

Frederick B. Abramson
President

Paul L. Friedman
President-Elect

Daryl A. Chamblee
Secretary

Donald T. Bucklin
Treasurer



Katherine A. Mazzaferri
Executive Director

David B. Dorsey
*Assistant Executive
Director*

Ann Barker
*Director, Public
Service Activities*

The District of Columbia Bar

1426 H STREET, N.W., EIGHTH FLOOR, WASHINGTON, D.C. 20005-2184
(202) 638-1500

Lawyer Referral and Information Service 638-1509

MEMORANDUM

TO: Members of the Board of Governors

FROM: Lynne M. Lester *LM*
Manager, Divisions Office

DATE: January 3, 1986

SUBJECT: Statement in support of H.R. 3578, the D.C. Judicial Efficiency and Improvement Act of 1985 submitted to the Senate Committee on Governmental Efficiency and the District of Columbia of the Committee on Governmental Affairs

Pursuant to Division Guideline No. 13, Section a, the enclosed proposed public statement is being sent to you by
Division 6-District of Columbia Affairs

(a)(iii): "No later than 12:00 noon on the seventh (7th) day before the statement is to be submitted to the legislative or governmental body, the Division will forward (by mail or otherwise) a one-page summary of the comments (summary forms may be obtained through the Divisions Office), the full text of the comments, and the full text of the legislative or governmental proposal to the Manager for Divisions. The one-page summary will be sent to the Chairperson(s) of each Division steering committee and any other D.C. Bar committee that appear to have an interest in the subject matter of the comments. A copy of the full text and the one-page summary will be forwarded to the Executive Director of the Bar, the President and President-Elect of the Bar, the Division's Board of Governors liaison, and the chairperson of the Committee on Divisions. Copies of the full text will be provided upon request through the Divisions Office. Reproduction and postage expenses will be incurred by whomever requested the full text (i.e., Division, Bar committee or Board of Governors

BOARD OF GOVERNORS

Frederick B. Abramson • Donald T. Bucklin • Daryl A. Chamblee • Vincent H. Cohen • James E. Coleman Jr.
Yvonne A. Conner • Dr. Chauncey Fortt • Paul L. Friedman • Jane A. Golden • Jamie S. Gorelick
Marcia D. Greenberger • Janine D. Harris • Ann Kernan Macrory • Anne Meister • Frank J. Martell
M. Elizabeth Medaglia • Charles F.C. Ruff • Lois J. Schiffer • Girardeau A. Spann • Marna S. Tucker
John Vanderstar • William P. Vazquez • Patricia A. Wynn

account). The Manager for Divisions shall help with the distribution, if requested, and shall forward a copy of the one-page summary to each member of the Board of Governors. In addition, the Manager for Divisions shall draw up a list of all persons receiving the comment or statement, and he/she shall ascertain that appropriate distribution has been made and will assist in collecting the views of the distributees. If no request is made to the Manager for Divisions within the seven-day period by at least three (3) members of the Board of Governors, or by majority vote of any steering committee or Committee of the Bar, that the proposed amendment be placed on the agenda of the Board of Governors, the Division may submit its comments to the appropriate federal or state legislative or governmental body at the end of the seven-day period."

a(vi): The Board of Governors may request that the proposed comments be placed on the agenda of the Board of Governors for the following two reasons only:

(a) The matter is so closely and directly related to the administration of justice that a special meeting of the Bar's membership pursuant to Rule VI, Section 2, or a special referendum pursuant to Rule VII, Section 1, should be called, or (b) the matter does not relate closely and directly to the administration of justice, involves matters which are primarily political, or as to which evaluation by lawyers would not have particular relevance.

a(v): Another Division or Committee of the Bar may request that the proposed set of comments by a Division be placed on the Board's agenda only if such Division or Committee believes that it has greater or coextensive expertise in or jurisdiction over the subject matter, and only if (a) a short explanation of the basis for this belief and (b) an outline of proposed alternate comments of the Division or Committee are filed with both the Manager for Divisions and the commenting Division's Chairperson(s). The short explanation and outline of proposed alternate comments will be forwarded by the Manager for Divisions to the Board of Governors.

a(vi): Notice of the request that the statement be placed on the Board's agenda lodged with the Manager for Divisions by any Board member may initially be telephoned to the Manager for Divisions (who will then inform the commenting Division), but must be supplemented by a written objection lodged within seven days of the oral objection.

Please call me by 5:00 p.m., Thursday, January 9, 1986
if you wish to have this matter placed on the Board of Governors'
agenda for Tuesday, January 14, 1986

Enclosures



The District of Columbia Bar

PROPOSED PUBLIC STATEMENT SUMMARY

Date: January 3, 1986

Division: Division 6-District of Columbia Affairs

Committee: _____

Contact Person: Jacquelyn Helm at 882-6702

Type of public statement: Amicus Brief _____ Resolution _____
Letter _____ Testimony _____
Report/study _____ Other Statement _____

Comments approved by the steering committee: Yes XXXX No _____

Recipient of public statement: Senate Subcommittee on Governmental

Efficiency and the District of Columbia of the Committee on
Governmental Affairs

Expedited consideration requested (two-day review period): Yes _____ No XXX

Standard seven-day review period requested: Yes XXX No _____

Subject title: H.R. 3578, the District of Columbia Judicial

Efficiency and Improvement Act of 1985

Summary: Please attach a one-page summary of proposed comments.

ONE PAGE SUMMARY OF THE STATEMENT OF DIVISION 6 ON
H.R. 3578
THE D.C. JUDICIAL EFFICIENCY AND IMPROVEMENT ACT OF 1985
SUBMITTED TO THE
SENATE COMMITTEE ON GOVERNMENTAL EFFICIENCY AND THE
DISTRICT OF COLUMBIA OF THE
COMMITTEE ON GOVERNMENTAL AFFAIRS

We support as consistent with the spirit of the Court Reform and Self-Government Acts (1) requiring the U.S. Attorney to make annual statistical reports and recommendations to the Mayor and Council, (2) eliminating of the federal role in the appointment of the Executive Officer of the District Courts; (3) elimination of the federal Chief Judges from the panel that appoints the Board of Trustees for Office of the D.C. Public Defender; (4) eliminating the requirement that District of Columbia Judges file financial disclosure reports with the Federal Judicial Ethics Committee, in view of the existing requirement that these judges file similar reports with the Tenure Commission; and (5) authorizing the D.C. Court of Appeals to answer questions certified by federal and state courts. However, we hesitate to support giving permanent authority for hearing commissioners without the adoption of provisions relating to the appointment, qualifications, tenure, and removal, many of which were recommended by the Council on Court Excellence.

With respect to amendments relating to the Judicial Nomination Commission, we support (1) giving the Commission more time to evaluate judges who have made themselves available for another term and (2) making the list of judicial nominees public. While we do not oppose the confidentiality of Commission materials, we suggest that it is not necessary to exempt the Commission from the Federal Freedom of Information Act, because that Act by its own terms does not apply to the Commission. We oppose the provision exempting the Commission from the Open Meetings statute, not because we oppose the policy but because we believe the Council has the authority to exempt the Commission from this statute and that action by the Council on this issue would be in the interests of home rule. We hesitate to support certain provisions permitting disclosure of information to the Commission without further local discussion. We strongly oppose deleting the category of "exceptionally well-qualified" in the Commission's evaluation of sitting judges as its presence is an inducement to the bench to maintain high levels and informs the bar and the public.

STATEMENT OF
JAMES C. MCKAY, JR.
CHAIRMAN, LEGISLATION COMMITTEE
DIVISION VI (DISTRICT OF COLUMBIA AFFAIRS) OF THE
DISTRICT OF COLUMBIA BAR*
BEFORE THE
SUBCOMMITTEE ON GOVERNMENTAL EFFICIENCY
AND THE DISTRICT OF COLUMBIA
GOVERNMENTAL AFFAIRS COMMITTEE
UNITED STATES SENATE
ON
H.R. 3578
DISTRICT OF COLUMBIA JUDICIAL EFFICIENCY
AND IMPROVEMENT ACT OF 1985

January , 1986

Mr. Chairman and members of the Committee:

Thank you for the opportunity to submit a statement on H.R. 3578, the District of Columbia Judicial Efficiency and Improvement Act of 1985. This statement is made on behalf of Division VI of the District of Columbia Bar, the Division responsible for monitoring legislative and judicial developments that affect the District of Columbia.*

PRO-HOME RULE AMENDMENTS

We support a number of provisions in the bill which are a logical outgrowth of the Court Reorganization and Self-Government Acts and which further home rule by enhancing the independence of the District of Columbia Government from the Federal Government.

STANDARD DISCLAIMER

*

The views expressed herein represent only those of Division VI (District of Columbia Affairs) of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

We support section 2 of the bill, which would require the United States Attorney for the District of Columbia to submit annual reports on prosecutions and convictions by the United States Attorney for the District of Columbia to the Mayor and Council. We believe that it would be of great benefit to the District Government in fulfilling its administrative and legislative responsibilities over the District's criminal justice system.

In addition, we support provisions of the bill eliminating the federal role in the administration of the District's criminal justice system. We therefore favor section 4, which deletes the requirement that the Executive Officer of the Court be selected from a list provided by the Administrative Office of the United States Courts, and section 6, which eliminates the Chief Judges of the Federal Circuit and District courts from the panel that appoints the Board of Trustees for the Office of the Public Defender for the District of Columbia.

Similarly, we support section 8, which eliminates the requirement that District of Columbia Judges file financial disclosure reports with the Federal Judicial Ethics Committee, in view of the existing requirement in D.C. Code § 11-1530 that these judges file similar reports with the District of Columbia Commission on Judicial Disabilities and Tenure. We believe that it is consistent with court reform and home rule that the District of Columbia judiciary report

to an agency of the District of Columbia Government rather than the Federal Government.

Likewise, we support section 9, which would enact the Uniform Certification of Questions of Law Act in the District of Columbia. It would authorize the D.C. Court of Appeals to answer questions certified to it by federal and state appellate courts. Twenty-four states have enacted this uniform law since it was adopted by the National Conference of Commissioners on Uniform State Laws in 1967. We support its enactment in the District because it is consistent with the theory embodied in the Court Reform Act that the District of Columbia Court of Appeals should be treated like the highest court of a state, and because it would be in the interests of judicial economy.

HEARING COMMISSIONERS

We have reservations, however, about section 3, which make permanent the temporary statutory authorization for hearing commissioners. We join the statement of the Council on Court Excellence, submitted before the House District of Columbia Committee on this bill, in urging amendment of the proposed legislation by incorporating certain standards taken from the Federal Magistrate's Act, 28 U.S.C. § 631 et seq. These amendments relate to the appointment, qualifications, functions, tenure, and removal of hearing commissioners. We offer these specific comments:

1. Appointment of hearing commissioners by concurrence of all active judges pursuant to standards and procedures, including a merit selection panel, should be included in the bill, as the Council on Court Excellence recommends.

2. Since experience and judgment are significant qualifications, the Committee may wish to consider a five year bar membership requirement, as provided for federal magistrates instead of three years.

3. The bill in its current version contains no express provision that full-time hearing commissioners may not engage in the practice of law or that part-time commissioners may not serve in criminal actions "nor act in any capacity that is . . . inconsistent with the proper discharge of their office. See 28 U.S.C. § 632(a), (b). Restrictions on the concurrent practice of law are, perhaps, implicit in the proposed amendment to D.C. Code § 11-1732(g) that Commissioners "shall abide by the Canons of Judicial Ethics," but should be made more even more explicit.

4. We agree with the Council of Court Excellence proposal of a minimum term for hearing commissioners. See proposed amendment to D.C. Code § 11-1732(e), (f), (g). The Council on Court Excellence has proposed a 8-year term, identical to that provided for Federal Magistrates. As judges of the District of Columbia Courts, unlike Federal judges, are not appointed for life, but for 15 years, it would, perhaps, be more appropriate to reduce the term to 5

years. Cf. D.C. Code § 40-504(a) (5-year term for hearing examiners of the Bureau of Traffic Adjudication).

Finally, we agree with the comments of the Council on Court Excellence that hearing commissioners should be removable only for cause. We suggest the Committee adopt the most current procedures and standards relating to the removal of judges of the District of Columbia Courts enacted in 1973 by section 431(d) and 432 of the District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code, title 11, appendix.

JUDICIAL NOMINATION COMMISSION

We have a varied reaction to the provisions concerning the Judicial Nomination Commission. We fully support section 14, which would give the Commission additional time to evaluate judges who have made themselves available for another term. We also support section 12, which would make the list of judicial nominees public.

While we have no opposition to section 11, which would make materials furnished to or developed by the Judicial Nomination Commission privileged and confidential, we do not believe that it is necessary or desirable to include the final sentence of the section, which provides that the Federal Freedom of Information Act would not apply to those materials. This sentence is unnecessary because the Nomination Commission, as an agency of the District Government, is specifically excluded from the scope of the

Federal Freedom of Information Act by 5 U.S.C. §551(1)(D). Therefore, to include this sentence would, at best, cause confusion, and, at worst, lead to the implication that the Federal Freedom of Information Act might apply to other agencies of the District Government.

We oppose section 11 because we believe that the Council should be permitted to exempt the Commission from the Open Meetings provision, D.C. Code § 1-1504. This provision, although originally enacted by Congress by Title VII of the Self-Government Act, is a purely local law which the drafters of that Act contemplated would be within the legislative authority of the Council. No one has questioned the Council's authority to amend other provisions of local law enacted by Title VII, such as the amendments to the D.C. Election Act, added by § 751 of the Self-Government Act. Therefore, the Council should be permitted to amend the local Open Meetings provision to provide an exemption for the Commission.

We have reservations about two provisions in section 13 of the bill, which would permit disclosure of certain confidential information submitted to the Commission--namely, the provision authorizing a judge to disclose confidential medical information, which may have the practical effect of forcing its disclosure, and the provision requiring disclosure of documents at a hearing before the Commission for the purposes of prosecution for

perjury before the Commission, which may raise fifth amendment concerns. We believe that these provisions should be more fully discussed before enactment.

TENURE COMMISSION

We oppose section 15 of the bill, which would eliminate the option of the Tenure Commission to rate a judge "exceptionally well-qualified." The requirement can and should be made to serve the purpose of recognizing those judges whose service is truly exceptional. It also serves as an inducement to judges to maintain a high quality of justice. In our view, any efforts expended concerning this requirement should be devoted to making the rating meaningful by, for example, encouraging the Commission to give reasons for an "exceptionally well-qualified" rating. Therefore, we believe that this section should be deleted from the bill.

CONCLUSION

In conclusion, we support the many provisions of H.R. 3578 that further the independence of the District's judicial and criminal justice system and thereby enhance home rule. We have reservations about certain provisions that are unrelated to this purpose, and hope that the Committee will reconsider the ones that we have mentioned. With these exceptions, we support this legislation and hope that the Committee will take favorable action.

Thank you for the opportunity to submit this statement.