

**Statement of Irvin B. Nathan
Attorney General for the District of Columbia**

Before the

**Committee on Government Operations
Kenyan McDuffie, Chairperson**

**Bill 20-117, the
Prohibition on Government Employee Engagement in Political Activity
Amendment Act of 2013**



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

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**Room 120
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, D.C.**

Good morning Chairperson McDuffie and members of the Committee on Government Operations. I am Irv Nathan, Attorney General for the District of Columbia. On behalf of the Executive Branch, I am pleased to testify in support of Bill 20-117, the “Prohibition on Government Employees Engaging in Political Activity Amendment Act of 2013.” We believe, however, that the Council should promptly amend Bill 20-117 to allow lawyers employed by the District to run for the new elected Attorney General position.

As you know, in late 2012, Congress enacted the Hatch Act Modernization Act of 2012, providing that District employees were no longer subject to the restrictions in the Hatch Act that applied exclusively to federal employees. Instead, Congress essentially left the job of regulating this activity to the District government. Previously, in 2010, anticipating that Congress would enact such legislation, the Council had enacted the “Prohibition on Government Employee Engagement in Political Activity Act of 2010” (the “District’s local prohibitions on political activity Act” or our “local Hatch Act”) and provided that this local law would take effect upon enactment of the federal legislation and provision of funding to implement the local law. That federal law has now taken effect -- as of January 28, 2013. Several changes have taken place in the District government since the local prohibitions on political activity were adopted back in 2010, most notably the creation of BEGA and the 2010 referendum amending the Charter to

provide for an elected Attorney General for the District through partisan elections. The emergency legislation the Council passed earlier this year and Bill 20-117 (the permanent version) made some of the needed changes including, most notably, transferring enforcement authority from the Board of Elections to BEGA, which we support.

The Executive requests, however, that the bill also be amended, among other things, to allow lawyers employed by the District government -- in either OAG or elsewhere within the agencies -- to run in the partisan elections for the new elected Attorney General position. This is necessary to correct an unintended consequence of the combination of three items: the elected attorney general referendum, the Council's choice to make the election partisan, and the pre-existing language of the local Hatch Act. It is also necessary to ensure that an important purpose of Congress is not thwarted by the local Hatch Act. When Congress enacted the Hatch Act Modernization Act, District government employees became eligible to run for partisan political office, subject to any contrary local law in the District. However, the District's local prohibitions on political activity continue to bar employees (as defined in the statute) from running for any partisan political office, including Attorney General.

Bill 20-117 should be amended to ensure that the local rules track the now-amended federal standard in this regard. By virtue of the 2010 referendum,

District law already limits the candidates for the elected Attorney General to a finite group: those who (i) have been for five years or more active members of the D.C. Bar, (ii) are District residents, and (iii) will have been actively engaged, for at least 5 of the 10 years immediately preceding the assumption of the position of Attorney General, as an attorney in the practice of law in the District, a judge of a court in the District, a professor of law in the District or an attorney employed in the District by the United States or the District governments. See D.C. Act 18-351. It is ironic that working as a lawyer for the D.C. government is a listed qualification for the job, but a lawyer must resign from that employment before being allowed to run for the office.

Bill 20-117 should be amended to allow lawyers employed by the District government, who otherwise meet the qualifications, to run for the office of Attorney General without having to resign from their jobs. I understand that this proposal may raise the broader question of whether and to what extent District civil servants should be allowed to run for other elected positions in the District government, such as for Mayor or for the Council. That is an important question worthy of further study before the Council and the Mayor make a final policy judgment. But it should not delay the imperative to decide the issue for the Attorney General position at this time. The Council must act promptly on this issue because the first Attorney General primary election is scheduled take place in

less than a year, in April, 2014. The Council should amend the law as quickly as possible to allow lawyers employed by the District to run for Attorney General, consistent with the federal reform recently secured, and to ensure that we do not eliminate from the applicant pool those with the most relevant experience and perspectives. The Attorney General position is unique among elected positions; it is the only one that must be held by an experienced, licensed lawyer who has lived in and practiced in the District, in addition to other qualifications.

There are compelling reasons for the Council to make this amendment to Bill 20-117. The elected Attorney General will be the only elected official who serves, in effect, as an agency head. There are experienced, skilled attorneys currently working for the District, not only at the OAG but throughout the government, who might be interested in running for the office and who are fully qualified by their experience and training for the position, but who are unwilling or financially unable to resign from their current employment in order to run. Allowing them to run will benefit the District by increasing the pool of qualified candidates and giving a broader choice to the electorate. Those lawyers who are working for the District have the most knowledge and experience with the Attorney General's office and may be in the best position to run it efficiently, in a non-partisan fashion and with the least disruption to its operations as we transition from an appointed Attorney General to an elected one. As someone who has

actively solicited individuals in private practice to run for the office, I can advise this Committee that there are few successful private practitioners who are willing to give up their lucrative practices for the burdens of this office, which include difficult personnel decisions, and frequent criticisms and challenges from opposing counsel, the public, the press and the Council. For the benefit of all of our citizens, we should insure the widest possible pool for this important and demanding position.

Just as employees in other agencies have been selected to serve as the head of an agency, previous Mayors have, in several cases, appointed a lawyer employed by the District to serve as Attorney General (or, as it was known earlier, the Corporation Counsel). It does not make sense to reduce the pool of possible candidates available to run for office to something less than the pool that had been available to Mayors who wanted to appoint a well-qualified person to serve in the position. In addition, lawyers who are employed by the District are subject to D.C. Bar ethical rules as well as other conflict rules that would prohibit them from taking action in their official capacities that are influenced by extraneous matters including their political ambitions. In order to give full effect to the federal Hatch Act reforms, and in order to provide for an enhanced qualified pool of potential candidates, Bill 20-117 should be amended to permit District lawyers employed by the District to run for Attorney General, subject, of course, to the other existing and

fully continuing restrictions on employees including, *e.g.*, the prohibition against using government time and resources for political activity, soliciting contributions from subordinates, and similar prohibitions.

In addition, I would like to point out one other small issue with the current local Hatch Act. The local prohibitions on political activity now provide that various elected officials, such as the Mayor and City Council Members, are exempt from the definition of “employee,” thus excluding them from the restrictions on political activity contained in that law. There is no time limit in their exclusion from the definition of employee. But the Attorney General is included in this exemption only after January 1, 2014. I understand that at the time this provision was included in the statute, the primaries for the Attorney General position were set for September 2014 so the Attorney General would have had 9 months to put together a campaign, obtain the requisite signatures and convince the public. As noted, the primaries are now scheduled to take place on April 1, 2014. Restricting the Attorney General’s ability to engage in political activity until January 2014 may not provide enough time to run in the primaries. This date restriction should be removed. By removing the date restriction, the Attorney General will have the same right to engage in political activity as other elected public officials. And the same rights as opposing candidates from the private sector or the Council. Why should a private practitioner or a Council Member be able to start campaigning for

Attorney General tomorrow but the sitting Attorney General must wait until January, 2014? As I have stated on numerous occasions, I do not intend to run for the elected Attorney General position. However, anything could happen to me between now and January 1, 2014 and the Mayor could appoint another lawyer to serve as Attorney General who may want to run for the elected position. Because the primary is scheduled for April 1, 2014, candidates will need to begin to campaign and circulate petitions in the fall. In my hypothetical, if there were an appointed Attorney General or (before Council confirmation) an Acting Attorney General that wanted to run for the position, he or she would have to resign in 2013 in order to do so, but would not have to resign starting January 1, 2014. Not only should the date in the statute be eliminated, but the issues in the first ever Attorney General election are another good reason to pass the pending legislation postponing the primaries from early April to mid-June, 2014. Such a postponement will give more possible candidates a chance to consider running, and permit the electorate a longer period of time to become acquainted with the candidates and make a more informed judgment on whom to elect.

We have one other comment. BEGA is charged with enforcing the ethics restrictions included in the District's "Code of Conduct." Bill 20-117 would add the requirements of the local Hatch Act to the Code of Conduct, making BEGA responsible for enforcement of the local Hatch Act and provide that the same

notice and other requirements applicable in other BEGA proceedings would also apply to proceedings involving the local Hatch Act. BEGA is uniquely qualified to take on this responsibility and the Executive wholeheartedly supports this change in Bill 20-117, just as we supported this change in the emergency legislation. We support also the other changes that Bill 20-117 would make permanent.

Thank you for the opportunity to testify. I am available to answer your questions.