77  Box 29 - JGR/Independent Counsel – Roberts, John G.: Files
SERIES I: Subject File
THE WHITE HOUSE
WASHINGTON

April 11, 1984

MEMORANDUM FOR RICHARD A. HAUSER

FROM: JOHN G. ROBERTS

SUBJECT: H.R. 5279, Independent Counsel for the District of Columbia

OMB has asked whether we have any objections to clearing a proposed Justice report on H.R. 5279. This bill, modeled after the independent counsel provisions of the Ethics in Government Act, would authorize the D.C. Corporation Counsel to request that the D.C. Superior Court appoint an Independent Counsel to investigate and prosecute cases involving the affairs of the D.C. Government. If such an Independent Counsel is appointed, the U.S. Attorney and the Corporation Counsel are precluded from conducting any investigation or proceeding within the defined jurisdiction of the Independent Counsel.

The proposed Justice report strongly opposes this bill. Justice notes that there is no need for a D.C. Independent Counsel, since the U.S. Attorney has no conflict of interest with D.C. Government officials and is fully capable of investigating and prosecuting crimes involving the affairs of the D.C. Government. The report also notes that the standards in the bill are extremely vague and unworkable. This bill is a looney idea and the Justice report is appropriately strong in listing its flaws. OMB would like our views orally by 4:00 p.m. today; unless you object I will note no objection to the proposed Justice report.

Attachment
Attached for clearance is a draft Justice letter for the record on H.R. 5279, re appointing an independent counsel for the District of Columbia. A hearing is scheduled for tomorrow in the House District Committee on the bill. Although Justice is not testifying at the hearing, it would like to send the report up today or tomorrow.

Accordingly, please get me your comments by 4:00 p.m. today. If I don't hear from you by then, I will assume you have no objections.
Honorable Mervyn M. Dymally
Chairman
Subcommittee on Judiciary and
Education
Committee on the District of
Columbia
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your separate letters to United States Attorney d'Genova and myself with respect to the Subcommittee’s hearing on April 12, 1984 regarding H.R. 5279, a bill to provide for the establishment of an independent counsel under circumstances requiring the investigation and possible prosecution of alleged violations of law arising from the conduct of the affairs of the District of Columbia government.” We regret that we will be unable to appear at the hearing. However, while we have not reviewed the legislation extensively, we must convey our strenuous opposition to its enactment.

H.R. 5279 would establish a procedure where the Corporation Counsel of the District of Columbia would institute an investigation when he receives information that a violation of law involving the affairs of the District of Columbia government has occurred. If the Corporation Counsel determines that there are reasonable grounds to believe that further investigation or prosecution is warranted, a request to the Superior Court of the District of Columbia for the appointment of an independent Counsel must be made. The Superior Court shall then appoint an independent counsel and define his prosecutorial jurisdiction. Finally, H.R. 5279 precludes the United States Attorney or the Corporation Counsel from conducting any investigation or proceeding involving the particular subject matter.

The United States Attorney for the District of Columbia, as the delegate of the President and the Attorney General, has the statutory prosecutive authority in the U.S. District Court and the District of Columbia Superior Court. D.C. Code §23-101. This responsibility covers offenses under the District of Columbia Code and federal statutes and includes illegal activities...
The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration program.

Sincerely,

ROBERT A. McCONNELL
Assistant Attorney General
98TH CONGRESS  
2d Session  
H.R. 5279

To provide for the establishment of an independent counsel under circumstances requiring the investigation and possible prosecution of alleged violations of law arising from the conduct of the affairs of the District of Columbia government.

IN THE HOUSE OF REPRESENTATIVES

MARCH 28, 1984

Mr. Fauntroy (for himself, Mr. Dellums, Mr. Dymally, and Mr. Gray) introduced the following bill; which was referred to the Committee on the District of Columbia

A BILL

To provide for the establishment of an independent counsel under circumstances requiring the investigation and possible prosecution of alleged violations of law arising from the conduct of the affairs of the District of Columbia government.

1  Be it enacted by the Senate and House of Representa-
2  tives of the United States of America in Congress assembled,
3  
SHORT TITLE
4  Section 1. This Act may be cited as the “District of
5  Columbia Independent Counsel Act”.
APPLICABILITY OF PROVISIONS OF THIS ACT

Sec. 2. The Corporation Counsel of the District of Columbia (hereinafter in this Act referred to as the "Corporation Counsel") shall conduct an investigation pursuant to the provisions of this Act whenever the Corporation Counsel receives information sufficient to constitute grounds to investigate that there has been committed a violation (other than a violation constituting a petty offense) of any law of the District of Columbia, or any law of the United States applicable exclusively to the District of Columbia, arising from the conduct of the affairs of the District of Columbia government.

APPLICATION FOR APPOINTMENT OF AN INDEPENDENT COUNSEL

Sec. 3. (a)(1) Upon receiving information that the Corporation Counsel determines is sufficient to constitute grounds to investigate that any violation of law covered by this Act under section 2 has occurred, the Corporation Counsel shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Corporation Counsel considers appropriate. In determining whether grounds to investigate exist, the Corporation Counsel shall consider—

(A) the degree of specificity of the information received, and

(B) the credibility of the source of the information.
(2) In conducting preliminary investigations pursuant to this section, the Corporation Counsel shall have no authority to convene grand juries, plea bargain, or grant immunity.

(b)(1) If the Corporation Counsel, upon completion of the preliminary investigation, finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted, the Corporation Counsel shall so notify the Superior Court of the District of Columbia (hereinafter in this Act referred to as the "Superior Court") and the Superior Court shall have no power to appoint an independent counsel.

(2) Such notification shall be by memorandum containing a summary of the information received and a summary of the results of any preliminary investigation.

(3) Such memorandum shall not be revealed to any individual outside the Superior Court, the Office of the Corporation Counsel, the Office of the United States Attorney for the District of Columbia, or the Department of Justice without leave of the Superior Court.

(c)(1) If the Corporation Counsel, upon completion of the preliminary investigation, finds reasonable grounds to believe that further investigation or prosecution is warranted, or if ninety days elapse from the receipt of the information without a determination by the Corporation Counsel that there are no reasonable grounds to believe that further invest-
tigation or prosecution is warranted, then the Corporation Counsel shall apply to the Superior Court for the appointment of an independent counsel. In determining whether reasonable grounds exist to warrant further investigation or prosecution, the Corporation Counsel shall comply with the written or other established policies of the Office of the Corporation Counsel and the Office of the United States Attorney for the District of Columbia, as appropriate, with respect to the enforcement of any applicable law.

(2) If—

(A) after the filing of a memorandum under subsection (b) of this section, the Corporation Counsel receives additional information sufficient to constitute grounds to investigate about the matter to which such memorandum related, and

(B) the Corporation Counsel determines, after such additional investigation as the Corporation Counsel considers appropriate, that reasonable grounds exist to warrant further investigation or prosecution,

then the Corporation Counsel shall, not later than ninety days after receiving such additional information, apply to the Superior Court for the appointment of an independent counsel.

(d)(1) Any application under this Act shall contain sufficient information to assist the Superior Court to select an...
independent counsel and to define such independent counsel's prosecutorial jurisdiction.

(2) No application or any other documents, materials, or memorandums supplied to the Superior Court under this Act shall be revealed to any individual outside the Superior Court, the Office of the Corporation Counsel, the Office of the United States Attorney for the District of Columbia, or the Department of Justice without leave of the Superior Court.

(e) The Corporation Counsel may ask an independent counsel to accept referral of a matter that relates to a matter within that independent counsel's prosecutorial jurisdiction.

(f) The Corporation Counsel's determination under subsection (c) of this section to apply to the Superior Court for the appointment of an independent counsel shall not be reviewable in any court.

DUTIES OF THE SUPERIOR COURT

Sec. 4. (a) Upon receipt of an application under section 3 of this Act, the Superior Court shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction. An independent counsel's identity and prosecutorial jurisdiction shall be made public upon request of the Corporation Counsel or upon a determination of the Superior Court that disclosure of the identity and prosecutorial jurisdiction of such independent counsel
would be in the best interests of justice. In any event the
identity and prosecutorial jurisdiction of such prosecutor shall
be made public when any indictment is returned or any crimi-
nal information is filed.

(b) The Superior Court, upon request of the Corporation
Counsel which may be incorporated in an application under
this Act, may expand the prosecutorial jurisdiction of an ex-
isting independent counsel, and such expansion may be in lieu
of the appointment of an additional independent counsel.

(c) The Superior Court may not appoint as an independ-
ent counsel any person who holds or recently held any office
of profit or trust under the District of Columbia government.

(d) If a vacancy in office arises by reason of the resigna-
tion or death of an independent counsel, the Superior Court
may appoint an independent counsel to complete the work of
the independent counsel whose resignation or death caused
the vacancy. If a vacancy in office arises by reason of the
removal of an independent counsel, the Superior Court may
appoint an acting independent counsel to serve until any judi-
cial review of such removal is completed. Upon the comple-
tion of such judicial review, the Superior Court shall take
appropriate action.

(e) Upon a showing of good cause by the Corporation
Counsel, the Superior Court may grant a single extension of
the preliminary investigation conducted pursuant to section 3
of this Act for a period not to exceed sixty days.

(f) Upon request by any individual subject to an investi-
gation conducted by an independent counsel pursuant to this
Act, the Superior Court may, in its discretion, award reim-ursements for all or part of the attorney’s fees incurred by
such individual during such investigation if—

(1) no indictment is brought against such indi-
vidual; and

(2) the attorney’s fees would not have been in-
curred but for the requirements of this Act.

AUTHORITY AND DUTIES OF AN INDEPENDENT COUNSEL

SEC. 5. (a) Notwithstanding any other provision of law,
an independent counsel appointed under this Act shall have,
with respect to all matters in such independent counsel’s
prosecutorial jurisdiction established under this Act, full
power and independent authority to exercise all investigative
and prosecutorial functions and powers of the Corporation
Counsel and the United States Attorney for the District of
Columbia. Such investigative and prosecutorial functions and
powers shall include—

(1) conducting proceedings before grand juries and
other investigations;

(2) participating in court proceedings and engag-
ing in any litigation, including civil and criminal
matters, that such independent counsel considers
necessary;
(3) appealing any decision of a court in any case
or proceeding in which such independent counsel par-
takes in an official capacity;
(4) reviewing all documentary evidence available
from any source;
(5) determining whether to contest the assertion
of any testimonial privilege;
(6) contesting in court (including, where appropri-
ate, participating in in camera proceedings) any claim
of privilege;
(7) making applications to any court of the Dis-
trict of Columbia for a grant of immunity to any wit-
ness, consistent with applicable statutory requirements,
or for warrants, subpoenas, or other court orders;
(8) inspecting, obtaining, or using the original or a
copy of any District of Columbia tax return, in accord-
ance with the applicable statutes and regulations;
(9) initiating and conducting prosecutions in any
court of competent jurisdiction, framing and signing in-
dictments, filing informations, and handling all aspects
of any case in the name of the District of Columbia or
the United States, as appropriate; and
(10) consulting with the Corporation Counsel and
the United States Attorney for the District of Colum-
bia or any other district in which a violation was al-
leged to have occurred.
(b) An independent counsel appointed under this Act
shall receive compensation at a per diem rate equal to the
annual rate of basic pay for level IV of the Executive Sched-
ule under section 5315 of title 5.
(c) For the purposes of carrying out the duties of the
office of independent counsel, an independent counsel shall
have power to appoint, fix the compensation, and assign the
duties, of such employees as such independent counsel con-
siders necessary (including investigators, attorneys, and part-
time consultants). The positions of all such employees are
exempted from the competitive service. No such employee
may be compensated at a rate exceeding the maximum rate
provided for GS–18 of the General Schedule under section
5332 of title 5.
(d) An independent counsel may request assistance from
the Office of the Corporation Counsel and the Office of the
United States Attorney for the District of Columbia, and
such offices shall provide such assistance, including access to
any records, files, or other materials relevant to matters
within such independent counsel’s prosecutorial jurisdiction,
and the use of the resources and personnel necessary to perform such independent counsel’s duties.

(e) An independent counsel may ask the Corporation Counsel, the United States Attorney for the District of Columbia, the Attorney General, or the Superior Court to refer matters related to the independent counsel’s prosecutorial jurisdiction. An independent counsel may accept referral of a matter by the Corporation Counsel, the United States Attorney for the District of Columbia, or the Attorney General if the matter relates to a matter within such independent counsel’s prosecutorial jurisdiction as established by the Superior Court. If such a referral is accepted, the independent counsel shall notify the Superior Court.

(f) An independent counsel shall, except where not possible, comply with the written or other established policies of the Office of the Corporation Counsel and the Office of the United States Attorney for the District of Columbia respecting enforcement of the criminal laws.

(g) The independent counsel shall have full authority to dismiss matters within such counsel’s prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written or other established policies of the Office of the Corporation Counsel and the Office of the United States Attorney for the District of Columbia.
REPORTING AND OVERSIGHT

SEC. 6. (a) An independent counsel appointed under this Act may make public from time to time, and shall send to the District of Columbia Council and the appropriate committees of the Congress statements or reports on the activities of such independent counsel. These statements and reports shall contain such information as such independent counsel considers appropriate.

(b)(1) In addition to any reports made under subsection (a) of this section, and before the termination of an independent counsel's office under section 7(b) of this Act, such independent counsel shall submit to the Superior Court a report under this subsection.

(2) A report under this subsection shall set forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted.

(3) The Superior Court may release to the District of Columbia Council, the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the Superior Court considers appropriate. The Superior Court shall make such orders as are appropriate to protect the rights of any individual named in such report and
to prevent undue interference with any pending prosecution.

The Superior Court may make any portion of a report under this section available to any individual named in such report for the purposes of receiving within a time limit set by the Superior Court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may in the discretion of the Superior Court be included as an appendix to such report.

(c) The District of Columbia Council shall have oversight jurisdiction with respect to the official conduct of any independent counsel appointed under this chapter, and such independent counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

(d) A two-thirds majority of all members of the District of Columbia Council may request in writing that the Corporation Counsel apply for the appointment of an independent counsel. Not later than thirty days after the receipt of such a request, or not later than fifteen days after the completion of a preliminary investigation of the matter with respect to which the request is made, whichever is later, the Corporation Counsel shall provide written notification of any action the Corporation Counsel has taken in response to such request and, if no application has been made to the Superior Court, why such application was not made. Such written notification shall be provided to the District of Columbia Coun-
cil, and shall not be revealed to any third party, except that
by a two-thirds majority of all members of such Council, the
Council may, either on its own initiative or upon the request
of the Corporation Counsel, make public such portion or por-
tions of such notification as will not in the Council's judgment
prejudice the rights of any individual.

REMOVAL OF AN INDEPENDENT COUNSEL; TERMINATION
OF OFFICE

SEC. 7. (a)(1) An independent counsel appointed under
this Act may be removed from office only by the personal
action of the Corporation Counsel and only for good cause,
physical disability, mental incapacity, or any other condition
that substantially impairs the performance of such indepen-
dent counsel's duties.

(2) If an independent counsel is removed from office, the
Corporation Counsel shall promptly submit to the Superior
Court, the District of Columbia Council, and the appropriate
committees of the Congress a report specifying the facts
found and the ultimate grounds for such removal. The Dis-
trict of Columbia Council shall make available to the public
such report, except that such Council may, if necessary to
protect the rights of any individual named in the report or to
prevent undue interference with any pending prosecution,
delete or postpone publishing any or all of the report. The
Superior Court may release any or all of such report in the
same manner as a report released under section 6(b)(3) of this Act and under the same limitations as apply to the release of a report under that section.

(3) An independent counsel so removed may obtain judicial review of the removal in a civil action commenced before the Superior Court and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief. The Superior Court shall cause such an action to be in every way expedited.

(b)(1) An office of independent counsel shall terminate when (A) the independent counsel notifies the Corporation Counsel that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel, or accepted by such independent counsel under section 5(e) of this Act, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Office of the Corporation Counsel, the Office of the United States Attorney for the District of Columbia, or the Department of Justice to complete such investigations and prosecutions and (B) the independent counsel files a report in full compliance with section 6(b) of this Act.

(2) The Superior Court, either on its own motion or upon suggestion of the Corporation Counsel, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial
jurisdiction of the independent counsel or accepted by such
independent counsel under section 5(e) of this Act, and any
resulting prosecutions, have been completed or so substan-
tially completed that it would be appropriate for the Office of
the Corporation Counsel, the Office of the United States At-
torney for the District of Columbia, or the Department of
Justice to complete such investigations and prosecutions. At
the time of termination, the independent counsel shall file the
report required by section 6(b) of this Act.

RELATIONSHIP WITH THE OFFICE OF THE UNITED
STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA

SEC. 8. (a) Whenever a matter is in the prosecutorial
jurisdiction of an independent counsel or has been accepted
by an independent counsel under section 5(e) of this Act, the
Office of the United States Attorney for the District of Co-
lumbia and the Office of the Corporation Counsel shall sus-
pend all investigations and proceedings regarding such
matter, except to the extent required by section 5(d) of this
Act, and except insofar as such independent counsel agrees in
writing that such investigation or proceedings may be
continued.

(b) Nothing in this Act shall prevent the Corporation
Counsel or the United States Attorney for the District of
Columbia from making a presentation as amicus curiae to
any court as to issues of law raised by any case or proceeding
in which an independent counsel participates in an official capacity or any appeal of such a case or proceeding.

AUTHORIZATION OF APPROPRIATIONS

Sec. 9. There are authorized to be appropriated such sums as may be necessary, to be held by the Office of the Corporation Counsel as a contingent fund, for the use of any independent counsels appointed under this Act. Any sums appropriated under this section shall remain available until expended.
Honorable Mervyn M. Dymally  
Chairman  
Subcommittee on Judiciary and Education  
Committee on the District of Columbia  
House of Representatives  
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your separate letters to United States Attorney diGenova and myself with respect to the Subcommittee's hearing on April 12, 1984 regarding H.R. 5279, a bill to provide for the establishment of an independent counsel under circumstances requiring the investigation and possible prosecution of alleged violations of law arising from the conduct of the affairs of the District of Columbia government." We regret that we will be unable to appear at the hearing. However, while we have not reviewed the legislation extensively, we must convey our strenuous opposition to its enactment.

H.R. 5279 would establish a procedure where the Corporation Counsel of the District of Columbia would institute an investigation when he receives information that a violation of law involving the affairs of the District of Columbia government has occurred. If the Corporation Counsel determines that there are reasonable grounds to believe that further investigation or prosecution is warranted, a request to the Superior Court of the District of Columbia for the appointment of an independent Counsel must be made. The Superior Court shall then appoint an independent counsel and define his prosecutorial jurisdiction. Finally, H.R. 5279 precludes the United States Attorney or the Corporation Counsel from conducting any investigation or proceeding involving the particular subject matter.

The United States Attorney for the District of Columbia, as the delegate of the President and the Attorney General, has the statutory prosecutive authority in the U.S. District Court and the District of Columbia Superior Court. D.C. Code §23-101. This responsibility covers offenses under the District of Columbia Code and federal statutes and includes illegal activities of
involving the District of Columbia government. There is no need for the cumbersome mechanism envisioned by H.R. 5279. A fundamental premise of the criminal justice system of the District of Columbia is the good judgment and integrity of the officers and employees of the Department of Justice. The implicit assumption of H.R. 5279, that the Department of Justice cannot conduct investigations and prosecutions fairly, effectively and competently, is simply unfounded.

Moreover, an element of unfairness emerges from the legislation. Formal and informal Department of Justice policies and precedents are established to protect those who are the subject of investigations. These policies are premised on the historical principle, emanating from the Constitution, that one is presumed innocent until proven guilty. These policies have their strength from the fact that ultimately all employees in the Department of Justice can be held accountable for any impropriety or incompetence. As it is unclear who the "independent counsel" is accountable to, H.R. 5279 distorts the present accountability of individuals which is an essential part of our system of government. H.R. 5279 is further objectionable in that it apparently intends to preclude an officer of the federal government, the United States Attorney, from carrying out his constitutional and statutory responsibility to enforce the law in the seat of the Nation's government.

We must also note that the mechanism established by H.R. 5279 is faulty and unworkable. The bill grants to the Corporation Counsel authority to conduct investigations which are beyond his present jurisdiction and expertise. Moreover, the standard which evokes the mechanism, "a violation . . . of any law . . . arising from the conduct of the affairs of the District of Columbia government" is so vague as to encompass any act such as a major felony by an elected official to the violation of a regulatory offense, such as smoking in a prohibited area by a civil service employee. The enforcement of the law is not served by procedures which offer no guidance to those who must enforce it and abide by it. H.R. 5279 departs from clear and enunciated standards which are the foundation of good laws.

Finally, H.R. 5279 appears to premised on the notion that there is some type of conflict of interest present. We are unaware of any circumstances which have been raised which question the ability of the United States Attorney for the District of Columbia to meet his statutory responsibility of prosecutor in the District. By the very nature of his position, the United States Attorney, who is appointed by the President, and confirmed by the Senate, has no conflict. The record of the office in the area of public integrity demonstrates this. Accordingly, we cannot perceive a purpose or intent behind H.R. 5279.

In summary the Department of Justice opposes strongly enactment of H.R. 5279.

DRAFT
The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration program.

Sincerely,

ROBERT A. McCONNELL
Assistant Attorney General

Attachment
John:

For your review. This has been submitted to OMB with a hope that it can be submitted by tomorrow's hearing.

[Signature]

John Logan