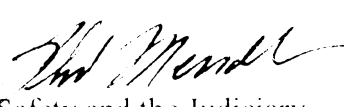


**COUNCIL OF THE DISTRICT OF COLUMBIA  
COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY  
COMMITTEE REPORT**

1350 Pennsylvania Avenue, NW 20004

**TO:** All Councilmembers

**FROM:** Councilmember 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.

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#### QUALIFICATIONS FOR THE OFFICE OF THE ATTORNEY GENERAL

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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.<sup>1</sup> For this and other work, Mr.

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<sup>1</sup> District of Columbia Office of the Attorney General website: Acting AG Bio – Peter Nickles, <http://oag.dc.gov/oc/cwp/view.a,3,q,638711,ocNav,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.<sup>2</sup> 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.

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#### RESIDENCY IN THE DISTRICT OF COLUMBIA

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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.<sup>3</sup> Only after Mr. Nickles decided that he would

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<sup>2</sup> 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).

<sup>3</sup> 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.<sup>4</sup> 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.

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

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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,<sup>5</sup> 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.<sup>6</sup>

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

<sup>4</sup> 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."

<sup>5</sup> 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.").

<sup>6</sup> 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.<sup>7</sup>

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.<sup>8</sup>

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."<sup>9</sup> 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.<sup>10</sup>

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.

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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.").

<sup>7</sup> *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.").

<sup>8</sup> 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.

<sup>9</sup> *Id.*

<sup>10</sup> 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]." <sup>11</sup> He wrote in a later e-mail to Singer that "[t]he Mayor has spoken, and I trust you will listen." <sup>12</sup> 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

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

<sup>12</sup> *Id.*

Mr. Nickles in making legal decisions on behalf of the District.<sup>13</sup> 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.<sup>14</sup> In response to criticism of his conflation of these roles, Mr. Nickles stated he was merely "coordinating" legal efforts for the city.<sup>15</sup>

### **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.<sup>16</sup> This action raises

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<sup>13</sup> 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.

<sup>14</sup> Nakamura and Leonnig, *supra* note 13.

<sup>15</sup> 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).

<sup>16</sup> 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.<sup>17</sup> 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."<sup>18</sup>

### **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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> 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.

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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.

<sup>17</sup> 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].

<sup>18</sup> 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).

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

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

<sup>21</sup> 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).



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JUDGMENT & INDEPENDENCE

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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.<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> These actions are a deterrent to labor and management cooperation, and lead to losses that cannot immediately be quantified.

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<sup>22</sup> 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].

<sup>23</sup> 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.*

<sup>24</sup> Anderson testimony, at 2.

<sup>25</sup> *Id.*

However the loss to the frontline workforce, and the deleterious effect on employee morale, is readily observable. A number of employees within the Office of the Attorney General have already shared their frustration with the agency leadership.

In other agencies Mr. Nickles has taken an active role in terminations, including the Metropolitan Police Department and the Child and Family Services Agency. In both cases questions have been raised as to whether the proper legal process was followed, and court orders have been issued requiring the District to rehire terminated workers. In the case of MPD, after a court ordered the rehiring of 20 officers, Mr. Nickles advised the Chief of Police to re-fire. His intervention into was in contradiction to a court determination that MPD had not met critical disciplinary deadlines. Failing to meet the administrative requirements resulted in the order that the officers be reinstated; in nearly every case with full back pay and benefits. At CFSA, an arbitrator overruled Mr. Nickles' firing of unionized workers because there was no evidence of an investigation. Notwithstanding this decision, the Attorney General responded that the workers would remain fired. In both cases Mr. Nickles defended these terminations, not only creating animus with union members but also increasing litigation against the District.

Concerns about Mr. Nickles' judgment were raised almost immediately after his assuming the role of Active Attorney General. Only weeks into his new role, Mr. Nickles fired Alan Morrison, the special counsel hired to defend the District's handgun ban before the Supreme Court, shortly before the case was to be argued. Mr. Morrison had been hired by Mr. Nickles predecessor for the express purpose of arguing the gun ban case.<sup>26</sup> His termination came within a week of the District's deadline to submit a legal brief in the case.

The timing of the termination alone is problematic. Equally concerning, however, is the lack of rationale given by Mr. Nickles for this decision. Mr. Morrison suggested that the termination was part of an effort by Mr. Nickles to purge the office of his predecessor's allies, and to root out any individual who "was part of a campaign" to discredit the Fenty administration.<sup>27</sup> This again raises concerns as to whether the nominee exercises independence from the Mayor in operating as the Attorney General.

#### **E-mail Deletion Policy:**

As general counsel to the Mayor, Mr. Nickles helped promulgate and push an e-mail deletion policy that raised eyebrows as well as a number of questions in the wake of a White House scandal involving the deletion of e-mails. The proposed policy sought to have all e-mails automatically, and permanently, deleted after six months.

One does not need to look far to recognize that this plan was ill-conceived. Within the past year District government has been rocked by its own scandal within the Office of Tax and Revenue (OTR) that has cost the District millions. An e-mail policy, like the one proposed,

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<sup>26</sup> David Nakamura, *Attorney For D.C. Gun Ban Case Fired; Counsel Was Set To Defend Law Before High Court*, WASH. POST, Jan. 3, 2008, at B1.

<sup>27</sup> *Id.*

would have put evidence of this scandal in jeopardy. With e-mail retention currently burdening the system, Mr. Nickles advocated a “conservative” policy for retention.<sup>28</sup> However, as the OTR scandal demonstrates, the preservation of such information is essential. This policy was poorly devised, and does not demonstrate what works best for the District. Fortunately, the Executive succumbed to pressure from the Council and the public and backed away from the proposal.

### **Proposed Rulemaking Regarding Gender Expression:**

On April 4, 2008, the Office of the Inspector General issued a Management Alert Report for the Department of Corrections (DOC) policy on inmate gender classification. The report stated that DOC’s inmate classification and housing policy may violate certain provisions of the D.C. Human Rights Act and related regulations promulgated by the Office of Human Rights.<sup>29</sup> This stirred concern in the Council and in the public, but even more so when the Administration proposed rulemaking to exempt agencies, including DOC, from certain requirements under the Human Rights Act.<sup>30</sup>

Mr. Nickles testified at his confirmation hearing that in moving forward with the proposed rulemaking he thought he had worked out a solution. However, his actions sparked outrage from a number of members of the public at the same hearing. Alison Gill, testifying on behalf of the D.C. Trans Coalition, questioned Mr. Nickles’ legal judgment and his lack of sensitivity toward individual liberties and human rights. Ms. Gill referenced a May 13 letter from Mr. Nickles to the Inspector General in which the Acting Attorney General wrote that the new policy for DOC is consistent and compliant with District human rights laws and regulations.<sup>31</sup> The Council and members of the public were shocked by the District’s pursuit of this policy. DC Trans Coalition testified that the policies Mr. Nickles referenced simply placed in writing what the Inspector General had found noncompliant with the D.C. Human Rights Act.<sup>32</sup>

Provoking even more outrage, Mr. Nickles’ October 3 response to a complaint filed before the District’s Office of Human Rights justified the new DOC policies by invoking the “business necessity” exemption to the Human Rights Act. Ms. Gill responded that “[i]n effect, [Mr. Nickles] is stating that the only way the DC jail can possibly function is to discriminate on

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<sup>28</sup> See Yolanda Woodlee, *City E-mails to Be Purged After 6 Months*, WASH. POST, Aug. 3, 2007, at B6.

<sup>29</sup> *Department of Corrections and Office of Human Rights, DOC Policy on Inmate Gender Identification May Violate District Regulations*, Office of the Inspector General, Inspections and Evaluations Division, Management Alert Report, MAR 08-I-005 (April 4, 2005).

<sup>30</sup> The Proposed Rulemaking, published in the July 11, 2008 issue of the *District of Columbia Register*, sought to amend Title 4, Chapter 8 of the District of Columbia Municipal Regulations. Proposed subsections 801.3 and 801.4 would have exempted them from the protections of the Human Rights Act, individuals “incarcerated, institutionalized, or otherwise within the District’s custody.”

<sup>31</sup> Letter from Peter J. Nickles, Interim Attorney General, District of Columbia Office of the Attorney General, to Charles Willoughby, Inspector General, District of Columbia Office of the Inspector General, (May 13, 2008).

<sup>32</sup> 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*, 1 (Oct. 17, 2008) (written testimony of Alison Gill, D.C. Trans Coalition ).

the basis of gender identity and expression” (emphasis original).<sup>33</sup> GLAA Vice President Rick Rosendall testified that this proposed rulemaking “ran roughshod over the Human Rights Commission, an independent agency charged with defending [the D.C. Human Rights Act] rather than with defending any DC government agency policy at any cost.”<sup>34</sup> The focus of the Attorney General should be ensuring that agencies comply with human rights protections in the law, not in seeking exemptions to those requirements.

### **Concern for Civil Liberties:**

Mr. Nickles’ defense of certain Executive initiatives raises questions about his commitment to defend civil liberties. Certain initiatives the Executive has pursued, such as the police checkpoints, raise serious constitutional questions that must be given serious consideration, in terms of legal analysis, and a meaningful explanation of this analysis. With regard to the checkpoint program, this is not what the District received.

The checkpoints were utilized on two occasions in June-July of this year. Mr. Nickles stated that, prior to implementation, the Office of the Attorney General worked collaboratively with the U.S. Attorney’s Office and the Metropolitan Police Department to conduct “a comprehensive review of the initiative’s legality.”<sup>35</sup> However, just two weeks before the checkpoints were launched a top prosecutor at the U.S. Attorney’s Office raised serious concerns about the constitutionality of the program. Assistant U.S. Attorney Bradley Weinsheimer wrote MPD on May 20<sup>th</sup> that he is “very concerned that the [checkpoints] will not pass constitutional muster or at least that there are so many circumstances that will lead to discretionary authority on the part of officers that as applied, the [checkpoints] will be unconstitutional.”<sup>36</sup>

Nevertheless, Mr. Nickles forged ahead with the initiative, stating that the legal justification could be found in two legal memorandums from his office. The first of these, produced on June 4<sup>th</sup>, stated that the proposed checkpoint program met legal sufficiency. However, civil rights groups argued that the legal sufficiency on which Mr. Nickles and the July 4 memoranda relied was ignoring the on-point case law that suggested there were serious constitutional problems with the program. On June 10<sup>th</sup>, six days after Mr. Nickles stated that he was “not worried about the constitutionality”<sup>37</sup> of the program, a follow-up memorandum was

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<sup>33</sup> *Id.* at 2.

<sup>34</sup> 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*, 2 (Oct. 17, 2008) (written testimony of Rick Rosendall, Vice President for Political Affairs, Gay and Lesbian Activists Alliance).

<sup>35</sup> Letter from Nickles to Mendelson, Oct. 15, 2008, at 13.

<sup>36</sup> Michael Neibauer, *U.S. Attorney Questioned Constitutionality of Sealed Safety Zones in May*, THE EXAMINER, June 5, 2008, available at [http://www.examiner.com/a-1425545-U\\_S\\_attorney\\_questioned\\_constitutionality\\_of\\_sealed\\_safety\\_zones\\_in\\_May.html](http://www.examiner.com/a-1425545-U_S_attorney_questioned_constitutionality_of_sealed_safety_zones_in_May.html) (last visited Nov. 13, 2008).

<sup>37</sup> Michael Neibauer, *Lanier plans to seal off rough ‘hoods in latest effort to stop wave of violence*, THE EXAMINER, June 4, 2008 available at [http://www.examiner.com/a-1423820-Lanier\\_plans\\_to\\_seal\\_off\\_rough\\_hoods\\_in\\_latest\\_effort\\_to\\_stop\\_wave\\_of\\_violence.html](http://www.examiner.com/a-1423820-Lanier_plans_to_seal_off_rough_hoods_in_latest_effort_to_stop_wave_of_violence.html) (last visited Nov. 13, 2008).

prepared to address these cases. The memorandum states that the cases were “all reviewed by this Office prior to my June 4, 2008 memorandum,”<sup>38</sup> but Mr. Nickles’ based his earlier comments on the constitutionality of the checkpoints without being briefed about these possible issues.

Without a full legal analysis of this program, Mr. Nickles stormed ahead without deliberation or consideration of any ramifications, such as an encroachment on civil liberties. The opinion offered to justify the constitutionality of the checkpoints, and Mr. Nickles dismissive reaction to any questioning, makes the Attorney General appear more concerned with providing justification for the Executive’s program then providing an independent legal review.

This program followed another Metropolitan Police Department initiative that raised an equal number of constitutional concerns. The “Safe Homes Initiative” as first announced, allowed police officers to go door-to-door to ask residents in high-crime neighborhoods to search their homes for guns. In this case, however, the widespread uproar from residents and civil liberties groups caused the Administration to cease implementation of the program as it had originally planned.

A preliminary injunction to enjoin further implementation of the MPD checkpoints was recently denied, although the underlying lawsuit alleging civil rights violation is still ongoing.<sup>39</sup> The Administration has backed off the Safe Homes Initiative. However, the pattern is nonetheless disturbing. The nominee sees his role as advocate for the Mayor, without regard to the descending web of infringement on civil liberties of District residents.

### **Interaction with the Council:**

In testifying before this Committee in January 2008, former Attorney General Robert Spagnoletti defined the job of Attorney General as having three major components: (1) manager of a very large government office; (2) chief lawyer for the District; and (3) a key player in the political process between the executive and legislative branches.<sup>40</sup> As Acting Attorney General for the past 11 months, Mr. Nickles has had plenty of opportunity to act as a key player between the Mayor and the Council. However, throughout this period Mr. Nickles has often operated in a way that frustrates the ability of the Council to fulfill its defined role and is disrespectful to the Council’s status as a coequal branch of government.

Very recently the Council sought, and properly obtained, several subpoenas for testimony and documents from Department of Housing and Community Development employees over the

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<sup>38</sup> Memorandum from Wayne C. Witkowski, Deputy Attorney General, to Peter J. Nickles, Interim Attorney General, Re: Supplemental Legal Sufficiency of Metropolitan Police Department Plan to Restrict Vehicle Traffic in High Crime Neighborhoods (June 10, 2008) (on file with the Committee).

<sup>39</sup> On October 30, 2008, the U.S. District Court for the District of Columbia issued a decision denying a motion for a preliminary injunction to enjoin further implementation of the checkpoints. *Mills v. District of Columbia*, No. 08-1061 (RJI.) (D.D.C. filed Oct. 30, 2008).

<sup>40</sup> Spagnoletti testimony, at 4.

termination of the Rent Administrator. In an 11 page response to the Committee on Housing and Urban Affairs, Mr. Nickles informed the Committee Chairperson that the employees “respectfully decline to appear, or to produce the referenced documents, in response to the subpoenas.”<sup>41</sup> The letter further explained a range of privileges being asserted to exempt the employees from testifying. Mr. Nickles testified that he thought the subpoena was too broad, and did not believe that the Council had the authority to make those subpoenaed answer over privilege.<sup>42</sup>

Whether or not the claims to privilege are valid, Mr. Nickles recommendation to ignore the underlying subpoenas ignores the rule of law, ignores the separation of powers, and is outright dismissive of the Council’s role. In responding to a subpoena, the process is clear: the individual appears, is questioned, and if a privilege exists, the individual may raise it. Ignoring the Council subpoena was not only legally flawed, but was also disrespectful to the legislative branch.

The public process and transparency in government exist for a reason. Government gains its legitimacy from such openness. The Acting Attorney General has sought to frustrate this: advising witnesses to ignore Council subpoenas, failing to send witnesses to public hearings to respond to community concerns, and pushing the expansion of Executive authority to the detriment of the legislative process. Mr. Nickles has sought to justify efforts by the Executive to subvert the Council’s role with regard to everything from school closings to development projects. His justifications appear to increasingly inform the Council that its proposed action is in violation of the authority granted to the Executive under the Home Rule Charter. Increasingly, this appears more as a means to advocate for Executive action than to objectively advise the Council as to its authority.

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COMMITTEE RECOMMENDATION OF DISAPPROVAL

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In making its recommendation to disapprove the confirmation of Mr. Nickles to the position of Attorney General, the Committee stresses the concerns raised throughout this report. In his actions and in his judgment Mr. Nickles has shown himself to lack independence from the Mayor. Without independence, the District must remain guarded with regard to the comments and actions of Mr. Nickles. Predecessors to this role have stated that the Attorney General must have the confidence to say no to the Executive when the law or ethics require.<sup>43</sup> The actions of the Attorney General must inspire trust in the District.

In an Attorney General, the District needs the guiding hand of an individual who will place the District above the partisan agenda of any individual, administration, or party, and who

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<sup>41</sup> Letter from Peter. J. Nickles, Acting Attorney General, Office of the Attorney General, to Marion Barry, Chairperson, Committee on Housing and Urban Affairs, 2, October 8, 2008.

<sup>42</sup> Nickles oral testimony, Oct. 17, 2008.

<sup>43</sup> Spagnoletti testimony, 4.

will possess the vision, independence, and skill to guide the District in all law business without deferring to the whims or wishes of the Executive. In considering Peter Nickles for the role of Attorney General, we must be confident that the nominee will place service to the District paramount to any such agenda. We must be sure that the nominee will serve under a banner of independence and impartiality. We must be sure that Mr. Nickles' vision for the District of Columbia is in alignment with the vision we all share.

## II. LEGISLATIVE CHRONOLOGY

January 6, 2008	Peter Nickles is appointed Acting Attorney General by Mayor Adrian Fenty.
July 2, 2008	PR 17-928, the "Attorney General Peter J. Nickles Confirmation Resolution of 2008," is introduced by Chairman Gray at the request of the Mayor, and is referred to the Committee on Public Safety and the Judiciary.
July 18, 2008	Notice of Intent to act on PR 17-928 is published in the <i>D.C. Register</i> .
August 15, 2008	Notice of Public Hearing is published in the <i>D.C. Register</i> .
October 17, 2008	The Committee on Public Safety and the Judiciary holds a public hearing on PR 17-928.
November 17, 2008	The Committee on Public Safety and the Judiciary marks-up PR 17-928.

## III. SUMMARY OF TESTIMONY

The Committee on Public Safety and the Judiciary held a public hearing on PR 17-928 on Friday October 17, 2008. The testimony summarized below is from that hearing. A copy of this testimony is attached to this report.

***Paul Tagliabue, Former Commissioner, National Football League; Senior of Counsel, Covington and Burling, LLP***, testified in support of the nominee. Mr. Tagliabue cited his knowledge and respect of the nominee gathered through four decades of knowing him both professionally and personally.

***Carol Fennelly, Executive Director, Hope House DC***, testified in support of the nominee. Ms. Fennelly stressed the nominee's history of advocacy in urging his confirmation.

***Togo D. West, Jr., Former United States Secretary of Veterans, Affairs; Former United States Secretary of the Army; Chairman, TLI Leadership Group***, testified in support of the nominee. In recommending his confirmation, Mr. West focused on Mr. Nickles' professionalism and public service.

***Cathy L. Lanier, Chief of Police, Metropolitan Police Department***, testified in support of the nominee. Chief Lanier testified about her experience working cooperatively with Mr. Nickles during his tenure as Acting Attorney General, and noted his strong leadership qualities.

***Shelley Broderick, Dean, University of the District of Columbia David A. Clarke School of Law***, testified in support of the nominee. Ms. Broderick spoke of Mr. Nickles' leadership in expanding the UDC intern program within OAG, as well as his work bringing lawsuits against the District on behalf of the voiceless.

***Jim McGrath, Chairman, TENAC***, testified in opposition to the nominee. Mr. McGrath testified that Mr. Nickles is lacking in both the demeanor and temperament to serve as the District's Attorney General, and remarked on the nominee being dismissive when interacting with tenant advocates and showing disdain when questioned on tenant issues.

***Steven J. Anderson, President, Local 1403 AFGE***, testified in support of the nominee with qualifications. In particular, the union has challenged some of Mr. Nickles' personnel decisions and continues to argue that the net effect of these decisions has been to reduce productivity and morale.

***Alison Gill, D.C. Trans Coalition***, testified in opposition to the nominee. Ms. Gill testified that the D.C. Trans Coalition believes Mr. Nickles has, during his tenure as Acting Attorney General, sought to justify discrimination against the transgender community and to undermine the D.C. Human Rights Act.

***Rick Rosendall, Vice President for Political Affairs, Gay and Lesbian Activists Alliance of Washington, D.C.***, testified in opposition to the nominee unless Mr. Nickles stopped efforts to weaken transgender protection rules, end opposition to domestic partnership parentage legislation, and commit to consulting with the GLBT community on issues affecting that community.

***George R. Clark, Federation of Citizens Associations***, testified in opposition to the nominee. Mr. Clark stated that at the Federation's 45 member organizations voted unanimously to oppose Mr. Nickles for the position of Attorney General. He also stressed that District residents are entitled to an independent Attorney General who is their lawyer, not the lawyer for the Mayor.

***Patrick Joseph Tayman, Public Witness***, testified in opposition to the nominee. Mr. Tayman discussed the alleged interference by Mr. Nickles, when serving as the Mayor's general



counsel, with the duties of the then Attorney General Linda Singer. He also voiced opposition to Mr. Nickles' nomination given that he is not a District resident.

**Robert Vinson Brannum, Public Witness**, testified as to a number of concerns he has with the nominee, particularly his residency outside of the District, his interaction with and efforts to involve the community, his views on the role of the Council, and his lack of independence from the Mayor.

**Al Bilik, Council 20 AFSCME**, testified in opposition to the nominee. Mr. Bilik testified as to a number of perceived errors in terminations carried out by Mr. Nickles, and suggested that the nominee may have violated D.C. legal ethics rules. He also stressed the importance of an Attorney General that would exercise considered, independent judgment in applying the law.

**David Schwartzman, Legislative Agenda and Tax & Budget Coordinator, DC Statehood Green Party**, testified in opposition to the nominee. Mr. Schwartzman discussed a few of the issues he believes make Mr. Nickles unfit for the position of Attorney General, including his refusal to comply with subpoenas issued by the Council and disrespect he has shown in his treatment of District government union workers.

**Alex Martin, President, Cleveland House Tenants Association**, testified in opposition to the nominee. Mr. Martin testified that Mr. Nickles illustrated poor temperament in responding to public inquiries into the recent firing of the Rent Administrator.

**Jonathan Strong, Public Witness**, testified in opposition to the nominee. Mr. Strong noted that the Council often does not get to observe the behavior of a nominee before the individual's confirmation. Having had the opportunity to do so with this nominee, Mr. Strong urged the Council to "decline" his confirmation.

**Kristopher Baumann, President, Fraternal Order of Police**, testified in opposition to the nominee. Mr. Baumann stated that he was initially impressed by Mr. Nickles, but that too many questions have been raised since his nomination. He also testified that Mr. Nickles has inserted himself in a way that has never been seen before, and that the District will long be paying for the errors the nominee has made while Acting Attorney General.

**Lawrence Guyot, Public Witness**, testified in opposition to the nominee. Mr. Guyot stated his concern that Mr. Nickles would not be able to refrain from acting as the Mayor's attorney while serving in the position of the District's Attorney General.

**Michael Sindram, Public Witness**, testified that the Attorney General is not the Mayor's attorney.

**John W. Fenwick, Public Witness**, testified in support of the nominee with qualifications. Mr. Fenwick stated that he was behind Mr. Nickles so long as the he acted as the lawyer for the District and not for the Mayor.

***Geraldine Hobby, Public Witness***, testified in opposition to the nominee. Ms. Hobby expressed concern about the lack of compassion shown by Mr. Nickles in responding to complaints about the governments handling of disability retirement cases.

***Peter J. Nickles, Nominee, Attorney General for the District of Columbia***, testified regarding his vision for the Office of the Attorney General and his five top priorities for improving the agency. His testimony, and answers to written committee questions, are attached.

#### **IV. IMPACT ON EXISTING LAW**

The position of Attorney General exists pursuant to § 1-610.51 of the D.C. Official Code. By operation of law, the appointment is deemed approved on the 90<sup>th</sup> day after submission by the Mayor, excluding days of Council recess, unless the Council takes action. The 90<sup>th</sup> day is December 13, 2008.

#### **V. FISCAL IMPACT**

PR 17-928 will have no adverse fiscal impact on the District of Columbia budget or financial plan. Compensation for service as Attorney General for the District of Columbia is provided pursuant to D.C. Official Code § 1-610.52 and has been included in the District's budget appropriation. The Attorney General will receive a salary of \$175,000 and is eligible for an annual performance incentive, not to exceed 10% of base pay, based upon the successful attainment of goals and performance contract, subject to agency funding.

#### **VI. SECTION-BY-SECTION ANALYSIS**

Section 1 states the long and short titles for PR 17-928.

Section 2 disapproves the appointment of Peter J. Nickles as the Attorney General for the District of Columbia.

Section 3 requires that a copy of the resolution, upon adoption, be transmitted to the nominee and the Mayor.

Section 4 provides that the resolution shall take effect immediately.

## **VII. COMMITTEE ACTION**

On November 17, 2008, the Committee on Public Safety and the Judiciary met to consider PR 17-928, the “Attorney General Peter J. Nickles Confirmation Resolution of 2008.” The meeting was called to order at 10:46 a.m. and PR 17-928 was the third item on the agenda. After ascertaining a quorum (Chairman Mendelson, and Councilmembers Alexander, Bowser, Cheh, and Evans present), Chairman Mendelson moved an amendment to the print, changing the approval resolution to a disapproval resolution. Councilmembers Bowser and Evans made statements in opposition to the amendment. Chairman Mendelson moved the amendment, which was approved by a vote of three to two (Chairman Mendelson and Councilmembers Alexander and Cheh voting yes; Councilmembers Bowser and Evans voting no). Chairperson Mendelson moved the amended print. Councilmembers Bowser and Evans made statements in opposition to the amendment. Chairman Mendelson moved the print, which was approved by a vote of three to two (Chairman Mendelson and Councilmembers Alexander and Cheh voting yes; Councilmembers Bowser and Evans voting no). Chairman Mendelson moved the report, with leave for staff to make technical and conforming amendments. The report was approved by a vote of three to two (Chairman Mendelson and Councilmembers Alexander and Cheh voting yes; Councilmembers Bowser and Evans voting no). The meeting adjourned at 11:22 a.m.

## **VIII. ATTACHMENTS**

1. PR 17-928 as introduced.
2. Written responses to the Committee’s questions of the nominee.
3. Written testimony and letters of support.
4. Committee Print for PR 17-928.

A PROPOSED RESOLUTION

17-928

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To disapprove the appointment of Peter J. Nickles as the Attorney General for the District of Columbia.

RESOLVED, BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this resolution may be cited as the "Attorney General Peter J. Nickles Confirmation Disapproval Resolution of 2008".

Sec. 2. The Council of the District of Columbia disapproves the appointment of:

Peter J. Nickles  
9341 Cornwell Farm Road  
Great Falls, VA 22066

as the Attorney General for the District of Columbia, in accordance with section 2 of the Confirmation Act of 1978, effective March 3, 1979 (D.C. Law 2-142; D.C. Official Code § 1-523.01), to serve at the pleasure of the Mayor.

Sec. 3. The Council of the District of Columbia shall transmit a copy of this resolution, upon its adoption, to the nominee and to the Office of the Mayor.

Sec. 4. This resolution shall take effect immediately.