

Statement of
MICHAEL B. HAYS, CHAIR, CRIMINAL JUSTICE COMMITTEE
and
CARY M. FELDMAN, MEMBER
of the
COUNCIL FOR COURT EXCELLENCE
before the
COMMITTEE ON THE JUDICIARY,
COUNCIL OF THE DISTRICT OF COLUMBIA
regarding the
DISTRICT OF COLUMBIA
CORPORATION COUNSEL SUBPOENA AUTHORITY ACT OF 2001
BILL # 14-0321

December 5, 2002

Good morning, Madam Chair and members of the Committee. My name is Michael Hays. With me today is Cary Feldman.

We are pleased to be here today in response to your invitation to testify as volunteer board members and representatives of the Council for Court Excellence with respect to Bill 14-0321. As you know, the Council for Court Excellence is a non-partisan civic organization that works to improve the administration of justice in the local and federal courts and related agencies in the District of Columbia. For over 20 years, the Council for Court Excellence has been a unique resource for our community, bringing together members of the civic, legal, judicial, and business communities to work in common purpose to improve the administration of justice. We have worked closely with the D.C. Council in the past on such important areas as the 1994 Probate Reform Act, the Sentencing Reform Amendment Act, the 2000 Office of Administrative Trials and Hearings Establishment Act the operations of the city's child protection system, and most recently, the 2002 Uniform Trust Code. We appear today as members of the Council for Court Excellence and not on behalf of any client or in any other paid capacity. No judicial member of the Council for Court Excellence has participated in or contributed to the formulation of this testimony.

Madam Chair, there are several very important policy and implementation issues of concern raised by Bill 14-0321 that I would like to address. The underlying policy issue I believe is the need to balance the Corporation Counsel's legitimate investigative needs with the desire to restrain the possibility of prosecutorial excess. The Council for Court Excellence is sympathetic to the need of the Corporation Counsel to be able to effectively investigate serious

criminal offenses and to compel the production of documents and testimony toward that end. However, the Council for Court Excellence is very concerned that the broader public policy issues are not sufficiently addressed in this emergency legislation, which we understand emerges from a particular juvenile case currently at the Corporation Counsel's Office in which it wants to compel testimony. Passing sweeping legislation such as Bill 14-0321 to address a problem in a particular case on an emergency basis is, we believe, ill-advised. As described below, Bill 14-0321 provides too much discretion to the Corporation Counsel's office.

First, this legislation grants the Corporation Counsel authority that no United States Attorney's Office has. United States Attorneys may subpoena witnesses only as a means of presenting evidence to a grand jury, which is an arm of the court, but may not subpoena witnesses to office conferences. In fact, the Superior Court of the District of Columbia recently corrected the practice of the District of Columbia US Attorney's Office of subpoenaing witnesses for office visits. Now, grand jury subpoenas must specify on their face that the witness should proceed directly to the grand jury, not the prosecutor's office. The rationale for this rule is that part of the function of the grand jury, which is convened by the court, is to keep tabs on the prosecutor.

There is no comparable oversight here. Allowing the Corporation Counsel such subpoena authority provides the opportunity for prosecutors to conduct investigations in secret. If prosecutors obtain the power to examine witnesses without court or grand jury involvement, we move to the model in civil code countries such as France that do not have the strong emphasis on the presumption of innocence and the constitutional separation of powers that we do.

Second, Bill 14-0321 specifies none of the procedures for taking testimony. Although the Bill authorizes the Corporation Counsel to administer oaths, unlike the Federal Rules of Criminal Procedure applicable to grand jury proceedings it does not specify that any testimony must be recorded. The Bill does not address whether a witness is entitled to counsel or must be advised of his or her right to counsel. It also leaves room, in practice, for the Corporation Counsel to “delegate” this subpoena power to the Metropolitan Police Department, so that witnesses could be coerced into questioning under oath by law enforcement officers with no court oversight. The Bill does not provide that witnesses should be advised of their right to apply to a court to quash the subpoena, or of their 5th Amendment right not to be compelled to incriminate themselves. These deficiencies offer too much opportunity for a violation of our citizens’ Constitutional rights.

Third, the sweeping provisions of Bill 14-0321 provide virtually unlimited authority to the prosecutor. The Bill is not limited to serious offenses. The Corporation Counsel prosecutes a number of minor offenses, such as drinking in public, that are technically criminal in nature. Moreover, there is nothing in the Bill to prevent the subpoena authority from being used even after charges are brought, contrary to the use of the DC Superior Court grand jury subpoena, thereby upsetting the normal balance in criminal prosecutions. Also, unlike the procedures imposed by the Federal Rules of Criminal Procedure, there is nothing to prevent the prosecutor from using the information gleaned in a criminal investigation for other purposes, such as in a civil case.

If there is a need to compel testimony or the production of documents in a particular case, there should be a way to use the grand jury, which has very wide investigatory powers, to obtain the desired information. There are a whole set of procedures already in place to deal with all these issues in the grand jury context.

In summary, the power that the prosecution holds in our system of justice is already quite significant. It is held in check only by the rights of the defendant and other witnesses established through a complex set of interrelated procedures established by rule and case law. The power to coerce a person into giving a statement or a document is a very important one. Our system of jurisprudence has acknowledged this importance by demanding adherence to strict protective procedures. Many of these procedures are essentially swept away by this legislation.

In sum, the Council for Court Excellence believes the area of compelled testimony and document production must be approached with great caution and deliberation. Bill 14-0321 does not do that.

This concludes our testimony. We would be happy to answer any questions that you may have.