

**DISTRICT OF COLUMBIA  
BOARD OF ELECTIONS**

In Re: “District of Columbia Term Limits Campaign”
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Administrative Hearing  
No. 19-029

Re: Rejection of Proposed  
Initiative Measure

**MEMORANDUM OPINION AND ORDER**

**Introduction**

This matter came before the Board of Elections (“the Board”) on Wednesday, March 6, 2019, pursuant to D.C. Official Code § 1-1001.16(b)(1) (2016 Repl.). It involves a finding by the Board that the proposed measure, “District of Columbia Term Limits Campaign,” (hereinafter “the DC TLC” or “the Measure”), is not a proper subject of initiative pursuant to D.C. Official Code § 1-1001.16(b)(1). The proposer of the Measure, James Butler, appeared before the Board *pro se*. Chairman D. Michael Bennett and Board Members Dionna Lewis and Michael Gill presided over the hearing. Executive Director, Alice Miller, General Counsel, Kenneth McGhie, Senior Staff Attorney, Rudolph McGann, and Director of the Office of Campaign Finance, Cecily Collier-Montgomery were also present. This Memorandum Opinion constitutes the Board’s findings of fact and conclusions of law.

## Statement of Facts

On January 25, 2019, James Butler filed the DC TLC as an initiative measure pursuant to D.C. Official Code § 1-1001.16(a). In summary, the Measure seeks to limit certain enumerated statutory<sup>1</sup> and Charter-created<sup>2 3</sup> elected offices to two (2) consecutive, four-year terms.

On January 28, 2019, the Board's General Counsel requested that the Office of Documents and Administrative Issuances publish in the *D.C. Register* a "Notice of a Public Hearing: Receipt and Intent to Review" ("the Notice") with respect to the Measure. The Notice was published in the *D.C. Register* on February 8, 2019. 66 DCR 1804. On January 28, 2019, the General Counsel also sent the Notice to the Attorney General for the District of Columbia ("the Attorney General"), the Office of the Mayor's Legal Counsel, and the General Counsel for the Council of the District of Columbia ("the Council") inviting them to comment on the issue of whether the Measure presented a proper subject.

On February 28, 2019, the Attorney General submitted comments to the Board concluding that "the Measure is not a proper subject for initiative, as it violates the Home Rule Act."<sup>4</sup> The Chairman of the Council of the District of Columbia, Phil Mendelson, also submitted

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<sup>1</sup> The Measure seeks to establish term limits for members of the State Board of Education, an elected office created by an act of the Council. Public Education Reform Amendment Act of 2007, D.C. Law 17-9 (June 12, 2007); D.C. Official Code § 38-2651. The qualifications for this office are codified at D.C. Official Code § 38-2651 (e)(1).

<sup>2</sup> The Measure seeks to establish term limits for the Mayor of the District of Columbia and members of the Council of the District of Columbia, elected offices created in the original Home Rule Act ("the Charter"). District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813), §§ 402, 421; D.C. Official Code §§ 1-204.02 and 1-204.21. The qualifications for these elected offices are also contained within the Charter.

<sup>3</sup> The Measure seeks to establish term limits for the Attorney General for the District of Columbia, an elected office created by an amendment to the Charter. "The Elected Attorney General Charter Amendment" (D.C. Law 18-160A). The qualifications for this office are not contained within the Charter. See D.C. Official Code § 1-301.83.

<sup>4</sup> Op. Atty. Gen. Racine at 1 (Feb. 28, 2019).

comments opining “the proposed initiative would violate the District Charter by imposing additional qualifications for office on the elected officials identified[.]”<sup>5</sup> Assistant General Counsel for the Council, Zach Walter, presented the Chairman’s concerns at the hearing through testimony before the Board. He also submitted for the record materials he referenced in his testimony including: the Supreme Court case *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995); the Washington state Supreme Court case *Gerberding v. Munro*, 134 Wn.2d 188, 949 P.2d 1366 (Wash. 1998); the American Law Reporter annotation on the legislative power to prescribe qualifications for or conditions of eligibility to constitutional office (34 A.L.R.2d 155); an opinion of the former General Counsel for the Council, Charlotte Brookins-Hudson, concerning whether Initiative 49 (D.C. Law 10-254), a term limits initiative, was a proper subject; and a statement of the former Corporation Counsel<sup>6</sup>, Frederick D. Cooke, Jr., concerning the authority for the Council to enact ordinary legislation to create a term limit for the office of Mayor (Bill 7-338, “The Election Amendment Act of 1987”).

During the hearing, the following members of the public testified in favor of the initiative: Michael Clark; Dorothy Davis; Vanessa Robinson; Michael Sindram; and Virgil Young, Jr. These individuals spoke strongly in favor of the merits of the Measure. In short, those who testified in favor of the Measure believe that imposing term limits on elected officials will bring about better governance of the District; reduce abuse of power and corruption; and enhance the livability of the District of Columbia for all residents.

James Butler, the proposer, spoke in support of the Measure and reminded the Board that it had already approved a similar initiative concerning term limits in 1994 -- Initiative 49, “District of Columbia Term Limits Initiative.” Voters approved the measure, and it became law

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<sup>5</sup> Op. Council Chairman Mendelson at 1 (Feb. 28, 2019).

<sup>6</sup> The Corporation Counsel is the former iteration of the current Attorney General.

until repealed by Council legislation. Mr. Butler argued that the Superior Court of the District of Columbia has never had the opportunity to weigh in on this matter, and that the Charter does not specifically deny the imposition of term limits for elective office in the District of Columbia.

### **Analysis**

#### **A. An initiative cannot amend the terms of the Charter.**

The electorate's power of initiative coexists with, and cannot extend beyond, the legislative power of the Council of the District of Columbia. "A proposed initiative...violates Title IV of the Home Rule Act, approved December 24, 1973 (87 Stat. 785; D.C. Official Code § 1-204.01 *et seq.*) ("the Charter") if it seeks to legislate in a manner that the Council itself could not."<sup>7</sup> The Charter prohibits the Council from changing the terms of the Charter through normal legislation. Any change to the terms of the Charter must be affected through an amendment to the Charter.<sup>8</sup> Because the Council may not amend the terms of the Charter through ordinary legislation, neither may the electorate circumvent the Charter amending procedure through an initiative. An initiative that seeks to change the terms of the Charter will violate the Home Rule Act and accordingly, the Board must reject the initiative as an improper subject pursuant to D.C. Official Code § 1-1001.16(b)(1).

#### **B. Term limits are a qualification for office.**

The DC TLC seeks to impose two consecutive four-year term limits on the offices of Mayor, members of the Council, the Attorney General, and Members of the State Board of

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<sup>7</sup> Op. Atty. Gen. Racine at 2, citing the Home Rule Act § 602(a), which establishes the legislative limitations of the Council.

<sup>8</sup> Section 303 of the Home Rule Act provides, in relevant part: "the charter [] may be amended by an act passed by the Council and ratified by a majority of the registered qualified electors of the District voting the in the referendum held for such ratification." D.C. Code § 1-203.03(a).

Education to two consecutive four-year terms of office.<sup>9</sup> A limitation upon the right of an individual who has held public office to again seek that office (a “term limit”) is considered a qualification because it bears upon the right of a class of individuals to obtain public office.<sup>10</sup> In short, the Measure seeks to add a degree of “non-incumbency” as an additional qualification for the enumerated offices, including both Charter-established elected offices (Mayor, members of the Council, and Attorney General) and statutory elected offices (State Board of Education).

**C. The qualifications for the offices of Mayor and member of the Council are fixed and exhaustive.**

In order to determine whether the DC TLC presents a proper subject for initiative, the Board must first determine whether the addition of a qualification for the offices of Mayor and members of the Council can be achieved through normal legislation.<sup>11</sup> Whether the Council or the electorate have the power to prescribe eligibility qualifications for these offices through normal legislation depends upon the authority granted in the Charter. Because the Charter has no explicit answer to this question, the existence or nonexistence of this legislative power is implied. For that reason, the Board must examine and interpret the Charter and apply relevant constitutional principles, rules of statutory construction, and case law. For the following reasons, the Board is persuaded that the qualifications for the elected offices of Mayor and member of the

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<sup>9</sup> The Measure seeks “to amend D.C. Code Sec 1.001.8 to read as follows[:] No person elected to the office of Mayor, Chairman of the Council, Attorney General, Member of the Council, or State Board of Education, shall serve more than two (2) full consecutive, four (4) year terms.” Although no such code provision exists, the Board assumes that this is a typographical error and that the proposer is referring to D.C. Code § 1-1001.08.

<sup>10</sup> H.B. Chermiside, Jr., Annotation, *Construction and Effect of Constitutional or Statutory Provisions Disqualifying One for Public Office Because of Previous Tenure of Office*, 59 A.L.R.2d 716 (1958).

<sup>11</sup> Although the Measure seeks to impose term limits on multiple offices, for the reasons discussed, *infra*, the Board’s memorandum will only address whether the addition of a qualification to the offices of Mayor and member of the Council violates the Charter. Because of the Board’s final conclusion with respect to the offices of Mayor and member of the Council, the Board determines that it is unnecessary to resolve the question of whether establishing term limits for the office of Attorney General violates the Charter. *See* Op. Atty. Gen. Racine at 2, n.10. The Board agrees with the opinion of the Attorney General that establishing term limits for members of the State Board of Education, a statutory office, does not violate the Charter. *See* Op. Atty. Gen. Racine at 2.

Council are exclusive and cannot be altered except by the special process of a Charter amendment.

**1. The plain language of the Qualification Clauses in the Charter suggests that the lists of qualifications for Mayor and member of the Council are exhaustive and cannot be amended by normal legislation.**

Congress, when establishing the Office of the Mayor and the Council of the District of Columbia in the Charter, included qualifications for holding those offices.<sup>12</sup> In general, the Qualification Clauses require that the Mayor and members of the Council be qualified electors, meet residency requirements, avoid felony convictions while holding office, and meet other specific requirements concerning outside employment or holding other public offices. The Qualification Clauses also establish the term lengths for each of these offices as well as prescribe that elected officials will forfeit their respective office when they fail to maintain the qualifications listed. Importantly, the Qualification Clauses omit any limit on the number of terms, consecutive or otherwise, that an officeholder may serve.

By Congress' enumeration of those specific qualifications for the offices of Mayor and member of the Council, Congress excluded all other qualifications by implication.<sup>13</sup> This interpretation is consistent with constitutional law principles and a significant amount of case law. "According to a substantial amount of authority, where a constitution lays down specific eligibility requirements for a particular constitutional office, the constitutional specification in that regard is exclusive and the legislature (except where expressly authorized to do so) has no

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<sup>12</sup> Home Rule Act §§ 402 and 421(c)(1) (D.C. Official Code §§1-204.02 and 1-204.21(c)(1)).

<sup>13</sup> Op. Atty. Gen. Racine at 3 (citing *United States Term Limits v. Thornton*, 514 U.S. 779, 793 n. 9 (1995)(the enumeration of certain qualifications for office in the U.S. Constitution signaled omission of all other qualification by implication).

power to require additional or different qualifications for such constitutional office.”<sup>14</sup> The Charter establishes specific eligibility requirements for the offices of Mayor and members of the Council in the Qualification Clauses. The Qualification Clauses also lacks any express authorization for the Council (and by extension, the electorate through initiative) to make amendments to these qualifications. Accordingly, the Qualification Clauses in the Charter are exclusive and any additional qualification created through normal legislation would violate the terms of the Charter.

Additionally, examination of other provisions of the Charter shows that Congress did not intend that the Qualification Clauses be amended through normal legislation, but rather by Charter amendment only. For example, the provisions of the Charter that establish the compensation rates for the Mayor and the members of the Council are expressly permitted to be amended through normal legislation.<sup>15</sup> That one provision of the Charter made a special dispensation to permit amendment through normal legislation indicates that when Congress was silent about amendment in other clauses of the Charter, that normal legislation would not be proper to amend the terms of the Charter. Because the Qualification Clauses do not include permission to amend through normal legislation, any adjustment to these Clauses must be done through Charter amendment.

## **2. Parallel Supreme Court jurisprudence supports the interpretation that the Charter’s Qualification Clauses are exclusive and cannot be amended by normal legislation.**

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<sup>14</sup> C.T. Foster, Annotation, *Legislative Power to Prescribe Qualifications for or Conditions of Eligibility to Constitutional Office*, 34 A.L.R.2d 155. In contrast, “[w]here the constitution creates a particular office but does not prescribe any specific qualifications for eligibility thereto, it has been considered that the legislature has power to prescribe qualifications for such constitutional office, at least where such qualifications are reasonable and not in conflict with those prescribed by the constitution for office holding generally[.]” *Id.*

<sup>15</sup> Op. Atty. Gen. Racine at 4 (citing Home Rule Act §§ 403 and 421, approved December 24, 1973 (87 Stat. 836; D.C. Official Code § 1-204.03 and 1-204.21).

Although the Board is unaware of any controlling case law which has interpreted the qualifications enumerated in the Qualification Clauses as exclusive, the Supreme Court has interpreted parallel constitutional provisions in *United States Term Limits v. Thornton*, 514 U.S. 779 (1995) (“*Thornton*”).<sup>16</sup> The Court in *Thornton* struck down an amendment to the Arkansas constitution which imposed term limits for United States Senators and Representatives by barring candidates who otherwise met the qualifications contained in the U.S. Constitution from obtaining ballot access. The Court held that the constitutional qualifications clauses were exclusive and therefore prevented states from adding qualifications outside of the Constitution, drawing upon the foundational case, *Powell v. McCormack*, 395 U.S. 486 (1944), in which the Court invalidated a House Resolution which excluded a Representative from New York, who was otherwise qualified to hold office, from membership in the House of Representatives.

The petitioners in *Thornton* argued that the Constitution contains no express prohibition against states adding qualifications, and such efforts should be appropriate exercise of States’ reserved power under the Tenth Amendment. The Court concluded that:

The power to add qualifications is not within the ‘original powers’ of the States, and thus is not reserved to the States by the Tenth Amendment. Second, even if States possessed some original power in this area, we conclude that the Framers intended the Constitution to be the exclusive source of qualifications for Members of Congress, and that the Framers thereby "divested" States of any power to add qualifications.”

*Thornton* at 800.

The Court also declined to characterize Arkansas’ state constitutional amendment as an attempt to regulate time, place, and manner of elections by the state as permitted by Article II, Section I. “The Framers intended the Elections Clause to grant States authority to create

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<sup>16</sup> See Op. Atty. Gen. Racine at 5.

procedural regulations, not to provide States with license to exclude classes of candidates from federal office.” *Id.* at 832. Accordingly, the Court held that the power to modify the qualifications for elected offices impacts a fundamental right and cannot be implied to fall within the states’ power to regulate time, place and manner of elections.

Applying the holding of *Thornton*, the Qualification Clauses in the Charter, just like the constitutional qualifications clauses, are exclusive and cannot be amended unless by an amendment to the Charter. Further, the application of the holding of *Thornton* supports the conclusion that the legislative authority granted by section 752 of the Charter to enact laws “with respect to matters involving or relating to elections” cannot be so broad as to be able to modify the qualifications for the offices established in the Charter.

### **Conclusion**

The DC TLC seeks to impose term limits on the offices of Mayor and member of the Council, among others. The imposition of a term limit affects the qualifications of individuals to run for and hold elected office. The qualifications for the offices of Mayor and member of the Council are contained within the Charter and are fixed, exhaustive, and cannot be amended by normal legislation. Neither the Council, by regular act, nor the electorate, through the initiative process, may change the terms of the Charter. Because the DC TLC would amend the terms of the Charter, the Board concludes that the DC TLC is not a proper subject for initiative because it conflicts with title IV of the Home Rule Act.

For the foregoing reasons, it is hereby:

**ORDERED** that the Measure entitled, the “District of Columbia Term Limit Campaign”  
is **RECEIVED BUT NOT ACCEPTED** pursuant to D.C. Code 1-1001.16(b)(1).

Date: April 3, 2019



D. Michael Bennett  
Chairman  
Board of Elections