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Before the

Committee on the Judiciary and Public Safety
Tommy Wells, Chairperson

Bill 20-134, the Elected Attorney General Implementation and Legal Service Establishment Amendment Act of 2013

Office of the Attorney General
for the District of Columbia

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Introduction and Overview

Good morning Chairman Wells, Councilmembers, and staff. I am Irv Nathan, Attorney General for the District of Columbia. On behalf of the Executive Branch, I am pleased to testify today in support of Bill 20-134, the "Elected Attorney General Implementation and Legal Service Establishment Amendment Act of 2013."

The administration is proposing a package of reforms to allow the District to implement effectively the 2010 choice of the Council (subsequently ratified in a referendum by the voters) to create an elected District of Columbia Attorney General. For the first time in the long history of the District of Columbia, an elected Attorney General will, by law, take office in January 2015.[1] As a result of the 2010 legislation, the District will move from its long-standing unitary executive model, tracking the federal model, under which the Attorney General is appointed by the Mayor, and will join the 43 states that have a divided executive. These states have an elected Chief Executive *and* an elected Attorney General, neither subordinate to the other, and both serving in the executive branch.

Our goal in proposing this legislation is to implement faithfully the Council's and voters' choice to create a divided executive in the District in a way

[1] *See* District of Columbia Clarification and Elected Term Amendment Act of 2009 (the "Elected AG Act"),Title I, effective May 27, 2010, D.C. Law 18-160, D.C. Official Code § 1-301.81 *et seq.* (2011 Supp.); and Title II, section 435 of the District of Columbia Home Rule Act, as added May 30, 2011, D.C. Law 18-160A, D.C. Official Code § 1-204.35 (2011 Supp.).

that will allow both the elected Attorney General's office and the Mayor's office to function well over the long term in the best interests of our residents. Since my January 2011 appointment as Attorney General, I have made clear publicly to this Committee and others that our office places a high priority on ensuring a transition that maximizes the likelihood of success for the divided executive branch in 2015 and well beyond.

To do so, I assembled an Office of the Attorney General ("OAG") Task Force that worked for many months on this issue. At my request, the Task Force reviewed the history of the District's OAG (called the Office of the Corporation Counsel until 2004), and consulted with the National Association of Attorneys General, former state Attorneys General, other state officials, and national experts such as the Columbia Law School State Attorneys General Program. The Task Force also researched the organizational structures in place in the states with a similarly divided executive, and conferred informally with numerous judges, representative stakeholders, the agency general counsels, and the OAG lawyer and staff unions. My Senior Counsel Ariel Levinson-Waldman chaired the Task Force, and he is here with me today. Following the Task Force's review and analysis, it produced a unanimous set of recommendations. Based on these recommendations, and the Task Force's Report, I concluded and recommended to the Mayor that a divided executive branch can work in the District, as it has in

many states, but that several significant reforms to the structure of the OAG are warranted to help ensure a successful transition to its new status. The Mayor reviewed and adopted our policy recommendations, which are set forth in the legislation that is before the Committee today.

Over the course of our analysis, we identified several bedrock principles that we believe should guide the needed reforms. We should strive to minimize the potential for conflict between the two elected officials within the divided executive – the Mayor and the Attorney General. In addition, any changes should ensure that, consistent with the electorate's understanding in voting on this measure, the Attorney General controls the District's litigation in the courts and remains as the District's chief legal officer. The Attorney General should retain the ability to provide formal legal opinions that control all agencies in the District absent a judicial ruling to the contrary. At the same time, the Mayor should retain control over and accountability to the electorate for programmatic, budget and policy choices for the District government.

Our bill proposes three key changes to further these principles, while maintaining to the maximum degree the stability of the OAG when it comes to litigation and formal advice-giving. Our bill transfers the subordinate agency counsels to the control of their agency heads appointed by the Mayor, thereby allowing these lawyers to remain in the chief executive reporting line after the

elected Attorney General takes office. This change returns OAG to the federal paradigm, on which our Home rule legislation was based, where agency counsel report to federal agency heads. It is also consistent with the general rule established by a number of states, including New York, Florida, Colorado, New Mexico, Montana, Nebraska, Kansas, Kentucky, and Massachusetts, Pennsylvania, and others, that place their agency counsels within the control of the chief executive. Indeed, the latest state to go from an appointed to an elected Attorney General, Pennsylvania, adopted this approach in 1980, after studying the experience of the many other states with a divided executive, and has functioned with it for over three decades. This approach will help minimize potential conflicts between the Mayor and the elected Attorney General in the District over agenda, policies, or priorities, which could impact programs initiated by the Mayor and subordinate agency directors.

Let me make clear that I have no personal stake in this matter. I do not intend to run for the elected Attorney General position, and I do not plan to work for this or any other Mayor after 2014. I am here to deliver our best advice, after careful consideration and analysis, and the Mayor's conclusions on how to set up this office in a way that is best for the District, structurally in the long-term. As I will discuss further, in the long-term, the responsible assumption is that some future District of Columbia Attorneys General may well have political or personal

aspirations that generate conflict with the then-sitting Mayor. They will want to use this position as a stepping stone to become Mayor, and they may well see it in their interest to oppose the sitting Mayor while in the Attorney General position. In light of these considerations, the executive should be structured to maintain the Mayor's ability to establish policy for the District and to have control over matters for which he or she will be held accountable by the electorate. Agency General Counsels are management-side employees; they are currently at will-employees and will remain at-will employees as of 2015. If the Attorney General were to continue to hire, fire, compensate and supervise agency counsels, nothing would prevent the Attorney General from filling these positions with individuals with opinions and perspectives similar to the Attorney General's and in conflict with the Mayor's policy goals. In addition, the Attorney General could countermand the instructions of the agency heads to their general counsel, thereby impeding the Mayor's programs.

Historically, the appointed Attorney General has been an important part of the Mayor's team, and has worked cooperatively with it. After the new Attorney General is elected, the degree of the Attorney General's collaboration with the Mayor will be uncertain – the Mayor and Attorney General may or may not share information and may or may not have the same policy goals. Our structural choice with respect to the reporting lines of agency counsels should account for

this situation and include measures that ensure that agency counsels, through their agency directors, are accountable to the Mayor, just as the Mayor is accountable to the electorate.

To help ensure that this transfer works effectively, our bill provides that the agency counsel will have an independent legal office under the Mayor's authority. The agency directors will report on a day-to-day basis to their respective agency director, but they will also have a dotted-line type relationship to a newly established Mayor's Office of Legal Counsel ("MOLC"), which will coordinate their activities. The Mayor will appoint the Director, who would, with a small staff, provide substantive review and decision-making on interagency legal issues, and coordinate the hiring, training, compensation, and reviews of agency counsels by agency directors. By contrast, we recommend that all of the litigating and advice-giving attorneys currently within the OAG's divisions remain entirely with the OAG to ensure that we keep the core functions of the OAG under the elected Attorney General. Thus, other than the Child Support Services Division, which I will discuss next, every one of the OAG's ten divisions would remain within the OAG under en elected Attorney General in 2015 and going forward. This means that the city will continue to have a formidable law firm in the OAG.

Finally, we recommend that the Child Support Services Division ("CSSD"), be transferred as a discrete whole to the Department of Human Services. CSSD is a large division in the OAG, but it also has more policy and operational functions than traditional legal responsibilities. Its mission includes the establishment of paternity, the establishment and enforcement of support orders, and the collection of child support, and it has many more program staff than lawyers. This transfer will make the District more like the vast majority of the states, almost all of which house their CSSD outside of the state office of the attorney general.

1. The need to transfer agency General Counsels and create a new legal office within the Mayoral reporting line.

For virtually all of the 20th Century, before and after Home Rule, the governing law and practice in the District was for District executive agencies to hire and supervise their own in-house counsel to provide them with legal advice and transactional assistance independent of the Office of the Corporation Counsel. This has long been the norm in the federal government and in many of the states.[2]

Not until 2005 was the District's law and practice changed to require agency counsel to report to the Attorney General and to assign the hiring, payment and supervision of agency counsel to the appointed Attorney General. In 2005, the Council vested in the OAG control of the agencies' personnel and non-personnel

[2] *See, e.g.*, National Association of Attorneys General, *State Attorneys General: Powers and Responsibilities* (1990 ed.) at 52; *State Attorneys General: Powers and Responsibilities* (2008 ed.) at 60.

budgets as they applied to the agency counsel offices and staff.[3] In short, the current structure in the District is less than a decade old.

Since the 2005 Act, the structure of the OAG, with the subordinate executive agency General Counsels reporting to the Attorney General has largely been effective. A principal *reason* that it has been effective, however, is that the agency directors and the Attorney General report to a common ultimate authority – the Mayor. The agency General Counsel and their subordinates maintain relationships with both their respective directors and agencies on a day-to-day basis. From time to time they communicate with the Attorney General and my senior staff through an established reporting line, periodic reports, informal communications, and periodic meetings with the Attorney General and OAG leadership to discuss cross-agency legal issues.

If the law is left unchanged, the elected Attorney General would continue to direct, supervise, and control an important group of employees who, in our view, should remain under the authority of the Mayor: *i.e.*, subordinate agency counsel and their non-lawyer support staff. If these lawyers and staff remain in the elected Attorney General's office, the situation threatens to cause several significant problems.

[3] Legal Services Amendment Act of 2005, Effective Oct. 20. 2005. D.C. Law 16033, 52 DCR 7503.

First, the elected Attorney General can and will almost certainly have agenda and priorities different from – perhaps even inimical to – those of the Mayor and agency directors. It is important to remember that the choices the Council is making here must be well-designed for the long-term structural health of the District government. Let me be clear: it is my hope that the District's elected attorney general in 2015 and later will not make legal decisions for political or partisan reasons and will continue our office's consistent practice of independence and objective, unbiased legal analysis. But I urge you to legislate with a more cautious -- and realistic -- picture in mind of the future.

Many state attorneys general seek higher office after their tenure as attorney general, using their positions as political stepping stones. It is therefore no coincidence that the National Association of Attorneys General, or NAAG, is also called, only half-kiddingly, the National Association of Aspiring Governors. Many of the nation's current Governors are former state attorneys general and many current AGs aspire to higher office. Indeed, one only need to look at our neighbor in Virginia to see that an elected attorney general seeking to become the jurisdiction's elected Chief Executive may take steps to advance his or her policy and political agenda that can be inconsistent with the policy preferences of the Governor and his appointees. Thus, for example, Attorney General and announced candidate for Virginia Governor Ken Cucinelli recently sought to overrule an order

by the state board's Department of Health concerning women's health issues. And in recent years, the attorneys general in Kansas and Mississippi have gone so far as to *sue* their states' governors, while in South Carolina, then-Governor Mark Sanford sued the state's then-attorney general. I mention these examples to highlight that as we move towards a divided executive, we should be prepared for some possible, sometimes extreme, conflicts between these two elected executive branch officials.

The consequence of agency counsel being controlled by the elected Attorney General's office where the agencies where they are charged with advising every day are controlled by the Mayor could, in some situations, undermine or conflict with the agendas of the Mayor and agency directors. The Mayor and the agency directors and program staff s depend on their agency counsels for legal advice and support, including transactional assistance and administrative litigation. Likewise, it could also adversely impact agency counsel's ability to function effectively if they are expected to continue to advise their agency directors from an elected Attorney General's office. At the most extreme, professional ethics rules would preclude agency counsel from representing the Mayor or agency directors and reporting to the Attorney General when their interests are adverse.[4]

[4] *See* D.C. Bar Rules of Professional Conduct Rule 1.7.

Further, even without any overt conflict or any bad faith, an elected Attorney General could divert agency counsel from performing duties beneficial to the Mayor and the agencies. Beginning in 2015, the elected Attorney General will set priorities for the OAG, which presumably will not all follow the Mayor's priorities. In addition, the Attorney General would have the authority to reassign agency counsel to other parts of the OAG, or to de-fund them entirely in proposed OAG budgets, thereby reducing or eliminating legal resources that the Mayor and agency directors need. We are not suggesting that these problems will be frequent or constant, but they are likely to arise and could be destructive. We should avoid them by careful planning, and should create a culture of cooperation by distinguishing between the roles of the lawyers for the OAG and the lawyers for the agencies.

These are not abstract concerns. Let me give you just a few concrete examples, of which there are many:

1. Suppose the Mayor and the Director of DYRS are strong believers in the rehabilitation of adjudicated youth, but an Attorney General elected on a strong law and order platform prefers a more retributive policy. Now assume there are two candidates for the general counsel position of the agency, one who shares the Mayor and the agency director's approach, and

one who shares the Attorney General's. If the Attorney General has the final say on the hiring and promotion of the general counsel, the selected general counsel is likely to be in constant battle with the agency director, impeding the goals that the Mayor has set and for which he or she alone is accountable to the electorate. This same potential dichotomy is applicable in virtually every agency, whether the issue is TANF relief, housing priorities, returning the disabled to less restrictive places of confinement, or environmental versus economic development concerns.

2. Take truancy, as another example. Suppose the future public school Chancellor (along with the future Mayor) is a believer in working cooperatively with parents of truants to get their assistance in improving attendance. Assume the elected Attorney General believes in a more punitive approach, which includes threatening and following up on the threat to put parents in jail for educational neglect. The public school general counsel is asked to write a letter to the parents; the Chancellor ask for a conciliatory letter that seeks the parent's cooperation; but the Attorney General countermands that order and directs the General Counsel (whose hiring, firing and compensation the AG controls) to write a threatening letter, proposing to send the parents to jail if they don't get their child back to school promptly. Whose order is the general counsel going to follow? How

is this impasse going to be resolved? The Mayor cannot solve it because the Attorney General is independently elected and not subordinate to the Mayor. The Attorney General would be in a position to undermine the Mayor and Chancellor's policy decision.

3. Finally, think also about our consent decrees and the District's need and desire to be relieved of federal judicial supervision for governmental responsibilities. If the Mayor decides to put an emphasis on a particular agency to demonstrate its suitability to function and end its court supervision, an Attorney General who wanted to prioritize other agencies or cases or other matters could thwart that effort by assigning the general counsel to other responsibilities, diminishing the legal staff at the agency, or delaying the work product of the general counsel. The elected Attorney General might do this because of a sincere belief that another agency should get priority or in the worst case because the Attorney General, with plans to run against the Mayor, does not want the Mayor to get political credit for relief from the consent decree and wants to postpone that relief until the Attorney General is the Mayor. Our proposal avoids setting up the Mayor and Attorney General for this type of resources-based conflict.

In reaching our conclusion that the agency counsel should report to a director within the mayoral reporting line and thus be transferred out of OAG, we have closely and fully considered a number of possible concerns.

First, some may raise a concern about actual or perceived decimation of the OAG. This concern is misplaced. It is important to keep in mind that under our proposal, the OAG would still have several hundred lawyers and a total of nearly 400 FTEs. Accordingly, it will continue to have an ample and robust staff be able to perform its better streamlined core functions of representing the District government in both affirmative and defensive litigation in the courts and opining for government officials on legal issues. Currently, the District's OAG is larger than all but about ten states' Attorney General offices in the country. Our proposal would in essence right-size the OAG by dedicating this substantial group to the main functions of an Attorney General's office, while having an OAG that is more proportional to the District's size and population.

Second, we have examined whether our proposal is fully consistent with the choice made by the voters in 2010 to have an elected Attorney General. It is. There is absolutely no reason to think that when the Council and the voters changed the Attorney General to an elected position, they considered such issues as the reporting lines of subordinate agency counsel. Neither did they consider

whether the Mayor and his subordinate agencies should be without their own lawyers for advice-giving and other legal support, particularly for matters that are unique to government operations or personnel. The issue of agency counsels was not in the bill, was never once discussed in the Council legislative debate, and was not in any way part of the public debate in op-eds and speeches that accompanied the lead-up to the 2010 referendum. I doubt that even one in a hundred voters knew about the reporting lines of agency counsel. Further, what we are proposing, through the subpoena authority and other mechanisms, is that the Council adopt measures that *strengthen* the OAG's investigative and litigating authority. I am confident that is what voters thought they were voting for: an independent Attorney General with the powers to investigate and then litigate fearlessly for the best interests of our residents. That is what our proposals enable the OAG to do in the divided executive model chosen by the Council.

Third, the proposal will not lead to confusion or diffusion of legal opinions within the agencies. Each of the general counsel will still be able to obtain the opinions of the Attorney General on any issue of law, and be required to follow that opinion until and unless it is changed by the courts. It will be the responsibility of the Attorney General and the MOLC to be sure that all agency counsel are following the Attorney General's legal interpretations.

Fourth, we also have not overlooked the possible concern that transferring the agency counsel out of the OAG could reduce the degree of cooperation and support provided by the agency counsel in litigation matters where the OAG is representing the agency. This support is critical to the success of the District in litigation. Some of the Attorneys General in states with divided executives have reported difficulties in getting cooperation before and during litigation from their agency clients. These clients may, at times, regard the lawyers in the state Attorney General's office as outsiders or even as adversaries. However, as recent experience has shown, as long as the agency directors and agency counsel have a clear and firm mandate from the Mayor that such support is to be provided to the OAG, it should be forthcoming. This will, in our view, be achievable as long as the Mayor's directive on this point is and remains clear. On the flip side, experience has also shown that even under the *current* structure where the agency counsels formally report to the Attorney General, this support can be difficult to obtain absent a clear mayoral directive, which this Mayor has, fortunately, provided. This is an important concern but it is one that needs to be addressed without regard to whether the agency counsels nominally report to the Attorney General.

We have also considered closely the possible risks of losing the benefits of the current reporting lines, and the possible impact on agency counsel independence

from demanding agency directors that has been associated with the current structure. Agency counsels currently formally report to the OAG, while advising the agency director and agency program officer clients on a day-to- day basis. Some have raised concern that our proposal leaves agency counsel at the mercy of agency directors who want legal opinions that are not shared by the Attorney General's office. Our proposal fully addresses this possible concern in several important ways.

Significantly, the bill would establish the MOLC and create the position of Director for this office. This Office will help ensure that agency counsel are protected from undue influence of agency directors. Under our proposed structure, agency counsel would report on a day-to-day basis to their respective agency director, while ultimately being coordinated by a Director of the MOLC, appointed by the Mayor, who would, with a small complement of attorneys, provide substantive review of interagency legal issues. Specifically, the office would coordinate the hiring, compensation, training, and resolution of significant personnel-related issues for subordinate agency counsels in conjunction with agency directors; provide legal policy advice to the Mayor and executive branch; resolve interagency legal issues for the Mayor; oversee the representation of agencies in investigative matters before the federal Executive Branch, Congress, or the Council of the District of Columbia; and supervise outside counsel in matters

where the Office of the Attorney General is recused from a matter or otherwise not available. That office would ensure that general counsel and their staff are protected from any undue pressures or retaliation by agency heads. This office, which we expect will be led by an experienced lawyer, would ensure the substantive and legal personnel-related uniformity of positions and decisions currently performed by me or another senior OAG staff member. It would not make as much sense for these roles to be performed by an elected Attorney General not working within the Mayor's control. This would be so particularly when there is a need for quick and informal legal advice wrapped up in a real-time understanding of the policy goals and program options presented, and the need to give advice in a way that promotes the achievement of those mayoral policy goals, consistent with governing law.

I note that in reality under the current system, the many agency counsels do not actually in any meaningful way report on a day to day, or week to week basis to the Office of the Attorney General. Agency counsels sit with their agency director and program staff clients and interact every day with their agency clients. They advise not only on legal matters but on policy and practical issues as well. That is how it should be. Currently, as a practical matter, agency counsel must have the confidence of and a functional working relationship with the agency director. That would simply continue to be the case under the proposed approach

by moving the agency counsel outside of the OAG reporting line. The agency counsel should not be placed in a position on these policy and practical matters where they may receive conflicting commands from the agency director and Attorney General, and where the person they formally report to, the elected Attorney General, may well have a political agenda different from, or even antagonistic, to the Mayor and the agency director.

Finally, and contrary to what some may suggest, there is no basis to assume that the agency counsels will not meet, email and get together in a cross-agency way as coordinated by the MOLC. This happens only periodically now, and it is indeed my hope that such coordination would *increase,* not lessen, once the transfer is implemented. There is absolutely reason to assume that it will not. Counsel for agencies, particularly the smaller General Counsel offices, will have both a strong incentive and an opportunity to discuss with their colleagues and with the MOLC the array of legal issues that arise for any agency – FOIA, procurement, employment, whistleblower issues, collective bargaining issues, privilege questions, and the like. And, as noted, they will always have access to the Attorney General for a final decision on any legal interpretation issue.

Ultimately, our proposal as reflected in the bill fully addresses the risks associated with changing the reporting lines of agency counsels. Most importantly, those risks are fully justified by the need to avoid the chaotic and potentially

destabilizing risks presented by the prospect of future elected District Attorneys General using their supervision of agency counsels to undermine the policy or budget decisions of future Mayors. Our bill would minimize the opportunities for such conflict while ensuring full independence and vitality of the OAG under elected leadership.

2. Locating the Child Support Services Division Under the Mayor

The other principal change proposed by Bill 20-134 is the transfer of the OAG's CSSD, fully intact, to the Department of Human Services ("DHS"). This transfer will make DHS the District's designated child support agency for federal law purposes. Consistent with the principles I described previously, this critical social service program for our families and children should remain within the mayoral reporting line.

CSSD's responsibilities include locating parents, establishing paternity, and establishing, modifying, and enforcing support orders. CSSD has about 210 employees, including 20 attorneys, many of whom litigate the paternity and support matters that other parts of CSSD initiate. In FY 2012, CSSD had a combined federal and local budget of about $ 29.15 million, about two-thirds of which is federal dollars.

Prior to 1998, this program existed as the Office of Paternity and Child Support Enforcement ("OPCSE") in the District's Department of Human Services

("DHS"). In 1997, aware that the child support program was failing, the Mayor and the interested agencies began working to reorganize its operations. The goal of the reorganization was to remove the program from DHS and to consolidate its functions, insofar as possible, into a single entity. The Superior Court was not in a position to receive the program, so the focus of the reorganization centered on the OAG. The operation of a large, essentially administrative human services program such as child support did not fit neatly into the OAG's mission.

However, the OAG was able to provide the supportive home for the program that was needed for it to succeed. Reorganization Plan No. 1 of 1998 was adopted and subsequently became effective on April 26, 1998. As a result, and through the OAG's support and CSSD's strong leadership under its current director, Deputy Attorney General Benidia Rice, the District's child support program has corrected its deficiencies so that it is no longer in a penalty status and has started receiving federal performance incentives. These have included over $900,000 in federal audit incentive awards for each of the last two fiscal years and a 2007 performance award from the National Child Support Enforcement Association and the federal Office of Child Support Enforcement, and demonstrated improvements along key metrics that show the increased support for children the agency is securing: for example, from FY 2003 to FY 2012, D.C. paternity establishment percentage increased from 63.9% to 90.0%, and the percentage of current support paid—i.e.

what share of all the child support orders were paid by non-custodial parents—rose from 48.0% in FY 2003 to 60.9% in FY 2012. CSSD in the last decade has become a success for the District under the OAG with an appointed Attorney General; it should be within the Mayor's bailiwick, and it is ready to be housed again in a social services agency, as is the case in the overwhelming majority of the states in the country.

Based on CSSD's current success, the OAG's oversight of the program is no longer necessary to ensure its continued effectiveness. Moreover, operation of a human services program still does not fit squarely within the typical legal functions of an attorney general's office and would rest more appropriately in a separate part of government, as is generally done in the states. The child support program is intrinsically connected with the Temporary Assistance for Needy Families ("TANF") program, so it makes sense to move CSSD to DHS.

Poor performance of the child support program could result in the loss of federal TANF funding, so coordination between CSSD and DHS is critical. Further, the delivery of basic human services to District families is an executive, programmatic, and social policy function. Absent the special circumstances that existed prior to 1998, such a function should not be located in an exclusively legal agency outside of the Mayor's line of authority and thus control, which would be the case if CSSD remains under an elected Attorney General. In particular, it will

be important for the Mayor to be able to protect the local budget dollars and priority given to CSSD, and his or her ability to do so would be sharply limited with CSSD out of the Mayoral reporting line.

Conclusion

Adoption of Bill 20-134 would help ensure that the Mayor retains policy and budget control for the Executive, while making the OAG better mission-focused and more effective in fulfilling its set of legal duties for the District in 2015 and beyond. I urge the Council to take prompt and favorable action on Bill 20-134. Chairman Wells, thank you again for holding today's hearing. I am pleased to answer any questions.