

# **Council of the District of Columbia**

## **Report**

1350 Pennsylvania Avenue, N.W. Washington, D.C. 20004

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To: All Councilmembers

From: Linda W. Cropp, Chairperson, Committee of the Whole

Date: July 2, 2002

Subject: PR 14-34, "Establishment of an Office of the District Attorney Advisory Referendum Approval Resolution of 2002"

The Committee of the Whole, to which PR 14-34, the "Establishment of an Office of the District Attorney Advisory Referendum Approval Resolution of 2002," was referred, reports favorably on the resolution as amended and recommends its adoption by the Council of the District of Columbia.

### **Statement of Purpose and Effect**

The amendment in the nature of a substitute to PR 14-34 calls upon the Board of Elections and Ethics to hold an advisory referendum during the November 5, 2002 election, at which voters would be asked whether there should be a home rule charter amendment providing for a locally elected district attorney. The locally elected district attorney would perform the current local functions of the Presidentially-appointed United States Attorney for the District of Columbia.

### **Legislative History**

March 3, 1998	PR 12-671, "Sense of the Council Regarding the Establishment of an Office of the Attorney General of the District of Columbia Resolution of 1998", introduced by Councilmember Catania and co-sponsored by Councilmembers, Allen, Chavous, Mason, Schwartz, Smith and Thomas and referred to the Committee of the Whole
March 13, 1998	Notice of PR 12-671 published in D.C. Register
June 25, 1998	Public hearing on PR 12-671

January 21, 2001

PR 14-34 introduced by Councilmember Catania, Chairman Cropp and Councilmembers Allen, Ambrose, Brazil, Chavous, Evans, Fenty, Graham, Mendelson, Orange, Patterson, Schwartz and referred to the Committee of the Whole with comments from the Committee on Judiciary and the Subcommittee on Labor, Voting Rights and Redistricting

July 13, 2001

Notice of public hearing on PR 14-34 published in DC Register

October 9, 2001

Joint public hearing on PR 14-34 by the Committee of the Whole, the Committee on the Judiciary and the Subcommittee on Labor, Voting Rights and Redistricting

July 2, 2002

Committee of the Whole mark-up

### **Committee Reasoning**

Everywhere in the United States except the District of Columbia the authority of the United States Attorney is limited to violations of Federal law. This limitation includes the territories of Guam, America Samoa, the U.S. Virgin Islands, U.S. Mariana Islands, and Puerto Rico. U.S. Attorneys are bound by the policies and procedures established by the U.S. Department of Justice. As a result, as Federal attorneys, their primary concern is not with local crimes or local justice priorities. Therefore, every state has a local criminal justice system to prosecute violations of the local criminal statutes and to foster local criminal justice policies and priorities. This, however, is not the current system in the District of Columbia. Here, the U.S. Attorney performs both the Federal and local prosecutor functions. This is an inequality that will be remedied by this proposal and the transfer of this key component of home rule and self-government.

Although the District of Columbia enjoyed a brief period of limited home rule for three years after the Civil War, the modern history of home rule began in 1961 when the 23rd amendment to the United States Constitution gave the District's residents the power to participate in presidential elections. In 1967, the President reorganized the District's government and created the District of Columbia Council, comprised of appointed members, to legislate for the District. In 1973, the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act or Act) (87 Stat. 774; D.C. Official Code 1-141 et seq) provided for an elected legislature for the District and general executive authority in the Mayor, while reserving to Congress several important legislative powers, including the power of final approval over the District's annual budget and the power to prevent local legislation from going into effect without Congressional

review. Then, in 1978, Congress sent to the states for ratification a constitutional amendment which would have given the District voting representation in both houses of Congress but which ultimately failed to achieve the required support by 3/4 of the states within the 7-year statutorily required period.

The purpose of the Home Rule Act was to "restore to the citizens of the District of Columbia some measure of self-government and to reorganize the machinery of local government to achieve maximize efficiency" (District of Columbia Self-Government and Governmental Reorganization Act; Report No. 93-482, 93d Cong. p. 1441). The House Committee on the District of Columbia considered this legislation to achieve a number of objectives:

- "(1) to establish a form of local government responsible and accountable to the voters;
- "(2) to provide for the District a system of municipal government similar to that provided in all other cities throughout the United States; and
- "(3) to relieve Congress of the burden of legislating on essentially local matters, but to provide a mechanism to prevent any excess in the exercise of local governmental authority with respect to the Federal interest" (Public Law 93-198; Report No. 93-482 pp. 1441-1442).

Prior to the enactment of the Home Rule Act of 1973, President John F. Kennedy in transmitting his suggested home rule legislation to Congress in July of 1961 stated "[r]estoration of suffrage and the responsibility to the people of the District for dealing with their municipal problems is long overdue. It is time to eliminate the last legal and constitutional anomaly in the United States and to reaffirm our belief in the principle that government should be responsible to the governed." (Public Law 93-198; Report No. 93-482 p. 1443).

President Richard M. Nixon in his 1969 message to Congress made the following arguments in favor of self-government for the District of Columbia which are as valid in 2002 as they were in 1969 . He stated that "[g]ood government in the case of a city must be local government. The Federal Government has a special responsibility for the District of Columbia. But it also bears toward the District of Columbia the same responsibility it bears toward all other cities: to help local government work better, and to attempt to supplement local resources for programs that city officials judge most urgent. [H]owever, this Federal responsibility does not require Federal rule. [F]ull citizenship through self-government must be given to the people of this city: The District Government cannot be truly responsible until it is made responsible to those who live under its rule. The District's citizens should not be expected to pay taxes for a government which they have no part in choosing- or to bear the full burdens of citizenship without the full rights of citizenship" (Committee Print, Public Law 93-198 pp. 1685-1686).

Moreover, it was believed that the Home Rule Act "relieves Congress from the time-consuming and burdensome task of sitting as City Council. The local Council, not the Congress would be required to settle and pay labor disputes, license occupations.....amend health laws and regulations, regulate interest and usuary rates and consumer credit and perform a myriad of other local functions" (Public Law 93-198; Report No. 93-482 p. 1442). Yet, the provisions of the Home Rule Act impose certain limitations on the legislative power of the Council of the District of Columbia ("Council"). For example, the Council is specifically restricted from: taxing income at its source; permitting buildings to exceed specified height limitations; or enacting a law relating

to the jurisdiction of the District of Columbia Courts or the authority of the U.S. Attorney for the District of Columbia.

Section 1-301.111 of the District of Columbia Official Code states the duties and authority of the Corporation Counsel of the District of Columbia. It specifically states that "[t]he Corporation Counsel shall be under the direction of the Mayor, and *have charge and conduct of all 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 if the Executive Secretary of the Mayor. He shall perform such other professional duties as may be required of him by the Mayor" (D.C. Official Code § 1-301.111) (emphasis added).

Section 23-101 of the D.C. Official Codes Code makes clear that there are in fact two offices in the District Columbia responsible for criminal prosecutions. §23-101 states the following:

"(a) Prosecutions for violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations, where the maximum punishment is a fine only, or imprisonment not exceeding one year, shall be conducted in the name of the District of Columbia by the Corporation Counsel for the District of Columbia or his assistants, except as otherwise provided in such ordinance, regulation, or statute, or in this section.

"(b) Prosecutions for violations of section 6 of the Act of July 29, 1982 (D.C. Official Code, sec 22-1307), relating to disorderly conduct, and for violations of section 9 of that Act (D.C. Official Code, sec. 22-1312), relating to lewd, indecent, or obscene acts, shall be conducted in the name of the District of Columbia by the Corporation Counsel or his assistants.

"(c) All other criminal prosecutions shall be conducted in the name of the United States by the United States Attorney for the District of Columbia or his assistants, except as otherwise provided by law.

"(d) An indictment or information brought in the name of the United States may include, in addition to offenses prosecutable by the United States may include, in addition to offenses prosecutable by the District of Columbia, and such prosecution may be conducted either solely by the Corporation Counsel or his assistants or solely by the United States Attorney or his assistants if the other prosecuting authority consents.

"(e) Separate indictments or informations or both, charging offenses prosecutable by the District of Columbia and by the United States may be joined for trial if the offenses charged therein could have been joined in the same indictment. Such prosecution may be conducted either solely by the Corporation Counsel or his assistants or solely by the United States Attorney or his assistants if the other prosecuting authority consents.

"(f) If in any case any question shall arise as to whether, under this section, the prosecution should be conducted by the Corporation Counsel or by the United States Attorney, the presiding judge shall forthwith, either on his own motion or upon the suggestion of the Corporation Counsel or the United States Attorney, certify the case to the District of Columbia Court of Appeals, which court shall hear and determine the question in a summary way. In every such case the defendant or defendants shall have the right to be heard in the District of Columbia Court of Appeals. The decision of such court shall be final." (DC Official Code § 23-101)

Currently, the Corporation Counsel has the following responsibilities:

- Prosecutes and defends civil litigation - in the DC Superior Court and US District Court for the District of Columbia - and appeals - in the DC Court of Appeals, US Court of Appeals for the DC Circuit, and US Supreme Court
- Prosecutes certain violations of criminal law, including all juvenile criminal cases, traffic infractions, and adult misdemeanor cases in the DC Superior Court, and defending appeals of these matters
- Enforces consumer protection laws when there is a pattern of abuse
- Conducts or assists with criminal investigations involving government fraud, recouping monies for the District
- Enforces the District's regulatory laws
- Represents the District in child abuse and neglect cases and represents victims of intra-family domestic violence by obtaining civil protection orders and prosecuting related contempt of court matters in the DC Superior Court
- Provides legal advice and opinions
- Drafts and reviews proposed legislation and rulemakings
- Prosecutes all civil commitment matters in the DC Superior Court
- Manages the District's complex litigation on receiverships and other major equity and programmatic cases, like those involving the Public Schools or environmental law matters
- Serves as the District's legal counselor in financial transactions and bond issuances
- Drafts, negotiates, and reviews real estate lease agreements and procurement contracts
- Defends tax collections
- Enforces child support laws and serves as the authorized federal Title IV-D agency for this purpose.

The mission of the United States Attorney for the District of Columbia is "to enforce the criminal laws of the United States and the District of Columbia, represent the interests of the United States in civil litigation, and respond to the public safety needs of the community by leading an effective, well-coordinated law enforcement effort that contributes to the overall goal of improving the quality of life in the District of Columbia."

Currently, the U.S. Attorney for the District of Columbia has the following responsibilities:

- Promote the fair and impartial administration of justice, adhering to the highest ethical, professional and performance standards;
- Promote a motivated and diverse workforce that is well-trained, empowered, and equipped to perform the mission of the Office;
- Prosecute Federal and local crime;
- Represent the interests of the United States in defensive and affirmative civil litigation;
- Coordinate with Federal and local law enforcement agencies;
- Form effective partnerships with law enforcement agencies, other governmental and private entities, and the community at large in aid of law enforcement;
- Prioritize law enforcement objectives, taking into account the needs of the various constituencies served;
- Improve the effectiveness of the law through legislation and litigation;
- Protect the rights of victims of crime and witnesses;
- Improve community safety by reducing crime and the fear of crime;
- Assist in the prevention of crime by engaging in community service activities and by serving as a catalyst and coordinator for other Federal and local governmental agencies and private entities involved in improving the quality of life in the District of Columbia; and
- Inspire confidence in the criminal justice system.

With this bifurcated system, criminal prosecutions of local laws in the District are fragmented and disjointed, and public accountability is severely restricted. Currently, the District does not have full prosecutorial authority over violations of its criminal laws. Except in the District of Columbia every state and city selects the officials who will prosecute local crimes. In the District, however, the Presidentially-appointed United States Attorney, rather than an official chosen by the District's officials or voters, prosecutes all crimes other than violations which constitute misdemeanors. This arrangement diffuses responsibility, allowing members of Congress to hold the District's local government responsible for insufficient crime control while refusing to allow a prosecutor chosen by the District's voters or elected officials to decide which crimes to prosecute, what plea bargains to accept, and what sentences or sentencing alternatives to seek.

In 1973, Congress enacted the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act). The Home Rule Act gives the District an elected legislature, although Congress retains final approval over the District's budget and has veto power over local legislative initiatives. It is important to note that the Home Rule Act grants the citizens of the District the right to elect a Mayor and Council with the primary purpose to "grant to the inhabitants of the District of Columbia powers of local self-government and to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters" (D.C. Official Code §1-201.02).

H.R. 7988 (96th Congress; 2d Session, the District of Columbia Criminal Justice Reform Act) was introduced in 1980 in the House of Representatives to establish an Office of Attorney General for the District of Columbia, to transfer prosecutorial authority for local offenses and to provide for the local appointment of the judges for the District of Columbia Courts. H.R. 7988 proposed to transfer to the District full authority over the prosecution of violations of its laws through the creation of an office of the Attorney General for the District of Columbia. Under this bill, the Attorney General was to be appointed by the Mayor with the advice and consent of the Council. Although the method of selecting the Attorney General in H.R. 7988 differs from the method of selection in this bill, the principles and ideologies surrounding the establishment of the Office of Attorney General remain the same.

The Hon. Benjamin Civiletti, Attorney General of the United States, provided the following testimony at the hearing on H.R. 7988: "I believe as a matter of principle that the responsibility for the local criminal justice system should rest not with Federal entities but with agencies of the District of Columbia. The transfer of the responsibilities covered by this bill is the next logical step in the process of establishing a unified criminal justice system for the District of Columbia, a process that began with the enactment of the D.C. Court Reform and Criminal Procedure Act of 1970 and continued with the 1973 passage of the D.C. Self Government and Governmental Reorganization Act. Creating a local prosecutor's office to handle violations of the District of Columbia Code is, in my view, an appropriate extension of home rule for the District. The transfer of that authority to a local [o]fficial should increase not only the actual responsiveness of the prosecutor to community concerns, but also the community's sense that its interests are being served by its principal law enforcement authority." (Hearing before the Subcommittee on Judiciary, Manpower and Education of the Committee on the District of Columbia House of Representatives; 96th Cong. 2d., September 23, 1980, Serial No. 96-21).

The District of Columbia Criminal Justice Reform Act proposed to transfer authority over local criminal law to the District of Columbia government. The Justice Reform Act had 3 principle objectives: (1) to transfer prosecutorial authority over local offenses to a newly created Office of the Attorney General for the District of Columbia; (2) to provide for the local appointment of judges of the District of Columbia Courts; and (3) to transfer custody of prisoners convicted of local offenses to the District government.

On September 12, 1983, the citizens of the District of Columbia petitioned Congress to be admitted to the Union as the 51st State. A constitutional convention had been called by an initiative vote on November 4, 1980. The new constitution was ratified by another vote of the citizens of the District on November 2, 1982. Article III (The Executive Branch) Sec. 2 (The Attorney General) states that "[T]here shall be an Attorney General appointed by the Governor, with the advice and consent of the House of Delegate, for a term of four years. The Attorney General shall be the chief legal office of the State and shall have responsibility for advising the Governor on legal questions, prosecute offenders, and representing the State in all legal matters."

Voting is essentially an expressive exercise. By voting, an individual shows something of themselves, displaying desires, beliefs, judgments, and perceptions. The voter gives voice to

his/her sentiments and views, concertizes them, and asserts them, though anonymously, through the marking of a candidate's name or the "yes" or "no" of a referendum. This may be a communicative effort, one that creates a link between the voter and someone else - for example, government officials, political parties, or the general public - and in the case of the establishment of an Attorney General for the District of Columbia- sending a message from the residents of the District to the members of Congress and the President.

PR 14-34 seeks to reinitiate the process - begun with the Home Rule Act and continuing with the proposed Criminal Justice Reform Act and the statehood effort - of transferring to the citizens of the District the responsibility over the local criminal justice system. The proposal outlined in the amendment in the nature of a substitute to PR 14-34 is an important element in the continuing struggle for increased local autonomy and democracy in the District of Columbia. The citizens of the District of Columbia, like all Americans in other jurisdictions, deserve to have a local criminal justice system, including the prosecutors in that system, which is directly responsible to the citizens or their elected officials. The desire to obtain locally this fundamental American right does not mean that the District has not been served by excellent U.S. Attorneys and their assistants whose efforts and successes are greatly appreciated. However, United States Attorneys and their assistants by virtue of their Federal appointment are structurally more inclined to prosecute Federal rather than local laws, and less inclined to be sensitive to local rather than Federal priorities and policies. The locally elected district attorney proposal is designed to address this structural inequity by providing the citizens of the District direct input into the operation of our local criminal justice system as well as local accountability for such operations.

### **Impact on Existing Law**

If a majority of the voters endorse the proposal for a locally elected district attorney in the advisory referendum that will be held during the November election pursuant to PR 14-34, the Committee will recommend Council enactment of legislation prior to the end of Council Period 14 which would request Congress to amend the Home Rule Act. Affirmative action by Congress to amend the Home Rule Act is necessary for this proposal to become effective.

The Office of District Attorney for the District of Columbia ("DA") to be established by this proposal would be headed by the District Attorney elected on a partisan basis by the registered qualified voters of the District. The term of office for the DA will be for 4 years and shall coincide with the term of the Mayor, except for the first District Attorney. Within 60 days of the effective day of this proposal, the Mayor, with the approval of the Council, shall appoint a District Attorney who shall serve until succeeded by an elected DA. The first election for DA would take place in 2006. The DA would be the chief legal officer for the District and would prosecute the local criminal laws of the District of Columbia, including violations committed by both adult and juvenile offenders, and perform any related functions as provided by local law in the District of Columbia. The District Attorney would also have the authority to perform civil enforcement and other legal functions as provided by local law in the District of Columbia. After the effective date of the Home Rule Act amendment that would effectuate this proposal, all functions and responsibilities of the District Attorney shall be provided by the local law of the District of



Columbia.

Prosecutions for violations of the laws of the District of Columbia shall be conducted in the name of the District of Columbia by the District Attorney except an information or indictment brought in the name of the United States in the United States District Court for the District of Columbia may include charges of violations of the laws of the District of Columbia if the District Attorney consents to the inclusion of such charges in writing and an indictment or information brought in the name of the District of Columbia in the Superior Court of the District of Columbia may, with the consent of the District, be joined for trial in the United States District Court for the District of Columbia with an indictment or information brought in that court if the charges in the indictments or informations could have been joined in the same indictment or information in such District Court before the effective date of this Act. Moreover, this proposal shall not affect the authority of the Attorney General of the United States or the United States Attorney for the District of Columbia to exercise jurisdiction concerning violations of the laws of the United States.

### **Section-by-Section Analysis**

Section 1 provides the short title.

Section 2(a) states that the Council seeks to request that Congress amend the District of Columbia Home Rule Act to establish a locally elected and independent Office of the District Attorney and hereby approves an advisory referendum in November 2002, which shall ask the voters whether such an office should be established.

Section 2(b) states that the expenditure of funds necessary to implement this resolution are subject to the availability of appropriations.

Section 3 states that the Council adopts the fiscal impact statement contained in this report.

Section 4 states the effective date.

### **Fiscal Impact**

The only cost associated with PR 14-34 is the cost associated with the publication of the measure in two local newspapers of general circulation. The cost, which would be based on the length of the measure, is estimated from a low of \$3,500 to a high of \$10,000 per publication. Because the length of the advisory referendum measure is short, the Committee believes that the estimated cost would be towards the low end of this spectrum. Although these funds are not specifically provided in the Board of Elections and Ethics FY 2003 budget, the Committee believes that the expenditure of these funds early in the fiscal year can be absorbed by the Board.

### **Position of the Executive Branch**

Deputy Mayor for Public Safety Margret Nedelkoff Kellems testified for the Executive Branch at the Committee's October 2001 public hearing on this proposal. Deputy Mayor Kellems stated that the Executive supports an appointed District Attorney as it would create a structure more conducive to coordination because prosecution policy and enforcement policy would fall under the same executive. The Executive agrees with the Council that accountability is the driving force in having either a locally appointed or locally elected District Attorney since either alternative would provide greater accountability to the citizens of the District of Columbia. Under the current arrangement, the Executive stated, the District of Columbia's chief prosecutor, the United States Attorney, must respond to the mandate of the Attorney General for the United States, whose priorities may or may not coincide with the specific needs of the District of Columbia.

The Executive recommends that the assumption of prosecutorial authority be considered within a broader discussion that also addresses the political and economic aspects of the District's flawed structural relationship with the federal government. The executive testimony emphasizes that the CFO estimates that this proposal would result in unbudgeted costs of \$55 million for FY 2002 and greater than \$230 million in the FY 2002 through 2005 financial plan. These estimates are based on the personnel and non-personnel costs of the United States Attorney's Office for the District of Columbia.

### **Committee Action**

On October 9, 2001, the Committee of the Whole, Judiciary and the Subcommittee on Labor, Voting Rights and Redistricting held a joint public hearing on PR 14-34. Attached is a copy of the testimony and written comments received by the Committee on PR 14-34.

On July 2, 2002, the Committee considered an amendment in the nature of a substitute to PR 14-34. Chairman Cropp moved approval of PR 14-34 and this Report, which were approved by voice votes (Chairman Cropp and Councilmembers Allen, Ambrose, Brazil, Catania, Chavous, Evans, Fenty, Graham, Mendelson, Patterson and Schwartz present; Councilmember Orange absent).

### **Attachments**

- (A) PR 14-34 as introduced
- (B) Public Hearing testimony
- (C) Committee Print of PR 14-34