

**COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY
COMMITTEE REPORT**

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TO: All Councilmembers
FROM: Councilmember Phil Mendelson, *Phil Mendelson*
Chairman, Committee on Public Safety and the Judiciary
DATE: November 17, 2008
SUBJECT: Report on PR 17-928, "Attorney General Peter J. Nickles Confirmation Disapproval Resolution of 2008"

The Committee on Public Safety and the Judiciary, to which PR 17-928, the "Attorney General Peter J. Nickles Confirmation Disapproval Resolution of 2008" was referred, reports favorably thereon, and recommends approval by the Council.

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I. BACKGROUND AND NEED

The purpose of Proposed Resolution 17-928 is to disapprove the nomination of Peter J. Nickles as the Attorney General for the District of Columbia. Mr. Nickles is currently a resident of Great Falls, Virginia.

In making this recommendation, the Committee emphasizes a number of concerns with appointing this nominee to position of the Attorney General. Mr. Nickles' tenure as Acting Attorney General is replete with actions and statements that show he regards his primary responsibility to be to the Mayor. If the past eleven months in which Mr. Nickles has served in this role -- six spent in an interim capacity and nearly five as the nominee -- are prologue to how he will operate in this role if confirmed, then the Attorney General for the District of Columbia will continue to operate in a capacity that is, essentially, the Mayor's attorney rather than the city's.

The Attorney General is the chief law enforcement officer in the District of Columbia with responsibility for representing the public interest and upholding the law. As such, the

Attorney General must have judgment, sensitivity, absolute commitment to the rule of law, and the understanding he or she has one client: the government. These interests should be paramount in every aspect of the Attorney General's service. These interests survive any one individual Attorney General, and survive any administration during which he or she is appointed. The energies of this office should not be spent pursuing a partisan agenda.

With regard to the nominee's independence, this vote is the Council's only check. Mr. Nickles' predecessors have universally recognized the independence innate in this role. The Committee believes that the rights, the safety, and the security of the citizens of the District of Columbia should not, on principle, be sacrificed to individual politics. However, in judgment, temperament, and practice, Mr. Nickles has adhered to his belief that the Attorney General's primary client is the Mayor, leaving the role of the peoples' chief law enforcement officer vacant. In the Council's role reviewing a candidate's fitness for office, it is crucial to consider the impact that confirmation has on the citizens of the District of Columbia.

A nomination submitted to the Council should not be considered a *fait accompli*. Rather, a nomination instigates the Council's oversight role in assuring that the candidate put forth is competent, has nothing disqualifying about him or her, understands his or her role and the mission of the agency, has vision for the agency, and will serve in the best interests of the District and its citizens. The Committee believes that the nominee does not meet this standard and recommends to the Council the disapproval of his confirmation.

QUALIFICATIONS FOR THE OFFICE OF THE ATTORNEY GENERAL

Without question, Mr. Nickles possesses a resume of exceptional experience and knowledge. A graduate of Princeton University and Harvard Law School, Mr. Nickles has over four decades of experience practicing as an attorney. The majority of this time was spent at Covington & Burling, a law firm where he became a partner in 1971. During his tenure in private practice, Mr. Nickles litigated cases that advanced the rights of the disadvantaged and brought cases that improved conditions for those without a voice.

His efforts while in private practice have helped to secure relief for the District's homeless and mentally ill residents in the form of the creation of community-based services for persons with mental illnesses. He was an advocate for prisoners' rights and represented prisoners in claims of unconstitutional conditions in District facilities. These efforts helped resolve deficiencies in the security, health care, sanitation, and fire safety provided to prisoners. Mr. Nickles also represented a class of women prisoners in a class action that resulted in an injunction requiring the District to provide adequate reproductive health care and prevent harassment and sexual abuse. With particular focus on prisoners' rights, Mr. Nickles' work has led to improved conditions, reduced violence, and better service.¹ For this and other work, Mr.

¹ District of Columbia Office of the Attorney General website: Acting AG Bio - Peter Nickles, <http://oag.dc.gov/occewp/view.a.3.q.638711.occNav.31705.asp> (last visited Nov. 6, 2008).

Nickles was awarded the District of Columbia Bar's Pro Bono Lawyer of The Year Award for 1998.

Mr. Nickles has been a member of the D.C. Bar since 1964, and has served the District legal community as an advisor and teacher. From 1970 until 1975, he was Chairman to Covington & Burling's Neighborhood Legal Services Program for the District. Between 1980 and 1992, he served as an Adjunct Professor of Law at Howard Law School. Early in his career, between 1968 and 1970, Mr. Nickles served as general counsel of the Jackson State Task Force and the Kent State Task Force, reporting to the Scranton Commission on Campus Unrest.

Mr. Nickles remained in private practice until he was asked to serve as general counsel by Mayor Fenty when he took office in January 2006. He remained in that role until January 2008, when he was appointed to the position of Acting Attorney General following the departure of Linda Singer. Under his regime, the Office of the Attorney General has experienced certain improvements. The agency has, during his tenure, made strides in affirmative litigation efforts, filing actions against slumlords, against a managed care organization, and against other entities to enforce consumer protection laws. He has also made rulemaking a priority, focusing the efforts of OAG's Rulemaking Section to update city regulations and increase efficiency.² Mr. Nickles has also developed a professional development program for support staff, a comprehensive trial skills training program for lawyers, and an awards program for outstanding employees.

It is also worth noting that Mr. Nickles was involved in a collaborative effort to respond, with regulations and legislation, to the recent Supreme Court *Heller* decision affecting the District's handgun ban.

RESIDENCY IN THE DISTRICT OF COLUMBIA

While currently a resident of Virginia, the nominee has stated that, if confirmed, he will move into the District. The Council has sought similar assurances from Mr. Nickles in the past. When he first came to the District government in January 2006, Mr. Nickles stated his intention to take up residency in the District since it was presumed at the time that the residency requirement applicable to subordinate agency heads applied to the Mayor's general counsel as well. However, nearing the expiration of the 180 day deadline with which to comply, Mr. Nickles indicated that he was "too busy" to do so.³ Only after Mr. Nickles decided that he would

² Letter from Peter J. Nickles, Acting Attorney General, District of Columbia Office of the Attorney General, to Phil Mendelson, Chairperson, Committee on Public Safety and the Judiciary, Council of the District of Columbia, 4-5 (Oct. 15, 2008) [hereinafter Letter from Nickles to Mendelson, Oct. 15, 2008] (on file with the Committee).

³ See James Jones, *Fenty's Top Legal Adviser Faces Residency Test*, WASH. CITY PAPER, June 15, 2007, at 10 ("Way back in November, when Nickles was introduced to the press, he indicated he would, as required by law, take up residency in the District."); "With only 20 days left to make the move, Nickles says he's been too busy keeping District agencies out of receivership to do much house shopping."); see also Yolanda Woodlee, *Failure to Move*

rather remain a resident of Virginia was it determined that the Mayor's general counsel is not required to live in the District.

The residency requirement for many District government positions has been given considerable focus by the Council in reviewing nominees, and rightly so. Living within the District allows those who work for local government to create personal ties to the jurisdiction that enable them to better serve District residents. Mr. Nickles has not made an effort to become a District resident since he began working for the city in January 2006. This symbolic reluctance to become a resident has angered many in the community. Indeed, his current commute to work from outside the District sends a powerful statement to the residents on whose behalf the Attorney General functions.

Residency is about more than just renting an apartment in the District. For the chief law enforcement officer, it is imperative that there be a strong connection to this jurisdiction. The law requires the Attorney General to be a resident of the District throughout his or her tenure.⁴ The unique nature of the Attorney General makes it important that the individual in that role be closely connected to the needs and wants of this jurisdiction. Making the District one's home means that an individual has an ultimate stake in the outcome of government action.

CONELATION OF ROLE OF GENERAL COUNSEL TO THE MAYOR AND
ATTORNEY GENERAL TO THE DISTRICT OF COLUMBIA

A review of Mr. Nickles' record while serving as the Mayor's general counsel, and his record to date as the Acting Attorney General for the District of Columbia, illustrates that the nominee sees little distinction in the client and duties of these two positions. In both capacities Mr. Nickles unapologetically views the Mayor as the primary client,⁵ and has shown in many of his actions that he sees no limitation on his role regardless of his title. The Council has been dogmatic in asserting that the Attorney General serves the District and not any single politician, party, or ideology. However, the nominee has shown that he either does not recognize or does not value any distinction in these roles.⁶

Spurs Legal Debate; Council Members Seek to Close Apparent Loophole in Residency Law, WASH. POST, Sept. 9, 2007, at C6.

⁴ D.C. OFFICIAL CODE § 1-515.01(e) (2008). That paragraph reads: "Each subordinate agency, independent agency, and instrumentality head shall be a resident of the District of Columbia throughout his or her tenure and shall forfeit his or her position if he or she fails to remain a resident of the District of Columbia."

⁵ See *Bill 17-548, the Attorney General for the District of Columbia Clarification Act of 2007*, Hearing Before the Council of the District of Columbia Committee on Public Safety and the Judiciary, 2 (Jan. 28, 2008) (written testimony of Acting Attorney General Peter J. Nickles) [hereinafter Nickles testimony, Bill 17-548] ("Enacting the bill would sever the accountability of the Attorney General to the Mayor and the Executive Branch, which is the Attorney General's primary client, undermining the Executive's ability to execute the laws.")

⁶ Confronted by a sharp ideological change from previous holders of the office, the Council took steps to clarify the role of the Attorney General (see Bill 17-548). The testimony submitted by then Acting Attorney General Nickles on this legislation dismissed any benefit of such clarification and questioned what problem the legislation actually

The problem, never previously viewed as an institutional issue, is the nominee's assertion that the Attorney General does not possess any independence from the Executive Office of the Mayor. Predecessors to this role have disagreed. Former Attorney General Robert Spagnoletti testified before this Committee in January 2008 that

there are often matters where the Office of the Attorney General must represent the interests of the District as a whole, and such representation may come into conflict with the political interests of the Mayor and his Executive Office.⁷

Mr. Spagnoletti said that during his tenure he did not experience any encroachment on his independence and was able to make decisions without consideration or concern for politics.⁸

Mr. Spagnoletti also noted the importance of being able to exercise such independence, as the Attorney General, in fulfilling his or her obligations, may be called upon to prosecute those in the Executive branch. He encountered this very issue just a few years ago, when as Attorney General he brought criminal charges against then Mayor Williams' staff after an investigation found potential election law violations. Mr. Spagnoletti was able to proceed because, as he phrased it: "Even when we prosecuted those closest to the Mayor or his staff, we were free from influence or pressure."⁹ Questioned about how he would proceed if his obligations as Attorney General came into conflict with the Executive, Mr. Nickles only responded that he does not anticipate any conflicts.¹⁰

Mr. Nickles is clearly an advisor to the Mayor on a variety of political matters. If in his role as the Attorney General he is later required to defend these same political matters, his defense strategy is compromised. An ulterior motive to justify the Mayor's politics, or his own, abandons the District of Columbia and its citizens as a client. For talented advocates, the law becomes not an answer to a question, but a tool that is used to achieve a purpose. The nominee appears skilled in this kind of advocacy. The concern is that Mr. Nickles has demonstrated through words and actions that he plans to advocate for the Mayor in his role as Attorney General. The Committee is concerned that the District and its citizens are therefore left unprotected.

aimed to resolve. See Nickles testimony, Bill 17-548, at 11 (Under the heading "Lack of Beneficial Purposes and Effects." Mr. Nickles wrote "It is unclear what problems the bill seeks to solve.").

⁷ *Bill 17-548, the Attorney General for the District of Columbia Clarification Act of 2007, Hearing Before the Council of the District of Columbia Committee on Public Safety and the Judiciary*, 3-4 (Jan. 28, 2008) (written testimony of former Attorney General Robert Spagnoletti) 3-4 [hereinafter Spagnoletti testimony] ("The clearest example of this is in the context of criminal prosecution where the decision to bring and pursue charges must be free from political purpose.").

⁸ Mr. Spagnoletti testified: "I was very fortunate to serve under Mayor Williams who appreciated the need for independence of the Office [of Attorney General] and allowed me and my staff to make decisions based on the strength of the case and not political concerns." *Id.* at 4.

⁹ *Id.*

¹⁰ Letter from Nickles to Mendelson, Oct. 15, 2008, at 3. Mr. Nickles reiterated this position during questioning at the October 17, 2008 hearing to consider his confirmation.

General Counsel to the Mayor
(January 2007 – January 2008)

Mr. Nickles served as the Mayor's general counsel beginning January 2, 2007, when the current mayor took office, and he remained in that role until taking the reigns as Acting Attorney General in January 2008. In a position appointment without any public input or oversight from the Council, Mr. Nickles expanded the role of the Mayor's general counsel to become actively engaged in the operations of government, and, in particular, the operations of the Office of the Attorney General. During this period Mr. Nickles was, at times, the voice of the Executive. Even more problematic, however, were instances where he was the voice of the Attorney General – although neither appointed nor confirmed as such.

Legal Action against Bank of America:

When news broke in late 2007 of a scandal in the Office of Tax and Revenue that was likely to lead to significant losses to the city, then Attorney General Linda Singer moved quickly to seek damages from Bank of America for its role in cashing fraudulent checks. By December her efforts were under way and were welcomed as a means to mitigate some of the District's losses. On December 6, however, the Mayor's general counsel, Peter Nickles, e-mailed Attorney General Singer directing her to "[s]top work on this [lawsuit]."¹¹ He wrote in a later e-mail to Singer that "[t]he Mayor has spoken, and I trust you will listen."¹² This action exceeded the authority of his office, but perhaps even more troubling is his suggestion that the Attorney General should subvert her own legal opinion for the political priorities of the Executive Branch.

Even after this exchange, with the lawsuit against Bank of America seemingly aborted, Ms. Singer's efforts to obtain a tolling agreement with the bank were again extinguished by Mr. Nickles. Mr. Nickles testified soon after becoming Acting Attorney General in January that a tolling agreement was unnecessary. Ironically, by the time of his confirmation hearing Mr. Nickles was lauding the tolling agreement he had just obtained. Mr. Nickles previously testified that no claim would be precluded under law as a result of this delay. If so, the inevitable question is: why get a tolling agreement now?

Departure of Previous Attorney General:

Attorney General Linda Singer announced her resignation from the Office of the Attorney General on December 17, 2007. Having been confirmed by the Council a mere eight months prior, her departure meant more turnover in the Attorney General position and disruption to the agency. Widely reported as the reason for her departure, and with an alternative explanation conspicuously lacking, was Ms. Singer's growing frustration with interference from the Mayor's general counsel in the duties of her office and the Mayor's increasing reliance on

¹¹ Carol D. Leonnig, *Fenty General Counsel Halted Action Against Bank in Tax Fraud Case*, WASH. POST, Jan. 28, 2008, at B1.

¹² *Id.*

Mr. Nickles in making legal decisions on behalf of the District.¹³ Even before Ms. Singer's departure, Mr. Nickles appeared in court at times as if he were the Attorney General, prompting one U.S. District Court judge to question why Mr. Nickles was doing so much talking when he wasn't recognized as a lawyer in the case.¹⁴ In response to criticism of his conflation of these roles, Mr. Nickles stated he was merely "coordinating" legal efforts for the city.¹⁵

Acting Attorney General for the District of Columbia

(January 2008 - present)

The Council has been able to see a preview over the past 11 months of what the District might expect from the agency under his leadership. Thus far the District has witnessed an Attorney General who sees no lines or limitations on his role in government. So what can be expected is little or no restriction on the authority of the Attorney General. Yet the position derives its very identity from its separateness, from the trust garnered by the Attorney General's ability to render independent legal advice. Providing superior legal service to the District of Columbia should remain the ultimate aim, without regard to politics. Mr. Nickles' actions for the past 11 months raise concerns about his ability to remain independent from such outside influence.

Employee Terminations:

Terminations in a number of District agencies have come at the request, or with the direct involvement, of the Attorney General. Mr. Nickles has sought to make himself the public face of accountability and efficiency in District government. With the primary duties of managing a large legal office and operating as the District's chief lawyer, the Attorney General is not expected, nor is it even desirable, to conduct the executive functions of the Mayor or of the many other District agencies. However, Mr. Nickles has inserted himself into the operations of a number of agencies as well as reinserting himself into his former role as the Mayor's general counsel.

In July of this year, the interim deputy general counsel to the Mayor stepped down after ethics charges led to the loss of his law license. Although no longer the Mayor's attorney, it was Mr. Nickles, nearly half a year into his role as the District's Attorney General, and not the Mayor's current general counsel that requested the deputy's resignation.¹⁶ This action raises

¹³ See Gary Emerling, *Singer Quits As Attorney General; No Reason Given for Move*, WASH. TIMES, Dec. 18, 2007, at B1; see also David Nakamura and Carol D. Leonnig, *Attorney General Quits; Clash With Fenty Aide Cited; Top Lawyer Felt Sidelined*, WASH. POST, Dec. 18, 2007, at B1.

¹⁴ Nakamura and Leonnig, *supra* note 13.

¹⁵ Bill Myers, *A.G.'s Absence Questioned*, THE EXAMINER, Nov. 11, 2007, available at <http://www.examiner.com/a-1033635~A.G.'s%20absence%20questioned.html> (last visited Nov. 11, 2008).

¹⁶ Jeff Jeffrey, *Fenty Lawyer Resigns, Is Disbarred; Million-dollar Malpractice Case Involving Botched Divorce Led to Downfall*, LEGAL TIMES, July 28, 2008, at 1. ("Fenty [] spokesman Leslie Kershaw: "When Attorney General Nickles learned of allegations stemming from some private work before [the deputy general counsel] worked for the government, he asked for and received his resignation on June 16.") *Id.* at 6. "Says Acting Attorney

concerns about where Mr. Nickles' focus lies, as well as concerns over whom the nominee views as his primary client.

More recently, Mr. Nickles publicly acknowledged that he had tangled up his previous and current positions. A number of witnesses at the October hearing on Mr. Nickles nomination stated a deep concern over his handling of the termination of the Rent Administrator within the Department of Housing and Community Development. Witnesses also testified that Mr. Nickles, appearing at a public forum to respond to concerns surrounding the firing and other tenant issues, was non-responsive and visibly irritated by questions from the public.¹⁷ Although he had been serving in the role of Attorney General for the previous 11 months, Mr. Nickles stated of his actions at the public forum: "I regret the issue relating to Ms. Wiggins; and I wholeheartedly confess that in that situation I was acting as the Mayor's lawyer."¹⁸

Lottery Contract:

Mr. Nickles' recent comments regarding the proposed lottery contract illustrate the difficulty in determining what he views as the boundaries of his role. As the District looks to the Attorney General for legal advice, to see the Attorney General also operate as an advocate for the Mayor's policy priorities is confusing to individuals both in and out of government.

When the Mayor initially submitted a proposed lottery contract with W2I to the Council, the Acting Attorney General publicly expressed disappointment in the Council for not acting to approve the Mayor's proposal.¹⁹ To date Mr. Nickles has been involved in a number of aspects of this issue. In May he was also involved in investigations into bias in the lottery vendor selection process.²⁰ By September, having completed an investigation into the selection process, evaluated the contract proposal submitted by the Mayor, and chastised the Council for not acting, Mr. Nickles was also in the process of investigating the current contractor, Lottery Technology Enterprises, for security breaches.²¹ His involvement in so many aspects of this issue create problems for those seeking to rely on the Attorney General's independent legal advice, not being able to tell whether he is instead acting as advocate for the Mayor.

General Peter Nickles. "I asked for his resignation, and I got it within 36 hours." Mike DeBonis, *Vetting Zoo*, WASH. CITY PAPER, Aug. 1, 2008, at 14.

¹⁷ See, PR 17-928, *Attorney General Peter J. Nickles Confirmation Resolution of 2008, Hearing Before the Council of the District of Columbia Committee on Public Safety and the Judiciary* (Oct. 17, 2008) (written testimony of Jim McGrath, Chairman, D.C. Tenants Advocacy Coalition (TENAC)) [hereinafter McGrath testimony].

¹⁸ PR 17-928, *Attorney General Peter J. Nickles Confirmation Resolution of 2008, Hearing Before the Council of the District of Columbia Committee on Public Safety and the Judiciary*, (Oct. 17, 2008) (oral testimony of Peter J. Nickles, nominee for Attorney General, Office of the Attorney General for the District of Columbia).

¹⁹ Nikita Stewart, *\$120 Million Lottery Deal Tabled by D.C. Council; Members Say They Want More Data*, WASH. POST, May 14, 2008, at B1.

²⁰ Nikita Stewart, *The D.C. Lottery's Tangled Roots; Controversy Over Proposals Shows Intricate Links*, WASH. POST, May 18, 2008, at C1.

²¹ David M. Nakamura, *City Hits Lottery Firm with \$1.4 Million Fine*, *D.C. Wire*, Sept. 18, 2008, 12:00 PM, available at http://voices.washingtonpost.com/dc/2008/09/city_hits_lottery_firm_with_14.html (last visited Nov. 11, 2008).

JUDGMENT & INDEPENDENCE

In the 11 months since he first took charge of the Office of the Attorney General, Mr. Nickles has launched a number of initiatives, pursued a range of policies, and made public comments that the Committee believes raise serious constitutional concerns, a lack sensitivity for civil liberties, and show a lack of respect for process. While some of his pursuits would, if pursued by other means, likely receive widespread support, the Committee believes it necessary to emphasize the importance of process.

District Employee Terminations:

Processes for personnel actions are of great importance, particularly in civil service. Disputed terminations can spur lawsuits that drag on for years and result in high costs to taxpayers from litigation and continued compensation for the duration of the dispute. The government should take great care to ensure rights are protected and employment regulations followed. Mr. Nickles approach has at times been in opposition to this with deleterious effects for the District.

Personnel actions within the Office of Attorney General itself have caused the president of the attorneys' union to warn that the net effect of Mr. Nickles' decisions has been detrimental to government.²² The termination of several attorneys at OAG earlier this year was cited by the Acting Attorney General as necessary because of agency budgetary constraints. Mr. Nickles stated that budget constraints were cited to save the attorneys from public embarrassment over the actual reason for their termination: deficient performance.²³ It was later discovered that a number of these attorneys had received "satisfactory" performance evaluations. Even if these evaluations were negative, informing individuals of the deficiency, and providing an opportunity to correct, would have been both proper and fair.

Steve Anderson, President of the AFGE Local 1403, testified that whether the reason was budgetary constraints or substandard performance, management still failed to follow the process established in the law for terminating the employees.²⁴ The union found that Mr. Nickles was unwilling to engage in reasonable discussions over the terminations, and ultimately took the District to court. Mr. Nickles eventually settled their case, but three employees continue to pursue age discrimination cases against the District.²⁵ These actions are a deterrent to labor and management cooperation, and lead to losses that that cannot immediately be quantified.

²² PR 17-928, *Attorney General Peter J. Nickles Confirmation Resolution of 2008, Hearing Before the Council of the District of Columbia Committee on Public Safety and the Judiciary* (Oct. 17, 2008) (written testimony of Steve Anderson, President, AFGE Local 1403) [hereinafter Anderson testimony].

²³ Letter from Peter J. Nickles, Acting Attorney General, District of Columbia Office of the Attorney General, to Phil Mendelson, Councilmember, At-Large, Council of the District of Columbia, 1 (July 1, 2008). Mr. Nickles stated: "I was advised that budgetary constraints were cited in the proposed notices in an effort to minimize the emotional impact on the attorneys whose performance was deficient." *Id.*

²⁴ Anderson testimony, at 2.

²⁵ *Id.*

