COUNCIL OF THE DISTRICT OF COLUMBIA
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WASHINGTON, D.C. 20004

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February 19, 2009

Peter Nickles, Attorney General
Office of the Attorney General
1350 Pennsylvania Avenue, N.W., Suite 409
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Dear Mr. Nickles:

I am responding to your February 17, 2009 letter to Chairman Gray requesting repeal of the 10 p.m. curfew from the D.C. Jail. I am appalled.

First, as Attorney General for the District of Columbia, it is not your prerogative to unilaterally declare an adopted law of the District to be unconstitutional. Especially when the apparent reason is simply that you don't like it. You do not have the authority to "direct that DOC" [Department of Corrections] disregard D.C. Code § 24-211.02(b)(6), as you propose to do.

Second, as Attorney General for the District of Columbia it is your duty to uphold the laws of the District. The law which you dislike was duly adopted by the Council in 2003 and signed by the Mayor. Both our General Counsel and your predecessor determined that the law was legally sufficient. No question of constitutionality was raised, nor considered likely. It is irresponsible for the attorney tasked for defending the District to now risk liability to the city by stating unequivocally that the law was and is unconstitutional.

Third, your letter and attached draft opinion convey a fundamental misunderstanding of the issue. The curfew was adopted as part of a larger law to improve conditions for inmates. Releasing inmates at midnight out the back door of the jail, into a neighborhood where there is no transportation and no other facilities to assist inmates is not in their best interest. Often, they have no place to go. At the time this legislation was adopted, they were being released without identification, and still wearing their jail uniforms.

Hearings of the Judiciary Committee have repeatedly documented these risky release-related practices. And inmate advocacy groups have complained at our hearings of violations of the 10 p.m. curfew. As further evidence of the desirability for this curfew, no prisoner advocate has filed a lawsuit, nor has the Council received testimony to repeal it. Prisoner advocates support the curfew for the reasons outlined above.

Fourth, your analysis of the law is flawed. Although constitutional issues are potentially raised in any instance of overdetention, courts have repeatedly permitted certain societal interests

and administrative needs to override liability. Your analysis ignores the safety, public interest, and administrative issues discussed in various cases.

There is no case law that supports your conclusion that the 10 p.m. curfew is unconstitutional. Cases that have resulted in liability have involved instances of willful neglect or detentions exceeding the date of release by *several days*. Neither of these is at issue here. Indeed, a cursory search of relevant case law reveals that courts have upheld the detention for up to two days following a release order.[1] The courts have repeatedly avoided setting any time limit for release, asserting a case by case reasonableness standard, although on the pretrial side of detention the courts have stated that a 48 hour timeframe is reasonable.[2]

Thus, the constitutional concerns you raise are not so clear-cut as asserted. Further, your statement that "no court has determined that a blanket prohibition against release during a certain period of the day" justifies the continued detention contemplated in the District's curfew law, inaccurately suggests that a court has made a determination on such an issue. It also ignores the public interest that is benefited by the 10 p.m. cutoff.

Fifth, while your letter correctly points out that the District has been sued on the issue of overdetention under *Bynum*,[3] you fail to mention that the settlement agreement from that case required the construction of an inmate processing center (IPC) to prevent the very issues you identify as unconstitutional.[4] The District settled that class action lawsuit over the overdetention and strip searching of inmates for $12 million. The 2006 settlement agreement required $3 million of these funds to go toward construction of the IPC. The IPC is intended to provide adequate processing facilities for intakes, releases, and associated records processing. Despite my repeated inquiries on the progress of this project, the IPC continues to encounter delays that push the completion date further into the next decade. The failure to construct the IPC as required by the *Bynum* settlement -- not the 10 p.m. curfew -- potentially exposes the District to millions of dollars of liability.

Finally, your focus should be on the realistic goal of meeting the curfew, rather than repealing it. Under DOC Director Devon Brown, there are now very few cases of inmates ready for release between 10:00 p.m. and 7:00 p.m. That number could be eliminated if the Executive insisted that the courts and U.S. Marshals stop returning the inmates to the jail too late for release

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[1] A quick search of relevant case law revealed a number of cases that supports this proposition. *See, Lund v. Hennepin County*, 427 F. 3d 1123 (8th Cir. 2005) (12 hours overdetention); *Brass v. County of Los Angeles*, 328 F.3d 1192 (9th Cir. 2003) (39 hours overdetention); and *Dye v. Hennepin*, 2005 U.S. Dist. LEXIS 812 (Dist. Minn. 2005) (slightly less than 48 hours).

[2] *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

[3] *Bynum v. District of Columbia*, Civil Action No. 02-956 (RCL). This case spanned the time when the 10 p.m. curfew was adopted, but the litigation *did not challenge the curfew*. Mr. Nickles' letter also refers to subsequent litigation directly linked to the *Bynum* case: *Barnes v. District of Columbia*, 2007 U.S. Dist. LEXIS 20856 (U.S.D.C.). The opinion in the latter case states that the overdetention at issue in *Bynum* involved "periods ranging from an extra day to many days or even months on end." *Id.* at 1. Further, for the *Bynum* class members "frequently one day of overdetention turned into two, or a week, or even more." *Id.* at 3. The 10 p.m. curfew was *not* the issue.

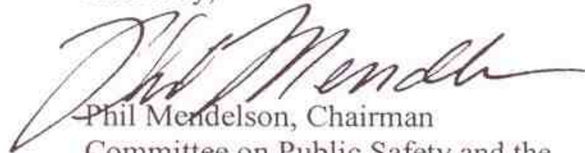
[4] *Bynum v. District of Columbia,* 412 F. Supp. 2d 73 (D.D.C. 2006).

processing. Other jurisdictions do this. As stated above, the IPC is another component of meeting the timeframes prescribed in the law.

As the city's chief attorney it is your duty to work with both the legislative and executive branches of government, not to bypass the legislature by fiat -- acting unilaterally to change the law because you could not get your way collaboratively last year on this matter.

The curfew is an issue, for you, of inconvenience. It is not a constitutional issue. It has a sound basis and there is an alternative the Executive should pursue with the courts. Regardless, it is not for you to decide and direct what laws will be followed.

Sincerely,



Phil Mendelson, Chairman
Committee on Public Safety and the Judiciary

cc: All Councilmembers

PM/bm