of 2012 is null and void and should not be implemented by District government officials or employees.

Sincerely,



Irvin B. Nathan  
Attorney General  
for the District of Columbia

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(d) An appropriation made by subsection (a) shall cover all obligations or expenditures incurred for such project or activity during the portion of fiscal year 2015 for which this section applies to such project or activity.

(e) This section shall not apply to a project or activity during any period of fiscal year 2015 if any other provision of law (other than an authorization of appropriations)--

(1) makes an appropriation, makes funds available, or grants authority for such project or activity to continue for such period, or

(2) specifically provides that no appropriation shall be made, no funds shall be made available, or no authority shall be granted for such project or activity to continue for such period.

(f) Nothing in this section shall be construed to effect obligations of the government of the District of Columbia mandated by other law.