CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY

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OPINION NO. 2005-01

SUBJECT:	Compelling the Mayor's Attendance at Board Meetings
REQUESTED BY:	Hon. Chris Daly Member, Board of Supervisors
PREPARED BY:	Thomas J. Owen Deputy City Attorney
DATED:	December 9, 2005

QUESTION PRESENTED:

May the Board of Supervisors, by ordinance or amendment to its Rules of Procedure, command the Mayor's personal appearance once a month at its meetings to answer questions from Board members?

SHORT ANSWER:

No. Such a requirement would conflict with separation of powers principles in the City Charter and the Board of Supervisors may not impose it by ordinance or by amendment to the Board's Rules. While the Board may request that the Mayor attend its meetings once a month to answer questions and the Mayor may decide to appear, the Board may not compel the Mayor to do so.

BACKGROUND:

You have asked this office to prepare an ordinance or an amendment to the Board's Rules requiring the Mayor to attend the Board of Supervisors' meetings once a month to respond to questions from the Supervisors. You have indicated that this requirement would parallel the procedure for "the Prime Minister's Question Time," where the Prime Minister of Great Britain appears before the House of Commons to answer questions from members.

ANALYSIS:

The Board's Authority to Seek and Obtain Information

The issue here is whether the Board of Supervisors has the authority to command the Mayor's personal appearance at a Board meeting. There is no question that the Board can seek specific information from the Mayor, or from any other City official or employee about the governance of the City:

> The Legislature's right to obtain accurate and up-to-date information on matters of public concern cannot be disputed. "The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution."

(*Connerly v. State Personnel Board* (hereafter *Connerly*) (2001) 92 Cal.App.4th 16, 62, quoting *Barenblatt v. United States* (1959) 360 U.S. 109, 111.) "This investigatory power is inherent in the legislative process." (*Lear Siegler, Inc. Energy Products Div. v. Lehman* (9th Cir. 1988) 842 F.2d 1102, 1109, citing *Watkins v. United States* (1954) 354 U.S. 178, 187; *Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 499 (Powell, J., conc.).)

But the *Connerly* court noted that separation-of-powers principles limit how the power of inquiry may be exercised. (92 Cal.App.4th at p. 63.) The Legislature may not exercise direct supervisorial control over the execution of the laws. (*Ibid.*) "In this light, the statutory provisions that require data to be collected and reported to the Legislature cannot be intended as some sort of supervisorial device; they can be intended only as the basis for future legislative consideration, within the power of inquiry, with respect to the need for future legislative action." (*Ibid.*)

Separation of Powers In General

Separation of powers principles underlie the core system of checks and balances in the American system of government:

> The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch. The courts have long recognized that [the] primary

> purpose [of the separation-of-powers doctrine] is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government. To serve this purpose, the courts have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch.

(*Carmel Valley Fire Protection Dist. v. State of California* (hereafter *Carmel Valley*) (2001) 25 Cal.4th 287, 297; internal citations and quotations deleted.)

However, that separation need not be absolute:

> [T]he separation of powers doctrine recognizes that the three branches of government are interdependent. Accordingly, it permits actions of one branch that may significantly affect those of another branch as long as there is no material impairment of the other branch's core functions. The purpose of the doctrine is to prevent one branch of government from exercising the *complete* power constitutionally vested in another; it is not intended to prohibit one branch from taking action properly within its sphere that has the incidental effect of duplicating a function or procedure delegated to another branch.

(*Id.*, at p. 298; internal citations and quotations deleted, emphasis in original.)

It is true that "[t]he Legislature may, by statute, exercise broad control over the policies to be implemented and the ways and means of their accomplishment. However, acts which are done to carry out the policies and purposes already declared by the Legislature are not a legislative function." (*California Radioactive Materials Management Forum v. Department of Health Services* (hereafter *Radioactive Materials*) (1993) 15 Cal.App.4th 841, 871; disapproved on another point in *Carmel Valley*, *supra*, 25 Cal.4th at p. 305, fn. 5.) The Legislature cannot exercise direct supervisorial control over the performance of the duties of an executive officer in his or her execution of the laws; rather, it can exercise control only indirectly by dictating the manner of execution of the laws via the enactment of legislation. (*Carmel Valley*, *supra*, 25 Cal.4th at p. 304; *Connerly*, *supra*, 92 Cal.App.4th at p. 63; *Radioactive Materials*, *supra*, 15 Cal.App.4th at p. 873.)

Interference With a Coordinate Branch of Government

The separation of powers doctrine protects against interference by one branch of government with another branch, as well as usurpation of its powers. "Even if the

challenged sections of the [the statute] do not constitute attempted *control* of the executive's role under the statute, they may still pose a potential disruption of the executive's function. . . ." (*Lear Siegler, Inc., Energy Products Div. v. Lehman*, *supra*, 842 F.2d at p. 1108; emphasis in original.) Where Congress has not aggrandized its own power at the expense of a coordinate branch of government, the relevant inquiry is whether Congress has "impermissibly undermined" the role of that branch. (*Id.* at p. 1109, citing *Commodities Futures Trading Comm. v. Schor* (1986) 478 U.S. 833, 859-60 (Brennan, J., dis.).)

As discussed above, the separation of powers doctrine prevents any single branch of government from purporting to exercise core functions belonging to another branch. (*Carmel Valley*, *supra*, 25 Cal.4th at p. 297.) But it also prevents one branch of government from taking actions "that undermine the authority and independence of one or another coordinate Branch." (*Ibid.*) "[T]he proper inquiry focuses on the extent to which [the challenged legislation] prevents the Executive Branch from accomplishing its constitutionally assigned function." (*Nixon v. Administrator of General Services*, *supra*, 433 U.S. at p. 443.)[1] "The question of governmental power in this case is whether the Act . . . impermissibly interferes with the President's power to carry out his Art. II obligations." (*Id.* at p. 498 (Powell, J., conc.).)

Separation of Powers Under the City Charter

The voters of San Francisco adopted a separation of powers as part of their City Charter. The San Francisco Charter makes a clear division between powers and duties of the executive branch under the Mayor (SF Charter Art. III) and the legislative branch under the Board of Supervisors (SF Charter Art. II) by prohibiting the Board and its members from interfering in the exercise of certain administrative powers. Although the 1996 amendments to the Charter gave the Board greater latitude in setting policy through the adoption of ordinances, it is still official misconduct for City legislators to interfere in the administration of the executive branch. (SF Charter § 2.114.) For this reason, the legislative history of the predecessor to the current ban on interference in administrative affairs is instructive.

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[1] In *Nixon*, interference with the functions of another branch of government was just the first step in the separation-of-powers analysis. (*Nixon v. Administrator of General Services*, *supra*, 433 U.S. at p. 433.) The Court went on to determine whether the impact of such interference was justified by an overriding need to promote objectives within the constitutional authority of Congress. (*Ibid.*) But California law does not include such a balancing test, and applies the separation of powers doctrine whether or not the encroachment appears to carry out an important policy. (*Carmel Valley*, *supra*, 25 Cal.4th at p. 301, n. 4.)

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Francis V. Keesling, who chaired the drafting committee for the City's 1932 Charter, wrote a book that combined a historical account of the drafting with an analysis of its most significant provisions. We often turn to his book as an authoritative source in interpreting provisions of the Charter. (See *Kennedy v. Ross* (1946) 28 Cal.2d 569, 576 [citing Keesling to establish the intent of the drafters of the SF Charter].) In his book, Keesling makes clear the intent of the drafters of the Charter to adopt a strong separation of powers. The California Commission on County Home Rule had earlier recommended "[d]istinct separation between the legislative and administrative functions of the County." (Keesling, *San Francisco Charter of 1931* (1933), p. 31.) According to Keesling, one of the basic principles that animated the drive for Charter reform in San Francisco was an aim to see that "[t]here shall be a sharp separation between legislative and administrative functions in the municipal government in order to end the present conflicts of authority between the Board of Supervisors and the various executive departments." (*Id.* at p. 30.) A Washington, D.C. newspaper story on the adoption of the new San Francisco charter noted that "[t]he new charter as a whole is a long step in advance, particularly in its large degree of separation of legislative and administrative functions." (*Id.* at p. 83.)

Describing the drafting process, Keesling wrote that "[t]he major problems acted upon in early sessions, with the significant exception of depriving the supervisors of administrative powers and confining the board to legislation, were determined by close votes." (*Id.* at pp. 37-38.) He emphasized the significance of the non-interference provision of the new charter: "It was the definite intention to effectively deprive the Board of Supervisors of all administrative powers." (*Id.* at p. 45.) For Keesling, the non-interference provision, and the separation of legislative and executive powers, were crucial bulwarks against municipal corruption:

> [The non-interference provision] is a provision that the citizens should carefully guard. The manipulating politician is greatly annoyed and handicapped by it. Unless interested citizens unite to conserve this provision in the charter the politician, who is constantly active, will proceed by the wearing down process and take advantage of attrition. The old order of interference and political log-rolling may be re-established in that manner.

(*Id.* at p. 43.)

Both the document itself, and Keesling's account of the concerns that underlay its drafting, demonstrate that there is a separation of powers at the core of the San Francisco Charter. The courts have characterized the relationship between Mayor and the Board of Supervisors as analogous to that between the President and the United States Congress. (*Affordable Housing Alliance v. Feinstein* (1986) 179 Cal.App.3d 484,

491.) Under the Charter, the Mayor may "[s]peak and be heard at any meeting of the Board of Supervisors or any of its committees." (SF Charter § 3.100(9).) The Mayor may attend Board meetings, but is not required to do so. Cooperation and respect for comity have enabled both parties to come to mutually agreeable and voluntary terms for the Mayor's appearance before the Board. The Charter does make the Mayor responsible for "[p]resentation before the Board of Supervisors of a policies and priorities statement setting forth the Mayor's policies and budget priorities for the City and County for the ensuing fiscal year, . . . (SF Charter § 3.100(6).) But even that provision does not require the Mayor to appear personally, or to make the presentation more often or at a time and date of the Board's choosing.

Requiring the Mayor's Personal Attendance

We turn now to an analysis of the instant proposal under the separation of powers principles discussed above. A recent California Supreme Court case suggests a model for that analysis:

> [T]he appropriate standard by which the statutory provisions in question are to be evaluated for purposes of the state constitutional separation of powers clause is whether these provisions, viewed from a realistic and practical perspective, operate to defeat or materially impair the executive branch's exercise of its constitutional functions. . . . [I]n applying this standard, it is appropriate to consider whether the statutes either (1) improperly intrude upon a core zone of executive authority, impermissibly impeding the Governor (or another constitutionally prescribed executive officer) in the exercise of his or her executive authority or functions, or (2) retain undue legislative control over a legislative appointee's executive actions, compromising the ability of the legislative appointees to the Coastal Commission (or the Coastal Commission as a whole) to perform their executive functions independently, without legislative coercion or interference.

(*Marine Forest Society v. California Coastal Commission* (2005) 36 Cal.4th 1, 45.)

In this instance, the appropriate prong of the *Coastal Commission* test is the first one: does the proposed law "improperly intrude upon a core zone of executive authority, impermissibly impeding the [Mayor] in the exercise of his or her executive authority or functions"?

If the Board were to adopt the proposed legislation, it would be asserting a right to command the physical presence of the Mayor at a time and place of the Board's

choosing.[2] The core assertion by the Board of authority over the Mayor's person is inconsistent with the Mayor's status as the head of a separate and co-equal branch of City government.

There is a well-recognized rule in the California and federal courts that, absent extraordinary or compelling circumstances, high government officials will not be subject to involuntary depositions. (*Westly v. Superior Court* (2004) 125 Cal.App.4th 907, 910-11; *Nagle v. Superior Court* (1994) 28 Cal.App.4th 1465, 1468; *Civiletti v. Municipal Court* (1981) 116 Cal.App.3d 105, 110; *State Board of Pharmacy v. Superior Court* (1978) 78 Cal.App.3d 641, 644-45; *Deukmejian v. Superior Court* (1983) 143 Cal.App.3d 632, 633; *Detoy v. City and County of San Francisco* (N.D.Cal. 2000) 196 F.R.D. 362, 369.)

As the courts have explained, they are highly reluctant to compel the testimony of important public officials because of the strong public interest in permitting such officials to attend to public business without the interruption of giving testimony in every private dispute which might implicate their governmental agencies. "The general rule is based on the recognition that an official's time and the exigencies of his everyday business would be severely impeded" if litigants could take an official away from his or her work to appear at depositions. (*Nagle v. Superior Court*, *supra*, 28 Cal.App.4th at p. 1468; internal quotes omitted.) "[W]e would find that heads of government departments . . . would be spending their time giving depositions and have no opportunity to perform their functions." (*State Board of Pharmacy v. Superior Court*, *supra*, 78 Cal.App.3d at p. 645.) Because "[h]igh ranking government officials have greater duties and time constraints than other witnesses . . . [they] should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." (*Detoy v. City and County of San Francisco*, *supra*, 196 F.R.D. at p. 369.)

For similar reasons, the proposal to require the Mayor, by ordinance or Board rule, to personally appear at a Board meeting to answer questions could impermissibly impede the Mayor in the exercise of his or her executive authority or function. As a result, such a requirement would conflict with the separation of powers principles contained in the City Charter.

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[2] The Board's options in enforcing such a requirement would be limited. The Board has no power under the Charter to discipline the Mayor for failure to obey an ordinance. The Mayor is not subject to removal for misconduct in office under Charter § 15.105.

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CONCLUSION:

Accordingly, the Board may not by ordinance or amendment to its rules command the Mayor's personal appearance once a month at its meetings to answer questions from Board members. Such an ordinance or rule would conflict with separation of power principles contained in the City Charter.

The Board of Supervisors may by motion or resolution invite the Mayor to appear and the Mayor may choose to appear, but the Board may not compel the Mayor's appearance on a standing basis.

Very truly yours,

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APPROVED:

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