The original documents are located in Box 10, folder "District of Columbia (1)" of the James M. Cannon Files at the Gerald R. Ford Presidential Library.

[Feb. 1976]
District of Columbia

OMB Recvd ——— ?

OMB memo to P 2/20
Prom memo to Sec 2/24
from memo P to Sec 2/26
DC memo to P 2/27

Judy Johnson memo to Staff 2/23

USCSC memo to OMB 2/10

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: February 23 Time: 700pm

FOR ACTION: Dick Parsons
Max Friedersdorf
Ken Lazarus
Robert Hartmann

cc (for information): Jack Marsh
Jim Cavanaugh

FROM THE STAFF SECRETARY

DUE: Date: February 25 Time: 300pm

SUBJECT:

D.C. Enrolled Act 1-88-District of Columbia Shop-Book Rule Act

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

x____ For Your Comments ____ Draft Remarks

REMARKS:

Please return to Judy JOhnston, Ground Floor West Wing

Recommend disapproval in accordance with the views of the Department of Justice. Would also note that if the assertion of authority by the D.C. Council is allowed to stand in this instance, there are indications that further changes would be made in local rules of evidence which could further erode the process of law enforcement in the District.

Ken Lazarus

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: February 23 Time: 700pm

FOR ACTION: Dick Parsons
Max Friedersdorf
Ken Lazarus
Robert Hartmann Veto message ok
Pat Lindh

cc (for information): Jack Marsh
Jim Cavanaugh

FROM THE STAFF SECRETARY

DUE: Date: February 25 Time: 300pm

SUBJECT:

D.C. Enrolled Act 1-87 - Affirmative action in District Government Employment Act

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

x ____ For Your Comments ____ Draft Remarks

REMARKS:

Please return to Judy Johnston, Ground Floor West Wing

I agree that this legislation does not represent an optimum model of affirmative action. However, the power conferred upon the President by the Home Rule Act is a two-edged sword and, in these circumstances, I fail to discern any substantial Federal interest warranting intervention in D.C. affairs. Recommend the President decline to act.

Ken Lazarus

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

THE WHITE HOUSE

WASHINGTON

February 25, 1976

MEMORANDUM FOR: JIM CAVANAUGH

FROM: MAX L. FRIEDERSDORF MLF.

SUBJECT: D.C. Enrolled Act 1-87 - Affirmative action in District Government Employment Act

The Office of Legislative Affairs concurs with the agencies that the Act be disapproved.

Attachments

THE WHITE HOUSE

WASHINGTON

February 25, 1976

MEMORANDUM FOR: JUDY JOHNSTON

FROM: PAT LINDH PL

SUBJECT: D.C. Enrolled Act 1-87

I agree with the Civil Service Commission arguments and would recommend disapproval.

In the disapproval statement, I would suggest one word change on page 2 last paragraph. Instead of using adequate representation, as some think one is adequate, I would recommend fair or use the language used on the first page of the statement, adequate and equitable.

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: February 23 Time: 700pm

FOR ACTION: Dick Parsons
Max Friedersdorf
Ken Lazarus
Robert Hartmann

cc (for information): Jack Marsh
Jim Cavanaugh

FROM THE STAFF SECRETARY

DUE: Date: February 25 Time: 300pm

SUBJECT:

D.C. Enrolled Act 1-88-District of Columbia Shop-Book Rule Act

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

x____ For Your Comments ____ Draft Remarks

REMARKS:

Please return to Judy JOhnston, Ground Floor West Wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FEB 20 1976

MEMORANDUM FOR THE PRESIDENT

Subject: District of Columbia Enrolled Act 1-88 -- District of Columbia Shop-Book Rule Act

Last Day for Action

February 27, 1976 - Friday

Purpose

To make documentary records of business transactions admissible as evidence in judicial proceedings in the courts of the District of Columbia.

Agency Recommendations

Office of Management and Budget	Disapproval (Memorandum of disapproval attached)
Department of Justice	Disapproval

Discussion

Introduction

The District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) provides that Acts of the City Council which have been vetoed by the Mayor and overridden by a two-thirds vote of the Council shall be transmitted by the Council Chairman to the President for review. These Acts become law unless the President expresses disapproval within thirty days. We understand that the Home Rule Act has been interpreted to provide that if the President declines to act, thereby approving the legislation, the Congress would then have thirty days for its consideration of the legislation. On the other hand, if the President disapproves the D.C. bill, the Mayor's veto would become final.

This is the second Council override of a mayoral veto since the Home Rule Act was enacted. A separate memorandum is being submitted to you on the other bill.

Summary of Act 1-88

This legislation would amend Title 14 of the D.C. Code, which contains rules of evidence, to exempt business records from the hearsay rule. Act 1-88, cited as the "District of Columbia Shop-Book Rule Act," provides that any documentary record (either the original written version or a photographic copy) of any business transaction, event, or occurrence shall be admissible as evidence in any civil or criminal judicial proceeding in the courts of the District of Columbia. The introduction of a reproduced record does not preclude admission of the original as evidence.

Background

Although, under the Home Rule Act, all legislative power granted to the District is vested in the Council, that power is subject to reservations by the Congress of its own constitutional powers and to specific limitations included in Title VI of the Home Rule Act. Specifically, Section 602 of that Act, headed "Limitations on the Council" prohibits the Council from enacting any act, resolution, or rule relating to the organization and jurisdiction of the District of Columbia courts, as set forth in Title 11 of the D.C. Code.

In addition, Section 602 similarly prohibits the Council from enacting any rule, resolution, or law with respect to the rules of criminal procedure for a period of two years from the date on which the first elected members of the Council take office.

The District of Columbia Court Reorganization Act of 1970, P.L. 91-358, which established the D.C. Superior Court and the D.C. Court of Appeals as local courts, forms Title 11 of the D.C. Code and provides, in part, that the Superior Court must operate under the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. It also provides that, with the approval of the D.C. Court of Appeals, the Superior Court may modify those rules and may adopt and enforce such other rules as it deems necessary. This rulemaking authority was not modified under the Home Rule Act.

Enactment of P.L. 93-595 (approved January 2, 1975), establishing new Federal Rules of Evidence, repealed certain rules of judicial procedure relating to the admissibility of evidence, including a 1936 Federal Shop-Book Rule, which was in force in the D.C. courts. P.L. 93-595, which took effect on July 1, 1975, and which includes a new shop-book rule as a rule of evidence, did not reference the D.C. courts as courts within the purview of the Act. Apparently believing that these new rules of evidence could not be applied in the D.C. Superior Court, and that the absence of a shop-book rule would have had a disruptive effect on litigation, the Board of Judges of that court reenacted a shop-book rule, which is substantially identical to this bill and the repealed 1936 Federal rule. The rule was approved by the D.C. Court of Appeals and became effective on July 1, 1975, thus coinciding with the effective date of the new Federal Rules of Evidence.

On December 16, 1975, the D.C. Council passed this legislation, because it viewed the Board of Judges' action in passing the rule as an emergency measure to be consummated by legislative enactment of substantive law. The Mayor, however, vetoed the bill on the grounds that (1) its passage was unnecessary in view of the legitimacy of the Superior Court's action, and (2) the Council exceeded its legislative authority under the Home Rule Act in passing a law affecting the judicial procedures of the D.C. courts. The Mayor's veto was overridden on January 27, 1976, by a unanimous vote of the eleven Council Members present.

Issue

The Federal interest in this matter is whether the intent of Congress in delegating legislative authority to the D.C. Council under the Home Rule Act has been appropriately carried out in this instance. The specific issue to be decided is whether or not the Council was within its authority under the Home Rule Act in enacting this bill. If not, it has exceeded its powers under the Home Rule Act and encroached upon the powers of the D.C. courts. However, neither the continued effect nor the content of the D.C. court's rule was contested by the Council; only the legitimacy of the Council's action is disputed.

Summary of Arguments

The arguments of the D.C. Corporation Counsel and the General Counsel of the D.C. Council which, respectively, formed the basis of the Mayor's veto and the Council's override are summarized below for your consideration. Briefly, the arguments presented by the Corporation Counsel are:

-- Under the D.C. Court Reorganization Act, which was not modified by the Home Rule Act, the power to prescribe rules of judicial procedure, including rules of evidence, was vested exclusively in the D.C. courts, subject only to acts of Congress.

-- The Home Rule Act prohibits the Council from enacting any act with respect to the provisions of Title 11 of the D.C. Code, which contains the courts' rulemaking authority.

-- Rules of evidence are an integral part of rules of judicial procedure, and, therefore, the D.C. courts' action in this regard was within the scope of their rulemaking authority under the 1970 D.C. Court Reorganization Act, i.e., Title 11 of the D.C. Code. For example, the Superior Court has replaced other Federal rules of procedure, including the new Federal Rules of Evidence, with the former versions of these rules.

Conversely, the General Counsel of the D.C. Council argues:

-- The shop-book-rule is a substantive law of evidence, which is quite distinct from rules of judicial procedure, and which, therefore, must be promulgated by legislation.

-- Codification of the D.C. rules of evidence in Title 14 of the D.C. Code instead of under Title 11 (dealing with the organization, jurisdiction, and authority of the D.C. courts) reflects Congressional intent that rules of evidence are not exclusively a function of the judiciary. P.L. 93-595, which established the new

Federal Rules of Evidence and affirmed the right of Congress to supersede rules of evidence promulgated by the Supreme Court, is referenced as analgous precedent.

-- The Home Rule Act limits the authority of the Council with respect to Title 11, not to Title 14.

View of the Department of Justice

The Department of Justice advises that the Shop-Book Rule, though technically a rule of evidence, is clearly in the nature of a procedural rule which could properly be encompassed within the rules of civil procedure. Therefore, promulgation of the Shop-Book Rule by the D.C. courts was well within the courts' express power to adopt rules of civil procedure, and, as such, is beyond the power of the Council under the Home Rule Act. The Department further advises that it is not necessary in this instance to determine whether Title 11 of the D.C. Code empowers the courts to adopt rules of evidence of a more substantive nature (although the courts did in fact do so on December 22, 1975). Similarly, it is not necessary to determine whether the Council retains authority to enact legislation altering the rules of evidence now codified in Title 14 of the D.C. Code. In this connection, the D.C. Corporation Counsel has noted that the Council has suspended action on a number of bills to enact rules of evidence for the Superior Court, pending your decision.

Conclusion

We concur with the views of the Mayor and the Department of Justice that this bill be disapproved on the ground that the D.C. Council has exceeded its authority in this instance and encroached upon the authority of the courts to enact rules of procedure. Your decision on this matter would, therefore, be based on a technical legal interpretation of the distinctions between rules of procedure and evidence, judgments generally reserved to the courts or the Congress. You may wish to consider the alternative of not taking any action on this bill. As noted earlier in this memorandum, the bill would then go to the Congress which would have 30 days to make its judgment. It might be more appropriate to have the Congress

settle the jurisdictional question of the relative authority of the D.C. courts and the City Council rather than draw the Presidency into narrow legal questions.

A proposed statement of disapproval to the Chairman of the City Council is attached for your consideration.

James M. Frey
Assistant Director for
Legislative Reference

Enclosures

TO THE CHAIRMAN OF THE DISTRICT OF COLUMBIA CITY COUNCIL

In accordance with the District of Columbia Self-Government and Governmental Reorganization Act, I disapprove Act 1-88, the District of Columbia Shop-Book Rule Act.

The Act would make documentary records of business transactions admissible as evidence in any civil or criminal judicial proceeding in the courts of the District of Columbia. This "shop-book rule" is substantially identical to the one adopted by the D.C. Superior Court which took effect on June 30, 1975.

The issue is whether the City Council was acting within its authority under the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) in passing a law affecting the judicial procedures of the D.C. courts. The Federal interest is whether the intent of Congress in delegating legislative authority to the Council under the Home Rule Act has been appropriately carried out in this instance.

I am advised by the Department of Justice that this "shop-book" rule is clearly within the nature of a procedural rule which could properly be encompassed within the rules of civil procedure and that promulgation of the rule is clearly within the express power of the District of Columbia courts to adopt rules of civil procedure and, as such, is beyond the power of the City Council.

Therefore, since the Council has exceeded its statutory authority in enacting this bill, I am disapproving Act 1-88.

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

February 20, 1976

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

This is in response to your request for the views of the Department of Justice on the District of Columbia enrolled bill B-1-137, the District of Columbia Shop-Book Rule Act, which was submitted to the President for approval on January 29, 1976. Under section 404(e) of the District of Columbia Self-Government and Governmental Reorganization Act (P.L. 93-198), a bill passed by a two-thirds majority of the District of Columbia City Council over a mayoral veto becomes law at the end of the thirty-day period beginning on the date of transmission to the President, unless disapproved by the President within that period.

Bill 1-137 is substantially identical with Rule 43-I adopted by the D.C. Superior Court on June 30, 1975, which, in turn, is substantially identical with the relevant provisions of the U.S. Code since repealed. Those provisions essentially allow the introduction into evidence of records regularly made in the normal course of any recurring business, to include accurate photographic copies. They are also consistent with Rule 803 (6) of the Federal Rules of Evidence to the same effect, although different in form. Thus, there is no dispute over the substance of the enrolled bill; Mayor Washington, the D.C. Superior Court, and the D.C. City Council all agree on its desirability.

The issue between the Mayor and Council is a more fundamental one. In the Mayor's view, the Council lacks statutory authority to legislate rules of evidence, and any action by the Council to that effect must be without force. Mayor Washington's veto of the Council enactment was correct in this instance although the reasons stated in his message of January 7, 1976, sweep too broadly. The Justice Department recommends that the President disapprove the enrolled bill, enacted by the Council over the Mayor's veto.

The City Council is the sole legislative body of the District of Columbia government, and all legislative power granted to the District is vested in and may be exercised by the Council, Home Rule Act, Sec. 404(a). However, that power is subject to careful reservations by the Congress of its own constitutional powers and to specific limitations included in title VI of the Home Rule Act. Indeed, the very grant of power in section 404(a) begins with the words, "[s]ubject to the limitations specified in title VI of this Act, . . ." Thus, there are real limits on the Council's authority to act.

The most specific of those title VI limitations are set forth in Section 602 of the Home Rule Act. That section, headed "Limitations on the Council," reads in pertinent part as follows:

> (a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to --
>
> *
> *
> *
>
> (4) enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia courts); . . .

Therefore any action by the City Council with respect to matters controlled by any provision of title 11 of the District of Columbia Code is beyond the authority of the Council and should properly be disapproved by the Mayor and by the President. The question then becomes one of whether enactment of the Shop-Book Rule is such an action.

The courts of the District of Columbia are created by Act of Congress. The Court Reorganization Act (P.L. 91-358, 84 Stat. 473) forms title 11 of the present D.C. Code, a title over which the D.C. City Council has no legislative authority. Section 718(a) of the Home Rule Act continues the Superior Court and Court of Appeals for the District in existence even after Home Rule, and section 431(a) of the same Act vests the whole judicial power of the District in those two courts. That authority is to be exercised under the terms of title 11 of the D.C. Code.

Pursuant to Section 11-946 of title 11, the Superior Court must operate under the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. With the approval of the District of Columbia Court of Appeals, the Superior Court may modify those rules and may adopt and enforce such other rules as it deems necessary. The Superior Court has adopted, with the approval of the Court of Appeals, its new Rule 43-I, which is identical in substance with the enrolled bill under discussion. Rule 43-I became effective in the Superior Court June 30, 1975.

Rule 43-I is technically a rule of evidence but it is clearly in the nature of a procedural rule which could properly be encompassed within the rules of civil procedure. Prior to enactment of the Federal Rules of Evidence, several provisions of the Federal Rules of Civil Procedure contained evidentiary provisions of a similar nature. See, e.g., Rule 26(b)(2), Rule 32(a)(1), Rule 33(c), Rule 43, Rule 44, Fed. Rules of Civ. Proc. (1970). Title 11 of the District of Columbia Code clearly empowers the District of Columbia Courts to adopt rules of procedure of this nature and the Home Rule Act just as clearly restricts the power of the Council to affect such rules.

It is not necessary in this instance to determine whether title 11 of the D.C. Code empowers the courts to adopt rules of evidence of a more substantive nature (although the courts have, in fact, done so). Nor is it necessary to determine whether the Council retains authority to enact legislation altering the rules of evidence now codified in Title 14 of the D.C. Code. Promulgation of the Shop-Book Rule by the District of Columbia courts is well within the courts' express power to adopt rules of civil procedure and, as such, is beyond the power of the City Council. Because of the ramifications of a veto with respect to the separate issue of the power of the Council to modify statutory rules of evidence, such as those contained in Title 14, the Department of Justice recommends that veto of the Council's action be premised on the narrow ground that the Shop-Book Rule was adopted by the courts as an exercise of its undisputed power to adopt rules of civil and criminal procedure.

Sincerely,

Michael M. Uhlmann

Michael M. Uhlmann
Assistant Attorney General

Attachments

Home Rule Act Pub. L. 93-198, 87 Stat. 774

Sec. 404 Powers of the Council

(a) Subject to the limitations specified in title VI of this Act, the legislative power granted to the District by this Act is vested in and shall be exercised by the Council in accordance with this Act. . . .

Sec. 602 Limitations on the Council

(a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to--

. . .(4) enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia courts);

D.C. Code

11-946 Rules of Court

The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules. The Superior Court may appoint a committee of lawyers to advise it in the performance of its duties under this section.

July 29, 1970, Pub. L. 91-358, §111, title I, 84 Stat. 487. (emphasis added)

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: February 23 Time: 700pm

FOR ACTION: Dick Parsons
Max Friedersdorf
Ken Lazarus
Robert Hartmann
Pat Lindh

cc (for information): Jack Marsh
Jim Cavanaugh

FROM THE STAFF SECRETARY

DUE: Date: February 25 Time: 300pm

SUBJECT:

D.C. Enrolled Act 1-87 - Affirmative action in District Government Employment Act

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

x ____ For Your Comments ____ Draft Remarks

REMARKS:

Please return to Judy Johnston, Ground Floor West Wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FEB 20 1976

MEMORANDUM FOR THE PRESIDENT

Subject: District of Columbia Enrolled Act 1-87 -- Affirmative Action in District Government Employment Act

Last Day for Action

February 27, 1976 - Friday

Purpose

To establish the goal of employment of women and minorities in District of Columbia government agencies proportional to their representation in the total population of the District between the ages of 18 and 65.

Agency Recommendations

Office of Management and Budget	Disapproval (Memorandum of Disapproval attached)
Civil Service Commission	Disapproval
United States Commission on Civil Rights	Disapproval
Department of Labor	Disapproval (Informally)
Department of Justice	Approval
Equal Employment Opportunity Commission	No recommendation

Discussion

Introduction

The District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) provides that Acts of the City Council which have been vetoed by the Mayor and overridden by a two-thirds vote of the Council shall be transmitted by the Council Chairman to the President for review. These Acts become law unless the President expresses disapproval within thirty days. We understand that the Home Rule Act has been interpreted to provide that if the President declines to act, thereby approving the legislation, the Congress would then

have thirty days for its consideration of the legislation. On the other hand, if the President disapproves the D.C. bill, the Mayor's veto would become final.

This is the first Council override of a mayoral veto since the Home Rule Act was enacted. A separate memorandum is being submitted to you on a second bill involving a Council override.

Summary of Act 1-87

Act 1-87 is designed to increase employment opportunities for women and minorities in the agencies of the District government. The bill states that "the goal of affirmative action in employment throughout the District government is, and must continue to be, full representation, in jobs at all salary and wage levels and scales, in accordance with the representation of all groups in the available work force of the District of Columbia, including, but not limited to Blacks, Whites, Spanish-speaking Americans, Native Americans, Asian Americans, females and males." "Available work force" is defined as the total population of the District of Columbia between the ages of 18 and 65.

Each District government agency would be required to develop and submit to the Mayor and Council an affirmative action plan within 12 weeks of enactment and annually thereafter. Each plan would state

-- the number of women and minorities who would be employed by the agency "using the goal of their representation in the available work force in the District";

-- the actual employment levels of women and minorities in the agency and the difference between the actual employment and the goals;

-- the number of women and minorities projected to be hired and promoted in the period until the next plan; and

-- what actions the agency is taking to assure equal employment opportunity for women and minorities and for "the aging, the young, the handicapped, and the homosexual citizens of the District."

Other provisions of the bill would direct the Mayor to transfer all Equal Employment Opportunity officers from their respective agencies to the central Office of Human Rights (HR); impose the responsibility of equal employment opportunity on each agency; and provide for the Act's effective date.

The bill passed the City Council on December 10, 1975, was vetoed by the Mayor on December 24, and the veto was overridden on January 19, 1976, by a 9-0 vote with 4 Council members absent.

Issues

The Mayor and the City Council disagree on the effects of this legislation. Specifically, there is a difference of opinion as to whether the bill would require D.C. agencies to hire women and minorities strictly in proportion to their percentages in the gross population of the District of Columbia regardless of qualifications or other factors. Such a statutory requirement would be a matter of concern to the Federal government because of its implications in affirmative action policy generally.

The Mayor, the Civil Service Commission, and the Civil Rights Commission believe that the goal of affirmative action in employment as defined in the bill would lead to the future requirement that employment be in accordance with population parity at all levels of the District Government, regardless of the qualification or availability of individual employees. In this connection the Civil Service Commission, in a letter to Mayor Washington, stated:

> "The use of gross population data is inappropriate in defining the work force available to an employing organization. Such data more often than not fails to reflect the availability of particular skills in the labor market required by the employing agency. If no attention is paid to the relative availability of needed skills, the result is frequently erroneous expectations on the part of potential applicants and/or deliberate decisions to hire less than qualified personnel. Either one of these results could turn well-intentioned goals into senseless and even illegal quotas. Indeed the bill fails to take into account the concept of relative ability which underlies the merit system and competitive staffing."

In its views letter, the Civil Rights Commission "strongly opposes quota systems by which an employee limits its work force to fixed numbers or percentages of any race, sex, or ethnic group."

The Federal interest in this question arises partly because of the present responsibility of the Civil Service Commission in the District government personnel system. Until the District

establishes its own personnel system, the Commission has jurisdiction over positions (about 20%) in the District government which are in the competitive service. In addition, the Commission is responsible for the merit system compliance required for D.C. participation in numerous Federal grant programs and compliance with the Civil Rights Act is an important aspect of a merit system. The Equal Employment Opportunity program in the District government must also be carried out under the regulations of the Commission.

Another source of Federal interest in this issue is a statement entitled a "Federal Policy on Remedies Concerning Equal Employment in State and Local Government Personnel Systems," issued jointly by the Equal Employment Opportunity Commission, the Justice Department, the Department of Labor, and the United States Civil Service Commission. That statement describes distinctions between permissible goals and impermissible quotas in equal employment. This bill does not appear to adhere to those distinctions. The Commission notes in its views letter that jurisdictions writing affirmative action plans must set goals "based on the availability of race/ethnic group members and women with the necessary job skills in the relevant recruiting area" and that work forces must not be established "on non-merit based lines simply for the sake of achieving proportional representation."

However, the City Council and the Justice Department do not believe the bill is objectionable. Justice states that it sees no reason for disapproval since "it appears the Act could be administered, consistent with its language, to take into account the availability of qualified persons." Justice does not mention either the Civil Service Commission's responsibility in this area or the "Four Agency Agreement" even though it is a signatory to the latter. The Council argues that (a) the population standards set in the bill are long range goals, not quotas; and (b) these standards are quite different from population parity, because the young and elderly (those under 18 and over 65) have been removed from the definition of "available work force."

Recommendation

We believe the principle regarding Presidential actions on District legislation enunciated by the Justice Department in its views letter is appropriate: "The presidential authority to disapprove City Council action...is intended as a safeguard for the Federal interest in this Federal city." Absent a Federal interest, this authority should not be exercised. The

question is whether the bill raises a substantial issue of Federal concern.

In our view, the Presidential authority to disapprove should be exercised in this case. We base this recommendation on two judgments.

1. The bill appears to justify the belief of the Mayor, the Civil Service Commission, and the Civil Rights Commission, that it not only establishes gross population parity as a standard of employment in the District government but in fact mandates it in the future. The bill sets forth a goal (representation in accordance with the available work force in the District) and then requires agency plans which seem to set up a process which would lead over time to a D.C. work force characterized by proportional representation along racial, sexual and ethnic lines. This process would be set in motion by the requirements that the plans state the difference between what employment would be under the goal and what it is now and that the agencies move toward eliminating that gap.

2. Approval of this bill would be inconsistent with both the responsibility of the Civil Service Commission regarding merit-based employment systems in the District government and the District's Equal Employment Opportunity program, and the "Four Agency Agreement" on equal employment in State and local governments.

Accordingly, we recommend disapproval. A proposed statement of disapproval to the Chairman of the City Council is attached for your consideration.

James M. Frey
Assistant Director
for Legislative Reference

Enclosures

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D.C. 20415

CHAIRMAN

February 10, 1976

Honorable James T. Lynn
Director
Office of Management and Budget
Washington, D. C. 20503

Attention: Assistant Director for Legislative Reference

Dear Mr. Lynn:

This is in reply to your request for the Civil Service Commission's views on Enrolled D. C. Bill No. 1-133, "To insure the further development and specification of Affirmative Action employment plans by all District government agencies."

Upon review of the documents furnished, we find ourselves in agreement with the Mayor's veto comments. The bill which passed the City Council contains a number of issues which we find to be non-merit based. My letter of December 12, 1975, to Mayor Washington (copy attached) clearly explains the position of this agency on Bill 1-133. It was submitted to the Mayor in accordance with the Commission's jurisdiction over competitive service positions in the District Government as well as our responsibilities under both the Equal Employment Opportunity Act of 1972 and the Intergovernmental Personnel Act.

It should be noted that neither the Council-passed bill nor the alternative proposal by the Mayor would modify the Commission's regulatory authority over the Equal Employment Opportunity program in the District government. Consequently the provisions of the proposed legislation and its implementation must be consistent with Part 713 of the Commission's regulations and with other Commission regulations applicable to appointments, promotions, etc., in the competitive service.

We would like to take this opportunity to emphasize two points which should be taken into consideration by any jurisdiction writing an affirmative action plan:

(1) Setting affirmative action goals requires a careful analysis of the number of employees by race/ethnic groups in job categories, salary levels, organizational units and similar breakdowns compared with the number of persons by race/ethnic groups with the required skills in the appropriate recruiting areas.

Where this analysis indicates that discrimination may have occurred in the past, whether intentional or not, an affirmative action plan should include numerical employment goals and timetables aimed at improving the employment situation. The goals and timetables set should be realistic and flexible, based upon the availability of race/ethnic group members and women with the necessary job skills in the relevant recruiting area and upon the job opportunities anticipated.

(2) Equal employment opportunity is not accomplished by an agency when it meets race/ethnic employment goals that are proportional to general population figures. Management officials should avoid any tendency to establish their work forces along race/ethnic or any other non-merit based lines simply for the sake of achieving proportional representation.

Therefore, we recommend that the President disapprove Bill 1-133. The substitute bill, which the Mayor recommends, is a significant improvement over Bill 1-133. Nevertheless, it needs additional work in the assessment of the present employment situation in the District government, the identification of major equal employment opportunity problems, the allocation of resources and the definition of measurable goals. We would be happy to work with the appropriate District government staff in making those improvements.

By direction of the Commission:

Sincerely yours,

Robert E. Hampton
Chairman

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D.C. 20415

CHAIRMAN

DEC 12 1975

Honorable Walter E. Washington
Mayor of the District of Columbia
Washington, D.C. 20004

Dear Mayor Washington:

Recently we received a copy of a bill on Affirmative Action in Employment which was adopted by the District's City Council on December 2, 1975. Since the Civil Service Commission exercises certain responsibilities toward the District Government under both the Equal Employment Opportunity Act of 1972 and the Intergovernmental Personnel Act as well as some general responsibilities for competitive service positions, we find it necessary to bring to your attention certain concerns which we have regarding this legislation.

Section 2 of the bill uses the phrase, "available work force" which is defined as "the total population of the District of Columbia between the ages of 18 and 65." Thus, the bill in effect states that if "females and males who are Black, White, Spanish-speaking, Native American and Asian American" are not represented at salary and wage levels in District employment in proportion to their number in the total population of the District between the ages of 18 and 65, corrective affirmative steps must be taken.

The use of gross population data is inappropriate in defining the work force available to an employing organization. Such data more often than not fails to reflect the availability of particular skills in the labor market required by the employing agency. If no attention is paid to the relative availability of needed skills, the result is frequently erroneous expectations on the part of potential applicants and/or deliberate decisions to hire less than qualified personnel. Either one of these results could turn well-intentioned goals into senseless and even illegal quotas. Indeed the bill fails to take into account the concept of relative ability which underlies the merit system and competitive staffing.

In March 1973, four Federal agencies, the Equal Employment Opportunity Commission, the Justice Department, the Department of Labor, and the U.S. Civil Service Commission, jointly issued a "Federal Policy on Remedies Concerning Equal Employment Opportunity in State and Local Government Personnel Systems," generally referred to as the "Four Agency Agreement." Attached is a copy for your information. In that policy, the agencies recognize that, in appropriate circumstances, goals and timetables are "a proper means for helping implement the nation's commitment to equal employment opportunity through affirmative action programs." They also describe the basic distinctions between permissible goals and impermissible quotas.

It is our view therefore that Governmental agencies especially those operating within the context of a merit system must avoid any tendency to arbitrarily establish their work forces along race, sex or ethnic lines for the sake of achieving proportional representation.

We remain keenly interested in the adoption of an affirmative action policy for the District Government which provides true equal opportunity in employment. We would be happy to work with you in providing assistance on this and related issues. Please feel free to call upon us.

Sincerely yours,

Robert E. Hampton
Chairman

Enclosure

UNITED STATES COMMISSION ON CIVIL RIGHTS
WASHINGTON, D. C. 20425

STAFF DIRECTOR

February 12, 1976

Mr. James M. Frey
Assistant Director for
Legislative Reference
Office of Management & Budget
Washington, D.C. 20503

Dear Mr. Frey:

This is in response to your request of February 5, 1976 for the views of the U.S. Commission on Civil Rights with respect to the "Affirmative Action in District Government Act", which has been submitted to the President by the District of Columbia City Council pursuant to Section 404(E) of the District of Columbia Self-Government & Governmental Reorganization Act.

The Commission believes that the Council has adopted a leadership position by drafting and enacting this legislation to make affirmative action in employment a reality in the District of Columbia government. The Council has properly sought to carry out the affirmative duty which rests with the Mayor and the Council to eliminate the last vestiges of discrimination and to assure that nondiscriminatory employment practices are followed in the future.

However, the Mayor's veto message makes an important point with which we agree. The definition of "available work force" must in our view include language which makes it clear that the Council does not intend to legislate the hiring of women and minorities in proportion to their percentages in the population of the District of Columbia. In our view the purpose of this affirmative action legislation is to remedy underutilization and eliminate employment discrimination. The Commission position on the manner in which such a remedy should be based is indicated in its report: The Federal Civil Rights Enforcement Effort, 1974, Volume V, "To Eliminate Employment Discrimination."

> By underutilization, the Commission means the disparity between minority and female employment in the employer's work force and the proportion of these groups having those skills and knowledges manifestly related to the job. The establishment of goals and timetables, we insist, is not a quota to fix a particular level of employment for any group, but rather an attempt to make a good faith effort to overcome past discriminatory practices which excluded minority and female applicants.

The U.S. Commission on Civil Rights strongly opposes quota systems by which an employer limits its work force to fixed numbers or percentages of any race, sex, or ethnic group. The Commission recognizes that such quota systems have been used to keep members of certain minority groups and women from achieving their full potential and believes that there is no legal or moral justification for such practices.

The Commission recommends that the President not sign this bill until language is included in section 2 which makes it clear that "available work force" relates to persons in underutilized groups possessing skills manifestly related to the jobs available.

Sincerely,

John A. Buggs

JOHN A. BUGGS
Staff Director

ANT ATTORNEY GENERAL
GISLATIVE AFFAIRS

Department of Justice
Washington, D.C. 20530

February 20, 1976

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

This is in response to your request for the views of the Department of Justice on the District of Columbia Council Bill 1-133, "Affirmative Action in District Government Employment Act". Pursuant to Section 404(e) of the District of Columbia Self-Government and Governmental Reorganization Act (P.L. 93-198), the President has thirty days within which to "disapprove" any act passed by a two-thirds vote of the Council over the Mayor's veto of an earlier enactment.

Bill 1-133 states that the "goal of affirmative action in employment throughout the District [of Columbia] government" is "full representation, in jobs at all salary and wage levels . . . of all groups in the available work force of the District of Columbia, including, but not limited to, Blacks, Whites, Spanish-speaking Americans, Native Americans, Asian Americans, females, and males". (Sec. 2). "[F]ull representation" is to be in accord with "the representation of [such] groups in the available work force of the District . . ." (id.); "available work force is defined as "the total population of the District of Columbia between the ages of 18 and 65". (id.).

To achieve this goal, each agency of the District government is to develop and submit to the Mayor and Council an affirmative action plan (Sec. 3), which shall include goals, as outlined above, at all pay levels in all offices of each agency, including projected new hires and promotions (Secs. 4 and 5). "These shall be the goals, not the quotas, of the plan." (Sec. 4).

Each agency shall also indicate in its plan what steps it is taking to secure employment rights for "the aging, the young, the handicapped and the homosexual citizens of the District . . ." (Sec. 6; see also Sec. 8); other provisions of the bill impose the responsibility of equal employment opportunity cases (Sec. 9), and provide for the Act's effective date (Sec. 10).

The Justice Department does not recommend executive disapproval of the Act.

It is important that governments at all levels in the United States heed the equal employment opportunity obligations implicit in the Fifth and Fourteenth Amendments and explicit in Title VII ofthe Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. While racial ethnic or sexual statistics concerning an employer's work force are but one indicator of whether it is providing equal employment opportunity, the courts have been unanimous in finding statistical information very probative. Accordingly, the Council's concern with this aspect of employment is quite proper, and, absent compelling policy or constitutional considerations, the Act should not be disapproved.

The Department has considered the correspondence you shared with us -- (1) the December 12, 1975, letter from Chairman Hampton of the Civil Service Commission to Mayor Washington, and (2) Mayor Washington's veto message of December 24, 1975, to the Council -- and do not find there a sufficient predicate for executive disapproval.

Both Chairman Hampton and Mayor Washington express concern about the Act's defining "available work force" as the "total population of the District" (e.g., Hampton letter, p. 1). From this they conclude that the Act calls for population parity at all levels of the District government, regardless of qualifications or availability. This is seen as possibly turning "well-intentioned goals into senseless and even illegal quotas" (id.).

If the Act had to be read to require that all groups be represented at all levels of the District government in their proportion of the population regardless of qualifications or availability the Department would agree that substantial policy and possibly constitutional issues would be raised. However, since it appears the Act could be administered consistent with its language to take into account the availability of qualified persons, there appears to be no reason for executive disapproval. It should be noted, however, that if the Council had intended population parity without regard to the factors mentioned above, there would be no need for each agency of the District government to calculate kinds of employees by levels; rather, the Council could simply have established the percentages for all groups in the District (by using, say, the 1970 census) and left to each agency merely the mathematical calculation for its particular size.

Finally, in each instance where Presidential disapproval of a city council bill is considered, that consideration must take into account the objectives of P.L. 93-198, which include: "grant to the inhabitants of the District of Columbia powers of local self-government." (Sec. 102(a)). Thus, the question before the President here is different from the question before the President deciding whether to veto a bill passed by Congress or the question before the Mayor in deciding whether to veto a bill passed by the City Council. The presidential authority to disapprove city council action presumably is intended as a safeguard for the federal interest in this federal city. Regardless of the wisdom of Bill 1-133, it does not seem to impinge on the national government, and therefore should be left to the political and judicial processes of the District of Columbia.

Sincerely,

Michael M. Uhlmann
Assistant Attorney General

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

February 19, 1976

MEMORANDUM

TO : Edgar Morgan
Director
Congressional Affairs

FROM : Constance L. Dupre CLD
Associate General Counsel
Legal Counsel Division

SUBJECT : Mayor Washington's Proposed Substitute Bill on Affirmative Action

Under Title VII of the Civil Rights Act of 1964, as amended, an employer is permitted to initiate voluntary affirmative action programs upon completion of an internal self-analysis which reveals underutilization of protected classes in proportion to their representation in the relevant labor force, and the employer has reason to believe that the presumption of discrimination arising from such underutilization could not be rebutted. This memorandum is based upon the assumption that such a self-analysis has been made.

We wish to note that, pursuant to Section 717 of Title VII, those units of the Government of the District of Columbia having positions in the competitive service are subject to the United States Civil Service Commission's rules, regulations, orders and instructions concerning employment discrimination and affirmative action programs. Those units not subject to procedures of the competitive service are subject pursuant to Section 701 of Title VII, to the jurisdiction of the Equal Employment Opportunity Commission in matters involving alleged employment discrimination.

Since the Equal Employment Opportunity Commission was afforded only a few days to evaluate this bill, it is imperative that we emphasize that this memorandum only addresses the more significant features of the bill and does not constitute an exhaustive analysis.

We have the following comments on the proposed substitute bill:

1. The bill, in Sections 2a and 3, provides for affirmative action goals of representation of minorities and females in the District government proportionate to their

representation in the "available labor force" in the District of Columbia, Section 9 of the bill, however, provides that "nothing in this Act shall be construed to prohibit the recruitment or hiring of applicants located outside of the District of Columbia."

Thus, the bill is establishing affirmative action goals by the use of labor force statistics for a narrower geographic area than from which it is drawing its workforce. Such a use diverges from the general principle of Title VII law 1/ as established by the Commission and the courts that minority population statistics used to establish goals for remedying discrimination, are taken from the area from which the workforce is drawn. 2/

Furthermore, Civil Service Commission guidance for federal affirmative action programs, as set forth in Section 713 of the Federal Personnel Manual, prescribes the establishment of goals (of hiring minorities and females) that are "reasonable in terms of their relationship to hiring needs and skills available in the recruiting area." 3/ (emphasis supplied)

Accordingly, it appears that the female and minority labor force statistics could more appropriately be taken from a broader geographical area than the District of Columbia, 4/ assuming that such an adjustment would further the goal of remedying the prior underutilization.

1/ The general principles of Title VII law are also relevant to the federal service.

2/ See the Commission publication, Affirmative Action and Equal Employment, Vol. 1, p.25, where private employers are advised: "Determine Extent of Underutilization of Minorities and Females - Survey your labor area (the area in which you can reasonably expect to recruit)...." See also Rios v. Enterprise Ass'n. Steamfitters, Local 638, 501 F.2d 622 (2d Cir. 1974), where the court ordered the use of statistics in the area for the union's territorial jurisdiction.

3/ Section 713, Federal Personnel Manual, Letter No. 713-22, 2(g), Cf. n.2 supra, and accompanying text.

4/ See EEOC publication, Affirmative Action and Equal Employment Vol. 1, p.25, where the private employer is advised:

2. The goal of attaining representation on the workforce proportionate to minority and female representation in the definition of "available workforce" as "those persons between the ages of 16 and and 65 eligible for the desirous of employment," is in accord with the general principles of Title VII law as established by the Commission and the Courts with respect to remedial affirmative action. The courts have held that Title VII imposes upon employers an affirmative duty to recruit minorities where there is a history of exclusion. See U.S. v. Ironworkers, Local 7, 438 F.2d 697 (7th Cir. 1971); Papermakers, Local, 189, v. U.S., 416 F.2d 980 (5th Cir. 1970), cert. denied, 397 U.S. 919 (1970). In implementing these affirmative duties by court order, the courts have rejected absolute preference remedies 5/ but have approved ratio hiring of previously excluded minorities, for both private and public employers, rejecting arguments that such ratio hiring is unconstitutional or in contravention of Title VII's anti-preferential treatment statute. 6/ In setting hiring goals, the courts have

---

4/ continued

> Your labor area should generally be the Standard Metropolitan Statistical Area (SMSA) for which Census Bureau and other employment data is available. An Affirmative Action Program should include "an area of reasonable recruitment." For example: if you are located in a predominantly white county 30 miles from an urban area with considerable minority population, the urban area is an area of reasonable recruitment.

The reverse situation would apply to the District of Columbia, i.e., the suburbs would be regarded as an area of reasonable recruitment.

5/ Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), cert. denied, 406 U.S. 150 (1972).

6/ Carter, supra; United States v. Wood, Wire Metal Lathers International Union, Local No. 46, 471 F.2d 408 (2d Cir. 1973), cert. denied, 412 U.S. 939 (1973).

cautiously approved the use of minority representation in the relevant labor force. 7/

> We believe that from the outset the court should be guided by the most precise standards and statistics available in view of the delicate constitutional balance that must be struck in the use of such goals or quotas between the elimination of discriminatory effects, which is permissible, and the involvement of the court in unjustifiable reverse racial discrimination, which is not. These conflicting considerations make it essential that the percentage figure be reached with the utmost of care, since once the goal is reached the party will thereafter be bound by standards of non-discrimination applicable to all, and not forced to continue in effect a percentage ratio which could become anachromistic. Rios, id. at 633.

Although the affirmative action discussed above was judicially ordered after a specific finding of past discrimination, the fact that the affirmative action program established here is voluntary, does not render illegal the goals of minority representation in the workforce in proportion to their representation in the relevant labor force. If underutilization of minorities and females in the workforce be found by the use of such a yardstick, it may be presumed (a rebuttable presumption) that discriminatory exclusion has been taking place. Affirmative action by its very nature is remedial. We note here that courts have upheld federal affirmative action programs against challenge under the Equal Protection Clause. Contractors Ass'n. of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 19), cert. denied 404 U.S. 854; Weiner v. Cuhahoga Community College District, 19 Ohio Lt. 2d 35, 249 N.E. 2d 907, 908, cert. denied 396 U.S. 1004.

7/ See Rios, supra, n.2; Bridgeport Guardians v. Bridgeport Civil Service Commission, 482 F.2d 1333 (2d Cir. 1973) (specific numbers of minority patrolmen to be appointed in order to achieve 15% representation on workforce, in relation to the 25% representation of the minority population in the area).

In Contractors Ass'n., supra, the court specifically held that "a finding as to the historical reason for the exclusion of available tradesmen from the pool is not essential for federal contractual remedial action." As the Four Agency Agreement of March 1973 stated with respect to affirmative action for state and local governments, "all agencies recognize that goals and timetables are appropriate as a device to help measure progress in remedying discrimination." The agreement defines "goal" as a numerical objective, fixed realistically in terms of the number of vacancies expected and the number of qualified persons available in the relevant job market.

3. The change of the definition "available labor force" from "those persons between the ages of 16 and 65" to "those persons between the ages of 16 and 65 eligible for and desirous of employment," is in accordance with Title VII principles of affirmative action. Such circumscription of statistics in setting affirmative action goals is in accord with the Rios standard set forth supra, that the percentage figure be reached "with the utmost care."

4. We wish to comment on the statement by the Civil Service Commission that "the bill fails to take into account the concept of relative ability which underlies the merit system and competitive staffing." 8/ We think it important to note that in affirmative action programs there is no requirement that candidates selected from the underutilized groups be superior in qualifications to those over whom they are selected. The standard that is used is that they be qualified. The Four Agency Agreement explains this as follows:

> "While determinations of relative ability should be made to accord with required merit principles, where there has been a history of unlawful discrimination, if goals are set on the basis of expected vacancies and anticipate availability of skills in the market place, an employer should be expected to meet the goals if there is an adequate pool of qualified applicants from the discriminated against group."

8/ See Letter of December 12, 1975, from Robert E. Hampton, Chairman, to Mayor Walter E. Washington.

In fashioning its ratio remedy, the court in Carter v. Gallagher speaks only in terms of choosing qualified persons, stating at p.330, "[W]e think some reasonable ratio who can qualify (emphasis added) under the revised qualification standards is in order for a limited period of time...." Moreover, in most instances where there is an underutilization of minorities and/or females, discriminatory selection devices are involved, which do not properly measure the ability of the candidate to do the job. As the court stated in Carter v. Gallagher:

> Because of the absence of validation studies on the record before us, it is speculative to assume that the qualifying test, in addition to separating those applicants who are qualified from those who are not, also ranks qualified applicants with precision, statistical validity and predictive significance... Id. at 331.

With respect to the possibility of District of Columbia discriminatory employment selection devices, we note that in the case of Davis v. Washington, 9 EPD para. 9980 (D.C. Cir., 1975), the Court concluded that the District of Columbia police entrance testing examination was discriminatory as it had a disproportionate rejection rate for minority applicants.

Accordingly, we feel that the bill, in order to conform to "merit" requirements, need state only that candidates selected for a job pursuant to affirmative action programs be "qualified" for that job.

5. Section B, which prescribes the goal of hiring females and minorities in proportion to their representation in the "available" workforce is awkwardly stated. More appropriate wording for the first sentence would be: Each plan shall set a numerical goal in the workforce of females and males who are Black, White, Hispanic, Native American, and Asian American, in proportion to their representation in the "available labor force."

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

February 24, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: Jim Cannon

SUBJECT: D. C. Enrolled Act 1-87 -- Affirmative Action in District Government Employment Act

Under the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act), where, by two-thirds vote, the City Council overrides the Mayor's veto of a bill, the bill is sent to the President for his review and he has 30 days in which he may disapprove the City Council's override of the Mayor's veto. The subject bill is the first one on which the City Council has overridden the Mayor's veto since the Home Rule Act was enacted. It is presented for your review.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

INFORMATION

February 24, 1976

MEMORANDUM FOR: Jim Cannon

FROM: Dick Parsons D.

SUBJECT: D. C. Enrolled Act 1-87 -- Affirmative Action in District Government Employment Act

Normally I would not bother you with routine legislation, but I think the attached bill is potentially politically explosive.

Under the D. C. Home Rule Act, if the City Council passes a bill and the Mayor vetoes the bill and the City Council overrides the Mayor's veto by a two-thirds vote, the President has 30 days in which he may override the City Council's override, thereby affirming the Mayor's veto. The attached bill is the first one on which the Council has overriden the Mayor's veto since the Home Rule Act was enacted.

This bill is intended to promote affirmative action in D. C. government employment by establishing the goal of representation in all D. C. government jobs of minorities and women in proportion to their representation in the available work force. The "available work force" is defined as the total population of the District of Columbia between the ages of 18 and 65.

OMB, the U.S. Civil Service Commission and the U.S. Commission on Civil Rights have recommended disapproval of the bill because they believe that it would require District government agencies to employ minority group members and women on the basis of race or sex, without regard to their qualifications for the jobs, since, in defining "available work force," no mention is made of skills or abilities manifestly related to given jobs. The Department of Justice, on the other hand, believes that a skill-qualification requirement could be read into the law and, therefore, does not oppose its enactment.

On the merits, I agree with OMB, the Civil Service Commission and the Commission on Civil Rights that the bill should be disapproved (if for no other reason than to force the City Council to clarify its intention in this regard).

However, the President should be aware of two things before he acts on this measure:

1. Disapproval of the bill could enrage a sizeable (and vocal) segment of the civil rights community as well as the proponents of home rule. While I would view the disapproval as substantively justified, it would be based on a rather subtle and difficult-to-define nuance of legal interpretation. Moreover, I do not believe that the Federal interest here is so clear or compelling as to require Presidential involvement.

2. The President has an alternative to disapproval of the bill. If he says nothing within the 30-day period, the Congress then has 30 days in which to review the Act and disapprove it if it (the Congress) so determines. The President may wish to simply pass the ball to the Congress.

In light of these factors, I would not recommend that the President disapprove the bill. I think he should let the Congress or the courts do it.

Attached is a draft of the text of a memorandum from you to the President setting forth the issue as I see it. Note, however, that I have not set forth your recommendation to the President, since I thought you might want to reflect not only on these points but on the views of the President's other advisers.

Attachment

THE WHITE HOUSE

WASHINGTON

February 25, 1976

MEMORANDUM FOR: JIM CAVANAUGH

FROM: MAX L. FRIEDERSDORF M. L.

SUBJECT: D.C. Enrolled Act 1-88 - District of Columbia Shop-Book Rule Act

The Office of Legislative Affairs concurs with the agencies that the Act be disapproved.

Attachments

THE WHITE HOUSE

WASHINGTON

February 26, 1976

MEMORANDUM FOR: JIM CANNON

FROM: DAVID LISSY

SUBJECT: District of Columbia Enrolled Act 1-87 -- Affirmative Action in District Government Employment Act

I would prefer that the President disapprove this D.C. City Council action.

If, however, you share Dick Parson's view that the President take no action then I have an additional suggestion which I believe Dick finds acceptable.

If the President takes no action because he determines there is no substantial Federal interest, it is important that Ron Nessen get us on record as to the reasons for Presidential non-action and also express our concern about the merits of the legislation. This City Council action frightens people who worry about affirmative action turning into quotas. They will be surprised if the President does not act and will see it as inconsistent with the President's general views.

Points to make in the press briefing:

.. The only reason the President did not act was because the Federal interest was not clearly substantial.

.. On the merits, we think this legislation is very unwise -- but "home rule" means just that.

.. We do not believe quotas are appropriate and it is the Mayor's view that this legislation would require quotas regardless of the qualification or availability of individual employees.

.. We understand that Congress now has 30 days in which it may choose to disapprove the action of the City Council.

When asked whether we would recommend that Congress act or would consider Congressional action inappropriate for the reasons the President did not act -- we should duck the question.

cc: Dick Parsons

Last day for action:
February 27, 1976

THE WHITE HOUSE

WASHINGTON

DECISION

February 27, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Presidential Policy on Home Rule

This is an important issue related to your policy of federal, state and local relationships.

In 1973, Congress passed the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) which was to provide for home rule in and by the city of Washington. Part of that law provides that if the D.C. Council passes a bill, has it vetoed by the Mayor and then overrides his veto, the bill must be sent to the President for his review. The President has 30 days in which to disapprove the bill or take no action. If he takes no action, then Congress has 30 days in which it can override the D.C. Council action. If neither the President nor Congress acts, then the bill becomes law. D.C. laws are, of course, subject to judicial review.

Up to now, this issue has not come before you. Now there are two such bills which have been presented for your review. What you do on these bills will probably set a precedent not only for your Administration but for Presidents who follow you.

PRIMARY ISSUE

The fundamental issue can be stated in these two options:

Option I
Should the President intervene in the District of Columbia home rule process only if there is a clear and compelling Federal interest?

Option II
Should the President intervene if there is a substantial Federal interest?

Arguments in Favor of Option I

A. The Presidential authority to disapprove actions of the D.C. Council was intended as a safeguard of Federal interest in the District and not as a general check on the wisdom of Council decisions.

B. Unless there is an overriding Federal interest, the President should not intervene in home rule decisions in Washington any more than he intervenes in similar decisions by, for example, the City of Baltimore.

Arguments in Favor of Option II

A. Washington is unique as a federal city, and the President has an obligation to safeguard a special Federal interest in the District.

B. The President must insure that the intent of Congress in delegating legislative authority to the D.C. Council is properly carried out.

SECONDARY ISSUES

1-87 Affirmative Action in District Government Employment Act

This bill is being viewed as an attempt to set up quotas for employment by the District government.

It is intended to promote the concept of affirmative action in D.C. government employment by establishing the goal of representation in all D.C. government jobs of minorities and women in proportion to their representation in the available work force. The "available work force" is defined as the total population of the District of Columbia between the ages of 18 and 65.

OMB, the U.S. Civil Service Commission and the U.S. Commission on Civil Rights have recommended disapproval of the bill because they believe it would require District government agencies to select minority group members and women for employment on the basis of race or sex, without regard to their qualifications for the jobs, since, in defining "available work force," no mention is made of a

skill or an ability requirement. This result is of concern to the Federal government because of the responsibility of the Civil Service Commission to insure that competitive service positions in the District government are filled in accordance with merit principles.

The Department of Justice, on the other hand, believes that a skill or an ability requirement can be read into the law and, therefore, the law can be administered in accordance with the merit system. Therfore, Justice does not oppose enactment of the law.

The OMB enrolled bill memorandum on this bill is attached at Tab A.

1-88 District of Columbia Shop-Book Rule Act

In this bill, the D.C. Council may have reached beyond its authority under the Home Rule Act. Specifically, the bill provides that any documentary record of any business transaction, event or occurrence shall be admissible as evidence in any civil or criminal judicial proceeding in the courts of the District of Columbia.

OMB and the Department of Justice have recommended disapproval of the bill on the ground that the D.C. Council had no authority to enact it. They point out that, under the D.C. Court Reorganization Act, the power to prescribe rules of judicial procedure, including rules of evidence, is vested exclusively in the D.C. courts. OMB and Justice believe there is a Federal interest here in ensuring that the intent of Congress in delegating legislative authority to the Council is being appropriately carried out.

The OMB enrolled bill memorandum on this bill is attached at Tab B.

RECOMMENDATION

1. OMB recommends disapproval of both bills.

2. The President's Counsel (Lazarus) recommends no action on 1-87 and disapproval of 1-88.

3. Max Friedersdorf, Dick Parsons and I recommend you take no action on either bill. We do not believe that the Federal interest involved in either case is sufficiently

compelling to warrant Presidential disapproval. If home rule is to have real meaning, the sanctity of the local political process must be respected where no compelling federal interest exists. This position is, I believe, also consistent with your general view that local governments should retain, to the maximum extent possible, control over local matters.

If you concur in this recommendation, I suggest you issue a statement explaining your reasons for taking no action (draft attached at Tab E).

If you decide to disapprove one bill and not the other, the draft statement at Tab E can be amended to make essentially the same point about home rule.

DECISION

D.C. Enrolled Act 1-87 (Affirmative Action)

GRF Take no action (not sustain Mayor's veto).

_____ Disapprove the bill (sustain Mayor's veto). (Statement at Tab F)

D.C. Enrolled Act 1-88 (Shop-Book Rule)

_____ Take no action (not sustain Mayor's veto).

GRF _____ Disapprove the bill (sustain Mayor's veto). (Statement at Tab G)

To: J. Cavanaugh
2-20-76
6:15 J.M.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FEB 20 1976

MEMORANDUM FOR THE PRESIDENT

Subject: District of Columbia Enrolled Act 1-87 -- Affirmative Action in District Government Employment Act

Last Day for Action

February 27, 1976 - Friday

Purpose

To establish the goal of employment of women and minorities in District of Columbia government agencies proportional to their representation in the total population of the District between the ages of 18 and 65.

Agency Recommendations

Office of Management and Budget	Disapproval (Memorandum of Disapproval attached)
Civil Service Commission	Disapproval
United States Commission on Civil Rights	Disapproval
Department of Labor	Disapproval (Informally)
Department of Justice	Approval
Equal Employment Opportunity Commission	No recommendation

Discussion

Introduction

The District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) provides that Acts of the City Council which have been vetoed by the Mayor and overridden by a two-thirds vote of the Council shall be transmitted by the Council Chairman to the President for review. These Acts become law unless the President expresses disapproval within thirty days. We understand that the Home Rule Act has been interpreted to provide that if the President declines to act, thereby approving the legislation, the Congress would then

To: J. Cavanaugh 2-20-76 6:15 J.M.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FEB 20 1976

MEMORANDUM FOR THE PRESIDENT

Subject: District of Columbia Enrolled Act 1-87 -- Affirmative Action in District Government Employment Act

Last Day for Action

February 27, 1976 - Friday

Purpose

To establish the goal of employment of women and minorities in District of Columbia government agencies proportional to their representation in the total population of the District between the ages of 18 and 65.

Agency Recommendations

Office of Management and Budget	Disapproval (Memorandum of Disapproval attached)
Civil Service Commission	Disapproval
United States Commission on Civil Rights	Disapproval
Department of Labor	Disapproval (Informally)
Department of Justice	Approval
Equal Employment Opportunity Commission	No recommendation

Discussion

Introduction

The District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) provides that Acts of the City Council which have been vetoed by the Mayor and overridden by a two-thirds vote of the Council shall be transmitted by the Council Chairman to the President for review. These Acts become law unless the President expresses disapproval within thirty days. We understand that the Home Rule Act has been interpreted to provide that if the President declines to act, thereby approving the legislation, the Congress would then

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have thirty days for its consideration of the legislation. On the other hand, if the President disapproves the D.C. bill, the Mayor's veto would become final.

This is the first Council override of a mayoral veto since the Home Rule Act was enacted. A separate memorandum is being submitted to you on a second bill involving a Council override.

Summary of Act 1-87

Act 1-87 is designed to increase employment opportunities for women and minorities in the agencies of the District government. The bill states that "the goal of affirmative action in employment throughout the District government is, and must continue to be, full representation, in jobs at all salary and wage levels and scales, in accordance with the representation of all groups in the available work force of the District of Columbia, including, but not limited to Blacks, Whites, Spanish-speaking Americans, Native Americans, Asian Americans, females and males." "Available work force" is defined as the total population of the District of Columbia between the ages of 18 and 65.

Each District government agency would be required to develop and submit to the Mayor and Council an affirmative action plan within 12 weeks of enactment and annually thereafter. Each plan would state

-- the number of women and minorities who would be employed by the agency "using the goal of their representation in the available work force in the District";

-- the actual employment levels of women and minorities in the agency and the difference between the actual employment and the goals;

-- the number of women and minorities projected to be hired and promoted in the period until the next plan; and

-- what actions the agency is taking to assure equal employment opportunity for women and minorities and for "the aging, the young, the handicapped, and the homosexual citizens of the District."

Other provisions of the bill would direct the Mayor to transfer all Equal Employment Opportunity officers from their respective agencies to the central Office of Human Rights (HR); impose the responsibility of equal employment opportunity on each agency; and provide for the Act's effective date.

The bill passed the City Council on December 10, 1975, was vetoed by the Mayor on December 24, and the veto was overridden on January 19, 1976, by a 9-0 vote with 4 Council members absent.

Issues

The Mayor and the City Council disagree on the effects of this legislation. Specifically, there is a difference of opinion as to whether the bill would require D.C. agencies to hire women and minorities strictly in proportion to their percentages in the gross population of the District of Columbia regardless of qualifications or other factors. Such a statutory requirement would be a matter of concern to the Federal government because of its implications in affirmative action policy generally.

The Mayor, the Civil Service Commission, and the Civil Rights Commission believe that the goal of affirmative action in employment as defined in the bill would lead to the future requirement that employment be in accordance with population parity at all levels of the District Government, regardless of the qualification or availability of individual employees. In this connection the Civil Service Commission, in a letter to Mayor Washington, stated:

> "The use of gross population data is inappropriate in defining the work force available to an employing organization. Such data more often than not fails to reflect the availability of particular skills in the labor market required by the employing agency. If no attention is paid to the relative availability of needed skills, the result is frequently erroneous expectations on the part of potential applicants and/or deliberate decisions to hire less than qualified personnel. Either one of these results could turn well-intentioned goals into senseless and even illegal quotas. Indeed the bill fails to take into account the concept of relative ability which underlies the merit system and competitive staffing."

In its views letter, the Civil Rights Commission "strongly opposes quota systems by which an employee limits its work force to fixed numbers or percentages of any race, sex, or ethnic group."

The Federal interest in this question arises partly because of the present responsibility of the Civil Service Commission in the District government personnel system. Until the District

establishes its own personnel system, the Commission has jurisdiction over positions (about 20%) in the District government which are in the competitive service. In addition, the Commission is responsible for the merit system compliance required for D.C. participation in numerous Federal grant programs and compliance with the Civil Rights Act is an important aspect of a merit system. The Equal Employment Opportunity program in the District government must also be carried out under the regulations of the Commission.

Another source of Federal interest in this issue is a statement entitled a "Federal Policy on Remedies Concerning Equal Employment in State and Local Government Personnel Systems," issued jointly by the Equal Employment Opportunity Commission, the Justice Department, the Department of Labor, and the United States Civil Service Commission. That statement describes distinctions between permissible goals and impermissible quotas in equal employment. This bill does not appear to adhere to those distinctions. The Commission notes in its views letter that jurisdictions writing affirmative action plans must set goals "based on the availability of race/ethnic group members and women with the necessary job skills in the relevant recruiting area" and that work forces must not be established "on non-merit based lines simply for the sake of achieving proportional representation."

However, the City Council and the Justice Department do not believe the bill is objectionable. Justice states that it sees no reason for disapproval since "it appears the Act could be administered, consistent with its language, to take into account the availability of qualified persons." Justice does not mention either the Civil Service Commission's responsibility in this area or the "Four Agency Agreement" even though it is a signatory to the latter. The Council argues that (a) the population standards set in the bill are long range goals, not quotas; and (b) these standards are quite different from population parity, because the young and elderly (those under 18 and over 65) have been removed from the definition of "available work force."

Recommendation

We believe the principle regarding Presidential actions on District legislation enunciated by the Justice Department in its views letter is appropriate: "The presidential authority to disapprove City Council action...is intended as a safeguard for the Federal interest in this Federal city." Absent a Federal interest, this authority should not be exercised. The

question is whether the bill raises a substantial issue of Federal concern.

In our view, the Presidential authority to disapprove should be exercised in this case. We base this recommendation on two judgments.

1. The bill appears to justify the belief of the Mayor, the Civil Service Commission, and the Civil Rights Commission, that it not only establishes gross population parity as a standard of employment in the District government but in fact mandates it in the future. The bill sets forth a goal (representation in accordance with the available work force in the District) and then requires agency plans which seem to set up a process which would lead over time to a D.C. work force characterized by proportional representation along racial, sexual and ethnic lines. This process would be set in motion by the requirements that the plans state the difference between what employment would be under the goal and what it is now and that the agencies move toward eliminating that gap.

2. Approval of this bill would be inconsistent with both the responsibility of the Civil Service Commission regarding merit-based employment systems in the District government and the District's Equal Employment Opportunity program, and the "Four Agency Agreement" on equal employment in State and local governments.

Accordingly, we recommend disapproval. A proposed statement of disapproval to the Chairman of the City Council is attached for your consideration.

James M. Frey
Assistant Director
for Legislative Reference

Enclosures

TO THE CHAIRMAN OF THE DISTRICT OF COLUMBIA CITY COUNCIL

In accordance with the District of Columbia Self-Government and Governmental Reorganization Act, I disapprove Act 1-87, the Affirmative Action in District Government Employment Act.

This legislation states that the goal of affirmative action in employment throughout the District government is "full representation, in jobs at all salary and wage levels and scales, in accordance with the representation of all groups in the available work force of the District of Columbia including, but not limited to, Blacks, Whites, Spanish-speaking Americans, Native Americans, Asian Americans, females, and males." The Act defines "available work force" to be the total population of the District of Columbia between the ages of 18 and 65. Agencies are requested to develop affirmative action plans indicating the actual number of women and minorities employed and the number that would be using the goal of affirmative action stated in the bill.

We can all concur in the ultimate purpose of this legislation to insure adequate and equitable representation of women and minorities in all segments of the District of Columbia Government. The bill as written could be interpreted, however, to legislate the hiring of women and minorities in proportion to their percentages in the population of the District of Columbia. This could lead to arbitrarily establishing work forces along racial, sexual, or ethnic lines solely for the sake of achieving proportionate representation. Such a result would be of concern to the Federal government because of the Civil Service Commission's responsibility to insure that competitive service positions in the District Government as well as under the Equal Employment

Opportunity program are filled in accordance with merit principles. Affirmative action to achieve the desirable goals of this bill should be carried out in the context of the merit system of employment.

I believe that many of the questions of meaning and interpretation relating to this legislation can be settled by further discussions between the City Council and the Mayor and action by them. The United States Civil Service Commission, which retains various responsibilities relating to District of Columbia Government personnel, stands ready to help to achieve a satisfactory and effective solution to the issue of equal employment opportunity in the District.

I am, therefore, returning this legislation in the hope and expectation that a consensus can be reached at the local level on legislation that will lead us toward the goal of adequate representation of women and minorities in the District of Columbia Government.

THE WHITE HOUSE

February , 1976

To: J. Cavanaugh 2-20-76 6:15 p.m.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FEB 20 1976

MEMORANDUM FOR THE PRESIDENT

Subject: District of Columbia Enrolled Act 1-88 -- District of Columbia Shop-Book Rule Act

Last Day for Action

February 27, 1976 - Friday

Purpose

To make documentary records of business transactions admissible as evidence in judicial proceedings in the courts of the District of Columbia.

Agency Recommendations

Office of Management and Budget	Disapproval (Memorandum of disapproval attached)
Department of Justice	Disapproval

Discussion

Introduction

The District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) provides that Acts of the City Council which have been vetoed by the Mayor and overridden by a two-thirds vote of the Council shall be transmitted by the Council Chairman to the President for review. These Acts become law unless the President expresses disapproval within thirty days. We understand that the Home Rule Act has been interpreted to provide that if the President declines to act, thereby approving the legislation, the Congress would then have thirty days for its consideration of the legislation. On the other hand, if the President disapproves the D.C. bill, the Mayor's veto would become final.

This is the second Council override of a mayoral veto since the Home Rule Act was enacted. A separate memorandum is being submitted to you on the other bill.

Summary of Act 1-88

This legislation would amend Title 14 of the D.C. Code, which contains rules of evidence, to exempt business records from the hearsay rule. Act 1-88, cited as the "District of Columbia Shop-Book Rule Act," provides that any documentary record (either the original written version or a photographic copy) of any business transaction, event, or occurrence shall be admissible as evidence in any civil or criminal judicial proceeding in the courts of the District of Columbia. The introduction of a reproduced record does not preclude admission of the original as evidence.

Background

Although, under the Home Rule Act, all legislative power granted to the District is vested in the Council, that power is subject to reservations by the Congress of its own constitutional powers and to specific limitations included in Title VI of the Home Rule Act. Specifically, Section 602 of that Act, headed "Limitations on the Council" prohibits the Council from enacting any act, resolution, or rule relating to the organization and jurisdiction of the District of Columbia courts, as set forth in Title 11 of the D.C. Code.

In addition, Section 602 similarly prohibits the Council from enacting any rule, resolution, or law with respect to the rules of criminal procedure for a period of two years from the date on which the first elected members of the Council take office.

The District of Columbia Court Reorganization Act of 1970, P.L. 91-358, which established the D.C. Superior Court and the D.C. Court of Appeals as local courts, forms Title 11 of the D.C. Code and provides, in part, that the Superior Court must operate under the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. It also provides that, with the approval of the D.C. Court of Appeals, the Superior Court may modify those rules and may adopt and enforce such other rules as it deems necessary. This rulemaking authority was not modified under the Home Rule Act.

Enactment of P.L. 93-595 (approved January 2, 1975), establishing new Federal Rules of Evidence, repealed certain rules of judicial procedure relating to the admissibility of evidence, including a 1936 Federal Shop-Book Rule, which was in force in the D.C. courts. P.L. 93-595, which took effect on July 1, 1975, and which includes a new shop-book rule as a rule of evidence, did not reference the D.C. courts as courts within the purview of the Act. Apparently believing that these new rules of evidence could not be applied in the D.C. Superior Court, and that the absence of a shop-book rule would have had a disruptive effect on litigation, the Board of Judges of that court reenacted a shop-book rule, which is substantially identical to this bill and the repealed 1936 Federal rule. The rule was approved by the D.C. Court of Appeals and became effective on July 1, 1975, thus coinciding with the effective date of the new Federal Rules of Evidence.

On December 16, 1975, the D.C. Council passed this legislation, because it viewed the Board of Judges' action in passing the rule as an emergency measure to be consummated by legislative enactment of substantive law. The Mayor, however, vetoed the bill on the grounds that (1) its passage was unnecessary in view of the legitimacy of the Superior Court's action, and (2) the Council exceeded its legislative authority under the Home Rule Act in passing a law affecting the judicial procedures of the D.C. courts. The Mayor's veto was overridden on January 27, 1976, by a unanimous vote of the eleven Council Members present.

Issue

The Federal interest in this matter is whether the intent of Congress in delegating legislative authority to the D.C. Council under the Home Rule Act has been appropriately carried out in this instance. The specific issue to be decided is whether or not the Council was within its authority under the Home Rule Act in enacting this bill. If not, it has exceeded its powers under the Home Rule Act and encroached upon the powers of the D.C. courts. However, neither the continued effect nor the content of the D.C. court's rule was contested by the Council; only the legitimacy of the Council's action is disputed.

Summary of Arguments

The arguments of the D.C. Corporation Counsel and the General Counsel of the D.C. Council which, respectively, formed the basis of the Mayor's veto and the Council's override are summarized below for your consideration. Briefly, the arguments presented by the Corporation Counsel are:

-- Under the D.C. Court Reorganization Act, which was not modified by the Home Rule Act, the power to prescribe rules of judicial procedure, including rules of evidence, was vested exclusively in the D.C. courts, subject only to acts of Congress.

-- The Home Rule Act prohibits the Council from enacting any act with respect to the provisions of Title 11 of the D.C. Code, which contains the courts' rulemaking authority.

-- Rules of evidence are an integral part of rules of judicial procedure, and, therefore, the D.C. courts' action in this regard was within the scope of their rulemaking authority under the 1970 D.C. Court Reorganization Act, i.e., Title 11 of the D.C. Code. For example, the Superior Court has replaced other Federal rules of procedure, including the new Federal Rules of Evidence, with the former versions of these rules.

Conversely, the General Counsel of the D.C. Council argues:

-- The shop-book-rule is a substantive law of evidence, which is quite distinct from rules of judicial procedure, and which, therefore, must be promulgated by legislation.

-- Codification of the D.C. rules of evidence in Title 14 of the D.C. Code instead of under Title 11 (dealing with the organization, jurisdiction, and authority of the D.C. courts) reflects Congressional intent that rules of evidence are not exclusively a function of the judiciary. P.L. 93-595, which established the new

Federal Rules of Evidence and affirmed the right of Congress to supersede rules of evidence promulgated by the Supreme Court, is referenced as analgous precedent.

-- The Home Rule Act limits the authority of the Council with respect to Title 11, not to Title 14.

View of the Department of Justice

The Department of Justice advises that the Shop-Book Rule, though technically a rule of evidence, is clearly in the nature of a procedural rule which could properly be encompassed within the rules of civil procedure. Therefore, promulgation of the Shop-Book Rule by the D.C. courts was well within the courts' express power to adopt rules of civil procedure, and, as such, is beyond the power of the Council under the Home Rule Act. The Department further advises that it is not necessary in this instance to determine whether Title 11 of the D.C. Code empowers the courts to adopt rules of evidence of a more substantive nature (although the courts did in fact do so on December 22, 1975). Similarly, it is not necessary to determine whether the Council retains authority to enact legislation altering the rules of evidence now codified in Title 14 of the D.C. Code. In this connection, the D.C. Corporation Counsel has noted that the Council has suspended action on a number of bills to enact rules of evidence for the Superior Court, pending your decision.

Conclusion

We concur with the views of the Mayor and the Department of Justice that this bill be disapproved on the ground that the D.C. Council has exceeded its authority in this instance and encroached upon the authority of the courts to enact rules of procedure. Your decision on this matter would, therefore, be based on a technical legal interpretation of the distinctions between rules of procedure and evidence, judgments generally reserved to the courts or the Congress. You may wish to consider the alternative of not taking any action on this bill. As noted earlier in this memorandum, the bill would then go to the Congress which would have 30 days to make its judgment. It might be more appropriate to have the Congress

settle the jurisdictional question of the relative authority of the D.C. courts and the City Council rather than draw the Presidency into narrow legal questions.

A proposed statement of disapproval to the Chairman of the City Council is attached for your consideration.

James M. Frey
Assistant Director for
Legislative Reference

Enclosures

TO THE CHAIRMAN OF THE DISTRICT OF COLUMBIA CITY COUNCIL

In accordance with the District of Columbia Self-Government and Governmental Reorganization Act, I disapprove Act 1-88, the District of Columbia Shop-Book Rule Act.

The Act would make documentary records of business transactions admissible as evidence in any civil or criminal judicial proceeding in the courts of the District of Columbia. This "shop-book rule" is substantially identical to the one adopted by the D.C. Superior Court which took effect on June 30, 1975.

The issue is whether the City Council was acting within its authority under the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) in passing a law affecting the judicial procedures of the D.C. courts. The Federal interest is whether the intent of Congress in delegating legislative authority to the Council under the Home Rule Act has been appropriately carried out in this instance.

I am advised by the Department of Justice that this "shop-book" rule is clearly within the nature of a procedural rule which could properly be encompassed within the rules of civil procedure and that promulgation of the rule is clearly within the express power of the District of Columbia courts to adopt rules of civil procedure and, as such, is beyond the power of the City Council.

Therefore, since the Council has exceeded its statutory authority in enacting this bill, I am disapproving Act 1-88.

THE WHITE HOUSE

February , 1976

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STATEMENT BY THE PRESIDENT
CONCERNING HOME RULE

The District of Columbia Self-Government and Governmental Reorganization Act (the Home Rule Act) provides that Acts of the D.C. Council which have been vetoed by the Mayor and overridden by a two-thirds vote of the Council shall be transmitted to the President for his review. The President shall then have thirty days in which to acquiesce in or disapprove these Acts.

D.C. Enrolled Acts 1-87, relating to affirmative action in D.C. government employment, and 1-88, relating to the so-called Shop-Book Rule of evidence, are the first such acts to be sent to the President for his review since the Home Rule Act was enacted.

While I have serious reservations concerning the substance of ~~both of these Acts~~ 1-87, I have chosen not to disapprove ~~either~~ THESE Act because I believe to do otherwise would violate the sound precepts of home rule. If home rule for the District is to have real meaning, the integrity of the local political process must be respected. The Federal government should intervene only where there is a clear and compelling Federal interest. Neither Enrolled Act 1-87 nor Enrolled Act 1-88 meets this test.

APPROVE_____ DISAPPROVE_____

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TO THE CHAIRMAN OF THE DISTRICT OF COLUMBIA CITY COUNCIL

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We can all concur in the ultimate purpose of this legislation -- to insure ~~adequate and equitable~~ fair representation of women and minorities in all segments of the District of Columbia Government. The bill as written could be interpreted, however, to legislate the hiring of women and minorities in proportion to their percentages in the population of the District of Columbia. This could lead to arbitrarily establishing work forces along racial, sexual, or ethnic lines solely for the sake of achieving proportionate representation. Such a result would be of concern to the Federal government because of the Civil Service Commission's responsibility to insure that competitive service positions in the District Government as well as under the Equal Employment

Opportunity program are filled in accordance with merit principles. Affirmative action to achieve the desirable goals of this bill should be carried out in the context of the merit system of employment.

I believe that many of the questions of meaning and interpretation relating to this legislation can be settled by further discussions between the City Council and the Mayor and action by them. The United States Civil Service Commission, which retains various responsibilities relating to District of Columbia Government personnel, stands ready to help to achieve a satisfactory and effective solution to the issue of equal employment opportunity in the District.

I am, therefore, returning this legislation in the hope and expectation that a consensus can be reached at the local level on legislation that will lead us toward the goal of fair representation of women and minorities in the District of Columbia Government.

THE WHITE HOUSE

February , 1976

TO THE CHAIRMAN OF THE DISTRICT OF COLUMBIA CITY COUNCIL

In accordance with the District of Columbia Self-Government and Governmental Reorganization Act, I disapprove Act 1-88, the District of Columbia Shop-Book Rule Act.

The Act would make documentary records of business transactions admissible as evidence in any civil or criminal judicial proceeding in the courts of the District of Columbia. This "shop-book rule" is substantially identical to the one adopted by the D.C. Superior Court which took effect on June 30, 1975.

The issue is whether the City Council was acting within its authority under the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) in passing a law affecting the judicial procedures of the D.C. courts. The Federal interest is whether the intent of Congress in delegating legislative authority to the Council under the Home Rule Act has been appropriately carried out in this instance.

I am advised by the Department of Justice that this "shop-book" rule is clearly within the nature of a procedural rule which could properly be encompassed within the rules of civil procedure and that promulgation of the rule is clearly within the express power of the District of Columbia courts to adopt rules of civil procedure and, as such, is beyond the power of the City Council.

Therefore, since the Council has exceeded its statutory authority in enacting this bill, I am disapproving Act 1-88,

FOR IMMEDIATE RELEASE

FEBRUARY 28, 1976

Office of the White House Press Secretary

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File

THE WHITE HOUSE

TO THE CHAIRMAN OF THE DISTRICT OF COLUMBIA CITY COUNCIL

In accordance with the ~~District of Columbia Self-~~ Government and Governmental Reorganization Act, I disapprove Act 1-88, the District of Columbia Shop-Book Rule Act.

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I am advised by the Department of Justice that this "shop-book rule" is clearly in the nature of a procedural rule which could properly be encompassed within the rules of civil procedure and that promulgation of the rule is clearly within the express power of the District of Columbia courts to adopt rules of civil procedure and, as such, is beyond the power of the City Council.

Therefore, since the Council has exceeded its statutory authority in enacting this bill, I am disapproving Act 1-88.

GERALD R. FORD

THE WHITE HOUSE,

February 27, 1976.

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FOR IMMEDIATE RELEASE FEBRUARY 28, 1976

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

The District of Columbia Self-Government and Governmental Reorganization Act (the Home Rule Act) provides that Acts of the D.C. Council which have been vetoed by the Mayor and overridden by a two-thirds vote of the Council shall be transmitted to the President for his review. The President shall then have thirty days in which to disapprove these Acts or allow them to become law.

D.C. Enrolled Acts 1-87, relating to affirmative action in D.C. government employment, and 1-88, relating to the so-called Shop-Book Rule of evidence, are the first such acts to be sent to the President for his review since the Home Rule Act was enacted.

If home rule for the District is to have real meaning, the integrity and responsibility of local government processes must be respected. The Federal government should intervene only where there is a clear and substantial Federal interest.

I have been advised by the Department of Justice that, in enacting Act 1-88, the D.C. Council exceeded the authority which the Congress had delegated to it under the Home Rule Act; therefore, I disapproved it. I have chosen not to disapprove Act 1-87, however, because, while I have serious reservations about the merits of the Act, I believe my disapproval of it would violate the sound precepts of home rule. The Federal interest involved here is not clear and substantial.

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