

# Government of the District of Columbia

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June 20, 1989

The Honorable Betty Ann Kane  
chairperson  
Committee on Government Operations  
Council of the District of Columbia  
District Building  
1350 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Dear Chairperson Kane:

This is in reply to your May 17, 1989 letter in which you ask two questions about the operation of Advisory Neighborhood Commissions.

First, you seek my views on alternative proposals considered by ANC 2-E at its May 3, 1989 meeting. The proposals deal with the subject of the presentation by an ANC commissioner to a District or Federal agency of recommendations contrary to those formally approved by his Commission. Under the first proposal (a copy of which you attached to your letter), an ANC 2-E commissioner who dissents or abstains on a particular question before his Commission would be prohibited from appearing before a District or Federal agency for the purpose of presenting recommendations contrary to the recommendations formally adopted by his Commission. In the second proposal (a copy of which you attached to your letter), an ANC 2-E commissioner would not be prohibited from presenting to a District or Federal agency recommendations which are contrary to those formally adopted by his Commission, but would be required to inform the agency orally or *in* writing that he is not speaking for his commission, but only for himself and his single-member-district constituents.

I agree with your assessment that the first proposal raises First Amendment concerns. The right to present recommendations to the government is a fundamental right guaranteed by the First

Amendment to the constitution.<sup>1</sup> On the other hand, it is reasonable for ANC 2-E to require a commissioner who wishes to present to a District or Federal agency recommendations that are contrary to those adopted by ANC 2-E to state that he represents himself and his single-member-district constituents and not the Commission. In this regard it is relevant to note that the "great weight" requirement of § 13 of the Advisory Neighborhood Commissions Act of 1975 (as added in § 2 of the Duties and Responsibilities of Advisory Neighborhood Commissions Act of 1975), D.C. Code § 1-261(d) (1987), relates only to the properly presented, written recommendations which have been adopted by the Commission. See generally, Kopff v. District of Columbia Alcoholic Beverage Control Board, 381 A.2d 1372, 1383-1385 (D.C. 1977). Thus, the disclaimer requirement in the second proposal could aid District agencies in fulfilling their responsibilities vis-a-vis ANCs.

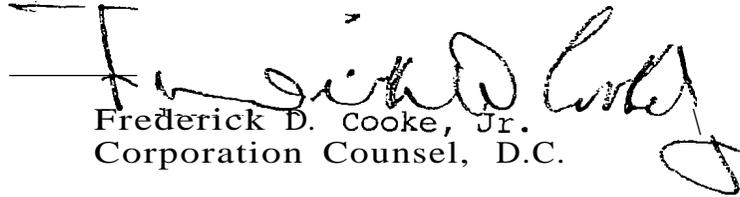
Your second question concerns access by ANC commissioners to their ANC office. While § 738 of the District of Columbia Self-Government and Governmental Reorganization Act, D.C. Code § 1-251 (1987), and § 2 of the Duties and Responsibilities of Advisory Neighborhood Commissions Act of 1975, D.C. Code § 1-264 (1987)), contemplate that ANCs may operate an office, there is no language which addresses the question of the right of access by individual commission members to such office. Absent some contrary rule or procedure adopted by an ANC, a person who is a duly elected or

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1 The First Amendment provides in pertinent part that "Congress shall make no law...abridging...the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." As a creature of Congress, the District government does not, of course, have the power to act where Congress is constitutionally forbidden to act. And since ANC commissioners are publicly elected, their actions are governmental actions for purposes of the rights guaranteed by the First Amendment. In United Mine Workers of America, District 12 v. Illinois State Bar Association, 389 U.S. 217, 222 (1967), the Court stated: "...[T]he rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in purpose, with the other First Amendment rights of free speech and free press." The first proposal considered by ANC 2-E would be a content-based restriction on political speech in a public forum. Accordingly, it would be subjected to the "most exacting scrutiny," and would be upheld only if the proposal "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Boos v. Barry, 108 S.Ct. 1157, 1164 (1988). The first proposal of ANC 2-E would not meet this stringent test.

appointed ANC commissioner has an implied right of access to an office operated by the Commission of which he is a member. And unless otherwise provided in a rule or procedure adopted by an ANC, each ANC commissioner is entitled to access to the Commission's office on an equal basis.

Sincerely,



Frederick D. Cooke, Jr.  
Corporation Counsel, D.C.