

**Statement of Karl A. Racine  
Attorney General for the District of Columbia**

**Before the**

**Committee on the Judiciary  
Kenyan McDuffie, Chairperson**



**Office of the Attorney General  
for the District of Columbia**

**PUBLIC ROUNDTABLE ON  
PROPOSALS RELATING TO THE POWERS OF THE  
OFFICE OF THE ATTORNEY GENERAL  
AND THE MAYOR'S OFFICE OF LEGAL COUNSEL**

**April 22, 2015**

**Room 123  
John A. Wilson Building  
1350 Pennsylvania Avenue, NW  
Washington, D.C.**

## I. INTRODUCTION

Good Morning, Chairman McDuffie, Chairman Mendelson, Councilmembers, staff and members of the public. I am Karl A. Racine, Attorney General for the District of Columbia, and on behalf of my colleagues at the Office of Attorney General (OAG), I very much appreciate the opportunity to appear before you today.

As you know, by an overwhelming 76 percent of the vote,<sup>1</sup> citizens of the District passed a referendum in 2010 to establish an independent Office of Attorney General that would operate independently of the Mayor and the Council. In passing this mandate, the District joined 43 jurisdictions, including Maryland and Virginia, that have elected Attorneys General who are directly accountable to the voters. Like Maryland, Virginia and the other 41 states that have elected Attorneys General, the AG has an obligation to act in the public interest and functions as a check and balance. These principles are central to a mature democracy and are a further step toward the District achieving full self governance and statehood.

The referendum contained numerous important duties and responsibilities for the elected AG, including:

1. that the elected AG “have charge and conduct of all law business” of the District and “all suits instituted by and against” the District government;<sup>1</sup>
2. the “power to control all litigation and appeals”; and
3. the power and responsibility to act in the public interest.

In anticipation of the District’s first Attorney General election, the Executive Branch and the Council evaluated and held hearings on how best to transfer from the unitary model with an AG subordinate to the Mayor to a bifurcated model seen in 43 states, where the sovereign’s

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<sup>1</sup> See the District of Columbia Clarification and Elected Term Amendment Act of 2010, effective May 27, 2010 (D.C. Law 18-160; D.C. Official Code § 1-301.81 et. seq.).

Chief Executive Officer and Chief Legal Officer do not report to the other. After extensive debate and hearings, the Council passed the Elected Attorney General Implementation Amendment Act of 2013. Among other things, this Act transferred supervision of agency counsel from the Attorney General to subordinate agency heads so that they would be within the Mayoral reporting line, and not that of the elected Attorney General. The Act also included a provision creating the Mayor's Office of Legal Counsel (MOLC)—a “small office” that was headed by a Director who was appointed by and served at the pleasure of the Mayor.

The unelected Director of the MOLC was not created nor authorized to displace or diminish the role or responsibilities of the Attorney General. Unlike the former appointed Attorney General or Corporation Counsel, the Director of the MOLC is not publicly vetted or confirmed by the Council, required to have a minimum number of years of having practiced law, or even be a member of the District of Columbia Bar. The MOLC is required to enforce the law as declared by the Attorney General. The opinions of the Attorney General operate as the “guiding statement of law in the District government.”

Since taking office on January 2, 2015 as Attorney General, we have worked within the structure created by the Council. Significantly, while I believe the Council erred in moving lawyers out of OAG and into the agencies, OAG's Budget Support legislation does not seek the immediate return of those lawyers to OAG. Rather, I am committed to working within the system that the Council created.

My testimony today will focus on the Mayor's Budget Support Act legislation, report on the removal of a particular group of OAG's real estate and commercial lawyers away from OAG and to the Deputy Mayor for Economic Development, and lastly touch on my proposed technical and nontechnical clarifications to the AG's duties and responsibilities.

## **II. THE MAYOR'S BUDGET SUPPORT ACT LEGISLATION REGARDING THE OAG (SUBTITLE E)**

Just over a month ago, the Executive Office of the Mayor provided OAG with a draft version of the Budget Support Act for legal review. As in prior years, OAG performed significant review and worked with the Executive to prepare the draft Budget Support Act. At the end of this process, OAG certified the legal sufficiency of a version of the Budget Support Act that Executive staff presented to us as final. The version of the Budget Support Act that the Mayor actually introduced, however, included Subtitle E concerning the OAG, which my Office was not given an opportunity to evaluate.<sup>2</sup>

The version of the Budget Support Act submitted to the Council, which includes Subtitle E, is not legally sufficient, because the Subtitle is *not* legally sufficient. The Subtitle would substantially undermine the independent role of the elected Attorney General that the voters incorporated by referendum into the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 790; Pub. L. 93-198; D.C. Official Code § 1-201.01 *et seq.*), and would, accordingly, violate the District's Charter. The following analysis reflects the legal basis for this conclusion.

### **A. Factual and Legal Background.**

#### **1. District of Columbia Clarification and Elected Term Amendment Act of 2010**

On March 30, 2010, the Council enacted the District of Columbia Clarification and Elected Term Amendment Act of 2010 ("Referendum Act"), effective May 27, 2010 (D.C. Law 18-160; D.C. Official Code § 1-301.81 *et seq.*). The purpose of the legislation was to "make

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<sup>2</sup> It is not clear to OAG whether the legislative package for the Budget Support Act that was presented to the Council contained the Certificate of Legal Sufficiency the Legal Counsel Division issued with respect to the prior version of the Budget Support Act. If the Certificate were included, it would not have reflected our assessment of the Budget Support Act as introduced.

clear in the law what is axiomatic: that the responsibility of the Attorney General is to *serve the citizens of the District*” (emphasis added). Report of Bill 18-65, “Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2009” (“Committee Report”), Committee on Public Safety and the Judiciary, dated December 16, 2009, p. 1. The first two sentences of the Committee Report state:

The position of attorney general holds an elevated place in our democratic form of government as it is the public official, at all levels, responsible for justice. The attorney general serves not only as a counselor to the government but as an advocate of the public interest.

*Id.* at 1. The Referendum Act was designed to codify the institutional independence of the Attorney General and strengthen the Attorney General’s role. The Council chose to accomplish these objectives by initiating the process of making the Attorney General an elective office and by establishing, through the language and legislative history of the Referendum Act, that the District’s elected Attorney General would continue to perform the core functions of this office and serve as the lawyer for the citizens of the District of Columbia.<sup>3</sup>

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<sup>3</sup> The Committee Report contains an abundance of statements reflecting the Council’s view that the Attorney General is the lawyer for not just the government, but the public as a whole. For example, it states that the Attorney General’s role as a counselor to the government and advocate of the public interest

rightfully deserves veneration, since the individual serving in this role maintains an entire jurisdiction – be that country, state, or city – and its inhabitants as a client. The Attorney General for the District of Columbia, like its counterparts in other jurisdictions, has an obligation to represent and defend the legal interests of the public.

*Id.* at 1. Moreover, the Committee Report quotes former Attorney General Robert J. Spagnoletti’s testimony in saying:

“as a lawyer, the Attorney General is there to represent the interests of his [or her] client – which happens to be the District of Columbia.”

*Id.* at 6. It should be noted that the Committee Report reflects the Committee understands that the position of Attorney General already operated with a significant degree of independence, even when the Attorney General was appointed by and reported to the Mayor. The Referendum Act strengthened and codified this independence.

The best evidence of the Council’s intent concerning the role of the elected Attorney General is contained in section 101 of the Referendum Act (D.C. Official Code § 1-301.81).

That section states:

Sec. 101. Duties of the Attorney General for the District of Columbia.

(a)(1) The Attorney General for the District of Columbia (“Attorney General”) shall have charge and conduct of *all law business* of the said District and all suits instituted by and against the government thereof, and shall possess all powers afforded the Attorney General by the common and statutory law of the District and shall be responsible for upholding the *public interest*. The Attorney General shall have the power to control litigation and appeals, as well as the power to intervene in legal proceedings on behalf of this public interest.

(2) The Attorney General shall furnish opinions in writing to the Mayor and the Council whenever requested to do so. All requests for opinions from agencies subordinate to the Mayor shall be transmitted through the Mayor. The Attorney General shall keep a record of requests, together with the opinions. Those opinions of the Attorney General issued pursuant to Reorganization Order No. 50 shall be compiled and published by the Attorney General on an annual basis.

(b) The authority provided under this section shall not be construed to deny or limit the duty and authority of the Attorney General as heretofore authorized, either by statute or under common law.

(Emphasis added.)

This section could not be more clear in legislatively establishing the Attorney General’s authority and independence. It states that the Attorney General shall be in charge of, conduct, and control all of the District’s law business and shall act in the public interest. It also restates the Attorney General’s core functions, as they have developed in the District, and, along with other sections of the Referendum Act, affirmatively establishes that the performance of these functions shall no longer be under the Mayor’s direction or control.<sup>4</sup>

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<sup>4</sup> Section 141(a) of the Referendum Act repealed Sections 18 and 19 of Chapter 108 of the Acts of the Legislative Assembly, adopted August 23, 1871 (D.C. Official Code §§ 1-301.111 and 1-301.112). Section 18 (D.C. Official Code § 1-301.111) stated:

In addition to explicitly stating that the Attorney General serves the public and is in charge of *all* the District's legal matters, section 101 of the Referendum Act incorporates the core powers of the Attorney General as they have been described in other sources. The section brings forward the Attorney General's authority, as stated in Reorganization Order No. 50, dated June 26, 1953, as amended, by referring to the Attorney General's opinion and advice-giving function included in that Order, and using language similar to that contained in the Order in describing the Attorney General's authority.<sup>5</sup> The Referendum Act goes beyond that language by emphasizing that the Attorney General shall control all litigation and appeals and take legal action to protect the public interest.

In addition, the section's statements in subsections (a)(1) and (b) that the Attorney General shall possess all of the Attorney General's powers under common law are important. During its consideration of the Referendum Act, the Council accepted the conclusion advanced by DC Appleaseed that the District's Attorney General has common law powers that derive from

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The Corporation Counsel shall be under the direction of the Mayor, and have charge and conduct of all law business of the said District, and all suits instituted by and against the government thereof. He shall furnish opinions in writing to the Mayor, whenever requested to do so. All requests for opinions shall be transmitted through the Mayor, and a record thereof kept, with the opinions, in the Office of the Executive Secretary of the Mayor. He shall perform such other professional duties as may be required of him by the Mayor.

The repeal of this section and its replacement by section 101 of the Referendum leaves no doubt that the Council intended the Attorney General to retain the core functions associated with the Office while acting independently of the Mayor in fulfilling these functions.

<sup>5</sup> Reorganization Order No. 50 established the Office of the Corporation Counsel, now the Attorney General, by delegation from the Executive. Part II, section (a)(A) stated that the Corporation Counsel was:

the attorney for and chief law officer of the District of Columbia Government and has charge of all of its law business. [The Corporation Counsel], through his professional staff conducts prosecution of all cases, including criminal, instituted by it and defense of all suits against the District of Columbia, its officers, employees, and agents arising out of performance of official duties. . . . [The Corporation Counsel] furnishes legal advice to the [Mayor] and the [Council] and the several departments and agencies of the District of Columbia and upon request of said [Mayor] and [Council] renders written opinions to them.

This language shows that the Attorney General had an important, independent legal role even before the Council decided to strengthen it. It also supports the view that the Council intended this role to continue.

the common law powers of this official in Maryland in 1801, when the land comprising the District was ceded.<sup>6</sup> As noted in *Shevin v. Exxon Corporation*, 526 F.2d 266, 268 (5<sup>th</sup> Cir. 1976), a case the Committee relied upon that deals with the Attorney General’s common law powers, “the role of attorney general has evolved from merely representation of a monarch to representation of an entire government and its citizenry.” The Referendum Act thus made the Attorney General the legal representative of both the citizens of the District of Columbia and its government.

Although the District’s approval of the Referendum Act made significant changes to local law, the Council could not, on its own, convert the existing Office of Attorney General into an elected office. The Council therefore included a proposed Charter Amendment in the Referendum Act, which Congress declined to affirmatively approve. The Charter Amendment, including the entire Referendum Act, was then submitted to District voters for approval during a referendum conducted on November 2, 2010.<sup>7</sup> The voters (with 76 percent approving) overwhelmingly approved this measure.

## **2. The Elected Attorney General Implementation and Legal Service Establishment Amendment Act of 2013**

In 2013, after the voters approved the Charter Amendment, the Council considered the Elected Attorney General Implementation and Legal Service Establishment Act of 2013 (“2013

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<sup>6</sup> Committee Report, *supra* n. 2, at 5. Although these powers could have been legislatively abrogated, the District has never done so. Instead, it has reaffirmed them. *See, e.g.*, section 101(a)(1) of the Referendum Act (D.C. Official Code § 1-301.81 01(a)(1)).

<sup>7</sup> The Elected Attorney General Charter Amendment, 57 DCR 6217, added a new section 435 to the Home Rule Act, which provided for the election of the Attorney General. The Charter Amendment, which the voters approved, also contained the full text of the Referendum Act, including the provisions that related to the Attorney General’s strengthened independence and authority. *See* District of Columbia Board of Elections and Ethics “District of Columbia Voter Guide: Tuesday, November 2, 2010 General Election” (“Voter Guide”), at 44-50, *available at* [http://www.dcboee.org/popup.asp?url=/pdf\\_files597.pdf](http://www.dcboee.org/popup.asp?url=/pdf_files597.pdf) (last visited April 6, 2015) (contains the full text of the Referendum Act).

Act”), effective December 13, 2013 (D.C. Law 20-60; 60 DCR 15487). The Mayor proposed this legislation after then-Attorney General Irvin B. Nathan advised that changes to the reporting lines of counsel in the subordinate agencies were necessary to ensure that the legal advice provided to these agencies reflected the agenda, policies and priorities of the Mayor.<sup>8</sup> As a result, when enacted,<sup>9</sup> the 2013 Act transferred the supervision and control of subordinate agency counsel from the Attorney General to the agency Directors. The 2013 Act also created the Mayor’s Office of Legal Counsel (“MOLC”), a “*small office*” that would “repor[t] to the Mayor and [be] responsible for cross-agency legal, training, and other issues associated with the agency counsel offices.”<sup>10</sup> (Emphasis added.)

The limited role that the 2013 Act assigned to the MOLC is expressed in the act itself and its legislative history. Section 101(a) of the 2013 Act states the MOLC’s responsibilities as:

- (A) Coordinating the hiring, compensation, training and resolution of significant personnel-related issues for subordinate agency counsel in conjunction with agency directors;
- (B) Providing legal and policy advice to the Mayor and executive branch;
- (C) Resolving interagency legal issues for the Mayor;
- (D) Overseeing the representation of agencies in investigative matters before the executive branch of the federal government, Congress, or the Council of the District of Columbia; and

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<sup>8</sup> Report on Bill 20-134, the “Elected Attorney General Implementation and Legal Service Establishment Act of 2013” (“2013 Act Committee Report”), Committee on the Judiciary and Public Safety, dated July 3, 2013, p. 3, available at <http://lims.dccouncil.us/Download/29290/B20-0134-CommitteeReport.pdf> (last visited April 6, 2015). The Mayor believed this was needed under “the new system of divided authority, where both the Mayor and the Attorney General will be elected, neither will be subordinate to the other, and both will serve in the Executive Branch.” *Id.* at 2.

<sup>9</sup> Most of the operative provisions of the 2013 Act were initially rejected by the Committee on Public Safety and the Judiciary. They were subsequently adopted by the full Council.

<sup>10</sup> Letter from Mayor Vincent C. Gray to Chairman Phil Mendelson, Jan. 12, 2013 (“Introduction Letter”), available at <http://lims.dccouncil.us/Download/29290/B20-0134-INTRODUCTION.pdf> (last visited Mar. 17, 2015) (seeking introduction of the proposed bill that became the 2013 Act).

(E) Supervising outside counsel in matters where the Office of the Attorney General is recused from a matter or otherwise not available.

These functions replace the predominantly administrative functions that OAG performed before the 2013 Act in coordinating the activities of multiple agency counsel offices with disparate needs located throughout the District. The MOLC was envisioned as having only five employees -- a Director, three attorneys, and one administrative assistant.<sup>11</sup> Its role, as reflected in its functions, is to ensure consistency in the duties, activities, and treatment of agency counsel who would be accountable to different agency Directors, many of whom would be non-lawyers with different constituents and missions.

As former Attorney General Nathan explained at a hearing on the 2013 Act, the MOLC provisions of the Mayor's bill were designed to implement the transfer of general counsels to the Mayor.<sup>12</sup> Some feared that placing agency counsel under their agency heads' supervision might "leav[e] agency counsel at the mercy of agency directors who want legal opinions that are not shared by the Attorney General's office."<sup>13</sup> The MOLC would protect agency counsel from potential "undue influence" from their agency directors,<sup>14</sup> and would harmonize agency counsels' positions and decisions on substantive and legal-personnel matters.<sup>15</sup>

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<sup>11</sup> Memorandum from Natwar M. Gandhi, Chief Financial Officer, to the Hon. Phil Mendelson, Chairman, Council of the District of Columbia, "Fiscal Impact Statement – 'Elected Attorney General Implementation Act of 2013,'" June 28, 2013, at 2 (available in the PDF for the 2013 Act Committee Report, *supra* n. 7, at 219).

<sup>12</sup> Statement of Irvin B. Nathan, Attorney General for the District of Columbia, Before the Committee on the Judiciary and Public Safety, Mar. 26, 2013 ("Nathan Written Testimony"), at 6. Former Attorney General Nathan's testimony is attached to the 2013 Act Committee Report, available at <http://lims.dccouncil.us/Download/29290/B20-0134-CommitteeReport.pdf>, starting on page 123 of the document. Attorney General Nathan was the principal witness in support of the Act.

<sup>13</sup> Nathan Written Testimony, *supra* n. 12 at 17.

<sup>14</sup> *Id.* See *id.* at 18 (MOLC would "ensure that general counsel and their staff are protected from any undue pressures or retaliation by agency heads").

<sup>15</sup> *Id.* at 17-18.

Rather than diminishing the role of the Attorney General, the MOLC would be responsible for implementing the Attorney General’s legal views across the government.<sup>16</sup> The Attorney General would remain in charge of interpreting statutes and regulations,<sup>17</sup> and would continue to be “responsible for the commercial activities of the District.”<sup>18</sup> Moreover, despite the creation of the MOLC, it was anticipated that an agency general counsel could seek and receive opinions from the Attorney General if the attorney disagreed with his or her agency director on a question of law.<sup>19</sup> The MOLC’s functions, as defined in the 2013 Act, were thus targeted to address specific concerns associated with the transfer of agency counsel back to the subordinate agencies. This entire endeavor was part of the District’s overall effort to implement the Referendum Act and create a strong, independent, elected Attorney General.

**B. Content and Impact of the Subtitle E.**

The Mayor’s proposed changes to the Attorney General’s powers and responsibilities are contained in Subtitle E of the BSA. That section would revise the Referendum Act and the 2013 Act in several ways that would conflict with the underlying policies of these acts, undermine the authority and independence of the Attorney General, unnecessarily expand the role of the MOLC, and insulate the actions of the Executive from independent legal scrutiny.<sup>20</sup> Direct your

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<sup>16</sup> Council of the District of Columbia, Committee on the Judiciary and Public Safety, “Public Hearing on Bills 20-13 and 20-134,” March 26, 2013 (“2013 Act Public Hearing”), video available at [http://dc.granicus.com/MediaPlayer.php?view\\_id=28&clip\\_id=1675](http://dc.granicus.com/MediaPlayer.php?view_id=28&clip_id=1675) (last visited March 4, 2015). See Nathan Written Testimony, *supra* n. 12, at 15 (“It will be the responsibility of the Attorney General and the MOLC to be sure that all agency counsel are following the Attorney General’s legal interpretations.”).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *See id.*

<sup>20</sup> The problematic provisions of the Subtitle are contained in sections 1042, 1043(a) and (c), and 1044(a). Section 1042 states that the purpose of the Subtitle is to clarify “that the relationship of the Attorney General and Mayor is that of attorney and client.” Section 1043(a) (1) would transfer the supervision from the agency Directors to the MOLC on all legal matters. It would also make the MOLC responsible for providing legal sufficiency reviews of

attention to Subsection E’s Preamble. The Preamble to the Subtitle recognizes that based on “principles of democracy, including shared responsibility, accountability, and checks and balances in the exercise of power” the Subtitle would “clarif[y] that the relationship of the Attorney General and Mayor is that of attorney and client.” Section 1042 of the Subtitle.<sup>21</sup> Interestingly, the Subtitle would purport to eliminate the Attorney General’s authority to act independently to uphold the public interest and serve as the attorney for District residents. It would do so by, among other things, amending section 101 of the Referendum Act (D.C. Official Code § 1-301.81) to provide that “[i]n *all* law business carried out by the Attorney General, the relationship between the District government and the Attorney General shall be as client to attorney” (emphasis added). Section 1044(a)(1) of the Subtitle.

By purporting to restrict the Attorney General’s role to acting as the attorney for the Mayor or the District government with respect to all law business the Attorney General performs, the Subtitle would significantly reduce the elected Attorney General’s independence. Rule 1.2(a) of the District’s Rules of Professional Conduct gives the client control over the objectives of the representation, and to some extent, its methods.<sup>22</sup> This requirement would

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legislation, regulations, and contracts at the request of the Mayor, while also allowing the Attorney General to provide such reviews at the Mayor’s request. Section 1043 (c) would also place the legal work of subordinate agency counsel under the MOLC’s authority, and section 1044(a) would establish an attorney-client relationship between the Attorney General and the District government with respect to all legal business carried out by the Attorney General. The subtitle would also make several uncontroversial amendments to local law that would remove various OAG functions, such as personnel and procurement, from the administrative control of the Mayor.

<sup>21</sup> The juxtaposition of these two sections makes the nature of the attorney-client relationship unclear, unless the intent is to equate the Mayor with the District government. In any event, the Attorney General already represents both the Mayor and the District government with respect to many matters.

<sup>22</sup> Rules of Professional Conduct: Rule 1.2--Scope of Representation states:

(a) A lawyer shall abide by a client’s decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to accept an offer of settlement of a matter. . . .”

allow the Mayor to determine, for example, which cases the Attorney General may pursue, in what manner, for what purposes, and to control the settlement of cases.<sup>23</sup> Far from having the power to control litigation and appeals, as is granted to the Attorney General under section 101 of the Referendum Act, the Subtitle would place this “control” under the direction of the Mayor for most, if not all, purposes. Significantly, the Subtitle makes absolutely no reference to the Attorney General’s duty to act in the public interest. This omission of what the voters and the Council made clear in the referendum and 2013 law would call into question the Attorney General’s ability to bring actions on behalf of the public interest, or representing the interests of District residents, independently of the Mayor, as the Referendum Act intended. This portion of the Subtitle would thus negate one of the primary purposes for which the Referendum Act was enacted.

To be clear, there is no question that the independent, elected Attorney General is charged with and does represent the Mayor and the District government in the majority of their activities and operations. The Attorney General has historically provided legal advice to the Mayor, the Council, the courts, and the subordinate agencies, and the Attorney General has had the responsibility to speak for the District on legal matters as part of the Attorney General’s core functions. In addition, the Attorney General has provided important legal assistance to the Mayor and the subordinate agencies to support their activities and help them to advance their legal and policy agendas. In doing so, the Attorney General abides by the duty to keep client communications confidential.

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<sup>23</sup> As has already been reported in the press, even in the absence of the Subtitle, the Director of the MOLC has expressed the opinion that the Mayor has the authority to determine how and whether the Attorney General should settle individual cases.

The fact that the Attorney General acts as the Mayor's and the government's attorney with respect to many critical matters, and will continue to do so, is not inconsistent with the elected Attorney General's role in taking additional action to represent the public and advance the public interest.<sup>24</sup> In fact, the public interest requires an independent Attorney General to work collaboratively with the Mayor with respect to matters important to District residents and to provide the best possible advice to the District with respect to its legal affairs. The only reason to enact a provision that limits the Attorney General's authority to act to legal matters in which the Attorney General represents the Mayor or the government would be to place the Attorney General under the Mayor's control and curtail the Attorney General's independence.

In addition to placing the Attorney General under the control of the Mayor with respect to the conduct of legal business, the Subtitle would permit the Mayor to affirmatively assign to the MOLC core legal functions historically performed by the Attorney General and thus eliminate the check and balance that the referendum and 2013 law require. Section 1043(a)(1)(B) of the Subtitle would make the MOLC responsible for “[p]roviding legal sufficiency reviews of legislation, regulations, and contracts, at the request of the Mayor; provided, the Attorney General may also provide such reviews at the request of the Mayor.”

Under Reorganization Order No. 50 and the existing version of section 101 of the Referendum Act, the Attorney General's core functions in conducting the District's law business have included the review and certification of proposed legislation, rulemakings, and contracts for legal sufficiency. This function has required the Attorney General to provide the Executive Branch with an independent assessment of the legality of some of the District government's most important legal actions. In doing so, the Attorney General has been able to prevent the District

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<sup>24</sup> The Referendum Act addresses those rare situations in which these dual roles might conflict by providing for the appointment of a special counsel. Section 109 of the Referendum Act (D.C. Official Code § 1-301.89).

from taking action that has had the potential for producing litigation resulting in significant monetary awards against the District. The Attorney General has also provided objective assistance to District agencies in effectively and defensibly achieving their legal and policy objectives.

By giving the Mayor the authority to decide whether significant legal actions should be reviewed by the MOLC or the Attorney General, the Subtitle would eliminate one of the Attorney General's core functions, while expanding that of the Director of the MOLC, an unelected official that is neither vetted nor confirmed by the Council, accountable only to and employed at the pleasure of the Mayor.<sup>25</sup> It would also give the Mayor the ability to decide which legal actions should be subject to the Attorney General's independent review. OAG has historically provided legal sufficiency reviews of, for example, contracts proposed by the Mayor that involve the expenditure of millions of dollars of District taxpayers' money. By giving MOLC the ability to perform these reviews in lieu of the Attorney General, the Subtitle would allow the Mayor to decide on a case-by-case basis, whether or not to allow this independent review, or whether to advise the Attorney General of these and other legal matters in the first place.<sup>26</sup> Legal sufficiency certifications of the Attorney General constitute more than mere legal advice to the Executive. They are expressions of legal approval by an independent public official, which are relied upon by the Council, the public, and private parties. Checks and balances are a cornerstone of mature democracies. Checks and balances protect the public from

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<sup>25</sup> The Director of the MOLC is not even required to be confirmed by the Council.

<sup>26</sup> The Mayor has recently expressed an intent to eliminate funding for positions within OAG that participate in the development and review of major commercial transactions. Instead of continuing to fund these positions, the Mayor apparently intends to relocate this function and the related positions to the Office of the Deputy Mayor for Planning and Economic Development. The same individuals responsible for promoting and initiating these transactions would also be responsible for reviewing them, without any independent supervision.

excesses of one branch over another. Businesses rely on checks and balances to ensure that contracts that the city enters into are valid and defensible in court.

Finally, the Subtitle would expand the role of the MOLC to supervising the legal work of subordinate agency counsel. Section 1043(a)(1)(A) of the Subtitle. This expansion of the MOLC's role, in combination with other provisions of the Subtitle, encroaches upon the Attorney General's role to be the chief legal officer for the District and all its residents to being simply one of the Mayor's lawyers.<sup>27</sup>

Our neighbor states, Maryland and Virginia, are our competitors for business. Those states have elected Attorneys General who are charged with representing the state and the public interest. Those states have functioning checks and balances that the public and businesses rely upon to ensure lawful and proper functioning of government.

### **C. The Subtitle Violates the District Charter.**

The obvious legal defect in the provisions of Subtitle E described above is that, purporting to rely on "principles of democracy," the Subtitle would override the will of the voters as expressed by their approval of the Charter Amendment by referendum in 2010. As noted above, the Charter Amendment added a new section 435 to the Home Rule Act that requires the Attorney General to be elected. The Subtitle would not amend this section, but it would eliminate many of the core functions, powers, duties, and other characteristics of the Office of Attorney General that the voters ratified when they chose to make the Attorney General an elected office.

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<sup>27</sup> Such a reduction of the Attorney General's authority would even circumscribe the Attorney General's authority under Reorganization Plan No. 50, which was in place when the Attorney General was appointed by the Mayor. That Order made the Attorney General the District's chief legal officer with authority over matters that the Subtitle would allow the Mayor to refer to the MOLC.

As noted above, new section 435 of the Home Rule Act was part of the Referendum Act, which strengthened and expanded the authority and independence of the Attorney General. The Council approved this entire Act, after public hearings, as part of the normal legislative process. Creating an elected office was one of the means the Council included in the Referendum Act to further support the independence of the Office at a time when many observers believed that the position of Attorney General had become less independent and too closely associated with the Mayor.

According to the Referendum Act's Committee report, "making th[e] Charter change is making the position of Attorney General the strong, independent office that the District requires and deserves."<sup>28</sup> District voters participating in the referendum had to have been aware of reasons for and effects of the Charter Amendment when they decided to make the Attorney General an elected office. The entire Referendum Act was included in the Charter Amendment that the voters approved, and the Board of Elections mailed a voter's guide containing the entire Charter Amendment to every household in the District.<sup>29</sup> By approving the Charter Amendment, the voters did anything less than incorporate the Referendum Act's vision of and requirements for an independent Attorney General into the District Charter. Courts "may consider the intent of both the Council and the electorate when interpreting a Charter Amendment enacted by referendum." *Zukerberg v. D.C. Bd. of Elections & Ethics*, 97 A.3d 1064, 1076 (D.C. 2014).

### **III. REVIEW OF REAL ESTATE TRANSACTIONS AND LAND DEALS**

In addition, as you know, efforts are underway by the Executive Office of the Mayor (EOM) to unilaterally encroach on the Attorney General's legal responsibility to conduct all the

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<sup>28</sup> Committee Report at 10.

<sup>29</sup> The Charter Amendment, including the full Referendum Act, was also published in two newspapers of general circulation in the District, pursuant to 3 DCMR § 1010.3. These newspapers included the *Washington Post*, August 27, 2010 at page B6, and the *Washington Times*, August 29, 2010 at page B22.

law business in the District and to provide independent review of major commercial transactions. In March, the Deputy Mayor for Planning and Economic Development (“DMPED”) communicated to me the administration’s desire to move the reporting lines and duties of the four real estate attorneys, who are currently under the supervision OAG’s Commercial Division, making them part of a new General Counsel’s office based in DMPED. The Deputy of OAG’s Commercial Division and Section Chief of OAG’s Real Estate Section -- who together supervise the work of those four lawyers -- would also be offered positions in DMPED’s new General Counsel’s office. Under this plan, these six outstanding lawyers, who currently work on major real estate deals for the District and report through OAG’s Commercial Division to the Attorney General, would all be moved to newly-created positions within DMPED, outside of the OAG and under the Mayor. DMPED’s plan is seemingly to transfer its legal work away from OAG. This transfer of supervision and reporting lines of these particular lawyers is seemingly an attempt to override the Council’s deliberate decision in 2013 to leave the responsibilities for supervising the legal aspects of commercial transactions with the Attorney General. (See letter from Irvin B. Nathan to Chairman Kenyan McDuffie dated April 22, 2015.)

As you know, in anticipation of the city’s first Attorney General election, conducted in November 2014, the Council in 2013 passed the Elected Attorney General Implementation Amendment Act. That Act transferred supervision of agency counsel from the Attorney General to subordinate agency heads so that they would be within the Mayoral reporting line and not that of the elected Attorney General. Attorney General Nathan, the architect of the Elected Attorney General Implementation Amendment Act, specifically distinguished the legal work involved in

handling the transactional functions of DMPED, such as complex dispositions of valuable District properties to developers, from other agency counsel functions.<sup>30</sup>

Whatever the merits of that policy choice in making these changes (as I've noted, I think it should not have been made), the Council wisely and intentionally chose *not* to transfer outside of the OAG the lawyers who handle the critical transactional functions of DMPED, such as complex dispositions of valuable District properties to developers. The Council distinguished those legal reviews from agency counsel functions. The Council wisely and specifically left this OAG function and the personnel who perform it untouched. This choice reflected the Council's recognition of the importance of having the attorneys who perform the legal analysis associated with major real estate transactions report to, and be supervised by, OAG.

The Council specifically left within OAG the Legal Counsel Division and the real estate attorneys in the Commercial Division, both of which employ experienced attorneys who have traditionally worked in close consultation with other legal experts in the Office of the Attorney General and the agencies to furnish legal advice to the Mayor, Deputy Mayors, agencies and the Council. Nothing in the text or history of that legislation diminished the Attorney General's pre-existing and essential, independent responsibility for, in the words of the Charter amendment passed overwhelmingly by the voters in 2010, the "charge and conduct of all law business of the . . . District

That was the fundamental premise of the proposal in the bill that was adopted in the 2013 Act as concerns the agency counsel transfer but the continued role of the Commercial Division and other advice-giving lawyers of the OAG staying as core part of the OAG. At no point during the tortured history of the election of the District's Attorney General was there ever any consideration to having the MOLC, to any degree, displace the Attorney General.

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<sup>30</sup> Nathan, Irvin. Letter to The Honorable Kenyan McDuffie. 22 April. 2015

As explained above, under the Charter Referendum and the Act, the Attorney General is the Chief Legal Officer and has the exclusive responsibility and obligation to independently perform legal review and legal sufficiency of real estate transactions and land deals. Regardless, DMPED's decision to have a legal staff does not alter OAG's legal obligation. In order for real estate and land deals to proceed, the Executive and OAG must work cooperatively, as we do, with all other legal matters on a daily basis to protect and advance the interests of the District and its residents. The Council's decision in 2013 to have the real estate lawyers remain at OAG and for OAG to continue its legal sufficiency reviews because checks and balances of the legal sufficiency of deals that the City enters into is a hallmark of a mature democracy and good government. The business community relies on this check and balance to have confidence in conducting business in the District. The public interest relies on this check and balance to have confidence that business deals are consistent with D.C. law.

**IV. BILL 21-139, THE "ATTORNEY GENERAL INDEPENDENCE AND AUTHORITY IMPLEMENTATION AMENDMENT ACT OF 2015"**

Bill 21-139, the "Attorney General Independence and Authority Implementation Amendment Act of 2015" that amends local law to clarify the functions of the elected Attorney General, differs from Subtitle E in two important ways. First, OAG's proposed amendments are consistent with the Referendum Act and the Charter Amendment --they simply codify, elaborate on, or fill in gaps in the structure that this legislation created.

Although the referendum, and the local law enacted with it, established the Attorney General's authority, it did not make all the conforming D.C. Code revision vested in practice and common law. These revisions are as follows:

## Legal Powers of the Attorney General

- (1) The charge and conduct of all law business of the District Government;
- (2) All authority afforded the Attorney General by the common and statutory law of the District;
- (3) The authority over litigation and appeals, as well as the power to intervene in legal proceedings on behalf of the public interest;
- (4) The authority to determine the controlling law of the District and to issue binding formal legal opinions, absent court precedent;
- (5) The authority and duty to provide formal and informal legal advice in writing to all branches, offices, agencies, departments, and instrumentalities of District government;
- (6) The sole authority to approve the hiring of outside counsel;
- (7) The power and duty to certify legal sufficiency for all legal actions of legal consequence to be taken by the District;
- (8) The right to submit legislation to the Council and to be heard by the Council, pursuant to Council rules;
- (9) The authority to settle claims against the District, under \$1.5 million and over \$1.5 million with the consent and approval of the Mayor; and
- (10) The authority to assign or delegate the Attorney General's powers to subordinates when it is determined to be in the public interest.

Bill 21-139 will place into D.C. Code a list of powers and duties that are the core functions of an equivalent state-level Attorney General. It reflects many of the functions that the Attorney General and the office's forerunner, the Corporation Counsel, have historically performed, even before the voters made the Attorney General an elected office.

The legislation also allows the Attorney General to submit proposed OAG budgets to the Mayor for direct inclusion, and consideration by the Council, consistent with the comity shown between the Mayor and Council with their respective budget submissions. It would also provide the Attorney General with independent personnel and procurement authority. It would also allow the Office of the Attorney General, an independent entity, to bargain collectively with staff independently of the Mayor, and continue the Attorney General's current role of approving the hiring of outside counsel.<sup>31</sup> Moreover, the legislation would expand the Attorney General's subpoena authority, with the exception of juvenile criminal cases. This is important in order to strengthen the District's ability to pursue entities that violate the public trust of the citizens of the District of Columbia. Let me reiterate, though, that OAG is *not* seeking the ability for subpoena authority in juvenile criminal cases in this legislation. Moreover, as part of the Attorney General's authority to manage the District's litigation, the Attorney General has settlement authority for settlements under \$1.5 million. Any settlements over \$1.5 million would be subject to the consent and approval of the Mayor.

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<sup>31</sup> The legislation would also make some needed changes to the processes by which contract claims against the District are pursued and amend the District's law relating to the child support program to reflect the Attorney General's independence.

Finally, I want to take some time to discuss another major component of this legislation. My colleagues and I have carefully reviewed the practices of Attorney General in other states, and following the lead of states such as Arizona, Florida, Missouri, New Jersey, Ohio, and Washington that have established antitrust and consumer protection funds that allow their respective Attorney General to capture a portion of revenue they obtain from suing bad actors who prey on their residents. Indeed, just a few years ago the District had such a fund. The additional funds that I am seeking for Fiscal Year 2016 would come from settlements captured in Fiscal Year 2015. The new funding will be used to hire eight consumer-protection attorneys and staff, whose sole job will be to protect District consumers from unscrupulous persons and companies. On a per capita basis, the District ranks in the top five states for both fraud and identity-theft complaints. Our office does not have adequate personnel and resources to protect our residents from bad actors. Put another way, bad actors are getting away with scamming our citizens every day because we do not have the lawyers and staff in place to stop the bad guys. We need to do better to protect our citizens, and this proposal allows us to do that. The additional resources that these efforts will provide will enable OAG to support several new important initiatives and provide greater assistance to individual residents in resolving low-dollar-value disputes with business and other entities, functions OAG does not currently have the resources to perform.

OAG expects to receive a \$60 million judgment from the online hotel litigation case currently pending in the District of Columbia Court of Appeals. The sole question on appeal is

what amount the District will receive. It is quite possible that the District will receive significantly more than the \$60 million. We are asking that small amount of the proceeds from the online hotel litigation case be used as the start-up funding OAG needs to obtain the staffing and resources necessary to enhance OAG's consumer-protection efforts, and thus will make this fund self-sustaining.

I have had the opportunity to meet with Councilmembers and members of the community about this idea, and I have received positive support. However, reasonable and responsible questions about safeguards and oversight have been raised, and these safeguards are necessary to ensure that OAG uses the fund for the public interest and not just to grow an enormous litigation division. I very much appreciate these questions. To address this matter, I propose amending the Fund language to require that OAG submit to the Council a spending plan for the Fund on October 1st of each year, and a spending report on March 1st of each year. Funds generated by OAG's consumer protection activities will allow OAG to implement initiatives in four crucial areas:

- (1) Consumer Protection and Community Outreach;
- (2) Affordable Housing Protection and Enforcement;
- (3) Public Safety and Criminal Justice, Protecting Children and Families, and Juvenile Rehabilitation; and
- (4) Protecting Taxpayers, Workers, and Enforcing Honest Government.

These initiatives will address many of the concerns raised by District residents on issues in which the OAG can play an important role, and will be discussed in more detail in my April 29 budget hearing testimony. Not only will these initiatives serve the public interest, as envisioned by the Council and voters, but they will also generate substantial revenue for the District.

The revenue the OAG is requesting through the Consumer Protection Fund will not take funding away from any other program or service in the Fiscal Year 2016 budget because this is new money that the District has not yet received. Going forward, OAG will only receive the money to fund its initiatives from successful litigation on behalf of District residents, such as the online hotel litigation. OAG believes dedicating new revenue that OAG generates to the new Consumer Protection Fund will actually save the District money in the long run. This is because it will also allow OAG to protect the interest of District residents in several very important ways. It will allow OAG to deter consumer fraud, help keep housing affordable for District residents, and reduce the contracting costs of District government agencies by ensuring fair and open competition for local businesses. The Council's enactment of the legislation will be an important step in further ensuring that the Office of the Attorney General has the authority and independence the voters and the Council envisioned when they approved the referendum.

## **V. CONCLUSION**

Thank you for the opportunity to discuss these issues. It continues to be my goal that the OAG provide the District government with the highest-quality legal services while promoting the public interest. I am pleased to answer any questions that you may have. Thank you.