

Before the Council of the District of Columbia
Committee of the Whole, Committee on the Judiciary, and
Subcommittee on Labor, Voting Rights and Redistricting
Tuesday, October 9, 2001

Testimony of
THE COURTS, LAWYERS, AND ADMINISTRATION OF JUSTICE SECTION
of the District of Columbia Bar
in Opposition to
PR 14-34, "Sense of the Council Regarding the Establishment of an Attorney General for the
District of Columbia Resolution of 2001" and
Bill 14-22 "Local Selection of Judges Charter Amendment Act of 2001"

SUMMARY

The Courts, Lawyers, and Administration of Justice Section of the District of Columbia Bar, as the name implies, is concerned with matters that affect our courts, our lawyers, and the administration of our system of justice. Please note that the views expressed herein represent only those of the Courts, Lawyers and Administration of Justice Section of the District of Columbia Bar and not those of the District of Columbia Bar or its Board of Governors.

Given our focus, the Council of the District of Columbia, through Chairman Cropp and Councilmembers Patterson and Mendelson, has understandably solicited the Section's views about two pending legislative proposals of great public importance. The first proposal—PR 14-34—concerns the local election of an Attorney General for the District of Columbia and the consequent transfer of prosecutorial authority for local offenses to a newly-proposed Office of the Attorney General. The second proposal—Bill 14-22—concerns, among other things, the local selection of judges of the District of Columbia Courts by the Mayor with the consent of the Council, rather than by the President with the advice and consent of the Senate.

Based solely on our assessment of these proposals' implications for the quality of the courts, lawyering, and the administration of justice in the District of Columbia, the Courts, Lawyers, and Administration of Justice Section of the District of Columbia Bar cannot support either pending proposal.

With respect to the proposal to transfer local prosecutorial authority from the United States Attorney's Office for the District of Columbia to a newly-constituted Office of the Attorney General, we do not believe that the Council has identified deficiencies in the quality of prosecutions currently maintained by the United States Attorney's Office that would be improved by the proposed changes. To the contrary, the Section firmly believes that the quality of criminal justice in the District of Columbia would be appreciably degraded by the proposed transfer of prosecutorial authority.

With respect to the proposal to change the process for selecting local judges, the Section likewise sees insufficient reason for making any changes purely from the vantage point of the impact on the quality of the courts and the administration of justice. We know of no state court bench of like caliber. Like the bench and the Judicial Nomination Commission, we are persuaded that the way we pick our local judges is at least partly responsible.

In taking these positions, we subscribe to the wise old saw: "If it ain't broke, don't fix it." In the District of Columbia we are blessed with a superior criminal justice system and an unparalleled local judiciary. Plainly, neither is broken. In the absence of convincing evidence that these proposals will improve either, and particularly where there is reason to believe that the changes would impair the quality of our criminal justice system and our local judiciary, we respectfully cannot support either proposed change.

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The Courts, Lawyers, and Administration of Justice Section of the District of Columbia Bar, as its name implies, is concerned with matters that affect our courts, our lawyers and the administration of our system of justice here in the District of Columbia. Consistent with that mission, for example, we follow with great interest and routinely comment upon proposed changes to court rules in both our local and federal courts. Please note that the views expressed herein represent only those of the Courts, Lawyers and Administration of Justice Section of the District of Columbia Bar and not those of the District of Columbia Bar or its Board of Governors.

Given our focus, the Council of the District of Columbia, through Chairman Cropp and Councilmembers Patterson and Mendelson, has solicited the Sections's views about two pending legislative proposals of great public importance. The first proposal—PR 14-34—concerns the local election of an Attorney General for the District of Columbia and the consequent transfer of prosecutorial authority for local offenses to the Office of the Attorney General. The second proposal—Bill 14-22—concerns, among other things, the

local selection of judges of the District of Columbia Courts by the Mayor with the consent of the Council.

Our membership is diverse and claims representation from all along the broad spectrum of the Bar's membership. Predictably, the views of our members on the matters touched by these proposals are equally varied and diverse. For that reason, we initially struggled with the decision whether to offer our views in light of the perceived difficulty of saying authoritatively what "our" views are. In the end, we came to recognize what the Council has recognized all along: that the views of the Bar Section principally concerned with the quality of justice in the District of Columbia ought to be heard on matters so seminally related to its mission. And in so doing we further recognized that, by focusing our commentary exclusively on the area of our principle concern and expertise—namely, the quality of justice in the District of Columbia—we could weigh in without doing violence to the divergent views of our membership.

From the perspective of their impact on the quality of the administration of justice in the District of Columbia, the Courts, Lawyers, and Administration of Justice Section cannot support either pending proposal. To the extent that there are divergent views among the members of our Section, those views are principally animated by the political issue of Home Rule and the salutary benefits that passage of the proposed legislation may be perceived to have on that important concern—views that have been ably articulated by our sister Bar Section, the District of Columbia Affairs Section of the District of Columbia Bar. And given its focus, it seems entirely appropriate for the D.C. Affairs Section to express its views about these proposals through the prism of Home Rule. For our part, however, as we have explained, our commentary will be limited to this Section's views about the impact that the proposed legislation would have

on the quality of the courts, the lawyering, and, indeed, the quality of the administration of justice in the District of Columbia. And from this perspective, we believe that there will be little quarrel among our members.

The Courts, Lawyers, and Administration of Justice Section cannot say with confidence that the quality of justice would be improved by passage of the proposed legislation to create a local Office of the Attorney General responsible for prosecuting all local crimes, including, among other things, homicides, sex offenses, narcotics offenses, and local public corruption. Indeed, we believe that the quality of justice in the District of Columbia would be damaged by such a sweeping and dramatic change at this time.

From where we sit, we can see no substantive benefit to the quality of our criminal justice system from a transfer of local prosecutorial authority from the United States Attorney's Office to a District of Columbia Attorney General's Office. Nor have any such benefits been articulated. For instance, PR 14-34 is curiously devoid of any legislative findings that local prosecutions conducted by the United States Attorney's Office have been deficient or that the proposed legislation is likely to improve the quality of local prosecutions. Given the critical importance to the citizens of the District of Columbia of public safety and the surefooted investigation and prosecution of crime, it is unimaginable that a change so sweeping would be considered without primary regard to the impact of such a change on the quality of criminal prosecutions in the District. In the absence of evidence that the current system is deficient and, additionally, that the proposed changes would improve upon any such deficiencies, we do not believe that a change is prudent. Any perceived political victory would be a pyrrhic one were it to come at the expense of the public safety.

Here, then, is the heart of the issue: Would public safety and the quality of the criminal justice system in the District of Columbia suffer if authority for prosecuting local offenses were transferred from the United States Attorney's Office to a newly-created local Attorney General's Office? Without qualification or hesitation, we say: Yes. Our abiding conviction in that answer follows from two related points: first, the unparalleled caliber of the United States Attorney's Office for the District of Columbia, and second, the improbability that a local Attorney General's Office could ever replicate that caliber, let alone in the near term.

For our part, we do not believe that the current system of local criminal prosecution is deficient—far from it. To the contrary, we believe that the quality of local prosecutions is extremely high in this jurisdiction precisely because the authority for maintaining those prosecutions rests with the United States Attorney for the District of Columbia. The superior resources of that Office (including, among many other things, its routine ability to tap federal law enforcement assistance in support of local efforts) and its superior personnel and results are unmatched by any local District Attorney's Office across the country. Indeed, our United States Attorney's Office is consistently considered by the Department of Justice to be among the very best in the nation. The very opposite of deficient, it is hard to imagine a system as swift, as sure, or as fair as that which has protected our fellow citizens these many years.

The quality of local prosecutions conducted by the United States Attorney's Office for the District of Columbia sets the bar for any successor very high—and surely far too high for a local Attorney General's Office to meet. Since we are currently engaged in public discourse on matters that strike at the very heart of the safety and security of our citizens, we will pull no punches. The issues are too important not to be fully ventilated: We have a glimpse of a future

in which criminal prosecutions are conducted locally, and not by the United States Attorney's Office. Locally controlled, the Office of Corporation Counsel—the performance of which was criticized in a December 2000 report by the D.C. Applesseed Center—does not favorably compare with the United States Attorney's Office in terms of resources or results. The United States Attorney's Office in the nation's Capital attracts the best and brightest applicants from across the country. Assistant Corporation Counsel want to become Assistant United States Attorneys; not the other way around. There is little reason to believe that an experiment by another name will yield appreciably better results. It would be ironic, indeed, to localize the prosecution of homicides, rapes, robberies and all other criminal offenses at the very time when the ability of the Public Defender Service to attract and retain top-notch personnel has been demonstrably improved by its federalization. We believe that any fairminded investigation will compel the conclusion that the quality of criminal justice and public safety would appreciably suffer should this proposal become law.

We have earlier alluded to the absence of any derogatory findings about the quality of local prosecutions by the United States Attorney's Office. We do note, however, that the Council did articulate two justifications, unrelated to the quality of local prosecutions, for the proposed transfer of prosecutorial authority to a locally elected Attorney General. First, the resolution accompanying the bill expresses the Council's sense that such a transfer “will result in a more responsive and accountable local prosecutorial authority.” Second, the proposed legislation's statement of purpose suggests that the transfer be undertaken to “relieve the federal government of the burden of [] essentially local District responsibilities.” We are unpersuaded by either rationale for a change.

By contending that responsiveness and accountability would be enhanced were authority for prosecuting all local offenses to be transferred to a District of Columbia Attorney General, the Council implies that the United States Attorney has not been responsive to local concerns. Again, from where we sit, that does not appear to be the case. The truly dual nature of the United States Attorney's Office—as both local and federal prosecutor—cannot be questioned. Nor does that dual nature operate to the detriment of this great city or its citizens. Anyone who has ever enjoyed the privilege of serving the people of this city through his or her work at the United States Attorney's Office will speak with reverence of the spirit of, and commitment to, community service. No less a personage than FBI Director Bob Mueller, who himself left a lucrative partnership in private law practice for a line prosecutor's job some six years ago, not to try federal cases, but to prosecute homicides on behalf of the people of this city, demonstrates the kind of commitment to the just and sure enforcement of our local criminal laws embodied by our Assistant United States Attorneys. And one need only look at the scheduling book of former United States Attorney Wilma Lewis (who spent countless days and nights meeting with community groups)—let alone the scores of Community Prosecutors who regularly meet with and hear from citizen groups—to feel sure of the responsiveness and accountability of the United States Attorney's Office to the people, if not the politicians, of the District of Columbia.

The second point—that taking responsibility for prosecuting local offenses from the United States Attorney's Office will relieve the federal government of a substantial burden—similarly fails to justify passing the proposed legislation. As far as we know, the federal government has not asked to be unburdened of that responsibility. Once again, to our way of thinking, the polestar for any decision to transfer the authority to prosecute local crimes

should be the quality of justice in the District of Columbia; relief of a burden never begrudged cannot eclipse this paramount obligation to the people of this city and their safety.

Finally, the Council's apparent belief that a seamless transition of prosecutorial authority would occur should this proposal be enacted appears to be premised on the assumption that current Assistants United States Attorney would transfer happily from the United States Attorney's Office, where they work for the President of the United States and his Department of Justice, to the equivalent of a municipal District Attorney's Office. If past history is to be any judge, confidence in that assumption is misplaced. A primary reason that the United States Attorney's Office for the District of Columbia attracts the best and the brightest applicants from across the nation—Supreme Court clerks, Chiefs from other United States Attorney's Offices, law firm partners, and star local prosecutors from other jurisdictions—is because of the unique status as local District Attorney and federal prosecutor shared by no other prosecutor's office (local or federal) in the country. This dual status, and the excellence it engenders, is a blessing, not a curse. But just as surely as that status has attracted the best, elimination of that dual status will have inverse implications on the quality of any successor office prosecuting local criminal offenses. Assistant United States Attorneys, with impressive records and myriad professional options, will not be forced into an office that they did not choose. And that means much of the talent we have amassed in this jurisdiction will be lost. Make no mistake about it, in the event this proposal is enacted into law, the damage to the quality of local criminal prosecutions will be substantial and felt by the people of the District of Columbia for a very long time.

There is a far simpler way of articulating our view about PR 14-34: "If it ain't broke, don't fix it." One of the things that seems to work very well in our city is the quality of our

system of criminal justice. By virtue of our unique status, we are blessed with both the nation's finest prosecutors and defense attorneys. The system isn't broken, so let's not try to fix it—particularly with a system far less likely to work as well. We are talking about nothing short of public safety and the quality of justice, and that's something on which no price should be put.

As with our comments about PR 14-34, our view of Bill 14-22—specifically, the portions concerning proposed changes to selection of local judges—focuses exclusively on the implications for the quality of the courts and the administration of justice in the District of Columbia. From that perspective, the Courts, Lawyers, and Administration of Justice Section of the District of Columbia Bar sees no deficiency in the current process by which local judges are identified for selection and appointed. To the contrary, we believe that the caliber of the judges on our Superior Court and Court of Appeals is among the very best in state courthouses across the nation. We further believe that the mode of their selection and their status as Article I judges under the United States Constitution has appreciably contributed to the excellence of our bench.

Any system of judicial selection principally concerned with the quality of justice must be measured by its accomplishment of two crucial goals: promoting judicial independence and selecting judges of the highest caliber. By that measure, our current system is a great success. Common sense suggests what our conversations with judges, members of the Judicial Nomination Commission, and others confirm: that the current mode of selection attracts superior candidates and depoliticizes judicial nominations and appointments.

An independent judiciary insulated from politics and current passions has been

recognized from the founding of our Country as pivotal to promoting the fairness and integrity of the judicial process and to safeguarding individual liberties. Of equal importance to the actual independence of the judiciary is the *appearance* of an independent judiciary. Both goals are served by a system that depoliticizes the selection of judges and elevates merit over cronyism and political favor. Our current judicial selection system succeeds at doing this by means of a balanced and locally dominated Judicial Nomination Commission, which generates three potential nominees for the President's final consideration for appointment, with the advice and consent of the United States Senate. The President's choice, therefore, is constrained by the Commission, as the President selects from the list of three nominees the Commission has deemed worthy of appointment in the first instance. The Commission is widely regarded as the key element in the quality of our local bench.

Proposed changes to the composition of the Judicial Nomination Commission, as well as other parts of the judicial appointment process, threaten to undermine the apolitical nature of the Commission and, consequently, the public perception about the independence of the judges that would be appointed through that process. Currently, the Mayor and Council appoint three of the seven members on the Judicial Nomination Commission—a minority. Two additional members are supplied by the District of Columbia Bar; one by the President of the United States; and one by the Chief Judge of the United States District Court for the District of Columbia. The proposal to convert the President's one representative to the Judicial Nomination Commission to an additional member selected by the Council would mean that the representatives of the local political branches would dominate the Commission. In addition, the current proposal seeks to deprive the local judiciary of its status as an Article I court by divesting the appointment power

of the President in favor of the Mayor, with the advice and consent of the Council.

Together, these changes create a risk of cronyism that our current judicial selection process has so far successfully avoided. The proposed changes increase the possibility that the candidates ultimately forwarded to the Mayor and Council for appointment will be the very ones preselected by the same Mayor and Council through their majority representation on the Judicial Nomination Commission. Such preselection is not feasible under the current system because the President—who is constrained to select a nominee from the Commission’s list of three—selects only one of the seven members of the Judicial Nomination Commission. Because the Mayor and Council could conceivably preselect their favorites for appointment through whatever political “horse-trading” is necessary, whether that actually happens or not will hardly matter. Once it is possible to select judges based on the local political climate, rather than on the basis of judgment, intellect, compassion, and temperament, it is only a matter of time before people start believing that is precisely how judicial selections *are* being made. And when that happens, the critical perception of an independent judiciary free from politics is lost. In any case, regardless of the composition of the Commission, our local judges are currently insulated to some extent from potential political pressures from elected officials because of the inherent distance between the President and Senate, on the one hand, and the day-to-day decision making of the local bench. This buffer, we believe, would likely be reduced if judges owed their appointments to the locally-elected Mayor and Council.

The current system also has the breadth and quality of applicants it attracts to recommend it. The Article I status of the local courts—and the presidential appointment of their judges—lends a prestige and preeminence to the local court system unmatched in any state court

system. Undeniably, this status attracts applicants of a superior caliber. It goes without saying that with a broad array of highly capable applicants for the Judicial Nomination Commission to choose from, the quality of judicial nominations is appreciably elevated.

The current process suffers from no want of local influence; indeed, it is rightfully dominated by local members. Local appointees to the Commission—selected by the Mayor, the Council, and the D.C. Bar—enjoy a substantial majority. And it is that locally selected majority that circumscribes the President’s choice. Because the current selection process has created a judiciary that would be the envy of any state, and because there is a danger that public faith in the independence of the court system would be undermined by an increased role for partisan politics in judicial selections, we respectfully hope the Council will resist the temptation to “fix” a system of judicial selection that so assuredly is not broken. In sum, the Courts, Lawyers, and Administration of Justice Section of the District of Columbia Bar cannot support Bill 14-22 because we believe it would enhance neither the courts nor the administration of justice in the District of Columbia, but rather, would run a significant risk of diminishing the quality of both.