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.

The Washington Post, October 26, 2012

An unlawful proposal for D.C. budget autonomy

By Wayne C. Witkowski and Leonard H. Becker, Published: October 26

The D.C. Council is moving forward with a proposal to use the referendum process to give the District autonomy over its local budget — that is, the approximately $6 billion a year that the District raises in local taxes — and thereby enable it to avoid the need to wait for congressional action as part of the often-delayed federal budget process. But this raises one big question: Can the referendum process lawfully be employed in this way to reduce the role of Congress under the Home Rule Act?

At the outset, let us state that we strongly believe that, after almost four decades of home rule, the District should be able to enact its budget for local revenue without having to get approval from Congress. Section 446 of the D.C. Charter (part of the Home Rule Act) is obsolete in this respect. Unfortunately, only an act of Congress can cure this defect.

Under the Constitution, Congress has the exclusive authority to legislate for the District. The Home Rule Act is the product of Congress's exercise of that authority, and what Congress has given, Congress can limit or even take away. To advance the discussion on this important issue, we want to state firmly the Home Rule Act does not permit a referendum on budget autonomy. The only way the charter can be amended as proposed is through an act of Congress.

To understand why, one has to look closely at the pertinent provisions of the Home Rule Act, so bear with us as we walk through the law. Section 303 of the act specifies that it may not be used "under the limitations of sections 601, 602, and 603." Those sections are titled "Reservation of Congressional Authority," and Section 603(a) states: "Nothing in this Act shall be construed as making any change in existing law, regulation, or basic procedure and practice" regarding "the preparation, review, submission, examination, authorization and appropriation of the total budget of the District of Columbia government." When the Home Rule Act was enacted, existing law, procedure and practice required the District's total budget to be approved by Congress, and the language of the act leaves little doubt that Congress intended to prevent the District from using Section 303 to eliminate this authority — including over the portion of the D.C. budget based on local revenue.

Essentially, the District is seeking to replace affirmative congressional review of its local budget (meaning that Congress must act to pass legislation approving the budget) with passive review (meaning the local budget becomes law unless Congress takes action to disapprove it). But Congress understood

that overturning D.C. Council legislation under passive review — entailing diverting Congress from pressing national issues, expending scarce legislative time and resources to educate members about D.C. matters, winning majorities in both houses of Congress and obtaining the president's sign-on — is a cumbersome process. Indeed, Congress has rarely overturned council legislation during the almost four decades of home rule. It is absurd to think that Congress gave the District the power to make its budget acts subject only to passive review, especially when such a change itself would be subject only to passive review.

Besides Section 603(a), Congress made its primary role in enacting the District's budget triply sure. Section 303 also adds the limitation in Section 603(e) declaring the continued applicability to the District of the federal Anti-Deficiency Act, which requires that expenditures of the federal and the D.C. governments not exceed the amounts as appropriated by Congress. Section 303 further adds the limitation in Section 602(a)(3), which prohibits the council from amending any act of Congress, such as the Anti-Deficiency Act, that concerns the functions of the United States. It's 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.

Finally, among the legal risks of the current proposal is the prospect that the District will be sued and that the courts will rule this use of Section 303 to be unlawful. Unfortunately, if the District inflicts such an injury on itself, the cause of getting Congress to approve D.C. budget autonomy — the proper method to accomplish this — may be set back many years as members bristle at this attempt to circumvent their authority. Even if no suit is brought, D.C. government personnel who obligate and spend locally raised revenue will be in the untenable position of risking prosecution under the Anti-Deficiency Act — a strict liability statute that, under the Supremacy Clause of the U.S. Constitution, would preempt the proposed charter amendment.

It is simply unfair to place the District's employees in the position of choosing possible insubordination if they refuse to obligate or spend District funds, on the one hand, and prosecution under the Anti-Deficiency Act if they obligate or spend funds, on the other.

Wayne Witkowski is a former deputy attorney general for the Legal Counsel Division in the D.C. attorney general's office. Leonard Becker served as general counsel to Mayor Anthony A. Williams from 2003 through 2006.

Resume of Irvin B. Nathan

Irv Nathan is a former Attorney General of the District of Columbia (2011-2014), former General Counsel of the United States House of Representatives (2007-2010) and former Principal Associate Deputy Attorney General of the U.S. Department of Justice (1993-94). He is currently senior counsel to the Washington law firm of Arnold & Porter, where he started his legal career in 1968. As a litigation partner of the firm (1976-79, 1981-1993, 1994-2007), he was chair of the White Collar Defense practice group and handled complex commercial litigation, including securities fraud, antitrust , banking and accounting matters in federal and state courts. He is a Fellow of the American College of Trial Lawyers and currently serves as President of the Council for Court Excellence, a non-profit organization dedicated to improving the administration of justice in the District of Columbia.

As General Counsel of the House, appointed by Speaker Pelosi, he was responsible for providing legal advice to the leadership and Members of the House and for handling litigation where the official interests of the House, its members or officers were implicated. This included the landmark suit against the Bush White House establishing that senior White House officials are not immune from House subpoenas.

Irv was appointed by the Chief Judge of the District of Columbia Court of Appeals to the D.C. Board of Professional Responsibility (2004-08) and served as the Vice Chair of the Board in the last two years of his tenure. He had previously served as a hearing examiner for the Board and prior to that served as the Chair of the Ethics Committee of the D.C. Bar. He has also served for a number of years as an adjunct professor of law at the Georgetown University Law Center, teaching courses in ethics, litigation practice, and local D.C. law. He has also been a visiting professor at the Hebrew University Law School and the University of San Diego Law School and has taught classes at Howard Law School, GW Law School and American Law School.

Irv was graduated magna cum laude from Columbia Law School in 1967, where he served on the law review and received the Jerome Michael Trial Advocacy Award. He received his undergraduate degree from Johns Hopkins University in 1964, where he was elected to Phi Beta Kappa. He began his legal career as a law clerk to the Honorable Simon E. Sobeloff of the U.S. Court of Appeals for the Fourth Circuit.

Committee on Oversight and Government Reform
Witness Disclosure Requirement – "Truth in Testimony"
Required by House Rule XI, Clause 2(g)(5)

Name: Irvin Nathan

1. Please list any federal grants or contracts (including subgrants or subcontracts) you have received since October 1, 2012. Include the source and amount of each grant or contract.

NONE

2. Please list any entity you are testifying on behalf of and briefly describe your relationship with these entities.

N/A

3. Please list any federal grants or contracts (including subgrants or subcontracts) received since October 1, 2012, by the entity(ies) you listed above. Include the source and amount of each grant or contract.

N/A

I certify that the above information is true and correct.

Signature: [signature]

Date: 5/13/16