BEFORE THE
U.S. HOUSE OF REPRESENTATIVES
SUBCOMMITTEE ON FEDERAL WORKFORCE, POSTAL SERVICE,
AND THE DISTRICT OF COLUMBIA

ON
HR 733, THE DISTRICT OF COLUMBIA BUDGET AUTONOMY ACT OF 2007, AND
HR 1054, THE DISTRICT OF COLUMBIA LEGISLATIVE AUTONOMY ACT OF 2007

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Good afternoon Mr. Chairman, members of the committee and staff. I am Brian K. Flowers, General Counsel to the Counsel of the District of Columbia. I want to thank my Congressional Representative, Eleanor Holmes Norton for introducing this legislation, and you Mr. Chairman for inviting me to speak in support of HR 733, the District of Columbia Budget Autonomy Act of 2007, and HR 1054, the District of Columbia Legislative Autonomy Act of 2007, and to give me an opportunity to convince you to do what no one has been able to persuade Congress to do for 30 years – give the District of Columbia some measure of control over it's legislative and budgetary processes. Before I begin, I respectfully request that my entire statement be included as a part of the record.

I will be addressing three major areas, focusing primarily on matters pertaining to the need for legislative autonomy - (1) offering some insight into the impact the congressional review period has on the District's legislative process, (2) making specific comments and recommendations on the introduced bills, and (3) concluding with why the Congressional review

period no longer serves a useful purpose.

How the Congressional Review Period Affects the District's Legislative Process

The mandatory Congressional review period has resulted in the Council, and our office in particular mastering what at times, feels like a legislative circus, with many balls (or bills) in the air at the same time, and we don't know when they will come down. To give some degree of predictability to our process, we must emergency acts that remain in effect while our legislation is pending Congressional review. These acts are known at the Council as gap-fillers, or more specifically as Congressional review emergency acts, Congressional recess emergencies, Congressional adjournment emergencies, and legislative review emergencies. All of this legislation appears to be organized chaos to the uninitiated, but for those of us familiar with the Congressional review requirement, it is business as usual.

We have had to become masters at counting Congressional days. When I drive home at night, I often look to see if the light on top of the Capitol dome is illuminated. If it is, I know that is one less day that will be required before our laws become effective. Counting Congressional days is at times more of an art than a science. It does not lend itself well to automated counting, because it is impossible to predict with certainty when Congress will be in session. The best a computer can do is to project a possible effective date, and then the count, or at least critical counts, must be verified by a person. This has at times resulted in gaps in critical pieces of legislation, including criminal legislation that cannot be cured with a retroactive applicability date.

The 30-day period of Congressional review is never that. It is more like a 3 month period of review and in some instances, a much longer period. By way of illustration, a recent enactment of the Council that was designed to update terminology found in the D.C. Official Code required nine (9) months to undergo review by Congress to change the word "handicap" to "disability", because the language was contained in a criminal code provision and Congress had adjourned sine die, necessitating that the Congressional review period begin anew with the 110 Congress. That situation is not atypical, it happens every two years, and to a lesser degree during the August recess. There were at least 6 acts transmitted last year that required between 7 and 9 months to become effective as law, and many more that required more than 3 months.

The unpredictability of the congressional review period requires the Council to adopt many bills on an emergency basis to compensate for the long periods of delay. Section 412 of the Home Rule Act authorizes the Council, upon a finding of two-thirds of its members that emergency circumstances make it necessary that an act be passed after a single reading, to pass an act that takes effect immediately upon enactment, and that such an act shall be effective for a period of not to exceed 90 days. Section 412 does not define "emergency circumstances." The Council's rules were amended in 1983 to define emergency in such a manner that it includes the factor of delay. The pertinent provision reads as follows:

> (b) For purposes of this Rule, an "emergency" means a situation that adversely affects the health, safety, welfare, or economic well-being of a person for which legislative relief is deemed appropriate and necessary by the Council, ***and for which adherence to the ordinary legislative process would result in delay that would adversely affect the person whom the legislation is intended to protect.*** Council Rule 412.

This practice leads to some confusion with the public. Understandably, the public tends to think that emergency circumstances include only matters that are immediate threats to the public health, safety and welfare, and that are unpredictable. Many of the emergency measures passed by the Council, consistent with its rules, and court precedent are intended only to maintain the status quo and prevent uncertainty while permanent legislation awaits the expiration of the Congressional review period.

The Council's legislative practices are the result of judicial decisions and necessity

The Council's emergency authority was first challenged in *District of Columbia, et al. v. Washington Home Ownership Council*, 415 A.2d 1349 (D.C. 1980) (en banc) ("WHOC"), in which the court considered the Council's action in passing a series of three identical emergency acts imposing moratoriums on the conversion of rental housing to condominium and cooperative property and regulating the sale of converted units. At no time had the Council devised or passed permanent conversion legislation. The court held that the Council was without authority to pass a second substantially identical emergency because Congress had limited the effectiveness of emergency actions to no more than 90 days, absent adherence to the two-reading rule for legislation and transmittal of an act to Congress.

Following the Court of Appeals' decision in *Washington Home Ownership*, the D.C. Court of Appeals recognized an exception to the prohibition on consecutive emergencies where there is an identical act pending Congressional review. In *U.S. v. Charles Alston*, 580 A.2d 587 (D.C. 1990), the court found that the Council had the authority to pass consecutive identical

emergency acts to preserve the status quo until Congress approved temporary or permanent legislation. After the *Washington Home Ownership* case Congress increased the period of review from 30 to 60 days for acts amending the criminal code, so that acts could not possibly complete Congressional review prior to the expiration of first 90-day emergency act.

As a result of these suggestions by the Court, the Council adopted a rule that allows for the passage of temporary legislation, which bypasses the committee assignment process and has a limited duration of 225 days.[1] A temporary bill can only be used where it is approved on first reading at the same time as the emergency act and it is substantially identical to the emergency bill. The *Alston* case was the first case to be decided by a District of Columbia court after Congress had increased the review period from 30 to 60. In light of the lengthy time for Congressional review of criminal laws, the court held that it was appropriate for the Council to consider gap-closing emergencies to prevent an emergency bill from lapsing during the pendency of Congressional review of a temporary or permanent law.

I have included a copy of an Emergency, Temporary, Permanent Status Report that we use to track legislation in our office. This chart reflects that as of this month, we are following 47 sets of emergency and permanent or temporary bills. By comparison, during the month of February, after the 109th Congress adjourned sine die, we were tracking 81 sets of these acts. I use the term "set" because we must track the permanent acts that have related emergency and temporary acts that contain the same language. We use these charts to ensure that there is a measure that has been transmitted to Congress to accompany the emergency; the expiration dates of both the emergency and permanent measures; the effective date(s) of the bills; to prevent a

gap in legislative authority, to determine whether the measures have applicability dates; and when another emergency measure must be enacted.

Section 602 has not been used to disapprove a Council act since March 21, 1991.

The statistics with respect to congressional disapprovals under section 602 have been repeated before, and I will now update them for you. Since the Council passed its first acts in January of 1975 through January of 2007, the Council has transmitted for congressional review approximately 4,000 (3,973) acts , only three of which have been disapproved using the procedure found in section 602. But that statistic doesn't reflect the volume of work that is required to fulfill this statutory requirement, a requirement that history tells us serves little purpose. There were 308 acts transmitted to Congress during the last Council period (2005 - 2006), however that number does not translate into 308 separate transmittals. Each act was transmitted to at least 7 different officials or committees on the Hill. That means that there were not 308 pieces of legislation transmitted, but 2,156 transmittals during that period of time.[2] If you multiply that number by the number of years the District has been transmitting legislation, you will understand better why the review provision contained in section 602 imposes a significant burden on the District government with no real benefit for either Congress or the Council. These statistics do not include budget acts, reports, or other measures that must be transmitted to Congress, some of which will continue to be transmitted even if the requirement

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[1] See, *United States v. Alston*, 580 A.2d 587, 590-591 (D.C. 1990) and Council Rule 413.

[2]The transmittals are normally to the Speaker of the House, the President of the Senate, the Congressional Delegate from the District of Columbia and the appropriate subcommittees in each House. District acts are now transmitted to 11 separate members or subcommittees. A copy of that transmittal list is attached.

to transmit acts found in section 602 is eliminated.

One technical issue concerning HR 1054 that does not appear to have been addressed is that the review period applicable to a referendum proposal would be eliminated. Under the Initiative, Referendum and Recall Charter Amendments Act (D.C. Official Code § 1-204.12(b)(2)), the period of time during which the referendum process must be completed is now measured by the 30 or 60 day Congressional review period. If there is no 30 day review period the method for determining when a referendum would be permitted would have to be established independently. Express authority to establish that period under local law would resolve that issue.

Comments on HR 733, the District of Columbia Budget Autonomy Act of 2007

Most of my comments concern HR1054, and legislative autonomy, however there are two areas in HR 733 that could affect the ability of the Council to perform its oversight functions. My concern is with two complementary provisions, the establishment of the Office of District of Columbia Auditor and the Council's review of million dollar and multiyear contracts that could be superseded by the bill. A simple solution to the problem that I have identified would be to recodify the provisions out of Part D, the Budget and Financial Management section of the Charter, and place them in Part A, the portion of the Charter that concerns the Council's authority.

The first area concerns the Charter authority of the District of Columbia Auditor, a legislative branch officer who has been instrumental in helping the Council investigate agencies of the District. One of the foremost functions of the legislative branch is the ability to investigate and to oversee the executive branch. There have been several instances in which

public agencies, managing, obligating and spending public funds have raised objections to the Auditor's investigation of their activities, even to the point of raising privileges to prevent her investigation. It has been the assertion that the Auditor's authority is derived from the Charter that has trumped these attempts to shield information from the Auditor's investigations. Speaking as an attorney who is responsible for ensuring that the Auditor has the ability to enforce subpoenas, it is important that this authority remain in the Charter.

A second provision that is important to the Council is section 451 of the Charter, the provision that authorizes the Council to review million dollar contracts. This provision was added to the Charter by Congress at the request of the Council, following a court decision Wilson v. Kelly, 615 A.2d 229 (D.C. 1992), holding that the Council could not require the review of these contracts by resolution. It is the resolution review power that permits abbreviated review of contracts, avoiding the longer process when an act is required, in the absence of a Charter amendment.

The Congressional review period has evolved to the point that it is no longer used.

In the earlier days of Home Rule, Congress did exercise this power. At that time, Congress exercised a one house veto, and the President of the United States had the power to unilaterally reject a Council act where the Council had overriden a veto of the Mayor. To be sure, progress has been made, from the one house veto invalidated by *Chada*, and the Congressional repeal of the Presidential veto of where the Council had overridden a mayoral veto. But it is precisely this evolution that renders the current review provisions unnecessary. Congress has adopted an alternative and more efficient process for nullifying legislative actions of the District, a process that mirrors, in most respects, the ordinary legislative process of

Congress. There has been no use of section 602 since 1991, and at least twice that many repeals or amendments of District laws have been enacted since that time by other means. For that, I would point to the recent experience with the Public Education Reform Amendment Act, in which a bill was introduced in the House and became effective in less than 30 calendar days.

The Council also reviews legislation proposed by the Mayor and Executive agencies. It is rare that the Council exercises its authority to disapprove proposed actions. The more normal practice is that once it becomes apparent that the Council will disapprove the measure, it is withdrawn, or the Council enacts its own legislation to disapprove or amend the proposal. These same observations apply to Congress.

CONCLUSION

At this point, it would not be faith, good graces or good times upon which you would be relying, but 34 years of history and practice. Under the Constitution, the Congress exercises exclusive legislative authority over the District of Columbia. Under the Home Rule Act, the Congress and the Council share dual legislative authority, the Congress exercising authority over federal matters, and the Council over local matters.

As the Home Rule Act has been amended, bills with a negative fiscal impact cannot be implemented. Measures that violate the Constitution, federal law, or the Home Rule Act cannot be approved, and the Congress retains the authority to repeal or amend any law passed by the Council for any reason, at any time. Mr. Chairman, as a former member of the Chicago City Council, and the Cook County Board of Commissioners, you are well aware of the need for a local legislative body to be able to respond to constituent concerns in a timely manner. I ask that you approve the Bills before you and send these measures forward in the legislative process.

This is not a new request, but a renewed one. In testimony delivered on February 16, 1978, then Council Chairman Sterling Tucker stated plainly:

> I submit, Mr. Chairman, that the U.S. Constitution, not the Congressional veto provisions, ensures Congress' ultimate control of the affairs of the District. There is an extensive record compiled over the years about the Congressional authority to superintend the District. Just as long as that record is, there is no disagreement that the Congress can adopt any act regarding the District at anytime and on any subject. By use of legislation, Congress speaks.
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> That concludes my remarks. Thank you Mr. Chairman.

Congressional Disapprovals, and Examples of Congressional actions repealing District laws

Congressional disapproval of acts of the Council under section 602(c) of the Home Rule Act

Congress has utilized its authority under this section to nullify the following acts of the Council of the District of Columbia:

(1) The Location of Chanceries Act of 1979, D.C. Act 3-120, adopted on final reading by the Council October 9, 1979, signed by the Mayor November 9, 1979 (26 DCR 2188). Disapproval was effective December 20, 1979.

(2) The District of Columbia Sexual Assault Reform Act of 1981, D.C. Act 4-69, adopted on final reading by the Council July 14, 1981, signed by the Mayor July 2, 1981 (28 DCR 3409). Disapproval was effective October 1, 1981.

(3) The Schedule of Heights Amendment Act of 1990, Act 8-329, adopted on final reading by the Council December 18, 1990, signed by the Mayor December 27, 1990 (38 DCR 369). The disapproval was effective on March 21, 1991.

At the time of the disapproval of the first act, section 602(c)(1) of the Home Rule Act required both Houses of Congress to adopt a concurrent resolution disapproving the act. Act 3-120 was disapproved by both Houses of Congress in S.Con.Res.63 (in Lieu of H.Con.Res.228).

Act 4-69 would have amended titles 22 and 23 of the District of Columbia Code. At the time of the disapproval, section 602(c)(2) provided that either House of Congress could adopt a resolution disapproving an act of the Council that amended or would be codified in titles 22, 23, or 24. Act 4-69 was disapproved by one House of Congress, the House of Representatives, in H.Res.208.

By the time the Council transmitted Act 8-329 to Congress, the Supreme Court had decided, in Immigration and Naturalization Service v. Chada, 462 U.S. 919, 103 S. Ct. 2764 (1983), that a provision of the Immigration and Naturalization Act that allowed one House of Congress to invalidate a decision of the Executive Branch violated the constitutional doctrine of separation of powers. Congress amended the Home Rule Act to conform with the Chada decision. Section 602 was amended to require that in order to disapprove an act of the Council, both Houses of Congress must pass a joint resolution that would then require the signature of the President. Act 8-329 was disapproved by joint resolution of Congress and signature of the President and became Public Law 102-11.

Congressional actions repealing District laws after the Congressional review period has expired:

1. Section 139(a) of the District of Columbia Appropriations Act, 1994, approved October 29, 1993 (Pub. L. 103-127; 107 Stat. 1349), repealed dealing with the budgeting process of the Retirement Board:

(a) Title IV of the District of Columbia Omnibus Budget Support Act of 1992 (D.C. Law 9-145) is hereby repealed, and any provision of the District of Columbia Retirement Reform Act amended by such title is restored as if such title had not been enacted into law.

(b) Subsection (a) shall apply beginning September 10, 1992.

2. Section 11702 of the National Capital Revitalization and Self-Government Improvement Act of 1997, approved August 5, 1997 (Pub. L. 105-33; 111 Stat. 781), repealed the Clean Air Compliance Fee Act of 1994 (D.C. Law 10-242), retroactively to its effective date March 21, 1995:

(a) Repeal.--

(1) In general.-- Effective March 21, 1995, the Clean Air Compliance Fee Act of 1994 is hereby repealed (DC Code, sec. 47-2731 et seq.), except as provided in subsection (b).

(2) Conforming amendment.-- Section 2(b)(2) of the Stable and Reliable Source of Revenues for WMATA Act of 1982 (DC Code, sec. 1-2466(b)(2)) is amended by striking subparagraph (H).

(b) Exception for Provisions Exempting Delivery of Newspapers From Application of Certain Taxes.-- Subsection (a) shall not apply to section 14 of the Clean Air Compliance Fee Act of 1994.

3. Section 153 of Division C, of An Act Making omnibus consolidated and emergency appropriations for fiscal year ending September 30, 1999, and for other purposes, approved October 21, 1998 (Pub. L. 105-277; 112 Stat. 2681-146), repealed the Residency Requirement Reinstatement Amendment Act of 1998 (D.C. Law 12-138):

Sec. 153. The Residency Requirement Reinstatement Amendment Act of 1998 (D.C. Act 12-340) is hereby repealed.

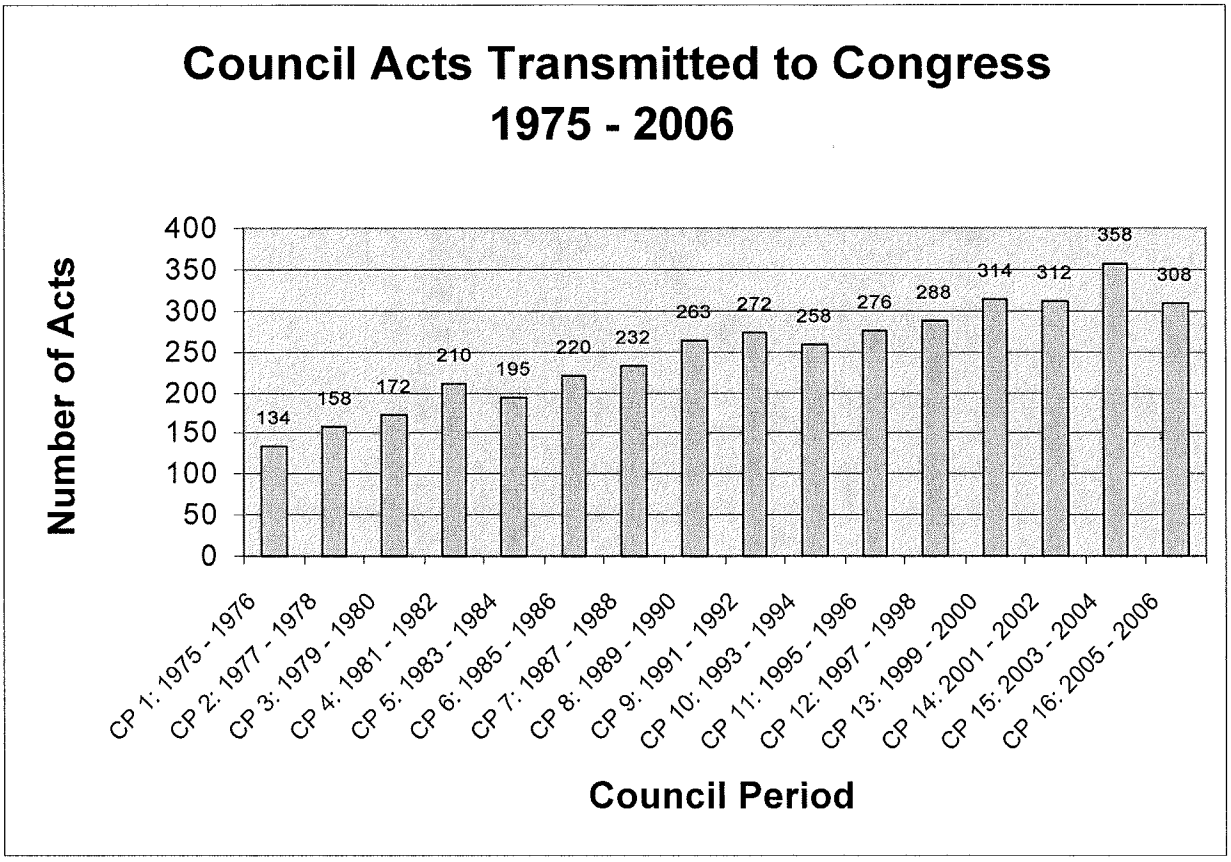
4. PL 109-115, November 30, 2005, 119 Stat 2396
PL 108-199, January 23, 2004, 118 Stat 3
PL 108-335, October 18, 2004, 118 Stat 1322
PL 108-7, February 20, 2003, 117 Stat 11 (Joint Resolution)
PL 107-96, December 21, 2001, 115 Stat 923
PL 106-522, November 22, 2000, 114 Stat 2440
PL 106-553, December 21, 2000, 114 Stat 2762
PL 106-113, November 29, 1999, 113 Stat 1501

The Legalization of Marijuana for Medical Treatment Initiative of 1998, also known as Initiative 59, approved by the electors of the District of Columbia on November 3, 1998, shall not take effect.

5. *Section 132 of the District of Columbia Appropriations Act, 1996, approved April 16, 1996, Pub. L. 104-134, prohibited use of funds for implementation or enforcement of the Health Care Benefits Expansion Act of 1992, effective June 11, 1992 (D.C. Law 9-114):

> No funds made available pursuant to any provision of this Act shall be used to implement or enforce any system of registration of unmarried, cohabiting couples whether they are homosexual, lesbian, or heterosexual, including but not limited to registration for the purpose of extending employment, health, or governmental benefits to such couples on the same basis that such benefits are extended to legally married couples; nor shall any funds made available pursuant to any provision of this Act otherwise be used to implement or enforce D.C. Act 9-188, signed by the Mayor of the District of Columbia on April 15, 1992.

* Section 132 of Pub. L. 104-134 did not repeal an act of the Council but prohibited the expenditure of funds in support of Law 9-114


Council Acts Transmitted to Congress
1975 - 2006
Number of Acts
400
350
300
250
200
150
100
50
0
134
158
172
210
195
220
232
263
272
258
276
288
314
312
358
308
CP 1: 1975 - 1976
CP 2: 1977 - 1978
CP 3: 1979 - 1980
CP 4: 1981 - 1982
CP 5: 1983 - 1984
CP 6: 1985 - 1986
CP 7: 1987 - 1988
CP 8: 1989 - 1990
CP 9: 1991 - 1992
CP 10: 1993 - 1994
CP 11: 1995 - 1996
CP 12: 1997 - 1998
CP 13: 1999 - 2000
CP 14: 2001 - 2002
CP 15: 2003 - 2004
CP 16: 2005 - 2006
Council Period