D.C. HOME RULE: EXAMINING THE INTENT OF CONGRESS IN THE DISTRICT OF COLUMBIA HOME RULE ACT OF 1973

HEARING

BEFORE THE

SUBCOMMITTEE ON
GOVERNMENT OPERATIONS

OF THE

COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

SECOND SESSION

MAY 12, 2016

Serial No. 114–112

Printed for the use of the Committee on Oversight and Government Reform

Available via the World Wide Web: http://www.fdsys.gov
http://www.house.gov/reform

U.S. GOVERNMENT PUBLISHING OFFICE

23–481 PDF WASHINGTON : 2017

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

JASON CHAFFETZ, Utah, *Chairman*

JOHN L. MICA, Florida
MICHAEL R. TURNER, Ohio
JOHN J. DUNCAN, JR., Tennessee
JIM JORDAN, Ohio
TIM WALBERG, Michigan
JUSTIN AMASH, Michigan
PAUL A. GOSAR, Arizona
SCOTT DESJARLAIS, Tennessee
TREY GOWDY, South Carolina
BLAKE FARENTHOLD, Texas
CYNTHIA M. LUMMIS, Wyoming
THOMAS MASSIE, Kentucky
MARK MEADOWS, North Carolina
RON DESANTIS, Florida
MICK MULVANEY, South Carolina
KEN BUCK, Colorado
MARK WALKER, North Carolina
ROD BLUM, Iowa
JODY B. HICE, Georgia
STEVE RUSSELL, Oklahoma
EARL L. "BUDDY" CARTER, Georgia
GLENN GROTHMAN, Wisconsin
WILL HURD, Texas
GARY J. PALMER, Alabama

ELIJAH E. CUMMINGS, Maryland, *Ranking Minority Member*
CAROLYN B. MALONEY, New York
ELEANOR HOLMES NORTON, District of Columbia
WM. LACY CLAY, Missouri
STEPHEN F. LYNCH, Massachusetts
JIM COOPER, Tennessee
GERALD E. CONNOLLY, Virginia
MATT CARTWRIGHT, Pennsylvania
TAMMY DUCKWORTH, Illinois
ROBIN L. KELLY, Illinois
BRENDA L. LAWRENCE, Michigan
TED LIEU, California
BONNIE WATSON COLEMAN, New Jersey
STACEY E. PLASKETT, Virgin Islands
MARK DeSAULNIER, California
BRENDAN F. BOYLE, Pennsylvania
PETER WELCH, Vermont
MICHELLE LUJAN GRISHAM, New Mexico

JENNIFER HEMINGWAY, *Staff Director*
DAVID RAPALLO, *Minority Staff Director*
PATRICK HARTOBEY, *Counsel*
WILLIE MARX, *Clerk*

SUBCOMMITTEE ON GOVERNMENT OPERATIONS

MARK MEADOWS, North Carolina, *Chairman*

JIM JORDAN, Ohio
TIM WALBERG, Michigan, *Vice Chair*
TREY GOWDY, South Carolina
THOMAS MASSIE, Kentucky
MICK MULVANEY, South Carolina
KEN BUCK, Colorado
EARL L. "BUDDY" CARTER, Georgia
GLENN GROTHMAN, Wisconsin

GERALD E. CONNOLLY, Virginia, Ranking Minority Member
CAROLYN B. MALONEY, New York
ELEANOR HOLMES NORTON, District of Columbia
WM. LACY CLAY, Missouri
STACEY E. PLASKETT, Virgin Islands
STEPHEN F. LYNCH, Massachusetts

CONTENTS

D.C. HOME RULE: EXAMINING THE INTENT OF CONGRESS IN THE DISTRICT OF COLUMBIA HOME RULE ACT OF 1973

Thursday, May 12, 2016

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT OPERATIONS,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, D.C.

The subcommittee met, pursuant to call, at 2:05 p.m., in Room 2154, Rayburn House Office Building, Hon. Mark Meadows [chairman of the subcommittee] presiding.

Present: Representatives Meadows, Jordan, Walberg, Buck, Grothman, Connolly, Norton, and Clay.

Mr. MEADOWS. The Subcommittee on Government Operations will come to order. And, without objection, the chair is authorized to declare a recess at any time.

It is the chairman's responsibility under the Rules of the House to maintain order and preserve decorum in the committee room. Members of the audience are reminded that disruption of congressional business is a violation of the law. We certainly welcome your presence and we would just caution you against any disruption.

Good afternoon and welcome. Today's hearing will shine a light on what Congress intended when it passed the Home Rule Act in 1973. We are not here to discuss the soundness of the District having budget authority as a policy matter. Our goal today is to determine whether the Local Budget Autonomy Act was consistent with the Home Rule Act enacted by Congress.

In addition, today's hearing will seek to identify the potential ramifications that we may face by the District of Columbia and local D.C. Government employees in the event the Local Budget Autonomy Act is enforced.

And at the outset of our country, the Founding Fathers saw fit to vest in Congress a constitutional right to maintain supreme legislative authority over the District. So important was this authority to James Madison that he even took time to expand upon the necessity of the Federal Government having an independent seat in The Federalist No. 43.

It was a result of this indispensable necessity, as Madison described it, for an independent seat of government that the District of Columbia was created, and in 1973 Congress undertook the process of delegating to the District a limited home rule for the first time in roughly 100 years. And it did so, undoubtedly, with the need to maintain its constitutionally vested authority in mind.

The voluminous Congressional Record associated with the Home Rule Act serves to demonstrate the need to balance popular sovereignty for the people of the District against the essential requirement that Congress maintain its supreme legislative authority.

Reviewing the record shows that numerous debates, hearings, and discussions were had over many of the provisions in the final Home Rule Act. In fact, the debates and editing continued all the way through to the House floor, where very important clarifying changes were made that were incorporated in the final version of the act.

During the floor debate a number of edits were made which, in the words of one of the principal architects of the Home Rule Act, Chairman Charles Coles Diggs, Jr., clarified the intent of the act. I ask unanimous consent that the Chairman Charles Coles Diggs, Jr.'s "Dear Colleague" letter, dated October the 9th, 1973, be put into the record. And without objection, so ordered.

Mr. MEADOWS. Among these edits was the express retention of the appropriations power of the Congress and the role of the Federal Government as a whole in the budgetary process as it relates to the District.

The intent to retain the role of the Federal Government in the budgetary process went unquestioned for nearly 40 years. In 2012, however, the District unilaterally claimed that this was not the congressional intent of the Home Rule Act and passed a Local Budget Autonomy Act. The Local Budget Autonomy Act was voted on by less than 10 percent of the eligible voters in the District of Columbia.

This act is currently involved in litigation at the Federal level regarding its legal status and was previously the subject of extended litigation in both the Federal and State courts with the House Bipartisan Legal Advisory Group having supported the plaintiff challenging the act's legality. As such, its status remains in legal limbo until the courts issue a final and definitive ruling.

The Local Budget Autonomy Act is not settled law, as some have asserted. Further, the GAO, or the Government Accountability Office, issued an opinion in January of 2014 stating that they believe the enforcement of this act would constitute a violation of the Antideficiency Act.

As a result, should the District attempt to enforce this act, D.C. employees could face repercussions, including those which stem from the Antideficiency Act violations. These employees could then be subjected to potential administrative penalties and could even be subject to criminal liabilities for violating the act.

Former D.C. Mayor Vincent Gray expressed these concerns of subjecting District employees to the possible administrative and criminal punishments for enforcing the Local Budget Autonomy Act in his April 11, 2014, letter to the Council of the District of Columbia stating that he would not implement the Local Budget Autonomy Act. So I ask for unanimous consent to enter this letter into the record. Hearing no objection, so ordered.

Mr. MEADOWS. I'd like to thank all of the witnesses for agreeing to testify before the committee today. We are fortunate to have attorneys who participated in litigating this issue, the chairman of the Council of the District of Columbia, and a member of GAO's

General Counsel's Office, also members of the congressional staff who were involved in the drafting of the Home Rule Act at the time of its passage.

I look forward to hearing from each of you on this very important issue.

I now recognize my good friend, Mr. Connolly, the ranking member of the Subcommittee on Government Operations, for his opening statement.

Mr. CONNOLLY. Thank you, Mr. Chairman. Thank you for holding this hearing. I also want to welcome my friend and former colleague, Phil Mendelson, who is chairman of the Washington, D.C., City Council.

I approach the subject of home rule as a former local government official, having served in neighboring Fairfax County for 14 years on the governing body, 5 years as chairman, of the largest jurisdiction in metropolitan Washington. I know what it takes to produce a budget every year. I know the difficulty of making revenue and expenditure estimates under the best of circumstances. I cannot imagine how a local government, my local government, would function efficiently or effectively if each budgetary decision required congressional approval.

I have consistently supported autonomy for the District and would argue that Congress' actions have actually had a deleterious effect on the District, its management, and its residents. I hope the irony of this situation is not lost on anyone watching who support the conservative principles of limited government and states' rights ostensibly. I don't mean my friend the chairman. I guess the District of Columbia is an ideological carveout.

How is it that a legislative body that struggles to pass its own annual budget and routinely misses appropriations deadlines would nonetheless insist on exercising overall authority and oversight over somebody else's?

D.C.'s lack of budget autonomy affects the entire national capital region, especially the thousands of my constituents who are civil servants and work every day here in the District of Columbia. Former Virginia Governor Bob McDonnell, a Republican, supported budget autonomy because of the negative consequences for both Virginia and Maryland if D.C.'s fiscal situation is left uncertain, particularly during a Federal Government shutdown like the one we endured several years ago.

Without budget autonomy, if the Federal Government shuts down, the D.C. government shuts down too, absent a specific exemption from Congress. That means all nonessential D.C. municipal services cease, potentially paralyzing the city and hundreds of thousands of commuters coming into the city, to say nothing of our constituents nationwide who visit D.C. in the millions every year.

The past two Republican chairmen of this committee also supported the policy of budget autonomy for the District. My predecessor and friend Tom Davis, and Darrell Issa, introduced legislation to expand the home rule, including bills to give D.C. autonomy. In fact, Tom Davis, my predecessor in this job, continues to fight for budget autonomy as a private citizen.

I regret that the committee has seemingly abandoned those bipartisan efforts in recent years. In fact, the committee, this com-

mittee, has gone out of its way to restrict home rule. Last year the committee and the House for the first time since 1991 passed a resolution of disapproval on a law passed by the D.C. City Council, the Reproductive Health Non-Discrimination Amendment Act. We did it because we could. That law prohibits employers from discriminating against employees based on their reproductive health decisions.

More recently, House Republicans passed for the second time this Congress a misguided D.C. voucher bill that was not only not requested by the District, but also has failed to deliver educational results according to a number of studies and tests.

The chairman of this committee seemed to also threaten jail time for the D.C. city Mayor for implementing the city's marijuana legalization law, which was adopted by public referendum by the residents of the District of Columbia. And when we do something like that, to me it's painful irony. First of all, we couldn't do it in Denver, same referendum, same outcome, because our reach doesn't go to Denver. We do it here because we can, because the Constitution gives us authority over a city that did not yet exist when the Constitution was adopted and was never envisioned to be a modern urban metropolis. In fact, D.C. Superior Court recently upheld the District's Budget Autonomy Act approved by those votes in 2013.

While some disagree about how to achieve it, all, including I think most of the witnesses today, will agree on the policy of budget autonomy for the District. To me, it's shameful that the community housing the Federal Government is not afforded the same rights to self-government as all others across the country.

It is time for congressional Republicans to get on board. And this is one case where I would hope, upon reflection, they would actually adhere to their own conservative principles: that government closest to the people is the best form of government, people are entitled to self-determination, there should never be taxation without representation.

These are American values, but they certainly are values I have heard from my conservative friends and I respect them. Let's start to apply them irrespective of race, irrespective of partisan voting patterns. This is about American rights, and nothing should substitute itself for our enshrinement of those rights and our respect for those rights.

I yield back.

Mr. MEADOWS. I thank the gentleman for his opening statements. And we will caution the audience, in terms of public displays of either pleasure or displeasure, we would ask you to refrain from that.

And so I now recognize the delegate from the District of Columbia, Ms. Eleanor Holmes Norton, for her opening statement.

Ms. NORTON. Thank you, Mr. Chairman.

First, I want to welcome Chairman Mendelson. I want to welcome all of the witnesses, especially my constituents, and others to this hearing.

Mr. Chairman, I appreciate that you have given me this time. You're my good friend, even when good friends must disagree, as we do today. I will read what I have to say in order to stay within the time you have given me.

You, Mr. Chairman, are known for your well-known kindness, and it's a courtesy, since I am not ranking member, for you to allow me to give an opening statement at this hearing. Of course, this hearing is on my very own district and it affects only those who live in the District of Columbia.

This hearing, however, appears to be a fait accompli, similar to when the committee went through the motions last month marking up the District of Columbia school vouchers bill. The committee knew that the bill could only be enacted on an appropriation bill, that there was not the support in the Senate, and Chairman Jason Chaffetz had already requested that the matter be put on the upcoming appropriation bill even before we had that hearing here.

This hearing seems designed to lay the predicate for using the appropriation process yet again to try to overturn, block, or preempt the Local Budget Autonomy Act of 2012, which was ratified by 83 percent of the D.C. voters.

The evidence for this is transparent. Speaker Paul Ryan's spokesperson told the press that Republicans are considering, quote, "legislative options" for the Budget Autonomy Act. The three top House Republican leaders have filed amicus briefs expressing their view that the Budget Autonomy Act is invalid. The House Appropriations Committee has said that the Budget Appropriation Act is invalid.

By calling legal experts, the subcommittee is trying a complicated legal matter in the court of public opinion and most will not understand much of the legal machinations we discuss here today because they are normally discussed in a court of law. Only the courts can determine the validity of the Budget Autonomy Act. Indeed, the Budget Autonomy Act has been litigated for the last 2 years with courts reaching conflicting conclusions.

Yet, the act is the law of the land. The Congress did not disapprove the Budget Autonomy Act during the congressional review period and the only court order in effect on the Budget Autonomy Act upheld its validity.

What is within the committee's authority is to remove Federal restrictions that harm the finances and operations of the D.C. government. The last two Republican chairmen of the committee studied this issue closely, Tom Davis and Darrell Issa, and sought budget autonomy for the District of Columbia. As Mr. Davis has said, "The benefits of budget autonomy for the District are numerous, real, and much needed. There is no drawback." Indeed, even the Republican witnesses here who have taken a position on the policy of budget autonomy support it.

Control over the dollars raised by local taxpayers and businesses is central to local control, one of the oldest principles of the United States Government and a much-cited principle of congressional Republicans in particular.

Budget autonomy also has practical benefits for both the District and the Federal Governments. For the District government, it means lower borrowing costs, more accurate revenue and expenditure forecasts, improved agency operations, and the removal of the threat of Federal Government shutdowns.

For Congress, it means not wasting time on budget line items it never amends. For the Federal Government, it means that the mu-

nicipal services that government, our government, relies on to function will not cease during a Federal shutdown.

To its credit, Congress has begun to recognize the hardships caused by the lack of budget autonomy. Since 2014, for the first time we were able to keep the Congress from involving the District, and Congress has exempted D.C. from Federal shutdowns.

Congress losses nothing under budget autonomy. This is not statehood. Under the U.S. Constitution, Congress has the authority to legislate on any District matter, including its local budget, at any time.

This year's Republican budget made the case for budget autonomy, and I conclude with what my colleagues said in their own budget:

"This budget would give our States and local municipalities the freedom and flexibility...that meets the unique needs and challenges of their communities...We are humble enough," said by my colleagues, "to admit that the Federal Government does not have all of the answers...Putting our faith in the people will respect and restore the principle of federalism in America."

Mr. Chairman, I rest my case. Thank you very much.

Mr. MEADOWS. I thank the gentlewoman for her comments.

I will hold the record open for 5 legislative days for any member who would like to submit a written statement.

Mr. MEADOWS. We will now recognize our panel of witnesses. And I'm pleased to welcome Ms. Edda Emmanuelli Perez, managing associate general counsel at the Office of General Council at the U.S. Government Accountability Office; Mr. Jacques DePuy, a retired partner at Greenstein Delorme and Luchs and a former counsel for the Subcommittee on Government Operations and Reorganization; Mr. Philip Mendelson, chairman of the Council of the District of Columbia; Mr. Irvin Nathan, senior counsel at Arnold & Porter and former attorney general of the District of Columbia; and Mr. Brian Netter, partner at Mayer Brown.

Welcome to you all. And pursuant to committee rules, all witnesses will be sworn in before they testify. So I would ask that you please rise and raise your right hand.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Let the record reflect that the witnesses have answered in the affirmative.

Thank you. Please be seated.

And so in order to allow time for discussion, I would ask that you please limit your oral testimony to 5 minutes. Your entire written statement will be made part of the record.

And you're now recognized for 5 minutes.

WITNESS STATEMENTS

STATEMENT OF EDDA EMMANUELLI PEREZ

Ms. PEREZ. Good afternoon, Mr. Chairman, Ranking Member, and members of the subcommittee. Thank you for the opportunity to discuss our legal opinion concerning the effect of the District of Columbia's Local Budget Autonomy Act.

The Budget Autonomy Act attempts to change the Federal Government's role in the District's budget process by removing Congress from the appropriation process of most District funds and by removing the President from the District's budget formulation process. GAO concluded that provisions of the Budget Autonomy Act that attempt to change the Federal Government's role in this way have no legal effect.

In the District of Columbia Home Rule Act, Congress established a District government and delineated its budget process. The Home Rule Act, as well as the Antideficiency Act and the Budget and Accounting Act, serve and protect two important constitutional powers reserved to the Congress: its power to exercise exclusive legislation in all cases whatsoever over the District and Congress' constitutional power of the purse.

GAO addressed the conflict between the Budget Autonomy Act and the Antideficiency Act and the Budget and Accounting Act. The Antideficiency Act bars officers and employees of the U.S. Government and the government of the District of Columbia from making or authorizing expenditures or obligations exceeding the amount available in appropriation. The Budget and Accounting Act requires the head of each agency, which includes the District government, to submit a budget request to the President for transmission to Congress. The Home Rule Act states that the council may not amend or repeal any act of Congress which is not restricted in its application exclusively in or to the District.

In addition to applying to the District, both the Antideficiency Act and the Budget and Accounting Act apply to all officers and employees of the United States and heads of Federal agencies. Thus, the Home Rule Act bars the District from amending or repealing these statutes.

We concluded that without affirmative congressional action otherwise, the requirements of the Antideficiency Act continue to apply and District officers and employees may not obligate or expend funds except in accordance with appropriations enacted into Federal law by Congress. The District government also remains bound by the Budget and Accounting Act, which requires it to submit budget estimates to the President.

We examined the legislative history of the Home Rule Act and found that it supported the conclusion that the Antideficiency Act continues to apply to the District. Although the Senate version of the Home Rule Act would have granted considerable fiscal autonomy to the District, the conference committee adopted the House provisions that required that the District submit its budget to Congress. The stated reason was that they did so to preserve the process through which Congress appropriates amounts for the District. By considering and explicitly rejecting the idea of granting greater budget autonomy to the District, Congress reserved to itself the authority to appropriate funds for the District.

We considered other arguments made in support of the Budget Autonomy Act. One such argument was that Congress granted the District a permanent appropriation of the District's local funds that would make local funds available without further action by Congress. We disagree. By law, the making of an appropriation must be expressly stated and cannot be inferred or made by implication.

Congress enacts appropriations by identifying the source of funding and authorizing the obligation and expenditure of those funds. Congress has not provided the District with such authority.

A further argument was that the purpose and text of the Antideficiency Act would be satisfied when the District government, rather than Congress, enacts an annual appropriation. Again, we disagree. Pursuant to the Constitution, both the appropriations power and the exclusive power to legislate over the District belong to Congress. As the cornerstone of fiscal laws enacted by Congress to implement its power of the purse, the Antideficiency Act clearly applies to the District, both by its very terms and by the terms of the Home Rule Act, reflecting Congress' decision to expressly limit District spending to amounts Congress appropriates.

We also considered whether it was legally significant that Congress has not enacted into law a resolution disapproving of the Budget Autonomy Act. Since the Home Rule Act provided no authority to enact the Budget Autonomy Act and acts taken without legal authority are void at the outset, it is of no legal significance that Congress did not enact a resolution disapproving of the Budget Autonomy Act.

GAO does not take a view on the merits of Congress granting greater budget autonomy to the District. Under the framework that the Constitution has established, only Congress has power to determine the nature of the District's process. In the Home Rule Act, Congress clearly established that it continues to retain sole authority to appropriate amounts for the District. If Congress wishes to change the District's budget process, it may, of course, do so by enacting legislation.

We are aware of court rulings issued after our January 2014 legal opinion. GAO's analysis and conclusions are consistent with and compelled by Congress' constitutional authority to exercise exclusive legislation over the District and with the laws Congress has enacted pursuant to that authority.

Thank you, Mr. Chairman and ranking member. This concludes my statement, and I'd be pleased to answer any questions you may have.

[The prepared statement of Ms. Perez follows:]

United States Government Accountability Office

GAO

Testimony

Before the Subcommittee on Government Operations, Committee on Oversight and Government Reform, House of Representatives

For Release on Delivery
Expected at 2:00 p.m. ET
Thursday, May 12, 2016

DISTRICT OF COLUMBIA

Local Budget Autonomy Amendment Act of 2012

Statement of Edda Emmanuelli Perez
Managing Associate General Counsel
Office of the General Counsel

Chairman Meadows, Ranking Member Connolly, and Members of the Subcommittee:

I am GAO's Managing Associate General Counsel responsible for GAO's appropriations law decisions and opinions. I am pleased to be here today to discuss our January 30, 2014 opinion concerning the effect of the District of Columbia's Local Budget Autonomy Amendment Act of 2012.[1] A copy of the opinion is attached as an appendix to this statement.

In the District of Columbia Home Rule Act, Congress established the District Government and delineated its budget process. The Budget Autonomy Act attempts to change the federal government's role in this budget process by removing Congress from the appropriation process of most District funds and by removing the President from the District's budget formulation process. In this opinion, we addressed the conflict between the Budget Autonomy Act and two other federal laws: the Antideficiency Act[2] and the Budget and Accounting Act, 1921.[3] The Antideficiency Act bars officers and employees of the U.S. Government and of the Government of the District of Columbia from making or authorizing expenditures or obligations exceeding the amount available in an appropriation or fund. The Budget and Accounting Act requires the head of each agency, which for the purposes of this Act includes the District Government, to submit a budget request to the President for transmission to Congress.

At issue in the opinion was whether the Home Rule Act and the Antideficiency Act allow the District Government to authorize its officers and employees to obligate and expend funds in accordance with an act of the Council of the District of Columbia, rather than in accordance with appropriations enacted into federal law in exercise of Congress's constitutional prerogative to legislate for the seat of government and its constitutional power of the purse. Also at issue was whether the Home Rule Act and the Budget and Accounting Act permit the District Government to change the process through which the District submits its budget request to the President for transmission to Congress.

[1] B-324987, Jan. 30, 2014.

[2] 31 U.S.C. § 1341.

[3] 31 U.S.C. § 1108.

We concluded that provisions of the Budget Autonomy Act that attempt to change the federal government's role in the District's budget process have no legal effect. The Home Rule Act, as well as the Antideficiency Act and the Budget and Accounting Act, serve and protect two important constitutional powers reserved to the Congress: (1) its power "to exercise exclusive Legislation in all Cases whatsoever" over the District, U.S. Const. art. I, § 8, cl. 17, and (2) Congress's constitutional power of the purse. We concluded, therefore, that without affirmative congressional action otherwise, the requirements of the Antideficiency Act continue to apply and District officers and employees may not obligate or expend funds except in accordance with appropriations enacted into federal law by Congress. The District Government also remains bound by the Budget and Accounting Act, which requires it to submit budget estimates to the President.

Our regular practice when rendering opinions is to contact relevant agencies and officials to obtain their legal views on the subject of the request.[4] The Chairman of the Council of the District of Columbia, the Mayor of the District of Columbia, and the Attorney General of the District of Columbia all provided their views. The Council chairman asserted that Congress granted the District a permanent appropriation of the District's local funds. Because a permanent appropriation is available for obligation and expenditure without further congressional action, he concluded that the Budget Autonomy Act lawfully repealed provisions of the Home Rule Act that restricted the District's authority to obligate and expend this permanent appropriation.

We disagreed with the Council chairman's assertion that Congress has provided the District with a permanent appropriation. By law, the making of an appropriation must be expressly stated. An appropriation cannot be inferred or made by implication. The Council chairman asserted that the District Charter established a permanent appropriation because it provided that District monies "belong to the District government." However, this language is not the express statement of appropriation that is necessary under 31 U.S.C. § 1301(d).

[4] GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/products/GAO-06-1064SP.

In the alternative, the Council chairman argued that the "purpose and text of the Antideficiency Act would be satisfied when the District Government", rather than Congress, "enacts an annual appropriation pursuant to the Autonomy Act." We disagreed. The Antideficiency Act clearly applies to the District, both by its very terms and by the terms of the Home Rule Act, and reflects Congress' decision to expressly limit District spending to amounts Congress appropriates. Only acts of Congress, not acts by the Council or by officers or employees of the District Government or the federal government, make amounts available for obligation and expenditure.

The Council chairman also placed significance in the fact that Congress has not enacted into law a resolution disapproving of the Budget Autonomy Act. However, the Home Rule Act provided no authority to enact the Budget Autonomy Act. It is elementary that acts taken without legal authority are void at the outset. It is, therefore, of no legal significance that Congress did not enact a resolution disapproving of the Budget Autonomy Act. Even in the absence of such a resolution, the amendments of the Budget Autonomy Act have no force or effect.

The plain meaning of the Home Rule Act, coupled with the continuing force of the Antideficiency Act and of the Budget and Accounting Act, compelled us to reach the conclusions we drew in the opinion. Pursuant to its constitutional authority "to exercise exclusive Legislation in all Cases whatsoever" in the District, Congress has enacted these statutes and has explicitly provided for the continuing application of the Antideficiency Act and the Budget and Accounting Act to the District.

GAO does not take a view on the merits of Congress granting greater budget autonomy to the District. This is a matter within Congress's discretion under its constitutional powers. Under the framework that the Constitution has established, only Congress has power to determine the nature of the District's budget process. In the Home Rule Act, Congress clearly established that it continues to retain sole authority to appropriate amounts for the District. If Congress wishes to change the District's budget process it may, of course, do so by enacting appropriate legislation.

Since we issued our January 2014 opinion, court rulings have also addressed the legality of the Budget Autonomy Act. In 2014, the U.S.

District Court for the District of Columbia ruled that "the Budget Autonomy Act does not comply with the requirements of the Anti-Deficiency Act" and that "the Budget Autonomy Act is unlawful."[5] However, in a three-sentence ruling that did not address the merits of the case, the U.S. Court of Appeals for the D.C. Circuit vacated this ruling and directed that the case be remanded to the Superior Court of the District of Columbia.[6] On remand, the Superior Court ruled that the Budget Autonomy Act was lawful and within the authority that Congress delegated to the District in the District of Columbia Home Rule Act.[7]

In conclusion, the analysis and conclusions in our January 2014 opinion are consistent with Congress's constitutional power to legislate over the District and with the laws that Congress has enacted pursuant to that authority.

Thank you, Mr. Chairman. This concludes my prepared statement. I would be happy to answer any questions that you or other members of the subcommittee may have.

GAO Contact and Staff Acknowledgments

If you or your staff have any questions about this testimony, please contact me at (202) 512-2853 or EmmanuelliPerezE@gao.gov. Contact points for our Office of Congressional Relations and Office of Public Affairs may be found on the last page of this statement. Julia C. Matta, Assistant General Counsel, and Omari Norman, Senior Attorney, made key contributions to this statement.

[5] *Council of the District of Columbia v. Gray*, 42 F. Supp. 3d 134, 154-155 (May 19, 2014).

[6] *Council of the District of Columbia v. Bowser*, 2015 U.S. App. LEXIS 8881 (D.C. Cir. May 27, 2015).

[7] *Council of the District of Columbia v. DeWitt*, no. 2014-CA-2371-B, slip op. (D.C. Super. Ct. Mar. 18, 2016).

Appendix: B-324987

GAO U.S. GOVERNMENT ACCOUNTABILITY OFFICE

United States Government Accountability Office
Washington, DC 20548

B-324987

January 30, 2014

The Honorable Ander Crenshaw
Chairman
Subcommittee on Financial Services
and General Government
Committee on Appropriations
House of Representatives

Subject: *District of Columbia—Local Budget Autonomy Amendment Act of 2012*

Dear Mr. Chairman:

This responds to your request for our opinion regarding the effect of the District of Columbia's Local Budget Autonomy Amendment Act of 2012 (Budget Autonomy Act). In the District of Columbia Home Rule Act, Congress established the District Government and delineated its budget process. Through the Budget Autonomy Act, the Council of the District of Columbia and District voters attempt to change the federal government's role in this budget process by removing Congress from the appropriation process of most District funds and by removing the President from the District's budget formulation process. In this opinion, we address the conflict between the Budget Autonomy Act and two other federal laws: the Antideficiency Act[1] and the Budget and Accounting Act, 1921.[2] The Antideficiency Act bars officers and employees of the U.S. Government and of the Government of the District of Columbia from making or authorizing expenditures or obligations exceeding the amount available in an appropriation or fund. The Budget and Accounting Act requires the head of each agency, which for the purposes of this Act includes the District Government, to submit a budget request to the President for transmission to Congress.

At issue here is whether the Home Rule Act and the Antideficiency Act allow the District Government to authorize its officers and employees to obligate and expend funds in accordance with an act of the Council of the District of Columbia, rather than in accordance with appropriations enacted into federal law in exercise of

[1] 31 U.S.C. § 1341.

[2] 31 U.S.C. § 1108.

Congress's constitutional prerogative to legislate for the seat of government and its constitutional power of the purse. Also at issue is whether the Home Rule Act and the Budget and Accounting Act permit the District Government to change the process through which the District submits its budget request to the President for transmission to Congress.

Our practice when rendering opinions is to contact relevant agencies and officials to obtain their legal views on the subject of the request.[3] We contacted the Chairman of the Council of the District of Columbia, the Mayor of the District of Columbia, and the Attorney General of the District of Columbia; all provided us with their views.[4]

As explained below, we conclude that provisions of the Budget Autonomy Act that attempt to change the federal government's role in the District's budget process have no legal effect. The Home Rule Act, as well as the Antideficiency Act and the Budget and Accounting Act, serve and protect two important constitutional powers reserved to the Congress: (1) its power "to exercise exclusive Legislation in all Cases whatsoever" over the District, U.S. Const. art. I, § 8, cl. 17, and (2) Congress's constitutional power of the purse. We conclude, therefore, that without affirmative congressional action otherwise, the requirements of the Antideficiency Act continue to apply and District officers and employees may not obligate or expend funds except in accordance with appropriations enacted by Congress. The District Government also remains bound by the Budget and Accounting Act, which requires it to submit budget estimates to the President.

In this opinion we express no views on the merits of Congress granting greater budget autonomy to the District.

BACKGROUND

Congressional delegation of authority in the Home Rule Act

The Constitution vests Congress with the power "to exercise exclusive Legislation in all Cases whatsoever, over . . . the Seat of the Government of the United States."

[3] GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/legal/resources.html.

[4] Letter from Chairman, Council of the District of Columbia, to Senior Attorney, GAO, Sept. 27, 2013 (Council Letter); Letter from Mayor, District of Columbia, to Assistant General Counsel, GAO, Sept. 11, 2013 (Mayor Letter); Letter from Attorney General, District of Columbia, to Assistant General Counsel, GAO, Sept. 10, 2013 (Attorney General Letter).

U.S. Const. art. I, § 8, cl. 17. The Supreme Court has held that this clause vests Congress with "plenary" authority to exercise, in the District of Columbia, "the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes." *Palmore v. United States*, 411 U.S. 389, 397 (1973). Pursuant to this authority, in 1973, Congress enacted the District of Columbia Home Rule Act, which provides the residents of the District with limited, but substantial, powers of local self-government.[5] Pub. L. No. 93-198, 87 Stat. 774 (Dec. 24, 1973), *codified as amended at* D.C. Code §§ 1-201.01–1-207.71 (2013). The Home Rule Act vests in an elected Council of the District of Columbia the District's legislative power, and in an elected Mayor the District's executive power. D.C. Code §§ 1-204.04, 1-204.22.

A portion of the Home Rule Act is designated as the "District Charter," which prescribes the structure and duties of the three branches of the District Government. *Id.* §§ 1-204.01–1-204.115. Since the enactment of the Home Rule Act, the Charter has required the Mayor to submit an annual budget for the District Government to the Council. *Id.* § 1-204.42. A section of the Charter titled "Enactment of Appropriations by Congress" requires the Council, after receipt of the Mayor's budget proposal, to adopt the District's annual budget, which the Mayor must then submit to the President for transmission to the Congress. *Id.* § 1-204.42. This Charter section also provides that "no amount may be obligated or expended by any officer or employee of the District of Columbia government unless such amount has been approved by Act of Congress, and then only according to such Act." *Id.*

Budget Autonomy Act

In the Home Rule Act, Congress provided that the Charter may be amended by an act passed by the Council and ratified by District voters. *Id.* § 1-203.03. The Budget Autonomy Act, which is the subject of this opinion, was proposed as such a charter amendment.[6] The Act attempts to amend sections of the District Charter pertaining

[5] Upon enactment, the act was titled the District of Columbia Self-Government and Governmental Reorganization Act. Pub. L. No. 93-198, § 101. In 1997, Congress renamed the act to the District of Columbia Home Rule Act. Pub. L. No. 105-33, § 11717, 111 Stat. 251, 786 (Aug. 5, 1997).

[6] The Council passed the Budget Autonomy Act on December 18, 2012; the Mayor signed the measure on January 18, 2013. *See* 60 D.C. Reg. 1724 (Feb. 15, 2013). District voters considered the Budget Autonomy Act in an election held on April 23, 2013. *See* District of Columbia Board of Elections, *Summary of Minutes, May 8, 2013 Regular Board Meeting, available at* www.dcboee.org/popup.asp?url=/pdf_files/Mins_May08_13.pdf (last visited Jan. 27, 2014). Under the Home Rule Act, the Chairman of the Council must submit charter amendments to Congress on the day the Board of Elections and Ethics certifies that

(continued...)

to the District's budget process. In particular, the Act renames the Charter section titled "Enactment of Appropriations by Congress," replacing this title with "Enactment of local budget by Council." D.C. Law 19-321, § 2(a), *amending* D.C. Code § 1-204.46. The Act further attempts to amend this section to provide separate treatment for the "federal portion" and the "local portion" of the District's budget.[7] D.C. Law No. 19-321, § 2(e), *amending* D.C. Code § 1-204.46(a). The "federal portion" would continue to be submitted by the Mayor to the President for transmission to Congress. *Id.* In a key change from the original provisions of the Home Rule Act, the Budget Autonomy Act would require the Chairman of the Council, instead, to submit the "local portion" directly to the Speaker of the House of Representatives "under the procedure set forth in section 602(c) of the Home Rule Act."[8] *Id.* Section 602(c) requires the Council to submit its enactments to the Congress. D.C. Code § 1-206.02. Acts so submitted become law about

(...continued)
such act was ratified by the requisite number of District voters. D.C. Code § 1-203.03(b). The Board of Elections and Ethics so certified the Budget Autonomy Act on May 8, 2013. Charter amendments become effective only upon (1) the expiration of a 35-day period (excluding weekends, holidays, and days in which either house of Congress is not in session) after the Chairman submits the amendment to Congress; or (2) the date specified in the charter amendment, whichever is later. *Id.* The Budget Autonomy Act set January 1, 2014 as its effective date. D.C. Law 19-321, § 3.

[7] Neither the Budget Autonomy Act nor the Home Rule Act as amended contains definitions for the terms "local portion" and "federal portion." A memorandum provided to us by the Council in support of its position indicates that the "local portion" is derived from District of Columbia tax revenues. Letter from Chairman, Council of the District of Columbia, to Senior Attorney, GAO, Sept. 27, 2013, Appendix A, at 1. Our conclusions on the legal effect of the Budget Autonomy Act do not turn on the meaning of either of these terms.

[8] There are some incongruities between the Budget Autonomy Act and the Home Rule Act. For example, the Budget Autonomy Act states that "local portion of the annual budget shall be submitted by the Chairman of the Council to the *Speaker of the House of Representatives* pursuant to the procedure set forth in section 602(c)." D.C. Law 19-321, § 2(e) (emphasis added). Section 602(c), however, requires the Chairman to submit particular acts not only to the Speaker but also to the President of the Senate. D.C. Code § 1-206.02(c). We need not resolve these incongruities for the purposes of this opinion.

30 business days after submission to Congress, unless a measure disapproving the legislation is enacted into law.[9] *Id.* § 1-206.02(c).

In addition, the Budget Autonomy Act attempts to amend language in the District Charter which forbids District employees from obligating or expending funds except in accordance with an act of Congress. Under the amended language, District officers and employees would be forbidden from obligating or expending local funds unless the amount "has been approved by an act of the Council." D.C. Law 19-321, § 2(e), *amending* D.C. Code § 1-204.46(c). Though the Council's act must have been submitted to Congress under section 602(c), under the Budget Autonomy Act, no congressional action would be necessary before District officers and employees may permissibly obligate and expend local funds. *Id.*

Under the Home Rule Act and the Charter as originally enacted, only the enactment of an appropriation, which requires passage by both Houses of Congress and presentment to the President, makes District funds available for obligation or expenditure. Under the Budget Autonomy Act, merely an act of the Council would suffice to make local amounts available for obligation and expenditure, even in the absence of any congressional action.

The Antideficiency Act and the Budget and Accounting Act apply to the District

In furtherance of its constitutional powers, Congress has applied both the Antideficiency Act and the Budget and Accounting Act to the District Government. The Antideficiency Act itself makes clear that it applies to officers and employees not only of the United States Government but also to the District of Columbia Government. 31 U.S.C. § 1341. When the Home Rule Act was enacted in 1974, it confirmed the Antideficiency Act's continuing application to the District by stating that nothing in the Home Rule Act affects the applicability of the Antideficiency Act to the District Government.[10] D.C. Code § 1-206.03(e). This continuing application of the Antideficiency Act to the District "reflects Congress' decision . . . to expressly limit District spending to amounts Congress appropriates." B-262069, Aug. 1, 1995. In addition, the Budget and Accounting Act requires the head of each "agency" to submit a budget request to the President. 31 U.S.C. § 1108(b)(1). The Budget and

[9] Section 602(c) applies to most acts of the Council. It does not, however, apply to charter amendments (which are enacted under a procedure set forth in section 303) or to "acts of the Council which are submitted to the President in accordance with [the Budget and Accounting Act]" or to other limited exceptions not applicable here. D.C. Code § 1-206.02(c).

[10] Because this section of the Home Rule Act is not contained in the Charter, the Home Rule Act grants Council and District voters no authority to amend or repeal this provision.

Accounting Act explicitly defines the word "agency" to include the District Government. 31 U.S.C. § 1101(1).

Limitations upon the powers of the District Government

The Home Rule Act limits the District Government's power in many respects. As discussed above, the Home Rule Act grants the Council and voters authority to amend the Charter. *See* D.C. Code § 1-203.03. However, the Home Rule Act grants the Council and voters no authority to amend provisions of the Home Rule Act outside of the Charter. Provisions not encompassed within the Charter include section 602(a)(3), which provides that the Council may not "enact any act to amend or repeal any Act of Congress . . . which is not restricted in its application exclusively in or to the District." *Id.* § 1-206.02(a)(3).

The District of Columbia Court of Appeals has ruled on the scope of section 602(a)(3) of the Home Rule Act. The court considered whether criminal sentencing requirements enacted by a District voter initiative could supersede those contained in a federal law. *McConnell v. United States*, 537 A.2d 211 (D.C. 1988). The court noted that the federal sentencing requirements, in addition to applying to defendants convicted under District law, also applied to federal defendants in every jurisdiction in the United States. *Id.* at 214. The court held that because the requirements applied outside of the District, the Council and District voters had no authority to repeal the requirements. "The District of Columbia is not authorized to repeal legislation national in scope, notwithstanding that the repeal would affect enforcement of the legislation only within the District's jurisdiction." *Id.* at 215. *See also Brizill v. D.C. Board of Elections and Ethics*, 911 A.2d 1212 (D.C. 2006) (District Government could not amend or repeal a federal law which barred gambling devices in certain enumerated jurisdictions, including the District).

DISCUSSION

The issue before us presents a matter of statutory interpretation. Our analysis is rooted in the fundamental constitutional principle that Congress is empowered "to exercise exclusive Legislation in all Cases whatsoever" over the District. All legislative authority that the District government may legitimately assert must have been given to it by Congress. B-302230, Dec. 30, 2003. Congress created the District Government by enacting the Home Rule Act. Any act of the District Government must comport with the provisions of the Home Rule Act. In this opinion, we consider whether the Home Rule Act granted the District Government authority to enact certain provisions of the Budget Autonomy Act. In particular, we address the conflict between the Budget Autonomy Act and two other federal laws: the Antideficiency Act and the Budget and Accounting Act.

The District Government cannot amend or repeal the requirements of the Antideficiency Act or the Budget and Accounting Act

The Home Rule Act states that the Council may not "amend or repeal any Act of Congress . . . which is not restricted in its application exclusively in or to the District."[11] D.C. Code § 1-206.02(a)(3). As the D.C. Court of Appeals has held, the District Government cannot amend statutes that have any application outside of the District, even if such an amendment would "affect enforcement of the legislation only within the District's jurisdiction." *McConnell*, 527 A.2d at 215. Both the Antideficiency Act and the Budget and Accounting Act have application outside of the District, and neither act is restricted in its application exclusively to the District. The language of the Antideficiency Act makes clear that it applies not only to officers and employees of the District of Columbia Government but also to *all* officers and employees of the United States Government. 31 U.S.C. § 1341(a)(1)(A) ("an officer or employee of the United States Government or of the District of Columbia Government may not" make an expenditure or obligation exceeding available amounts). The Budget and Accounting Act applies not only to the District Government but also to the head of each federal agency. 31 U.S.C. § 1108(b)(1). Because both of these statutes apply outside of the District and its government and are not restricted in application exclusively to the District, the Home Rule Act bars the District from amending or repealing either statute.

The legislative history of the Home Rule Act shows that consideration was made in 1973 to a proposal to grant budget autonomy to the District and that the proposal was rejected. The Senate version of the Home Rule Act would have granted considerable fiscal autonomy to the District by providing that the "adoption of any budget by act of the Council shall operate to appropriate and to make available for expenditure, for the purposes therein named, the several amounts stated therein as proposed expenditures." S. 1435, 93rd Cong., § 504 (1973); S. Rep. No. 93-219, at 8 (1973). In contrast, House amendments to the Senate bill would have required the Council to submit a budget "to the President for transmission to the Congress, leaving Congressional appropriations and reprogramming procedures as presently existing." H.R. Rep. No. 93-703, at 78 (1973). The conferees adopted the House provisions, "preserving the Congressional appropriations provisions of existing law" and using language that Congress ultimately enacted in the Home Rule Act. *Id.* As this review of the history demonstrates, Congress considered granting the Council authority to make funds available for obligation and expenditure. Under the Home Rule Act, however, pursuant to its constitutional authority to legislate for the District,

[11] Section 602(a)(3) of the Home Rule Act is a limitation upon the Council's authority. Because all Charter amendments must first be passed by the Council, all Charter amendments must comport with the limitations of section 602(a)(3). *Hessey v. Board of Elections and Ethics*, 601 A.2d 3, 16 (D.C. 1991); D.C. Code § 1-206.02(a)(3).

Congress ultimately withheld from the District the authority to make funds available for obligation or expenditure, instead reserving this authority exclusively for Congress.

The Home Rule Act also provides that it makes no "change in existing law, regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the federal Office of Management and Budget, and the Comptroller General of the United States in the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia government." D.C. Code § 1-206.03(a). This section first states that it makes no change not only to existing "law" but also to "regulation" or to "basic procedure or practice" in the District's budget process. It preserves the federal role in that process not merely by mentioning the federal government generally but instead by specifying not one, but four federal entities: Congress, the President, the Office of Management and Budget, and GAO. It states that these four entities would continue to play their respective roles in several precisely enumerated steps of that budget process: "preparation, review, submission, examination, authorization, and appropriation." We can think of no more specific manner for Congress to specify in the Home Rule Act that Congress would retain a firm hand in the District's budget process.

The Budget Autonomy Act arrogates to the Council of the District of Columbia authority over portions of the District's budget process that Congress, in the Home Rule Act, clearly specified would remain firmly within congressional control. Only Congress may enact legislation authorizing the District Government to obligate and expend funds, contrary to the Budget Autonomy Act, which attempts to grant to the Council authority to authorize such obligations and expenditures. Under the Home Rule Act, the District must submit its budget request to the President for transmission to the Congress as part of the President's budget request, which is submitted to Congress to await potential legislative action. Yet the Budget Autonomy Act attempts to authorize the Council to send its budget directly to the Speaker of the House and, further, states that the Council's transmission becomes law not after congressional enactment but, rather, after congressional silence.

Because Congress established the District Government pursuant to its constitutional authority "to exercise exclusive Legislation in all Cases whatsoever" over the District, it is elementary that "all legislative authority that the District government may legitimately assert . . . must have been given to it by Congress." B-302230, Dec. 30, 2003. However, portions of the Budget Autonomy Act stand in direct conflict with the Antideficiency Act and with the Budget and Accounting Act and, therefore, are not permissible under the Home Rule Act, which states that the District Government may not "amend or repeal any Act of Congress . . . which is not restricted in its application exclusively in or to the District." As we pointed out in 2003, it "is well accepted in the law that *ultra vires* behavior is, *ab initio*, legally ineffective." B-302230, at 11–12. Therefore, portions of the Budget Autonomy Act that purport to

change the federal government's role in the District's budget process are without legal force or effect.

Views of officials of the Government of the District of Columbia

As noted above, we contacted the Chairman of the Council of the District of Columbia, the Mayor of the District of Columbia, and the Attorney General of the District of Columbia for their views on the subject of this opinion; all provided us with their views. The Chairman of the Council states:

> "We strongly believe that the Home Rule Act allows the Autonomy Act. The process for amending the Home Rule Act has been used before and is proper. The role of Congress is retained, both through legislative review and its plenary authority under the U.S. Constitution. Also, the new procedure meets the requirements of the Anti-Deficiency Act."

Council Letter. The Chairman asserts that "[t]here is no dispute that the Antideficiency Act applies to District officers and employees." Council Letter, Attachment A, at 6. We agree with this position. Our views diverge, however, where the Chairman asserts that the Antideficiency Act allows District officers and employees to obligate or expend funds "in strict accordance with a budget act duly enacted [by the Council] pursuant to the District's charter, as amended by the Autonomy Act." *Id.* The Chairman asserts that Congress has granted to the District a permanent appropriation of the District's local funds. Council Letter, Attachment A, at 9–10. A permanent appropriation is available for obligation and expenditure without further congressional action. B-204078.2, May 6, 1988; GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 22–23. He concludes that the Budget Autonomy Act lawfully repealed provisions of the Home Rule Act that restricted the District's authority to obligate and expend this permanent appropriation. Council Letter, Attachment A, at 12.

We disagree with the Chairman's assertion that Congress has provided the District with a permanent appropriation. By law, the making of an appropriation must be expressly stated. 31 U.S.C. § 1301(d). An appropriation cannot be inferred or made by implication. 50 Comp. Gen. 863 (1971). The Chairman asserts that the District Charter established a permanent appropriation because it provided that District monies "belong to the District government." Council Letter, Attachment A, at 9; D.C. Code § 1-204.50. However, this language is not the express statement of appropriation that is necessary under 31 U.S.C. § 1301(d).

The Chairman also cites decisions in which we concluded that Congress had provided agencies with a permanent appropriation. B-228777, Aug. 26, 1988; B-197118, Jan. 14, 1980. However, these decisions are not pertinent here. We

have concluded that only statutes that authorize both the deposit and the expenditure of a class of receipts make those funds available for the specified purpose without further congressional action. *See, e.g.*, B-228777, B-197118. In this case, though the Home Rule Act requires the deposit of funds, it does not authorize their expenditure and, therefore, manifests no congressional intent to make these amounts available for obligation or expenditure without further congressional action. Indeed, section 446 of the Home Rule Act expressly provided that "no amount may be obligated or expended by any officer or employee of the District of Columbia Government unless such amount has been approved by Act of Congress, and then only according to such Act." D.C. Code § 1-204.46. Congress could not have intended to provide a permanent appropriation to the District in the Home Rule Act where, in the very same act, it provided that funds would be available only with the approval of an act of Congress.

In the alternative, the Chairman argues:

> "[T]he purpose and text of the Antideficiency Act would be satisfied when the District Government enacts an annual appropriation pursuant to the Autonomy Act. This is evident by the text of the Antideficiency Act, which provides that obligations and expenditures must be consistent with an appropriation, but does not specifically state that it must be a *congressional* appropriation."

Council Letter, Attachment A, at 11–12. We disagree. The applicability of the Antideficiency Act to the District, both by its very terms and by the terms of the Home Rule Act, "reflects Congress' decision . . . to expressly limit District spending to amounts *Congress* appropriates." B-262069 (emphasis added). Only acts of Congress, not acts by the Council or by officers or employees of the District Government or the federal government, make amounts available for obligation and expenditure.

The Chairman also places significance in the fact that Congress has not enacted into law a resolution disapproving of the Budget Autonomy Act.[12] Council Letter,

[12] Specifically, the Chairman asserted that "now that the Autonomy Act has completed the process set forth in [Home Rule Act] section 303, including the Congressional review period, the Autonomy Act is law and was a legitimate exercise of the charter-amendment power." Council Letter, Attachment A, at 5–6. A memorandum provided to us in support of the Council's position states that "Congress had the opportunity to veto the Charter amendment . . . but declined to do so," which suggests that "Congress determined that the District has the legal authority under the Anti-Deficiency Act to amend its Charter in the way it did." Council Letter, Attachment B, at 5.

Attachment A, at 5–6. As discussed above, the Home Rule Act provided no authority to enact the Budget Autonomy Act. It is elementary that acts taken without legal authority are void at the outset. *See* B-302230, at 11–12; *McConnell*, 537 A.2d at 215 (District ballot initiative had no effect because it exceeded powers granted to the District in the Home Rule Act). It is, therefore, of no legal significance that Congress did not enact a resolution disapproving of the Budget Autonomy Act. *See id.* Even in the absence of such a resolution, the amendments of the Budget Autonomy Act have no force or effect.

The Mayor stated that "[a]lthough I strongly support budget autonomy for the District of Columbia and believe that the status quo is unacceptable, I continue to have legal concerns with the act and refer you to the Attorney General's Response for details." Mayor Letter. In his response to us, the Attorney General of the District of Columbia stated that he "fully support[s] the concept of budget autonomy for the District for the revenues that we raise from our citizens." Attorney General Letter, Attachment, at 2. However, he also states that "any fair reading" of the Home Rule Act and of the District Charter contained therein demonstrates that the Home Rule Act does not provide the Council and the District voters authority to enact the Budget Autonomy Act. Attorney General Letter, Attachment, at 3–4. For the reasons we discussed in this opinion, we agree with the concerns the Mayor and the Attorney General of the District of Columbia have expressed.

CONCLUSION

Provisions of the Budget Autonomy Act that attempt to change the federal government's role in the District's budget process have no legal effect. District officers and employees continue to be bound by the Antideficiency Act, which bars them from obligating funds except in accordance with appropriations enacted by Congress. The District Government remains bound by provisions of federal law which require it to submit budget estimates to the President for transmission to the Congress for the enactment of appropriations.

The Constitution vests Congress with power "to exercise exclusive Legislation in all Cases whatsoever" over the District. Pursuant to this authority, Congress has enacted the Home Rule Act. While the Home Rule Act grants the District Government substantial powers of self-government, the District Government must also comport with the all of the act's limitations. A key limitation in the Home Rule Act provides that the District Government may not amend or repeal any act of Congress which is not restricted in its application exclusively in or to the District. However, portions of the Budget Autonomy Act irreconcilably conflict with two laws that are not restricted in their application exclusively in or to the District: the Antideficiency Act and the Budget and Accounting Act. These conflicts render the Budget Autonomy Act impermissible under the Home Rule Act and, therefore, the District Government acted beyond the scope of its authority when it attempted to enact the Budget Autonomy Act. Because acts taken *ultra vires* are, *ab initio*, legally

ineffective, portions of the Budget Autonomy Act that purport to change the federal government's role in the District's budget process are without legal force or effect.

The plain meaning of the Home Rule Act, coupled with the continuing force of the Antideficiency Act and of the Budget and Accounting Act, compels us to reach the conclusions we draw in this opinion. In this opinion we express no views on the merit of greater budget autonomy for the District; it is a matter that rests with the Congress.[13]

We are providing copies of this opinion to the Chairman of the Council, the Mayor, and to the Attorney General of the District of Columbia. If you have any questions, please contact Edda Emmanuelli Perez, Managing Associate General Counsel, at (202) 512-2853, or Katherine S. Lenane, Assistant General Counsel for Appropriations Law, at (202) 512-2792.

Sincerely yours,

Susan A. Poling
General Counsel

[13] Some members of Congress have proposed legislation that would affect some aspects of the budget process as it applies to the District Government. *See, e.g.*, H.R. 2793, 113th Cong. (2013).

GAO's Mission	The Government Accountability Office, the audit, evaluation, and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.
Obtaining Copies of GAO Reports and Testimony	The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's website (http://www.gao.gov). Each weekday afternoon, GAO posts on its website newly released reports, testimony, and correspondence. To have GAO e-mail you a list of newly posted products, go to http://www.gao.gov and select "E-mail Updates."
Order by Phone	The price of each GAO publication reflects GAO's actual cost of production and distribution and depends on the number of pages in the publication and whether the publication is printed in color or black and white. Pricing and ordering information is posted on GAO's website, http://www.gao.gov/ordering.htm. Place orders by calling (202) 512-6000, toll free (866) 801-7077, or TDD (202) 512-2537. Orders may be paid for using American Express, Discover Card, MasterCard, Visa, check, or money order. Call for additional information.
Connect with GAO	Connect with GAO on Facebook, Flickr, Twitter, and YouTube. Subscribe to our RSS Feeds or E-mail Updates. Listen to our Podcasts and read The Watchblog. Visit GAO on the web at www.gao.gov.
To Report Fraud, Waste, and Abuse in Federal Programs	Contact: Website: http://www.gao.gov/fraudnet/fraudnet.htm E-mail: fraudnet@gao.gov Automated answering system: (800) 424-5454 or (202) 512-7470
Congressional Relations	Katherine Siggerud, Managing Director, siggerudk@gao.gov, (202) 512-4400, U.S. Government Accountability Office, 441 G Street NW, Room 7125, Washington, DC 20548
Public Affairs	Chuck Young, Managing Director, youngc1@gao.gov, (202) 512-4800 U.S. Government Accountability Office, 441 G Street NW, Room 7149 Washington, DC 20548

Mr. MEADOWS. Thank you so such.
Mr. DePuy, you are recognized for 5 minutes.

STATEMENT OF JACQUES DEPUY

Mr. DEPUY. Thank you very much, Mr. Chairman, members of the committee. Thank you for inviting me to testify today with regard to congressional intent in the passage of the D.C. Home Rule Act of 1973.

I was subcommittee counsel to the Subcommittee of the House D.C. Committee, which held the hearings on and initially drafted the D.C. home rule bill in 1973. I was also very actively involved in the further drafting of the bill and political strategy pertaining to the bill in the full House District of Columbia Committee prior to House floor consideration of the bill and in the House-Senate conference committee.

I'm also a coauthor with Jason I. Newman of a law review article on the Home Rule Act published in 1975 by the American University Law Review. I also participated in the litigation brought by the Council of the District of Columbia against then Mayor Vincent Gray and Jeffrey DeWitt in the United States District Court in May 2014, along with two other former committee staff members and Mr. Newman as amici curiae. I have submitted a copy of the brief prepared by the four of us as amici to this committee.

Mr. DEPUY. I appear today solely on my own behalf.

I would also like this committee to know that although I testify today that the Congress did not intend to delegate to the D.C. Council or District voters any authority over local revenues through the charter amendment or any other process, I am personally a fervent believer in and advocate for the rights of the citizens of the District of Columbia to fully enjoy all rights of self-determination.

First, as indicated in the brief, the Home Rule Act contains numerous limitations and restrictions on the powers and authority of the then-to-be-created local government. Included among such limitations and restrictions were the charter amendment process, the authorization of a Federal payment, the budget process, and borrowing and spending. Such matters were not contained within the charter, were not to be subjected to a vote by District residents, and were not subject to the charter amendment process. In essence, such matters, with numerous others, were to be off limits to the local government.

Secondly, when Congress adopted the Home Rule Act, it was clearly understood that the act did not provide the local government with budget autonomy. Specifically, there was to be no change in the existing line item congressional appropriations role.

Furthermore, no distinction was made between local and Federal or any other category of revenues. Indeed, section 603(a) of the act states that, quote, "Nothing in this act shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to...the preparation, review, submission, examination, authorization, and appropriation of the total budget"—and I emphasize the words "total budget"—"of the District of Columbia." This provision is not part of the charter and cannot be changed by the charter amendment process.

I direct the committee to the brief, which, as I indicated, has been submitted for a much more detailed discussion of these important matters.

I'm happy to respond to questions, and I thank you.

[The prepared statement of Mr. DePuy follows:]

Edda Emmanuelli Perez is the Managing Associate General Counsel for the Appropriations Law, Budget Issues and Financial Management and Assurance teams in the Office of General Counsel. She is responsible for appropriations law opinions and decisions and GAO's *Principles of Federal Appropriations Law*, also known as the Red Book. Ms. Emmanuelli Perez is a frequent instructor of the Principles of Appropriations Law course that GAO offers to federal agencies. She also supervises the legal support provided to GAO audits of budget issues and federal entities' financial reporting, accounting, budget execution, internal controls, and other management and oversight systems.

Ms. Emmanuelli Perez was appointed to the Senior Executive Service in 2010. At that time, she became the Managing Associate General Counsel responsible for the legal support of GAO's audit work on issues including education, Social Security, retirement programs, health care, and homeland security. Previously, she was the Assistant General Counsel for Operations where she was responsible for personnel systems, information management systems, and oversight of administrative functions. She also served as the Assistant General Counsel for GAO's audit work on financial markets and housing issues, and as the Assistant General Counsel for audit work related to the nation's physical infrastructure.

Ms. Emmanuelli Perez received her law degree from Georgetown University Law Center in 1988 and her undergraduate degree from Inter American University of Puerto Rico in 1984. She is a member of the Maryland State Bar.

TESTIMONY OF JACQUES B. DEPUY
BEFORE SUBCOMMITTEE ON GOVERNMENT OPERATIONS, COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
U.S. HOUSE OF REPRESENTATIVES

May 12, 2016

Mr. Chairman, thank you for inviting me to testify today with regard to Congressional intent in the passage of the D.C. Home Rule Act of 1973, particularly with respect to budgeting, spending and appropriations matters. I am Jacques B. DePuy, currently an attorney who practices law in the District of Columbia.

I was subcommittee counsel to the subcommittee of the House D.C. Committee which held the hearings on and initially drafted the D.C. Home Rule bill. I was also very actively involved in the further drafting of the bill and political strategy pertaining to the bill in the full D.C. Committee, prior to House floor consideration of the bill and in the House-Senate conference committee. I am also co-author, with Jason I. Newman, of a law review article on the Home Rule Act published in 1975 by the American University Law Review. I also participated in the litigation brought by the Council of the District of Columbia against then mayor Vincent Gray and Jeffrey DeWitt in the United States District Court in May, 2014, along with two other former committee staff members and Mr. Newman, as amici curiae. I have submitted a copy of the brief prepared by the 4 of us as amici curiae to this committee (the "Brief").

I appear today solely on my own behalf. I also would like this committee to know that, although I testify today that the Congress did not intend to delegate to the D.C. Council or District voters any authority over local revenues through the charter amendment or any other process, I am personally a fervent believer in and advocate for the rights of the citizens of the District of Columbia to fully enjoy all rights of self-determination.

First, as indicated in the Brief, the Home Rule Act contains numerous limitations and restrictions on the powers and authority of the then to-be-created local government. Included among such limitations and restrictions were the charter amendment process, the authorization of a federal payment, the budget process and borrowing and spending. Such matters were not contained with the Charter, were not to be subjected to a vote by District residents and were not subject to the charter amendment process. In essence, such matters – and numerous others – were to be "off-limits" to the local government.

Secondly, when Congress adopted the Home Rule Act it was clearly understood that the Act did not provide the local government with budget autonomy. Specifically, there was to be no change in the existing line item congressional appropriation role. Furthermore, no distinction was made between "local" and "Federal" (or other) revenues. Indeed, Section 603(a) of the Act states that "Nothing in this Act shall be construed as making any change in existing law, regulation or basic procedure and practice relating to...the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia." (Emphasis added.) This provision is not part of the Charter and cannot be changed by the Charter amendment process.

I direct the Committee to the Brief for a much more detailed discussion of these important matters. I am happy to respond to questions.

Thank you.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNCIL OF THE DISTRICT OF COLUMBIA, Plaintiff, v. VINCENT C. GRAY, in his official capacity as Mayor of the District of Columbia, and JEFFREY S. DeWITT, in his official capacity as Chief Financial Officer for the District of Columbia, Defendants.	Case Number 1:14-cv-00655-EGS

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* OF JACQUES B. DEPUY, DANIEL M. FREEMAN, JASON I. NEWMAN, AND LINDA L. SMITH IN SUPPORT OF DEFENDANTS VINCENT C. GRAY AND JEFFREY S. DEWITT

Jacques B. DePuy, Daniel M. Freeman, Jason I. Newman, and Linda L. Smith ("Movants") respectfully request leave of the Court to file the attached brief as *amici curiae* (attached hereto as **Ex. 1**) in support of Defendants Vincent C. Gray and Jeffrey S. DeWitt. Movants understand that Defendants have consented without any conditions to anyone who wants to file an amicus brief, and they have consented to the filing of this brief. Counsel for Plaintiff, however, has stated that it will not consent to this filing unless Defendants consent to their filing a third brief in this case, after the submission of the proposed amicus brief.[1] Movants

[1] Council has asked that we represent their position as follows: "Plaintiff consents, so long as we have the opportunity to respond, in light of the fact that the amicus brief was not submitted until after Plaintiff's reply." We note that this brief will be submitted on the date of Defendants' filing.

understand that Defendants have communicated to Plaintiff that while the parties are not free to modify the Court's order to allow Plaintiff to file a third brief, should any amicus present new and unanticipated arguments, Defendants would consider their position when and if Plaintiff seeks leave of Court to file a response to such arguments. Accordingly, this motion is required.

As discussed in the attached memorandum of points and authorities incorporated herein, Movants, as persons intimately involved with the process by which the Home Rule Act was passed in 1973, are uniquely positioned to have "information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir. 1997)). Accordingly, the Court should grant this motion and allow Movants to file a brief as *amici curiae*.

By */s/ Kenneth Letzler*

Kenneth A. Letzler
DC Bar No. 025-619
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004-1206
Telephone: 202.942.5000
Facsimile: 202.942.5999
email: kenneth.letzler@aporter.com
Attorneys for Movants

Dated: May 8, 2014

CERTIFICATE OF SERVICE

I hereby certify that on May 8, 2014, a copy of the foregoing Motion for Leave to File a Brief as *Amici Curiae* of Jacques B. DePuy, Daniel M. Freeman, Jason I. Newman, and Linda L. Smith in Support of Defendants Vincent C. Gray and Jeffrey S. Dewitt, along with attachments; a Memorandum of Points and Authorities; and a Proposed Order were filed and served pursuant to the Court's electronic filing procedures using the Court's CM/ECF System.

/s/ *Kenneth Letzler*
Kenneth A. Letzler
DC Bar No. 025-619
Arnold & Porter LLP
555 Twelfth Street, NW
Washington, DC 20004-1206
Telephone: 202.942.5000
Facsimile: 202.942.5999
email: kenneth.letzler@aporter.com

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNCIL OF THE DISTRICT OF COLUMBIA, Plaintiff, v. VINCENT C. GRAY, in his official capacity as Mayor of the District of Columbia, and JEFFREY S. DeWITT, in his official capacity as Chief Financial Officer for the District of Columbia, Defendants.	Case Number 1:14-cv-00655-EGS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* OF JACQUES B. DEPUY, DANIEL M. FREEMAN, JASON I. NEWMAN, AND LINDA L. SMITH IN SUPPORT OF DEFENDANTS VINCENT C. GRAY AND JEFFREY S. DEWITT

Jacques B. DePuy, Daniel M. Freeman, Jason I. Newman, and Linda L. Smith ("Movants" or "Amici") respectfully submit this memorandum of points and authorities in support of their motion for leave to file a brief as *amici curiae*. As discussed below, Movants are uniquely positioned to provide "information and perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Jin v. Ministry of State Security*, 557 F. Supp. 2d 131, 137 (D.D.C. 2008) (quoting *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (7th Cir. 1997)).

The Council has told this Court in its Memorandum of Points and Authorities in Support of Motion for Summary Judgment or Remand (at 16) that "history" and "context" are

important to the decision of this matter. Amici are individuals who were personally involved in the passage of the Home Rule Act in 1973 as either staffers or counsel for an interested party. In addition, three of the four Amici authored law review articles on the Act shortly after its passage. Hence, they can provide insight into the history and context based on their participation in those events.

Movant Jacques B. DePuy served as Counsel to the Subcommittee on Government Operations of the House District of Columbia Committee from 1973 to 1974, when the Home Rule Act was passed. He is also co-author of the leading Law Review article on the Act, Jason I. Newman & Jacques B. DePuy, *Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act*, 24 AM. U. L. REV. 537 (1975), which is cited multiple times in the Council's Memorandum and Reply Memorandum and is indicated by asterisk as an authority principally relied upon by Council. Additionally, Mr. DePuy is interested in the outcome of this case as a lawyer who has practiced law in the District of Columbia for many years.

Mr. DePuy has an additional, particular interest in this matter. He is referred to by name, and his remarks are quoted (in italics) in the Council's Reply Memorandum on page 15. However, as noted in the proffered brief, Amici submit that the quoted language is presented out of context in a way that has the potential to mislead the Court absent clarification. Mr. DePuy wishes to address that issue.

Movant Jason I. Newman was involved in the consideration of home rule for the District of Columbia in his capacity as counsel for the Self Determination Coalition, which supported home rule, and as a professor of law at the Georgetown University Law Center. He consulted actively with members of Congress and staff as to home rule legislation and helped

draft provisions of the Act. He is co-author with Mr. DePuy of the leading law review article on the Act, cited above.

Movant Daniel M. Freeman worked on the Home Rule Act as Assistant Counsel to the House Committee on the District of Columbia. He is now a professor at American University and is the author of "Home Rule and the Judiciary," Journal of the Bar Association of the District of Columbia.

Movant Linda L. Smith served as a Budget Analyst at the Office of Management and Budget and then moved to the Professional Staff of the House Committee on the District of Columbia, focusing on public finance, budgeting and borrowing. In this regard, Ms. Smith worked closely with Congressman Thomas Rees on the budget and borrowing provisions of the Home Rule Act. She subsequently served on the House Budget Committee, as Special Assistant to the Secretary of Transportation, and as Director of Administration for Budget and Public Finance of the Office of Management and Budget in the Carter and Reagan Administrations.

The Movants have clear recollection of the context in which the Home Rule Act was considered and passed, and a number of them have retained files from that time. Discussions with Amici and materials from contemporaneous files have enriched the proffered brief.

It is our understanding that, in contrast to the position taken by Plaintiff, Defendants have consented without condition to the filing of a series of amicus briefs in support of Plaintiff, including briefs addressing the history and context of the Act. In those briefs on behalf of Plaintiff, arguments are made about history and context that differ markedly from the Movants' knowledge of events and the evidence cited in the Movants' attached brief in support of that understanding. The Movants, unlike amici supporting the Council, participated in the

events in question and bring that understanding to their presentation. Indeed, Council's Reply submission quotes remarks from one of the Movants (Mr. DePuy) as supporting their position.

There is no prejudice to Plaintiff in accepting the attached brief. The Council has had many months to prepare its arguments on the Act and will be able to discuss and respond to the proposed brief, if it so chooses, during oral argument.

In sum, Amici's brief will help the Court by "assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the Court's attention to [pertinent matters that might otherwise] escape[] consideration." *Miller-Wohl Co., Inc. v. Comm'r of Labor & Indus., State of Montana*, 694 F.2d 203, 204 (9th Cir. 1982); *see also, e.g., Historic E. Pequots v. Salazar*, 934 F. Supp. 2d 272, 274 (D.D.C. 2013) (considering *amicus curiae* brief on motion to dismiss); *Dynalantic Corp. v. U.S. Dep't of Defense*, 885 F. Supp. 2d 237, 243 (D.D.C. 2012) (considering *amicus curiae* briefs on motion for summary judgment). For all of these reasons, Amici respectfully submit that consideration of the attached *amicus* brief will assist the Court in assessing the legal and factual issues presented in this case and will not prejudice Plaintiff.

Amici therefore ask that the Court grant leave to file the attached *amici curiae* brief.

By /s/ *Kenneth Letzler*

Kenneth A. Letzler
DC Bar No. 025-619
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004-1206
Telephone: 202.942.5000
Facsimile: 202.942.5999
email: kenneth.letzler@aporter.com
Attorneys for Movants

Dated: May 8, 2014

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNCIL OF THE DISTRICT OF COLUMBIA, Plaintiff, v. VINCENT C. GRAY, in his official capacity as Mayor of the District of Columbia, and JEFFREY S. DeWITT, in his official capacity as Chief Financial Officer for the District of Columbia, Defendants.	Case Number 1:14-cv-00655-EGS

[PROPOSED] ORDER

Upon consideration of the motion of Jacques B. DePuy, Daniel M. Freeman, Jason I. Newman, and Linda L. Smith for leave to file a brief as *amici curiae* in support of Defendants Vincent C. Gray and Jeffrey S. DeWitt and the record herein, it is hereby

ORDERED that the motion for leave to file is granted.

Signed this _____ day of May, 2014.

_____
Emmet G. Sullivan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNCIL OF THE DISTRICT OF COLUMBIA,	
Plaintiff,	
v.	
VINCENT C. GRAY	**Case Number 1:14-cv-00655-EGS**
and	
JEFFREY S. DeWITT,	
Defendants.	

BRIEF OF AMICI CURIAE JACQUES B. DEPUY, DANIEL M. FREEMAN, JASON I. NEWMAN AND LINDA L. SMITH IN SUPPORT OF DEFENDANTS VINCENT C. GRAY AND JEFFREY S. DEWITT

Kenneth A. Letzler
DC Bar No. 025-619
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004-1206
Telephone: 202.942.5000
Facsimile: 202.942.5999
email: kenneth.letzler@aporter.com
Attorneys for Messrs DePuy, Freeman, and Newman and Ms. Smith

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNCIL OF THE DISTRICT OF COLUMBIA,	
Plaintiff,	
v.	
VINCENT C. GRAY	**Case Number 1:14-cv-00655-EGS**
and	
JEFFREY S. DeWITT,	
Defendants.	

BRIEF OF AMICI CURIAE JACQUES B. DEPUY, DANIEL M. FREEMAN, JASON I. NEWMAN AND LINDA L. SMITH

I. INTEREST OF THE *AMICI CURIAE*

The Council has told this Court in its Memorandum of Points and Authorities in Support of Motion for Summary Judgment or Remand (at 16) that "history" and "context" are important to the Court's decision of this matter. *Amici Curiae* are uniquely situated to assist the Court on these issues.[1] When the Home Rule Act was passed in 1973, amicus Jacques B. DePuy served as Counsel to the Subcommittee on Government Operations of the House District of Columbia Committee. In that capacity, Mr. DePuy had a significant role in and responsibilities for the hearings in the House of Representatives on the Home Rule bill, the drafting of the Home Rule

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund preparation or submission of this brief. No person, other than Amici and Amici's counsel, contributed money intended to fund preparation or submission of this brief.

bill in the Subcommittee and the full District of Columbia Committee, the development of political strategy in the Committee and on the House floor, and consideration of the House-passed Home Rule bill by a Senate-House conference committee. Additionally, he is co-author of the leading law review article on the Home Rule Act, Jason I. Newman & Jacques B. DePuy, *Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act*, 24 AM. U. L. REV. 537 (1975) (hereinafter "Newman & DePuy"), which the Council repeatedly cites in its pleadings and which is indicated in its reply pleading as an authority principally relied upon. Indeed, Mr. DePuy is referred to by name and his remarks are quoted (in italics) in the Council's Consolidated Reply Memorandum on page 15. Mr. DePuy is further interested in the outcome of this case as a lawyer who has practiced law in the District of Columbia for almost forty years.

Amicus Daniel M. Freeman worked on the Home Rule Act as Assistant Counsel to the House Committee on the District of Columbia. He is now a professor at American University and is the author of "Home Rule and the Judiciary," Journal of the Bar Association of the District of Columbia.

Amicus Jason I. Newman was involved in the consideration of home rule for the District of Columbia in his capacity as counsel for the Self Determination Coalition which supported home rule and as a professor of law at the Georgetown University Law Center. He consulted actively with members of Congress and staff as to home rule legislation and helped draft provisions of the Act. He is co-author of the leading law review article on the Home Rule Act, cited above, which is one of the authorities principally relied upon by the Council and is repeatedly cited in their papers.

Amicus Linda L. Smith served as a Budget Analyst at the Office of Management and Budget and then moved to the Professional Staff of the House Committee on the District of Columbia, focusing on public finance, budgeting and borrowing. In this regard, Ms. Smith worked closely with Congressman Thomas Rees on the budget and borrowing provisions of the Home Rule Act. She subsequently served on the House Budget Committee, as Special Assistant to the Secretary of Transportation, and Director of Administration for Budget and Public Finance of the Office of Management and Budget in the Carter and Reagan Administrations.

Amici agree with the parties that, as a matter of public policy and of the fundamental values of a democracy, it is the duly elected representatives of the citizens of the District of Columbia who should determine how D.C. tax-payer money is spent. The issue presented here, however, is not what is good public policy, but what existing law says. As discussed below, it is only Congress that can establish budget autonomy for the District, and Congress has not to date done so.

II. ARGUMENT

A. Summary of the Argument

Council's Memorandum in Support of Summary Judgment argues (at 16) that history and context support its position. Amici, who were all active participants in the passage of the Act and who include the authors of the leading law review article on the Act, address both history and context. Key to the context of this case is that the structure of the Home Rule Act creates a dichotomy between the Charter (Title IV of the Act) and the remaining provisions (all other Titles). The Charter was intended by Congress to "establish the means of governance of the

District . . . ." Section 301.[2] The provisions that were included in the Charter were to be put to a vote by District residents and, upon "its acceptance by a majority of the registered qualified electors of the District voting thereon in the charter referendum . . . ," *id.*, were to be subject to the charter amendment process. Those many other, and very significant, provisions not contained in the Charter -- most notably including those dealing with the (federal) National Capital Planning Commission (Section 203), the delegation of limited legislative power (Section 302), the charter amending procedure (Section 303), authorization of a federal payment (Title V of the Home Rule Act), retention of constitutional authority (Section 601), limitations on the Council (Section 602), the budget process and limitations on borrowing and spending (Section 603), the continuing applicability of existing statutes (Section 714), continuation of the D.C. court system (Section 718), an independent audit process (Section 736), and the emergency control of the police (Section 740) among others – were expressly excluded from the Charter. They are not subject to a vote by District residents and are not subject to the charter amendment process. The non-charter provisions are "off-limits" to the local government.

When Congress adopted the Home Rule Act, all the participants in the process understood that the Act was a compromise which did not provide the District with budget autonomy. In particular, there was to be no change in the existing line item congressional appropriation role, and in that regard there was no distinction between "local" and "Federal" (or other) revenues. Section 603(a) states that "Nothing in this Act shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to . . . the preparation, review, submission, examination, authorization, and appropriation of the *total budget* of the

[2] Unless otherwise noted, all Section references are to the section of the Home Rule Act, the District of Columbia Self-Government and Governmental Re-Organization Act, Pub. Law No. 93-198, 87 Stat. 774 (1973), as initially enacted.

District of Columbia government." (emphasis added). This provision is not part of the Charter and cannot be changed by the Charter amendment process. While Council would have the Court essentially ignore this language by reading it as "a rule of construction, *not* limitation," the legislative history is to the contrary. (See pages 12-14 below). The language in question tracks that of a section of the bill originally reported out of the House District of Columbia Committee (the "Committee Bill"), which language is unequivocally described as a "prohibition," *i.e.*, a provision of substantive effect.

B. The History

Article I, Section 8 of the Constitution provides that "The Congress shall have power . . . to exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the seat of the government of the United States." Beginning in 1801, Congress granted the District some degree of autonomy over local matters. In 1874, the governance of the District of Columbia was changed, and by 1878 "the right of suffrage was firmly laid to rest." Newman & DePuy at 545-47.

The assertion of federal control rested on a variety of grounds, but malfeasance of the local government in financial matters was clearly a factor. The debt of the District had ballooned from $3 million in 1871 to $20 million in 1875 and $25 million in 1877 (a level that amounted to more than 25% of the appraised value of property in the District.) *Id.* at 545-47 and notes 54, 55, 59 and 60. As a result, Congress returned to itself total control over District governance, and for a nearly a century residents in the District of Columbia had no say in choosing the government that regulated their activities.

C. The Context In Which The Home Rule Act Was Passed

In the years preceding the Home Rule Act, the context in which Congress managed the affairs of the District was one in which power flowed to, and the agenda of Congress was dominated by, members of Congress who had seniority and served as Committee chairmen[3]. It was also a setting in which coalitions across party lines -- southern Democrats plus Republicans on the one hand and moderate Republicans plus Democrats on the other -- could carry the day. During this period, "Northeastern liberals (with large labor-union and Jewish constituencies) and Midwestern conservatives coexisted in the Republican Party. Southern conservatives (with all-white electorates), Northern liberals and big-city machine hacks coalesced in the Democratic Party." Michael Barone, *Washington is Partisan -- Get Used to It,* THE WALL STREET JOURNAL, Oct. 18, 2013, at A13. Thus, Congressional votes and alliances could fall along ideological lines, which differed from party affiliation. Political scientist Howard Rosenthal observes, "in 2000, almost all close votes are party-line votes, with Democrats opposing Republicans, whereas in the 70s, you could have a lot of close votes with people on opposite sides of the issue being from both parties." Howard Rosenthal, *Trends in Polarization: Political Leaders Panel at the Polarization of American Politics: Myth or Reality?*, CONFERENCE HOSTED BY THE CENTER FOR THE STUDY OF DEMOCRATIC POLITICS (Dec. 3, 2004) (*available at* http://www.princeton.edu/csdp/events/Polarization2004/Panel2.pdf) (lasted visited May 7, 2014).

Concerns that a cross-party coalition led by a powerful Chairman might defeat home rule were very much part of the context in which the Home Rule Act was considered. For many years

[3] *See, e.g.*, Gerald Clarke, *Congress: The Heavy Hand of Seniority,* TIME, Dec. 14, 1970, at 34; Michael Moss, *Congressional Committee Update Who's New?,* ENVIRONMENT, April 1979, at 25. Today, the situation is different, as power and influence have gravitated significantly to the Speaker, Majority Leader and Minority Leader in the House and to the Majority and Minority Leader in the Senate.

leading up to the consideration of the Home Rule Act, the positions of Chairman of the House Committee on the District of Columbia and Chairman of the Subcommittee on District of Columbia Appropriations of the House Appropriations Committee were held respectively by Congressmen John L. McMillan of South Carolina and William H. Natcher of Kentucky. They had amassed power through seniority, by strong personal and political networks within the House, and by virtue of the fact that, while most members of Congress had little or no interest in District of Columbia affairs, Chairmen McMillan and Natcher spent the time on D.C. matters necessary to develop expertise and influence. While the Senate year after year introduced and passed bills that would provide home rule for the District, the subject was anathema to the Chairman of the House District of Columbia Committee and irrelevant to the Chairman of the Subcommittee on District of Columbia Appropriations.

Thus, it was only in 1973 when Michigan's Charles Diggs succeeded Mr. McMillan as Chairman, and most of Mr. McMillan's committee allies (three of whom were subcommittee chairmen) were defeated or resigned, that home rule legislation was given serious consideration by the House Committee on the District of Columbia and its staff. Mr. DePuy was intimately involved in those efforts as counsel to the subcommittee that was charged with drafting and shepherding a home rule bill.

The bill initially reported out of the House District of Columbia Committee included budget autonomy for the District. The House Committee Bill, however, attracted considerable resistance on a number of fronts, particularly from Appropriations Subcommittee Chairman Natcher, whose concerns focused on the bill's provisions affecting the budget and appropriations. As a result, amendments were proposed and submitted to the House Rules Committee even before the bill reached the House floor. Some of the amendments were

wholesale substitutes for the Committee proposal, including those proposed by Republicans Ancher Nelson of Minnesota, the ranking Minority Member of the House Committee, and Joel Broyhill of Virginia and Democrat Edith Green of Oregon. There was also a concern that President Nixon might veto any home rule bill, particularly given his emphasis on issues of crime, including in the District of Columbia.

Opposition rested in part on the Constitution's provisions giving Congress jurisdiction over the District and, as House Minority Leader Gerald Ford put it, a belief that "the Nation's Capital belongs to every citizen of the United States, whether he lives in the District of Columbia or Michigan." Jack Kneece, *Ford Insists Hill Run D.C. Budget,* WASHINGTON STAR, Oct. 16, 1973, at B-2 (attached as Exhibit A). Second, and of perhaps greater importance, was the fact that giving budget autonomy to the District would strip the core power from Congressman Natcher's Appropriations Subcommittee. Proponents of the bill thus faced a possible coalition of moderate and conservative Democrats (Green, Natcher, and others) and Republicans. Moreover, the bill as reported by the House Rules Committee was to be considered under a rule that permitted debate and votes on a section by section basis. This rule "mean[t] home rule enemies could stall it [the bill] by debating each [of its 88] section[s]," Jack Kneece, *Diggs Ready to Deal on Home Rule Bill*, WASHINGTON STAR, Oct. 5, 1973, at B-1 (attached as Exhibit B), a situation that opened the door to obstructionism. 119 Cong. Rec. 33353 (Oct. 9, 1973) (remarks of Congressman Bolling).

In this setting there was considerable doubt that the House Committee Bill had enough votes to pass, and it was possible it would be met by a veto if it passed narrowly.[4] To enhance the chances that a home rule bill would secure passage in the House, Chairman Diggs -- after

[4] The Newman & DePuy article at page 559 n. 112 notes "the headway made by the opponents and a number of mistakes and occurrences which setback the proponents."

meeting with Appropriations Subcommittee Chairman Natcher and consulting with members of his own committee who supported home rule -- took an unusual step. He abandoned the original Committee Bill and offered new language in the form of a comprehensive substitute to the Committee-reported bill. The substitute was commonly referred to as the Diggs Compromise or as the Committee Substitute. As explained in a "Dear Colleague" letter to Members of Congress:

> The Committee substitute contains six important changes which were made after numerous conversations and sessions with Members of Congress and other interested parties. These changes clarify the intent of H.R. 9682 and accommodate major reservations expressed since the bill was reported out.
>
> Letter from Charles C. Diggs, *et al.* to Members of the House of Representatives

(reprinted in 119 Cong. Rec. 33353 (Oct. 9, 1973)).

Importantly, the substitute neutralized any concern that Congressman Natcher would see the bill as one stripping his subcommittee of its core function (and hence reducing his power in Congress). That change was the first of six listed in the Dear Colleague letter:

"1. Budgetary process. Return to the Existing Line Item Congressional Appropriation Role." *Id.*

California Democratic Congressman Thomas Rees, a strong home rule supporter and chairman of the House Subcommittee on Revenue and Financial Affairs of the House District of Columbia Committee that drafted the vast majority of budgetary and financial provisions in the home rule bill, made clear in the floor debate that this concession was necessary to get a bill passed. He began his remarks as follows:

> I speak in favor of the form that is before us now. It is entitled 'Committee Print' and just came off of the presses today. I think that the committee print is a reasonable compromise, and especially in the area of what the relationship of the Committee on Appropriations and Congress will be to the District of Columbia. Really the relationship, if this legislation is passed, will be the same relationship that Congress now has with the District of Columbia budget, that no money can be spent by the District of Columbia. The

> appropriation is specifically authorized for that purpose by the Committee on Appropriations in the House and in the Senate.
>
> This was the major compromise over the weekend, so that we have no change at all on budgetary control when we are discussing who will run the budget of the District of Columbia. I cannot say I am overjoyed by this compromise . . . . But it was the wisdom in the various sessions we had over the weekend that it would be best that we not change this and that the appropriations process be exactly the same appropriations process that we have now.

119 Cong. Rec. 33390-91 (Oct. 9, 1973).

With these and other changes, the Committee Substitute was considered on the House floor along with the competing substitutes offered by Mr. Nelson and Ms. Green. After extensive debate and significant efforts by the Majority Whip to convince members of the Democratic majority to vote for the Diggs Compromise, the Nelson and Green substitutes were defeated (but not overwhelmingly) and the Committee Substitute was approved. As the *Washington Star* observed, "the compromises maneuvered by Diggs had won the full support of the single most influential member of the House District Committee, Representative William H. Natcher. Natcher's high price was ultimate congressional control over the city's budget -- and it was not the only price paid." Editorial, *Home Rule at Last*, WASHINGTON STAR, Oct. 11, 1973 at A-18 (attached as Exhibit C). *See also* Noah Wepman, *Reforming the Power of the Purse: A Look At the Fiscal and Budgetary Relationship Between The District Of Columbia and the U.S. Congress*, 9 POLICY PERSPECTIVES 30 n. 2 (May 2002) (*available at* http://www.policy-perspectives.org/article/view/4229) (last visited on May 7, 2014) (hereinafter, "Wepman"), stating that the Diggs Compromise "was essential to garner the support of Representative William Natcher (D-Ky), the chairman of the District of Columbia Appropriations Subcommittee. His support carried not only many members of the Appropriations Committee,

but also a large number of Southern congressmen and was essential to enacting home rule for the district."

Passage of the Committee Substitute triggered a conference with the Senate to resolve differences in the House and Senate bills. The Republican leadership made clear its view that congressional control of the D.C. budget should not be subject to negotiation in the conference process. As House Minority Leader Gerald Ford put it, "In my view, this particular provision of the bill is non-negotiable in the House-Senate conference." *Ford Insists Hill Run D.C. Budget* (Exhibit A). Indeed, the issue was not subject to serious discussion because, as Senator Mathias explained, the "House conferees made it quite clear, however, that their body wanted fiscal control to remain in the Congress." 119 Cong. Rec. 42452 (Dec. 19, 1973). Absent this provision, the home rule bill would likely be defeated when it was reported back to the House after the conference report. Thus, to his chagrin, Senator Mathias (a strong home rule supporter) would "continue to have responsibility for reviewing and passing judgment on just about every penny which the local government may wish to spend." *Id.* at 42453.

The fundamental change in approach to budgeting and appropriating made in the Diggs Compromise and adopted by the Congress can be seen by comparing the language of the Committee Bill and the language of the Home Rule Act as passed, based on the Diggs Compromise. For example, while § 446 in the Committee Bill empowered Council, subject to the limitations in § 603, to make appropriations for the District, § 446 of the Home Rule Act as passed states that the Council-approved budget shall be submitted by the Mayor to the President for transmission to Congress. This section states that "[n]o amount may be obligated or expended by any officer or employee of the District of Columbia government unless such

amount has been approved by Act of Congress, and then only according to such Act." Section 446. Nothing of that sort was in the Committee Bill.

The Diggs Compromise was also implemented by adding critically important new §§ 603 (a) and (e), which, under the heading "Budget process; limitations on borrowing and spending," read as follows:

> "(a) Nothing in this act shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the Federal Office of Management and Budget, and the Comptroller General of the United States in the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia government . . . .
>
> (e) Nothing in this Act shall be construed as affecting the applicability to the District government of the provisions of . . . the so-called Anti-Deficiency Act . . . ."

Council essentially ignores the title of the section ("Budget process; *limitations* on borrowing and spending" (emphasis added)) and the fact that this language appears in a portion of the Act that cannot be altered by a Charter amendment. Instead, the Council italicizes the introductory language ('*Nothing in this Act shall be construed as* . . . .") and argues that the wording makes the provision "a rule of construction, *not* limitation." Memorandum at 30-33 (emphasis in the original). *See also* Council's Consolidated Reply Memorandum at 23-27. As shown in the table below, the language found in § 603 of the Diggs Substitute and italicized by Council was borrowed from § 602(b) of the Committee Bill, which imposes limitations on the Council's legislative powers. Section 602 of the Committee Bill, like § 603 of the Committee

Substitute, has a list of specific prohibitions and a more general provision that begins "nothing in this Act shall be construed as."

Comparison of Sections 602(b)[5] of the Committee Bill and 603(a) of the Home Rule Act

Committee Bill § 602 Limitations on the Council.	**Diggs Substitute § 603. Budget process; limitations on borrowing and spending.**
(b) Nothing in this chapter shall be construed as vesting in the District government any greater authority over the National Zoological Park, the National Guard of the District of Columbia, the Washington Aqueduct, the National Capital Planning Commission, or, except as otherwise specifically provided in this Act, over any Federal agency, than was vested in the Commissioner prior to the effective date of Title IV of this Act.	(a) Nothing in this chapter shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the federal Office of Management and Budget, and the Comptroller General of the United States in the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia government.

The identical language in §§ 602 and 603 should be interpreted together, particularly since it appears clear that, when Congress realized in October 1973 that it needed language implementing the Diggs Compromise's provisions on budgeting, it used in § 603 of the Committee Substitute familiar language borrowed from § 602 of the Committee Bill.

Given the procedural history of the Home Rule Act, no Section-by-Section analysis of the Committee Substitute or of the Conference bill was prepared, but there is such an analysis with regard to the Committee Bill, *see* H.R. REP. NO. 93-482, at 16 (1973), and the Section-by-Section analysis of Committee Bill § 602 is instructive. Section 602 of the Committee Bill parallels § 603 of the Diggs Substitute and the Home Rule Act. Each is entitled "limitations" and has text that uses two different formulations, one being specific prohibitions and the other beginning

[5] Section 602 of the Committee Bill is attached hereto as Exhibit D.

"Nothing in this Act shall be construed as." As shown in Exhibit E, the Section-by-Section analysis of § 602 of the Committee Bill shows that Congress meant both formulations -- the specific provisions and the more general "Nothing in this Act" language -- to function as prohibitions limiting Council action. The Report on Committee Bill § 602 says: "This section lists specific *prohibitions* against the District Council's legislative authority, which include *prohibitions* against" legislating on seven activities specifically described in § 602(a) (e.g., "taxation of United States or state properties"). *Id.* at 36 (emphasis added). The Section-by-Section analysis then addresses the "Nothing in this Act shall be construed" language in §602(b) and concludes that it too is a prohibition. "Subsection (b) *prohibits* the Council from exceeding its present authority over the National Zoological Park, the District National Guard, the Washington Aqueduct, the National Capital Planning Commission, or any other Federal agency." *Id.* at 37 (emphasis added). In other words, the language in § 602(b) stating that "nothing in this chapter shall be construed as" was intended as a substantive provision -- a prohibition -- not a statement of construction.

In using the same language for § 603(a) ("Nothing in this chapter shall be construed as") Congress meant to reach the same result. It was stating a prohibition, in this case one relating to the Council's budgeting authority.

The language (described above) that emerged from the House-Senate Conference needed to be approved by both houses of Congress. In seeking approval of the conference bill, Chairman Diggs described the reservation of budgetary power to Congress without qualification. In a Dear Colleague Letter of December 10, 1973, he said "The Conference Report accomplishes the following twelve objectives" with the first such objective being the reservation of Congress' right to "legislate for the District at any time on any subject." The second objective was to retain

in Congress "the authority to review and appropriate the entire District budget."[6] STAFF OF THE HOUSE COMM. ON THE DISTRICT OF COLUMBIA, 93d Cong., 4 LEGISLATIVE HISTORY OF THE DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT at 3041 (Comm. Print 1976) ("HOME RULE HISTORY"). In floor debate, Chairman Diggs again said that in the Conference Bill "[W]e have retained in the Congress the authority to review and appropriate the entire District budget . . . ." 119 Cong. Rec. 42037 (Dec. 17, 1973).

The Conference Report echoes that point. It says that the effect of the Diggs Compromise as adopted by the Conference Committee was to leave "Congressional appropriations and reprogramming procedures as presently existing. . . . The substitute maintains present law and procedures for Congressional reprogramming authorities and procedures. The court budget shall be handled by the Mayor, Council, and President in the same manner as the budget of the United States courts." H.R. REP. NO. 93-703, at 78 (1973).

Similarly, when the President signed the Act, he did so on the understanding that "final Congressional review of the District's appropriation process is retained under this measure." Presidential Statement on Signing the District of Columbia Self-Government and Governmental Reorganization Act, 9 WEEKLY COMP. PRES. DOC. 1483 (Dec. 24, 1973).

Thus, the Diggs Compromise, and in particular its emphasis on the "Return to the Existing Line Item Congressional Appropriation Role," succeeded in obtaining a significant measure of Home Rule for the District, although less than the original House Committee Bill envisioned. Without the compromise and the agreement of the Senate to accede to the House position on budgeting and appropriations matters, there is every reason to believe the home rule effort would have been defeated on the House floor.

---

[6] In referring to the entire District budget, Chairman Diggs made no distinction between "local" and Federal (or other) revenues.

Council argues that the Diggs Compromise involved only a "default" position, which could be changed at any time by Charter amendment. To the contrary, no one thought so at the time, and Council cites no evidence that Congress intended such a position.[7] First, the Dear Colleague letters quoted above did not describe the changes that way. If, as Council now claims, the Committee Substitute preserved the jurisdiction of the House (and Senate) Appropriations Subcommittee only as a temporary "default" position, subject to change by a Charter amendment, such a position would almost surely have failed to neutralize Chairman Natcher's opposition and most likely would have resulted in the defeat of the home rule bill.

Contemporary press reports likewise are clear on what the Diggs Compromise entailed: Congressional control over the District's budget. An October 5, 1973 story in the *Washington Star* quotes Chairman Diggs as saying he is "prepared to maintain the role of the House and Senate District appropriation subcommittees," a change that was characterized as "the major concession of retaining congressional line item oversight of the budget." *Diggs Ready to Deal on Home Rule Bill,* (Exhibit B). Similarly, an editorial at the time observed that the Diggs Compromise met "Natcher's high price [of] ultimate congressional control over the city's budget . . . ." *Home Rule at Last* (Exhibit C). A subsequent editorial repeated that view of the changes made by the Diggs Compromise, stating that the conference bill "falls short of what . . . home-rule advocates had sought" but that it "strikes a balance between the conflicting desires of Congress to give District residents a meaningful further measure of control over their own affairs while at the same time retaining strong measures of congressional oversight." Editorial, *Home Rule: One More Step to Go!,* WASHINGTON STAR, Dec. 2, 1973 at G-1 (attached as Exhibit F). Further, referring to the House-Senate conference process, the editorial noted that "the single

[7] There is no reference to a "default" concept in the congressional proceedings, and the use of this concept forty years later strikes Amici as foreign to the home rule effort.

most vital point of controversy was the House insistence that Congress retain -- much in the manner of the past -- the right to review and approve the annual District budget." *Id.* Similarly, an article on the then upcoming conference process reported that "The House and Senate District Appropriations subcommittees would review the budgets by line item under the House-passed version." Jack Kneece, *Senate to Seek Strong Home Rule Bill*, WASHINGTON STAR, Oct.12, 1973 at B-1 (attached as Exhibit G).

None of the members of the then appointed city council thought the Home Rule Act created a "default position" that an elected Council could remedy by proposing a charter amendment. *See* Harvey Kabaker, *Home Rule: Lack of Budget Authority Dismays Council*, WASHINGTON STAR, Oct. 14, 1973, at B-2 (attached as Exhibit H). Indeed, Representative Diggs was accused in a sermon of "selling his soul" by agreeing with Representative Natcher that "Congress should continue to have appropriations control over line items in the city's budget ...." Cathe Wolhowe, *Diggs Is Accused of 'Power Ploy,'* WASHINGTON POST, Oct. 8, 1973, at C1 (attached as Exhibit I).

Lastly, there was never any mention of a "default" position on budget in the lengthy Newman & DePuy law review article on the Home Rule Act (which, including appendices, contains more than 200 pages). That is because it never occurred to the authors, including Mr. DePuy who was a key member of the House staff who drafted the bill and Mr. Newman, who played an important role in the home rule effort, that the budget provisions were merely a "default" that could be changed by Charter amendment. Subsequent writing on the subject is to the same effect. *See* Wepman at 23-24 ("Included in the home rule act was the Diggs Compromise, which, among other provisions, granted Congress line-item control over the city's budget. Congress continues to exercise this authority as part of its annual budget process. . . . For

all intents and purposes, the Congress treats Washington, D.C., as a federal agency whose budget is subject to comprehensive congressional oversight. The District must submit its budget to Congress (after it has been approved by the mayor and City Council) for review and approval as part of the federal budget process. Indeed, the District has its own congressional appropriations subcommittee. . . . Congress essentially re-appropriates the entire District budget back to the city as if it were all federal money."). While Wepman deplores this structure and proposes ways to improve it, nothing in the article suggests that change could come via Charter amendment.

D. Council Is Wrong About Amicus DePuy's June 13, 1973, Remarks

While this brief focuses on history and context, we wish to discuss briefly the assertion in Council's reply pleading at 15 - 16 that Amicus DePuy's 1973 views on Charter amendment (in his role as Subcommittee counsel) support their sweeping position on the breadth of Charter amendment powers. Presumably because of concern with page limitations, Council's Reply truncates the setting in which Mr. DePuy spoke in a way that permits the reader to conclude mistakenly (a) that Mr. DePuy was talking about the Home Rule Act as passed and (b) that the issue under discussion was whether the District could change its fiscal year, even if that put it in conflict with the federal fiscal year.

In fact, the question raised was what could be done "should the Federal Government change their fiscal year." 1 HOME RULE HISTORY at 522. One member of Congress suggested that the language before them (Committee Discussion Draft No. 2) should "say that the fiscal year of the District of Columbia shall be the same as the Federal fiscal year . . . ." *Id.* Another member suggested that "you could change it [the D.C. fiscal year] by charter." *Id.* Mr. DePuy said either approach would work. Importantly, this conclusion came in the context of an early Committee draft of the Home Rule bill that gave the District budget autonomy and that contained

nothing like the limitations on the District's power to budget or to amend the Charter that were subsequently proposed and enacted as part of the Diggs Compromise in § 603(a).

In summary, what Mr. DePuy said was that, in the context of a Committee draft bill that would give the District budget autonomy, the definition of the D.C. fiscal year could be changed by a Charter amendment so as to align the District and Federal processes more closely, thereby facilitating congressional consideration of D.C. budget issues. That remark bears not at all on what Charter amendments are proper under a statute that denies the District budget autonomy and which includes limitations on the Charter amendment process as it relates to that subject.

III. CONCLUSION

Council suggests in this litigation that the portion of the Diggs Compromise which preserved for Congress the line item budget review and approval role was not a major issue. It was, they say, merely a "default" setting that could subsequently be changed by Charter amendment. History and context, they say, support their position. Similarly, Amici Concerned D.C. Professionals assert at pages 9 - 10 that the "objective" of Congress in passing the Home Rule Act was "to vest in District residents the ability to expand and improve the extent of home rule it confers . . . by amending its Charter, allowing it to create a budget process that best serves the needs of the District . . . ."

To the contrary, as discussed above, history and context paint a very different picture. Home rule legislation faced difficult prospects in the House. Chairman Diggs and his fellow Committee members who supported home rule for the District and who had sought budget autonomy for the District concluded that significant, but not complete, home rule was better than none. That was the reason Chairman Diggs took the unusual step of withdrawing the Committee Bill and offering a substitute that made concessions significant enough to garner the support of

Appropriations Subcommittee Chairman Natcher. The most significant concession was that "line item congressional appropriation" by Chairman Natcher's subcommittee would be untouched.

All parties, and amici, believe it would be better public policy had this concession not been necessary. But the votes were not there to pass the Committee Bill. Courts must enforce the law as enacted, not as the court or the parties would like it to be. Congress had no intention to allow a change in the line item budget process when it passed the Home Rule Act, and it did not view what it had done in preserving line item budgeting as merely a "default" position. It expressed itself on the subject in language described in a House Report as embodying a "prohibition," not construction.

If the Diggs compromise had explicitly stated the "default" setting approach that Council now embraces, the Home Rule Act would likely have failed.

Respectfully submitted,

/s/ Kenneth Letzler

Kenneth A. Letzler
DC Bar No. 025-619
ARNOLD & PORTER LLP
555 Twelfth Street, NW
Washington, DC 20004-1206
Telephone: 202.942.5000
Facsimile: 202.942.5999
email: kenneth.letzler@aporter.com
Attorneys for Messrs DePuy, Freeman, and Newman and Ms. Smith

EXHIBIT A

Ford Insists Hill Run D.C. Budget

By Jack Kneece
Star-News Staff Writer

Vice president-designate Gerald R. Ford says congressional control of the D.C. budget should stay in a House-passed home rule bill and not be subject to negotiation in a House-Senate conference.

"In my view, this particular provision of the bill is non-negotiable in the House-Senate conference," said Ford in a statement issued yesterday.

A spokesman for Senate District Committee Chairman Thomas F. Eagleton, D-Mo., said the senator would prefer to await the conference to discuss the matter, rather than get into a public dispute with Ford. (Ford, if confirmed as vice president, will be presiding officer of the Senate.)

"I am firmly convinced that if Congress is to be true to its constitutional mandate regarding the Nation's Capital, the Congress must retain control over the District budget," Ford said.

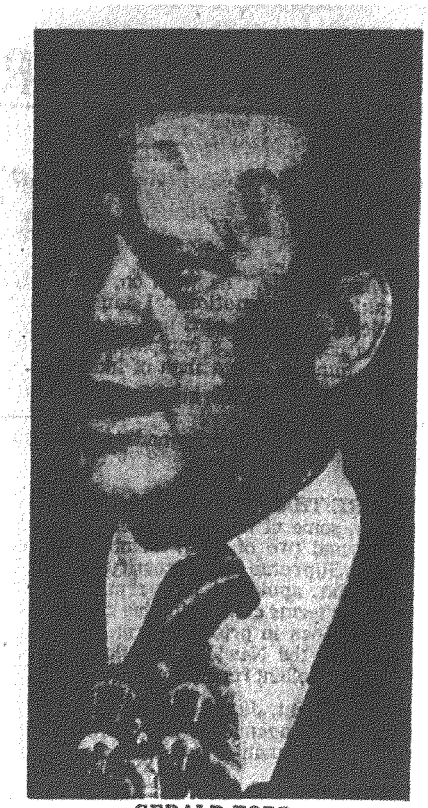
'A Senate-passed home rule bill provides more fiscal autonomy for the District, including a provision to allow the City Council, rather than Congress, to review the city budget.

FORD ELABORATED his position:

"In the last dozen years, the federal payment to thee District has jumped from $25 million to $187.5 million.

"In the last dozen years, we have built 3,228 new classrooms in the District at a cost of $303.3 million. Our per capita expenditure for education in the Nation's Capital for fiscal 1974 is $1,358 — one of the highest in the country."

Ford, who as vice president and chief Nixon lobbyist could be a formidable foe to further liberalization of home rule, quoted from the portion of the Constitution that says Congress shall "exercise exclusive legislation in all cases whatsoever" over the District.



GERALD FORD

EXHIBIT B

SAVING A DREAM

Diggs Ready to Deal on Home Rule Bill

By Jack Knoece
Star-News Staff Writer

The chairman of the House District Committee says he is prepared to continue detailed congressional oversight and control over the D.C. budget as a means of "reaching an accommodation" with home rule foes.

The committee home rule bill would give such line item oversight of the budget to an elected City Council.

But the chairman, Rep. Charles C. Diggs, D-Mich., said he is "prepared to maintain the role of the House and Senate District appropriation subcommittees" with certain minor modifications of the present appropriations process.

DIGGS ALSO revealed yesterday he is ready to make changes in the committee bill governing the system of appointing judges to D.C. Superior Court and the process by which Congress approves or disapproves legislation enacted by an elected City Council.

Diggs stressed that he is "trying to be reasonable in an effort to save the fundamental thrust of the committee bill." He did not use the word compromise.

Although he said he is prepared to make the major concession of retaining congressional line item oversight of the budget, Diggs said he plans to work out something with the chairman of the House D.C. appropriations subcommittee, Rep. William K. Natcher, D-Ky., to alter the existing system.

Specifically, he said line item oversight before the House subcommittee now involves every D.C. agency, with agency heads and their subordinates often spending several days waiting in Capitol hallways to testify.

"MEANWHILE, with all the trekking back and forth and the waiting, everything stops in the agency," Diggs said.

As for the judges, Diggs said he still intends that the mayor appoint them to 15-year terms, as provided in the committee's bill. He said the President — who now appoints Superior Court judges — already has enough of a role in the choice under terms of the committee bill because the President appoints three members of a nine-member nominating commission.

Diggs said the principal area of accommodation would be in allowing for the advice and consent of the Senate of mayoral nominees to the bench.

The veto provision of the committee bill would allow any act of an elected council to become law immediately, leaving the burden for a veto on Congress. Although Diggs was not specific on this point, there are indications a compromise would stay the effectiveness of council-enacted legislation until approval by Congress. But Diggs would only say this veto area is "adjustable."

DIGGS INDICATED that he is still undecided or not ready to yield on changing the federal payment provision of the committee bill. There have been indications, however, he also may yield on this provision.

The federal payment section, as now written in the committee bill, would establish a D.C. federal payment trust fund with a four-year authorization for lump sum annual federal payments in amounts predetermined through the congressional appropriations process.

The mayor would be required to submit for council approval a recommended federal payment level based on the costs and benefits to the District resulting from its role as the U.S. capital.

Payments would be requested a year in advance. After council approval, recommendations would go to the Office of Management and Budget for action and transmission to Congress in the president's budget.

See HOME RULE, B-4

B
Washington Star-News
Metro Life
OBITUARIES
COMICS — ACTION LINE

WASHINGTON, D. C., FRIDAY, OCTOBER 5, 1973

HOME RULE

Continued From B-1

THIS PROVISION would implement a Nelsen Commission recommendation for a predictable federal payment but retain congressional power to review the request and determine the total amount of the payment.

This provision—thought [redacted] more palatable than a fixed formula based [redacted] revenues as written into the Senate's home rule bill — has encountered stiff criticism. Diggs may yet be forced to change it to the Senate version.

Meanwhile, the House Rules Committee, after an unusual three days of testimony, yesterday granted an open rule to four home-rule bills. This means the bills will be fair game for floor amendments. They also will be read by section rather than title — as requested by Diggs — making them vulnerable to a lengthy debate on each section.

THERE ARE 88 sections in the 132-page committee bill and this means home rule enemies could stall it by debating each section. Although filibuster is prohibited in the House, opponents often use the tactic of debating separate sections as a delaying tactic.

Rep. Earl F. Landgrebe, R-Ind., promised yesterday: "We'll filibuster it to death."

Diggs said it appears the bill will take up much of the time of Congress in day-long sessions Wednesday, Thursday and possibly even Friday.

Diggs also said any dilatory tactic might work to the advantage of the bill.

After the rules panel denied Diggs' request to cut time required by reading the bill by title by an 8-6 vote, Rep. Richard Bolling, D-Mo., said, "This is the most destructive thing we could have done to the bill."

EXHIBIT C

Home Rule—At Last

After the long fight was over last night, Representative Charles Diggs put just the right face on the result. If it was not "all we had dreamed about," he said, the home rule bill passed by the House—ending a century-long impasse—certainly represented a worthwhile, historic breakthrough for the cause of more self-determination in the District of Columbia.

Assuming, as we do, a conference agreement with the Senate, what District residents gained was the right for the first time to elect a mayor and 13 city council members who will exercise significantly greater powers of local autonomy in a substantially reorganized city government. Those who complain that more was not gained are blind to two realities: First, that this was an immense legislative achievement, for which the city is indebted chiefly to District Committee Chairman Diggs; second, that the intricate federal-local relationships of this hybrid city cannot be totally separated, nor should they be, and that further delegations of local authority also inevitably will be linked with federal restraints to preserve that political marriage.

Early in yesterday's debate, Speaker Carl Albert predicted that the temper of the House favored enactment of a bill, and the final 343-to-74 vote proved him right. But the real turning point had come 24 hours before with the disclosure that the compromises maneuvered by Diggs had won the full support of the single most influential member of the House District Committee, Representative William H. Natcher.

Natcher's high price was ultimate congressional control over the city's budget—and it was not the only price paid. Before it ended, opponents of the original Diggs bill had won nonpartisan rather than partisan District elections, a continuation of judicial appointments by the President rather than the mayor and a series of federal "oversight" restraints against the city council's legislative actions—the most notable being a 30-day delay in the effective date of the actions to provide a chance for review by Congress. Those concessions, in our view, were reasonable.

For no rational purpose we can decipher, the House voted to create a federal enclave—a "National Capital Service Area" encompassing federal buildings and the downtown monuments—to be administered by an entirely superfluous new layer of bureaucracy in the White House. That provision deserves to die in conference.

Indeed, that forthcoming House-Senate conference should command the attention of us all, and the sooner the better. There are vast differences between the two bills, some of which will be hard to reconcile. In the House version, particularly, we want to take a longer, harder look at the precise impact of some provisions which obviously were not fully understood by many members in the maze of this week's debate.

For all that, though, the ingredients of compromise are there for a conference agreement that can give all District residents an immeasurably greater participation in the level of government that most directly affects them. It is an exhilarating prospect. And that, for the moment, is enough.

EXHIBIT D

Union Calendar No. 217

93D CONGRESS
1ST SESSION

H. R. 9682

[Report No. 93-482]

IN THE HOUSE OF REPRESENTATIVES

JULY 30, 1973

Mr. DIGGS (for himself, Mr. ADAMS, Mr. FRASER, Mr. DELLUMS, Mr. REES, Mr. FAUNTROY, Mr. HOWARD, Mr. MANN, Mr. MAZZOLI, Mr. ASPIN, Mr. RANGEL, Mr. BRECKINRIDGE, Mr. STARK, Mr. GUDE, Mr. SMITH of New York, and Mr. MCKINNEY) introduced the following bill; which was referred to the Committee on the District of Columbia

SEPTEMBER 11, 1973

Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

A BILL

To reorganize the governmental structure of the District of Columbia, to provide a charter for local government in the District of Columbia subject to acceptance by a majority of the registered qualified electors in the District of Columbia, to delegate certain legislative powers to the local government, to implement certain recommendations of the Commission on the Organization of the Government of the District of Columbia, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TABLE OF CONTENTS

AUTHORIZATION OF APPROPRIATIONS

SEC. 503. For the fiscal year ending June 30, 1976, and for each of the three fiscal years immediately thereafter, there is authorized to be appropriated to the trust fund a lump-sum unallocated Federal payment for each fiscal year (not including those payments reimbursing the District for water, sewer, and other special services) in such an amount as the Congress may from time to time appropriate.

TITLE VI—RESERVATION OF CONGRESSIONAL AUTHORITY

RETENTION OF CONSTITUTIONAL AUTHORITY

SEC. 601. Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.

LIMITATIONS ON THE COUNCIL

SEC. 602. (a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to—

953

93

(1) impose any tax on property of the United States or any of the several States;

(2) lend the public credit for support of any private undertaking;

(3) enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District;

(4) enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia courts);

(5) impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District (the terms "individual" and "resident" to be understood for the purposes of this paragraph as they are defined in section 4 of the Act of July 16, 1947);

(6) enact any act, resolution, or rule which permits the building of any structure within the District of Columbia in excess of the height limitations contained in section 5 of the Act of June 1, 1910 (D.C. Code, sec.

5–405), and in effect on the date of enactment of this Act;

(7) enact any act or regulation relating to the United States District Court for the District of Columbia or any other court of the United States in the District other than the District courts.

(b) Nothing in this Act shall be construed as vesting in the District government any greater authority over the National Zoological Park, the National Guard of the District of Columbia, the Washington Aqueduct, the National Capital Planning Commission, or, except as otherwise specifically provided in this Act, over any Federal agency, than was vested in the Commissioner prior to the effective date of title IV of this Act.

LIMITATIONS ON BORROWING AND SPENDING

SEC. 603. (a) No general obligation bonds shall be issued during any fiscal year in an amount which, including all authorized but unissued general obligation bonds, would cause the amount of principal and interest required to be paid in any fiscal year on the aggregate amounts of all outstanding general obligation bonds to exceed 14 per centum of the District revenues (less court fees and revenue derived from the sale of general obligation bonds) which the Mayor determines, and the District of Columbia Auditor certifies, were credited to the District during the immediately preced-

EXHIBIT E

93D CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 93-482

DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT

REPORT

BY THE

COMMITTEE ON THE DISTRICT OF COLUMBIA

TOGETHER WITH DISSENTING VIEWS

[To accompany H.R. 9682]

SEPTEMBER 11, 1973.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1973

SECTION-BY-SECTION ANALYSIS

TITLE I—SHORT TITLE PURPOSES, AND DEFINITIONS

This title contains a statement of purposes and definitions of the principal terms used in the bill.

TITLE II—GOVERNMENTAL REORGANIZATION

As heretofore stated, Title II of H.R. 9682 would carry out a number of the important recommendations of the Nelsen Commission.

The interest of the Federal establishment in proper city planning is amply protected, as indicated, by the provisions in Title II which authorize the National Capital Planning Commission to review all local plans and to overrule such plans as may have a negative impact on the Federal establishment. As is hereinafter specifically set forth, Section 203 provides an effective procedural arrangement whereby the interests of the local and Federal governments are to be reconciled whenever disputes occur as to local planning and development issues.

SEC. 201. REDEVELOPMENT LAND AGENCY

RLA is established as an instrumentality of the District of Columbia Government, composed of five members, as at present, appointed by the Commissioner and confirmed by the Council for five-year staggered terms. While RLA's corporate status and Board of Directors are retained, this section also gives the Commissioner power to dissolve the corporation, eliminate the Board of Directors, or take any other action as deemed necessary and appropriate with respect to the powers and duties of the Agency as a corporate body of perpetual duration.

This section also provides that the agency's present Board of Directors shall be terminated on July 1, 1974, and that the terms of the members appointed under the new provisions would begin on the same date. It is clearly not the intention of the Committee to create a new corporation, but rather to constitute a new Board effective July 1, 1974.

SEC. 202. NATIONAL CAPITAL HOUSING AUTHORITY

This section transfers the present Federal agency (NCHA) to the local government. It would permit the Commissioner, with the approval of the Council, to reorganize the agency, and subsection (b) transfers all functions, powers, and duties of the President under the District of Columbia Alley Dwelling Act of 1934 to the Commissioner.

Subsection 202(b) provides a statutory basis for the transfer of the

The vacancy created by such recall will be filled in the same manner as other vacancies.

TITLE V—FEDERAL PAYMENT

SEC. 501. FEDERAL PAYMENT TRUST FUND

Section 501 of the bill establishes in the United States Treasury a Federal payment Trust Fund administered by the Secretary of the Treasury who reports annually to Congress on the status of this fund. Congress may act to appropriate a Federal payment at any time during the fiscal year. The appropriated funds do not go directly to the city government, but rather are deposited in the trust fund for release by the Secretary of the Treasury at the beginning of such fiscal year. This is the same administrative procedure as used for Revenue Sharing funds.

SEC. 502. DUTIES OF MAYOR, COUNCIL, AND OMB

The Mayor, in section 502, is responsible for preparing a request for an annual Federal payment and such supplemental requests as he deems necessary. In making these requests, he may take into consideration intercity expenditure and revenue comparisons, and among other elements, nine factors for assessing the cost and benefits to the District because of its role as the Nation's Capital. It is the intent of this Committee that these factors should be used to the extent feasible, but they are not the exclusive criteria for determining the amount of the Federal payment sought. The Mayor shall submit his such request to the Council, which may approve, disapprove, or modify the amount. The request is then forwarded to the President (OMB) for his review, revision and submission to Congress. This procedure is carried out in line with the provisions of the Budget and Accounting Act of 1921, as amended, and parallels that followed for all Federal fund requests.

SEC. 503. AUTHORIZATION OF APPROPRIATIONS

Section 503 would authorize the appropriation of a lump sum unallocated Federal payment for fiscal years 1976, 1977, 1978, and 1979.

TITLE VI—RESERVATION OF CONGRESSIONAL AUTHORITY

SEC. 601. RETENTION OF CONSTITUTIONAL AUTHORITY

Congress, in section 601, retains its constitutional authority to legislate and to amend or repeal any law or any act passed by the Council.

SEC. 602. LIMITATIONS ON THE COUNCIL

This section lists specific prohibitions against the District Council's legislative authority, which include prohibitions against:

(1) taxation of United States or state properties;

(2) lending the public credit for any private undertaking;

(3) enactment of any Act which amends or repeals an Act of Congress, which concerns the functions or property of the United States, and which is not restricted entirely to the affairs of the District of Columbia;

(4) enactment of any act, resolution or rule which concerns the organization and jurisdiction of the District of Columbia courts;

(5) imposition of a personal income tax upon non-residents of the District;

(6) enactment of any act, resolution or rule that exceeds height limitations contained in section 5 of the Act of June 1, 1910, D.C. Code, Sec. 5–405 (concerns specific height limitations in the District of Columbia);

(7) enactment of any or regulation related to the United States District Court for the District of Columbia, or any other United States court in the District.

Subsection (b) prohibits the Council from exceeding its present authority over the National Zoological Park, the District National Guard, the Washington Aqueduct, the National Capital Planning Commission, or any other Federal agency.

SEC. 603. LIMITATIONS ON BORROWING AND SPENDING

This section establishes three limitations on the District's authority to spend and borrow monies. First, in section 603(a), the city cannot issue a new, long-term general obligation bond if in any year the amount of principal and interest that must be paid on this and the bonds already issued will exceed the 14% limitation. This single limitation on general obligation indebtedness replaces a series of complicated borrowing limitations currently governing the city, which are previously described. The purpose of this limitation is to insure that the city does not borrow beyond its reasonable capacity to repay its debts. The Committee has been advised that the 14% limitation is sufficient to meet the projected capital improvement plans of the District of Columbia, and is consistent with borrowing revenue ratios in comparable metropolitan areas.

In addition, section 603(a) clarifies that the outstanding indebtedness of the Redevelopment Land Agency and the National Capital Housing Authority at the time of their transfer into the city government shall not be included in calculating the 14% limitation.

Section 603(b) states that the 14 percent limitation mentioned in subsection (a) shall be calculated specifically according to the formula set forth in that subsection.

Section 603(c) establishes a general requirement that the city operate with a balanced budget, that is, the City Council cannot approve expenditures above the Mayor's best estimate of financial resources available for that year. In the event that Congress has not enacted the city budget, for the purpose of retaining a balanced budget, the Mayor shall consider the Federal payment amount to be the Federal payment appropriated for the past year; or if one House has acted, that amount; or if both Houses have acted to appropriate different

EXHIBIT F

Washington Star-News
JOHN H. KAUFFMANN, President
NEWBOLD NOYES, Editor

WASHINGTON, D. C., SUNDAY, DECEMBER 2, 1973

Home Rule: One More Step to Go!

It is doubtful that the full impact of last Tuesday's House-Senate conference agreement on D.C. home rule has registered as yet with most Washingtonians. After so many years of false starts and frustrating skirmishes, the desire for new powers of home rule has seemed almost doomed to perpetual disappointment. And last week's agreement, to be sure, still requires the formal endorsement of both houses of Congress.

Yet, laboring some unexpected setback, there is every indication that this time it's for real — that the conference report will win approval when it hits the House floor December 12 and that the Senate will concur shortly thereafter, quite likely winding up the whole business before Christmas.

Those votes would set in motion the machinery to permit—as early as next year—the election of a mayor, a city council chairman and 12 other council members (four elected at-large and eight from wards), who would head a reorganized government invested with substantial new legislative and administrative powers. To a citizenry now able to elect only a local school board and a nonvoting House delegate, the prospect of all that increased political activity and citizen participation in government is exhilarating. It implies, too, however, an awesome degree of voter responsibility in selecting the [illegible] leaders—not merely to provide sound local government but to enhance the city's chances of gaining further degrees of self-determination in the future.

For if the conference report represents, as Senate District Committee Chairman Thomas Eagleton asserts, a "reasonable, rational and productive achievement," it falls short of what he and many other home-rule advocates had sought. In essence, the new bill strikes a balance between the conflicting desires of Congress to give District residents a meaningful further measure of control over their own affairs while at the same time retaining strong measures of congressional oversight.

There is no cause whatever to lament those dual goals, despite the hand-wringing and rhetoric engaged in by some of our local political hopefuls. The delicate local-federal relationships involved in running this city can never be totally severed. No one should try. What is involved here, in order for the city to flourish, is a partnership in terms of both moral and financial commitments.

"... about wrapping it up by Christmas!"

Striking this balance, furthermore, was no easy task. The home-rule conferees had confronted a tough chore in reconciling the sharply divergent provisions of the House and Senate bills. In our view, although we would have preferred a different result in a couple of instances, they did a good job in numerous compromises, shortcomings in both bills were improved. On the whole, the House gained from the Senate many more concessions than it yielded—and from the outset that was predictable. Some of these compromises represent the essential price of securing House enactment of the substantial, desirable local gains that are involved. But it is fair to note, too, that the House had engaged this year in a bit deeper probe of the intricacies of home rule than the Senate.

The single most vital point of controversy was the House insistence that Congress retain—much in the manner of the past—the right to review and approve the annual District budget. Inherent in that process, however, is a congressional commitment to provide each year a federal payment that will be sufficient, in conjunction with city revenues, to finance a realistic, responsible budget. While this arrangement assumes a certain amount of good faith on all sides, we think it provides an acceptable, workable approach.

The retention of congressional budgetary review has tended to obscure, furthermore, the gains that would accrue to the city government in the new budgetary process. Foremost is the authority to assess new taxes, and to determine all tax rates. That power, coupled with borrowing authority and the assurance of an equitable federal payment, would enable the District for the first time to develop a balanced budget on the basis of orderly planning. And sadong as it is a responsible budget, we have every expectation that it would encounter no serious trouble in winning congressional approval.

As noted above, there are a couple of instances in which we wish the conferees had decided differently.

In the choice of local officials, we think it would have been better to authorize nonpartisan rather than partisan elections. While party primaries may add an extra dimension of interest to the political scene, we suspect that the over-all caliber of candidates would be just as high under a nonpartisan system, that relations with Congress might be made somewhat easier, and that a good deal of confusion arising from Hatch Act restrictions on potential candidates might have been avoided. We do not share the fear of some critics, however, that partisan elections seriously threaten a "spoils system" of local government, nor do we view this as a fatal flaw in the bill. Indeed, the conferees' insistence that no single party may field candidates for more than three of the five city council seats to be filled by city-wide votes is certainly a commendable idea.

Our second reservation concerns a provision that is merely silly: the decision to have a $36,000-a-year federal official whose sole function presumably would be to assure that adequate public services are provided by the city in a predominantly federal "National Capital Service Area" extending from Capitol Hill to the Lincoln Memorial. There is neither a necessity nor a justification to identify any such *federal* enclave. The Nation's Capital is not merely the vicinity of the great Mall; it is the entire city of Washington, and any suggestion to the contrary is a disservice to both federal and local interests.

Still and all, these are minor concerns in contrast to the positive features of the bill. Apart from elected officials and a full measure of general legislative authority, the city would achieve a charter analogous in many respects to a state constitution, a capability for more effective city planning, direct control over its housing and urban renewal agencies and an improved judicial system. For its part, Congress oversight prerogatives are assured by both the absolute right of legislative veto and its all-important control of the purse-strings. The city's judges, as at present, would be named by the President, but from nominees proposed by a responsible panel of experts.

It is no secret that some members of Congress, particularly in the House, remain dubious as to how all this might work out. But the grants of local autonomy in the current legislation could hardly be more tightly constrained. And it would be a cruel hoax if the House, when it considers the bill next week, were to deny District residents for a moment longer the opportunity to demonstrate their capacity for responsible self government once and for all.

Ziegler Strikes Again

Presidential press secretary Ronald Ziegler's performance the other day, when he lashed out at nearly everything in sight, indicates either that President Nixon fears his "Operation Candor" is failing or that bumbling has become a way of life in the White House handling of Watergate.

In the course of a single press briefing, Ziegler attacked the staff of the special Watergate prosecutor's office, ridiculed a suggestion by special prosecutor Leon Jaworski concerning the safekeeping of Watergate tapes, and suggested that the White House's own legal staff comes up short.

When Mr. Nixon is trying to restore public confidence in his administration and trying to get critics to lower their voices over Watergate, [illegible] ecutor himself is a bad development from Mr. Nixon's standpoint. It undercuts the White House promise to cooperate fully with Jaworski and it can only lead to further suspicion that the President is more interested in cover-up than in full disclosure.

For Ziegler to imply that the President's own Watergate lawyers are not up to par and that some of them are likely to be replaced suggests a certain amount of disorder, indecision and bungling behind the scenes at the White House.

We aren't sure whether Ziegler's outburst was prompted by Mr. Nixon or whether the press secretary took it upon himself. In either event it was a mistake in public relations.

EXHIBIT G

A Generally Quiet Protest
... Page B-2

Metro Life
B
Washington Star-News
OBITUARIES
WASHINGTON, D. C., FRIDAY, OCTOBER 12, 1973

Metrobus Ride For 25 Cents?
... Page B-4

VERSIONS DIFFER WIDELY

Senate to Seek Strong Home Rule Bill

By Jack Kneece
Star-News Staff Writer

The Senate conferees will insist on a strong home rule measure, exemplifying the best features of House-passed and Senate approved bills, says Sen. Charles McC. Mathias, R-Md.

Mathias said yesterday he had met with Sen. Thomas F. Eagleton, D-Mo., chairman of the Senate District Committee, "and we decided to work for the strongest bill we can get in conference."

Although Mathias said he did not want to comment on any single provision of the bill passed by the House 343-74, he indicated when asked if Senate conferees would insist on removing a provision for a nonvoting Senate delegate from the District.

ALTHOUGH the Senate leadership has not appointed conferees, Mathias said differences between the two bills, Mathias said he is certain that he and Eagleton will be among them.

Meanwhile, congressional sources say there will be no effort on the House side to persuade Senate conferees to accept most of the House version with minor exceptions.

Sources said the Senate, long partial to home rule legislation, could be expected to go along with most of the House bill.

There are many differences between the two bills, but the House bill is more thorough than the Senate version and the Senate is expected to go along with many House provisions.

The Senate bill would establish an 11-member city council and provide for an elected mayor—all on a partisan basis.

THE HOUSE version would set up a 13-member council and an elected mayor on a nonpartisan basis.

Both bills would require election of a council member from each of the city's eight wards, but the House version would provide for five at-large members while the Senate version would provide for three.

The Senate bill gives far more fiscal autonomy to an elected government. The city council would be the "governing body" which also would provide for an economic-federal program based on a fixed formula.

The House and Senate District Appropriations subcommittees would review the budgets by line item under the House-passed version.

See HOME RULE, B-4

HOME RULE

Continued from B-1

UNDER the Senate bill, the federal payment would increase from approximately $200 million to $264 million by fiscal year 1978 in uniform increments based on a projection of the annual growth rate of the city's tax base.

The House version sets a $250 million limit on the amount authorized for fiscal year 1975 and "each fiscal year thereafter," although that would be subject to congressional change.

Both bills would provide for an independent audit of D.C. fiscal management.

The House bill would provide more authority over zoning and planning than the Senate bill. It also would provide for city takeover of two controversial agencies, the Redevelopment Land Agency and the National Capital Housing Authority.

THE MOST obvious difference in the two pieces of legislation is in the sheer size of the House bill — 129 pages compared to a thin Senate bill of a few pages.

Both bills would allow a substantial amount of autonomy to the city council in setting tax rates but both bills also provide for a congressional veto by resolution of any act passed by the council.

As the home rule measure rolled toward final action in Congress, speculation was rising about candidates to be presented to a newly created District electorate.

"People are already worrying about who's going to run for what," City Council Vice Chairman Sterling Tucker observed to some 150 persons gathered at the District Building to celebrate House passage of a bill Wednesday night.

No comment was forthcoming from either Mayor Walter E. Washington or D.C. Del. Walter E. Fauntroy on whether they would bid for the mayor's post.

SUPPORTERS of Washington feel certain he will run for the elective office, but the mayor has rebuffed all attempts by the press to draw him out about his possible candidacy.

One source close to the mayor said, "He's just not going to say anything about this now. He feels it's too premature to talk about getting into a campaign before Congress passes a home rule bill."

Fauntroy said that "I have given no thought" to the question of running for mayor. "It is much too early to be even speculating about that."

EXHIBIT H

HOME RULE:

Lack of Budget Authority Dismays Council

By Harvey Kabaker
Star-News Staff Writer

Several members of the Presidentially-appointed D.C. City Council are reacting with dismay over the lack of budget authority for the proposed elected council in the House-passed home rule bill.

Some say that an elected councilman, who will owe his position to the people of the city, could be in a completely untenable position if Congress continues to hold the city's purse strings.

A close associate of Council Chairman John A. Nevius said that he will advise Nevius not to run for the first elected council, because of the likely frustrations and possibly damaging consequences to further political ambitions.

FOR HIMSELF, Republican Nevius is saying only that he "will have to study the matter." He said a lot depends on the availability of financial support for an election campaign which could come as early as the Fall of 1974.

The Rev. Jerry A. Moore Jr., a Republican council veteran who also heads the area Metro rapid transit and bus agency, feels that "they gutted the bill."

Moore believes that "elected officials who are controlled by the Hill are worse off than the appointed ones who know exactly where the action lies."

He posed this situation. "You'll have some fellow coming down here to lobby with the city council for a new recreation center, and his councilman will tell him that there isn't anything he can do, because someone on the Hill has line-item control over the budget."

FOR VARIOUS reasons, none of the present council members will say with assurance that he might be running. Mrs. Marguerite Selden, a Democrat and one of the three most recent appointees of President Nixon, is the only one who is certain she will not be a candidate.

"I am not a politician,' she said. "I took the appointment knowing that I would not want to run if home rule is passed. I told them at the White House, and I've said the same thing to others. I'll serve my term out, but won't run."

Dr. Henry S. Robinson Jr., a three-term Republican member, said that the proposed taxing power without final spending authority "puts the onus on the council. Every time we raise taxes, the citizens will raise hell with us." He added, "The whole ball game is control over your own budget."

But more than his colleagues, Robinson sounds like he wants to run. "I don't know whether it will be from the ward, or at large," he said. He is worried, he said, about nonpartisan elections, which he believes will be bad for Republicans.

IN CURRENT registration, Republicans are outnumbered by Democrats in a ratio of nearly 6 to 1, about 236,000 Democrats to about 40,000 Republicans. There are about 33,000 registered in no party, 600 in the Statehood Party and 600 miscellaneous registrations, such as the Socialist Workers and American Independent.

In the bill originally reported out of the House District Committee, no party could hold more than three of the five at-large seats, so Republicans would be guaranteed at least 2 out of 13. Robinson fears that in a citywide "nonpartisan" election, which the compromise bill specifies for the mayor and council, the Democratic Party could set up a nominally nonpartisan organization and dominate the field.

Therefore, Robinson thinks his dilemma would be whether to take his chances against the Democrats of Ward 5, and, incidentally, forego a chance for the council chairmanship, or to attempt a citywide campaign and become eligible for the potentially powerful and prestigious chair.

Mrs. Marjorie Parker, also a Republican, disagrees with Robinson. She thinks she would be helped because "if I were to run — and I'm not saying that I will — there might be a lot of people who would vote for me than if I were running on a strictly partisan basis."

SHE HINTED strongly that she would like to run — if the financial backing is available — as an at-large candidate, and hopes that "a woman" could be elected to chair the council. Though "disappointed" by the lack of budget authority, she said she believes that issue would not affect her decision on running.

Another Republican, Mrs. W. Antoinette Ford, agreed that budget power is "the bone of contention. Really, how can you be an effective elected council member if you can't even control your own purse strings?" Her decision on running is months away, she said.

Republican Rockwood H. Foster and Democrat Todson J. Meyers view the power limitation philosophically. "Authority, in many ways, is what you make of the opportunities before you. And power often amounts to persuasion," said Foster, a retired foreign service officer.

As for his own plans, Foster drily noted without bitterness that "it's a bit late for an overweight, white WASP from Northwest Washington to be running in an election here."

MEYERS BELIEVES that "no matter what the conditions Congress gives us, you need the best people you can find."

Acknowledging that the time that passes before the city may ultimately be given budget power will be "fraught with frustrations," Meyers said this simply emphasizes the need for elected officials who can 'approach the city's problems with intelligence and determination."

He added that he hopes there will be "a kind of interregnum period," during which a successful elected government can win further major concessions from Congress. As in the case of Mrs. Ford, he said he will have to spend some time before deciding whether to run.

Tucker is known to have ambitions that go beyond the council, but he steadfastly refuses to reveal any plans. Like Mayor Walter E. Washington, he puts the passage of a final home rule bill and the campaign for home rule charter adoption in a citywide referendum ahead of any overt personal campaigning. He also has a delicate route to tred between the Democratic ranks of the mayor and Del. Walter E. Fauntroy.

AS CHAIRMAN of the umbrella Coalition for Self Determination, Tucker is solidly behind the compromise bill and dismisses the objections of its detractors.

"There's more in that bill than many of us realize," he said. "Our job now is to educate ourselves, to look for the conference bill, and to educate the public so they will vote for the charter."

Few, if any, conflicts will arise because of the residences of the present members. Meyers lives in Ward 1, the central city. None lives in Ward 2, which includes the area north of downtown, Southwest and part of Capitol Hill.

Nevius, Foster and Mrs. Parker are in Ward 3, west of Rock Creek. With Foster unlikely to run, any competition for Nevius would come from persons not now on the council, unless he decides to try an at-large candidacy.

Tucker and Moore both live in Ward 4, upper 16th Street NW. In Ward 5, Northeast, with Mrs. Selden not running, Robinson could be up against a non-incumbent.

NO PRESENT council member lives in Ward 6, Capitol Hill and part of Anacostia. Mrs. Ford lives in Ward 7, Far Northeast-Southeast, and none lives in Ward 8, Far Southeast-Southwest.

Among the council members' personal considerations would be whether they could afford to quit or cut back their present jobs for the full-time salary of $22,720 a year (plus $5,000 for the chairman.).

Mrs. Ford would have to resign a position at the Commerce Department and Mrs. Parker would have to leave her job at D.C. Teachers College, because the bill bars government employes from holding elective office.

Foster and Mrs. Selden are retired. Moore is a minister. Tucker is executive director of the Washington Urban League. Meyers has said that his "part-time" council position has cut deeply into a lucrative law practice. Robinson is a private physician.

EXHIBIT I

Diggs Is Accused Of 'Power Ploy'
By Cathe Wolhowe Washington Post Staff Writer
Tuesday, March 4, 1975
pg. C1

Diggs Is Accused Of 'Power Ploy'

By Cathe Wolhowe
Washington Post Staff Writer

The Rev. David H. Eaton, pastor of All Souls Unitarian Church, accused House District Committee Chairman Charles C. Diggs Jr. (D-Mich.) yesterday of selling his soul to retain power by agreeing that Congress should continue to hold complete budget authority over the D.C. government.

". . . Diggs does not seem to understand that he has sold something that is not for sale —our souls, our ability to control our own lives," Mr. Eaton said in his sermon yesterday, as a congregation of about 250 persons clapped loudly.

"He (Diggs) can sell his soul if he wants, but not ours," Mr. Eaton said.

The clergyman was referring to Diggs' revelation last week that he and Rep. William H. Natcher (D-Ky.) chairman of the House District Appropriations Subcommittee, had reached agreement on the budgetary provision of proposed D.C. home rule legislation that is due to come before the House Tuesday.

Diggs said he and Natcher agreed that Congress should continue to have appropriations control over line items in the city's budget rather than accepting a provision in the home rule bill, endorsed by Diggs' committee, that would limit congressional control over the budget.

"Chairman Diggs made his deal only to keep himself in power," Mr. Eaton said. "And he made it without consulting any other members of the (District) Committee."

Upon hearing of Mr. Eaton's remarks, Diggs said, "I am prepared to take my lumps from the home-rule, self-determination purists who, like Reverend Eaton, think anything short of statehood represents a deficient or imperfect predic[illegible]

He added that he had made his agreement with Natcher because "we're not going to get anything through Congress like the purists want. This is a practical tactic."

Diggs said he did not consider his agreement a major change because "as long as the federal government is involved in financing the local government, it has the right to review and modify the entire matter."

Mr. Eaton said Diggs' agreement with Natcher takes "the guts out of the home rule bill, the ability to control what we spend, to determine what our spending priorities are."

He also said also that he was saddened by how the agreement was reached, adding that "Diggs actively acted against the wishes of our representative."

Del. Walter E. Fauntroy (D-D.C.) refused to comment on whether Diggs had reached agreement with Natcher without consulting him. He said he

See RULE, C5, Col. 1

CHARLES C. DIGGS JR.
. . . prepared to take lumps

DAVID H. EATON
. . . souls not for sale

Diggs' Home Rule Action Is Assailed

WILLIAM H. NATCHER
. . . said to agree

RULE, From C1

may comment after meeting today with other members of the District Committee.

Mr. Eaton told his congregation that the issue should not be considered "a merely political question, but a moral one — a matter of justice."

He added that the Board of Governors of the District of Columbia Bar had just written Diggs on this subject. The letter said the lawyers "considered suffrage for citizens of the District of Columbia so fundamental to American principles of law and justice as to transcend the ordinary and traditional political question.

"The issue of self-determination was the moral issue we fought over in 1776," Mr. Eaton said. "Just like Americans then had to go down to the harbor to get some action, maybe we are going to have to consider some different alternatives if this bill doesn't pass."

Although he said he was not advocating violence, he added, "I just can't keep going to meetings to ask for something that is my inherent right."

The home rule bill reported out by the House District Committee, similar to a measure already passed by the Senate, would have an elected mayor and city council and transfer to the local government some authority now held by Congress and the President.

A compromise measure sponsored by Rep. Ancher Nelsen (R-Minn.), ranking minority member of the District Committee, and Rep. Edith Green (D-Ore.), would have the council elected but the President would continue to appoint the mayor.

Mr. MEADOWS. Thank you, Mr. DePuy.

Chairman Mendelson, you're recognized for 5 minutes.

STATEMENT OF PHILIP H. MENDELSON

Mr. MENDELSON. Thank you Chairman Meadows, Ranking Member Connolly, Congresswoman Norton, and other members of the committee. I appreciate this opportunity to testify.

Although the topic for today's hearing is "D.C. Home Rule: Examining the Intent of Congress in the District of Columbia Home Rule Act of 1973," I want to speak more generally about the purpose and need for budget autonomy for the government of the District of Columbia.

With all due respect, the fundamental question before us is not whether budget autonomy as enacted by the Council and the voters is legitimate or consistent with the intent of the 93rd Congress. Rather, the fundamental question is whether Congress today wants budget autonomy for the District.

I frame the question this way because, as you know, Congress has plenary authority over the District. We have made our case in court that the Budget Autonomy Act of 2012 is legitimate. But that really doesn't matter if you, a majority of the Members of the House and Senate, want to overturn it because you can do so.

When we talk about budget autonomy, we are talking about only the local dollars portion of our budget. Many people believe the District's budget is comprised of Federal dollars because it has been appropriated by Congress in the same process as the budgets of the Federal departments. You know it isn't. In fact, 74.6 percent of our budget comes from locally imposed fees and taxes.

So I want to make three points. First, why budget autonomy is a good thing, that having budget autonomy is best practice for the fiscal management of the District. Second, why Congress shouldn't want exclusive budget authority over the District. And third, that while budget autonomy makes a big difference for the District, it does not make a big difference for Congress.

Why is budget autonomy a good thing? There are many reasons. It allows us to adopt our budget more quickly. It allows us to make changes, especially reductions in an economic downturn, immediately.

It also allows us to move quickly to implement a solution to emerging service needs. For instance, responding to a spike in homicides.

It gives us flexibility to change our fiscal year so as to better align it with the school year or the fiscal year of regional authorities. It also gives us the flexibility to budget or spend across fiscal years, such as rewarding program managers who save funds by allowing them to carry those funds forward.

Budget autonomy severs our ability to spend from the uncertainties of the Federal appropriation process. I mean, to put it bluntly, government shutdowns and the failure to appropriate timely.

It also enables us to tighten the period between budget preparation and implementation. Currently, the budget beginning October 1 is adopted 4 months earlier, in May, and based on revenue estimates prepared 7 months earlier, in February.

All of these positives from budget autonomy can be summed up in one simple fact: Budget autonomy helps our credit rating or Wall Street. Being tied to the Federal appropriations process is a negative rating factor.

Congress shouldn't want exclusive budget authority over the District. Some 145 years ago, Congress dissolved the territorial government of the District of Columbia and assumed direct control. It might have made sense during the century between reconstruction and home rule to treat the District as if it were an agency of the Federal Government, like the Department of Agriculture. In that time, Congress appropriated large Federal payments each year as part of our budget. Accordingly, both houses of the Congress had committees focused expressly on the District and substantial resources were devoted by you to running the District.

All that has changed. There is no longer a House or Senate District committee. While I'm sure our annual budget is carefully reviewed, Congress no longer rewrites it. Indeed, our budget is almost an afterthought in the Federal appropriation process, as evidenced by our treatment during the last government shutdown.

Congress wasn't sure it could trust us to handle our own finances when we got limited home rule in 1974, but all of that has changed. In many ways we have today the best financial situation of any large city in the Nation.

Congress will always have budget authority over us because it has plenary authority, but Congress should no longer want to maintain exclusive budget authority over the District. Not only is it a drag, as I outlined in my first point, but it is no longer necessary and Congress is no longer set up for it.

While budget autonomy makes a big difference for the District, it does not make a big different for Congress. Congress has failed to adopt our budget on time in almost 20 years, has not made any substantive changes to our local funds budget since at least the control board some 15 years ago.

In recent years, the Congress has tried to help the District by giving us authority to increase appropriations—slightly—when revenues increase and to enable us to spend our local budget without an appropriation during a government shutdown. These congressional actions actually support our argument that allowing local budget autonomy won't make a big difference for Congress.

What does Congress give up or lose with budget autonomy? Nothing. If you are worried we will misspend our money, Congress still has plenary authority to step in at any time. Congress also can have oversight hearings on our spending or on our local programs at any time, which you can do with or without a pending appropriation. As for riders, I would suggest hesitantly, that there will still be a Federal appropriations act for the District.

The pros versus the cons are overwhelming. The District is better off with it, not just as a home rule issue, but as a fiscal matter. Meanwhile, Congress gives up nothing fundamental and budget autonomy for our local dollars better matches the current structure and practice of the Congress.

As I said at the outset, the essential question before us today is not what was the intent of the 93rd Congress, but whether Con-

gress today will support budget autonomy for the District. Thank you.

[The prepared statement of Mr. Mendelson follows:]

COUNCIL OF THE DISTRICT OF COLUMBIA
THE JOHN A. WILSON BUILDING
1350 PENNSLYVANIA AVENUE, N.W.
WASHINGTON, D.C. 20004

TESTIMONY OF CHAIRMAN PHIL MENDELSON
COUNCIL OF THE DISTRICT OF COLUMBIA

D.C. HOME RULE: EXAMINING THE INTENT OF CONGRESS IN THE DISTRICT OF COLUMBIA HOME RULE ACT OF 1973

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON OVERSIGHT & GOVERNMENT REFORM
SUBCOMMITTEE ON GOVERNMENT OPERATIONS

MAY 12, 2016

Thank you Chairman Meadows, Ranking Member Connolly, and members of the Committee. I am Phil Mendelson, Chairman of the Council of the District of Columbia. I am pleased to testify before you today regarding the District of Columbia Home Rule Act and the Local Budget Autonomy Act. I would also like to thank the Delegate for the District of Columbia, Congresswoman Eleanor Holmes Norton, for her staunch representation of the District and leadership in relation to the subject of today's hearing.

As described in the Committee's invitation to appear today, the purpose of this hearing is to examine the congressional intent in the passage of the District of Columbia Home Rule Act of 1973, as well as to evaluate the potential outcomes related to enforcement of the Local Budget Autonomy Act.

Regarding the former, testifying along with me today is the Council of the District of Columbia's *pro bono* counsel, Mr. Brian Netter of Mayer Brown LLP. I defer to Mr. Netter to more specifically address the legal issues underlying the judicial decision regarding the intent. The Council, for its part, was guided on this matter by the statement of Congress as to its purpose in enacting the Home Rule Act. Section 102 of the Home Rule Act specifically provides such a "Statement of Purpose," providing that:

> "[T]he intent of Congress is ... *to the greatest extent possible*, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters."[1]

In the judicial decision upholding the District's budget autonomy law, Superior Court Judge Brian Holeman resolved the issue of legislative intent with specific attention to this statement of purpose. Just as the adoption of the Home Rule Act was intended to loosen the strict control over purely municipal matters, it follows that the Local Budget Autonomy Act removes the bureaucratic burdens associated with purely local expenditures.

That said, I will focus the majority of my testimony toward addressing the second issue to be reviewed by this Committee: the potential outcomes associated with the operating under the Local Budget Autonomy Act.[2] My testimony will first describe some of the policy arguments supporting local autonomy over the local budget, and put in context some of the tangible benefits that result from this control. Second, I will highlight the fiscal strength of the District and our efforts to maintain a strong and stable local economy. Finally, I will briefly address the practical consequences of the Local Budget Autonomy Act on the budgetary process.

POLICY ARGUMENTS SUPPORTING LOCAL BUDGET AUTONOMY

As the Committee is well aware, the District has had the authority, since 1973, to raise its own revenues. Prior to implementation of the Local Budget Autonomy Act, however, all District spending was authorized by Congress through the federal appropriations process irrespective of the source of revenue connected to such spending.[3] This includes money raised locally by the District. The consequences of this unique requirement has hampered the District in meeting service needs for our residents and visitors to the nation's capital.

This cumbersome hurdle to spending—requiring federal approval for local spending—is further divorced from a justifiable purpose when one considers the makeup of the District's budget. The District of Columbia's Fiscal Year 2017 budget totals $13.4 billion. Of this, the vast majority—$10 billion—is locally raised through District taxes and

---

[1] Section 102 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 777; D.C. OFFICIAL CODE § 1-206.02(c)(1) (emphasis added). In addition to the text of the statute, the Superior Court decision relied on records of proceedings convened in Congress that indicate that the legislative purpose of the Home Rule Act is to "entrust[] the District with the management of its own affairs, while retaining the power to veto the District's actions." *Council of the District of Columbia v.* DeWitt, Case no. 2014 CA 2371 B, 21 (2016) (citing *District of Columbia Self-Government and Governmental Reorganization: Markup by H. Comm. On D.C. of H.R. 9056*, 93d Cong. 1st Sess. (July 18, 1973) (statement of Chairman Adams)).

[2] D.C. Law 19-231; 60 DCR 12135 (2013).

[3] This also means that federal grants included in the District's budget, which are already appropriated to the federal agency responsible for program administration and awarded to the District, must be "re-appropriated" by Congress during consideration of the District's budget.

fees or derived from other local sources.[4] This means local dollars account for 74.6 percent of the District's total budget. Most of the rest—$3.3 billion—is federal formula spending that includes Medicaid and federal grants available to all jurisdictions and for which the federal government has no unique oversight responsibility. This latter portion accounts for 24.6 percent of the District's total budget. Overall, approximately 99.2 percent of the District's budget is derived from local revenue and federal grants not unique to the District. The remainder, less than 1 percent of the budget, comes from federal payments specifically requested for programs or projects unique to the District.[5]

This increased reliance on local revenues to fund the District's service delivery is a major shift from when Congress granted the District Home Rule. Indeed, even as late as 1991 the federal payment to the District constituted 40 to 50 percent of the District's total budget. However, a variety of factors has reduced that contribution dramatically. In part, the prudent fiscal leadership and financial management of the local government have ensured that we have a healthy revenue stream to allow local resources to pay for local services.

Though our financial health is sound, our financial management is hampered in many ways the federal appropriations process. With the enactment of Local Budget Autonomy Act, however, I am able to highlight cost savings and other efficiencies that the District will see as a result of the untethering of our local budget from the federal appropriations process. These benefits are discussed in the subsections below.

Local Budget Autonomy Saves Money

The federal budget process placed pressure on the District to approve its budget earlier in the calendar year in order to include it in the federal budget, which is generally formulated in the spring and summer. Assuming Congress adopted a federal budget before the close of the fiscal year on September 30th, there was a four-month lag between the District's approval of a local budget (end of May) and congressional approval of a federal budget (end of September).

However, enactment of a federal budget was often delayed well into the fiscal year while the federal government (and, likely, the District) operated under a Continuing Resolution. Indeed, only 3 times since 1990 has Congress appropriated on time—that is, adopted the District's fiscal year budget before the fiscal year began,

The impact of this on the local economy was substantial. Unable to operate under an approved budget results in hiring delays, lost revenues, and untimely procurements, all of which meant additional costs to the District. The resulting cash shortages forced the

[4] For fiscal year 2017, the local portion of the District's budget consists of the following: $7.3 billion derived primarily from income, property, and sales taxes; $0.3 billion from Dedicated Taxes; $1.3 million from Private Grants and Private Donations; $0.6 billion from Special Purpose Revenue; and $1.8 billion from Enterprise Funds.

[5] The federal payment includes reimbursement for emergency planning and expenses related to events like the Presidential Inauguration.

local government to borrow, adding more unnecessary costs. Each year, the short-term borrowing costs alone forced the District to incur approximately $3 million in additional interest expenses.[6]

Tied as it was to the federal appropriations process, the District also approached the end of each fiscal year unlike any other municipality or state in that, facing the absence of a federal appropriations act, it was forced to engage in extensive planning for a potential government shutdown. In the increasingly likely situation whereby the federal government would not adopt a federal appropriations bill, the District government—treated like a federal government agency—was not permitted to operate because the District's own locally raised funds would not have been appropriated by Congress.[7]

At the front line of government service delivery, the District has to ensure that vital services, particularly those relevant to public safety and public health, continue uninterrupted while we plan to shutter those other, "non-essential" services. The planning process alone forces additional, but avoidable, costs on the District. While recently Congress began including a provision for the District to continue operating absent a budget or Continuing Resolution, this authorization had to be adopted anew each year, and was never guaranteed.

A more systemic impact on the local government's finances is seen in the District's bond ratings and interest costs. While the District's disciplined financial management has enabled our credit ratings to rise from the low point of "junk bond" status in the mid-1990s to the current AA, Aa1, and AA from Standard and Poors, Fitch Ratings, and Moody's respectively, the uncertainty over whether the District will have an approved budget has impacted the District's bonds in two key ways. First, at the start of the fiscal year the uncertainty, though unconnected to the District, must be disclosed to potential buyers' of the District's municipal bonds. This has led to higher interest rates, which in turn means more of the District budget goes toward interest payments and less to other priorities. Further, in 2003 the District testified before this Committee that every time the District goes to Wall Street, the one item cited as detrimental to our achieving a higher bond rating is the uncertainty of the federal budget approval process.[8]

Finally, having a budget that requires congressional approval causes inefficiencies by encouraging managers to "use or lose" funding at the close of the fiscal year. Former Mayor Williams, testifying before this Committee in 2003, described the perverse incentive for managers to spend funds on things that are colorable or plausible, but not necessarily

---

[6] *Budget Autonomy for the District of Columbia: Restoring Trust in Our Nation's Capital, Hearing Before the H. Comm. on Government Reform*, 108th Cong., Serial No. 108-36, at 48 (June 13, 2003) (statement of Dr. Natwar Gandhi, Chief Financial Officer, District of Columbia) (hereinafter Cong. Budget Autonomy Hearing).

[7] CONGRESSIONAL RESEARCH SERVICE, DISTRICT OF COLUMBIA BUDGET AUTONOMY: AN ANALYSIS OF H.R. 733, 110TH CONGRESS, June 6, 2007.

[8] Cong. Budget Autonomy Hearing, *supra note* 6, at 54 (statement of Linda Cropp, Chairman, Council of the District of Columbia).

the smartest form of spending, rather than allow that funding to lapse.[9] The uncertainties of the federal appropriations process make it difficult for the District to adequately plan to allow those managers to carry those funds forward instead of spending in an inefficient manner.

Removing the uncertainty over the local budget ensures that the District 's budget is not being inefficiently spent on unnecessary borrowing costs or paying a premium for services that we would otherwise plan more efficiently to achieve.

Local Budget Autonomy Allows for More Accurate Data & Planning

As noted above, the federal appropriations process has previously required the District to formulate its budget four months before the start of the fiscal year. This means that the District's budget was formulated based on revenue estimates that were completed in February—seven months before the start of the fiscal year (and 20 months before the end of that fiscal year). This put the District at an extreme disadvantage in formulating its budget, and undermined the District's ability to accurately estimate its revenue and expenditure needs. Dr. Gandhi, in espousing the benefits of local budget autonomy, noted that "the more time that elapses between the formulation of a budget and its execution, the more likely the operating assumptions underlying that budget may change."[10]

Similarly, allowing the District to direct the spending of its local revenue under local budget autonomy ensures greater flexibility to respond to changing financial conditions during a fiscal year. Under the prior system, for example, if additional revenues became available the District was forced to wait on the federal appropriations process in order to achieve authorization for spending those additional funds.[11] This produced the perverse result of preventing the District from spending what were available funds on necessary services for as long as 18 months while awaiting a new budget cycle. Such funds could have been spent on critical service needs, like increased hiring of police officers and firefighters,

---

[9] Cong. Budget Autonomy Hearing, *supra note* 6, at 52 (statement of Anthony Williams, Mayor, District of Columbia).

[10] *Bill 19-993, Local Budget Autonomy Act of 2012: Public Hearing Before the Council of the District of Columbia Committee of the Whole*, Nov. 9, 2012, at 6 (written statement of Natwar M Gandhi, Chief Financial Officer). Dr. Gandhi also noted that in 2009 the Council approved a budget based on the CFO's February revenue estimates, only to have the June revenue estimates for that year show a projected decrease of $190 million for fiscal year 2009, and a projected loss of $150 million in fiscal year 2010. Though adopted by the Council, the fiscal year 2010 budget had not yet been signed by the Mayor. As a result of this, the District government was forced to act swiftly to not only revise the current year budget but the budget for the upcoming fiscal year. This hasty revision to the budget could have been avoided if the District operated under a more rational budget process, and the budget revisions could have been accomplished more efficiently if the budget was developed more contemporaneously with current revenue estimates.

[11] In 2009, Congress provided the District with authority to increase its appropriations, but placed a cap on the increase of 6 percent of the overall budget. *See* section 817 of the Omnibus Appropriations Act, 2009, approved March 11, 2009 (123 Stat. 699; D.C. OFFICIAL CODE § 47-369.02).

but were instead held in abeyance until a federal appropriation granted authority to spend.[12]

In addition to alleviating the strictures preventing the District from responding quickly to service needs, the Local Budget Autonomy Act allows the District to modify its fiscal year to more closely conform to the revenue cycle. Information on income and real property tax revenues, which are key to overall revenue projections for the District, is not available until after April, well into the current budget cycle. Adjusting the fiscal year would allow the District to budget based on the most up-to-date data, producing a more efficient spending plan.

More specifically, moving from a September/October fiscal year to a June/July fiscal year would align the District with the most common practice among local government jurisdictions. The most immediate advantages of the June/July cycle is that it conforms to the school year. Our current fiscal year, which had been tied to the federal appropriations process, severs the first quarter of the school year from the annual budget. The consequence is that our D.C. Public Schools (DCPS) have their largest spending quarter—which includes all the school year start-up costs—in the same fiscal year as the previous school year (three quarters). This proves particularly problematic for the school system in terms of hiring and procuring for an upcoming fiscal year. It also hampers new initiatives for students, and even classroom resources, as the funding for these items are uncertain until appropriated at the federal level.

This scenario is also true with regard to the District's university. The University of the District of Columbia (UDC), unlike any other school system in the country, must wait upon federal appropriation for portions of both the current and upcoming school year. Perhaps more problematic is that our education system—including both DCPS and UDC—are subject to closure in the event of a government shutdown. In the case of the UDC, this even means that services the University supplies, such as legal clinics to serve vulnerable populations, must be closed until funding is approved.

Under the Local Budget Autonomy Act, the District can modify its fiscal year to address these issues, as well as improve cash flow management and reduce some budgeting risks as has been asserted by the District's former Chief Financial Officer.

Local Budget Autonomy Improves Service Delivery to Residents and Visitors of the District

In the judicial opinion confirming the validity of the Local Budget Autonomy Act, the court noted that the process previously followed resulted in District agencies struggling to maintain operations while waiting for appropriation legislation "leading to lower or no availability of public services and benefits such as police patrols, public school nurses, and prescription drug benefits."[13] In 2003, former Mayor Williams testified before this

[12] Further, even the most commonplace of transactions, such as requests to reprogram funds from one object class to another if in excess of $1 million, require a congressional review period before the transfer is effectuated.

[13] *Council of the District of Columbia v. DeWitt*, Case no. 2014 CA 2371 B, 11 (2016).

Committee on the need for greater flexibility and noted that "[a]s the front line of government service delivery, no local government can operate effectively without the ability to respond quickly to changing public needs."[14]

With local budget autonomy the District can respond to changing circumstances and address immediate needs through changes to programs and services. As noted by the court, this can mean changes to the budget to hire additional police officers to address public safety needs, purchasing fire apparatus to keep residents safe, or hiring nurses to meet the health needs of our students. Absent this autonomy, there is a detrimental delay between identifying the service need and implementing a solution.

In addition to having to wait for the next federal appropriations for launching new initiatives, the District, prior to budget autonomy, was often hindered in making improvements to current services as a result of being tethered to the federal process. This has traditionally caused real hardship for schools, as noted above, causing new investments in programming and services to be jeopardized by the previous budget approval process. While the District was permitted some reallocation of funding in a fiscal year, a significant reallocation of resources required a supplemental appropriation bill moving through Congress. This had the effect of stalling urgent needs by months as delays mounted in the federal appropriations process.

As a local government, the District must meet the immediate needs of a thriving city. The flexibility to address the types of urgent service and programmatic needs of that city under local budget autonomy ensures that everything from trash collection to public safety response is delivered efficiently in terms of both time and resources.

This highlights another advantage to budget autonomy: ensuring that the service delivery—to residents, to visitors, and even to the federal government—is not disrupted due to federal budget battles which often have no relation to the District or its budget. As U.S. Representative Tom Davis noted in 2003, while Congress's involvement in the District's budget stems from a desire to ensure the financial well-being of nation's capital, "the unfortunate reality is that the city's local budget can get tied up in political stalemates over congressional appropriations that rarely have anything to do with the District's budget."[15]

FISCAL STRENGTH OF THE DISTRICT OF COLUMBIA

The advantages born out of local budget autonomy, as noted above, will only serve to improve the overall fiscal strength of the District. Since 2001 when the Control Board was suspended, the District government has routinely achieved balanced budgets and clean financial audits. Financial markets have recognized the District's laudable fiscal stewardship in the form of higher bond ratings and lower interest rates on borrowing. The District has a proven record of financial management, as evidenced by Mayor Muriel Bowser's proposed this past spring of the District's twenty-first balanced budget.

---

[14] Cong. Budget Autonomy Hearing, *supra note* 6, at 12 (written statement of Anthony Williams, Mayor, District of Columbia).

[15] Cong. Budget Autonomy Hearing, *supra note* 6, at 2 (statement of U.S. Representative Tom Davis).

Since Congress granted the District of Columbia home rule in 1973, the District has had many successes, but also many challenges. Perhaps our greatest challenge was the imposition of a Control Board in 1995, essentially stripping our local government of full control over our budget and management. The Control Board era forced the District to confront its finances head on and to realign the relationship between the District and the federal government. By 2001, the District was back on solid financial footing and the Control Board was dissolved.

Since that period, the District has had a strong economic record. We have grown our fund balance even in the wake of the Great Recession and massive cuts in federal spending. Our balanced budgets have relied not on steep tax increases or deep spending cuts, but on responsible policies that have grown our economy while providing a broad safety net for District residents.

Indeed, in 2015 the District invested its local dollars in a major tax relief package that reduced the effective tax rate for the majority of residents, and lowered business and sales taxes to make us more competitive regionally. As a result of this tax reform the District has received national and bipartisan recognition. The District has also maintained strong bond ratings. We also continue to make capital investments in our infrastructure, while remaining below our locally-mandated 12% debt cap.[16] Other indicators of financial strength include funding for retirement accounts. Our Police, Fire, and Teachers retirement fund—a defined benefit plan—is among the best in the nation, fully funded at over 100 percent. Our Other Post-Employment Benefits Fund, which sets aside the costs of retired government employee health care, is the best in the nation, currently funded at over 100 percent.

Our city is growing, our tax base is growing, our financial reserves are healthy, our capital spending is disciplined, and our retirement funds are among the best in the nation. We are adding over 1,000 new residents a month and businesses are flocking to the District. Few local governments, and even fewer states, can boast of such achievements, especially in the last decade.

The District's success and strong record of responsible financial management, even in the face of administrative hurdles that no other jurisdiction must endure, demonstrates that the flexibility inherent in local budget autonomy is warranted.

PRACTICAL CONSEQUENCES OF LOCAL BUDGET AUTONOMY

As outlined above, the Local Budget Autonomy Act allows the local government to operate more efficiently and with greater flexibility to meet the programmatic and service needs of those residents and entities. Among other things, local budget autonomy saves the District money, allows us to better forecast our budgets, and ensures local services are not interrupted by federal budget battles. This is accomplished not through a divestment of

[16] D.C. OFFICIAL CODE § 47-335.02(a) (2014). The congressionally adopted Home Rule Act allows for an 18% cap.

congressional authority, but an untangling of the District's local budget from the federal budget process.

During testimony received in consideration of the Local Budget Autonomy Act, and explored in depth during the subsequent litigation, it was noted that Congress maintains a range of options in continuing to exercise review over the District's budget. Further, Congress' exclusive jurisdiction—which the District is so often reminded of—is unaffected by local budget autonomy. Indeed, while the District will enact its local budget for the first time this year, approving the District's annual budget in the same manner as it considers all other legislation, the legislation will be sent to Congress for the standard 30-day review period. Also worth noting is that federal funds directly appropriated to the District remain with the federal appropriations process.

Despite the time-consuming budget process the District engaged in prior to local budget autonomy, since the Control Board era Congress has not made changes to the local funds portion of the District's appropriations (nor, it should be noted, has the White House). Instead of modifying the allocation of local funds in the District's budget, Congress has limited their changes to legislative provisions and direct federal appropriations—two things that remain available to Congress under local budget autonomy.

CONCLUSION

I appreciate the Committee providing me the opportunity to testify before you today regarding the District of Columbia Home Rule Act and the Local Budget Autonomy Act. As I stated at the outset, my testimony has focused on policy arguments surrounding the implementation of local budget autonomy for the District of Columbia. While the District's local budget previously been tethered to the federal appropriations process, this has produced increased costs and other inefficiencies without a tangible benefit.

Going forward, the District will maintain its proven record of financial management, and will continually strive to improve the fiscal strength of the District. With implementation of the Local Budget Autonomy Act we can now act more efficiently and with greater flexibility to meet the programmatic and service needs of residents and visitors to the District of Columbia.

Mr. MEADOWS. Thank you, Chairman Mendelson.
Mr. Nathan, you are recognized for 5 minutes.

STATEMENT OF IRVIN B. NATHAN

Mr. NATHAN. Thank you, Mr. Chairman. Thank you for the invitation to appear here today to testify about the validity of the District of Columbia Budget Autonomy Act, which was passed by the D.C. Council in 2012 and ratified by the District voters in 2013. During that period I served, as you mentioned, as the attorney general for the District.

I want to make clear that my views today about budget autonomy for the District are the same as when I was the D.C. attorney general. I believe that budget autonomy for the locally raised revenues of the District is sound and appropriate public policy. And for the reasons that have been described by the ranking member, by Congresswoman Norton, and by Chairman Mendelson, I think they should be enacted by the Congress. And if it were enacted by the Congress, it would be signed by the President.

However, unilateral legislation by the D.C. City Council enacting such a budget autonomy contravenes several explicit provisions of the Home Rule Act of 1973, contravenes the legislative bargain that led to the passage of home rule. It violates, as said by GAO, the longstanding Federal Antideficiency Act. And in my view, the Council's Budget Autonomy Act is null and void, and implementation of it may put D.C. office holders and their actions in legal jeopardy. This is the same opinion I expressed when I was the attorney general.

I want to make clear that my views are shared by the career lawyers at the attorney general's office. They are shared by the current elected attorney general, who courageously took this position in litigation during his election campaign, and in litigation in the Federal and local courts. And it's the view of the only Federal Court to look at this issue.

The legislative history is clear and so is the language of the statute. The legislative history is that the Home Rule Act was not going to pass until the Diggs compromise was reached, and you mentioned the "Dear Colleague" letter. That compromise gave limited home rule to the District and left budget authority with the Congress.

I note that neither Mr. Mendelson in his testimony nor the outside council for the city mentioned in their prepared testimony the language of the law, the Diggs compromise, or Federal Judge Emmet Sullivan's decision. I believe that Judge Sullivan's decision is a very sound one and is likely to be followed by courts that deal with this issue in the future.

What's important to recognize is that there is no court decision that has yet been decided that is going to be binding on any other court that is likely to consider this matter in the future. There could have been if Mayor Bowser's outside lawyers had allowed the matter to be decided by the Federal Court of Appeals. But they asked the Federal Court of Appeals to dismiss the case as moot and asked it to be remanded to the Superior Court.

When they asked it to be remanded, they said they were going to seek dismissal of the action in the Superior Court and claimed

that the action was not ripe as to the CFO, who was another party to that case. But when they got back to the Superior Court, they changed positions and said it was urgent to have this resolved, and they asked the Superior Court to decide it. And as you know, the Superior Court sided with the Council and said that this was valid.

In my testimony, I discuss the deficiencies of the Superior Court decision, and I think what's most important is that in a future litigation neither the Superior Court's decision nor Judge Sullivan's is going to be binding, but I believe that as a result of the Council's legislation there will be future litigation. There is already a case pending in the Federal Court, as you mentioned. And after this takes effect, it is inevitable, it seems to me, that there is going to be future litigation. And in the future litigation, I think most judges are going to find Judge Sullivan's decision invalidating this act, is going to find that persuasive and not find the Superior Court persuasive.

What I think and what has troubled me all along is that this is going to lead to confusion and chaos in the District's budgeting and finances, and I don't believe that's in anybody's interest, certainly not the residents of the District of Columbia and not in the congressional interest. I think everyone has an interest in seeing that there is no confusion and chaos in the budget or financial affairs as a result of litigation over the Budget Autonomy Act. That kind of confusion would not be fair to the D.C. residents or the many people who work in the District every day or tourists whose come and rely on the services.

Now, the best way to present such confusion or uncertainty is for Congress to enact budget autonomy, as the D.C. delegate has urged for years, in legislation, and as the President has recommended, and as the referendum shows that the D.C. residents desire.

You know, I think it's pretty clear that, as Mr. Mendelson has said, that the officials in the District of Columbia are responsible stewards of the D.C. budget and they would do a good job. They have done a good job and I think they would continue to do a good job of maintaining fiscal responsibility. And as noted, this would be consistent with congressional responsibility, which can always pass legislation if Congress is not satisfied with a particular policy or expenditure of the D.C. government.

So I think that the right solution to avoid this future litigation, which is going to be confusing and unfortunate, is for Congress to recognize the validity of what has been said here by Mr. Mendelson and by Congresswoman Norton and to pass budget autonomy and clarify the situation which at the moment is—it could be very deleterious to the District and, therefore, to the Nation. Thank you.

[The prepared statement of Mr. Nathan follows:]

Statement of Irvin B. Nathan

Before

The Subcommittee on Government Operations

Of The

U.S. House Committee on Oversight and Government Reform

May 12, 2016

Mr. Chairman and Members of the Subcommittee:

Thank you for the invitation to appear here this afternoon to testify about the validity of the District of Columbia Budget Autonomy Act , passed by the D.C. City Council and ratified by District voters in 2013.

During the period from January 2011 through 2014, I served as the Attorney General of the District of Columbia, appointed by Mayor Vincent Gray and confirmed unanimously by the D.C. Council. Prior to that, I had served as the General Counsel of the U.S. House of Representatives, appointed by Speaker Nancy Pelosi. And prior to that I had been a senior partner at the Washington law firm of Arnold & Porter, where I started practicing law in 1968.

I should make clear at the outset that my views on budget autonomy for the District are the same today as they were when I was D.C. Attorney General: I believe that budget autonomy for the locally raised revenues of the District is sound and appropriate public policy and should be enacted by the Congress and signed by the President. However, unilateral legislation by the D.C. City Council enacting such budget autonomy contravenes several explicit provisions of the Congressional Home Rule Act of 1973, the legislative bargain that led to the passage of the Home Rule Act and the long-standing federal Anti-Deficiency Act. In my view, the Council's Budget Autonomy Act is null and void, and implementation of that legislation will put D.C. officeholders and their actions in legal jeopardy. This is also the view I expressed in a formal legal opinion issued while I was D.C. Attorney General.

My view on the unlawfulness of the D.C. law is shared by U.S. Government Accountability Office; the House Appropriations Committee ; the General Counsel of the House; my successor, the first elected Attorney General of the District; and federal District Court Judge Emmet Sullivan, whose excellent and well reasoned opinion, while vacated on grounds of alleged mootness, remains the most persuasive judicial analysis of the issue, which is likely to guide any future court considering the issue. Judge Sullivan's opinion can be found at *Council of the Dist. of Columbia v. Gray*, 42 F. Supp. 3d 134 (D.D.C. 2014).

While I was D.C. Attorney General, representatives of D.C. Appleseed approached Mayor Gray with the concept of the Budget Autonomy Act, which would allow the D.C. City Council to appropriate and spend locally raised revenues without going through the federal budget process as had been followed for the prior 100 years. Mayor Gray asked my office to evaluate the legal validity of this proposal under existing federal law. I, in turn, requested senior career lawyers at the Attorney General's office, many of whom had spent decades at the office providing legal opinions on the validity of proposed Council legislation and defending Council legislation in court cases, to give me their opinion on the legality of the proposed Budget Autonomy Act. After extensive study of the language of the Home Rule Act of 1973, its legislative history, the language and intent of the federal Anti-Deficiency Act and the uniform practice of the budget process during the 40 years between 1973 and 2012, the career staff of the Office of Attorney General of the District of Columbia unanimously concluded that the Budget Autonomy Act was invalid because it contravened numerous provisions of the Home Rule Act and the Anti-Deficiency Act.

After receiving that conclusion, and making an independent analysis of the applicable provisions of the Home Rule Act and the Anti-Deficiency Act, I concurred that the proposed Budget Autonomy Act was invalid and would subject any D.C. office holders who spent or authorized the expenditure of funds that had not been appropriated by Congress to potential civil and criminal sanctions. Mayor Gray, a longtime advocate of statehood for the District, declined to support or sponsor the proposed legislation.

After the Council passed the proposed amendment to the City Charter, under the procedures established in the Home Rule Act of 1973, the matter had to be presented to the voters for ratification. The Council proposed that the matter be placed on the ballot during a special election at which one City Council seat had to be filled. Placement on the ballot required the approval of the D.C. Board of Elections, a three-person board. As with all such proposed referenda, the Board requested the opinion of the Attorney General and other interested parties and held a hearing on the issue.

I not only sent a letter setting forth our office's view on the invalidity of the proposed charter amendment, but I also appeared and testified at the hearing the Board held on the subject. While making clear that I supported the policy goal of budget autonomy for the District, I urged the Board not to allow the Council legislation to be placed on the ballot because the provision was illegal and invalid under federal law and would be misleading to the voters of the District. I am appending to my statement to this committee a copy of my testimony to the Board. The views expressed in that testimony continue to be my views today.

In my letter to the Elections Board and in my testimony before it, I cited three separate provisions of the Home Rule Act which precluded the Council from using the Charter amendment procedure to change the budget process in a way that virtually eliminates the President's role and alters the role of Congress from an active appropriator to a passive reviewer of Council appropriations. These are the same provisions that led federal Judge Sullivan to invalidate the Act and enjoin its enforcement.

The Home Rule Act in section 303(d) provides that the charter amending process "may not be used to enact any law or affect any law with respect to which the Council may not enact any act... under the limitations specified in sections 601, 602, and 603." Those provisions all appear in Title VI of the Home Rule Act, under the heading "Reservation of Congressional Authority" and "Limitations on the Council." Among them are three that I cited:

-- Section 603 (a) states that : "Nothing in this Act [which, of course, includes the amendment procedures] shall be construed as making any change in existing law, regulation or basis procedure and practice relating to the respective roles of the Congress , the President, the federal office of Management and Budget and the Comptroller General...in the preparation, review, submission , examination, authorization and appropriation of the total budget of the District of Columbia government."

-- Section 602(a) (3) states: "The Council shall have no authority to ...enact any act...which concerns the functions ...of the United States" [when it had been a function of the President and the Congress to pass a budget for the District of Columbia for over 100 years).

-- Section 603 (e) states :"Nothing in this Act shall be construed as affecting the applicability to the District government of the provisions of the...Anti-Deficiency Act," which provides that no funds may be spent or committed without an appropriation by the Congress.

In addition Section 446 of the Home Rule Act, entitled "Enactment of Appropriations by Congress:" provides that " no amount may be obligated or expended by any officer or employee of the District of Columbia government unless such amount has been approved by Act of Congress and then only according to such Act."

I was not successful in persuading the Board to keep the measure from the ballot. At the special election, less than 10% of the eligible voters cast a ballot on the referendum, but, of course, a sizeable percentage of those voters supported the referendum.

In 2014, both Mayor Gray and the District's Chief Financial Officer Jeffrey DeWitt advised the Council in writing that they would not implement the Budget Autonomy Act because they had each been advised by their respective counsel that the law was invalid, null and void. As a result, the Council filed suit against both of them in Superior Court in the District seeking a declaratory judgment that the Act was valid. The Office of the Attorney General, defending the Mayor and the CFO removed the case to the Federal District court in D.C., where it was assigned to Judge Sullivan.

Following full briefing and a lengthy hearing, Judge Sullivan found many reasons to hold the Budget Autonomy Act unlawful and invalid based on plain statutory language, legislative history, the experience of almost 40 years of home rule and "common sense." He relied on the same statutory provisions of the Home Rule Act that I had cited to the Board of Elections and in my formal opinion. He specifically found that "budgeting and appropriations [for the District] are unquestionably 'functions' of Congress. The court entered judgment for the Mayor and the CFO and enjoined all partiers from enforcing the Autonomy Act. When the Council sought a partial stay to allow it to continue to follow Budget Autonomy Act process, the court summarily rejected that motion as completely "devoid of legal merit."

The Council took an appeal to the federal U.S. Court of Appeals for the D.C. Circuit. There the matter was briefed and argued. A review of the transcript of that oral argument reveals that not a single judge asked a single question that reflected any doubt of the correctness of Judge Sullivan's ruling on the merits of the issue, namely that the Act was invalid. No federal appellate judge expressed a contrary view concerning the invalidity of the DC law.

At the urging of Mayor Bowser's privately retained lawyers several months after the oral argument and well after she took office, the federal appellate court agreed that the matter was moot in light of new Mayor's concurrence with the City Council, and, at their request, the matter

was remanded to the Superior Court . The Mayor's private lawyers had told the federal appellate court that the matter was not "ripe" as to the CFO and that she would ask the suit to be dismissed on the grounds of "ripeness" when it was returned to the Superior Court. However, when the matter got to the Superior Court, the Mayor's outside counsel changed positions and claimed that it was "urgent " that the local court decide this matter anew on the merits. At the local Judge's direction, the matter was then briefed in the Superior Court, but unlike Judge Sullivan, and the federal court of appeals, the Superior Court, Judge Brian Holeman, did not hold oral argument. In March, 2016, Judge Holeman issued a decision upholding the Budget Autonomy Act. No appeal was taken from that decision.

Judge Holeman's opinion is singularly unpersuasive. The opinion starts with a description of the "inequities of the District's position resulting from its lack of statehood and the lament that the citizens of the District are denied fundamental rights, such as representation in Congress and "a corresponding say in how the United States government spends tax dollars levied from citizens of the District." I agree with these sentiments, as did Judge Sullivan in remarks from the bench, but, as federal Judge Sullivan found, they are wholly irrelevant to the legal question of whether the Budget Autonomy Act is consistent with the Home Rule Act or the Anti-Deficiency Act. It does reveal, however, the understandable motivation behind Judge Holeman's decision.

Judge Holeman claimed at the outset that he found the District Court Sullivan's analysis "persuasive" and noted that the claim by the CFO's brief that Judge Sullivan's analysis was not questioned by the Circuit court panel "is not without merit". Yet Judge Holeman's opinion largely ignores Judge Sullivan's opinion and utterly fails to address or refute the federal court's analysis. Judge Holeman analyzed the situation as a matter of "federal pre-emption," a concept not contained in any of the briefs, when in fact it is simply a question of whether the federally enacted Home Rule Act prohibits the District from amending the budget procedure, described in the law, and followed for decades before and after the Home Rule Act.

As to the three provisions of the Home Rule Act that Judge Sullivan found prohibited the Budget Autonomy Act, Judge Holeman reached the opposite conclusion on each. As to the provision which precludes the City Council from enacting any law that affects the functions of the federal government, he found that when the President and the Congress appropriated funds for the District for the past 100 years, they were not "functions" of the United States" but were "local functions." With regard to Section 603 (a), Judge Holeman found that the limitation on changing the budget processes was only applicable at the moment that Congress passed the law, and had no effect once the ink on the President's signature was dry. At that point, he claims the District was free to use the amendment process and make any change it desired in the budgeting process. As to the Anti-Deficiency Act, Judge Holeman said that the law, which requires an appropriation or fund, does not specify that the appropriation or fund must be from Congress. Since the DC Council is providing the appropriation from locally raised funds which are in a General Fund, he found that there is no violation of the Anti-Deficiency Act. His interpretation is contrary to that of the agency that is the federal government's expert on this issue, the non-partisan Government Accountability Office, and contravenes over a century of federal jurisprudence which interprets the Anti-Deficiency Act to require a congressional appropriation or fund.

The Holeman opinion makes no mention of the Diggs compromise which was at the heart of the Home Rule Act. As Judge Sullivan's opinion explains in depth, the Home Rule Act championed by Congressman Diggs was not going to move forward over the opposition of the powerful subcommittee chairman William Natcher, whose subcommittee controlled the District's budget and appropriations. Chairman Natcher believed that the U.S. Constitution required the Congress to appropriate the entirety of the District's budget, and he and the many Congressmen whose votes he influenced would not agree to any home rule unless the District's budget and appropriations were left to Congress. As a result, Chairman Diggs, after meeting with Chairman Natcher, abandoned the original bill (which had included budget autonomy for the District) and offered a comprehensive substitute, commonly known as th Diggs Compromise. Mr. Diggs explained the compromise in a Oct, 1973 Dear Colleague letter . In it he laid out the differences from the original bill, the first of which was to preserve the jurisdiction of Mr. Natcher 's subcommittee and leave the budgetary process intact, "return to the existing Line Item Congressional Appropriation role." It was that compromise that led to the addition of 603 (a) to the section on the limitations on the Council, which said it could not make any changes to the budgeting structure.

Instead of referring to this critical 1973 legislative history, Judge Holeman relied on a friend of the court brief filed on behalf of octogenarian former members of Congress (and some staffers, including one who was not even working for the Congress that enacted Home Rule) who attested to what they now believe they meant back in 1973 when they voted for Home Rule. They seem to have forgotten that they supported legislation that was sponsored by the District's non-voting delegate year after year following Home Rule providing that Congress amend the law to permit the District to have budget autonomy. It is difficult to understand why they would have repeatedly requested Congress to grant budget autonomy if, as these former Members now claim, the District could secure budget autonomy unilaterally and without the action of Congress. The bottom line is that there is not a single word in the contemporaneous legislative history that suggests that any member of Congress believed then that D.C. would at some future time, without any Congressional action, be allowed to unilaterally alter the budgetary process for the "entire" D.C. budget as laid out in the Home Rule Act.

Neither the federal trial level decision by Judge Sullivan nor the local decision by Judge Holeman has any binding effect on another court if and when the matter of the validity of the Budget Autonomy Act is back in court. If , contrary to the request of the Mayor's lawyers, the federal court of appeals had decided the matter on the merits, its resolution would have been dispositive on the federal district court here and the local court. As it stands, there is no definitive court decision. There is already another suit pending in federal court challenging the City Council statute, and it is safe to predict that there will be future suits once the city implements the law and begins to spend locally raised monies that are not appropriated by Congress. I believe future courts in those reasonably anticipated cases are likely to find Judge Sullivan's federal court decision considerably more persuasive than Judge Holeman's analysis.

My concern always was and still is that such lawsuits challenging the validity of the locally passed Budget Autonomy Act would succeed and result in chaos and uncertainty for the District's budgetary and financial affairs. This would obviously not be fair or just for the

residents of the District, the hundreds of thousands of folks from surrounding jurisdictions that work in the District every workday , or the millions of tourists that visit each year.

The Budget Autonomy Act was born of the frustration built up over 40 years that more and more of the District's revenues come from locally raised funds, such as taxes, license fees and penalties, and less and less from a federal payment; that for more than a decade the District has been responsible in handling its funds; and from reliance on Congress, which over that same period has had difficulty in enacting a budget and has caused government shutdowns, which have had negative effects on the District.

I believe that while not valid as a matter of law, the Budget Autonomy Act is a cry for help by the city and its leaders. I believe that the best thing that can come from this hearing is support in Congress for the passage of federal legislation providing to the District budget autonomy for its locally raised funds. Such legislation would leave untouched Congress's legal right under Article I of the Constitution to alter or reject any budget choice of the Council. This sensible proposal has been in the President's legislative package to Congress for the last several years. There is no doubt he would sign such a law. It is not only the right and just result but it would also spare the District the future budgetary confusion and chaos that will result from the litigation likely to be spawned by the current locally enacted law. The citizens of the District do not deserve that unfortunate outcome, and Congress is in a position to resolve that matter in a fair and equitable manner.

Thank you.

Attachment

STATEMENT OF IRVIN B. NATHAN, ATTORNEY GENERAL OF THE DISTRICT OF COLUMBIA, ON THE LOCAL BUDGET AUTONOMY EMERGENCY AMENDMENT ACT OF 2012

BEFORE THE DISTRICT OF COLUMBIA BOARD OF ELECTIONS

JANUARY 7, 2013

Good morning, Madam Chair, Board Members, and staff. I am Irv Nathan, Attorney General for the District of Columbia. I'm joined today by my Senior Counsel Ariel Levinson-Waldman. Thank you for the opportunity to testify about the Local Budget Autonomy Emergency Act Amendment of 2012 and the D.C. Charter amendment process.

Like each of you, I am a member of the D.C. Bar and an official of the District of Columbia government. In both capacities we have taken oaths to uphold and faithfully execute the laws of the United States and the District of Columbia. In light of these oaths, I am here today to do something that is very difficult and sad, and will be urging you to do something that may be even more difficult and courageous. What I, in my capacity as an independent Attorney General and not as a spokesman for the Gray Administration, am asking you, as independent

referees of our electoral system, to do is to adhere to the D.C. Charter, passed by the Congress, signed by the President, endorsed by the citizens of the District and codified in the D.C. Code, and decline to place on a ballot for the electorate a politically popular proposed amendment to our charter, unanimously passed by the Council, signed by the Mayor, and praised by high-profile and well-meaning advocacy groups. What makes this so difficult and sad for me is that I fully support the concept of budget autonomy for the District for the revenues that we raise from our citizens. It is only just and right that we in the District be able to spend the funds we raise locally without advance permission from the Congress, which may not always have the best interests of the District in mind. That's why I fully support the diligent efforts of Mayor Gray, Congresswoman Norton and others to convince Congress to pass legislation providing budget autonomy for our locally raised revenues. For that is the only lawful way to achieve this worthy and just goal.

Any fair reading of the Charter demonstrates the proposed amendment violates the Charter's amendment procedures and that it would violate our governing law to place it on the election ballot. Specifically, section 303(d) of the Home Rule Act, Codified in D.C. Code section 206.03(d), states unequivocally "The [Charter] amending procedure ... may not be used to enact any law or affect any law with respect to which the Council may not enact ... under the limitations specified in §§ 1-206.01 to 1-206.03." Those sections reserve and retain for the federal government full authority over the D.C. budget and specifically provide that nothing in the Charter gives the District any right to make any change in the existing laws, regulations, procedures or practice relating to the roles of Congress, the President, the federal Office of Management and Budget, and the U.S. Comptroller General in the preparation, review, authorization and appropriation of the total budget of the District of Columbia government. Moreover, these

provisions say that the D.C. Council may not pass any law that concerns or affects the functions of the United States government, and these provisions further make clear that no expenditure by any D.C. government employee is lawful without an appropriation from Congress. The statutory provision (§ 206.03(d)) which forbids using the Charter amendment process to make any changes to the federal budget process is in the same section, indeed immediately follows the provision (§ 206.03 (c)), that empowers this Board to have a role in the Charter amending process. The prohibition is stated in clear, mandatory terms and must be followed by every entity, including most especially the Board, which is involved in the charter amendment process. As an independent agency where each of its members is chosen for "demonstrated integrity, independence, and public credibility...with knowledge [and] training... in government ethics or in elections law and procedure..." the Board has, in our judgment, a statutory obligation to make an independent examination of whether its actions would violate subsection (d).

The D.C. Court of Appeals spoke definitively on this topic more than two decades ago, when it stated: "Under the Self-Government [Home Rule] Act, Congress retains the power to appropriate all District government revenues...; the Council cannot authorize the spending of local revenues; only Congress can." *Hessey v. District of Columbia Board of Elections and Ethics*, 601 A.2d 3 (D.C. 1991) (en banc). (emphasis added). The Court added in a footnote: "The legislative history of the Self-Government Act makes clear that the ... Act left in place the pre-existing Congressional appropriations process for the District government." (Citations omitted.)

In my letter to you on Friday, I detailed the three separate limitations specified within D.C. Code §§ 206.01- 206.03 that would be violated by the proposed amendment and therefore barred under subsection (d) from the Charter amendment process. Any one of these three statutory limitations would, by operation of subsection (d), make it unlawful to use the Charter amendment process for the proposed

amendment and thus unlawful for the Board to place it on the ballot as part of that process. When the three are considered in their totality, the impropriety of this procedure is manifest. I'll discuss the three limitations here briefly, and would be pleased to address any of your questions on them as well. I will then discuss in more detail what I believe the Board's obligations are under the law, which is certainly not limited to the ministerial role of a clerk, as the D.C. Council's submissions would suggest.

First, Code §206.02(a)(3) provides that the Council has no authority to "enact any act, or enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District." Removing the expenditure of local funds from the federal appropriations process would affect the functions of the United States by preventing Congress, with Presidential approval, from appropriating local District funds. It would also alter the functions of the federal OMB

and the U.S. Comptroller General in our budget process. It would also have an application beyond District matters by limiting the participation of the federal government in the District's budget process. In addition, changing the District's fiscal year would affect the functions of the United States and extend beyond the District's local affairs by making it difficult, if not impossible, for Congress and federal officials to review the District's finances during its regular budget cycle.

Second, the amendment would violate Code §206.03(a) because the amendment would change the long-standing roles and procedures of the stated federal entities with respect to the District's "total budget." Upon enactment, rather than being subject to the federal appropriations process, the District would establish its own budget for local funds, to be appropriated according to a different fiscal year, subject only to passive Congressional review, rather than the currently mandated active review by Congress and the President. The

amendment's major change in the District's budget process would directly contradict the prohibition in this section, which states:

> (a) Nothing in this act [The Home Rule Act] shall be construed as making any change in existing law, regulation, or basic procedure relating to the respective roles of the Congress, the President the federal Office of Management and Budget, and the Comptroller of the United States in the preparation, review, submission, examination, authorization and appropriation of the total budget of the District of Columbia government.

While ignoring the two other limitations, the D.C. Council's submission suggests that there are two possible readings of this provision. The first it admits is "a bright-line prohibition of the ability of the [D.C.] Council to affect the budget process as set forth" in the Charter. As an alternative it posits the provision could be read simply to mean that Congress maintains ultimate authority with respect to D.C.'s budget

and that the Council can change by Charter amendment all the parts that deal with the local part of the budget. The submission concludes that the Council prefers the second reading, without any statutory or legislative history justification. Indeed, the submission, in a part of the memo it has provided, said that Congress's legislative intent "is not dispositive of the issue," presumably admitting that the Council recognizes that Congressional intent favors the first interpretation. We submit there is only one fair reading of that provision, which accords with both the express language of Charter and Congressional intent: the bright-line prohibition against the Council altering the budget process as it existed when Home Rule was passed.

Third, the amendment would violate Code § 206.03(e) (a provision not discussed by the Council's submission) because the federal law provisions incorporated by reference there prohibit government employees from obligating or expending funds in excess or in advance of an appropriation by Congress.

The proposed Charter amendment would also violate the Anti-Deficiency Act and other provisions of Title 31 of the U.S. Code, which provide for criminal and civil penalties for any government employee, including explicitly any D.C. government employee, who expends government funds without an express Congressional appropriation. Under the Supremacy Clause of the U.S. Constitution, the Anti-Deficiency Act would prevail and any D.C. employee who spent local funds on the basis of the proposed amendment, assuming it became operative, would be in jeopardy of federal enforcement action and job loss.

Based on these provisions of the Charter and federal law, and after an extended period of research and analysis, my office, including apolitical career lawyers who have been with the office for decades, has reluctantly concluded that each of these provisions separately, independently and collectively precludes use of the charter amendment procedures for the proposed amendment, including its

placement on a ballot for the electorate. As two prominent District lawyers, Wayne Witkowski, for over 30 years a revered member of the Corporation Counsel's office (later the OAG), and Leonard Becker, former General Counsel to Mayor Williams and a former D.C. Bar Counsel, wrote in an op-ed piece, finding the proposed amendment unlawful, "It is no wonder that for almost four decades, the District's elected leadership, officials and lawyers have not viewed Section 303 as a vehicle for changing the District's budget procedures." (I am appending a copy of the Washington Post op-ed piece to my testimony.)

In a supplemental submission over the weekend, the Council has claimed that the Board has simply ministerial duties relating to Charter amendments that the Council has proposed, that the Board has no "jurisdiction" to consider the legality of its proposed amendment, that the Board should just defer to the Council's actions, and that the

Board's regulations and precedent preclude its making an independent legal analysis and judgment. The Council is wrong on all counts.

The Congress chose the Board to be involved in the amendment process precisely because of its independence, neutrality and knowledge and expertise in election law and procedure. The Mayor chose, and the Council ratified, lawyers for this Board who would understand and be bound by the law and, in accordance with the statute, in the performance of their duties, "would not be subject to the direction of any nonjudicial officer of the District..." D.C. Code § 1001.06.

Hypothetically, if the Council's views were accepted, the Board would have to put on the ballot, without any independent legal analysis, Charter amendment legislation passed by the Council no matter how plainly unlawful it was, such as: 1) abolishing the office of the Mayor (in violation of §§1-203.03 (a) and 1-204.21); or 2) precluding the U.S. Attorney from prosecuting any Council Member or Mayor for any

federal criminal offense (in violation of D.C. Code §1-206.02 (a) (8)); or 3) resegregating our public schools (in violation of the law of the land as expressed in *Brown v. Board of Education,* 347 U.S. 483 (1954), and *Bolling v. Sharpe*, 347 U.S. 497 (1954)). Of course, the Board would do no such thing, and in each case, it would exercise an independent legal judgment and conclude that the patently illegal measure could not be placed on the ballot, notwithstanding the Council's (hypothetical) votes and urgings.

The controlling principle is set forth in the binding case which must govern the Board, *Mayers v. Ridley*, 465 F.2d 630 (D.C. Cir. 1972). In that case, the D.C. Circuit ruled en banc that the D.C. Recorder of Deeds, who generally has a ministerial role in accepting deeds for filing, may not violate with impunity governing federal law and the U.S. Constitution and thus could not lawfully record and file deeds containing racially restrictive covenants which had been declared void and unenforceable in *Shelley v. Kraemer*, 334 U.S. 1 (1948). The D.C.

Circuit held that even though the Recorder's duties are ministerial, he had to make an independent legal judgment to insure that his actions were lawful under applicable law.

That is what this Board must do in this situation. It must insure that its actions in the Charter amendment process are lawful and in accordance with applicable law, including D.C. Code §1-203.03 (d). It is not a question of having "jurisdiction." It is not a question of giving deference to the Council, which may act for political reasons not strictly in accordance with the law. It is not a question of having to have regulations to deal with the rare time that the Council may propose an amendment barred by the Charter. The Board has no regulations that speak one way or the other to the question. In any event, what controls here is the statute, which gives the Board a role in the Charter amendment process. The question is solely one of the Board making sure that its actions are lawful and not misleading the electorate that its votes will be valid and not struck down as in violation of the Charter

or other federal law. As history is our guide, this type of issue will not arise frequently and even more rarely with such clarity.

The Board's independent legal analysis of its action is not inconsistent with its decision in *In Re School Governance Charter Amendment Act of 2000* (DCBOEE, May 11, 2000). In that case, the question was whether the Council had violated its own procedures in passing the proposed charter amendment regarding two readings of the proposed legislation in "substantially the same form." The Board concluded it did not sit in judgment or review of the Council's internal procedures and declined "to look behind the Council's actions." In this case, the Board has to decide if it can participate in the Charter amendment process by placing on the ballot a proposed amendment that is barred by the same Charter provision that gives the Board a role in the process. We are not asking the Board to "look behind the Council's actions." We are asking the Board to consider carefully before it takes its own action, and to be

sure that it is acting lawfully, just as the Recorder of Deeds has to do when presented with a deed that may violate federal law.

The Council's counsel also argues that if the Board refuses to place the proposed Charter amendment on the ballot, the Board will effectively deny the District's electorate the opportunity to let their views on this topic to be known. This, too, is wrong. The Council is fully able to pass a bill calling for a non-binding vote by the electorate in which District voters can express their views on local budget autonomy. By following the law here, the Board will prevent the voters from being misled about the likely consequence of their vote.

The Board's independent legal analysis can and does end the necessary inquiry for the Board. However, I note that, politically unpopular as this result may seem, the Board should take some comfort, as I do, in the fact that keeping this proposed amendment off the ballot may well be in the long-term interests of the District. As you may know, before becoming the Attorney General for the District, I served from 2007 to

January 2011 as the General Counsel of the U.S. House of Representative. And many years prior to that I served as a special outside counsel for a standing committee of the U.S. Senate. This service does not color my view of the law, which is derived from the objective analysis of all of the career lawyers in my office who have examined the issue; but this service does give me some sense of how Congress views its prerogatives and powers and how it will likely react if the proposed amendment goes forward and is passed by our voters, purporting to unilaterally change Congress's and the federal government's role with respect to the District budget.

To put it mildly, it is not likely to be pretty. As we have seen all too vividly, Congress is already able and has been willing to intrude on the District's affairs by enacting social policy that runs contrary to the views of the majority of District citizens regarding such issues as firearms, women's health, and the District government's ability to protect HIV patients. Any doubt about the likely reaction on the Hill was dispelled

by the public comments of Chairman Issa of the House Government Oversight Committee, which has jurisdiction over the District of Columbia. As quoted by Rollcall on December 7, 2012, he said, the proposed amendment "does undermine my ability to get for them [District residents] what I believe they want . . . It has been my proposal all along that nonbinding referendums, a statement of the people, a redress to their government, is positive . . . as opposed to essentially a partial secession from the union by saying, 'We believe we have this inalienable right' even though nowhere in the [Constitution] does this exist." In short, he has compared the passage of this proposed amendment as a "partial secession" from the United States. In apparent sympathy with D.C. voters, he noted "If D.C. residents are being asked to vote on a legal, constitutional question, it isn't a fair question to place to the people." Mr. Issa's words may be the tip of the iceberg of problems the District would have in Congress. Congress could react not only by invalidating the amendment, but also by taking punitive measures.

Even without a punitive response, if the amendment became law, it will likely be subjected to litigation and delay in the courts, never a good thing for the budget process, which requires stability and predictability. Finally, if the amendment became law, I and every other employee of the District government would have to be concerned about our personal civil and criminal legal exposure under the federal Anti-Deficiency Act if we were to expend funds pursuant to the local budget passed by the Council but not appropriated by the Congress.

In the end, of course, these are policy decisions to be made by the Council and the Mayor. But the one question which the Board and only the Board can decide is whether it will be acting lawfully in placing this proposed amendment on the ballot and leading D.C. voters to believe that when they vote on this proposed amendment they are engaged in a matter which is properly before them. On that issue, I am urging you to make an informed independent judgment, and the analysis I have provided from our office is designed to assist you in that endeavor.

Thank you for your consideration. I am pleased to answer any questions you may have.

Mr. MEADOWS. Thank you, Mr. Nathan.
Mr. Netter, you are recognized for 5 minutes.

STATEMENT OF BRIAN NETTER

Mr. NETTER. Thank you, Chairman Meadows, Ranking Member Connolly, and members of the subcommittee. My name is Brian Netter and I'm a partner in the Washington, D.C., office of the law firm Mayer Brown.

Along with my co-counsel, Karen Dunn of Boies, Schiller & Flexner, I was retained on a pro bono basis by the Council of the District of Columbia to independently assess whether the Local Budget Autonomy Act of 2012 complies with Federal law, including the Home Rule Act of 1973. I was not then and am not now an advocate for any policy outcome. Questions about why budget autonomy is desirable for the District and for Congress are better directed to Chairman Mendelson. My team's objective was to determine whether the Budget Autonomy Act comports with Federal requirements.

When we began investigating the legal issues presented by the Budget Autonomy Act, various political actors had taken positions already as to the validity of the act. But so far as we were aware, none had undertaken the no-stones-unturned sort of investigation warranted by the circumstances here. We therefore undertook an exhaustive investigation that began with the review of the 4,000-page set of committee proceedings from 1973, and ultimately resulted in us contacting each of the living Members of Congress who served on the relevant committees in 1973, as well as consulting the personal archives of key Members and Senators who have died.

The Home Rule Act represented a bipartisan success of the civil rights era. Overcoming longstanding resistance that had been blamed on racist attitudes toward the District, Congress came together to create for the District of Columbia a government by the people, of the people, and for the people.

The centerpiece of the Home Rule Act was the District's charter, which Congress envisioned as akin to a State constitution. In 1973, Congress created the process through which the District could propose amendments to the charter. Those amendments would become law only if both Chambers of Congress affirmatively approved the amendment by enacting a concurrent resolution. Because Congress retained for itself the ultimate authority to approve those amendments, the limitations on the District's charter amendment authority were few and narrow.

In 1983, the Supreme Court's decision in INS v. Chadha invalidated legislative procedures, such as the procedure for amending the District's charter. Accordingly, Congress needed to change the process. Congress decided to make amendments proposed by the District presumptively valid unless Congress enacted and the President signed a joint resolution of disapproval. In so doing, however, Congress did not alter the narrow set of limitations on the District's charter amendment authority that had been enacted in 1973 when Congress' affirmative ascent was required.

We investigated each of the supposed limitations on the District's authority that opponents of the Budget Autonomy Act used to question its legitimacy. In particular, we reviewed the reports that were

supplied by GAO and by Mr. Nathan. But we found the concerns in those reports to be legally unfounded.

In our system of laws, where there is a dispute about the interpretation or validity of a statute, it is the province and duty of the judicial department to say what the law is. And so we filed a lawsuit so that the issue could be resolved as our Constitution contemplates.

This was a high-profile case that received attention from thoughtful commentators. The Superior Court had before it briefs from the three parties, the Council, the mayor, and the chief financial officer, as well as friend of the court submissions from 11 different groups offering their views. Those groups included scholars on Federal budget law, legislative interpretation and local government law, and legislators and staffers who participated in the drafting of the Home Rule Act in 1973.

There obviously isn't sufficient time for us to discuss all of the many contours of those briefs. However, they provide a very detailed and sophisticated understanding of what Congress was doing, the context in which it was doing what it did, and how subsequent events, including the Supreme Court's decision in Chadha, affect the analysis of the Home Rule Act today.

On March 18, 2016, the Superior Court for the District of Columbia issued an opinion upholding the Budget Autonomy Act and offering a detailed explanation for why the opponents of the legislation were incorrect. The Superior Court permanently enjoined all district officers and officials to enforce all provisions of the Budget Autonomy Act, and the time to appeal has now expired.

What this means is that budget autonomy is, indisputably, the law of the District of Columbia. Congress retains its plenary authority over District affairs and will have the same review period over the District's budget as it has over any other legislation that originates from the D.C. Council. But in circumstances in which Congress fails to act, the default rule is now that the D.C. government will not be paralyzed and will instead be permitted to operate.

I thank the subcommittee for the opportunity to discuss these important matters and would be pleased to answer any questions.

[The prepared statement of Mr. Netter follows:]

United States House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Government Operations

D.C. Home Rule: Examining the Intent of Congress in the District of Columbia Home Rule Act of 1973

Testimony of Brian D. Netter

May 12, 2016

Thank you, Chairman Meadows, Ranking Member Connolly, and Members of the Subcommittee. My name is Brian Netter, and I am a partner in the Washington, D.C., office of the law firm Mayer Brown LLP. Along with my co-counsel, Karen Dunn, of Boies, Schiller & Flexner LLP, I was retained on a *pro bono* basis by the Council of the District of Columbia to independently assess whether the Local Budget Autonomy Act of 2012[1] complies with federal law, including the Home Rule Act of 1973.[2]

I was not then and am not now an advocate for any policy outcome. Questions about why budget autonomy is desirable for the District and for Congress are better directed to Council Chairman Phil Mendelson. My team's objective was to determine whether the Budget Autonomy Act is consistent with federal law.

When we began investigating the legal issues presented by the Budget Autonomy Act, many political actors had already taken positions on the validity of the Act. But, so far as we were aware, none had undertaken the sort of no-stones-unturned investigation and analysis warranted by the circumstances. We therefore undertook an exhaustive investigation that began with the 4,000-page set of published committee prints compiling the legislative history from the 1973 proceedings. We ultimately contacted each of the living Members of Congress and Senators who served on the relevant committees and subcommittees in 1973 and consulted the personal archives of key Members and Senators who have died.

The Home Rule Act represented a bipartisan success of the civil-rights era. Overcoming longstanding resistance that had been blamed on racist attitudes toward the Nation's capital, Congress came together to create for the

---

[1] D.C. Law 19-321, 60 D.C. Reg. 1724.
[2] Pub. L. No. 93-198, 87 Stat. 774.

District of Columbia a government by the people, of the people, and for the people.

The centerpiece of the Home Rule Act was the District Charter. The Ninety-Third Congress envisioned the District's Charter as akin to a state constitution. It was important for District citizens to embrace the document as their own, so Congress designed the Charter to take effect only upon ratification by District voters. So that the District's government could evolve, Congress created a procedure through which the District could propose amendments to its Charter.

In crafting the Home Rule Act, Congress recognized its constitutional role vis-à-vis the District by maintaining supervisory authority. As the Members of this Subcommittee are aware, every piece of legislation that is passed by the Council and signed by the Mayor is transmitted to Congress for its review. Under the Home Rule Act as originally enacted, ordinary legislation would become law automatically after 30 legislative days unless both Houses of Congress passed a concurrent resolution disapproving the legislation.

Congress designed a very different process for amendments to the Charter. In 1973, Congress authorized the District only to *propose* amendments to its Charter. Those amendments would become law only if both Chambers of Congress affirmatively approved the proposal through a concurring resolution. Because Congress retained for itself the ultimate decisionmaking authority, the limitations on the District's authority to propose amendments were few and narrow.

In 1983, the Supreme Court invalidated legislative vetoes in *INS v. Chadha*.[3] That decision required Congress to modify the procedure for ordinary District legislation and for amendments to the District Charter. Congress decided to make amendments proposed by the District presumptively valid, unless Congress enacted and the President signed a joint resolution of disapproval. In so doing, Congress left in place the narrow limitations on the District's Charter amendment authority.

We investigated each of the supposed limitations on the District's authority that opponents of the Budget Autonomy Act used to question its legitimacy. In particular, we reviewed reports prepared by the U.S. Government Accountability Office and by the Office of the Attorney General for the District of Columbia. But we found the concerns in those reports to be

[3] 462 U.S. 919.

legally unfounded. We were, therefore, confronted with a disagreement about the validity of the District's budget process.

In our system of laws, when there is a dispute about the interpretation or validity of a statute, it is "the province and duty of the judicial department to say what the law is."[4] And so we filed a lawsuit in the appropriate forum—the Superior Court for the District of Columbia—so that the issue could be resolved as our Constitution contemplates. The case was removed to federal court and subsequently remanded back to Superior Court for resolution on the merits.

This was a high-profile case that received attention from thoughtful commentators. The Superior Court had before it briefs from the three parties—the Council, the Mayor, and the Chief Financial Officer—as well as friend-of-the-court submissions from eleven different groups offering their views. Those groups included scholars on federal budget law, legislative interpretation, and local government law, and legislators and staffers who participated in the drafting of the Home Rule Act.

On March 18, 2016, the Superior Court for the District of Columbia issued an opinion upholding the Budget Autonomy Act and offering a detailed explanation of why the opponents of the legislation were incorrect. The Superior Court permanently enjoined "all members of the Council of the District of Columbia, Mayor Muriel E. Bowser, Chief Financial Officer Jeffrey S. DeWitt, their successors in office, and all officers, agents, servants, employees, and all persons in active concert or participation with the Government of the District of Columbia" to enforce all provisions of the Budget Autonomy Act. The time to appeal has now expired.

What this means is that budget autonomy is, indisputably, the law of the District of Columbia. Congress retains its plenary authority over District affairs and will have the same review period over the District's budget as it has over all other legislation originating from the D.C. Council. But in circumstances in which Congress fails to act, the default rule is now that the D.C. government will not be paralyzed and will instead be permitted to operate.

I thank the Subcommittee for the opportunity to discuss these important matters and would be pleased to answer any questions.

---

[4] *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).

Mr. MEADOWS. Thank you, Mr. Netter.

The chair recognizes the vice chair of the Subcommittee on Government Operations, the gentleman from Michigan, Mr. Walberg.

Mr. WALBERG. Thank you, Mr. Chairman, and thanks to the panel for being here.

Mr. DePuy, you were counsel to the committee responsible for the Home Rule Act at the time of its drafting. Can you describe for us the extent to which the act was debated at the committee level?

Mr. DEPUY. Yes. Congressman, the debate on the so-called Diggs compromise occurred after the bill had been reported to the floor, and it became clear to the majority of the committee that there were insufficient votes to pass the bill as then constituted. A majority of the committee members then chose to support a substitute amendment to the committee's own bill, a somewhat unusual procedure, and it was debated extensively on the floor. It was the subject of the "Dear Colleague" letter that the chairman mentioned.

Mr. WALBERG. It was debated in the committee as well?

Mr. DEPUY. It was not debated——

Mr. WALBERG. So it was sent to the floor.

Mr. DEPUY. It was sent to the floor, that's correct. And then, of course, it was the subject of much discussion in the Senate-House conference committee.

Mr. WALBERG. How was it altered out of committee on the floor? How was it altered?

Mr. DEPUY. The provision dealing with the basic appropriations process and the basic budgetary process was not amended. It was very clear and made clear by the Members of both parties that that topic was essentially not debatable and had to remain as it was and as it was passed by the House.

Mr. WALBERG. Was the 1973 act the only time either Chamber introduced home rule legislation while you were working in Congress?

Mr. DEPUY. The Senate had for years introduced home rule legislation. The House had not done so until Chairman Diggs became chairman of the House District of Columbia Committee, and so essentially that was the first time that the House in decades, if not longer, had considered home rule.

Mr. WALBERG. But it didn't pass any of those efforts prior for any specific reason that you could determine?

Mr. DEPUY. The House D.C. Committee, prior to the time when Chairman Diggs and others became a majority of the committee, I think it's fair to say was not particularly disposed towards granting the city much authority and retained as many powers as it could. So there was a disinclination by the prior committee to undertake any legislation that would generally grant more power to the city.

Mr. WALBERG. Why was the budget autonomy removed from the final home rule legislation if it was included in earlier versions?

Mr. DEPUY. It was decided as the bill got closer to being considered on the House floor that there were just not sufficient votes to pass the bill as it had been prepared on this topic prior to House consideration. There was considerable opposition from the House Appropriations Committee and from key Members of Congress to the home rule bill as it came out of committee prior to the Diggs substitute and the so-called Diggs compromise.

Mr. WALBERG. Was the removal of the budget autonomy from the Home Rule Act an intentional action by Congress?

Mr. DEPUY. Yes, very clearly so.

Mr. WALBERG. Very clearly intentional?

Mr. DEPUY. Yes.

Mr. WALBERG. What's the importance of section 603 in the Home Rule Act as it relates to the budgetary process?

Mr. DEPUY. I think that section is very clear that the congressional appropriations process and powers were not to be delegated to the new local government.

Mr. WALBERG. Thank you. I yield back my time.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes the ranking member.

Mr. CONNOLLY. Because of the exigencies of schedule, Mr. Chairman, I would ask that my colleague, my friend from Missouri, Mr. Clay, be recognized at this time, reserving my right to revert back.

Mr. MEADOWS. The chair recognizes the gentleman from Missouri, Mr. Clay, for 5 minutes.

Mr. CLAY. Thank you so such, Mr. Chairman.

Thank my friend Mr. Connolly, as well as Ms. Norton, for your indulgence.

Chairman Mendelson and Mr. Nathan, even with budget autonomy, all the Federal financial mandates on the District of Columbia remain in place. These include an independent chief financial officer, a borrowing cap, emergency and contingency reserve accounts. Moreover, the financial control board that Congress put in place in 1995 to address the District's financial crisis automatically comes back into existence if the District fails to meet any of seven financial conditions, such as not meeting its payroll for any pay period.

I would like both of you to answer this question. Under budget autonomy is there any reason to be concerned that the District will not balance its budget or otherwise lose its fiscal discipline? Mr. Mendelson first. Go right ahead.

Mr. MENDELSON. Thank you, Congressman Clay. You're correct in your question that those protections remain in place and that we have requirements under the law with regard to certain processes and to ensure that we have a balanced budget and that we can make payroll and that we remain in good fiscal order.

I would want to add this, though. Yes, there is a requirement in the law written by Congress about reserves, that we have to have two reserves. In fact, we have four reserves. There are two that we have added. And, in fact, the reserves that we have are substantially more than what Congress requires. And, in fact, our goal is to achieve reserves equivalent to 60 days of operating expenditures. That's far in excess of the congressional requirement. And we are currently at, I believe, 49 days of reserves.

In addition, you mentioned the borrowing cap, which is in the Home Rule Act. It is 18 percent of revenues, no more than that can be dedicated to interest payments. Well, we passed a local law that says 12 percent. So we are far better than what the Federal requirement is.

But I would add that there are some other things that we have in place, and this is something that you see across the country with regard to local jurisdictions and States as well, and that is how

they are doing with their unfunded pension liability and the other post-employment benefits. And while that's not written into the Home Rule Act, we see city after city struggling with a huge unfunded liability.

Well, on our retirement funds, our unfunded liability is zero. We are at 105 percent funded. And with regard to the other post-employment benefits, where city after city has zero, and that is to say they have 100 liability, we are 120 percent funded.

There is no other jurisdiction in the country, when you put the two together, that's as good as the District of Columbia.

Mr. CLAY. Thank you for that response.

Mr. Nathan?

Mr. NATHAN. Well, I agree with the question. Those restrictions are all in place and are adhered to by the District of Columbia. My concern is, as I've expressed it before, that with the Local Budget Autonomy Act, which will allow officials of the District to spend money that is not appropriated by Congress, that people could find that there are some violations of both Federal law and the Home Rule Act and that, for example, you said that we have to meet—the District has to meet the payroll. If those people are paid by funds that have not been appropriated by Congress, there would be an issue as to whether or not the District is in compliance. If it is not in compliance, there is a chance that the control board could come back into effect, which is not a position to be desired at all.

So, again, this is a reason why the passage of the Budget Control Act by the council was not well advised, but I urge the Congress to think about——

Mr. CLAY. Fair enough, fair enough. And I agree with that.

Mr. Chairman, I think the conversation needs to happen on this side now with the impetus of what Mr. Nathan said, that we are reasonable people. We are guests of the people of the District of Columbia. They are gracious. They are welcoming. They host us as the seat of government. We need to be reasonable and realize that they have evolved too since 1973. We need to be reasonable about that.

I don't know if you are willing, but I wanted to kind of share some of the history with the gentleman from Michigan of how that compromise came about in 1973. The resistance wasn't on your side of the aisle. It was on our side of the aisle because of the seniority system. And you had the mostly Southern Democrats that controlled that committee with the District of Columbia, and that's how the compromise came.

Mr. MEADOWS. Are you saying this was all the Democrats fault?

Mr. CLAY. I am. I am admitting it, but I think that the Republicans——

Mr. MEADOWS. I believe the gentleman's time has expired.

Mr. CLAY. I know my time has expired.

Mr. MEADOWS. I thank the gentleman.

The chair recognizes himself for a series of questions.

Ms. Perez, let me ask you, does the Antideficiency Act apply to the District of Columbia?

Ms. PEREZ. Yes, Mr. Chairman, it does. The Antideficiency Act by its own terms applies not only to officials and employees of the U.S. Government but specifically to officials and employees of the

District government. In addition, the Home Rule Act states that the Antideficiency Act continues to apply to the District and also includes a section that says that District funds continue to be appropriated by Congress so employees can only obligate in accordance with congressional appropriation.

Mr. MEADOWS. So is it GAO's opinion that the District of Columbia would be in violation of the Antideficiency Act in the event that the Budget Autonomy Act is implemented.

Ms. PEREZ. We would only opine on an Antideficiency Act violation if we had facts before us. That is the nature of how we do our opinions. But, certainly, we think it would be advisable for the District to consider the implications of the Antideficiency Act. It does say that District employees may not obligate or expend funds, except in accordance with an appropriation enacted by Congress or also that they cannot obligate or expend funds before they receive such an appropriation.

Mr. MEADOWS. So, Chairman Mendelson, with that information before you, do you believe that it is prudent to put potentially D.C. employees or those who would expend the funds at a disadvantage as it relates to the Antideficiency Act and potential punishment therewith?

Mr. MENDELSON. Well, I would have that concern, Chairman Meadows, except that we thought the way to resolve that would be to seek a declaratory judgement in court, and that was why the council initiated the litigation. And the litigation, as has been largely described, it was filed in superior court, and then it was removed to Federal court. And the circuit, as I recall, vacated the decision and remanded it to the superior court.

Mr. MEADOWS. Well, it was actually the mayor that—they didn't judge it necessarily on the merits of that particular case, as I understand. I've read hundreds and hundreds of pages. I know more about Home Rule than I ever cared to know about in the history thereof. So what we have is a superior court that has made a judgment on Federal law where there should be some question jurisdictionally with regards to that particular decision. And so, in light of GAO's concern, do you not share that same concern for D.C. employees?

Mr. MENDELSON. The short answer would be no. We have a court order, and the court order——

Mr. MEADOWS. I would suggest that maybe you rethink that because I think it's—Mr. Chairman, it is a great concern of mine, if they were my employees or under my direction to put them in a legal battle that is still ongoing, still being litigated, but potentially has the threat of not only fines, but criminal violations.

Mr. MENDELSON. Well, Chairman Meadows, there are two parts to this: One is whether we comply with the Antideficiency Act, and not only do we comply with the Antideficiency Act—in fact, we have a local Antideficiency Act that is stronger than the Federal Act with regard to our spending. So, with regard to that issue, there isn't an issue. The other part of it has to do with whether we could spend our local dollars without appropriations.

Mr. MEADOWS. That's a different philosophy. So let me go a little bit—Mr. Nathan has put forth a number. And I have read things that you actually had submitted in terms of briefs and other opin-

ions that I find very illuminating because your opinion is, is that you want budget autonomy personally. Is that correct?

Mr. NATHAN. That's correct.

Mr. MEADOWS. And so your personal opinion is that you believe D.C. should have budget autonomy, but the way they went about it was, in your opinion, not legal. Is that correct?

Mr. NATHAN. That's correct. But Congress has the ability to do it, and I think it is good policy and should be done.

Mr. MEADOWS. Well, and so as we look at that, Mr. Netter, let me come to you, because you have unbelievably found all kinds of information that I have not been able to find in reading hundreds, if not several hundred, pages of documents in the history and going through. How do you reconcile paragraph 601, 602, and 603 that shouldn't, in my mind, reading the clear language, are not amendment. And yet what we've done is the D.C. has tried to amend those through this particular action. How do you reconcile that?

Mr. NETTER. Well, chairman, I disagree vehemently that the District has tried to amend any of those provisions. There are a number of provisions and subprovisions within——

Mr. MEADOWS. Well, that's an interesting fact because 603 is very clear in terms of what it is. And it basically spells out in the context of how it's written this whole discussion that we're having.

Mr. NETTER. It does, but I disagree with your conclusions. Section 603(a) says: Nothing in this act shall be construed as making any change to existing law. And that sort of provision, which I am sure the chairman is quite familiar with, is a provision that is a rule of construction for the particular statute being enacted that explains how the statute is to be interpreted. And our litigating position, which was adopted by the superior court, was that section 603(a) explains for everybody to understand what Congress was achieving in 1973.

Mr. MEADOWS. But let's go on. Let's look at other paragraphs there, because if you look at the original intent of Home Rule in the 100 paragraphs, if you look at really the amendment process in the 300 paragraphs, and then you go to 601, 602, and 603, not just those, but if you look at the details of that, I don't see how you can find any other conclusion other than it was truly the intent of Congress to keep the appropriation process as a function of Congress and not to allow it to ever be amended.

Mr. NETTER. Well, there are two separate issues there, chairman. The first is whether Congress was granting budget autonomy in 1973, and we agree that it wasn't. The second question, however, is whether Congress was intending to prevent the District from proposing any changes to its budget process under the amendment authority that existed in 1973. Now, as I indicated in my opening statement, at the time, both chambers of commerce needed to acquiesce, needed to affirmatively agree with——

Mr. MEADOWS. Which they did with the Diggs compromise. And so if there is the Diggs compromise that, if you go back through the Congressional Record, it's very clear that the appropriators, which as my friend from Missouri talked about were Democrats at the time, wanted to maintain control. Did you not find that in your research? I know you didn't argue it, but did you not find that——

Mr. NETTER. We certainly did. We acknowledge that they wanted to maintain control, and they did maintain control by——

Mr. MEADOWS. Is that not the intent of Congress in 1973?

Mr. NETTER. But the intent of Congress was also to create an amendment process, and the District here followed that amendment process.

Mr. MEADOWS. Well, I respectfully disagree, and I'm out of time.

But I will recognize the ranking member, Mr. Connolly, for a very gracious 7–1/5 minutes.

Mr. CONNOLLY. My friend is always there. I thank him.

You know, the King of Siam in "The King and I" when faced with all kinds of inexplicable problems would say, "It's a puzzlement." There is a lot to sort out here.

Let me start with you, Ms. Emmanuelli Perez, you're the managing associate general counsel. Has somebody designated you as the judicial arbiter of constitutional issues or even adjudication of judicial rulings?

Ms. PEREZ. No, Mr. Ranking Member. The GAO——

Mr. CONNOLLY. My name is Connolly. You can address me by my name.

Ms. PEREZ. No, Mr. Connolly. GAO has statutory authority to issue legal opinions to Congress on the use of appropriated funds, to interpret the applicability of the Antideficiency Act, and we've been doing so since——

Mr. CONNOLLY. Even when there has been an adverse judicial ruling? You get to ignore judicial rulings?

Ms. PEREZ. Our legal opinion, we issued it in January of 2014, prior to the opinions.

Mr. CONNOLLY. Ah, but in your testimony today, you, therefore, took no cognizance of the fact that there's in fact been intervening judicial ruling.

Ms. PEREZ. Well, we have not issued——

Mr. CONNOLLY. I understand, but what am I supposed to do as a Member of Congress with your testimony as if there were no court and no court opinion. You are supposed to be advising us?

Ms. PEREZ. Well, and we are——

Mr. CONNOLLY. It seems you have a legal obligation, Ms. Perez, to take cognizance of a judicial ruling when you come here under oath and testify. And you've ignored the fact that there was a judicial ruling, which I think taints your testimony?

Ms. PEREZ. No, sir. I would not agree that we've ignored it. What we've said——

Mr. CONNOLLY. Well, you didn't even mention it.

Ms. PEREZ. No, I did. I said that we acknowledge that there are court cases. What we have stated——

Mr. CONNOLLY. Court cases? There is a court case.

Ms. PEREZ. Yes. And the——

Mr. CONNOLLY. The dispositive court case is in front of us.

Now, Mr. Nathan shares your legal opinion, which I'm going to get to, about, that notwithstanding, it still requires an act of Congress because he thinks and apparently you think that Mr. Mendelson and his friends, colleagues, on the city council have put themselves in legal jeopardy, notwithstanding a court ruling, because of the Antideficiency Act. Is that correct?

Ms. PEREZ. What we have interpreted is that the Antideficiency Act, pursuant to Congress' constitutional powers in this case, is it continues to apply. That's our opinion.

Mr. CONNOLLY. Okay. But let me explore. Your opinion is, even though there's been a court ruling, that Mr. Mendelson and his colleagues are relying on, nonetheless, somebody somewhere is going to find them in legal jeopardy, irrespective of a court ruling that they cite as their legal protection. You really think someone is going to prosecute him and his colleagues in light of the legal ruling they are relying on? Really?

Ms. PEREZ. Mr. Connolly, what we are saying is that we believe the Antideficiency Act continues to apply. And so, therefore, because it continues to state in codified law that it applies to the District of Columbia in addition to in the Home Rule Act that we always advise agencies and entities to follow the Antideficiency——

Mr. CONNOLLY. Well, if I were a member of D.C. City Council, quite frankly, though you put that nicely—the same with you, Mr. Nathan—I would call it intimidation. By citing Antideficiency and their exposure, irrespective of a court ruling, I don't know how else to conclude if I were a member of the D.C. City Council, other than you're warning me I could be in legal jeopardy; I should ignore court ruling, or I can ignore court ruling. Now I just think that's improper. I think that's not useful counsel for them, and it's certainly not welcome counsel for me as a Member of Congress seeking guidance through a very meddlesome set of problems.

Mr. Nathan, did you wish to comment?

Mr. NATHAN. Yes, I do. First of all, the statute, the Antideficiency Act, which has been in existence for over 100 years, is, of course, the supreme law of the land. That's a congressional statute. And everyone, including District officials, has to comply with that law.

Mr. CONNOLLY. Because I'm running out of time, Mr. Nathan, let me ask a question pursuant to what you just said.

Mr. NATHAN. Okay.

Mr. CONNOLLY. So is it your testimony that the court ignored the Antideficiency Act in giving its ruling?

Mr. NATHAN. It's my view that the court got it completely wrong.

Mr. CONNOLLY. Aha.

Mr. NATHAN. In the first place, I think what's important is the court, unlike the Federal court, ignored the GAO. The GAO is the Federal expert——

Mr. CONNOLLY. Listen, Mr. Nathan—Mr. Nathan. I'm sorry. I'm running out of time. I think the Heller ruling was wrong.

Mr. NATHAN. I think so too.

Mr. CONNOLLY. I think the court got it wrong.

Mr. NATHAN. I agree.

Mr. CONNOLLY. But I don't get to ignore it. I don't get to dismiss it.

Mr. NATHAN. But there is a——

Mr. CONNOLLY. I don't get to advise the city council they can afford to do so.

Mr. NATHAN. There is a very substantial difference, Mr. Connolly, between the U.S. Supreme Court, which issued the Heller opinion, and one trial judge of the Superior Court of the District

of Columbia, which will have no binding effect on any other court——

Mr. CONNOLLY. Wait a minute. Thank you. It's my time, sir.

On January 30th, GAO opined the BAA was invalid.

Mr. NATHAN. Right.

Mr. CONNOLLY. Its opinion did not have the force of law.You don't have force of law. On May 19, 2014, the U.S. District Court of the District of Columbia held that the BAA was invalid. I agree with GAO. On May 27th, the U.S. Court of Appeals for the District of Columbia vacated that ruling and ordered that the case be remanded to superior court. Hardly some rogue court action here, Mr. Nathan. You're taking that out of context. It was in response to an appellate court—without comment sending it back.

Mr. NATHAN. I didn't say it was a rogue court involved.

Mr. CONNOLLY. And without explanation, on March 18, the day after the holiest day of the year, Saint Patrick's Day, the superior court upheld the validity of the BAA. The court ruled that the HRA only preserved the then existing 1973 budget process. It did not prohibit the District from changing the local budget process in the future, confirming Mr. Netter's legal opinion. The fact that you think the court got it dead wrong is fascinating. You and I can have opinions about court rulings. That isn't how it works. He has sworn to uphold the law, Mr. Mendelson, and he's trying to do that, and he has an opinion. And I think that opinion is a protection against the Antideficiency Act and against any charge that he's clearly thumbing his nose at Congress. And until and unless that opinion is changed or we take action, that's the law of the land, Mr. Nathan.

Mr. NATHAN. It's not the law of the land. Let's——

Mr. CONNOLLY. Well, it is a ruling he has to rely on.

Mr. NATHAN. It is not even the law of the District of Columbia. It is a decision of one trial court.

Mr. CONNOLLY. I'm sorry, sir. You're the one cherry-picking. You're choosing a process you like verses a process you don't like. That's not what an elected official has to do. He doesn't get to do that. He has to rely on the court, the cognizant court of jurisdiction, that has made a ruling. And until that ruling is overturned or until we pass a law or take an action, he's perfectly within his right to proceed.

My time is up. I thank the chair.

Mr. MEADOWS. I thank the gentlemen for his passion.

And I will recognize the gentleman from Wisconsin, Mr. Grothman, for 5 minutes.

Mr. GROTHMAN. We'll try to clean up a little bit here with Mr. Nathan. Thanks for coming on over. Why did the court remand the budget autonomy case?

Mr. NATHAN. Well, because the lawyers for Mayor Bowser, 3 months after she took office, went to the court of appeals. It was after it had been argued in the court of appeals. There was a transcript—there is a transcript. I urge the court—the panel to look at that transcript. Not a single one of the three Federal appellate judges that heard the argument raised a question about the validity of Judge Sullivan's opinion of the accuracy that it—which agreed with GAO that this was invalid. But the mayor said that,

unlike the previous mayor—of course, she was on the city council when it passed it law—she said she agreed with the law, and therefore, the matter was moot because now the mayor and the city council were in agreement. And the court of appeals said: Okay. It's moot.

The mayor's lawyer said: If you remand it to the superior court where this case started, we will seek dismissal of the action because it should be dismissed because it's moot and because, as to the CFO, the matter is not right. And then—so that's what the court of appeals did. They vacated. They remanded. But when it got back to the superior court, those same lawyers said: Well, we think it is urgent that this be decided now. We ask the superior court to decide it.

The superior court did not hold a hearing, as both the Federal district court and the court of appeals did, but based on the pleadings and the memoranda that were filed, the court issued its decision.

With respect to Mr. Connolly and the statement about the Antideficiency Act, what the superior court said essentially was that there—that the statute, the Antideficiency Act, doesn't say that the appropriation or fund has to come from Congress, and there is a fund here that the District has, and therefore, this doesn't violate the Antideficiency Act.

In my view, as I said in my testimony, that interpretation is inconsistent with the 100 years of Federal jurisprudence that the Antideficiency Act means that the appropriation or fund has to come from Congress. It says that all Federal agencies, including expressly the District of Columbia, has to comply with congressional appropriations or funds. And I point out, as I pointed out in my testimony, that whereas Federal judge Sullivan relied on the advice of the GAO, which is the expert in the Antideficiency Act, the superior court judge ignored the advice of the GAO and the opinion that it rendered on the subject.

I think what's important here is to understand that this decision by the superior court is not binding, even on another superior court judge, much less on the appellate court in the District and certainly not on any Federal district court judge or the Federal court of appeals. And my concern is that there could be and there already is other litigation. There's litigation in the Federal court, and once this takes effect, there is likely to be other litigation. And when there is this other litigation, a judge is going to have a choice between considering the decision of Judge Sullivan, the Federal district court judge who gave this very serious consideration and wrote a very well-articulated opinion on it. And they'll have that and they'll have the opinion by Judge Holeman. And my belief is that a court in the future is likely to be more persuaded by Judge Sullivan's opinion than by Judge Holeman.

Mr. GROTHMAN. How would you advise Mayor Gray on the Budget Accountability Act?

Mr. NATHAN. Well, I issued an opinion to him, and he reflected that in the letter, which is part of the record where he told the council that, because of the dangers of violating both the Home Rule Act and the Antideficiency Act and putting District employees in jeopardy, that he was not going to implement the Budget Auton-

omy Act. That's what led to the litigation that Mr. Mendelson filed on behalf of the council.

Mr. GROTHMAN. And, finally, in your opinion, did Congress intend to delegate the District's autonomous budget authority.

Mr. NATHAN. No. I'm afraid that the Congress in 1973 passed a Home Rule Act and specifically precluded the District from amending the Home Rule Act to provide for budget autonomy. It made it clear in section 303(d) that the amending procedure could not be used to enact any law which would violate section 601, 602 and 603. Those sections said: We are specifically reserving authority in the Congress, and we're putting limits on what the council can do. And among the other things that they said was: You can't violate the Antideficiency Act; you can't change the way the budget is operated now, both by the Congress, the President, OMB, and the practices and policies that had existed for the previous hundred years.

And, of course, you know, when we looked at it, you know, we had hoped to find the Budget Autonomy Act valid, but when we looked at it, we saw that the language of the statute, the legislative history, and the practice for 40 years after the Home Rule Act would not permit it.

In addition to the fact that, during the 40 years after Home Rule, that the budget was submitted, as required by the Home Rule Act, to the President and then to the Congress. Over that 40 years, every representative of the District, with the concurrence of the council, asked for legislation from the Congress to have budget autonomy. If those people who—including those like Walter Fauntroy, who was there when the Home Rule Act was passed, if they believed that the District had that authority unilaterally to change it immediately after the passage of the law, there would have been no need to ask the Congress to pass legislation. I think that those proposals, which, in my opinion, were valid and should have been enacted by the Congress and can still be enacted by the Congress and should be, but the fact that they asked Congress to do it is a pretty good recognition that they understood that the D.C. government on its own could not do this.

Mr. GROTHMAN. Thank you so much. That's all my time.

Mr. MEADOWS. I thank the gentleman from Wisconsin.

The chair recognizes the gentlewoman from the District of Columbia, Ms. Eleanor Holmes Norton, for 5 minutes.

Ms. NORTON. Thank you, Mr. Chairman.

I regret that Mr. Nathan had to relitigate superior court decision. He is a member of the bar. So am I. Whatever is the final decision that is not appealed is the final decision until appeals. So if you are Mr. Mendelson or the city council and you have a court order from the superior court, it seems at the very least we ought to agree that Mr. Mendelson and the council are protected, given the final order of any court in the United States at this point. And we shouldn't be getting into nitpicking about whether you agree or I agree, because, in fact, reasonable lawyers can and have shown even at this table that they can disagree on the validity of the Local Budget Autonomy Act approved in 2013. So I want to apologize to people who have come to this hearing expecting to hear profound, principled reasons why, since the birth of the Nation, the

District should have had budget autonomy over its own local budget, because I'm now compelled for the record to, in fact, engage in some statutory construction and to ask the witnesses about their views.

Mr. DePuy, you helped draft the Home Rule Act, and of course, that act establishes principles or procedures at least for the city to amend the charter—the charter can be amended; there are certain procedures—and for Congress to disapprove of a charter amendment during a review. Now assuming—please accept my assumptions for purposes of this question—that the Local Budget Autonomy Act, the one that was recently passed, was not otherwise prohibited by the Home Rule Act, did the District of Columbia follow the procedures for passing and transmitting a charter amendment to the Congress for a review period.

Mr. DEPUY. Ms. Norton, I did not follow that procedure so I'm not in a position to respond to your question.

Mr. NATHAN. I can answer that. You are correct, Congresswoman Norton, the procedures were followed.

Ms. NORTON. Thank you, Mr. Nathan.

Mr. Netter, here, we really get into parsing legislation, but that's what's necessary here, I believe. I'm looking first at 603(a) of the Home Rule Act, which apparently everyone agrees the District may not amend. And it provides—and here I'm quoting—nothing in this act shall be construed as making any change of existing law—"existing law" it says—operative words as far as I'm concerned. And, of course, it's referring to the budget. When the Home Rule Act was passed in 1973, existing law required Congress to approve the budget. Why then doesn't 603(a) prevent the District from enacting the Local Budget Autonomy Act?

Mr. NETTER. It doesn't, Congresswoman Norton. I think it is important to recognize also how section 603(a) came to be. There was another proposed bill from Congressman Nelson that had a provision that became 603(a), but it was worded differently. It said: Notwithstanding any other provision of law, unless specifically authorized or directed by the Congress, there shall be no change made in existing law.

Ms. NORTON. No change whatsoever.

Mr. NETTER. Right. Unless Congress affirmatively made a change. And that was revised in section 603(a) to say this act, the Home Rule Act of 1973, was not making any change, and that's why section 603(a) doesn't limit the future authority.

Ms. NORTON. That's very important what you just said. This bill is a compromise bill, so we have right there two different versions and then the final version.

Mr. Netter, all agree as well that section 602(a)(3) of the Home Rule Act may not be amended by the District. Now this is the provision that prohibits the District from passing laws that concern—and here are the operative words—the functions or property of the United States. Now the Home Rule Act, as passed in 1973, provided that the President shall transmit the District's budget to the Congress for approval. The Local Budget Act removes the President and the Congress from the budget process. That's its point. Please explain whether the Budget Autonomy Act violates the provision 602(3)—(a)(3), I'm sorry.

Mr. NETTER. It doesn't, Congresswoman Norton. And there is a line of binding precedents from the D.C. Court of Appeals that dates back to 1982 for the case called District of Columbia v. Greater Washington Central Labor Council. And that line of cases explains that, in section 602(a)(3), Congress was limiting the District's authority to exercise Congress' role as the national government but was not limiting the District's role to exercise functions that Congress might otherwise exercise as the local government. A series of cases have rejected the theory that 602(a)(3) limits which actors are discharging those obligations. It doesn't matter if an obligation is moved from a Federal official to a local official. The question is whether the underlying act would be pursued under Congress' national legislative authority or its Article I, Section 8, authority to legislate as a local legislature for the District. There's no argument that I can contemplate through which the District would be allowed to raise taxes under its local legislative authority but could not spend that money under its local legislative authority.

Ms. NORTON. Thank you very much.

Mr. Chairman, I've exceeded my time. Do you have questions?

Mr. MEADOWS. Yes. I mean, I want to be generous.

Ms. NORTH. I'd appreciate it.

Mr. MEADOWS. If you have one followup question?

Ms. NORTON. I do have a—my staffer reminds me it is not a followup question. It's a question to the GAO.

Mr. MEADOWS. Okay. All right. Why don't we do a very brief second round? And that way, I'll be courteous to the gentlewoman, as any good Member from North Carolina should be.

Ms. NORTON. Any good Southern gentleman.

Mr. MEADOWS. Yeah. All right. I didn't want to go there, but—Mr. Netter, so do you concur with Ms. Holmes Norton's premise that 602 and 603 and 601 are unamendable?

Mr. NETTER. I do agree with that, yes.

Mr. MEADOWS. All right. So your premise under the Budget Autonomy Act is that you amended what?

Mr. NETTER. Section 446 of the charter was what was amended by the Budget Autonomy Act. I think it is important to note that if it were true that section 603(a) says that the Home Rule Act——

Mr. MEADOWS. I don't want to relitigate it. I'm just saying—for the record, you're saying that 601, 602, and 603 are unamendable.

Mr. NETTER. They are unamendable. They remain in force, and they are being honored by the Budget Autonomy Act, yes.

Mr. MEADOWS. That's all I want to know, because I think our interpretation thereof and my reading of it and your reading and the interpretation are vastly different based on the context. And so it's real interesting because you talked about this context that you went back. At what point or how many different documents did you ignore that talked about the appropriation authority wanting to be retained in Congress? How many different pieces of evidence did you ignore?

Mr. NETTER. We didn't ignore a single piece of evidence.

Mr. MEADOWS. How many of those did you leave out of your argument?

Mr. NETTER. Oh, none of them at all. I can tell you——

Mr. MEADOWS. You're under oath.

Mr. NETTER. I am, yes.

Mr. MEADOWS. Because I've looked at your argument, and there are a whole lot of information out there that seems to not have been included in your argument.

Mr. NETTER. I disagree with that. It is—certainly, our position is that Congress made a compromise——

Mr. MEADOWS. So your testimony here today is that you found no substantial reason to believe that it was the intent of Congress to keep the appropriations process uniquely with Congress. That's your sworn testimony?

Mr. NETTER. That's not how I would state it.

Mr. MEADOWS. Well, that's my question. Is that your sworn testimony, no?

Mr. NETTER. No. My sworn testimony is that Congress in 1973 was leaving the budget process in place, but in doing so, Congress did not create any impediments to the District proposing——

Mr. MEADOWS. Mr. Nathan, would you agree with that?

Mr. NATHAN. I do not agree with that, and it violates common sense. This law would not have passed but for Congress retaining the power of appropriations and the budget control and not having the District have budget autonomy. If those people who voted for that insisted on that believe that the moment that the ink was dry on the President's signature that the council could change that, they never would have voted for this in the first place. And that's obvious by the 40 years of practice in the District and the repeated efforts by the representatives quite appropriately to get Congress to grant budget autonomy. If they had that power and that's what Congress thought in passing the law, they would never have sought the authority of Congress. They would have just gone to the council.

Mr. MEADOWS. So, Mr. Netter, how do you reconcile that? How do you reconcile that the gentlewoman to my right has asked for budget autonomy for Congress to act on budget autonomy for the District. Other members have asked that. Why would they be asking that if the District had the ability all along? How do you reconcile those two?

Mr. NETTER. Well, I disagree that the District had the authority all along because of the charter problem that we discussed earlier, which is to say that, in 1973, both Chambers of Congress needed to affirmatively approve an amendment. So this issue only arose after Congress changed the process in the 1980s. And the reason——

Mr. MEADOWS. So why—she's asked me for it since the—since that particular—why would she have done that if they had the right to do it? Is it just, all of a sudden, they found this right that they've been ignoring for 40 years?

Mr. NETTER. Well, it's true that there was not a single amendment to the charter from 1980——

Mr. MEADOWS. Sir, that defies common sense. It just defies—and, Mr. Netter, with all due respect, it defies common sense. So let me finish with this, and then——

Mr. MENDELSON. Mr. Chairman?

Mr. MEADOWS. Hold on, just one second.

Mr. Nathan, are you aware of any Federal actions that are taking place as it relates currently to the Budget Autonomy Act. Is there any litigation that is pending?

Mr. NATHAN. There is a lawsuit in Federal court. It is actually before Judge Sullivan asking to invalidate the Budget Autonomy Act. There is a very substantial question in that litigation whether the plaintiff has standing to raise this claim, and that has not yet been decided. But my concern—and I've explained it to Mr. Mendelson and the council before—is that if this takes effect and moneys are spent without congressional appropriation, those who are adversely affected by such expenditures will have standing to challenge the statute. And if they do, then—and if they bring it in—any court they bring it in, but certainly if they bring it in Federal court, there will be no effect of the superior court's decision, and that judge will decide this matter afresh and will have the opinion of Judge Sullivan and may, in fact, be assigned to Judge Sullivan to render a decision on that, and that is why the actions of the District would be in jeopardy?

Mr. MEADOWS. The chair recognizes the gentlewoman Ms. Eleanor Holmes Norton for another 5 minutes.

Ms. NORTON. Thank you, Mr. Chairman.

I think Mr. Mendelson wanted to comment on—and I know you didn't mean to cut him off, but your time had expired. So I would like to give him some of my time to say why is it—why didn't—you know, Mr. Nathan said you should have raised this from the get-go. How come you're raising it now and prior counsels haven't raised it?

Mr. MENDELSON. Thank you, Congresswoman.

Let me try to struggle with this briefly. You know, from time to time, particularly in the area of I'll say civil rights and voting rights, there are new theories that emerge. There were some advocates who came to me in 2012, and they said: You know, we think actually that the council has the authority to amend the Home Rule Act in this area.

I was rather dubious at first. But this was a theory, a legal theory that had not been realized or argued or advanced prior to that. And this happens all the time if you look over the history of this country and the way arguments evolve on different issues, particularly issues involving civil rights or voting rights. So it was a new theory. We argued it. And, ultimately, we won in court.

The other thing I wanted to say is that a piece I think is missing—and I say this from a lay perspective. I'm not an attorney. I'm somewhat familiar with the legal arguments and minutia of the legal arguments. But much of the debate here has been stuck in 1973. And in 1973, because of the compromise, it was clear that it was the intent of the majority of the Members of Congress that the District would not be able to adopt its own budget. But Congress also adopted a Home Rule Act that had an amendment process. That amendment process in 1973 was pretty locked tight. So if you were a Southern Democrat who did not want the District to have budget autonomy—and that was where the compromise was—you could look at the amendment process that was included in the bill and be assured that it was going to be over his dead body that we would get budget autonomy.

But that amendment process changed. It changed through some acts of Congress—and—it changed through some acts of Congress and so that what have been locked tight, requiring affirmative act by Congress, was now a different process. And it's because of those changes that we were able to advance this amendment to the Home Rule Act. We have amended the Home Rule Act in recent years in other ways. The elected attorney general is an amendment that initiated from the council and went through the congressional review process, not an affirmative process by the Congress but a passive review. That was an amendment to the Home Rule Act.

We believe, and Mr. Netter is better able than I am to articulate this, that the changes in the amendment process subsequent to 1973 are what allowed us to amend the Home Rule Act with regard to our passing legislation, which is the budget.

Ms. NORTON. Mr. Mendelson, I'm very glad you made that argument. It is so clear. You barely got Home Rule by the skin of your teeth. Now you start out amending the darn thing.

I have been waiting for somebody here to cite the amendments, the charter amendments that have, in fact, passed. The reason people are stuck in 1973, of course, is they are stuck in a period where, of course, our city got Home Rule in the first place in a Democratic Congress with profound racial overtones, with people who didn't want us to have it, because at that time, the majority of those who lived in the District of Columbia were African American, so they are going to start off by challenging the Home Rule Act. Give me a break.

Let me indicate the best argument I can make, Mr. Nathan, for not immediately challenging or even, in some of the ensuing years, is when the 14th Amendment of the United States was applied to women, it was not until the 1970s, not for a moment do I believe that women were not, in fact, subject to the 14th Amendment that provides that they are indeed fully equal when it comes to State action, until the 1970s when Ruth Bader Ginsburg argued that when she was a counsel for the ACLU. So I don't think you ever ask: What's wrong were you people? If you thought you were entitled to something all along, why didn't you just do it then?

Look, I want to ask you, Ms. Emmanuelli Perez, about her view, because she has said that the Budget Autonomy Act violates the Antideficiency Act. And I have indicated I thought Mr. Mendelson was entirely within his right with the only outstanding court decision protecting the District. And I don't think she said otherwise, but she certainly has said that the budget autonomy—that it violates not only the Federal Antideficiency Act but the Budget and Accounting Act, which apply both to the District of Columbia and, of course, to the Federal Government.

Now I'd like Mr. Netter's view—I would just like to say what you have said that you have said that the Antideficiency Act and the budget and accounting act were not violated. So, Mr. Netter, can I ask you, does the Antideficiency Act specify which—whether—I would like to get this out; this is important to clarify and especially since it is a GAO—whether Congress or the District must authorize the obligation or expenditure of District local funds? Does it expressly say which one, or does it mention either one?

Mr. MEADOWS. The gentlewoman's time has expired so you can both very briefly—they have called votes—respond to that.

Ms. PEREZ. Yes. The Antideficiency Act refers to an appropriation. When you look at the longstanding history of that act, it's always been applied to congressional appropriations.

Ms. NORTON. But it doesn't say so, does it?

Ms. PEREZ. It doesn't say congressional appropriation. It is enacted by Congress, and it is referring to Federal officials as well as District officials who have always relied on Federal appropriations by Congress.

Ms. NORTON. It does not say expressly which of those bodies, the District or the Congress. That's only—when you go into statutory authority, look first to see what is said. Then you go to see what was meant.

Ms. PEREZ. Yes, ma'am. It does not say an appropriation enacted by Congress, but that is how it has always been interpreted. It comes out of Congress——

Ms. NORTON. That's what I want to hear.

Mr. MEADOWS. Mr. Netter 30 seconds.

Mr. NETTER. I appreciate that. Let me read into the record what the statute says. It says: No officer of the District may authorize or make an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.

The District of Columbia government possesses the District of Columbia general fund under section 450 of the Home Rule Act. That money does not pass through the Treasury, and it is not subject to Congress' constitutional power of the purse. The only question is whether the amount was made available. And that becomes a circular question. If the Home Rule Act is otherwise valid, as the superior court has found that it is, then all the requirements of the Antideficiency Act have been satisfied.

Mr. MEADOWS. All right. I want to thank all of the witnesses.

Mr. DePuy, do you agree with Mr. Nathan's characterization of the intent of Congress, yes or no?

Mr. DEPUY. Yes.

Mr. MEADOWS. Mr. Mendelson, in your response, it was clear that you said the original intent of Congress was to retain control of the appropriations process in your previous answer. Is that correct?

Mr. MENDELSON. Yes, in 1973.

Mr. MEADOWS. So I want to thank all of you for this illuminating hearing, and obviously, it is one that will continue to go on as we address this issue. I also want to thank the audience because I know that this is something of great passion and great concern to so many, and you have conducted yourselves in a very congenial manner. I want to thank you for that.

If there is no further business before this subcommittee, the committee stands adjourned.

[Whereupon, at 3:52 p.m., the subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

only to protect her people from this latest Arab onslaught.

The road to peace, Mr. Speaker, is not the path of armed conflict; nor will peace be achieved by more death and destruction. Peace in the Middle East now, as over the past 25 years, can only be achieved by negotiation between the nations directly involved. Israel has repeatedly demonstrated restraint under great military pressure from the Arab world. She has repeatedly demonstrated her willingness to negotiate directly with her Arab neighbors so as to lessen tensions. If we are to have the possibility of lasting peace in the Middle East. Such negotiations are now imperative.

DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT

Mr. BOLLING. Mr. Speaker, I yield 30 minutes to the gentleman from Ohio (Mr. LATTA), pending which I yield myself such time as I may consume.

Mr. Speaker, this rule which was reported from the Committee on Rules last week provides for an open rule with 4 hours of general debate on this bill, the so-called home rule bill, H.R. 9682. It waives points of order routinely and necessarily against sections 202, 204, 713, 722, and 731 of the bill for failure to comply with the provisions of clause 4, rule XXI, which have to do with appropriations language not being in order in such a bill. It provides that it shall be in order to consider without the intervention of any point of order the text of three substitutes which may be offered as amendments. No. 1, the so-called Broyhill substitute, is H.R. 10597. The second, the so-called Green-Nelsen substitute, is H.R. 10693, and the third, the so-called Nelsen-Green substitute, is H.R. 10692.

The rule also provides for getting the bill to conference by substituting under the Senate number the language of the House-passed bill. It occurs to me that it might be helpful if I tried to outline what I understand to be the actual parliamentary situation in addition to the more or less technical situation provided for by the rule.

I am well aware that this may not stand up, but when the rule came out, I felt very strongly that given the circumstances that existed, the bill should not be considered under the rule, but I have called it up, and I am supporting this rule because of the developments which have taken place since.

When it came out the provision requiring that it be read by section seemed to me an ideal vehicle for obstructionism. I have had some opportunity to observe bills handled under a section-by-section reading and under a reading by title and I felt very strongly that it was preferable for anything as controversial as the committee reported bill to be read in the more orderly fashion of by title rather than by section.

Since that time, since my very strong objections to that rule were stated, a number of developments have taken place, and without in any way suggesting that the Broyhill substitute and the Green-Nelsen substitute are not in order and need not be taken seriously, I would suggest that at the moment the situation apparently is one in which the committee bill is solely a vehicle for the consideration of two substitutes. The first is the substitute to be offered by the gentleman from Minnesota (Mr. NELSEN) and the other is the substitute to be offered by the chairman of the committee, the gentleman from Michigan (Mr. DIGGS) with the support of a majority of the Committee on the District of Columbia. I would like to insert in the RECORD first the statement which appeared in the RECORD on yesterday by the gentleman from Michigan (Mr. DIGGS) describing the changes from the committee bill of his new bill and also a "Dear Colleague" letter of October 9 signed by a significant number of the members of the Committee on the District of Columbia, including the distinguished chairman of the Committee on the District of Columbia, describing the differences between the original bill and the substitute to be offered by the gentleman from Michigan (Mr. DIGGS).

Mr. Speaker, I ask unanimous consent to insert certain relevant material in the RECORD.

The SPEAKER. Is there objection to the request of the gentleman from Missouri?

There was no objection.

[From the CONGRESSIONAL RECORD, Oct. 8, 1973]

STATEMENT BY HON. CHARLES C. DIGGS, JR.

Mr. Speaker, because of the unusual parliamentary situation, the original committee sponsors will offer an amendment in the nature of a substitute during the floor debate on H.R. 9682, the self-government bill for the District of Columbia.

The substitute contains six important changes which were made after numerous conversations and sessions with Members of Congress and other interested officials and citizens. These changes clarify the intent of H.R. 9682 and accommodate major reservations expressed since the bill was ordered reported last July.

Other than these changes, the committee substitute follows the committee bill, H.R. 9682.

The changes made by the substitute are as follows: First, budgetary process—no change in the congressional appropriation role; second, change election for Mayor and City Council from partisan to nonpartisan; third, authorization of power for the President over the local police in an emergency; fourth, further Federal oversight re the City Council; 30-day layover for effective date of legislative actions of the City Council; Presidential authority to sustain veto by the Mayor.

Fifth, Judiciary: Continued Senate confirmation of judges; automatic reappointment for judges rated "well qualified" or "exceptionally well qualified" by the tenure commission; and

Sixth. Reservation of congressional authority; additional limitations on City Council; Prohibit Council from changing functions or duties of District of Columbia U.S. attorney and District of Columbia U.S. marshal; prohibit changes in statutes under titles 22, 23, 24 of District of Columbia Code—the Criminal Code.

It is agreed by the committee members who have carefully fashioned this bill after months of hearings and weeks of markup sessions that the bill will now carefully balance the local interest and Federal interest in the Nation's Capital. I trust the House will agree and give approval to this bill for an effective new government for Washington, D.C.

U.S. HOUSE OF REPRESENTATIVES,
Washington, D.C., October 9, 1973.

DEAR COLLEAGUE: Because of the unusual parliamentary situation regarding H.R. 9682, the Self-Determination bill for the District of Columbia, the undersigned Members of the D.C. Committee will offer an amendment in the nature of a substitute during the Floor debate.

The Committee substitute contains six important changes which were made after numerous conversations and sessions with Members of Congress and other interested parties. These changes clarify the intent of H.R. 9682 and accommodate major reservations expressed since the bill was reported out.

They are as follows:

1. Budgetary process. Return to the Existing Line Item Congressional Appropriation Role.

2. Change Election for Mayor and City Council from Partisan to Non-Partisan.

3. Authorize the President in an Emergency to Take Control of D.C. Police Force.

4. *Further* Federal Oversight re City Council:

(a) Require a 30-day Lay-Over for Effective Date of Legislative Actions of the City Council.

(b) Give the President Authority to Sustain the Veto by the Mayor When Overridden by the City Council.

5. Judiciary:

(a) Require Senate Confirmation of Judges.

(b) Provide for Automatic Reappointment for "Exceptionally Well Qualified" and "Well Qualified" judges as determined by the Commission on Judicial Disabilities and Tenure.

6. Reservation of Congressional Authority—*Additional* Limitations on Council:

(a) City Council Prohibited from Changing Functions or Duties of U.S. Attorney and U.S. Marshal in D.C.

(b) City Council is prohibited from making changes in Statutes Under Titles 22, 23 and 24, of the D.C. Code—the Criminal Code.

Other than these changes, the committee substitute follows the committee bill, H.R. 9682.

For further information the undersigned, their staffs and the staff of the House District Committee welcome your inquiries.

Sincerely,

Charles C. Diggs, Donald M. Fraser, Thomas M. Rees, Brock Adams, Walter E. Fauntroy, Romano L. Mazzoli, James J. Howard.

Les Aspin, John Breckinridge, Fortney H. (Pete) Stark, Gilbert Gude, Charles B. Rangel, Henry P. Smith, III, James R. Mann, Stewart B. McKinney.

I hope that this matter is going to be considered in an orderly fashion. I hope that the real contest which exists will lend itself to orderly consideration, and it is basically for this reason that I have described that I support the passage of this rule. Under other circumstances I might have opposed it, but I have the impression, and I hope it is a valid impression, that this is going to be considered in an objective, orderly and serious fashion. It is a terribly serious issue and it deserves orderly consideration, and I hope that is what it is going to get under this proceeding and with these developments. I hope the Members will take the time to take a look prior to the debate on the amendments at the changes that have been made and the choices that are presented.

Mr. Speaker, I think this rule should be adopted.

VINCENT C. GRAY
MAYOR

April 11, 2014

The Honorable Phil Mendelson
Chairman
Council of the District of Columbia
John A. Wilson Building, Suite 504
1350 Pennsylvania Avenue, N.W.
Washington, DC 20004

Re: Enactment of the Fiscal Year 2015 District Budget

Dear Chairman Mendelson:

I write to urge the Council to act on the FY 2015 budget submitted on April 3, 2014 within the 56 days set forth in the original Home Rule Charter, to return the budget within that time, and not to base its actions or rely in any way in considering this budget on the Local Budget Autonomy Act of 2012 (the Act), which purported to amend the Charter. Failure to do so could have serious and destabilizing consequences for the District of Columbia government.

As you know, I believe deeply that Congress should grant the District budget autonomy and should do so as soon as possible. Indeed, this Administration worked successfully to convince President Obama to include such a proposal in his pending budget legislation, and we are doing all we can to convince Congress of the wisdom and fairness of this proposal.

At the same time, I must take seriously my responsibility as Mayor of this great city to ensure that the District government complies in all respects with the governing federal law, including in connection with its budget and finances. At my request, our D.C. Attorney General Irvin Nathan has issued the enclosed formal opinion concluding that the Act is null and void as it patently contravenes the Home Rule Act and provisions of Title 31 of the U.S. Code. As explained in the Attorney General's opinion, the Act if followed would interfere improperly with the Constitutional and federal statutory roles of the Congress and President of the United States as well as the Mayor in the budget and appropriations process for the District of Columbia, and compliance with it could cause officials and employees of the District government to be in violation of federal statutes that carry administrative as well as criminal penalties. His opinion is fully consistent with the written opinion issued by the U.S. Government Accountability Office ("GAO") on January 30, 2014. The GAO concluded: "Provisions of the [Act] that attempt to change the federal government's role in the District's budget process have no legal effect....The District Government remains bound by provisions of federal law which require it to submit

budget estimates to the President for transmission to the Congress for the enactment of appropriations... Because acts taken *ultra vires* are, *ab initio*, legally ineffective, portions of the [Act] that purport to change the federal government's role in the District's budget process are without legal force or effect." (pp. 11-12, emphasis added.) I am not willing either to violate federal appropriations laws or to subject our employees to the risks of prosecution or administrative sanctions that would flow from the Council's implementation of the illegal Act.

The Act, if implemented, would purport effectively to cut the President and Mayor out of our respective roles pursuant to the Home Rule Act in transmitting to Congress the entire budget for the District – both the federal *and* local dollars portion of the budget. The Act would also reduce the role of Congress in appropriating local revenue, which revenue approximates 70% of the D.C. budget. The Act would call for the local portion of the annual budget to be submitted by the Chairman of the Council to the Speaker of the House of Representatives for passive review. But the Home Rule Act expressly calls for the full District's budget – both local and federal dollars – to be transmitted by the *Mayor* to the *President* for transmission by him to the Congress and for Congress then to appropriate the full D.C. Budget. The Council cannot usurp the Mayor's long-established authority and responsibility to submit the full unified budget, nor can it unilaterally restructure the role in the budget process played by federal officials and Congress.

The Attorney General's legal opinion is binding on the Executive branch officials in the District government absent a controlling court opinion to the contrary. Because, as the opinion concludes, the Act is a legal nullity, the Act can have no effect on the formation of the District's budget. Further, monies voted on by the Council but not contained in a budget passed by both houses of Congress and signed by the President cannot be spent without exposing our employees to criminal or civil liability.

We must comply with federal law while we continue to push in Congress for budget autonomy, for which we now have support from the White House and within both houses of Congress. In support of this request to the Council, consider some of the following possible adverse consequences if the Council adheres to the Act, in the absence of a governing judicial ruling of its validity, and ignores the provisions of the binding and valid Home Rule Charter.

If the Council follows its contemplated schedule and takes more than 56 days to consider the budget pursuant to the Act, evidenced by a currently scheduled second vote on the FY 15 Budget Request Act 70 days from the budget's submission (*i.e.*, two weeks after the 56 day statutory deadline), it will be in violation of the Home Rule Act. That violation will deprive my Office as well as the President and Congress of the ability to comply with applicable statutory responsibilities in the creation and enactment of the District's budget, a process set up four decades ago by Congress for the benefit of funding the District's operations and followed faithfully and scrupulously until this year. If that happens, I intend to the best of my ability to continue to comply with the Home Rule Act's budget requirements. Therefore, I intend to transmit to the Congress and President the full District budget as it stands after the 56th day following transmission to you of the budget, whether or not the Council has taken a second vote. A dispute as to whether or not this is the District's duly proposed budget could well lead either to the President's ignoring the elected officials of the District and transmitting his own budget for the District to the Congress (31 U.S.C. § 1108(b)(1)) or even to Congress' declining to pass any significant budget for the District in FY 2015.

Second, if the District fails to enact a valid Budget Request Act and submit it to Congress for inclusion in a continuing resolution or appropriations act, there is also a serious risk that the District will not be able to avail itself of the protection afforded by section 816 of the Consolidated Appropriations Act, 2014. This crucial appropriations authority advanced to the District the funds contained in the FY 2015 Budget Request Act for periods during which no federal continuing resolution or appropriations act for the District is in effect. However, a condition included by Congress, presumably for the District's financial benefit, is that the District have a validly enacted budget. We have come too far to jeopardize our ability to keep the District functioning if the federal government shuts down again. I urge the Council to be responsible and enact a valid budget for the protection of the District. If the Council does not, it will put the District's finances in a highly precarious position.

There is even the possibility that if the District government does not come together to enact a valid budget, in accordance with the Home Rule Charter as passed by Congress, the Control Board could be reactivated. (D.C. Official Code § 47-392.09.) If because of the absence of Congressional appropriations, the District cannot lawfully make local expenditures in FY 2015, the District could once again become subject to governance by the Control Board. Such action occurs by operation of law if the District fails to meet its payroll for any pay period, fails to make any required payments relating to pensions and benefits or fails to make payments required under an interstate compact. (D.C. Official Code §§ 47-391.07 (b); 47-392.09) That would be a disastrous outcome for Home Rule in the District and we should take steps to avoid it.

As you consider our urgent request, you should know of my intended actions in light of the Attorney General's opinion, and in consultation with the Chief Financial Officer. First, I will direct all subordinate agency District officials not to implement or take actions pursuant to the Act, which contravenes our Home Rule Charter and other federal law. Second, I will veto any FY 15 budget transmitted by the Council that is not inclusive of both the local and federal portions of the budget, as required under the Home Rule Act. Third, as noted, to achieve compliance to the extent I am able with the Home Rule Act, I will transmit to the Congress and President the full District budget as it stands after the 56th day following transmission to you of the budget, whether or not the Council has taken a second vote.

I would be pleased to meet with you and other appropriate Members of the Council to discuss these matters and to find solutions which will avoid the dire possible consequences of failing to reach agreement on the proper procedures for the FY 2015 budget process. As always, I appreciate a mutually respectful dialogue with you. Thank you for your prompt consideration of these matters.

Sincerely,

Vincent C. Gray

Vincent C. Gray
Mayor

Enclosure

cc: Jeffrey S. DeWitt, Chief Financial Officer
Irvin B. Nathan, Esq., Attorney General
The Honorable David A. Catania
The Honorable Vincent B. Orange, Sr.
The Honorable David Grosso
The Honorable Anita D. Bonds
The Honorable Jim Graham
The Honorable Jack Evans
The Honorable Mary M. Cheh
The Honorable Muriel Bowser
The Honorable Kenyan McDuffie
The Honorable Tommy Wells
The Honorable Yvette M. Alexander
The Honorable Marion Barry

ELEANOR HOLMES NORTON
DISTRICT OF COLUMBIA

COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE

SUBCOMMITTEES

RANKING MEMBER, HIGHWAYS AND TRANSIT

ECONOMIC DEVELOPMENT, PUBLIC BUILDINGS, AND EMERGENCY MANAGEMENT

WATER RESOURCES AND ENVIRONMENT

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

SUBCOMMITTEES

FEDERAL WORKFORCE, U.S. POSTAL SERVICE, AND THE CENSUS

ENERGY POLICY, HEALTH CARE, AND ENTITLEMENTS

Congress of the United States
House of Representatives
Washington, DC 20515-1301

Statement of Congresswoman Eleanor Holmes Norton
Committee on Oversight and Government Reform
Subcommittee on Government Operations
Hearing on "D.C. Home Rule: Examining the Intent of Congress in the District of Columbia Home Rule Act of 1973"
May 12, 2016

I would like to thank my good friend, Chairman Mark Meadows, for his well-known kindness and courtesy in allowing me an opening statement on a matter that affects only my district. This hearing, however, appears to be a fait accompli, similar to when the committee went through the motions last month marking up the District of Columbia school voucher bill a second time during this Congress. The committee knew that the Senate had tried but been unable to mark up the bill, and that the bill could only be enacted on an appropriations bill. Prior to the second markup, Chairman Jason Chaffetz requested that the Appropriations Committee do so. This hearing seems designed to lay the predicate for using the appropriations process to try to overturn, block or preempt the Local Budget Autonomy Act of 2012 (BAA), which was ratified by 83% of D.C. voters.

The evidence is transparent. Speaker Paul Ryan's spokesperson recently told the press that Republicans are considering "legislative options" to stop the BAA. The three top House Republican leaders—Speaker Ryan, Majority Leader Kevin McCarthy and Majority Whip Steve Scalise—all have said the BAA is invalid. The Bipartisan Legal Advisory Group of the U.S. House of Representatives (BLAG), which speaks for the House in litigation and is controlled by the Republican leadership, has submitted amicus briefs in each BAA court challenge expressing its view that the BAA is invalid. Indeed, the latest such brief called the BAA "a naked and unabashed effort to strip Congress of powers vested in it by Article I of the Constitution," as if voters in any district had such power. In 2013, the Republican-led House Appropriations Committee said in a report that the BAA is "an expression of the opinion of the residents, only, and without any authority to change or alter the existing relationship between Federal appropriations and the District."

By calling legal experts, the subcommittee seems to be trying a complicated legal matter in the court of public opinion. Only the courts, not a congressional hearing, can definitively determine the validity of the BAA. Indeed, the BAA has been litigated for the last two years, with courts, as well as the Government Accountability Office (GAO), reaching conflicting conclusions. Yet the BAA is the law of the land. Congress did not disapprove the BAA during the congressional review period, and the only court order in effect on the BAA upheld its validity and mandated that District officials implement it. No entity appealed the order, including BLAG.

MAIN DISTRICT OFFICE
90 K STREET, N.E., SUITE 100
WASHINGTON, D.C. 20002-4203
(202) 408-9041
(202) 408-9048 (FAX)

2136 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515-5101
(202) 225-8050
(202) 225-3002 (FAX)
(202) 225-7829 (TDD)
WWW.NORTON.HOUSE.GOV
PRINTED ON RECYCLED PAPER

SOUTHEAST DISTRICT OFFICE
2041 MARTIN L. KING, JR. AVENUE, S.E.
SUITE 238
WASHINGTON, D.C. 20020-7026
(202) 678-8900
(202) 678-8844 (FAX)

What is within the committee's authority is to remove federal restrictions that harm the finances and operations of the D.C. government. Out of simple fairness in keeping with their own Republican local control principles, the last two Republican chairmen of the committee, Tom Davis and Darrell Issa, sought budget autonomy for the District during their chairmanships. As an amicus brief filed by Mr. Davis in a recent BAA case noted: "The benefits of budget autonomy for the District are numerous, real, and much needed. There is no drawback." One of the other signatories on the brief was Alice Rivlin, the founding director of the Congressional Budget Office, a former director of the White House Office of Management and Budget and a chair of the D.C. financial control board. I ask unanimous consent to include the brief in the record. Indeed, even the witnesses called by Republicans today who have taken a position on the merits of budget autonomy all agree D.C. should have it, though they disagree on the validity of the BAA.

Control over the dollars raised by local taxpayers is central to local control, one of the oldest principles of American government and a much cited principle of congressional Republicans. Beyond this core principle, budget autonomy has practical benefits for both the District and federal governments. For the District government, it means what every local government already has: lower borrowing costs; more accurate revenue and expenditure forecasts; improved agency operations; and, in D.C.'s case, the removal of the threat of federal government shutdowns. For Congress, it means not wasting valuable subcommittee, committee, and floor time on budget line items it never amends. For the federal government generally, it means that the municipal services it relies on to function will not cease during a federal shutdown.

To its credit, Congress has begun to recognize the hardships caused by the lack of budget autonomy, especially after the 2013 federal government shutdown. Since then, for the first time, Congress has annually exempted D.C. from federal shutdowns. The leading bond rating agencies have called the shutdown exemption credit positive.

Congress loses nothing under budget autonomy. Under the U.S. Constitution, Congress has the authority to legislate on any District matter, including its local budget, at any time, notwithstanding the BAA.

The budget released this year by the Republican-led House Budget Committee made both the principled and practical case for budget autonomy: "[T]his budget would give our states and local municipalities the freedom and flexibility to pursue a reform movement that meets the unique needs and challenges of their communities. We are humble enough to admit that the federal government does not have all the answers. The American people ought to be trusted to make the right decisions for themselves, their families, and their enterprises. Putting our faith in the people will respect and restore the principle of federalism in America." I rest my case, Mr. Chairman.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

COUNCIL OF THE DISTRICT OF COLUMBIA, Plaintiff, v. VINCENT C. GRAY, in his official capacity as Mayor of the District of Columbia, and JEFFREY S. DeWITT, in his official capacity as Chief Financial Officer for the District of Columbia, Defendants.	No. 1:14-cv-00655-EGS

BRIEF *AMICI CURIAE* OF DR. ALICE M. RIVLIN, THE HONORABLE THOMAS M. DAVIS, AND THE HONORABLE ANTHONY A. WILLIAMS IN SUPPORT OF NEITHER PARTY

Richard P. Bress (DC Bar No. 457504)
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304
(202) 637-2200

Attorney for Amici Alice M. Rivlin, Thomas M. Davis, and Anthony A. Williams

May 2, 2014

TABLE OF CONTENTS

INTEREST OF *AMICI CURIAE*

This case addresses a question of vital importance to the District of Columbia and its residents: whether the Local Budget Autonomy Act of 2012, passed unanimously by the City Council and approved in a referendum by an overwhelming majority of voters, is valid legislation permitting the District to spend the local tax and fee revenue it raises without seeking affirmative approval from Congress. *Amici curiae* are three prominent individuals who have spent the majority of their career in government service. Although they are not addressing the legal issues involved in this case, they are uniquely qualified to speak to the larger policy implications of budget autonomy for the District of Columbia.

Amica Dr. Alice M. Rivlin is a senior fellow in the Economic Studies Program at Brookings. Earlier in her career, Dr. Rivlin served as vice chair of the Federal Reserve Board and as director of the White House Office of Management and Budget in the first Clinton administration. She also chaired the District of Columbia Financial Management Assistance Authority and was the founding director of the Congressional Budget Office. In February 2010, President Obama named Dr. Rivlin to the Commission on Fiscal Responsibility and Reform. She co-chaired, with former Senator Pete Domenici, the Bipartisan Policy Center's Task Force on Debt Reduction. Dr. Rivlin is an expert on fiscal and monetary policy. The Council for Excellence in Government named Dr. Rivlin one of the greatest public servants of the last 25 years, and the National Academy of Social Insurance awarded her the 2013 Robert M. Ball Award for Outstanding Achievements in Social Insurance.

Amicus Thomas M. Davis serves as the Director of Federal Government Affairs for Deloitte & Touche LLP. Prior to joining Deloitte, Mr. Davis served seven terms in Congress representing Virginia's 11th congressional district as a Republican. During his tenure in the House, he served as Chairman of the House Government Reform and Oversight Committee,

charged with oversight of the District of Columbia, as well as the Chair of the subcommittee on Technology and Procurement Policy. Under his leadership, the House Government Reform and Oversight Committee investigated matters related to the effective administration of government programs of vital public interest, including government contracting in support of the war in Iraq, the Agriculture Department's handling of the discovery of Mad Cow Disease in the United States, the flu vaccine shortage, the role of the National Guard in national security and homeland defense, and management of the Department of Homeland Security. Mr. Davis was also the Chief Sponsor of the D.C. Financial Resources Management and Assistance Authority (or, as it is widely known, the Control Board).

Amicus Anthony A. Williams served as the fifth mayor of Washington, DC, from 1999 to 2007 as a Democrat. During his two terms, Mayor Williams was widely credited with leading the District's financial comeback and improving the performance of its government agencies, all while lowering taxes and investing in infrastructure and human services. Prior to his election, he was the independent CFO of the District, working with and on behalf of local officials, the DC Financial Control Board, and the U.S. Congress. Mayor Williams also worked in a variety of positions in federal, state, and local government, including serving as the first CFO for the U.S. Department of Agriculture under President Bill Clinton.

Amici's combined expertise in the fields of finance, economics, social policy, and local and federal governance makes them exceptionally well suited to speak to the importance of the Budget Autonomy Act of 2012 for the proper functioning of the District's institutions and the wellbeing of its residents. All three have previously testified before or written letters to both the Council and Congress in support of budget autonomy and the policy implications of the law challenged in this case. *Amici* submit this brief in support of neither party and do not opine on

the legal issues before the court. Rather, the brief addresses the policy and practical implications of this dispute.

ARGUMENT

Budget autonomy has been an aspiration in the District of Columbia from the moment the District lost the privilege in 1874. The passage of the Home Rule Act of 1973 represented a significant step towards regaining budget autonomy. Although Congress retained ultimate control over D.C. legislation, budgeting, and borrowing, it created the General Fund and decreed that all fees and revenues raised by the District be deposited in the appropriate local fund instead of the U.S. Treasury. Congress took another substantial step towards budget autonomy in 1995, when it created the Office of the Chief Financial Officer. Having a CFO allowed the local government gradually to strengthen its financial health and operational efficiency. Since the establishment of the CFO office, the District's budget outlook has transformed from dismal to outstanding.

The District's track record of financial stability, coupled with the democratic importance and practical policy benefits of budget autonomy, led *Amici*, along with numerous other individuals and organizations, to support the passage of the Budget Autonomy Act of 2012. Indeed, the Act was not only passed unanimously by the DC Council, and ratified by 83% of the voters, but also successfully completed the 35-day congressional review required by the Home Rule Act. It is not surprising that the new Act was permitted by Congress to become law given that local budget autonomy for the District enjoys substantial bipartisan support on the Hill. The fundamental policy behind the Budget Autonomy Act and the widespread support for the change it brought about counsel that this Court should mandate the law's enforcement absent a compelling showing that it is legally invalid.

A. There Is No Policy Reason To Deny The District Of Columbia Budget Autonomy

The lack of local budget autonomy for the District of Columbia is profoundly unfair and anti-democratic. Although nearly 98% of the District's funds are locally raised or come in the form of federal dollars available to all jurisdictions,[1] in contrast to the fifty states and Puerto Rico, the District's entire budget is subject to affirmative congressional approval—and will remain so unless the Budget Autonomy Act takes effect. As the Council's Committee of the Whole Report concluded, "[n]ot only is this process unique to the District, it highlights the separate and unequal treatment of the District."[2] Unlike the states and Puerto Rico, who are free to manage their own finances as they see fit, the District must have its own locally financed budget approved by an affirmative act of Congress—a federal body, in which it has no voting representation.

Denying the District budget autonomy is also anachronistic. When Congress passed the Home Rule Act in 1973, congressional skepticism towards budget autonomy for the District was perhaps understandable.[3] The federal government had treated the District's citizens like colonial subjects for almost a century, leaving the local population with little experience in electoral politics or self-governance.[4] The District's fiscal inexperience manifested as late as 1995, when

---

[1] Council of the District of Columbia Committee of the Whole, Report on Bill 19-993 (Dec. 4, 2012) ("Committee of the Whole Report"), attached testimony of Alice Rivlin at 1 ("Rivlin Testimony"), *available at* http://dcclims1.dccouncil.us/images/00001/20130418101959.pdf at 97.

[2] Committee of the Whole Report at 2.

[3] H.R. 960, and H.R. 1045, Greater Autonomy for the Nation's Capitol: Hearing Before the H. Subcomm. on Federal Workforce, Postal Service, and the District of Columbia, 111th Cong., at 67 (2009) ("Greater Autonomy Hearing") (testimony of Alice Rivlin).

[4] *Id.*

the city faced a deep fiscal crisis—prompting the creation of the Control Board and the Office of the CFO.[5]

Those days, however, are long since gone. Since 1996, the District of Columbia government has consistently demonstrated its ability responsibly to manage its own resources—turning a cumulative $550 million deficit into a remarkable $1.2 billion fund balance.[6] As Natwar Gandhi—former CFO of the District—has testified, "[t]here is no question that the District has the financial infrastructure to permit it to manage its local funds effectively."[7] "At a time when state and local governments throughout the country are having difficulties, the District has produced 17 consecutive balanced budgets and 16 consecutive clean year-end financial audits."[8] It has built up a large fund balance and significant cash reserves—and finished Fiscal Year 2012 with a $417 million budget surplus.[9] "Financial markets have recognized the District's laudable fiscal stewardship in the form of higher bond ratings and lower interest rates on borrowing."[10]

Congress has implicitly recognized this progress. It has hardly made any changes in the local funds section of the District's budget in recent years. There is nothing of substance left to

---

[5] *Id.*

[6] The District of Columbia's Fiscal Year 2010 Budget: Ensuring Fiscal Sustainability, Hearing Before the H. Subcomm. on Health Care, District of Columbia, Census and the National Archives of the Committee on Oversight and Government Reform, 112th Cong., at 35 (2011) (statement of Natwar Gandhi).

[7] Committee of the Whole Report, attached Public Hearing on Bill 19-993, Local Budget Autonomy Act, at 4 (2012) ("Gandhi Testimony"), *available at* http://dcclims1.dccouncil.us/images/00001/20130418101959.pdf at 130.

[8] Letter from Mayor Anthony Williams and former Rep. Thomas Davis to Council Chairman Phil Mendelson on Law 19-321, The Local Budget Autonomy Amendment Act of 2012 (Sept. 24, 2013) ("Davis Letter").

[9] *Id.*

[10] Committee of the Whole Report at 3.

Congress's use of budget approval as an instrument of fiscal control.[11] What remains is a hollow vestigial process.[12] Under the Budget Autonomy Act, moreover, Congress still must affirmatively approve the federally funded aspect of the District's budget, and it retains its ability more generally to exercise oversight of the District's entire budget and operations, in the form of periodic audits and after-the-fact review.[13] And, of course, Congress at all times retains the authority to override the Budget Autonomy Act with affirmative legislation, should that ever prove necessary. There is thus no policy reason today to deny the District its right to manage its own finances.

Although the right to develop and implement its own locally enacted budget is a fundamental aspect of self-governance, the push for budget autonomy is not simply about democracy and fairness. As demonstrated by the testimony of *Amici* and numerous other advocates, budget autonomy is also a practical imperative that would significantly enhance the efficiency and proper function of the local government.

The need for congressional approval of D.C.'s budget distorts the budgeting process, costs local taxpayers millions of dollars every year, and creates a destructive uncertainty about the provision of basic services when partisan politics leaves the federal government's own financial decisions in disarray.[14] The time elapsed between the submission of the District's budget and final congressional approval—often upwards of four months—inevitably means that assumptions made by the CFO, the Mayor, and the Council are out of date by the time the

---

[11] Rivlin Testimony at 2.

[12] *Id.*

[13] Gandhi Testimony at 5; Budget Autonomy for the District of Columbia: Restoring Trust in Our Nation's Capital: Hearing Before the H. Comm. on Government Reform, 108th Cong., at 4 (2003) ("Budget Autonomy Hearing") (statement of Thomas Davis).

[14] Rivlin Testimony at 2.

District's budget takes effect.[15] That in turn necessitates hasty revisions, invites crucial errors, and endorses guesswork. It also complicates hiring and procurement, and requires the District to borrow additional funds and pay more interest.[16] Bond rating agencies take the uncertainties of the Federal process into account in assessing the District's finances, and discount to a degree whatever ratings the District might otherwise receive.[17]

Moreover, when Congress passes a continuing resolution, thus extending Federal appropriations at prior-year levels without permanently enacting the District's budget, local agencies must delay proposed cost-saving measures until Congress settles the matter. Worse yet, where Congress altogether fails to act due to a partisan deadlock, the D.C. government is faced with an imminent shutdown of even basic services—a local calamity written off as mere collateral damage of the failure of national politics. Just last year, in the October 2013 federal government shutdown, D.C. was caught in the crossfire of national political feuds. The District managed to stay afloat and operational in essential areas only by tapping into its reserve funds already approved by Congress. In response to this political and fiscal crisis, Mayor Gray confronted Congress and urged that D.C. should be able "'to spend [its] own money.'"[18]

If enforced, the Budget Autonomy Act would effectively address and resolve these practical concerns. The Budget Autonomy Act would also enable the District to adjust its fiscal

---

[15] Committee of the Whole Report at 3.

[16] *Id.* at 4.

[17] Budget Autonomy Hearing at 32 (testimony of Natwar Gandhi).

[18] Mike DeBonis& Ed O'Keefe, Ed, *Vincent Gray confronts Reid on Capitol steps over shutdown's impact on District*, Wash. Post (Oct. 9, 2013), *available at* http://www.washingtonpost.com/local/dc-politics/dc-mayor-gray-confronts-reid-on-capitol-steps-over-shutdowns-impact-on-city/2013/10/09/02577428-3103-11e3-89ae-16e186e117d8_story.html (quoting Mayor Gray).

year to align with that of other local and state jurisdictions.[19] A July-June fiscal year would better align the District's revenue cycle with income taxes in due in April and property taxes collected in March and September.[20] This in turn would permit the District to execute its fiscal year budget based on the most recently available and thus most accurate revenue information.[21] It would also closely mirror the school year, and thus allow the District's educational institutions—D.C. Public Schools, the University of the District of Columbia, and the District's charter schools—to manage funds more effectively.[22]

And providing the District with the authority to direct the spending of its locally raised revenue would substantially increase the District's ability to react to changing program and financial conditions during a fiscal year without having to follow a lengthy and sluggish approval procedure for every minor adjustment to the budget.[23]

B. The Budget Autonomy Act Enjoys Broad Bipartisan Support

Because the District has amply demonstrated its fiscal responsibility, and because the District's need annually to come hat in hand for approval to expend its own locally raised funds creates harmful inefficiencies and violates universal values of self-determination, the principle of budget autonomy has long enjoyed widespread bipartisan support.[24] As demonstrated by the Nov. 9, 2012 Hearing of the Committee of the Whole, "the concept of budget autonomy is widely supported across party and institutional lines."[25] In his testimony at that hearing, *Amicus*

---

[19] Committee of the Whole Report at 4.

[20] Budget Autonomy Hearing at 32-33 (testimony of Natwar Gandhi).

[21] Budget Autonomy Hearing at 33.

[22] *Id.*

[23] *Id.*

[24] *See, e.g.*, Committee of the Whole Report at 4-5.

[25] *Id.* at 4.

Tom Davis testified that Republicans in the House of Representatives with oversight over the District of Columbia—including Rep. Jo Ann Emerson, Rep. Darrell Issa, and Rep. Eric Cantor—favor budget autonomy.[26] The Budget Autonomy Act, which completed congressional review and became law in July 2013, thus did not represent a "poke in the eye of Congress"—nor was it perceived as such on the Hill.[27] Indeed, there has not been a single proposal in Congress to overturn the Act.

But Congress has proved unable to address the issue. Over the years, both the House and the Senate have considered many different iterations of local budget autonomy.[28] The District of Columbia's non-voting representative in the House of Representatives, Delegate Eleanor Holmes Norton (D-DC), has introduced legislation that would afford the District sweeping autonomy through congressionally initiated changes to the Home Rule Act.[29] Senators Joe Lieberman (ID-CT) and Susan Collins (R-ME) also introduced legislation that would remove the need for affirmative Congressional approval, replacing it with passive approval.[30] Congress's failure to enact these proposals has never been about any articulated or sustained opposition. Budget autonomy has been yet another casualty of the current partisan gridlock.[31]

It was in light of this political climate—and fearing that its finances could yet again be held hostage as a result—that the District sought an alternative route to budget autonomy. Following the process established by Congress, the District enacted the Budget Autonomy Act of

---

[26] *Id.*

[27] Davis Letter at 2.

[28] Committee of the Whole Report at 4.

[29] *Id.*; *see also* District of Columbia Budget Autonomy Act of 2011, H.R. 345, 112th Cong. (2011).

[30] Committee of the Whole Report at 4; *see also* District of Columbia Local Budget Autonomy Act of 2012, S. 2345, 112th Cong. (2012).

[31] Davis Letter at 2.

2012, with widespread support. The Act was (1) backed by numerous civic leaders and advocacy groups, (2) unanimously adopted by the Council, (3) signed by the Mayor, (4) certified by the Board of Elections, (5) overwhelmingly ratified by 83% of the voters, and (6) effectively upheld by the Congress through its 35-day review process. It represents the culmination of years of legislative work on both the local and federal level and embodies the will of the people.

CONCLUSION

The benefits of budget autonomy for the District are numerous, real, and much needed. There is no drawback. *Amici* thus urge this Court to enforce the Budget Autonomy Act absent a compelling showing of legal invalidity.

Dated: May 2, 2014

Respectfully submitted,

/s/ Richard P. Bress

Richard P. Bress (DC Bar No. 457504)
LATHAM & WATKINS LLP
555 Eleventh Street, NW, Suite 1000
Washington, DC 20004-1304
(202) 637-2200

Attorney for Amici Alice M. Rivlin, Thomas M. David, and Anthony A. Williams

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2014, I caused a copy of the foregoing Unopposed Motion for Leave to File a Brief *Amici Curiae* and attached Brief *Amici Curiae*, to be electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all registered counsel of record.

/s/ Richard P. Bress

ENROLLED ORIGINAL

AN ACT

Codification
District of Columbia
Official Code
2001 Edition

Winter 2013

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the District of Columbia Home Rule Act to provide for local budget autonomy.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Local Budget Autonomy Amendment Act of 2012".

Sec. 2. The District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 777; D.C. Official Code § 1-201.01 *et seq.*), is amended as follows:

(a) The table of contents is amended by striking the phrase "Sec. 446. Enactment of Appropriations by Congress" and inserting the phrase "Sec. 446. Enactment of local budget by Council" in its place.

Amend
§ 1-204.04

(b) Section 404(f) (D.C. Official Code § 1-204.04(f)) is amended by striking the phrase "transmitted by the Chairman to the President of the United States" both times it appears and inserting the phrase "incorporated in the budget act and become law subject to the provisions of section 602(c)" in its place.

Amend
§ 1-204.12

(c) Section 412 (D.C. Official Code § 1-204.12) is amended by striking the phrase "(other than an act to which section 446 applies)".

Amend
§ 1-204.41

(d) Section 441(a) (D.C. Official Code § 1-204.41(a)) is amended –by striking the phrase "budget and accounting year." and inserting the phrase "budget and accounting year. The District may change the fiscal year of the District by an act of the Council. If a change occurs, such fiscal year shall also constitute the budget and accounting year." in its place.

Amend
§ 1-204.46

(e) Section 446 (D.C. Official Code § 1-204.46) is amended to read as follows:

"ENACTMENT OF LOCAL BUDGET BY COUNCIL.

"Sec. 446. (a) Adoption of Budgets and Supplements - The Council, within 70 calendar days, or as otherwise provided by law, after receipt of the budget proposal from the Mayor, and after public hearing, and by a vote of a majority of the members present and voting, shall by act adopt the annual budget for the District of Columbia government. The federal portion of the annual budget shall be submitted by the Mayor to the President for transmission to Congress. The local portion of the annual budget shall be submitted by the Chairman of the Council to the Speaker of the House of Representatives pursuant to the procedure set forth in section 602(c). Any supplements to the annual budget shall also be

adopted by act of the Council, after public hearing, by a vote of a majority of the members present and voting.

"(b) Transmission to President During Control Years - In the case of a budget for a fiscal year which is a control year, the budget so adopted shall be submitted by the Mayor to the President for transmission by the President to the Congress; except, that the Mayor shall not transmit any such budget, or amendments or supplements to the budget, to the President until the completion of the budget procedures contained in this Act and the District of Columbia Financial Responsibility and Management Assistance Act of 1995.

"(c) Prohibiting Obligations and Expenditures Not Authorized Under Budget- Except as provided in section 445A(b), section 446B, section 467(d), section 471(c), section 472(d)(2), section 475(e)(2), section 483(d), and subsections (f), (g), (h)(3), and (i)(3) of section 490, no amount may be obligated or expended by any officer or employee of the District of Columbia government unless--

"(1) such amount has been approved by an act of the Council (and then only in accordance with such authorization) and such act has been transmitted by the Chairman to the Congress and has completed the review process under section 602(c)(3); or

"(2) in the case of an amount obligated or expended during a control year, such amount has been approved by an Act of Congress (and then only in accordance with such authorization).

"(d) Restrictions on Reprogramming of Amounts - After the adoption of the annual budget for a fiscal year (beginning with the annual budget for fiscal year 1995), no reprogramming of amounts in the budget may occur unless the Mayor submits to the Council a request for such reprogramming and the Council approves the request, but and only if any additional expenditures provided under such request for an activity are offset by reductions in expenditures for another activity.

"(e) Definition - In this part, the term "control year" has the meaning given such term in section 305(4) of the District of Columbia Financial Responsibility and Management Assistance Act of 1995.".

Amend § 1-204.46b

(f) Section 446B(a) (D.C. Official Code § 1-204.46b(a)) is amended as follows:

(1) Strike the phrase "the fourth sentence of section 446" and insert the phrase "section 446(c)" in its place.

(2) Strike the phrase "approved by Act of Congress".

Amend § 1-204.47

(g) Section 447 (D.C. Official Code § 1-204.47) is amended as follows:

(1) Strike the phrase "Act of Congress" each time it appears and insert the phrase "act of the Council (or Act of Congress, in the case of a year which is a control year)" in its place.

(2) Strike the phrase "Acts of Congress" each time it appears and insert the phrase "acts of the Council (or Acts of Congress, in the case of a year which is a control year)" in its place.

(h) Sections 467(d), 471(c), 472(d)(2), 475(e)(2), and 483(d), and 490(f), (g)(3), (h)(3), and (i)(3) are amended by striking the phrase "The fourth sentence of section 446" and inserting the phrase "Section 446(c)" in its place.

Amend §§ 1-204.67, 1-204.71, 1-204.72, 1-204.75, 1-204.83, 1-204.90

Sec. 3. Applicability.

Section 2 shall apply as of January 1, 2014.

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 5. Effective date.

This act shall take effect as provided in section 303 of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 784; D.C. Official Code § 1-203.03).

_____

Chairman

Council of the District of Columbia

_____

Mayor

District of Columbia

GAO U.S. GOVERNMENT ACCOUNTABILITY OFFICE
United States Government Accountability Office
Washington, DC 20548

B-328059

May 23, 2016

The Honorable Mark Meadows
Chairman
Subcommittee on Government Operations
Committee on Oversight and Government Reform
House of Representatives

Dear Mr. Chairman:

On May 12, 2016, GAO testified before the Subcommittee at the hearing titled "D.C. Home Rule: Examining the Intent of Congress in the District of Columbia Home Rule Act of 1973."[1] This responds to the additional questions you asked in your May 18, 2016 letter.[2]

1. In your testimony before the Committee at the May 12, 2016, hearing you stated the Budget Autonomy Act was in conflict with two other federal laws—the Budget and Accounting Act of 1921 and the Antideficiency Act—can you explain the nature of this conflict?

GAO issued a legal opinion on January 30, 2014 concerning the effect of the District of Columbia's Local Budget Autonomy Amendment Act of 2012, where we addressed the conflict between the Budget Autonomy Act and two federal laws: the Antideficiency Act and the Budget and Accounting Act, 1921. B-324987, Jan. 30, 2014. Under the Constitution, only Congress may appropriate funds and it must do so only through the enactment of legislation. U.S. Const. art. I, § 9, cl. 7. In furtherance of its constitutional power of the purse, Congress enacted the Antideficiency Act and the Budget and Accounting Act. Under the Antideficiency Act, officers and employees of both the federal government and of the District of Columbia government may not incur obligations or make expenditures exceeding

[1] GAO, *District of Columbia: Local Budget Autonomy Amendment Act of 2012*, GAO-16-663T (Washington, D.C.: May 12, 2016).

[2] Letter from Chairman, Subcommittee on Government Operations, Committee on Oversight and Government Reform, House of Representatives, to Managing Associate General Counsel, GAO, May 18, 2016.

the amount available in an appropriation or fund. 31 U.S.C. § 1341. Under the Budget and Accounting Act, the head of each agency, which for the purposes of this Act includes the District government, must submit an appropriation request to the President for transmission to Congress. 31 U.S.C. §§ 1101(1), 1108(b)(1).

The Budget Autonomy Act attempts to permit the District government to obligate and expend funds even if Congress has not appropriated them. D.C. Law 19-321, § 2(e). This stands in irreconcilable conflict with the Antideficiency Act. The Budget Autonomy Act also attempts to permit the District government to eliminate the President from the District's budget process. D.C. Law 19-321, § 2(e). This stands in irreconcilable conflict with the Budget and Accounting Act. Because the Home Rule Act bars the District government from amending or repealing any federal statute of general applicability, the District government cannot amend or repeal the provisions of either the Antideficiency Act or the Budget and Accounting Act. D.C. Code § 1-206.02(a)(3); B-324987, at 7.

The Constitution vests Congress with power "to exercise exclusive Legislation in all Cases whatsoever" over the District. U.S. Const. art. I, § 8, cl. 17. Congress exercised this constitutional authority not only when it applied the Antideficiency Act and the Budget and Accounting Act to the District, but also when it enacted the Home Rule Act and provided that the District remains bound by and cannot amend the provisions of those two laws.

2. Does the Antideficiency Act apply to the District of Columbia? If so, how does the Antideficiency Act apply to the District of Columbia?

Yes. The statutory text of the Antideficiency Act itself states that it applies to officers and employees not only of the United States Government but also to the District of Columbia government. 31 U.S.C. § 1341. In addition, as we noted in our January 30, 2014 opinion, when the Home Rule Act was enacted in 1974, it confirmed the Antideficiency Act's continuing application to the District by stating that nothing in the Home Rule Act affects the applicability of the Antideficiency Act to the District Government. B-324987, Jan. 30, 2014; D.C. Code § 1-206.03(e). Although the Home Rule Act grants the District Council and voters power to amend parts of the Home Rule Act, the provision concerning applicability of the Antideficiency Act to the District cannot be amended by the District. As we stated in 1995, the continuing application of the Antideficiency Act to the District "reflects Congress' decision . . . to expressly limit District spending to amounts Congress appropriates." B-262069, Aug. 1, 1995.

It is also significant to note that exceptions to the Antideficiency Act are exceedingly rare and, if granted by Congress, such exceptions are explicitly stated. B-303961, Dec. 6, 2004; 42 U.S.C. § 2210(j) (allowing specified agencies to make particular contracts "without regard to" the Antideficiency Act). Congress has granted no such exception for the District. In fact, as noted above, in the Home Rule Act, Congress

confirmed the Antideficiency Act's continuing application to the District by stating that nothing in the Home Rule Act affects the applicability of the Antideficiency Act to the District Government.

3. Does the Antideficiency Act require an appropriation by Congress? If so, why?

Yes, the Antideficiency Act requires an appropriation by Congress. One of the arguments we considered in our January 2014 legal opinion was made by the Chairman of the Council who argued that:

> "[T]he purpose and text of the Antideficiency Act would be satisfied when the District Government enacts an annual appropriation pursuant to the Autonomy Act. This is evident by the text of the Antideficiency Act, which provides that obligations and expenditures must be consistent with an appropriation, but does not specifically state that it must be a *congressional* appropriation."

B-324987, at 10. As we stated in our legal opinion, we disagree. To hold otherwise would negate Congress's power of the purse and the text and purpose of the Antideficiency Act itself as interpreted by courts, including the Supreme Court, and GAO case law. The Constitution vests the power of the purse in Congress. The Antideficiency Act is the cornerstone of the fiscal statutes enacted by Congress to implement its power of the purse. It is a basic tenet of the Constitution that only Congress has the power to make laws: "All legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. Therefore, only Congress, and not the District Council, has the power to enact laws that make appropriations. Indeed, the Constitution vests in Congress legislative power over the District. U.S. Const art. I, § 8, cl. 17 (vesting in Congress power to "exercise exclusive Legislation in all Cases whatsoever" over the District). Under the statutory framework that Congress has established pursuant to its constitutional authority, only acts of Congress, not acts by the Council or by officers or employees of the District Government or the federal government, make amounts available for obligation and expenditure. The applicability of the Antideficiency Act to the District, both by its very terms and by the terms of the Home Rule Act, "reflects Congress' decision . . . to expressly limit District spending to amounts *Congress* appropriates." B-262069 (emphasis added).

4. What role does GAO have in appropriations law?

a. Do agencies and courts generally give deference to or find persuasive GAO opinions on appropriations laws?

b. What is GAO's role specifically as it relates to the Antideficiency Act?

c. Do agencies and courts generally give deference to or find persuasive GAO's opinions on Antideficiency Act violations?

GAO has the statutory authority to issue legal opinions regarding the Antideficiency Act and whether the Act was violated. *See* 31 U.S.C. § 712. GAO's decisions and opinions are rooted in prior decisions issued by this agency and its predecessors, dating back over a century and have been followed by Congress, federal agencies and the District. Although GAO's decisions do not bind the courts, judges often recognize GAO's expertise in this area and adopt the reasoning of our body of case law. *E.g. United States Department of the Navy v. Federal Labor Relations Authority*, 665 F.3d 1339, 1349 (D.C. Cir. 2012) (the court recognized "the assessment of the GAO and thus, the Comptroller General as an expert opinion, which we should prudently consider but to which we have no obligation to defer" (internal quotation marks omitted)); *Star-Glo Associates v. United States*, 414 F.3d 1349, 1354 (Fed. Cir. 2005) ("[i]n considering the effect of appropriations language both the Supreme Court and this court have recognized that the [GAO] publication, *Principles of Federal Appropriations Law* . . . provides significant guidance"); *Thompson v. Cherokee Nation*, 334 F.3d 1075, 1084 (Fed. Cir. 2003) (GAO's opinions and its *Principles of Federal Appropriations Law*, "while not binding, are expert opinions, which we should prudently consider" (internal quotation marks omitted)). Indeed, GAO's appropriations case law and publications have been cited and relied upon by numerous tribunals at the trial and appellate levels, including the U.S. Supreme Court. *E.g. Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181, 2189 (2012) (citing GAO's *Principles of Federal Appropriations Law* regarding availability of payments to contractors); *Hercules v. United States*, 516 U.S. 417, 426 (1996) (noting with approval the rule from GAO's appropriations case law that open-ended indemnity agreements are invalid); *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (noting agreement with GAO that agencies may allocate lump-sum appropriations as they see fit).

Similarly, agencies throughout the federal government rely on GAO precedent as they make the determinations necessary to lawfully execute their budgets. *See, e.g.*, GAO, *Antideficiency Act Reports: Fiscal year 2012* (Washington, D.C.: Dec. 2012), at 1, *available at* www.gao.gov/products/D03741 (after a GAO decision concluded that the Securities and Exchange Commission failed to properly record its lease obligations, the agency adjusted its financial records, reported an Antideficiency Act violation, amended its Administrative Control of Funds policy, and authorized the General Services Administration to perform all future new lease acquisitions for the agency's office space needs). Indeed the District government has also requested and relied upon GAO's interpretations of appropriations law. B-318426, Nov. 2, 2009; B-302230, Dec. 30, 2003.

Agencies must investigate and report Antideficiency Act violations to the President and Congress and provide copies to the Comptroller General. 31 U.S.C. § 1351. Where GAO has found an Antideficiency Act violation, an agency must report the violation even if it disagrees with GAO; it must report the violation and can state its disagreement.[3] If GAO concludes there is an Antideficiency Act violation but the agency involved does not report the violation in a reasonable period of time, GAO will report the violation to Congress. *See, e.g.*, B-308715, Nov. 13, 2007. The Antideficiency Act provides for administrative discipline, including suspension from duty without pay or removal from office. 31 U.S.C. § 1349. Typically, agencies decide the appropriate administrative discipline and report such discipline to the Congress and the President as required by the Antideficiency Act. The Act also provides for criminal penalties of up to $5000 or imprisonment up to 2 years or both for officers or employees of the federal government or the District government if the violation is knowing and willful. 31 U.S.C. § 1350. The Department of Justice decides whether to prosecute.

In addition to the actions that agencies and the Department of Justice may take to enforce the Antideficiency Act, Congress uses its oversight and appropriations power to investigate and respond to violations of the Act. Though GAO has no direct role in enforcing the Antideficiency Act, the Congress and its members request GAO legal opinions as they carry out their constitutional powers, and Congress may choose to take action in response to GAO's opinions. For example, after GAO concluded that one agency violated the Antideficiency Act, Congress subsequently reduced its appropriations by about 33 percent.[4] In another instance, after GAO concluded that the Department of Defense violated a statutory notification requirement and the Antideficiency Act, the House of Representatives subsequently voted 249-163 to condemn and disapprove of the Department's actions.[5]

5. What impact, if any, does the Superior Court of the District of Columbia's decision in the *Council v. Dewitt* litigation have on GAO's view of the conflict between the Local Budget Autonomy Act and the Antideficiency Act?

---

[3] OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, pt. 4, § 145.8 (2015).

[4] GAO concluded that the Office of Science and Technology Policy (OSTP) violated the Antideficiency Act when it improperly used its appropriations for bilateral engagements with China. B-321982, Oct. 11, 2011. The explanatory statement accompanying the fiscal year 2012 OSTP appropriation expressed concern for OSTP's actions, while the act appropriated $4.5 million for fiscal year 2012, a reduction from $6.66 million for fiscal year 2011. Pub. L. No. 112-55, div. B, title III, 125 Stat. 552, 622 (Nov. 18, 2011); H.R. Rep. No. 112-284, at 251 (Nov. 14, 2011); *see also* Pub. L. No. 112-10, § 1316, 125 Stat. 38, 120 (Apr. 15, 2011).

[5] B-326013, Aug. 21, 2014; H.R. Res. 644, 113th Cong. (2014).

As stated in our testimony, we are aware of the litigation addressing the Budget Autonomy Act since we issued our legal opinion, and we have studied the Superior Court's ruling in this matter. Our regular practice when rendering opinions is to contact relevant agencies and officials to obtain their legal views on the subject of the request.[6] Accordingly, as we developed our opinion in this matter we contacted the Chairman of the Council of the District of Columbia, the Mayor of the District of Columbia, and the Attorney General of the District of Columbia. All provided a thorough discussion of their views. Therefore, as we developed our opinion we considered the same arguments and theories as the Superior Court did in this matter. We believe that the analysis and conclusions in our opinion are consistent with Congress's constitutional power to legislate over the District and with the laws that Congress has enacted pursuant to that authority. We maintain our view that the District remains bound by the requirements of the Antideficiency Act and the Budget and Accounting Act.

6. In GAO's legal opinion on the Local Budget Autonomy Act, the Chairman of the Council of the District of Columbia asserted that the "general fund" provided for in Sec. 450 of the Home Rule Act constituted a permanent appropriation; an interpretation rejected by the GAO. Please explain why the "general fund" as described in Sec. 450 is not intended to be a permanent appropriation?

Congress did not make a permanent appropriation when it created the District's General Fund. By law, the making of an appropriation must be expressly stated. 31 U.S.C. § 1301(d). An appropriation cannot be inferred or made by implication. *See* 50 Comp. Gen. 863 (1971). For example, regular annual and supplemental appropriation acts are required by law to bear the title "An Act making appropriations . . . .". 1 U.S.C. § 105. Indeed, the annual appropriation that Congress makes for the District not only appears in an act bearing this title but also states that "[l]ocal funds *are appropriated* for the District of Columbia for the current fiscal year out of the General Fund of the District of Columbia." Financial Services and General Government Appropriations Act, 2016, Pub. L. No. 114-113, div. E, title IV, 129 Stat. 2242, 2423, 2447 (Dec. 18, 2015) (emphasis added). The Chairman of the Council asserts that the District Charter established a permanent appropriation because it provided that District monies "belong to the District government." B-324987, at 9; D.C. Code § 1-204.50. However, unlike the language that appropriates money for the District each year, this language is not the express statement of appropriation that is necessary under 31 U.S.C. § 1301(d).

---

[6] GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), *available at* www.gao.gov/products/GAO-06-1064SP.

Alternatively, a federal statute also makes an appropriation if it (1) authorizes the collection of fees, and (2) makes the fees available for expenditure for a specified purpose. Such statutes constitute continuing or permanent appropriations; that is, the money is available for obligation or expenditure without further action by Congress. B-228777, Aug. 26, 1988; B-197118, Jan. 14, 1980. The Chairman of the Council asserted that the Home Rule Act created such a permanent appropriation when it established the District's General Fund. We disagree. Though the Home Rule Act requires that the District Government deposit funds, it does not authorize their obligation and expenditure and, therefore, manifests no congressional intent to make these amounts available for obligation or expenditure without further congressional action. Indeed, section 446 of the Home Rule Act was titled "Enactment of appropriations *by Congress*" and expressly provided that "[n]o amount may be obligated or expended by any officer or employee of the District of Columbia government unless such amount has been approved by Act of Congress, and then only according to such Act." Pub. L. No. 93-198, § 446, 87 Stat. 774, 801 (Dec. 24, 1973) (emphasis added). Congress could not have intended to provide a permanent appropriation to the District in the Home Rule Act where, in the very same act, it provided that funds would be available only with the approval of an act of Congress.

We trust that this is responsive to your request. If you have any questions, please contact me at (202) 512-2853 or Julia C. Matta, Assistant General Counsel for Appropriations Law, at (202) 512-4023.

Sincerely yours,

Edda Emmanuelli Perez
Managing Associate General Counsel

○