COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY
COMMITTEE REPORT

1350 Pennsylvania Avenue, NW 20004

TO: All Councilmembers

FROM: Councilmember Phil Mendelson,
Chairman, Committee on Public Safety and the Judiciary

DATE: December 16, 2009

SUBJECT: Report on Bill 18-65, "Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2009"

The Committee on Public Safety and the Judiciary, to which Bill 18-65, the "Attorney General of the District of Columbia Clarification and Elected Term Amendment Act of 2009" was referred, reports favorably thereon with amendments, and recommends approval by the Council.

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I. BACKGROUND AND NEED

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. This latter task 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.

Bill 18-65, the Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2009, makes clear in the law what is axiomatic: that the responsibility of the Attorney General is to serve the citizens of the District. The legislation codifies the

institutional independence and makes modifications to strengthen the position of Attorney General through the establishment of minimum qualifications and a term of service.

A major substantive change to the Attorney General position under Bill 18-65, however, is in the selection process. While the Attorney General has a long established obligation to represent and defend the legal interests of the public, it is not the public but the Executive that appoints the individual to this position. Title II of this legislation, upon enactment by the United States Congress, would remedy this inequity by allowing for the direct election of the Attorney General by the citizens of the District. The clear trend throughout the United States is toward the election of the jurisdiction's chief legal officer. Permitting District residents to elect their Attorney General is not only in keeping with this trend, but would provide greater structural independence as well as elevate the position's importance.

This legislation was originally introduced in Council Period 17. The present Committee Print has been instructed by valuable testimony received during two hearings, including input from previous attorneys general, as well as extensive written comments and research. This includes the research compiled by DC Appleseed with the *pro bono* assistance of Latham and Watkins LLP and Ross Dixon & Bell, LLP (now Troutman Sanders LLP). A September 2008 DC Appleseed memorandum (attached to this report) provides a comprehensive review of issues that were raised during discussions of the predecessor bill, and has helped to shape the current Committee Print.

The Office of the Attorney General for the District of Columbia serves an essential role in the operation of government and in furthering the interests of justice for District residents. Bill 18-65 further enables the Office to fulfill these missions by strengthening the position of the Attorney General and clarifying the law to prevent undue influence on actions and decisions of this public position. The Committee believes this legislation will help improve the Office, allowing the individual in the position of Attorney General to proceed with confidence by making clear in the law that he or she is the lawyer *for* the District of Columbia and is thus to act as the public interest requires.

This legislation will not prevent the current Attorney General from continuing to serve in that role.

The Attorney General and the Public Interest

The development of the role of attorney general spans over seven hundred years of Anglo-American history.[1] Spanning from its inception in the 13th century as counselor to the King of England to its contemporary role in the United States as a counselor to state and representative of the public interest, the role of attorney general has evolved and expanded to

[1] NAT'L ASS'N OF ATTORNEYS GENERAL, STATE ATTORNEYS GENERAL: POWERS AND RESPONSIBILITIES 1 (Emily Myers & Lynne Ross, eds., 2007)(2d ed.) ("NAAG 2007").

include both broader powers and duties. Though born out of the English King's need to represent his interests, the role of attorney general has evolved from merely representation of a monarch to representation of an entire government and its citizenry. Over time, then, the attorney general "became less the 'King's lawyer' and more a public official responsible for justice."[2]

The historical development of the position of attorney general has been extensively explained in a publication of the National Association of Attorneys General (NAAG), an organization dedicated to facilitating the enhanced performances of attorneys general and their staffs.[3] In *State Attorneys General, Powers and Responsibilities*, the authors of this publication provide detailed information about the development of the attorney general from its inception, as mentioned above, through its introduction to the American colonies and its evolution to the position it is today.[4] This analysis reveals that the duties of the position were, at least initially and until sometime after it was transplanted to the colonies, poorly defined if defined at all. During the 16th and 17th centuries, however, the duties of the attorney general were expanding beyond representation of the Crown to include legal counselor to the Houses of Parliament. In addition, the attorney general's role during this period was expanding such that his representation was understood to encompass the public interest and not just the interests of the government under which he served.[5]

With a lack of statutory guidance governing the role of the position, early attorneys general in the United States "became possessed of the common law powers of the English Attorney General, except as changed by constitution or statute."[6] As outlined by NAAG, the common law with regard to the attorney general's power evolved from a view toward representing the interests of the Crown to one in which the "holder [of the office] is viewed, and views himself, as the great officer of state to whom the responsibility of safeguarding and representing the public interest is entrusted."[7] As noted by DC Appleseed, the "public interest" is a collective term that "does not connote an obligation to any one particular member of the public […and…] includes not only the majority on any particular issue, but also the minority, and the common interests they share in procedures that are fair to all."[8]

This common law authority is the basis for an attorney general's authority and responsibilities, a view that has been reiterated by the courts. The preeminent case in this regard

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[2] *Id.* at 4.
[3] The stated mission of NAAG is: "[t]o facilitate interaction among Attorneys General as peers and to facilitate the enhanced performance of Attorneys General and their staffs." NAAG Website, Information on the Association, *available at* http://www.naag.org/about_naag.php (last visited Dec. 12, 2009).
[4] *See generally* NAAG 2007, *supra* note 1, at 1-15.
[5] William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2449-2450 (2006).
[6] NAAG 2007, *supra* note 1, at 37 (quoting Cooley, *Predecessors of the Federal Attorney General: The Attorney General in England and the American Colonies*, 2 AM. J. LEGAL HIST. 307, 309 (1958)).
[7] *Id.* (quoting J. EDWARDS, THE LAW OFFICES OF THE CROWN, 295 (1964)).
[8] Memorandum of DC Appleseed to Councilmember Phil Mendelson, Re: Attorney General of the District of Columbia Clarification Act of 2007, 8 (Sept. 5, 2008) (attached to this report).

is *Shevin v. Exxon Corporation*.[9] In that case, the U.S. Court of Appeals for the Fifth Circuit considered whether the Attorney General for the State of Florida possessed the right, absent explicit authorization from the state's departments, agencies, and political subdivisions, to commence a major antitrust action against a number of oil companies. The court reversed a decision of the district court to dismiss the action, finding that the common law powers associated with the representation of the public interest had not been modified by specific constitutional or statutory provisions. In reviewing the authority of the Attorney General, the court noted that:

> [The attorney general's] duties and powers typically are not exhaustively defined by either constitution or statute but include all those exercised at common law. There is and has been no doubt that the legislature may deprive the attorney general of specific powers; but in the absence of such legislative action, he typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to the public interest.[10]

The court in *Shevin* buttressed this statement on common law powers by noting that the Florida Supreme Court held in an 1869 decision that the Attorney General's responsibility to the public interest is preserved since the "[l]egislature has not seen fit to make any change in the common law rule."[11] That decision, more than a century prior, notes the office is a "public trust" which requires the occupant to "act with strict impartiality […in…] matters of public concern."[12]

These common law powers, including the right to act on behalf of the public interest, indisputably flow with the position of attorney general absent specific constitutional or statutory guidance to the contrary. Indeed, as noted by NAAG, the *Shevin* decision epitomizes the majority rule that while "each jurisdiction varies in the extent to which the Attorney General's common law authority is recognized, cases affirming the Attorney General's use of those traditional powers are legion."[13]

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[9] 526 F.2d 266 (5th Cir. 1976).
[10] *Id.* at 268-269.
[11] State ex rel. Attorney General v. Gleason, 12 Fla. 90, 112 (1869), cited and quoted in *Shevin*, supra note 9, at 270 (emphasis removed from original).
[12] *Id.*
[13] NAAG 2007, *supra* note 1, at35. *See also, Id.* at note 12 (citing cases in a number of jurisdictions that uphold the Attorney General's common law powers); *Id.* at 40 (noting that in most jurisdictions it is settled law that the attorney general exercises broad common law powers); Wayne Witkowski, *Who is the Client of the Municipal Government Lawyer?*, 209 PRAC. L. INST. CRIM. 117, 130 ("every state has statutes that address the powers and duties of its attorney general; and in most states the attorney general retains so-called common law powers, including the right to initiate and intervene in suits on behalf of the people and the public interest."); and U.S. Chamber Institute for Legal Reform, State Attorney General Code of Conduct, at 3 ("As the chief legal officers of their states, AGs have an obligation to enforce and defend the laws of their states with integrity and fairness. AGs also serve as counselors to state agencies and legislatures and as representatives of the public interest."), *available at* http://www.instituteforlegalreform.com/images/stories/documents/pdf/AGCode.pdf (last visited Dec. 16, 2009). The NAAG summarizes this concept as follows:

> In sum, the common law, if not expressly limited by constitution, statute, or judicial decision, provides power crucial to the fulfillment of an Attorney General's responsibility. Courts have

The analysis provided by DC Appleseed supports the finding that the District's Attorney General maintains common law powers, including the position's duty to the public.[14] According to their research, the common law powers of the Attorney General for the District of Columbia stem from Maryland common law as the District is derived from land ceded by that jurisdiction in 1801. As such, the law in existence in Maryland -- including the common law -- at that time became the law of the District.[15] These common law powers, as DC Appleseed notes, have since been specifically modified for the Maryland Attorney General through the acts of the state's General Assembly.[16] However, no such deprivation of common law authority has been achieved through the District's Charter or through statute.

While "common law powers, once assumed, could be abrogated by statute… doing so would need to be explicit."[17] A careful review of the District's Charter, and relevant statutory provisions pertaining to the Attorney General's authority, clearly reveal that no such deprivation has been achieved or attempted. Instead, and as explained more fully below, the responsibilities of the Attorney General have consistently aimed toward the execution of the District's law business in furtherance of the public interest.

Powers and Responsibilities of the Attorney General

The NAAG defines the role of the attorneys general of the states and territories "as counselors to their legislatures and state agencies and also as the 'People's Lawyer' for all citizens."[18] In this role, an attorney general must have a unique mix of skills, not least of which is the ability to manage a large law office. An attorney general can be responsible for a broad range of legal matters such as advocacy in child enforcement proceedings, enforcement of environmental laws, and criminal prosecutions.

> expanded the role of the state Attorney General beyond representation of governmental entities to protection of the public's legal interest. As legislative and judicial recognition of the public interest has developed, the common law has stood, and will continue to stand, as a firm basis for refinement of the Attorney General' role as chief law officer of a sovereign state.

NAAG 2007, *supra* note 1, at 48. The U.S. Court of Appeals for the Fourth Circuit has specifically stated that the vast majority of state attorneys general, including the Attorney General for the District of Columbia, possesses "common law powers and duties in addition to those defined expressly by statutory or constitutional provision." Pennsylvania v. Mid-Atlantic Toyota Distributors, Inc., 704 F.2d 125, 129 n.7 (4th Cir. Md. 1983).

[14] Appleseed Memo, *supra* note 8, Appendix C at 3.

[15] *Id*. at notes 11 and 12 and accompanying text.

[16] *See Id.* at note 14 and accompanying text (discussing the historical background of the common law powers of the Maryland Attorney General as described in Murphy v. Yates, 276 Md. 475, 480-88 (Md. 1975)).

[17] *Id.* at 4 (citing *Shevin* at 268-9: "the legislature may deprive the attorney general of specific [common-law] powers … [,] in the absence of such legislative action he typically may exercise all such authority as the public interest requires.").

[18] NAAG Website, What does an Attorney General do?, *available at* http://www.naag.org/what_does_an_attorney_general_do.php (last visited Dec. 12, 2009).

The Office of the Attorney General for the District of Columbia (OAG), while similar to the attorneys general of the many states in that it houses the jurisdiction's chief legal officer,[19] is somewhat unique in terms of its structures and responsibilities. With a staff of over 700 individuals, including more than 300 attorneys that handle in excess of 20,000 cases per year, OAG is one of the largest Attorney General's offices in the nation.[20] The OAG also has a diverse range of legal responsibilities that reflect the District's unique nature of city, county, and state functions. As such, the OAG performs for the District all defensive civil litigation, handles appeals of civil and criminal judgments, engages in consumer protection matters, is responsible for child support enforcement, provides transactional assistance for the city, and even reviews legislative and regulatory proposals.[21] While the U.S. Attorney for the District of Columbia is responsible for the prosecution of felonies in the District, the OAG also prosecutes certain violations of criminal law. Perhaps further complicating the difficult task of the OAG is the existence of over 300 separate D.C. Code provisions that address OAGs duties.

The Attorney General for the District of Columbia has, by statute, "charge and conduct of all law business" of the District.[22] This authority closely mirrors the authority granted to the many states' attorneys general in that the position is responsible for overseeing the implementation of the laws. According to former Attorney General for the District of Columbia Robert Spagnoletti, there are three major components to this position:

1. Manager of a very large government office;
2. Chief lawyer for the District of Columbia; and
3. A key player in the political process between the executive and legislative branches.[23]

While appointed by the Mayor, the Attorney General for the District of Columbia has responsibilities far broader than those of similarly appointed positions within the District government. Unlike other cabinet level positions, "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."[24] This important task, then, requires that the Attorney General operate with independence to fulfill his or her obligation to the public interest.

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[19] While under the current statute the Office is referred to as the Corporation Counsel, the name was changed in 2004 by then Mayor Anthony Williams to the Office of the Attorney General to more accurately reflect its state-like role and responsibilities. Robert Spagnoletti, Corporation Counsel at the time, became the first to serve as Attorney General for the District of Columbia. *Bill 17-548, Attorney General of the District of Columbia Clarification Act of 2007: Hearing before the DC Council Committee on Public Safety and the Judiciary*, Jan. 28, 2008, at 2 (written testimony of Robert Spagnoletti, Partner, Schertler & Onorato, LLP, and former Attorney General for the District of Columbia).
[20] 2005 OAG annual report, at 4, *available* at http://oag.dc.gov/occ/frames.asp?doc=/occ/lib/occ/news/annual_report.pdf (last visited Dec. 12, 2009).
[21] *Id.*
[22] D.C. OFFICIAL CODE § 1-301.111 (2006 Repl.).
[23] Spagnoletti, *supra* note 19, at 4.
[24] *Id.* at 3.

This independence, established in common law and retained under the current statutory scheme for OAG, requires a degree of autonomy from other branches of government. For example, the Attorney General, though currently appointed by the Mayor, is still duty bound to oversee the implementation of a law enacted through an override of a mayoral veto.[25] Residents of the District must have confidence that the office "conducts their legal business without fear or favor, respecting the law and not pursuing the political agenda of anyone in either the executive or legislative branches of government."[26] The ability to practice such autonomy leads to legal opinions that are thus respected as objective by the District government and its citizens.

As an appointee of the Mayor, the Attorney General is a part of the executive branch. This creates tension with regard to the duty of chief legal officer. Indeed, disputes arise even for elected attorneys general where the governor may view the position as subservient in the executive branch of government. However, while most attorneys general "acknowledge "some obligation to represent the [executive] and other parts of the state government, [they] tend to perceive their overriding obligation to be to the broader concerns of representing the state, the law, and the public interest."[27] Greater conflict in this vein has been avoided in the District largely because of a cooperative relationship between the Executive and the Attorney General within the executive branch of government. For example, Mr. Spagnoletti testified before the Committee that during his tenure as Attorney General then Mayor Anthony Williams appreciated the need for independence in that Office, even refraining from attempts to influence prosecution of those close to the Mayor or his staff.[28] This sentiment was echoed by other former Attorneys General who were interviewed by DC Appleseed while researching issues pertaining to this legislation.[29]

Within the executive branch, the Attorney General may operate in some respects under the general direction of the Mayor.[30] For example, the Attorney General might incorporate the Mayor's policy goals in order to benefit the public good. However, the ability to operate with the degree of independence described above is essential to the Attorney General faithfully executing the obligations of the Office. It is axiomatic that the Attorney General must be able, and, in fact, is required, to say 'no' to the Executive when the law or ethics so require. The ability of the chief law enforcement officer to make decisions in a continuum that is not dependent upon political pressure assures the optimum benefit for District residents.

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[25] *See Bill 17-548, Attorney General of the District of Columbia Clarification Act of 2007: Hearing before the DC Council Committee on Public Safety and the Judiciary*, Jan. 28, 2008, at 2 (written testimony of Kathy Patterson , former Councilmember of the Council of the District of Columbia and former Chairperson of the Committee on the Judiciary).
[26] *Id.* at 2.
[27] Marshall, *supra* note 5, at 2453.
[28] Spagnoletti, *supra* note 19, at 4.
[29] *See generally* Appleseed memo, *supra* note 8, Appendix A.
[30] For a full discussion of how the Mayor provides general direction to the Attorney General, *see* Appleseed memo at 11-12, and Appendix C.

Other Provisions in Bill 18-65

In addition to reinforcing the independence of the Attorney General, Bill 18-65 also strengthens the position by effectuating certain qualifications and aspirations that should translate into greater stability for the office holder. The importance of stability cannot be overstated since the position of Attorney General, though filled historically with talented and well regarded attorneys, has the highest turnover rate of any such office in the country.[31] The average tenure of the District's Attorney General is only about 18 months.[32] According to interviews of previous incumbents performed by DC Appleseed, the reasons for such a short tenure are likely varied, but include a lack of sufficient stature for the Office within government as well as issues in the working relationship with the Executive.[33]

To remedy this, Bill 18-65 establishes a term of office and requires that the Attorney General meet a number of qualifications. Only three jurisdictions in the United States, in addition to the District of Columbia, do not set minimum qualifications for the attorney general.[34] Section 103 of the Committee Print requires that the Attorney General be a member in good standing of the District of Columbia Bar for a minimum period of time, have engaged in the practice of law for a specified period of time, and be a bona fide resident of the District. As a unique city with a complicated legal system, this requirement ensures experience, connection, and commitment to the District. Failure to maintain the minimum qualifications as provided in the bill will result in an automatic forfeiture of the position.

Bill 18-65 also puts in place a fixed-term of four years to coincide with the Mayor's tenure in office. Instituting a term should both increase the independence of the Attorney General and promote greater stability in the Office. Setting the term at four years creates an expectation as to the length of service that is expected of the Attorney General. This specification of term is intended to inspire aspiration, and not be a limitation on the ability of the Attorney General to serve. The four-year term in this legislation does not impact the removal authority or create a tenure for the office. Individuals serving as Attorney General may be re-nominated at the expiration of a term.

Bill 18-65 also includes a provision allowing the Attorney General to have a special counsel appointed in cases where he or she determines that a conflict of interest exists. Section 109 of the Committee Print permits the Attorney General to notify the Mayor that "his or her duty to represent the public interest in a particular matter may prevent him or her from adequately representing the government, an agency, or an official." The Mayor is then able to

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[31] *See Bill 17-548, Attorney General of the District of Columbia Clarification Act of 2007: Hearing before the DC Council Committee on Public Safety and the Judiciary*, Jan. 28, 2008, at 2 (oral testimony of James Tierney, Director, National State Attorneys General Program, Columbia Law School, and Former Attorney General of Maine).
[32] Appleseed memo, *supra* note 8, at 11.
[33] *Id. See also Id.* at Appendix A (summarizing interviews with current and former Attorneys General).
[34] *Id.* at 13 (citing COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES, Keon Chi, ed. (2007); and NAAG 2007, *supra* note 1, at 20-23).

appoint a special counsel in the matter, unless the Mayor is expected to be adverse to the special council in which case the Chief Judge of the District of Columbia Court of Appeals is given appointment authorization. The inclusion of this provision is in recognition of the dual roles of the Attorney General -- serving both the District government and its citizens -- as well as the need to place the public interest paramount.

These provisions serve to elevate the role of Attorney General within the government by providing greater strength and credibility to the position. These provisions also provide greater stability to the Office to the benefit of both the District government and its citizens.

Justification for Electing the Attorney General

Bill 18-65 contemplates a much broader policy change in proposing that the position of Attorney General be subject to election by District voters. Under the current system, the Mayor appoints the Attorney General subject to the advice and consent of the Council. Creating an elected Attorney General position will foster the necessary independence of this Office, strengthen its stature within the government, and benefit the District by making the Attorney General directly accountable to voters.

Among attorneys general nationwide, the trend is clearly toward the election of this position by the electorate. While early in the nation's development the attorney general was generally selected by either the legislative or executive branch of government,[35] today the attorney general is popularly elected in 43 states, appointed by the governor in five, and otherwise selected in two others.[36] It is not surprising, then, that proposals to make the Attorney General an elected position have been suggested in the past.[37]

In March of 1998, for example, PR 12-671, the "Sense of the Council Regarding the Establishment of an Officer of the Attorney General of the District of Columbia Resolution of 1998," was introduced in the Council. The resolution urged congressional action to create an

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[35] NAAG 2007, *supra* note 1, at 18.

[36] NAAG website, How does one become an Attorney General?, *available at* http://www.naag.org/how_does_one_become_an_attorney_general.php (last visited Dec. 12, 2009). The attorney general is appointed by the governor in Alaska, Hawaii, New Hampshire, New Jersey and Wyoming (as well as in American Samoa, Guam, the Northern Mariana Islands, Puerto Rico and the Virgin Islands). The state legislature selects the Attorney General of Maine by a secret ballot. In Tennessee, the state Supreme Court selects the Attorney General. *Id.*

[37] In addition to proposals made in the Council to create a local chief legal officer, efforts have also been made in Congress to encompass the local prosecutorial duties currently with the U.S. Attorneys Office for the District of Columbia in a local position. For example, the District of Columbia Criminal Justice Reform Act was introduced in 1980 in the House of Representatives in order to create an Office of the Attorney General and "transfer prosecutorial authority for local offenses" to that office in order to remedy the inequity of having a federal office prosecute what are purely local criminal cases. H.R. 7988, 96th Cong. (1980). Likewise, the District of Columbia District Attorney Establishment Act of 2007, sought to create a locally elected and independent district attorney to carry out all of the District's criminal and civil legal proceeding. H.R. 1296 110th Cong. (2008).

Office of the Attorney General and make the head of that Office an elected position so that the District would have a more responsive and accountable local prosecutorial authority. This proposed resolution was re-introduced, largely identical to the previous version, in Council Period 13.[38] Bill 13-243, the "Corporation Counsel Qualification Amendment Act of 1999," was another legislative initiative to address the chief legal officer for the District. This legislation would have set qualifications in the law, such as membership in good standing in the District of Columbia Bar and a specific level of legal experience, for the Corporation Counsel (now the Attorney General).

During Council Period 14, a modified version of previously proposed resolutions was introduced by all 13 members of the Council.[39] At the July 2, 2002 Legislative Meeting, the Council voted 12 to 0 (with one member absent) in favor of the proposed resolution. The resolution adopted by the Council called 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 Act amendment providing for a locally elected district attorney. The locally elected district attorney would perform the current local functions of the United States Attorney for the District of Columbia. The referendum was overwhelmingly supported by District voters (82.21 percent in favor, 17.79 percent opposed).[40] At roughly the same time, the Council adopted Bill 14-600, the "Establishment of an Office of the Attorney General for the District of Columbia Charter Amendment Act of 2002." This legislation would have amended the Home Rule Act to establish an elected Office of the District Attorney responsible for performing the local prosecutorial functions exercised by the U.S. Attorneys Office. While adopted unanimously by the Council, Congress declined to take action.

These previous efforts show the long and continued sentiment for making the District's chief legal officer an elected position. The provision in Bill 18-65 that seeks to accomplish this objective has been placed in Title II of the Committee Print because the implementation of such a provision requires the affirmative action of the United States Congress. The District's Home Rule Act currently lists the specific positions subject to election -- specifically: the Mayor and the members of the Council.[41] Including the position of Attorney General among those that are elected by voters requires an Act of Congress. Congress should recognize that making this Charter change is making the position of Attorney General the strong, independent office that the District requires and deserves.

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[38] PR 13-29, Sense of the Council Regarding the Establishment of an Office of the Attorney General of the District of Columbia Resolution of 1999 (introduced on Jan. 5, 1999).

[39] PR 14-34, Sense of the Council Regarding the Establishment of an Office of the Attorney General for the District of Columbia Resolution of 2001 (introduced on Jan. 23, 2001)

[40] *See* BOEE Certification Election Results for the November 5, 2002 General Election, Initiative Measure #62 and Advisory Referendum A, *available at* http://www.dcboee.org/election_info/election_results/elec_2002/htmldocs/initiative.shtm (last visited Dec. 14, 2009) (the percentages equate to 89,868 votes in favor of the referendum, and 19,467 votes opposed).

[41] D.C. OFFICIAL CODE §§ 1-204.01 and 1-204.21 (2006 Repl.).

Conclusion

Bill 18-65, the Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2009, codifies the institutional independence and makes modifications to strengthen the position of Attorney General including the requirement that the Attorney General be popularly elected by the citizens of the District of Columbia. The District government should, on behalf of the citizens, ensure that the position of Attorney General places the public interest and the pursuit of justice paramount.

II. LEGISLATIVE CHRONOLOGY

December 18, 2007	Bill 17-548, the "Attorney General of the District of Columbia Clarification Act of 2008," is introduced by Councilmember Mendelson, co-sponsored by Councilmembers Brown and Catania, and is referred to the Committee on Public Safety and the Judiciary.
January 4, 2008	Notice of Intent to act on Bill 17-548 is published in the *D.C. Register.*
January 18, 2008	Notice of Public Hearing is published in the *D.C. Register.*
January 28, 2008	The Committee on Public Safety and the Judiciary holds a public hearing on Bill 17-548.
January 6, 2009	Bill 18-65, the "Attorney General of the District of Columbia Clarification Act of 2009," is introduced by Councilmember Mendelson, co-sponsored by Councilmembers M. Brown, K. Brown, and Catania, and is referred to the Committee on Public Safety and the Judiciary.
January 16, 2009	Notice of Intent to act on Bill 18-65 is published in the *D.C. Register.*
May 22, 2009	Notice of Public Hearing is published in the *D.C. Register.*
July 10, 2009	The Committee on Public Safety and the Judiciary holds a public hearing on Bill 18-65.
December 16, 2009	The Committee on Public Safety and the Judiciary marks-up Bill 18-65.

III. POSITION OF THE EXECUTIVE

At the hearing on January 28, 2008, Peter Nickles, then interim Attorney General for the District of Columbia, appeared to state his conclusion that the Council lacked the legal authority to adopt Bill 17-548, the Attorney General of the District of Columbia Clarification Act of 2008,

as introduced because vesting removal authority in the Council would violate the separation-of-powers under the District's Charter.

At the July 10, 2009 hearing on Bill 18-65 the Executive Office of the Mayor provided no witnesses to testify on the legislation. Attorney General Nickles submitted a written statement reiterating his opinion regarding the Council's legal authority but expressing support for making the Attorney General an elected office.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The Committee received no testimony or comments from Advisory Neighborhood Commissions regarding Bill 18-65.

V. SUMMARY OF TESTIMONY

The Committee on Public Safety and the Judiciary held two hearings on legislation to strengthen the position of Attorney General for the District of Columbia and to codify the independence innate in that role. On Monday January 28, 2008, the Committee held a public hearing on Bill 17-548 (the predecessor bill to Bill 18-65). The Committee held a public hearing on Bill 18-65 on Friday, July 10, 2009. The testimony summarized below is from both hearings. A copy of this testimony is attached to this report.

Public Hearing on Bill 17-548 -- January 28, 2008

Robert Spagnoletti, Partner, Schertler & Onorato, LLP, and former Attorney General for the District of Columbia, testified in support of setting minimum qualifications, a fixed term, and for requiring that specific cause be shown for removal of the Attorney General. In discussing the independence of the position, Mr. Spagnoletti stressed that the client of the Attorney General is the District of Columbia, and it is the interests of the District as a whole which must be paramount.

Kathy Patterson, former Councilmember of the Council of the District of Columbia and former Chairperson of the Committee on the Judiciary, testified in general support of the measure. She stated support for efforts to improve and strengthen the performance of the office, and urged the Committee to consider filling the position by citywide election.

James E. Tierney, Director, National State Attorneys General Program, Columbia Law School, and Former Attorney General of Maine¸ testified that he does not take a position on the details of the legislation other than to say that the District should join the rest of the United States in ensuring that the Attorney General has a level of independence from the Executive. His testimony was detailed, expert, but not written.

George R. Clark, President, Federation of Civic Associations, Inc., testified regarding concern about conflicts of interest in the Office of the Attorney General. He urged the Council to take action to ensure that the District's chief law enforcement officer is acting in the best interests of all citizens.

Peter Nickles, Interim District of Columbia Attorney General, testified that he believes the Council lacks the legal authority to pass the legislation as introduced because vesting removal authority in the Council would violate the separation-of-powers under the District's Charter. Further, that the legislation would cause a number of very serious policy and practical problems or change the law in a way that is not necessary or appropriate.

Public Hearing on Bill 18-65 -- July 10, 2009

J. Michael Hannon, Hannon Law Group, LLP, testified in opposition to the current system providing for mayoral appointment of the Attorney General. He argued for greater accountability for the Attorney General, and urged the Council to continue studying ways to improve the Attorney General's independence.

John Rosser, Vice Chairman, FOP DC Corrections Union, testified in support of Bill 18-65. Mr. Rosser discussed the importance of accountability, arguing that making this an elected position would ensure that the Attorney General answers to the electorate and not the individual who appoints him or her.

Al Bilik, Executive Assistant to the Director, Council 20 AFSCME, testified on behalf of Council 20 in support of Bill 18-65. Mr. Bilik argued that the legislation would provide a significant, and much needed, measure of independence from the Executive by allowing a direct election of the Attorney General by voters.

Walter Smith, Executive Director of DC Appleseed Center for Law and Justice, testified that DC Appleseed supports what the organization understands to be the three goals of the legislation: (1) set reasonable qualifications for the Attorney General, (2) strengthen the independence of the Attorney General, and (3) initiate steps toward making the Attorney General an elected position. Mr. Smith appeared at the hearing accompanied by Merril Hirsh, Partner, Troutman Sanders LLP; Whitney Lindahl, Associate, Troutman Sanders LLP; and Sean Krispinsky, Associate, Latham & Watkins, LLP. Both firms provided extensive *pro bono* assistance in conducting a comprehensive review, in association with DC Appleseed, of issues surrounding this legislation.[42]

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[42] *See* Appleseed memo, *supra* note 8.

VI. IMPACT ON EXISTING LAW

Bill 18-65 creates a comprehensive statute on the role, duties, and responsibilities of the Attorney General for the District of Columbia. The legislation repeals D.C. Official Code §§ 1-301.111 through 1-301.113 in order to incorporate these provisions, with some modification, into an organized group of laws pertaining to the chief legal officer. The freestanding provisions inserted by Bill 18-65 codify the independence of this office, establish a term of office, and establish qualifications and requirements for individuals in the position of Attorney General. The legislation also inserts provisions to address the inability of the Attorney General to carry on in that role, providing the ability to temporarily relinquish the role to the Chief Deputy Attorney General if he or she is unable to carry out the duties or appoint a special counsel in the event of a conflict. The legislation also provides for the automatic forfeiture of the position of Attorney General for failure to meet the requirements of the Act.

Bill 18-65 would also, upon enactment by Congress, amend the District of Columbia Home Rule Act (87 Stat. 777; D.C. Official Code § 1-204.01) by inserting a new section that will make the position of Attorney General elected on a non-partisan basis.

The legislation will not prevent the current Attorney General from continuing to serve in that role.

VII. FISCAL IMPACT

The attached December 16, 2009 Fiscal Impact Statement from the Chief Financial Officer states that funds are sufficient to implement Bill 18-65. This legislation requires no additional funds or staff. The Chief Financial Officer notes that adding the Attorney General for the District of Columbia to the ballot in a general election will not pose any significant cost to the D.C. Board of Election and Ethics, and that other costs associated with the election of this position can be absorbed using existing resources.

VIII. SECTION-BY-SECTION ANALYSIS

TITLE I -- Attorney General for the District of Columbia

PART A

Section 101 provides for the duties of the Attorney General for the District of Columbia. Subsection (a) of this section modifies the language currently within D.C. Official Code § 1-301.111 to clarify the Attorney General's independence and role in representing the public interest. Subsection (b) makes clear that the common law powers of the Attorney General are not abrogated by this Act. As revised, the language adequately describes the duties of the Attorney General.

Section 102 provides for appointment of the Attorney General by the Mayor, with the advice and consent of the Council, until such time as the position is filled through an election. Subsection (b) of this section also provides for a four-year term for the Attorney General to coincide with the term of office for the Mayor. Given the historically high turnover in the position of Attorney General, the institution of a term is intended to provide an expectation that the individual will remain in Office for that period, not limit their length of service. While an appointed position, an individual may be reappointed with the advice and consent of the Council for additional terms.

Section 103 sets minimum qualifications and requirements for the position of Attorney General, including requiring membership in the District of Columbia Bar for a minimum period as well as that the Attorney General live in the District after taking office. Subsection (b) requires that the Attorney General devote full time to the position, and not engage in the private practice of law while serving in that role.

Section 104 provides for the automatic forfeiture of the position of Attorney General for failure to maintain the qualifications required by section 103(a) of this Act, for violation of the prohibition against the private practice of law in section 103(b) of this Act, or for conviction of a felony while in Office.

Section 105 codifies the salary of the Attorney General. The salaries of other independent positions, such as the Chief Financial Officer, are similarly codified.

Section 106 codifies the budget process for the Office of the Attorney General. The budget processes of independent agencies, such as the Office of the Inspector General, are similarly codified.

Section 107 requires the Attorney General to appoint a Chief Deputy Attorney General who shall meet the requirements under 103 of this Act. The provision also makes clear that the Chief Deputy Attorney General, Deputy Attorneys General, and Assistant Attorneys General all serve under the direction and control of the Attorney General.

Section 108 consistent with D.C. Official Code § 1-301.113, this provision permits the Attorney General, Chief Deputy Attorney General, Deputy Attorneys General, and Assistant Attorneys General to administer oaths.

Section 109 permits the Attorney General to appoint a special counsel where the Attorney General determines that his or her duty to represent the public interest in a particular matter may prevent him or her from providing adequate representation.

PART B

Section 110 inserts provisions pertaining to the inability of the Attorney General to carry out his or her duties. The provisions in this part apply following the election of the Attorney General pursuant to Title II of this Act.

Subsection (a) allows the Attorney General to appoint the Chief Deputy Attorney General as the acting Attorney General if he or she is temporarily unable or unavailable to carry out the duties of the Office.

Subsection (b) addresses the event of a vacancy in the position of Attorney General, allowing for the appointment by the Mayor by and with the consent of the Council for the remainder of the term.

Section 111 states that the provisions in this part are not applicable until the Attorney General is elected to the position pursuant to Title II of this Act.

PART C

Section 112 makes conforming amendments.

TITLE II -- Election of Attorney General

Section 201 amends the District of Columbia Home Rule Act to make the position of Attorney General for the District of Columbia an elected position. While elected on a non-partisan basis, nothing in this Act prevents an individual candidate from belonging to a political party. The election of the Attorney General is not intended to abrogate any of the common law powers that currently exist for the Attorney General.

Section 202 states that the provisions in this title are to apply upon enactment by the United States Congress.

TITLE III -- Fiscal Impact; Effective Date

Section 301 adopts the Fiscal Impact Statement.

Section 302 establishes the effective date by stating the standard 30-day Congressional review language.

IX. COMMIITTEE ACTION

On December 16, 2009, the Committee on Public Safety and the Judiciary met to consider Bill 18-65, the Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2009. The meeting was called to order at 2:45 p.m., and Bill 18-65 was the first item on the agenda. After ascertaining a quorum (Chairman Mendelson and Councilmembers Alexander, Bowser, Cheh, and Evans present), Chairman Mendelson moved an amendment to the print removing a provision that all opinions issued by the Attorney General are available for public inspection. The amendment was accepted. Chairman Mendelson then moved the print, as amended, with leave for staff to make technical changes. During an opportunity for discussion, Councilmember Evans stated his opposition to the bill, citing concern that subjecting the Attorney General to election would politicize the position. Councilmember Bowser inquired about the process of creating an elected position. Chairman Mendelson explained that this required congressional action. Councilmember Alexander asked regarding the qualifications for the position, and Chairman Mendelson explained the qualifications being proposed in the Committee Print. Councilmember Cheh then responded to earlier comments about the appointment of the Attorney General, stating that the nature of appointment does not correlate with the quality of the lawyer or the independence. The vote on the print was four to one (Chairman Mendelson and Councilmembers Alexander, Bowser, and Cheh voting aye; Councilmember Evans voting nay). Chairman Mendelson then moved the report with leave for staff to make technical and editorial changes. After an opportunity for discussion the vote on the report was four to one (Chairman Mendelson and Councilmembers Alexander, Bowser, and Cheh voting aye; Councilmember Evans voting nay). The meeting adjourned at 3:36 p.m.

X. ATTACHMENTS

1. Bill 18-65 as introduced.

2. Written testimony and comments.

3. Fiscal Impact Statement

4. Committee Print for Bill 18-65.