How Did Home Rule Affect Our "Home" Courts: Looking Back at How Home Rule Influenced Our Local Court

April 28, 2023
4:00 p.m. – 5:00 p.m.

DCBAR | Continuing Legal Education

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About the Speakers
(Listed Alphabetically)

Michael K. Fauntroy is an associate professor of policy and government and the founding director of the Race, Politics, and Policy Center at George Mason University. He began his second stint at Mason in 2021 after eight years on the political science department faculty at Howard University, where he also served as acting director of the Ronald W. Walters Leadership and Public Policy Center. He previously served on the Mason faculty from 2002-13.

Prior to joining the faculty at Mason, he was an analyst in American national government at the Congressional Research Service (CRS). At CRS, he provided research and consultations for members and committees of Congress. He also served as a civil rights analyst at the U.S. Commission on Civil Rights, where he conducted research on voting rights, fair housing, and education policy.

Fauntroy is the author of two books. *Republicans and the Black Vote*, which analyzed the relationship between African American voters and the Republican Party. The book was a 2007 *Foreword Magazine* book of the year finalist in political science. He also authored *Home Rule or House Rule? Congress and the Erosion of Local Governance in the District of Columbia*. A third book, *More Than Just Partisanship: Conservatism and Black Voter Suppression*, is under contract with New York University Press. He has also published chapters in edited volumes and academic journals at the intersection of race and politics.

His essays and commentary have been published in the *Huffington Post*, the *Washington Times*, *New York Daily News*, the *Black Commentator*, and the *Chicago Defender*, among others. He is a widely cited scholar, having been quoted in the *Washington Post*, the *New York Times Magazine*, *Newsday*, *USA Today*, the *New York Post*, the *Los Angeles Times*, and the *Boston Globe*, among others. He is a regular television, radio, and podcast presence having appeared on virtually every major American national broadcast network. He is also an in-demand analyst on local television and radio outlets. He currently serves as U.S. politics analyst for CTV News in Canada and Canadian Broadcasting Corporation radio.

Fauntroy earned a BA in political science from Hampton University, and a master's in public administration and a PhD in political science from Howard University.

Laura Moorer is the Law Librarian for the DC Court of Appeals. She joined the Court in 2019 and prior to that was the Law Librarian for the Public Defender Service for DC for almost fourteen years. Laura received her MLS from the University of Maryland, her JD from Mercer Law School and her Bachelors of Science from Virginia Tech, Magna Cum Laude. Laura is barred in Maryland, the District of Columbia and Georgia. Laura enjoys providing legislative history assistance, and training sessions, to the Court's clerks and especially enjoys studying D.C. history, especially as it relates the Courts and the creation of D.C.'s unique history. Laura is married to Richard Moorer, a park ranger at Pinnacles NP, and is the proud mom to two kids, a senior and freshman in high school. Laura also maintains an Instagram account re: the library and it can be found @dccalibby.

TAB ONE

How did Home Rule affect our "Home" courts: Looking back at how Home Rule influenced our local courts

DC Bar Conference, April 28, 2023

Laura Moorer, MLS, Esq., Law Librarian, DC Court of Appeals

Dr. Michael K. Fauntroy, Ph.D., Associate Professor of Policy and Government, Director, Race, Politics, and Policy Center, George Mason University

DC History Center, Laura Hagood and Anne McDonough

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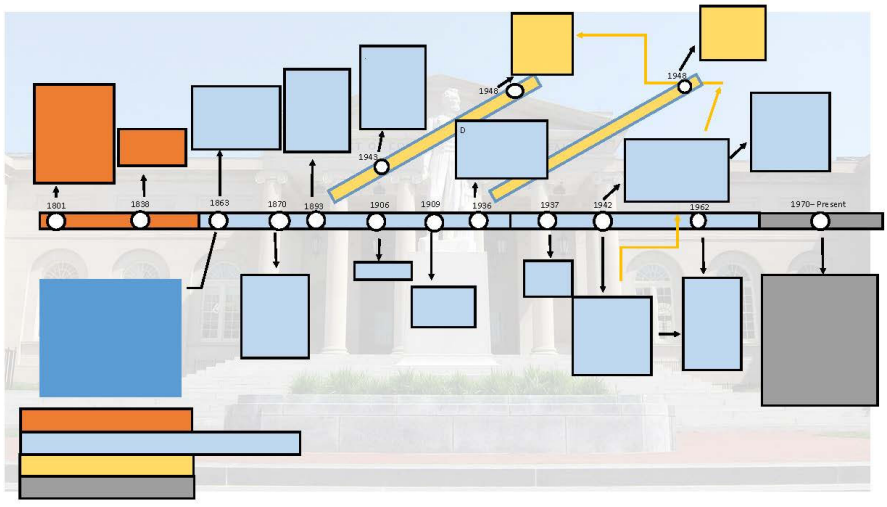

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History of our Courts in the Nation's Capital—Constant Reorganization

- "One" court system doing two jobs until 1970
  - National and local cases
  - First court created in 1801
  - First major Reorganization in 1863—President Lincoln
- 1871-1874- brief bicameral legislature with a delegate
- 1874- Reorganization of city's government-- replaced with a 3 member Board of Commissioners
- Board of Commissioners, 1874-1967
- DC Council appointed under *Reorg Plan No. 3 of 1967*- President Johnson

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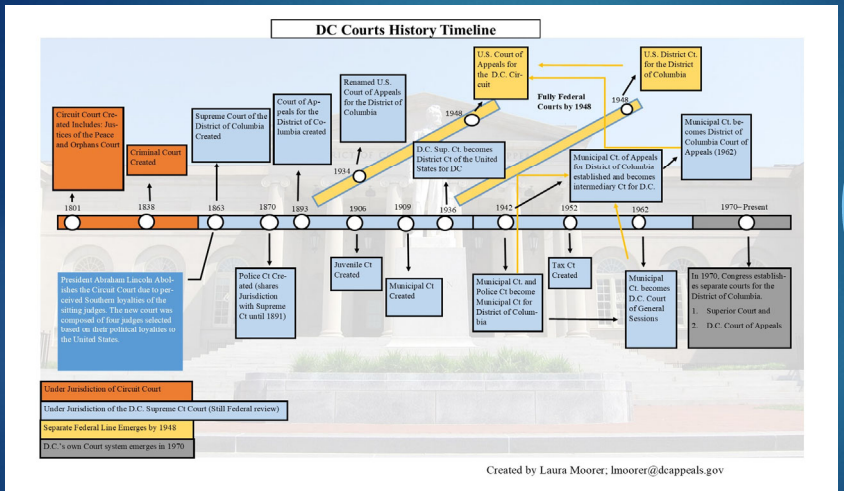
D.C. Courts Timeline



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By the late 1890s and early 1900s, courts starting to resemble a local and national system

- Police Court--1891
- Juvenile Court--1906
- Municipal Court--1909

Handling local matters

- Municipal Court becomes D.C. Court of General Sessions in 1962
- DC Court of Appeals emerges in 1962 as well
- Caseloads increasing – criminal cases and complex litigation arising from the federal agencies located in D.C.

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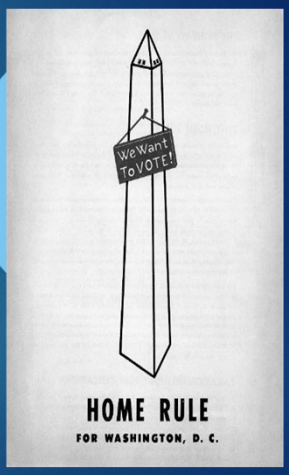
While the courts are changing, D.C.'s march towards Home Rule is also continuing

- 1961, 23rd Amendment passes-- giving D.C. citizens the right to vote in U.S. Presidential Elections. U.S. CONST. amend. XXIII
- 1967, President Johnson reorganizes the D.C. government, brings back the D.C Council and fills with appointed members. *Reorganization Plan No. 3 of 1967*, 32 Fed. Reg. 11,669
- Crime increasing in D.C.--Nixon takes on the "War on Crime"
- 1970—Reorganization of the DC Courts

(second major reorganization of the D.C. Courts under a President)

- *District of Columbia Court Reform and Criminal Procedure Act of 1970*, Pub. L. No. 91-358, 84 Stat. 473



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1970--New Court System and a New D.C. Bar

Two new Article I courts created (effective Feb. 1, 1971):

- Superior Court
- DC Court of Appeals
- Court governed by the Joint Committee on Judicial Administration
- Mandatory, and unified D.C. Bar, created and placed under the jurisdiction of the DC Court of Appeals
- First meeting of the new D.C. Bar was held on April 1, 1972
- First Bar Conference held in 1976

84 STAT.] PUBLIC LAW 91-358–JULY 29, 1970 473

Public Law 91-358

AN ACT

To reorganize the courts of the District of Columbia, to revise the procedures for handling juveniles in the District of Columbia, to codify title 23 of the District of Columbia Code, and for other purposes.

July 29, 1970 [S. 2601]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "District of Columbia Court Reform and Criminal Procedure Act of 1970".

District of Columbia Court Reform and Criminal Procedure Act of 1970.

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Legitimacy of New Court

- *M.A.P. v Ryan,* 285 A.2d 310 (1971)—establishing precedential value of pre-court reform decisions—February 1, 1971
- *Palmore v United States*, 411 U.S. 389 (1973)—in holding that defendants accused of crimes in D.C. were not required to have a trial by an Article III court, the Supreme Court approved of the creation of the DC Local courts as Article I courts.

The Third Branch

1520 H Street, N.W., Washington, D.C. 20005

A Bulletin of the Federal Courts

Vol. 3, No. 4 Published by the Administrative Office of the U.S. Courts and the Federal Judicial Center February 1971

Revised Court System in Nation's Capital Begins Operation

Operation of an almost totally reconstructed court system for the Nation's Capital began the first of February, highlighted by appropriate ceremonies attended by leaders of the Judiciary, the legal profession and the Federal Government.

The court reorganization plan was included in a sweeping legislative package passed last year by the Congress as an anti-crime measure, a 196-page code generally referred to as the D.C. Crime Act. Besides reorganizing and expanding the District of Columbia's court system, the new legislation strengthened the city's 5,000-man police force and added "tools" for the use of law enforcement officers and prosecutors in their drive to reduce crime in the streets.

Under the new laws, police have the right, with court permission, to enter premises unannounced in an effort to better secure evidence. This is the so-called "no-knock" law. By another provision, courts have the right to order "dangerous offenders" held without bail up to 60 days prior to trial.

As now constituted, Washington has a D.C. Superior Court—a court of general jurisdiction—and an expanded D.C. Court of Appeals. They function in much the same manner as trial and appellate courts in the 50 States. Appeals from their decisions go directly to the U.S. Supreme Court.

The Superior Court replaces a Court of General Sessions, which had served along the lines of a Municipal Court with limited jurisdiction and it also incorporates in its functions the duties of the D.C. Juvenile and Tax Courts. The new tribunal will certainly be one of the Nation's largest in numbers.

Attorney General John N. Mitchell speaking at D.C. Superior Court dedication (photo—The Washington Post).

Eventually, it will have 44 judges, all housed in one building and serving one community. A court executive, professionally trained in court management, will serve the judges of the Superior Court and handle the Court's administrative affairs.

For the first 18 months, the Superior Court will have limited jurisdiction over felonies (penalties up to 15 years in jail), but after this transitional period it will assume jurisdiction over all felony cases, including murder and rape.

Besides misdemeanor crimes, small civil suits, and its new felony jurisdiction, the Superior Court is given civil damage cases, including personal injury, in amounts up to $50,000; limited equity jurisdiction; and land condemnation, change of name, local habeas corpus petitions, drug commitments, and D.C. tax cases. In the long run, the revised court system is expected to relieve part of the heavy workload and case backlog of the U.S. District Court for the District of Columbia where disposition of the average criminal case runs into months and the backlog of civil cases stands at more than 4,500.

Court Executive Board Named

Chief Justice Burger in late January announced the appointments to the five-member Board of Certification under the new Circuit Court Executives Act, which became law January 5, 1971.

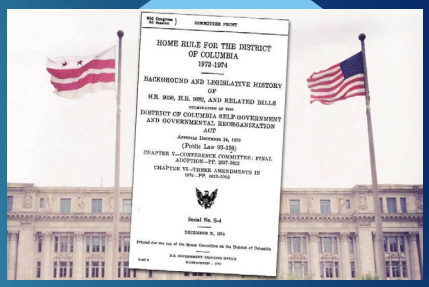
Elected to the Board by the Judicial Conference of the United States were: Judge Roger Robb, U.S. Court of Appeals for the District of Columbia; Chief Judge Frank M. Johnson, Jr., U.S. District Court, Middle Alabama; and John W. Macy, Jr., President, Public Broadcasting Corp., Washington, D.C., and former Chairman of the U.S. Civil Service Commission. The other two Board members, required to serve by Statute, are Judge Alfred P. Murrah, Director of the Federal Judicial Center, and Rowland F. Kirks, Director of the Administrative Office of the U.S. Courts. Judge Murrah was designated Board Chairman.

The new law (P.L. 91-647) permits the judicial council in each of the Nation's 11 judicial circuits to hire a Court Executive for the Circuit if they so elect. Applicants are to be chosen from a list of names certified by the Board, a provision recommended by the Judicial Conference. This is to insure that appointees possess such qualifications as special training in court management, executive ability, and experience in administration. They do not need to be lawyers.

The Board is already drawing up and publishing standard qualifications for the position. It must consider all who apply and it must maintain a roster of all persons certified.

Finally, Home Rule for DC in 1973

- First DC Delegate elected in 1971—*District of Columbia Delegate Act of 1973*, Pub. L. 91-405, 84 Stat. 845 (1970)
- Home Rule--*District of Columbia Self-Government and Government Reorganization Act*, Pub. L. 93-198, 87 Stat. 774 (1973)
- Created a tripartite "state" system:
  - Council (legislative)
  - Mayor (executive)
  - DC Courts (judicial)
- However, Congress still retained ultimate control over D.C.:
  - U.S. CONST. art. 1 s 8, cl. 17
  - Including fiscal autonomy over the District and the Court's budget's and approval of all legislation created by the Council



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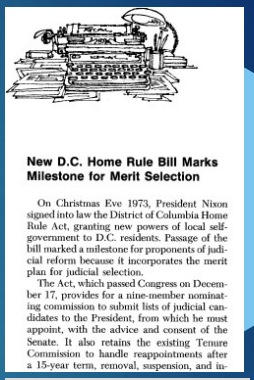
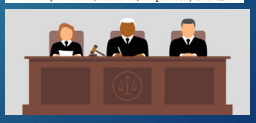
Home Rule's effects on the local courts…

- Biggest impact—selection of DC Court's judges and addition of a D.C. residency requirement
- Under the *Missouri Plan* compromise, the law created two new bodies to appoint and reappointment judges:
  - **Judicial Nomination Commission** (JNC) (made up of federal and local members)*
  - **DC Judicial Tenure Commission** (screening judges for reappointment)
- Added longer Congressional review authority over criminal code changes (60 days)





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Judiciary would remain separate and under the control of Congress

- Home Rule legislation makes it very clear the judiciary can only be amended by an act of Congress and the Council is *prohibited* from passing any legislation regarding the Courts. D.C Code § 1-147(a)(4)
- Courts would maintain an independent, separate budget

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Practical effects of Home Rule

- The courts still control the right to promulgate its own rules and budget.
- However, the courts do not exist in a vacuum. The Courts are impacted by new legislation passed by the Council (again with approval) of Congress and policies from the Mayor's office.
- But, the Council cannot pass legislation *directly* changing or impacting the judiciary.
  - See *District of Columbia Shop-Book Rule Act* in 1976. Act. No. 188, 22. D.C. Reg. 4551 and *Laumer v. United States*, 409 A.2d 190, 195 n.7 (D.C. 1979) "This Court is the final authority for establishing the evidentiary rules for the Superior Court of the District of Columbia."
- In reality, the judiciary was (and still is) impacted by Home Rule.

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Overall effect of Home Rule's tripartite model: Congressional Control

- Citizens—No voting rights in Congress (have a voice, but no vote).
- Courts—strict Congressional control—budget approval, Senate approval of judges, and even new court division creation (Congress created the new Family Court in 2002, DC Family Court Act of 2002, Pub. L. 107-114, 115 Stat. 2101),
- Council—Veto Power but legislation must still can be reviewed Congress. (ex/DC Code Overhaul)
- Mayor- No power to appoint or remove judges

*image from TLDR NewsUS

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"[W]orse still, recent events make the threat of retreat from home rule far more real than the promise of advance."

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50 years later—Home Rule is a living and ever changing legal and social construct for those who work and live in D.C.

QR code to research guide

The D.C. History Center's Guide:

Researching DC Statehood
by Kimmi Ramnine

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My contact information

- Laura Moorer
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  - @dccclibby
  - Ask A Librarian—DC Courts Libraries Page

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Recommended Readings

- Daniel Martin Freeman, *Home Rule and the Judiciary*, 41 J.B. Ass'n of D.C. 83 (1974).
- James C. McKay, Jr., *Separation of Powers in the District of Columbia under Home Rule*, 27 Cath. U.L. Rev. 515 (1978)
- Philip G. Schrag, *The Future of the District of Columbia Home Rule*, 39 Cath. U. L. Rev. 311 (1990).
- Theodore Voorhees, *The District of Columbia Courts: A Judicial Anomaly*, 29 Cath. U. L. Rev. No. 4 (1980)

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TAB TWO

Home Rule and the Judiciary

BY DANIEL MARTIN FREEMAN

Mr. Freeman is Counsel to the Committee on the District of Columbia of the U.S. House of Representatives.

The District of Columbia Self-Government and Governmental Reorganization Act [1] (Home Rule Act) will have a significant impact on the manner in which judges are selected for the District of Columbia courts. The operation of the courts themselves will continue to be administered in accordance with the 1970 Court Reorganization Act.[2]

The Act was approved by the President on December 24, 1973. One of the major objectives of the Act is to provide a local governmental charter which will establish a form of local government responsible and accountable to the voters of the District of Columbia. The charter was ratified in a referendum on May 7, 1974. Now the District of Columbia, like the vast majority of other American cities, will have an elected Mayor and City Council. Included in the charter are provisions for all three branches of the local government: executive, headed by the Mayor; legislative, the Council of the District of Columbia; and the judiciary, including both the District of Columbia Superior Court and the District of Columbia Court of Appeals.

THE JUDICIAL POWER

The Judiciary Section of the Home Rule Act is in Part C, Title IV. Title IV is the charter. The judicial power of the District is vested in the District of Columbia Court of Appeals and the Superior Court of the District of Columbia. The Superior Court has jurisdiction over any civil action or other matter brought in the District and over any criminal case

[1] P.L. 93-198, 87 Stat. 774.

[2] The budget for the courts will be prepared by them and submitted to the Mayor for transmittal to the Council. The Mayor may not make any revisions in the budget but may make recommendations. Sec. 445.

under any law applicable exclusively to the District of Columbia. The Superior Court has no jurisdiction over any civil or criminal matter over which a United States Court has exclusive jurisdiction pursuant to an Act of Congress. The Court of Appeals has jurisdiction of appeals from the Superior Court and, to the extent provided by the law, to review orders and decisions of the Mayor, the Council or any other District agency.[3]

Under the Home Rule Act, the Chief Judge of both the District of Columbia Superior Court and the District of Columbia Court of Appeals shall be designated by the District of Columbia Judicial Nomination Commission (Nomination Commission) from among the judges of the courts in regular active service. The term of office for the Chief Judge shall be four years or until a successor is designated. The Chief Judge thus designated shall then be eligible for redesignation.[4] The terms of office for judges shall be fifteen years, subject to mandatory retirement at age 70, or removal, suspension or involuntary retirement. Upon completion of his term, a judge shall continue to serve until reappointed or his successor is appointed and takes office.[5]

APPOINTMENT OF JUDGES

The Home Rule Act establishes a nomination commission procedure for appointing judges to the District of Columbia courts.[6] This nomination commission procedure is based on the merit selection process for judges, commonly known as the Missouri Plan. It is endorsed by the American Bar Association and the American Judicature Society.[7] Merit selection of judges is recognized to be the most effective way of obtaining qualified nominees to serve on the bench.

Under the charter, all new judges will be appointed through the nomination commission procedure. They must, however, still be confirmed by the United States Senate.[8] No person may be nominated or appointed a judge of a District of Columbia court unless he is a citizen of the United States[9] and unless he is an active member of the District of Columbia unified bar. He must have been engaged in the active practice of law in the District of Columbia for five years immediately preceding his nomination, or for those five years he must have been on the law faculty of a law school in the District, or employed as a lawyer by the United States or the District of Columbia government.[10] Appointees to the courts must be bona fide residents of the District of Columbia who have maintained an actual place of abode in the District for at least 90 days prior to nomination. A judge must retain such residency as long as he serves on the

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[3] Sec. 431(a).
[4] Sec. 431(b).
[5] Sec. 431(c).
[6] Sec. 434(a).
[7] Telegram to Cong. John Breckinridge (D-Ky.), 10/10/73. Congressional Record, House, 93rd Congress, 1st Session, 10/10/73, p. H8823.
[8] Sec. 433(a).
[9] Sec. 433(b)(1).
[10] Sec. 433(b)(2).

bench.[11] Judges who are currently sitting or who are appointed prior to the effective date of the charter will be grandfathered in, because the residency requirements for them will be those which are currently required by the District of Columbia Code.[12] These judges shall not be required to be residents of the District to be eligible for reappointment or to serve for any new term.[13] Basically what this means is that any judge who is now sitting or who was appointed and confirmed before the effective date of the charter and who was in compliance with then current residency requirements for judges in the District Code, will not be required to become a resident of the District of Columbia to maintain his seat or to be eligible for reappointment. Nominees to the bench are not to have been members of the Tenure Commission or the Nomination Commission for two years prior to the nomination.[14]

THE STRUCTURE OF THE NOMINATION COMMISSION

The Home Rule Act establishes the District of Columbia Nomination Commission.[15] The Nomination Commission shall consist of seven members who shall serve six-year staggered terms. The Commission members will be appointed as follows: one by the President of the United States; two by the District of Columbia unified bar; two by the Mayor, one of whom shall be a nonlawyer; one by the Council, who shall be a nonlawyer; and one will be appointed by the Chief Judge of the United States District Court for the District of Columbia who shall be an active or retired Federal judge.[16] The Chief Judge may appoint himself to either the Nomination Commission or the Tenure Commission, but not both.

The Commission was structured this way in order to accomplish two goals; first, to make sure that the Federal as well as the local interest is represented and, second, to make sure that the broad base of community interest is represented as effectively as possible. By providing for appointments by the President and the Chief Judge of the United States District Court, the Federal interest is represented. Having the Council and the Mayor make appointments to the Commission provides for local input from the community level, especially since two of the appointments must be nonlawyers. The interest of the local bar which must practice before the courts is represented by having the Board of Governors of the bar appoint two members of the Commission.

OPERATION OF THE NOMINATION COMMISSION

The Nomination Commission is charged with the responsibility of screening all candidates for the local bench. Within 30 days following the occurrence of a vacancy, or within 30 days prior to the occurrence of a vacancy which results from the expiration of a judge's term, the Commis-

[11] Sec. 433(b)(3).
[12] Sec. 433(b)(3), see D.C. Code, Sec. 11-1501(a).
[13] *ibid.*
[14] Sec. 433(b)(5).
[15] Sec. 434(a).
[16] Sec. 434(b)(4).

sion will submit to the President for possible nomination and appointment a list of three persons for each vacancy. If more than one vacancy exists at a given time, the Commission will submit lists in which no person is named more than once and the President may select more than one nominee from one list.[17] The 30 day period is utilized to ensure that there will be no hiatus—or as short a hiatus as possible—between the terms of the judges.

There is a special provision to ensure that judicial appointments will be made when there is a vacancy. If the President decides for any reason that he does not wish to nominate one of the three persons on the Nomination Commission's list and does not do so within sixty days after receiving a list, the Nomination Commission itself is given the power and the authority to nominate, with the advice and consent of the Senate, one of the persons from that list for the judicial position.[18] In the event that any person recommended by the Commission to the President dies, or becomes ineligible for any reason, the Commission is given the authority promptly to recommend to the President another person to be placed on the list.[19]

REAPPOINTMENTS TO THE BENCH

A special procedure has been established for reappointment to the bench.[20] If a sitting judge wants to be reappointed, he must declare his candidacy for such reappointment 3 months before the expiration of his term. At that time the Commission on Judicial Disabilities and Tenure (Tenure Commission) will prepare and submit to the President a written evaluation of the declaring candidate's performance during his present term of office and his fitness for reappointment for another term. The Tenure Commission shall use the standard American Bar Association rating terminology.

If the Tenure Commission determines a candidate to be "exceptionally well-qualified" or "well-qualified", then the term of the declaring candidate shall be automatically extended for another full 15-year term. If the Tenure Commission determines the declaring candidate to be "qualified" for reappointment to another term, then the President, in his discretion, may renominate such candidate with the advice and consent of the Senate.

If the Tenure Commission declares a candidate to be "unqualified", the President shall not submit his renomination and such judge shall not be eligible for reappointment or appointment as a judge of the District of Columbia courts.

If the President decides not to renominate a judge declared to be "qualified" by the Tenure Commission or if a judge is declared to be "unqualified" for reappointment, then the vacancy shall be filled through the normal nomination procedure.

The Tenure Commission, which is given this new responsibility under the Home Rule Act, has been restructured.[21] The restructuring parallels

[17] Sec. 434(d)(1).
[18] *ibid.*
[19] Sec. 434(d)(2).
[20] Sec. 433(c).
[21] Sec. 431(d).

the structure of the Nomination Commission. The members of the Tenure Commission shall be appointed in exactly the same way as the members of the Nomination Commission, although they may not serve on both Commissions.

The Tenure Commission has been given great responsibility for evaluating sitting judges because it is particularly qualified to do so. The Tenure Commission is charged with day-to-day supervision of complaints about sitting judges and is therefore the most qualified body to make such an assessment and evaluation for recommendation to the President with regard to reappointment.

The Tenure Commission's duties over removal, suspension and involuntary retirement of sitting District of Columbia judges will be basically the same as they were established under the District of Columbia Court Reform and Criminal Procedure Act of 1970.[22]

REMOVAL, SUSPENSION, AND INVOLUNTARY RETIREMENT

A judge of a District of Columbia court shall be removed from office when the Tenure Commission files an order of removal with the Court of Appeals certifying that a final judgement which is punishable as a felony under Federal or District of Columbia law has been entered in any court in the United States against a sitting judge.[23] A judge may also be removed for willful misconduct in office, willful and persistent failure to perform judicial duties, or any other conduct which is prejudicial to the administration of justice or which brings the judicial office into disrepute.[24] A judge of a District of Columbia court shall be involuntarily retired when the Tenure Commission determines that the judge suffers from a mental or physical disability which is, or is likely to become, permanent and which prevents, or seriously interferes with, the proper performance of his judicial duties.[25] A judge may be suspended during the course of appeals regarding complaints filed against him by the Tenure Commission.[26]

OPERATION OF THE COMMISSIONS

The procedures of both the Tenure Commission and the Nomination Commission are basically the same.[27] The same qualifications for membership on each Commission are used.

The Commissions shall act only at meetings called by their respective Chairmen or by the majority of the respective Commissions after notice has been given to all Commission members. The Commissions shall choose annually from among their members Chairmen and such other officers as may be deemed necessary. The Commission may adopt such rules or procedures as they deem necessary to govern their business. These rules may be different for the two Commissions. The Commissions are also given

[22] The District of Columbia Court Reform and Criminal Procedure Act of 1970, P.L. 91-358, 84 Stat. 473; see D.C. Code, Sec. 11-1521.
[23] Sec. 432(a)(1).
[24] Sec. 432(a)(2).
[25] Sec. 432(b).
[26] Sec. 432(c).
[27] See Sec. 431(d) and Sec. 434 generally.

the authority to request from the District of Columbia government such records, information, services, and other assistance and facilities as may be necessary to enable them to perform their functions properly. The Commissions are required, however, to treat such information as privileged and confidential.

No person may be appointed to either Commission unless he is a citizen of the United States and is a bona fide resident of the District who has maintained an actual place of abode in the District for at least 90 days immediately prior to his appointment. Persons who are employed by the legislative, executive or military departments of the United States may not be appointed to the Commissions, except for the retired or active federal judge who is to be designated. The same is true of District government employees. All persons appointed to the Commissions who are lawyers must have the qualifications prescribed for persons appointed as judges for the District of Columbia courts.

Commission members shall receive compensation at the daily equivalent of a GS-18, except that any member of the Commission who is an active or retired federal judge shall serve without additional compensation.

Any vacancy on either Commission shall be filled in the same manner as that in which the original appointment was made. Any person appointed to fill a vacancy in this manner shall only serve out the remainder of the unexpired term of his predecessor.

THE COURTS AND THE CRIMINAL LAW

Under the Home Rule Act, the Council shall have no authority to modify the court structure that was established under the District of Columbia Court Reform and Criminal Procedure Act of 1970.[28] The Council is forbidden from making any changes in Title 11 in the District of Columbia Code with regard to the composition, structure and jurisdiction of the District of Columbia courts. This power is reserved to the Congress.

It should be noted that under the Home Rule Act, the Council is specifically prohibited from passing any law relating to the United States courts, the U.S. Attorney, or the U.S. Marshal in the District of Columbia.[29] This is significant since the U.S. Attorney is the prosecuting officer in the District of Columbia.

The criminal law provisions, Titles 22, 23 and 24 of the D.C. Code, were given special treatment under the Home Rule Act. Currently, Congress is responsible for making the criminal laws in the District of Columbia. Under the new legislation, 24 months after the inauguration of the first members of the Council, the authority to enact legislation regarding the criminal code sections of the District of Columbia Code will be trans-

[28] Sec. 602(a)(4).
[29] Sec. 602(a)(8).

ferred to the Council.[30] A two-year waiting period was utilized because the Congress is in the process of establishing a Law Revision Commission for the District of Columbia. This Commission's first job will be to revise the District of Columbia Criminal Code. It was felt that the Law Revision Commission should be able to do its job completely and recommend the needed reforms in the District of Columbia Criminal Code to the Congress for enactment before the authority to modify the Code is obtained by the Council. The Congress does retain a special veto over changes in the criminal law made by the Council once it does attain jurisdiction.[31] If either House of Congress, during the 30-day period after an act modifying the criminal code is transmitted to the Speaker of the House and the President of the Senate, adopts a disapproving resolution of such act, then the act will not take effect.

[30] Sec. 602(a)(9).
[31] Sec. 602(c)(2).

LAWRENCE E. CARR JR.
ELECTED BAR ASSOCIATION PRESIDENT

Lawrence E. Carr, Jr. was elected President of the Bar Association of the District of Columbia in the June 1974 election. The announcement was made at the annual meeting of the Bar Association at the Mayflower Hotel on June 11, 1974.

A member of the Bar Association for twenty years, Mr. Carr has just completed a term as Vice-President of the Association. He had previously served as a member of the Board of Directors and as chairman and member of various committees of the Bar Association. A graduate of the University of Notre Dame (BS and LLB) and George Washington University Law School (LLM), Mr. Carr has been in general practice for 22 years. He is a senior partner in the firm of Carr, Bonner, O'Connell, Kaplan and Thompson.

Other officers elected were: David N. Webster, Vice-President; Stephen A. Trimble, Secretary; and Arthur R. Pilkerton, Treasurer.

Elected to the Board of Directors were: Charles L. Wilkes, Diane M. Sullivan, Earl H. Davis, John A. Beck and Glenn A. Mitchell.

Austin F. Canfield Jr. was elected Delegate to the American Bar Association.

Elected Trustees of the Research Foundation of the Bar Association were: Henry R. Berger, Charles A. Hobbs and Charles S. Iversen.

MAURICE H. KLITZMAN
NAMED CHAIRMAN OF THE YEAR

Maurice H. Klitzman, Chairman of the Patent, Trademark and Copyright Law Section of the Bar Association, was presented the Chairman of the Year Award for 1973-74 at the annual meeting on June 11, 1974.

Under his outstanding leadership, the Section has proposed and submitted amicus briefs on a number of significant patent matters and provided Congress with valuable comments on a wide variety of important pending patent legislation. The Section has also had a series of informative and educational meetings during the year.

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Separation of Powers in the District of Columbia under Home Rule

James C. McKay Jr.

SEPARATION OF POWERS IN THE DISTRICT OF COLUMBIA UNDER HOME RULE

James C. McKay, Jr. *

I. INTRODUCTION

Three years ago Congress restored a measure of home rule to the citizens of the District of Columbia by its enactment of the District of Columbia Self-Government and Governmental Reorganization Act.[1] In the distribution of governmental powers, the Act closely follows the federal tripartite model, vesting the legislative power in the Council,[2] the executive power in the Mayor,[3] and the judicial power in the District of Columbia courts.[4] The importance of the principle of separation of powers to the newly formed District of Columbia government has been amply demonstrated by the number of conflicts between the three branches during this short period. Each branch has, at times, charged the

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1. Pub. L. No. 93-198, 87 Stat. 774 (1973) [hereinafter referred to as the Self-Government Act] enacted December 24, 1973. Title IV of the Act, the "District Charter," which is in effect the Constitution of the District of Columbia, became effective January 2, 1975, after acceptance by a majority of voters in a special Charter referendum. *Id.* §§ 701, 704, 771, *reprinted in* D.C. Code § 1-121 note (Supp. V 1978). (All subsequent references to the District of Columbia Code, unless otherwise indicated, are to the 1978 supplement to the 1973 edition).

Prior to this Act, the citizens of the District of Columbia had enjoyed differing degrees of self-government at various times in the past, the last time during the short life of the Legislative Assembly established by the Act of Feb. 21, 1871, ch. 62, 16 Stat. 419, and abolished by the Act of June 20, 1874, ch. 337, 18 Stat. 116. The history of self-government in the District is summarized in the committee reports on the Self-Government Act. *See* S. REP. NO. 93-219, 93d Cong., 1st Sess. 3-4 (1973); H.R. REP. NO. 93-482, 93d Cong., 1st Sess. 47-49 (1973). *See generally* Newman & DePuy, *Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act*, 24 AM. U.L. REV. 537 (1975).

2. Self-Government Act § 404(a), D.C. Code § 1-144(a).

3. *Id.* § 422, D.C. Code § 1-162.

4. *Id.* § 431(a), D.C. Code, tit. 11, app., at 438. The term "District of Columbia courts" embraces the Superior Court of the District of Columbia and the District of Columbia Court of Appeals. *Id.* § 103(13), D.C. Code § 1-122(13).

other two with serious encroachments. Although the Act reserved considerable authority to the federal government over District affairs,[5] the federal government, for the most part, has played a passive role, allowing these conflicts to run their course.[6]

The separation of governmental powers is a structural principle fundamental to any democratic system of government.[7] Accepted as such by the drafters of the Constitution, it is a theme that appears throughout their writings, notably in *The Federalist*,[8] Jefferson's *Notes on the State*

5. Congress retains its ultimate authority over the District of Columbia. U.S. CONST. art. I, § 8, cl. 17; *see* Self-Government Act § 601, D.C. Code § 1-126. The Act expressly limits the legislative power of the Council in nine specific areas, *id.* § 602(a), D.C. Code § 1-147(a), including a two-year prohibition on the enactment of criminal laws, *id.* § 602(a)(9), D.C. Code § 1-147(a)(9), and a permanent prohibition on actions affecting the District of Columbia courts, *id.* § 602(a)(4), D.C. Code § 1-147(a)(4). Moreover, the Act reserves for the federal government a significant role in the local legislative process. No act of the Council, except for a temporary emergency act, *see id.* § 412(a), D.C. Code § 1-146(a), may take effect until it has lain before Congress for 30 working days when both Houses are in session, during which Congress may disapprove the act by concurrent resolution. *Id.* § 602(c), D.C. Code § 1-147(c). An act vetoed by the Mayor and overridden by the Council must be submitted to the President for 30 calendar days, during which he may sustain the Mayor's veto, before submission to Congress. *Id.* § 404(e), D.C. Code § 1-144(e). Furthermore, the judges of the District of Columbia courts are appointed by the President, with the advice and consent of the Senate, from a list of candidates supplied by the District of Columbia Judicial Nomination Commission. *Id.* § 433, D.C. Code, tit. 11, app., at 440. Finally, the District lacks fiscal autonomy, as the President and Congress retain the same authority over the District's budget as they possessed prior to home rule. *Id.* § 603(a), D.C. Code § 47-228(a).

6. Congress has neither repealed nor disapproved by concurrent resolution a single act of the Council, and the President has only once exercised his authority to sustain the Mayor's overridden veto. *See* note 147 & accompanying text *infra*. Moreover, Charles C. Diggs, Jr., Chairman of the House District of Columbia Committee, has introduced legislation, H.R. 9404, 95th Cong., 1st Sess. (1977), which would reduce the layover period required for acts of the Council before Congress and would terminate the President's authority to veto overridden acts of the Council. The measure was redesignated H.R. 12116, 95th Cong., 2d Sess. (1978), and was reported by the committee on May 1, 1978. *See* H.R. REP. NO. 95-1104, 95th Cong., 2d Sess. (1978). President Carter has shown his support for the termination of this presidential role. *See* Remarks of the Vice President on the President's Decisions on the Task Force on the District of Columbia Recommendations, 13 WEEKLY COMP. OF PRES. DOC. 1386 (Sept. 21, 1977). On the other side, however, Congress extended the two-year prohibition of the Council's authority to enact criminal laws for another two years—that is, until Jan. 3, 1979, Act of Sept. 7, 1976, Pub. L. No. 94-402, 90 Stat. 1220 (1976), and has routinely delayed its appropriation of the District's budget. *See* Act of Dec. 9, 1977, Pub. L. No. 95-205, 91 Stat. 1460 (1977).

7. The Supreme Court has recently reaffirmed the principle of separation of powers in Buckley v. Valeo, 424 U.S. 1, 120 (1976), in which the Court invalidated parts of the Federal Election Act providing for the appointment by congressional officers of a majority of the members of the executive Federal Election Commission as violative of the appointments clause. *See also* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 441-46 (1977).

8. THE FEDERALIST Nos. 47, 48, 49, 51, 71 (New Am. Lib. ed. 1961).

of Virginia,[9] and Washington's *Farewell Address*.[10] As Madison stated in *The Federalist*, paraphrasing Montesquieu, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[11] The principle was premised on a healthy skepticism of the motives of men in positions of power. As Madison explained:

> This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.[12]

The application of the principle, of course, does not require the complete separation of governmental powers or the hermetic sealing off of each branch from the others.[13] Indeed, the integrity of each branch can only be ensured by granting each select powers over the others sufficient to check them without controlling them. Thus, under the Constitution, the President shares the legislative power by his ability to veto acts of Congress, and he exerts an influence on the judiciary by his authority to nominate all federal judges. Congress, in turn, shares the President's power of executive appointment by its ability to confirm executive officers, and it exerts an influence on the judicial branch by its authority to confirm judges appointed by the President; moreover, it keeps check on both branches by its power of the purse. The judiciary, as the ultimate interpreter of the law of the land, possesses considerable power over both branches. Of course, the power of one branch to check another, being an exception to the general distribution of governmental powers, must be expressly granted by the organic law establishing the

9. T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (Univ. of N.C. ed. 1955), *quoted in* THE FEDERALIST, *supra* note 8, No. 48 (J. Madison), at 310-11.

10. 1 MESSAGES AND PAPERS OF THE PRESIDENTS 219 (1895).

11. THE FEDERALIST, *supra* note 8, No. 47 (J. Madison), at 301.

12. *Id.* No. 51 (J. Madison), at 322.

13. *See* Buckley v. Valeo, 424 U.S. 1, 121 (1976); Springer v. Philippine Islands, 277 U.S. 189 (1928). In the latter case, the Court noted that "[t]he existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the general inviolate character of this basic rule." *Id.* at 202.

governmental entity and may not be inferred from the basic powers of the branch exerting the check. Thus, the President could hardly infer the authority to veto acts of Congress from his executive authority alone.[14] The core of the principle of separation of powers is that, subject to such well defined exceptions, one branch may not, directly or indirectly, compel or control the actions of another.[15]

In granting home rule to the District of Columbia, Congress did not divide governmental powers strictly according to the federal model. It is well settled that Congress is under no constitutional compulsion to do so as its authority over the District under article I, section 8, clause 17, is plenary.[16] The most essential difference is that the legislative power of the District, instead of being divided between two rival Houses and thus weakened, is concentrated in a unicameral, thirteen-member Council.[17] Moreover, the checks given to certain branches against the others differ in some respects from the federal model. Hence, while the Mayor, as the President, may submit legislation[18] and veto acts of the legislature,[19] he lacks the authority to nominate members of the judiciary.[20] While the Council, as the Congress, holds the power of the purse over the executive branch,[21] it may not revise the budget of the judiciary;[22] nor is it vested with the authority (with certain express exceptions) to participate in the process of executive appointment.[23] The judicial branch of the District government, in contrast, has fewer checks against it from coequal branches than does the federal judiciary.[24] These differences,

14. *See* Buckley v. Valeo, 424 U.S. 1, 285 (1976), (White, J., separate opinion).

15. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 629-30 (1935); O'Donoghue v. United States, 289 U.S. 516, 530 (1933); Massachusetts v. Melon, 262 U.S. 447, 488 (1923).

16. *See* Palmore v. United States, 411 U.S. 389 (1973) (Congress not required to assure criminal defendant in District of Columbia accused of crime against United States of a trial by an article III judge with life tenure, but may create article I courts to hear such cases); Keller v. PEPCO, 261 U.S. 428, 443 (1921); Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 225 (1908).

17. Self-Government Act §§ 401(b), 404(a), D.C. Code §§ 1-141(b), 1-144(a). Only one State, Nebraska, has a unicameral legislature. NEB. REV. STAT. Const. art. III, § 1 (1975). *See* THE FEDERALIST, *supra* note 8, No. 62 (J. Madison) at 279.

18. Self-Government Act § 422(5), D.C. Code § 1-162(5).

19. *Id.* § 404(e), D.C. Code §1-144(e).

20. His appointment authority over the District of Columbia courts is limited to his power to appoint two of the seven members of the District of Columbia Judicial Nomination Commission, *id.* § 434(b)(4)(C), D.C. Code tit. 11, app., at 442, and two of the seven members of the District of Columbia Commission on Judicial Disabilities and Tenure, *id.* § 431(e)(3)(C), D.C. Code tit. 11, app., at 439.

21. Self-Government Act § 442, D.C. Code § 47-221.

22. *Id.* § 445, D.C. Code tit. 11, app., at 443.

23. *See* Part II-A *infra*.

24. *See* Part III *infra*.

however, do not diminish the importance of the principle of separation of powers in the District government. Though the balance is somewhat different, owing to the fundamental differences between national and local government, the theory remains the same.

A strengthening of the executive and judiciary branches was, in part, required by the consolidation of legislative power of the District government in a single body. It is significant that while advocating the principle of separation of powers the chief fear of the drafters of the Constitution was the fear of legislative despotism. As Madison warned:

> The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.
>
> . . . .
>
> . . . Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.[25]

And as Hamilton added:

> The tendency of the legislative authority to absorb every other has been fully displayed and illustrated by examples in some preceding numbers. In governments purely republican, this tendency is almost irresistible. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or the judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution.[26]

Recent commentators have asserted that the founders' fear of legislative despotism is groundless in view of the enhancement of the powers of the Presidency through its receipt of broad powers delegated from the Congress.[27] But whatever the validity of such observations in the federal context, the fear of legislative encroachment by the legislative branch of the District government, where the unicameral Council has refused to

25. THE FEDERALIST, *supra* note 8, No. 48 (J. Madison), at 309.

26. *Id.* No. 71 (A. Hamilton), at 433.

27. *See, e.g.*, Frohnmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 ORE. L. REV. 211, 215 (1973).

delegate any significant amount of its power to the Mayor, is very much warranted.

II. The Legislature v. The Executive

True to the fears of Madison and Hamilton, most of the conflicts that have occurred thus far in the District under home rule have involved encroachments by the legislature upon the powers of the other two branches, especially the executive. The Council has, at various times, attempted to interfere with the Mayor's power to appoint executive officers, veto legislation, and control executive agencies. Conversely, the Council has charged the executive with infringing upon its supposed authority over the qualifications of its members. The unfortunate result of such conflicts, many of which are unresolved, has been a continual tension between the executive and the legislature.

A. Confirmation Requirements and the Executive Power of Appointment

One of the most essential elements of the executive power is the power of appointment. Most of the Mayor's authority, especially with regard to day-to-day governmental operations, is exercised in his behalf by the heads of agencies of the District government.[28] Typical executive functions, such as the assessment of real property for tax purposes,[29] the removal of snow and ice from public highways,[30] and the implementation of the Federal Energy Administration's weatherization assistance program for low income persons,[31] are carried out by such officers.[32] It is therefore not surprising that the scope of the Mayor's power to appoint executive officers has been the subject of controversy. Considerable

28. *See* Self-Government Act § 422(6), D.C. Code § 1-162(6):

> The Mayor may delegate any of his functions (other than the function of approving or disapproving acts passed by the Council or the function of approving contracts between the District and the Federal Government under section 731 [D.C. Code § 1-826]) to any officer, employee, or agency of the executive office of the Mayor, or to any director of an executive department who may, with the approval of the Mayor, make a further delegation of all or a part of such functions to subordinates under his jurisdiction.

29. Delegated to the Director of the Department of Finance and Revenue. Mayor's Orders Nos. 75-55, 75-114, 1 D.C. Stat. 440, 468 (1975).

30. Delegated to the Directors of the Department of Transportation and the Department of Environmental Services. Mayor's Order No. 75-218, 1 D.C. Stat. 506 (1975).

31. Delegated to the Director of the Department of Housing and Community Development. Mayor's Order No. 77-126, 24 D.C. Reg. 1917 (1977).

32. *Cf.* Myers v. United States, 272 U.S. 52, 117 (1926): "The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates . . . ." *Quoted in* Buckley v. Valeo, 424 U.S. 1, 135 (1976).

conflict between the legislative and executive branches has been generated by the Council's continual attempts to grant itself the power of confirmation. Two measures, the Confirmation Act of 1976[33] and the Organization of Offices, Agencies, Departments and Instrumentalities Act of 1976,[34] both introduced January 13, 1976, would have required the Mayor's appointments of the heads of his principal executive agencies to be submitted to and confirmed by the Council. It is clear, however, from the text and legislative history of the Self-Government Act, that the Mayor's power of executive appointment under the Charter is exclusive and may not be diluted by the Council through its use of the legislative power.

The Mayor inherited much of this power from the appointed Commissioner of the District of Columbia, the chief executive officer of the District government prior to home rule under Reorganization Plan No. 3 of 1967.[35] The vast majority of the District agencies currently in existence were created pursuant to this Reorganization Plan, and the Commissioner was vested with the sole authority to appoint executive officers.[36] The Self-Government Act continued these agencies in existence[37] and transferred all of the functions of the Commissioner to the Mayor,[38] including the exclusive power to appoint the heads of these agencies.

Moreover, the authority to appoint the officers of either existing or new agencies which may be established by the Mayor[39] or the Council[40] is clearly implicit in the language of section 422 of the Charter,[41] which vests the executive power of the District in the Mayor and makes him the chief executive of the District government. The legislative history of the Act supports this interpretation; as the Senate Report notes:

> The executive power of the District shall be vested in the Mayor who shall be the chief executive officer of the District

33. Bill No. 1-225, 22 D.C. Reg. 3781 (1976), introduced by Council members Dixon, Winter, Clarke, Coates, Wilson, Shackleton, D. Moore, and Hobson.

34. Bill No. 1-234, 22 D.C. Reg. 4008 (1976), introduced by Council member Barry.

35. 3 C.F.R. 1026 (1966-70 Comp.), *reprinted in* D.C. Code, tit. 1, app., at 150 (1973), *and in* 81 Stat. 948 (1967).

36. Reorganization Plan No. 3 of 1967, § 303, 3 C.F.R. 1029 (1966-70 Comp.), *reprinted in* D.C. Code, tit. 1, app., at 151 (1973), *and in* 81 Stat. 950 (1967).

37. Self-Government Act § 714, D.C. Code § 1-133.

38. *Id.* § 422, D.C. Code § 1-162: "In addition, except as otherwise provided in this Act, all functions granted to or vested in the Commissioner of the District of Columbia, as established under Reorganization Plan Numbered 3 of 1967, shall be carried out by the Mayor in accordance with this Act."

39. Self-Government Act § 422(12), D.C. Code § 1-162(12).

40. *Id.* § 404(b), D.C. Code § 1-144(b).

41. D.C. Code § 1-162.

> government. He shall be responsible for the proper administration of the affairs of the District coming under his jurisidiction and control. The bill confers on him the usual administrative powers and duties, *including the power to appoint personnel in the executive branch of the city government* and to remove such personnel in accordance with applicable laws and regulations. (Emphasis added).[42]

It is particularly significant that the Self-Government Act contains nothing similar to the appointments clause of the Constitution[43] conditioning the President's appointment of executive officers on the "advice and consent of the Senate." Such a diminution of this inherently executive function must be expressly granted to the legislature by the organic law[44] and may not be assumed by that branch through its legislative powers.[45] That Congress did not intend a general dilution of this power of the Mayor is clear from its inclusion in the Self-Government Act of express provisions subjecting the Mayor's appointment of the officers of certain independent agencies to "the advice and consent of the Council."[46] Other than such express limitations on the executive power of appointment in this or other acts of Congress, however, nothing qualifies the authority of the Mayor to appoint executive officers. His power is exclusive.

For these reasons, the Corporation Counsel, in his review of these bills, concluded that they would constitute a "serious encroachment upon the executive power of the Mayor" in violation of the principle of

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42. S. REP. NO. 93-219, 93d Cong., 1st Sess. 7 (1973) (reporting on S. 1435, 93d Cong., 1st Sess., § 402 (1973)). *Cf.* Myers v. United States, 272 U.S. 52, 117 (1926).

43. U.S. CONST. art. II, § 2, cl. 2.

44. *See* Buckley v. Valeo, 424 U.S. 1, 121 (1976); Gillson v. Heffernan, 40 N.J. 367, 192 A.2d 583 (1963); Visone v. Reilly, 80 N.J. Super. 494, 194 A.2d 577 (1963); Walker v. Baker, 145 Tex. Civ. App. 121, 196 S.W.2d 324 (1946); People v. Shawyer, 30 Wyo. 366, 222 P. 11 (1923).

45. It is significant that earlier drafts of the United States Constitution vested the President with the exclusive authority, subject to certain express exceptions, to appoint all officers of the United States. *See* Buckley v. Valeo, 424 U.S. 1, 129-31, 271-74 (1976).

46. Namely, the Board of Elections, Self-Government Act § 491, D.C. Code § 1-1103; the Zoning Commission, *id.* § 492, D.C. Code § 5-412; the Public Service Commission, *id.* § 493, D.C. Code § 43-201a; and the Armory Board, *id.* § 494, D.C. Code § 2-1702. In addition, certain acts prior to home rule expressly vested the former District of Columbia Council with the authority to confirm certain officers appointed by the Commissioner—namely, the People's Counsel, D.C. Code § 43-205(b); the members of the Board of Equalization and Review, D.C. Code § 47-646(a); the members of the Housing Rent Commission, D.C. Code § 45-1623(a) (Supp. II 1975); and the members of the Redevelopment Land Agency, D.C. Code § 5-703(a). As the Mayor inherited the power of the Commissioner to appoint these officers, Self-Government Act § 422, D.C. Code § 1-162, the present Council of the District of Columbia inherited the power of the old District of Columbia Council to confirm these officers. *Id.* § 404(a), D.C. Code § 1-144(a).

separation of powers embodied in the Self-Government Act, and he recommended that they be disapproved.[47] Both bills subsequently died in committee.[48] The controversy, however, is far from being resolved. Bill No. 2-11,[49] introduced January 3, 1977, would subject the Mayor's appointment of all executive agency heads under the proposed District Government Independent Merit Personnel Act[50] to Council confirmation. The Corporation Counsel has reaffirmed his opposition to such an enactment.[51]

Further conflict over the scope of the Mayor's appointment power has been generated by the Council's establishment of so-called "independent" agencies as a means of circumventing the Mayor's appointment authority. However, whether a governmental entity is an executive agency, rather than a quasi-legislative or quasi-judicial agency, depends upon the statutory functions of the agency. If the functions are primarily investigative or informational, it is a legislative agency,[52] but if it is given authority to administer or enforce the laws of the District of Columbia, then it is an executive agency and, hence, by virtue of section 422 of the Self-Government Act, is under the appointive authority of the Mayor.[53]

The Council has enacted legislation establishing several such "independent" agencies headed by officers appointed by the Mayor "with the advice and consent of the Council"—namely, the Office of Aging,[54] the Commission on the Arts and Humanities,[55] the District of Columbia

47. Unpublished Opinion of the Corp. Counsel re Bill No. 1-225 & Bill No. 1-234 (Mar. 26, 1976).

48. *See* Rule 6Q of the Rules of Organization and Procedure of the Council, Res. No. 2-1, 23 D.C. Reg. 7984, 8021 (1977).

49. 23 D.C. Reg. 4603 (1977), introduced by Council member Dixon.

50. Bill No. 2-10, 23 D.C. Reg. 4488 (1977), introduced by Council member Dixon. Section 422(3) of the Self-Government Act, D.C. Code § 1-162(3), requires the Council to provide for a merit system for District government employees, who are currently in the federal civil service, no later than Jan. 3, 1980.

51. Opinion of the Corp. Counsel re Bill No. 2-11, Confirmation Amendments Act, 1 Op. C.C.D.C. 459 (1977). Moreover, the Legislative Research Center of Georgetown Univ. Law Center (D.C. Project), at the request of Council member Dixon, researched the issue of Council confirmation of executive appointments and ironically, in an unpublished analysis dated June 15, 1976, came to the same conclusion as the Corporation Counsel. A similar conclusion was reached by Leon Ullman, Deputy Assistant Attorney General, Office of Legal Counsel, in an unpublished memorandum to Kenneth Lazarus, Associate Counsel to the President, dated Apr. 7, 1976, concerning the D.C. Budget Act.

52. Self-Government Act § 413, D.C. Code § 1-148, provides that: "[t]he Council, or any committee or person authorized by it, shall have power to investigate any matter relating to the affairs of the District . . . ."

53. *Cf.* Buckley v. Valeo, 424 U.S. 1, 137-43 (1976); Springer v. Philippine Islands, 277 U.S. 189, 202 (1928).

54. D.C. Law No. 1-24, § 302, D.C. Code § 6-1712.

55. D.C. Law No. 1-22, § 4, D.C. Code § 31-1903.

General Hospital Commission,[56] and the Commission on Licensure to Practice the Healing Arts.[57] The first measure, the Act on Aging, was signed by the Mayor without mention of this objectionable provision. However, the Mayor, on the advice of the Corporation Counsel that such provision contravened the Charter,[58] did not refer his appointment of the head of that agency to the Council for confirmation,[59] and the Council has not challenged this action. The second measure, the Commission on the Arts and Humanities Act, was vetoed by the City Administrator as Acting Mayor,[60] and, as the Council failed to override the veto within 30 days as required by the Charter,[61] the Commission has, at most, a de facto status.[62] The Mayor vetoed the final two measures, but was overridden by the Council and has permitted the Council to "confirm" his appointments. Unfortunately, the Mayor's apparent acquiescence with respect to the appointment of the officers of the agencies created by these bills runs the danger of encouraging further attempted encroachments, thereby perpetuating the controversy over the scope of the Mayor's power of appointment.

B. Legislation by Resolution: Circumventing The Veto Power of the Mayor

Other conflicts between the legislative and executive branches have been engendered by the Council's use of resolutions.[63] Under the Charter, the Council is empowered to take two kinds of formal action: it may

56. D.C. Law No. 1-134, §§ 202(a), 205, D.C. Code §§ 32-1312(a), 32-1315.

57. D.C. Law No. 1-106, § 2(a)(1), D.C. Code § 2-103(a)(1).

58. Opinion of the Corp. Counsel re App't of the Exec. Dir. of the Office on Aging, 1 OP. C.C.D.C. 526 (1977).

59. The Act on Aging also created an advisory Commission on Aging with 15 lay members appointed by the Mayor with the advice and consent of the Council. *Id.* § 402, D.C. Code § 6-1721. The Mayor has permitted the Council to confirm these members as the Commission has no executive authority.

60. Self-Government Act § 422(1), D.C. Code § 1-162(1), authorizes the Mayor to "designate the officer or officers of the executive department of the District who may, during periods of disability or absence from the District of the Mayor execute and perform the powers and duties of the Mayor." The power to designate such a temporary Acting Mayor is distinct from the power to delegate executive functions to subordinates to carry out the day-to-day functions of the executive under § 422(6) of the Act, D.C. Code § 1-162(6). *See* Unpublished Opinion of the Corp. Counsel re Whether the City Adm'r May Veto an Act of the Council (July 11, 1975).

61. Self-Government Act § 404(e), D.C. Code § 1-144(e).

62. The Mayor has appointed and the Council has "confirmed" members of the Commission.

63. *See generally* Opinion of the Corp. Counsel re The Legal Force & Effect of a Resolution Adopted by the Council. 1 Op. C.C.D.C. 261 (1976).

pass acts and adopt resolutions. The distinction between them is defined in section 412(a): "The Council shall use acts for all legislative purposes. . . . Resolutions shall be used to express simple determinations, decisions, or directions of the Council of a special or temporary character."[64] An act of the Council is subject to a number of prerequisites before taking effect. A proposed act must be read twice in substantially the same form at an interval of at least thirteen days;[65] it must be presented to the Mayor for approval;[66] and, if approved (or not disapproved within ten working days), it must lie before Congress for thirty legislative days when both Houses are in session before taking effect.[67] If vetoed by the Mayor and overridden by the Council, it must first be submitted to the President.[68] The Council may dispense with the requirement of a second reading or of congressional review only under emergency circumstances, in which case two-thirds of the members present and voting may enact a temporary act, effective for a maximum period of ninety days.[69] A resolution, by contrast, takes effect immediately upon adoption.[70] It is effective without any review by the Mayor, the Congress, or the President.

The vast majority of resolutions adopted by the Council are proper uses of this device. They fall into two broad categories: resolutions which are purely symbolic and without any legal effect, and resolutions by which the Council exercises administrative or ministerial functions vested solely in that body by law. The first category includes resolutions honoring persons or groups, commemorating certain days, weeks, months, or years; expressing the opinion of the Council on public issues; and requesting or urging—but not compelling—certain actions by the Mayor, the courts, or the federal government. The second category includes resolutions making rules with respect to the internal organization or procedure of the Council; appointing or directing personnel

64. D.C. Code § 1-146(a).

65. Self-Government Act § 412(a), D.C. Code § 1-146(a).

66. *Id.* § 404(e), D.C. Code § 1-144(e).

67. *Id.* § 602(c), D.C. Code § 1-147(c).

68. *Id.* § 404(e), D.C. Code § 1-144(e).

69. *Id.* § 412(a), D.C. Code § 1-146(a). *See generally* Opinion of the Corp. Counsel re Emerg. Legis. Auth. of the Council. 1 Op. C.C.D.C. 467 (1977).

70. Under Council practice, resolutions may be adopted after a single reading at the biweekly legislative session. *See* Rules of Organization and Procedure of the Council, Res. No. 2-1, Rule 6, 23 D.C. Reg. 7984, 8014 (1977). Proposed resolutions (and bills) are subject to a 15 day notice requirement; however, this may be despensed with by a simple declaration by the Council that an emergency exists. Rule 6G, *id.* at 8017. Moreover, a resolution may be considered at a special session called for that purpose. Rule 6B, *id.* at 8014. Resolutions may be referred to a committee, but in practice are generally retained by the Council. Rule 6D, *id.* at 8016.

employed by the Council;[71] investigating the affairs of the District;[72] confirming nominees to District offices by the Mayor or Chairman of the Council pursuant to statutes expressly authorizing Council confirmation;[73] appointing members of District boards, commissions, or other bodies pursuant to statutes expressly authorizing such appointments;[74] disapproving executive reorganization plans;[75] and approving applications for grants to the District under federal law.

Some confusion, however, resulted from the transfer of certain functions of the former, appointive District of Columbia Council, established under Reorganization Plan No. 3 of 1967, to the present Council. The former Council had been given over 430 specific "quasi-legislative"[76] functions formerly exercised by the Board of Commissioners of the District of Columbia, the three member, appointive body that governed the District from 1874 to 1967. Section 404(a) of the Charter[77] transferred these functions to the new Council, as section 422 transferred the functions of the Commissioner to the Mayor.[78] The former Council's exercise of many of these "quasi-legislative" functions was made subject to the approval of the Commissioner—namely, those "in respect of rules and regulations . . . or . . . penalties or taxes."[79] Some important functions, however, were not made subject to his approval. The Council's exercise of one of these functions, the closing of public streets and alleys,[80] gave

71. Self-Government Act § 401(c), D.C. Code § 1-141(c).

72. *Id.* § 413(a), D.C. Code § 1-148(a). *See* note 52 *supra*.

73. *See, e.g.*, Self-Government Act § 455(a), D.C. Code § 47-120(a) (District of Columbia Auditor).

74. *See, e.g., id.* § 431(e)(3)(D), D.C. Code, tit. 11, app., at 439 (one member of the District of Columbia Commission on Judicial Disabilities and Tenure); *id.* § 434(b)(4)(D), D.C. Code, tit. 11, app., at 442 (one member of the District of Columbia Judicial Nomination Commission).

75. *Id.* § 422(12), D.C. Code § 1-162(12). Congress was careful to expressly provide the Council with this power in the Charter in view of the controversy over the power of Congress to subject the President's reorganization authority to congressional veto, *see* 5 U.S.C. § 901 (1970), without express authority to do so in the Constitution. The Supreme Court, unfortunately, has declined to resolve this important issue. Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977) (4-3 decision), *cert. denied*, 98 S. Ct. 718 (1978). *See generally* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

76. *See* Special Message to Congress Transmitting Reorganization Plan No. 3 of 1967 (June 1, 1967), 1 PUB. PAPERS OF PRES. JOHNSON 585, 586 (1968), *reprinted in* D.C. Code, tit. 1, app., at 163 (1973).

77. D.C. Code § 1-144(a).

78. D.C. Code § 1-162. *See* note 38 *supra*.

79. Reorganization Plan No. 3 of 1967 § 406, 3 C.F.R. 1058-59 (1966-70 Comp.), *reprinted in* D.C. Code, tit. 1, app., at 161 (1973), *and in* 81 Stat. 978 (1967).

80. *Id.* § 402(168), 3 C.F.R. 1040 (1966-70 Comp.), *reprinted in* D.C. Code, tit. 1, app., at 155 (1973), *and in* 81 Stat. 961 (1967).

rise to considerable controversy over the Council's use of its authority to adopt resolutions.

The closing of streets and alleys under the Street Readjustment Act of the District of Columbia[81] is essentially a legislative action. As the District of Columbia Court of Appeals stated, in construing that Act, "the Council in determining whether to close a street is exercising legislative discretion based upon primarily legislative facts."[82] The former Council chose to exercise this function by resolution. As the action did not concern rules, regulations, penalties, or taxes, it was not submitted to the executive. However, the ability of the former Council to take this legislative action by resolution did not authorize the present Council to do the same. The present Council is required to carry out the functions it inherited from the former Council "in accordance with the provisions of [the Self-Government] Act,"[83] and section 412 of that Act requires the Council to "use acts for *all* legislative purposes . . . ."

Perhaps misled by the practice of the former Council, the present Council adopted dozens of resolutions purporting to close various streets and alleys.[84] This practice continued until the end of 1976, despite several critical opinions issued by the Corporation Counsel.[85] In an effort to resolve this conflict, the Mayor proposed, and the Council passed, an emergency act validating all of the closings purported to be effected by

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81. D.C. Code § 7-401 to 410 (1973).

82. Chevy Chase Citizens Ass'n v. District of Columbia Council, 327 A.2d 310, 316 (D.C. 1974). The court continued:

> Thus the Council, in deciding whether to close a street, considers and devises broad policy—that goes beyond the circumstances of specific parties—relating instead to the public generally. Policy decisions must be made with respect to such matters as traffic flow, transportation facilities, population density, and proper mixture of housing, commercial facilities, schools and parks. In making these policy decisions, the Council tends to consult broad relevant surveys, studies and published reports. Expertise from other government departments is sought. Since at a public hearing any interested person may offer his opinion regarding the proposed closing, the Council considers the opinion not only of the abutting property owners but also of the public generally. In short, the Council in deciding whether to close a street conducts a quasi-legislative hearing, sitting in a legislative capacity, making policy decisions directed toward the general public. (Citation omitted).

Id. at 316-17.

83. Self-Government Act § 404(a), D.C. Code § 1-144(a).

84. *E.g.*, Res. Nos. 1-128, 1-129, 1-130, 1-131, 1-132, 1-133, 1 D.C. Stat. 299, 300, 301, 302, 303, 304 (1975); Res. Nos. 1-188, 1-189, 1-209, 1-210, 1-214, 1-216, 1-231, 1-249, 22 D.C. Reg. 4191, 4193, 5059, 5062, 5368, 5489, 5497, 6472 (1976).

85. Opinion of the Corp. Counsel re The Legal Force & Effect of a Resolution Adopted by the Council, *supra* note 63; Opinion of the Corp. Counsel re Whether Certain Functions of the Council with Respect to Alley Closings, Street Dedications, & Highway Plan Amendments May be Exercised by Act or Resolution. 1 Op. C.C.D.C. 368 (1976).

resolution prior to the effective date of the act.[86] The act also delegated the function of closing streets and alleys to the Mayor, subject to Council approval, since using an executive order of the Mayor rather than an act of the Council would obviate the often extensive Congressional layover period required for all permanent acts of the Council. However, this emergency act expired March 29, 1977, and the Council has failed to enact similar permanent legislation proposed by the Mayor.[87] And although, since December 1976, the Council has used acts instead of resolutions to close streets or alleys,[88] the controversy still persists as the Council has continually asserted that it may legally close streets and alleys by resolution.[89]

C. Resolutions Compelling Executive Officers

An entirely distinct use of the resolution by the Council, which has also raised separation of powers problems, is the use of this device to direct the activities of principal executive officers and the Mayor himself. Such a use of the resolution presumes a power over the executive which the Council simply does not possess. For example, Resolution No. 1-74 "directs the Metropolitan Police Department to adopt manpower distribution policies which would significantly increase foot patrols in the District of Columbia."[90] Resolution No. 1-241 "instructs the Office of the Corporation Counsel to represent the Council of the District of Columbia in opposition to Columbia Federal [Savings and Loan Association]'s application before any legal proceedings held by the Federal Home Loan Bank Board or any of its regional offices."[91] And Resolution No. 1-392 would require certain standards and procedures to be followed by the District of Columbia Accounting Office, the District of Columbia Treasurer, and other District agencies in the processing of vouchers and issuance of checks.[92] Clearly, the authority of the Police

86. The Emergency Street & Alley Closing Act of 1976, Act No. 1-184, 23 D.C. Reg. 4928 (1977) (eff. Dec. 29, 1976).

87. In Bill No. 2-56, 23 D.C. Reg. 5422 (1977), introduced Jan. 19, 1977, the Council excised the provisions delegating authority to the Mayor and substituted language revalidating closings validated by Act 1-184, the Emergency Street & Alley Closing Act of 1976.

88. *See, e.g.*, D.C. Laws Nos. 2-2, 2-3, 2-4, 2-5, 2-6, 23 D.C. Reg. 8193, 8197, 8200, 8203, 8206 (1977).

89. *See* Act No. 2-34, 23 D.C. Reg. 9236 (1977); Act No. 2-74, 24 D.C. Reg. 1784 (1977); Act No. 2-114, 24 D.C. Reg. 4834 (1977).

90. 1 D.C. Stat. 235 (1975).

91. 22 D.C. Reg. 5995, 5997 (1976).

92. 23 D.C. Reg. 3778 (1976). *Contra*, 1 OP. C.C.D.C. 105 (1976); *see* § 449(a) of the Charter, D.C. Code § 47-227(a), which provides that "the Mayor shall . . . prescribe the forms of receipts, vouchers, bills and claims to be used by all the agencies, offices, and instrumentalities of the District government . . . ."

Chief over the distribution of his forces, the authority of the Corporation Counsel over the invitation of litigation, and the authority of the District of Columbia Treasurer over the processing of vouchers and the issuance of checks are at the very heart of the responsibilities of those officers. The Council may not direct their activities; only the Mayor possesses such authority.

Other resolutions purport to direct the actions of the Mayor himself. For example, Resolution No. 1-244 "directs the Mayor to construct within six months . . . a ramp designed for use by the physically handicapped . . . and install an automatic door which operates with a treadle at the 13 and 1/2 Street entrance of the District Building."[93] Another resolution, No. 1-326,[94] requires the Mayor to submit to the Council a budget that would involve no increase in the overall tax burden to District taxpayers. The Self-Government Act requires the Mayor to submit an annual budget to the Council,[95] but does not authorize the Council to impose conditions on the Mayor's preparation of the budget or to require him to submit an additional "no-tax-increase" budget according to Council specifications. These resolutions represent attempts by the Council to assume direct control over matters committed to the discretion of the Mayor and his subordinate officers and clearly violate section 422 of the Charter, which vests the executive authority of the District in the Mayor. Thus, they were considered to have no legal effect.[96]

Several other resolutions, while not interfering quite as severely with the functions of the executive, would have imposed considerable burdens on certain executive agencies by requiring the collection of extensive statistical data, the undertaking of studies, the preparation of reports, or the publication and dissemination of information. A prime example is Resolution No. 1-99, which "directs the Office of Community Services of the Municipal Planning Office and the Office of Public Affairs to collect data by ward and census tract and to organize and make available to Council members, to government officials, and to interested members of the public data so collected."[97] Moreover, it requires these agencies "to establish a mechanism for disseminating, on a regular basis, all information, reports and studies collected or prepared by the District

93. 22 D.C. Reg. 6392, 6393 (1976). The Mayor agreed to this project, and it was completed by the District of Columbia Department of General Services and private contractors at a cost of over $30,000.

94. 23 D.C. Reg. 660 (1976). *See* 1 OP. C.C.D.C. 89 (1976).

95. Self-Government Act § 442, D.C. Code § 47-221.

96. *See* Opinion of the Corp. Counsel re The Legal Force & Effect of a Resolution Adopted by the Council, *supra* note 63, at 280-81.

97. 1 D.C. Stat. 267 (1975).

government and its agencies to all members of the Council, the public libraries of the District . . ." and directs them "to compile and make available . . . a catalog that will index and provide a bibliography for all publications, studies, and reports, prepared by, or under the auspices of, the Government of the District of Columbia."[98] Such a monumental undertaking would have required substantial expenditures, involving diversion of funds appropriated by Congress to the District for other programs. Another example is Resolution No. 1-97, which directs the Mayor to "conduct an examination into the feasibility of implementing a residency requirement for . . . District employees, in connection with the development and administration of a personnel system . . . ."[99] Section 422(3) of the Charter[100] directs the Council to enact a District government merit system, but does not authorize it to order the Mayor to conduct such an examination. A final example is Resolution No. 1-160, which requires "[e]very District government agency [to] develop and submit to the Mayor and Council an affirmative action plan."[101] The Council, however, has no authority by resolution to require executive agencies to develop and submit such reports, and it apparently conceded as much, for it subsequently enacted legislation along similar lines.[102] The reports, compilations, and plans sought by these resolutions are quite distinct from the evidence which the Council may require of any person pursuant to a valid investigation of District affairs under section 413(a) of the Charter.[103] This provision authorizes the Council to require executive personnel to testify or produce books, papers, or other existing evidence, but does not authorize it to require such officers by resolution to collect evidence, make compilations, render judgments, or develop policy.

The Council has attempted to compel executive officers not only by the direct use of resolutions, but also by the enactment of legislation authorizing the Council to take such actions at a later date by the use of resolutions. Such legislation, however, does not legitimize a use of the resolution which is contrary to the Charter. A prime example is the Council's enactment of D.C. Law No. 1-111, the District of Columbia Fire Department Operations Act of 1976.[104] The Act was essentially an

98. *Id.*
99. 1 D.C. Stat. 265 (1975).
100. D.C. Code § 1-162(3).
101. 22 D.C. Reg. 3533 (1976).
102. The Affirmative Action Employment Plan, D.C. Law No. 1-63, D.C. Code § 1-320a-h.
103. *See* note 52 *supra*.
104. D.C. Code § 4-401.

emotional response to a fatal fire occurring September 8, 1976, in which the station nearest the blaze was temporarily closed pursuant to a rotation system necessitated by lack of sufficient funds to keep all stations in the City open on a full time basis.[105] As a result, fire equipment arrived perhaps a few minutes later than it would have if the nearest station had been open.[106] In an attempt to prevent further such occurrences, the Council passed an emergency act which would have transferred authority over day-to-day operations of the Fire Department from the Mayor and Fire Chief to the Council.[107] The Act provided that "the District shall be divided into such fire companies, and subunits, thereof as the Council of the District of Columbia may from time to time direct," and that "[n]o decreases in the number of companies, changes in the type of companies, or changes in the location of stationhouses shall be made unless previously approved by resolution of the Council."[108] The Mayor vetoed the measure on the ground that it would deprive the Fire Chief of the flexibility he needed to meet rapidly changing conditions which could occur in major fires or natural disasters. He noted that "in emergency situations there will usually not be time to wait for a member of the Council to introduce a resolution permitting an action, for the Council to gather a quorum to consider the action, and (assuming consideration as an emergency resolution) for two-thirds of the Council to approve the resolution" without endangering the public safety by the delay.[109]

Though the Council was unable to override the Mayor's veto of the emergency measure, it enacted permanent legislation which was only slightly less objectionable. It provided, as did the emergency measure, that "[t]he District shall be divided into such fire companies, and other units as the Council of the District of Columbia may from time to time direct," but modified the subsequent provision slightly by providing that "[m]ajor changes in the manner the Department provides fire protection

105. *See* Wash. Star, Sept. 8, 1976, § A, at 1, col.1. (final ed.); Wash. Post, Sept. 9, 1976, § D, at 1, col. 1.

106. The incident also engendered a $5 million suit against the District. Chandler v. District of Columbia, CA No. 8623-77 (D.C. Super. Ct., filed Sept. 2, 1977). However, the suit was dismissed on the ground that the damage resulted from a discretionary action on the part of the District. Order of Revercomb, J. (Mar. 8, 1978).

107. Emergency District of Columbia Fire Department Operations Act of 1976, Emergency Act No. 1-70 (Nov. 11, 1976) (unpublished).

108. *Id.* § 2. The current law at that time, D.C. Code § 4-401 (1973), provided: "The fire department of the District of Columbia shall embrace the whole of the said District, and its personal and movable property shall be assigned and located as the [Mayor] of said District may direct within the appropriations made by Congress."

109. Unpublished veto message of the Mayor, Nov. 18, 1976. *See also* Opinions of the Corp. Counsel re Emergency Act No. 1-70. 1 OP. C.C.D.C. 336, 362 (1976).

and fire prevention shall be approved by resolution of the Council."[110] However, the substitution of this ambiguous phrase for the more precise phrase "decreases in the number of companies, changes in the type of companies, or changes in the location of stationhouses" resulted in little improvement, as any of these specific changes could be considered by the Council to constitute "[m]ajor changes in the manner the Department provides fire protection and fire prevention." Either measure represents an attempt by the Council to assume direct and continuing control over an executive function of the utmost importance to the public safety. The Mayor neither approved nor vetoed the act, and it purportedly became law without his approval.[111] Fortunately, the Council has not yet adopted a resolution pursuant to this act.

The importance of the preservation of these three primary powers of the Mayor—the appointment power, the veto power, and the power to control executive officers—in the face of sustained efforts by the Council to draw such power into its "impetuous vortex," cannot be underestimated. The District Charter contemplated, and the exigencies of local government require, a strong Mayor to counterbalance the concentration of legislative power vested in the Council.

D. Quo Warranto and the Council's Authority Over the Qualifications of its Members

The executive has not been alone in evoking the principle of separation of powers. The Council has reciprocated by charging encroachments by the executive in the case of *District of Columbia v. Tucker*.[112] On June 6, 1977, the Corporation Counsel initiated an action in quo warranto in the

110. D.C. Law No. 1-111, § 2, D.C. Code § 4-401.

111. The act is subject to an invalidating procedural infirmity. It was not presented to the Mayor until December 21, 1976. Section 404(e) of the Self-Government Act, D.C. Code § 1-144(e), requires that the Mayor be given 10 working days from his formal receipt of the bill to decide whether to approve or veto an act. However, the belated transmittal of the Act did not give the Mayor the required 10 days before the expiration of the first Council period on January 2, 1977 in accordance with § 401(b)(1), D.C. Code § 1-141(b)(1). The need for this time was acutely demonstrated by the large number of acts transmitted to the Mayor at the end of the year. The Council, of course, is not a continuous body, as six or seven of its membership of thirteen must be filled each biennium. *Id.* § 401(b)(4), D.C. Code § 1-141(b)(4). Acts of the Council which do not "become law" pursuant to § 404(e) before the end of the Council period in which they were enacted are nullities. *See* Opinion of the Corp. Counsel re Status of Acts of the Council of the District of Columbia Pending as of the End of the 94th Congress and the First Council Period (Dec. 30, 1976) *reprinted in* H.R. REP. NO. 95-1104, 95TH CONG., 2D SESS. 9 (1978). A recently reported congressional Bill, H.R. 12116, *supra* note 6, would clarify the pocket veto authority of the Mayor implicit in the Charter.

112. 106 DAILY WASH. L. REP. 41 (Super. Ct. D.C. 1977).

Superior Court of the District of Columbia against the Chairman of the Council on the ground that he lacked de jure title to his office by his failure to maintain the qualifications required by the Charter for holding office. Specifically, it was alleged that the Chairman engaged in outside employment for profit in violation of section 403(c) of the Charter,[113] and thereby forfeited his office pursuant to section 402.[114] The Corporation Counsel took the action in the name of the District of Columbia pursuant to D.C. Code sections 16-3521 to 3545 (1973), which authorizes the issuance of a writ of quo warranto against any person who "unlawfully holds or exercises . . . a public office of the District of Columbia, civil or military . . . ," and upon such a finding requires a judgment of ouster and exclusion from office.[115]

The Council, which was given leave to file a memorandum as amicus curiae, argued that this action by the Corporation Counsel violated the principle of separation of powers implicit in the Charter on the theory that this principle required that the qualifications of Council members be controlled, or at least be subject to initiation, by the Council, rather than the executive or judicial branches of government. Noting that the Self-Government Act did not contain a provision authorizing the Council to determine the qualifications of its members,[116] the court rejected this argument and held that an action by the highest legal officer in the government was the proper and traditional method to judge the qualifications of elected legislative officers.[117] The court concluded that a quo warranto action by the Corporation Counsel against the Council Chairman was not contrary to the principle of separation of powers and, indeed, was the only method available in the District to test a Council member's title to office.[118] The court ruled that the Chairman had in fact violated the prohibition of the Charter against engaging in outside employment, but refused to enter a judgment of ouster.[119]

Not surprisingly, soon after the institution of the action, legislation was introduced in the Council which would divest the Corporation

113. D.C. Code § 1-143(c).

114. D.C. Code § 1-142.

115. D.C. Code § 16-3545 (1973).

116. In contrast, the Houses of Congress have such power. U.S. CONST. art. I, § 5, cl. 1.

117. 106 DAILY WASH. L. REP. at 44-45. The court further noted that even if such a provision existed, this still would not preclude an action in quo warranto by the chief legal officer to test the qualifications of a legislator. *Id.* at 44, n.20 (citing Buckman v. State *ex rel.* Spencer, 34 Fla. 48, 15 So. 697 (1894); Snowball v. People *ex rel.* Grupe, 147 Ill. 260, 35 N.E. 538 (1893); State *ex rel.* Love v. Cosgrave, 85 Neb. 187, 194, 122 N.W. 885, 888 (1909)).

118. 106 DAILY WASH. L. REP. at 45.

119. *Id.* at 51.

Counsel of his authority to institute quo warranto actions against members of the Council, thereby divesting the Superior Court of authority to adjudicate such actions.[120] However, the bill is legally defective as it would diminish the civil jurisidiction of the Superior Court in violation of the Charter.[121] This use of its legislative power as a sword to destroy the executive's authority to initiate quo warranto actions renders the Council's use of the principle of separation of powers as a shield against such actions very questionable.[122]

III. THE LEGISLATURE V. THE JUDICIARY

Actions of the Council raising serious separation of power problems have been directed at the judicial branch as well as the executive, although not to the same extent. Fortunately, however, Congress took great pains to assure the independence of the District judiciary. The Charter provides for the appointment of judges by the President and their confirmation by the Senate[123] from a list of candidates provided by the District of Columbia Judicial Nomination Commission, a body constituted by federal, District, and private appointees.[124] A judge deemed "well-qualified" or better by the District of Columbia Commission on Judicial Disabilities and Tenure, a similarly constituted body, is

120. Bill No. 2-196, 24 D.C. Reg. 1145 (1977), introduced by Council member Clarke on July 26, 1977.

121. The measure, if enacted, would be invalid as it would contravene the Charter and other provisions of the Self-Government Act. Section 431(a) of the Charter, D.C. Code, tit. 11, app., at 438, vests the Superior Court with jurisidiction over all civil actions. D.C. Code § 11-921(a)(3)(A)(vi) (1973), enacted by the Court Reorganization Act, vests that court, as part of its civil jurisdiction, with authority over quo warranto actions. The Council is explicitly prohibited from enacting any legislation with respect to this section or any other section of title 11 of the D.C. Code under § 602(a)(4) of the Act, D.C. Code § 1-147(a)(4). Moreover, § 718(a) of the Act, D.C. Code tit. 11, app., at 443, continues the District of Columbia courts as established under the Court Reorganization Act. Only Congress can so alter the jurisidiction of the Superior Court.

122. Recently, however, congressional legislation was introduced which would amend the Charter to grant the Council the enclusive authority over the qualifications of its members. H.R. 10671, 95th Cong. 2d Sess. (1978), introduced February 1, 1978, by Representative Charles C. Diggs, Jr., would, *inter alia*, amend the forfeiture provision in § 402 of the Charter, D.C. Code § 1-142, to give the Council the authority, with the concurrence of two-thirds of its total membership, to expel any member who fails to maintain the qualifications of office provided by that section, and, in the case of the Chairman, by § 403(c), D.C. Code § 1-143(c). The bill would also amend the latter section to permit the Chairman of the Council to engage in occasional teaching, writing, or lecturing, as defined by the Council by regulation. However, both the Mayor and the Chairman of the Council opposed these parts of the bill in the hearings held March 16, 1978.

123. Self-Government Act § 433(a), D.C. Code tit. 11, app., at 440.

124. *Id.* § 434, D.C. Code, tit. 11, app., at 441-42.

automatically reappointed for an additional fifteen year term.[125] It is significant that the whole of part C of the Charter, which contains the provisions concerning the judicial branch, unlike parts A and B, which concern the legislative and executive branches, respectively, is not subject to amendment by the people pursuant to the Charter amendment procedure,[126] but may only be changed by act of Congress. Moreover, the Council is expressly prohibited from enacting any legislation "with respect to any provision of title 11 of the District of Columbia Code (relating to the organization and jurisdiction of the District of Columbia courts)."[127] To allay any doubt as to the status of the courts, the Self-Government Act further provides that they "shall continue as provided under the District of Columbia Court Reorganization Act of 1970 . . . ."[128] Congress, having recently enacted a comprehensive reform of the local court system, did not desire to subject it to further change by the Council.[129] Finally, to assure the fiscal independence of the courts, the Charter provides that the budget of the judiciary is not subject to revision by the Council or the Mayor.[130]

The most serious attempt by the Council to encroach upon the province of the District of Columbia courts was its enactment of the District of Columbia Shop-Book Rule Act in early 1976.[131] The Act was designed to fill a void in the rules governing the admissibility of evidence in the Superior Court caused by the repeal of the federal "Shop-Book Rule" Act,[132] which applied to the Superior Court, as well as other article I courts, and the federal judiciary. That statute provided an exception to the hearsay rule for records kept in the ordinary course of business. The federal Act was repealed in conjunction with the enactment of the Federal Rules of Evidence,[133] which included a provision—Rule 803(6)—superseding the federal "Shop-Book Rule" Act. However, the Federal Rules of Evidence, unlike the repealed federal Act, did not apply, by their own terms, to the Superior Court.[134]

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125. *Id.* § 433(c), D.C. Code, tit. 11, app., at 441. *See* Part IV-B *infra*.
126. *Id*, § 303(a), D.C. Code § 1-125(a).
127. *Id.* § 602(a)(4), D.C. Code § 1-147(a)(4).
128. *Id.* § 718, D.C. Code, tit. 11, app., at 443.
129. *See* STAFF OF THE HOUSE COMM. ON THE DISTRICT OF COLUMBIA, HOME RULE FOR THE DISTRICT OF COLUMBIA 1973 - 1974, 93d Cong., 2d Sess. 1074, 1097-98 (Comm. Print 1974) (markup by full Committee of H.R. 9056, July 24, 1973, remarks of Rep. Adams).
130. Self-Government Act § 445, D.C. Code, tit. 11, app. at 443.
131. Act No. 1-88, 22 D.C. Reg. 4551 (1976).
132. 28 U.S.C. § 1732(a) (1970).
133. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 2(b), 88 Stat. 1926, 1949 (1975).
134. FED. R. EVID. 1101(a).

There was little disagreement about the desirability of retaining a "shop-book rule" for the Superior Court. The controversy arose over the means by which the void would be filled, or more precisely, whether it should be filled by the courts or the Council. In anticipation of the repeal of the federal "Shop-Book Rule" Act, which would coincide with the effective date of the Federal Rules of Evidence, July 1, 1975, the Superior Court, with the approval of the District of Columbia Court of Appeals, promulgated Superior Court Civil Rule 43-I and analogous rules in other divisions of the court,[135] which, in effect, reinstated the federal "Shop-Book Rule" Act in that court. The courts took this action pursuant to their power under D.C. Code section 11-946 (1973)[136] to modify federal procedural rules, which were initially made applicable to the Superior Court, and to promulgate other rules governing the business of the court. Such rules, of course, have the force and effect of law.[137]

The Council intended the proposed District of Columbia Shop-Book Rule Act[138] to accomplish exactly the same thing. This legislative solution, however, was opposed by both the executive and judicial branches of the District government as an infringement of the rulemaking authority of the courts in violation of the principle of separation of powers. The Corporation Counsel argued[139] that the power of the courts of the District of Columbia to promulgate rules of evidence had long been considered an essential element of the judicial power of such courts.[140] By vesting the judicial power of the District in the Superior Court and District of Columbia Court of Appeals[141] and by continuing them as established under the Court Reorganization Act,[142] Congress had intended to assure the inviolability of this element of the courts' authority. The

135. SMALL CLAIMS R. 2, DOMESTIC RELATIONS R. 43-I, CRIMINAL R. 57(a), TAX DIV. R. 11(a), JUVENILE R. 114, INTRAFAMILY R. 1, NEGLECT R. 1, MENTAL HEALTH R. 4(a)(1), and MENTAL RETARDATION R. 12(g).

136. This section, as the remainder of title 11 of the D.C. Code, was enacted by the District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, tit. I, 84 Stat. 475 (1970) [hereinafter referred to as the Court Reorganization Act].

137. *See* In re C.A.P., 356 A.2d 335, 343 (D.C. 1976); Campbell v. United States, 295 A.2d 498, 501 (D.C. 1972).

138. Bill No. 1-137, 21 D.C. Reg. 3694 (1975), introduced June 17, 1975, by Council member Clarke.

139. *See* Unpublished Opinion of the Corp. Counsel re Bill 1-137, the D.C. Shop-Book Rule Act (Dec. 19, 1975).

140. *Id.* (citing Griffen v. United States, 336 U.S. 704, 716-17 (1949); Fisher v. United States, 328 U.S. 463, 476-77 (1946); and Cropley v. Volger, 2 App. D.C. 34 (D.C. Cir. 1893)).

141. Self-Government Act § 431(a), D.C. Code tit. 11, app., at 438.

142. *Id.* § 718(a), D.C. Code, tit. 11, app., at 443. *See* D.C. Code §§ 11-101, -701, -901 (1973).

Corporation Counsel also noted that the Council was expressly prohibited[143] from enacting legislation with respect to D.C. Code section 11-946 (1973), the source of the courts' rulemaking authority. He concluded that the power of the Council with respect to the District of Columbia courts under the Self-Government Act was miniscule in comparison with the authority of Congress over the federal judiciary under the Constitution,[144] and that the proposed act exceeded the Council's authority.

Although passed by the Council on December 16, 1975, the bill was vetoed by the Mayor on January 7, 1976 on the grounds that it exceeded the Council's authority and that it would be superfluous in light of the action of the courts.[145] The Council, however, overrode the Mayor's veto, and, pursuant to the Charter, the Act was transmitted to the President for a decision whether the veto would stand.[146] Noting that the promulgation of this procedural rule was clearly within the express power of the local courts, and, as such beyond the power of the Council, President Ford sustained the Mayor's veto.[147] This was the first and, thus far, the only time that a President has exercised his authority to sustain the Mayor's overridden veto.

The President's action temporarily ended the controversy over the respective roles of the legislative and judicial branches of the District government in the promulgation of rules of evidence and other procedural rules. A number of popular bills which contained provisions imposing rules of evidence on the Superior Court died.[148] The controversy, however, has not ended as members of the Council continue to introduce legislation imposing rules of evidence upon the District of Columbia courts. For example, the proposed Medical Records Act of 1977[149] would

143. *Id.* § 602(a)(4), D.C. Code § 1-147(a)(4).

144. The Council's authority over rules of court is more akin to the authority of the New Jersey legislature defined in Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950), where the court held that the state constitution provision that "[t]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts" ousted the power of the state legislature over rules of court. *Id.* at 414. *Accord*, Burton v. Mayer, 274 Ky. 263, 118 S.W.2d 547 (1938); Lee v. Baird, 146 N.C. 361, 59 S.E. 876 (1907).

145. Unpublished veto message of the Mayor (Jan. 7, 1976).

146. *See* Self-Government Act § 404(e), D.C. Code § 1-144(e).

147. The President's Message to the Chairman of the Council on His Disapproval of the D.C. Shop-Book Rule Act, 12 WEEKLY COMP. OF PRES. DOC. 301 (Feb. 27, 1976).

148. The Medical Records Act of 1975, Bill No. 1-149, 21 D.C. Reg. 4397 (1975) (Council member Shackleton); the D.C. Psychiatric Confidentiality Act, Bill No. 1-172, 22 D.C. Reg. 771 (1975) (Council member Shackleton); the Prior Sexual Conduct Evidence Act of 1975, Bill No. 1-214, 22 D.C. Reg. 3011 (1975) (Council member Hobson and six cosponsors).

149. Bill No. 2-233, 24 D.C. Reg. 3791 (1977).

render any "secondary medical record"[150] inadmissible as evidence in any proceeding by the courts of the District of Columbia.

The line between the rulemaking power of the courts and the legislative power of the Council was clarified somewhat by the decision of the District of Columbia Court of Appeals in *In re C.A.P.*,[151] rendered soon after the President's disapproval of the District of Columbia Shop-Book Rule Act. The court held that Superior Court Neglect Rule 18(c), which authorized, in certain circumstances, the termination of parental rights in a child neglect case, was without statutory basis[152] and beyond the inherent authority of the Superior Court.[153] The court of appeals reasoned that the termination of parental rights abridged the substantive right to conceive and raise one's children,[154] and, thus, could not be effected under the Superior Court's general authority to promulgate rules of procedure. Partially in response to this decision, the Council enacted the Prevention of Child Abuse and Neglect Act of 1977,[155] which supplied the legislative basis for the authority of the Family Division of the Superior Court to terminate parental rights pursuant to Superior Court Neglect Rule 18(c).[156]

In sum, it appears that the District of Columbia courts possess the exclusive power to promulgate rules of procedure governing the business of the courts, while only the Council possesses the authority to enact rules that affect substantive rights. The line between substantive rights and procedural rules, however, is still unclear. Further judicial decisions will be required to define the parameters of each sphere of authority.

IV. The Judiciary v. The Executive

In contrast to the frequent tension between the legislative and executive branches of the District government, relations between the executive and the judiciary have been extremely placid. Nevertheless, two matters have brought these branches briefly into conflict. The first

150. The term "secondary medical record" as distinguished from "primary medical record" is defined in the bill to include records "used to study morbidity and mortality" by certain governmental agencies or medical entities and records "used for professional training, supervision or discipline" of practitioners.

151. 356 A.2d 335 (D.C. 1976).

152. The statutory provisions relating to proceedings before the Family Division of the Superior Court are found in D.C. Code §§ 16-2301 to 2337 (1973).

153. Local rules with federal analogues that differ from the federal rules must be approved by the D.C. Court of Appeals, but ones governing areas where the federal rules are silent may be promulgated by the Superior Court alone. *See* D.C. Code § 11-946 (1973).

154. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 651 (1972).

155. D.C. Law No. 2-22, 24 D.C. Reg. 3341 (1977) (eff. Sept. 23, 1977).

156. *Id.* § 407(c), 24 D.C. Reg. at 774 (1977) (amending D.C. Code § 16-2320(a) (1973)).

involved the authority of a Superior Court judge over the Corporation Counsel, and the second involved the authority of the District of Columbia Commission on Judicial Disabilities and Tenure over a Superior Court judge.

A. Judicial Authority to Require Executive Representation of Private Litigants

The dispute which resulted in charges of judicial encroachment on the province of the executive arose over the authority of a Superior Court judge to order the Corporation Counsel to represent a private parental petitioner in a proceeding for the involuntary commitment of a mentally ill adult in the case of *District of Columbia v. Pryor*.[157] The applicable statute[158] requires a parent desiring the involuntary commitment of an adult child to petition the Commission on Mental Health, which acts as a special master for the Superior Court. After accepting the case, the Commission holds a hearing and makes findings, recommendations, and conclusions of law, which it reports to the Superior Court. A person whose commitment is sought has a right to counsel in any proceeding before the Commission or the Superior Court. There is no provision in current law, however, for the representation of the petitioner himself. Prior law provided for such representation by the Corporation Counsel, but this provision was repealed and is not in the present statute.[159]

Nevertheless, a Superior Court judge ordered the Corporation Counsel to represent the parental petitioners in two cases before the Superior Court in which the Commission on Mental Health had recommended civil commitment. After the court denied the District's motion to vacate the appointments, the District petitioned the District of Columbia Court of Appeals for a writ of prohibition, or in the alternative, for a writ of mandamus against the trial judge on the ground that the Superior Court was without authority to make the appointments. The court of appeals agreed and held that a Superior Court judge had no inherent discretionary authority to appoint the Corporation Counsel to represent private parties in such cases. Citing the statutory basis of the Corporation Counsel's responsibilities,[160] the court made the following observations:

> Subservience to the chief executive officer of the District government is the major thesis of this provision. To accept or create

157. 366 A.2d 141 (D.C. 1976).
158. D.C. Code § 21-541 (1973).
159. D.C. Code § 21-312 (1961).
160. D.C. Code § 1-301 (1973).

> an additional obligation to obey a court order to undertake representation of private citizens in mental health cases would not only be antithetical to the statute, but also would be contrary to the separation of powers concept so solidly ingrained in our governmental system. That one in public office is also a member of the Bar can be of no significance, for the two roles cannot be deemed separate and the order of appointment cannot be based on professional association as paramount to official responsibility and authority.[161]

Thus, this conflict between the judicial and executive branches was amicably resolved.

B. Interference with Judicial Independence: The Powers of the Tenure Commission

The issue of executive interference with judicial independence arose in an unusual context in the case of *Halleck v. Berliner*.[162] The alleged encroachment was not by the executive branch of the District government, but by the independent District of Columbia Commission on Judicial Disabilities and Tenure and the executive branch of the federal government. The District executive, however, was involved in the case as legal representative of the Commission.

The Tenure Commission, established by the Court Reorganization Act[163] and continued by the Self-Government Act,[164] consists of seven members; two appointed by the Mayor and two by the local Bar, and one each by the President, the Council, and the Chief Judge of the United States District Court for the District of Columbia.[165] It possesses two distinct powers—the power to remove, suspend, or retire a judge of of the District of Columbia courts for disability, malfeasance, or other conduct prejudicial to the administration of justice,[166] and the power, added by the Self-Government Act, to determine whether a sitting judge seeking another term shall be reappointed.[167] Pursuant to its reappointment power, the Commission routinely evaluates each sitting judge shortly before his term expires, based on information received in confidence from the Bar and the public, and rates the judge as exceptionally well qualified, well qualified, qualified, or unqualified. Either of the first

161. 366 A.2d at 143 (citation omitted).
162. 427 F. Supp. 1225 (D.D.C. 1977).
163. D.C. Code § 11-1521 (1973).
164. Self-Government Act § 718(a), D.C. Code, tit. 11, app., at 443.
165. *Id.* § 431(e)(3), D.C. Code, tit. 11, app., at 439.
166. *Id.* § 432, D.C. Code, tit. 11, app., at 439-40.
167. *Id.* § 433(c), D.C. Code, tit. 11, app., at 441.

two ratings results in his automatic reappointment. A rating of "qualified" does not assure reappointment, but gives the President the option, with the advice and consent of the Senate, to reappoint the judge—the same procedure that was followed prior to home rule. A rating of "unqualified" precludes reappointment.

The first judge to be evaluated by the Tenure Commission under its new authority was Charles W. Halleck of the Superior Court, who had been appointed by President Johnson for a ten-year term expiring October 20, 1975. He received a rating of "qualified," leaving his reappointment to the President's discretion. President Ford nominated him for another term, and the Senate District of Columbia Committee reported the nomination to the full Senate. However, the Senate took no action prior to its adjournment sine die on October 1, 1976, necessitating the return of the nomination to the President.[168] Though his term had expired, Judge Halleck continued serving as a hold-over judge.[169] While Judge Halleck's nomination was pending in the Senate, the Tenure Commission, pursuant to its removal power, initiated an investigation to determine whether grounds existed for disciplinary action and served him with a Notice of Formal Proceeding based on allegations of "conduct prejudicial to the administration of justice" as defined by the Code of Judicial Conduct of the American Bar Association.[170] On the eve of the date set for the hearing on these charges, Judge Halleck filed suit in the United States District Court for the District of Columbia to enjoin the Commission from holding the hearing and for a declaratory judgment that the removal and reappointment powers of the Commission were unconsitutional encroachments on the independence of the judiciary. In addition, he contended that the Commission was unduly influenced by an "institutionalized effort" by the United States Attorney's Office for the District of Columbia to prevent his reappointment, and that this constituted an impermissible encroachment by the federal executive on the District judiciary.

The Tenure Commission, represented by the Corporation Counsel, responded that Congress, given its plenary power over the District under article I, section 8, clause 17, of the Constitution,[171] was not compelled to grant to an article I judge of the District of Columbia courts tenure equal to that given by the Constitution to an article III judge. It noted that the

168. Standing Rules of the Senate, Rule XXXVIII(6), Senate Manual, 94th Cong., 1st Sess. (1975).

169. *See* D.C. Code § 11-1502 (1973).

170. Adopted for the District of Columbia courts by the Joint Committee on Judicial Administration. *See* D.C. Code 11-1701(a) (1973); District of Columbia Courts, Annual Report 8 (1973).

171. *See* Palmore v. United States, 411 U.S. 389 (1973).

drafters of the Court Reorganization and Self-Government Acts considered the Commission's possession of these powers to enhance, rather than diminish, judicial independence. The power of removal assured a high standard of conduct in the District judiciary, raising it beyond reproach,[172] and the power of reappointment assured that the tenure of a well qualified judge would be removed from the political process.[173]

The court[174] rejected Judge Halleck's arguments and held that the principle of separation of powers was not offended by a statutory scheme which allocated to an independent agency functions that had previously been exercised not by the judiciary, but by the President and Senate.[175] Furthermore, the court rejected the charge of undue influence by the United States Attorney's Office as not supported by the evidence.[176] *Halleck v. Berliner* settled the authority of the Tenure Commission over the judicial branch of the District government. The instant controversy was laid to rest when President Carter decided not to reappoint Judge Halleck.

V. CONCLUSION

The experiences of the District of Columbia government during the first three years of home rule demonstrate the need for, and continued vitality of, the principle of separation of powers. During this period, each of the three branches was involved in at least one serious dispute over the proper boundaries of its powers with each of the other branches. True to the fears of the drafters of the Constitution, the legislative branch has adopted the most expansive definition of its powers. Its frequent attempts to extend its sphere of activity and absorb the powers of the other branches have been directed principally at the executive branch and unfortunately, many of the conflicts precipitated by these encroachments on the executive, in contrast to other disputes between the branches, remain unresolved. However despite the tension and uncertainty engendered by these experiences, they have reaffirmed the key role of the separation of governmental powers and its corollary system of checks and balances in assuring the stability and vitality of the District of Columbia government.

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172. *See* S. REP. NO. 91-405, 91st Cong., 1st Sess. 11 (1969).

173. *See* 119 CONG. REC. 40315-16 (1973) (statement of Rep. Diggs on the Self-Government Act conference report).

174. Judge Roszel C. Thomsen, Senior District Judge of the District of Maryland, sitting by designation. The judges of the District Court of the District of Columbia had all recused themselves, probably because one of their associates, Judge Gerhard Gesell, was a member of the Tenure Commission.

175. 427 F. Supp. at 1234.

176. *Id.* at 1234-35.

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The Future of District of Columbia Home Rule

Philip G. Schrag

ARTICLES

THE FUTURE OF DISTRICT OF COLUMBIA HOME RULE

*Philip G. Schrag**

For proponents of greater home rule for the District of Columbia, the situation has gone from bad to worse. From 1961 to 1978, the District's more than 600,000 residents[1] gained both a greater role in national governance and greater opportunities for self-governance with respect to local matters.[2] But over the last twelve years, the goal of equal citizenship with other Americans has seemingly receded. Congress overturned two laws passed by the Council of the District of Columbia, the local legislature.[3] Congress also made extensive use of policy riders to District of Columbia appropriations to legislate indirectly for the District.[4] In addition, the states failed to ratify a constitutional amendment proposed in Congress that would have given the District voting representation in both Houses of Congress.[5]

This Article begins by briefly reviewing the recent historical development of home rule. Next, it explores the ways in which the people of the District

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1. As of the most recent count, the District had 622,000 residents. THE WORLD ALMANAC 540 (M. Hoffman ed. 1989). Its population exceeds the populations of Alaska, Vermont, and Wyoming. *Id.*

2. Obtaining a more significant voice in national affairs and more autonomy in local affairs can be perceived as either a single issue or as two related issues. As this Article demonstrates, either Congress or the people (through a constitutional amendment) could possibly address either of these problems without the other. However, home rule advocates tend to see the District's lack of voting representation in Congress and its limited home rule as two facets of a colonial status that can best be addressed through the single remedy of statehood. *See, e.g., New Columbia: 51st State of the Union* (D.C. Statehood Commission videotape, 1989).

3. *See infra* notes 15, 136-37 and accompanying text.

4. *See generally infra Appendix.*

5. *Time Runs Out for District of Columbia Proposal,* N.Y. Times, Aug. 22, 1985, at B13, col. 4 [hereinafter *Time Runs Out*].

might obtain a greater voice in the national legislature and more genuine home rule. Finally, it suggests that the District's citizens may have to make a political choice, which they have until now avoided, between seeking gradual improvements in their political rights and pressing strongly for statehood.

I. THE RECENT HISTORY OF HOME RULE

Although the District of Columbia enjoyed a brief period of limited home rule for three years after the Civil War,[6] the modern history of home rule began only in the 1950's, when large numbers of Americans started to recognize the injustice of completely excluding the District's population from participation in all political life.[7] In 1961, the twenty-third amendment to the United States Constitution gave the District's residents the power to participate in presidential elections.[8] In 1967, President Lyndon Johnson reorganized the District's Government and created the District of Columbia Council, comprised of appointed members, to legislate for the District.[9] Consequently, Congress ceased to function as the District's Council. In 1973, the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act or Act)[10] provided for an elected legislature for the District[11] while reserving to Congress several important legislative

6. From 1871 to 1874, the District had a bicameral legislature. The President of the United States appointed members of the upper body, but the District's residents popularly elected the lower body. L. SCHMECKEBIER, THE DISTRICT OF COLUMBIA: ITS GOVERNMENT AND ADMINISTRATION 31 (1928). After a scandal in the early 1870's, Congress revoked home rule and governed the District directly. S. SMITH, CAPTIVE CAPITAL — COLONIAL LIFE IN MODERN WASHINGTON 146 (1974).

7. The best history of the District is found in a two-volume set: C. GREEN, WASHINGTON, CAPITAL CITY, 1879-1950 (1963); C. GREEN, WASHINGTON, VILLAGE AND CAPITAL, 1800-1878 (1962).

8. U.S. CONST. amend. XXIII.

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:
>
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.

Id. § 1.

9. Reorganization Plan No. 3 of 1967, 32 Fed. Reg. 11,669, *reprinted in* 1 D.C. CODE ANN. 130 (1981) (Acts Relating to Establishment of District).

10. Pub. L. No. 93-198, 87 Stat. 774 (1973), *reprinted in* 1 D.C. CODE ANN. 175 (1981 & Cum. Supp. 1989) [hereinafter Home Rule Act].

11. *Id.* § 401 (codified as amended at D.C. CODE ANN. § 1-221 (1987)).

powers, including the power of final approval over the District's annual budget and the power to prevent local legislation from going into effect.[12] Then, in 1978, Congress sent to the states for ratification a constitutional amendment which would have given the District voting representation in both houses of Congress.[13]

The District, however, enjoyed only short-lived progress toward self-government. Indeed, 1978 proved to be the high water mark, to date, for the political rights of District residents. The state legislatures did not ratify the constitutional amendment within the congressionally specified seven-year period.[14] Furthermore, Congress began to disagree with the political judgments of the elected Council and increasingly used its reserved powers to regulate the District. For example, in 1981, Congress overturned the Council's major reform of the criminal laws defining and punishing sexual offenses.[15] Although this 1981 action involved the rare[16] use of Congress' expressly reserved power to stop local legislation from becoming effective,[17] Congress has frequently achieved an equal measure of control over District affairs by attaching conditions, colloquially known as "riders," to its annual approval of the District's budget.[18]

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12. *Id.* § 602(c) (codified as amended at D.C. CODE ANN. § 1-233(c) (1987)).

13. H.R. J. Res. 554, 92 Stat. 3795 (1978), *reprinted in* 1 D.C. CODE ANN. 357 (1981).

14. *See Time Runs Out, supra* note 5.

15. H.R. Res. 208, 97th Cong., 1st Sess., 127 CONG. REC. 22,752-79 (1981) (House of Representatives disapproval of the District of Columbia Sexual Assault Reform Act of 1981, D.C. Act 4-69).

16. Although in 1979 Congress overturned a District law that would have prevented foreign chanceries from being built in most residential neighborhoods, Congress has used its veto power only infrequently. *See* S. Con. Res. 63, 96th Cong., 1st Sess., 93 Stat. 1435 (1979); H.R. Con. Res. 228, 96th Cong., 1st Sess. (1979) (vacated by S. Con. Res. 63). Yet the existence of that power may routinely exert influence on the legislative decisions of the District's Council. For example, in 1989, the District of Columbia Council abandoned a controversial gun control bill though the Council had passed it on its first of two readings, after the ranking Republican on the House District Committee threatened to offer a resolution to overturn the law if the Council passed it. Abramowitz & Pianin, *D.C. Shelves Gun Law to Placate Hill,* Wash. Post, July 12, 1989, at A1, col. 5.

17. Home Rule Act, *supra* note 10, § 602(c) (codified as amended at D.C. CODE ANN. § 1-233(c) (1987)). Congress accomplished this particular exercise of power through a one-house veto, without presentation to the President, and therefore may have violated the separation of powers doctrine of Immigration & Naturalization Service v. Chadha, 462 U.S. 919 (1983). In 1984, however, Congress amended the Home Rule Act to make the procedure for blocking District legislation consistent with *Chadha* and at the same time, provided that "[a]ny previous Act of the Council of the District of Columbia which has been disapproved by the Congress pursuant to [the old provisions of the Home Rule Act] is hereby deemed null and void." Act of Oct. 12, 1984, Pub. L. No. 98-473, § 131(d)-(l), 98 Stat. 1974, 1974-75 (codified at D.C. CODE ANN. § 1-233(c) (1987)).

18. *See infra Appendix.*

Since 1975, Congress has used riders to impose more than seventy-five types of restrictions on the District.[19] Although riders are usually tied to annual appropriations,[20] Congress has often imposed the restrictions in several consecutive years. For example, despite the principle of home rule, from Fiscal Year (FY) 1975 through 1986, Congress used a budget rider to prevent the District from initiating a program to install meters in taxicabs.[21] In FY 1975, Congress used a rider to prohibit the use of the swimming pool at Woodrow Wilson High School after 9 p.m.[22] In FY 1987, it barred the University of the District of Columbia from acquiring the assets of the now defunct Antioch School of Law without prior approval of the District's Council.[23] From FY 1987 through 1989, Congress required the District to establish a free telephone hotline so that people living near Lorton Prison could promptly learn about any disturbances at the prison.[24]

Further, Congress has shown particular interest in the regulation of morality. By legislating for the District, members of Congress can take a highly visible stand without actually restricting the activities of any voters in their home districts. In particular, they can win the approval of their conservative

19. A chart describing the principal restrictions and their statutory sources is included as an Appendix, *infra.*

20. The Continuing Resolution which appropriated funds for Fiscal Year (FY)1985 provided a new procedural system for congressional review and possible preclusion of District legislation and provided that the new system was to be effective "without limitation as to fiscal year." Act of Oct. 12, 1984, Pub. L. No. 98-473, § 131(n), 98 Stat. 1837, 1974-76.

21. *See* District of Columbia Appropriation Act, 1975, Pub. L. No. 93-405, 88 Stat. 822, 827 (1974) (1975 Appropriation); District of Columbia Appropriation Act, 1976, Pub. L. No. 94-333, 90 Stat. 785, 791 (1975) (1976 Appropriation); District of Columbia Appropriation Act, 1977, Pub. L. No. 94-446, 90 Stat. 1490, 1494 (1976) (1977 Appropriation); District of Columbia Appropriation Act, 1978, Pub. L. No. 95-28, 92 Stat. 281, 287 (1977) (1978 Appropriation); District of Columbia Appropriation Act, 1979, Pub. L. No. 95-373, 92 Stat. 699, 704 (1978) (1979 Appropriation); District of Columbia Appropriation Act, 1980, Pub. L. No. 96-93, 93 Stat. 713, 717 (1979) (1980 Appropriation); District of Columbia Appropriation Act, 1981, Pub. L. No. 96-530, 94 Stat. 3121, 3126 (1980) (1981 Appropriation); District of Columbia Appropriation Act, 1982, Pub. L. No. 97-91, 95 Stat. 1173, 1180 (1981) (1982 Appropriation); District of Columbia Appropriation Act, 1983, Pub. L. No. 97-378, 96 Stat. 1925, 1931 (1982) (1983 Appropriation); District of Columbia Appropriation Act, 1984, Pub. L. No. 98-125, 97 Stat. 819, 825 (1983) (1984 Appropriation); Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,739 (1984)) (1985 Continuing Appropriations) (1985 Appropriation); Act of Dec. 19, 1985, Pub. L. No. 99-190, 99 Stat. 1185, 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,090 (1985) (1986 Continuing Appropriations) (1986 Appropriation).

22. 1975 Appropriation, 88 Stat. at 826.

23. Act of Oct. 30, 1986, Pub. L. No. 99-591, 100 Stat. 3341-180, 3341-184 (General Provisions § 101(d)) (1987 Appropriation).

24. 1987 Appropriation, 100 Stat. at 3341-183; District of Columbia Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-90, 1329-93 (1987) (1988 Appropriation); District of Columbia Appropriations, Act, 1989, Pub. L. No. 100-462, 102 Stat. 2269, 2269-3 (1988) (1989 Appropriation).

constituents without incurring as much wrath from their liberal constituents as they would attract if those constituents were themselves being regulated. Beginning in FY 1980, Congress barred the District from using federally appropriated funds to perform abortions, with three limited exceptions.[25] In 1981, Congress prevented the District from decriminalizing consensual, adult sodomy.[26] In FY 1982, Congress barred the District from advertising its lottery anywhere on the public transportation network, including stops and stations.[27]

Perhaps the greatest congressional backtracking on the 1973 promise of home rule came in a flurry of riders in the fall of 1988. In a single appropriations bill, Congress further restricted the availability of publicly-funded abortions in the District;[28] barred the District from requiring District employees to live in the District;[29] required the Council to repeal its law which prevented health and life insurance companies from requiring Acquired Immune Deficiency Syndrome (AIDS) testing as a condition of insurance;[30] and required the Council to amend the District of Columbia Human Rights Law to permit church-related educational institutions to discriminate against people who promote or condone homosexual acts or beliefs.[31]

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25. 1980 Appropriation, 93 Stat. at 719 (§ 220); 1981 Appropriation, 94 Stat. at 3127-28 (§ 118); 1982 Appropriation, 95 Stat. at 1181 (§ 118); 1983 Appropriation, 96 Stat. at 1933 (§ 118); 1984 Appropriation, 97 Stat. at 827 (§ 119); 1985 Appropriation, 98 Stat. 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,740 (1984) (§ 118)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. CONF. REP. NO. 419, 99th Cong., 1st Sess., *reprinted in* 131 CONG. REC. 34,784, 34,786 (1985)); 1987 Appropriation, 100 Stat. at 3341-190 (§ 117); 1988 Appropriation, 101 Stat. at 1329-99 (§ 117); 1989 Appropriation, 102 Stat. at 2269-9 (§ 117). The exceptions were for abortions to save the mother's life and in cases of promptly reported rape and incest. 1980 Appropriation, 93 Stat. at 719 (§ 220) (the exceptions remained identical in each subsequent appropriation through 1989). In FY 1989, Congress also barred the District from using its own tax revenues to perform abortions and eliminated the exceptions for rape and incest. 1989 Appropriation, 102 Stat. at 2269-9.

26. H.R. Res. 208, 97th Cong. 1st Sess., 127 CONG. REC. 22,752 (1981) (one-house veto).

27. 1982 Appropriation, 95 Stat. at 1175.

28. 1989 Appropriation, 102 Stat. at 2269-9; *see also supra* note 25.

29. 1989 Appropriation, 102 Stat. at 2269-13.

30. *Id.*

31. *Id.* at 2269-14. Unlike the other riders, which applied only to the year for which Congress appropriated funds (and which therefore at least theoretically enabled their opponents to renew the political battle in Congress the following year), this rider stopped all District expenditures unless the Council amended its law as Congress required, an amendment that would have a permanent effect. The peculiar format in which Congress passed this rider — a funding cutoff unless the Council amended local law — resulted from the fact that an attempt to change the human rights law on the floor of Congress as part of an *appropriations* bill would have been subject to a point of order in either House. However, this very device, forcing the Council to pass a law rather than directly legislating for the District, raised constitutional questions, and indeed, the United States Court of Appeals for the District of Columbia Circuit declared it unconstitutional. Clarke v. United States, 886 F.2d 404, 417 (D.C. Cir.

As if to prove that Congress could render the District even less autonomous, early in 1989 Congressman Bruce Morrison observed "a minor movement . . . toward greater Congressional control" of District affairs.[32] A subsequent wave of drug-related murders led Senator Warren Rudman to suggest federalizing the District's police force[33] and led President George Bush to speculate that he might have to call on troops to keep order.[34] The threat to cut back the District's already limited home rule was so effective that, in the summer of 1989, members of the District's Council withdrew their support from a gun control law opposed by the National Rifle Association as a result of "warnings that the bill could needlessly antagonize Congress at a time of fragile support for home rule."[35] Later in 1989, President Bush showed that he could exceed Congress' regulation of morality for the District: When Congress passed the District's FY 1990 appropriation bill without repeating the FY 1989 ban on the use of the District's local revenues for abortion, he vetoed the bill on that basis.[36]

These are disheartening developments for District residents who have voted[37] for measures that would lead to statehood, a political status that would bring with it the same local autonomy that other states enjoy as well as equal participation with other states in national legislative policy.[38]

1989). The *Clarke* decision is analyzed in Seidman, *The Preconditions for Home Rule,* 39 CATH. U.L. REV. 371, 377-403 (1990). In the FY 1990 appropriation bill, Congress directly amended the District's human rights law, eliminating the issue on which the court had ruled. District of Columbia Appropriations Act, 1990, Pub. L. No. 101-168, 103 Stat. 1267, 1284 (1989) (1990 Appropriation); *see* Abramowitz, *House Votes to Limit D.C. Law on Gays,* Wash. Post, Oct. 12, 1989, at B4, col. 4. No point of order was raised because the provision was first attached in the Senate, whose Parliamentarian advised members that it was germane to language in the House-passed bill providing funds for higher education. *See infra* notes 126, 137.

32. May, *Rumblings Rise Anew on Status of Capital,* N.Y. Times, Jan. 11, 1989, at B6, col. 1.

33. *See* Pianin & Sherwood, *Local Board of Trade Rebukes D.C. on Crime,* Wash. Post, Mar. 21, 1989, at A1, col. 5; *see also* Dionne, *Crime in Capital Fuels Assault on Home Rule,* N.Y. Times, Mar. 24, 1989, at A12, col. 1.

34. Weinraub, *Bush Considers Calling in Guard to Fight Drug Violence in Capital,* N.Y. Times, Mar. 21, 1989, at A1, col. 4.

35. Abramowitz & Pianin, *supra* note 16.

36. Abramowitz, *Bush Vetoes Funding Bill for District,* Wash. Post, Oct. 28, 1989, at A1, col. 6. Senator Gordon Humphrey defended the veto in terms reminiscent of the days before limited home rule for the District: "We are in effect the legislature for the District of Columbia." *Id.* at A6, col. 2.

37. The District's voters supported statehood by enacting an initiative creating a Statehood Constitutional Convention to write a state constitution to be presented to Congress as part of a statehood petition. Statehood Constitutional Convention Initiative, D.C. CODE ANN. §§ 1-111 to -118 (1987). *See generally* P. SCHRAG, BEHIND THE SCENES: THE POLITICS OF A CONSTITUTIONAL CONVENTION (1985) (history of the Statehood Constitutional Convention).

38. States must all be admitted to the Union on an "equal footing"; Congress could not give the District statehood without affording it or its citizens the same political rights as those

II. OPTIONS FOR CHANGE

What is to be done? In 1983, the District applied to Congress for admission to the Union as a state and has continually pressed its statehood petition.[39] These efforts have not gone utterly unnoticed: the House District Committee favorably reported a statehood admission bill in 1987,[40] and the National Democratic Party endorsed District of Columbia Statehood in its platform of 1988.[41] However, the 1987 statehood admission bill was never voted on in the House and has never had a hearing in the Senate. Furthermore, while President Bush, to whom Congress would have to present the Act of Admission for signature, has expressed considerable interest in statehood for Puerto Rico, he has not shown parallel concern for self-determination in the Nation's Capital.[42]

Therefore, to assess whether the District should properly focus all of its efforts for increased political liberties on the campaign to pass statehood legislation, one must examine not only the prospects for statehood, but also other ways in which the political rights of the District's residents could be enhanced.[43] This Article considers retrocession of the District to Maryland,

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enjoyed by citizens of other states. Coyle v. Smith, 221 U.S. 559, 567 (1911). *But see* Seidman, *supra* note 31, at 403-09 (arguing that politically and constitutionally, Congress could continue to treat the residents of the new District differently, even if statehood were achieved).

39. W. FAUNTROY, IF YOU FAVOR FREEDOM, *reprinted in D.C. Statehood, Part 1: Hearings and Markups on H.R. 51 Before the Subcomm. on Fiscal Affairs and Health of the House Comm. on the District of Columbia,* 100th Cong., 1st Sess. 561, 585 (1987) (Mayor of the District of Columbia transmitted petition for statehood on September 9, 1983); *see also D.C. Statehood, Part 1: Hearings and Markups on H.R. 51 Before the Subcomm. on Fiscal Affairs and Health of the House Comm. on the District of Columbia,* 100th Cong., 1st Sess. 233-52 (1987) (testimony by Mayor Barry in support of statehood) [hereinafter *D.C. Statehood Hearings Part 1*].

40. The Committee voted six to five, one Democrat joining the Republican minority. HOUSE COMM. ON THE DISTRICT OF COLUMBIA, NEW COLUMBIA ADMISSION ACT, H.R. REP. NO. 305, 100th Cong., 1st Sess. 30 (1987).

41. 1988 DEMOCRATIC PLATFORM COMM., THE 1988 DEMOCRATIC NATIONAL PLATFORM 5 (1988).

42. *See* Address of President George Bush to Joint Session of Congress, 135 CONG. REC. H268 (daily ed. Feb. 9, 1989) (indicating support for Puerto Rican referendum, which would include a statehood option). President Bush recently declared himself "unsympathetic" to District of Columbia statehood, but his view seems to be based at least in part on a misunderstanding. He told reporters that the District "should remain a Federal city" because "its funds come almost exclusively from the Federal Government." When the press later pointed out that only 14% of the District's budget is a federal subsidy, a White House spokesperson corrected the President's statement, saying that what he meant was that the District's budget includes "some" federal money. Devroy & Melton, *President Opposes Statehood*; D.C. Dependence on U.S. Aid Miscast, Wash. Post, Mar. 24, 1990, at A1, col. 1.

43. Members of Congress who would not vote for statehood might, nevertheless, support other reforms. They may find the present political arrangement unsatisfactory, either because they recognize the injustice of not permitting District residents to vote in federal elections or

the formation of a new political entity, and the piecemeal accumulation of greater political liberty. Then this Article briefly considers statehood itself, because although Congress seems unready to support statehood at the present time, District residents should nevertheless probably continue to petition for it. Increased commitment from the District itself could eventually produce a change in congressional views on statehood.

A. Retrocession

Some suggest[44] that retrocession of the District of Columbia to the State of Maryland, which, in 1788, ceded the land that is presently the District,[45] would properly dispose of the District. The advocates of retrocession assert that Congress could simply give Maryland back either the remainder of the District[46] or the entire residential portion, leaving as unique federal land the Capitol, White House, and Mall area. This proposal recently received unexpected political support when the Governor of Maryland said that he "would have no trouble with D.C. becoming part of Maryland."[47] Three

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because it is embarrassing internationally for American legislators to trumpet the advantages of democracy while not permitting those who inhabit our nation's capital to vote. By more than a two-thirds vote in each House, Congress did propose a constitutional amendment a decade ago that would have given the District voting representation in both Houses of Congress. 1 D.C. CODE ANN. 357 (1981). Of course, members of Congress may have voted for the amendment cynically, expecting the state legislatures to refuse to ratify it.

In addition, some members might like to give the District more genuine legislative home rule because they would prefer not to have to vote on controversial local legislation for the District. If forced by congressional procedures to cast votes on such matters as local abortion practices and homosexual rights, the need to placate single-issue voters in their home districts may conflict with their better judgment as well as their sense of the propriety of municipal self-government. While undoubtedly some members of Congress benefit politically in being able to express their public morality without affecting their constituents, others might prefer not to take stands unnecessarily on highly emotional issues. Delegating more power to a local legislature would meet their needs, even though they or their constituents would not now support statehood.

44. *See, e.g.*, J. BEST, NATIONAL REPRESENTATION FOR THE DISTRICT OF COLUMBIA 77-83 (1984); May, *supra* note 32. Testifying on D.C. Statehood on behalf of the Department of Justice and claiming that the United States Constitution would require the consent of Maryland before the District became a state, Assistant Attorney General Stephen J. Markman noted that rather than accede to statehood for the District, "Maryland might wish to retain the [D]istrict as it is entitled to do under the Constitution, returning to its original borders." *D.C. Statehood Hearings Part I, supra* note 39, at 341, 343. *See also* H.R. 4195, 101st Cong., 2d Sess, 136 CONG. REC. H646 (1990).

45. 2 Kilty Laws of Md. ch. 46 (1788), *reprinted in* 1 D.C. CODE ANN. 33 (1981).

46. In 1846, Congress retroceded the land that Virginia ceded to become part of the District of Columbia in the 18th century. *See* Phillips v. Payne, 92 U.S. 130, 131 (1876). The residents of Northern Virginia, who today live on land that once represented part of the District of Columbia, now enjoy the same liberties as citizens of all of the other states.

47. Baker, *Schaefer Invites the District to Reattach Itself to Maryland,* Wash. Post, Feb. 26, 1990, at A6, col. 1.

weeks later, Representative Ralph Regula introduced a retrocession bill in Congress.[48] Nevertheless, the prospects for retrocession appear substantially smaller than the chance of passing a District of Columbia statehood bill in Congress. First, the citizens of the District who have voted to move toward statehood[49] may not have much interest in retrocession to Maryland, particularly while any prospect of achieving statehood lingers.[50] Second, the governor cannot act unilaterally to enlarge his state; both politically and legally[51] he would have to obtain an act of the legislature. A recent survey of the Maryland House of Delegates and Senate, which asked the views of their members on retrocession, posed two questions. First, the survey asked whether, assuming Congress offered the District back to Maryland on the condition that Maryland assume responsibility for making up the approximately fourteen percent of the District's budget now provided by federal appropriations,[52] they would accept the District on that basis. Second, the survey relaxed the assumption about the federal payment and asked the same question on the presumption that Congress would continue to provide a subsidy (in recognition of protective and other services that the District supplied to the federal government) half as large as it now appropriates.

Forty-seven percent of the members of the House of Delegates and fifty-one percent of the Senators responded. Of those responding, eighty-two percent of the Delegates and ninety-two percent of the Senators replied that they would reject retrocession even if Congress continued to provide a subsidy at half the level that it would appropriate for a federally administered

48. H.R. 4195, 101st Cong., 2d Sess., 136 CONG. REC. H646 (1990).

49. *See supra* note 37.

50. Reverend Jesse Jackson responded to the Governor's suggestion by terming it a "Bantustan concept," that is, an enclave in a white state. Schneider & Melton, *Jackson Chides Schaefer for Offer to Annex District,* Wash. Post, Feb. 28, 1990, at B5, col. 5.

51. MD. CONST. art. III, § 46 (legislature has power to accept land from the United States). The Regula bill would also not make retrocession effective until the Maryland legislation had voted to accept it. H.R. 4195, § 7, 101st Cong., 2d Sess. (1990).

52. *See* OFFICE OF THE BUDGET, DISTRICT OF COLUMBIA, SERVING THE PEOPLE, MEETING THE CHALLENGE: FISCAL YEAR 1991 OPERATING BUDGET A-3 (federal funds made up 14% of the District's revenues in FY 1990). The percentage of District revenue contributed by the Federal Government has declined steadily in recent years, from 25.2% in FY 1981. HOUSE COMM. ON APPROPRIATIONS, DISTRICT OF COLUMBIA APPROPRIATIONS BILL, 1989, H.R. REP. NO. 680, 100th Cong., 2d Sess. 10 (1989).

seat of government.[53] Only one Senator and six Delegates out of the ninety-one legislators who responded were willing to take the District back.[54]

The comments that the legislators wrote on the questionnaire reveal more than the raw statistics. The survey provided the respondents with a space in which they could write any remarks, but it did not require them to do so. One Delegate wrote, "With all the problems associated with the District, I would not support any effort to return this territory to Maryland." Another said, "I would not want [Maryland] to accept the [District of Columbia] under any circumstances." A Republican Delegate said that Maryland was "tough enough for Republicans now - this would make political progress that much more difficult." Another Delegate explained that "[t]he State of Maryland has enough problems without accepting those of D.C." A Senator responded that "Maryland has a city with similar problems to [Washington] . . . high crime rates, high property tax rates, poor schools, high rates of drug use, high teenage pregnancy, a dwindling population, and [a] decaying manufacturing base. To accept another city with most of these problems would greatly strap state resources." Still other legislators responded more pointedly, such as the one who said, "[t]his sounds like a *bad dream*" or the Senator who sent his "THANKS, BUT NO THANKS! One would hope you had more important projects underway." Clearly, the proposal for retrocession to Maryland has little vitality.[55]

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53. The actual count was as follows:

House of Delegates		
Number of members		142
Number responding to survey		67
Number who would vote:		
a) Yes	6	
b) No	56	
c) Not sure or no answer	5	
Senate		
Number of members		47
Number responding to survey		24
Number who would vote:		
a) Yes	1	
b) No	22	
c) Not sure or no answer	1	

P. Schrag, Survey of the Maryland Legislature (1989) (unpublished survey).

54. *Id.*

55. In addition to possible objections from the District and from the legislature of Maryland, the possibility exists that the Governor of Maryland was not entirely serious or that he was more interested in blocking statehood than in annexing the District. First, Governor Schaefer must have known that the legislature did not favorably view retrocession, even if he had not performed a survey similar to the above one. Second, he made the statement not as a formal announcement of policy, but as a response to a reporter's question at a news conference

B. Other Combinations

In principle, the District could join a state other than Maryland. Any state desiring to annex the District could make an offer to Congress; the Constitution does not require contiguity of territory.[56] However, the political and economic barriers that make retrocession unlikely make annexation equally implausible.

Nonetheless, there are two plausible scenarios in which external incentives make union between the District and another state slightly more conceivable. The first involves Maryland. Imagine that Congress offered Maryland retrocession with the understanding that a negative response by Maryland to this right of first refusal would lead immediately to statehood for the District. Maryland might dislike statehood even more than it dislikes retrocession because the new state could impose a nonresident income tax on Maryland residents who work in Washington. The rate of this taxation, set by District legislators, even if no higher than the rate in effect for the District's own residents, could be considerably higher than that which an enlarged Maryland would impose on itself. Such an offer might cause at least the state legislators from the counties nearest to the District to become ardent retrocession advocates. On the other hand, those legislators represent only a minority of the residents in the State of Maryland, and they probably could not persuade their colleagues to accept retrocession so that the burden of supporting the District would fall equally on all the residents of Maryland.[57]

The other scenario posits a new state composed of the District and parts of two existing states: Montgomery and Prince George's Counties in Maryland, and the northern counties of Virginia. A state consisting of the Greater Washington metropolitan area makes sense both sociologically and economically. Sociologically, Washington shares more common interests with its surrounding suburbs than those suburbs do with the rest of their

called on another subject. Baker, *supra* note 47. Finally, a journalist noted that the Governor was "twinkling" as he spoke. *Id.*

56. The Upper Peninsula of Michigan and most of the Hawaiian Islands are parts of states separated from the main contiguous territories of those states by large bodies of water. More dramatically, the United States includes the State of Alaska, separated from the lower forty-eight contiguous states by the land mass of another country, Canada.

57. This is unlikely but not impossible, in view of the fact that if the new state did impose a nonresident income tax, voters from those counties would probably lobby powerfully for a credit against this tax on their Maryland income tax. This credit, if allowed by the Maryland State legislature, could generate a considerable revenue loss to Maryland. On the other hand, the majority could resist the political pressure and deny the credit, subjecting the commuters to taxation in two states.

states.[58] Economically, the tax base of the new state would be more substantial than that of the present District of Columbia. To create such a state, both Maryland and Virginia would have to consent to divestment of those metropolitan counties.[59] However, such action by the states is doubtful because those counties contribute significantly to their states' tax bases. Nevertheless, divestment is not utterly out of the question. Some legislators in both states believe that the counties nearest to Washington do not share the interests and values common to most other parts of the states.

C. The Piecemeal Approach

The third approach to greater political liberty envisions the District's leadership dividing the attributes of statehood into their component parts and seeking reform on a piecemeal basis. In principle, this approach offers two advantages. First, the members of Congress, who would have to grant each individual reform, may find it politically less threatening or less costly. Second, after a series of such reforms, the remaining gap between the political *status quo* and statehood would be reduced and would be easier to bridge than it presently appears. Yet this approach is problematic in that each reform might further reduce the political pressure on Congress to grant statehood, thus making that outcome progressively less likely.

At this juncture, there are six ways in which the District's residents have fewer political rights than their state resident counterparts:[60] voting representation in Congress, legislative autonomy, budget authority, judicial self-determination, control over criminal prosecution, and the ability to preserve or change the basic political system. Congress can reform most of these.

1. Voting Representation in Congress

Since 1970, the District has had a Delegate in the United States House of Representatives.[61] Congress permits this Delegate to vote in committees but

58. For example, the District of Columbia and its Maryland and Virginia suburbs share bus and rapid rail systems through a regional transportation agency, coordinate land planning through a regional planning agency, and cooperate in other areas of regional concern. Commenting on retrocession, the Governor of Maryland noted that "a lot of problems are spilling over into Montgomery and Prince George's County" and "there is somewhat of a barrier of what we [in Maryland] can do." Baker, *supra* note 47.

59. U.S. CONST. art. IV, § 3 ("no new State shall be formed . . . by the Junction of . . . Parts of States, without the Consent of the Legislatures of the States concerned").

60. Of course, United States citizens who reside in American territories and possessions have no greater political rights than those presently enjoyed by District residents.

61. District of Columbia Delegate Act, Pub. L. No. 91-405, 84 Stat. 848 (1970) (codified at 2 U.S.C. § 25a (1988) (also codified at D.C. CODE ANN. § 1-401 (1987)).

not on the floor.[62] The District has no representation at all in the United States Senate.

Having a Delegate in Congress is no small matter. The Delegate presents the views of District residents to members of the House. Further, the Delegate can vote in committee and even chair subcommittees,[63] and thus may engage in logrolling,[64] much as members of Congress do, obtaining advantages for the District in exchange for favorable consideration of bills that come through his or her committees.

Congress, however, restricts considerably the power of the District within its chambers by not allowing it a presence in the Senate and by not allowing its Delegate to vote on the House floor. Statehood would give the District a voting member of the House and two voting Senators.[65] The constitutional amendment that failed in 1985 would have accomplished the same result.[66] However, neither seems politically feasible in the near future.

Nevertheless, there are several available middle grounds. The District is now attempting to achieve some presence in the Senate by electing two "Senators" and a "Representative" who would appear on Capitol Hill and lobby

62. *Id. See, e.g., Commuter Tax: Hearings and Markup Before the Subcomm. on Fiscal Affairs of the House Comm. on the District of Columbia,* 94th Cong., 2d Sess. 328-33 (1976) (an example of committee service and voting by the District's Delegate in Congress).

63. Delegate Walter E. Fauntroy of the District currently chairs the Subcommittee on Fiscal Affairs and Health of the District of Columbia Committee and the Subcommittee on International Development, Finance, Trade and Monetary Policy of the Banking, Finance and Urban Affairs Commitee. 1989-1990 CONGRESSIONAL DIRECTORY 376, 379 (1989).

64. "Logrolling" refers to a legislator's trading of his or her support on one issue for the favorable votes of his or her colleagues on one or more other issues.

65. Professor Seidman argues that even if the District had voting representation in both Houses of Congress, it would have little ability to protect its interests through more effective logrolling. Seidman, *supra* note 31, at 411-12. He points out that the District's delegation would be small. *Id.* at 411. However, several other states have only one member in the House and the District would have at least as much power as those states' delegations. Furthermore, only occasionally do all of the members of large delegations, such as those of New York and California, vote as a bloc to maximize their logrolling power. Second, Seidman argues that logrolling engenders negative connotations in American political procedure, thereby making it difficult to make explicit, enforceable deals. *Id.* at 411. But this argument is no more applicable to the District's representatives than to any states' representatives. Finally, Seidman claims that the District's voting representatives would indeed have a more difficult time logrolling than similarly situated members of Congress from states because groups that lose battles within the District will ally themselves with national forces to obtain federal remedial legislation. *Id.* at 412. Seidman claims that this allowance will come even at the expense of undermining the District's representative's efforts to preserve local autonomy. *Id.* Divisions within the District may "undermine the freedom of the represenatives to effect a logroll." *Id.* at 411-12. But while a divided constituency may shake the resolve of *any* representative, it is unclear that logrolling impairs the bargaining power of a representative who has taken the side of the prevailing faction within his or her district.

66. *See supra* note 13 and accompanying text.

for statehood. Tennessee did exactly that while its statehood petition gathered dust in Washington.[67] Tennessee's "Senators-elect" became effective lobbyists for statehood in the halls of Congress.[68] Similarly, Alaska followed this model during its quest for statehood.[69] In 1980, the District's voters provided for the election of a Representative and two Senators in their statehood initiative.[70] For nearly a decade, the District's Council amended the initiative, postponing those elections several times.[71]

More recently, under pressure from Reverend Jesse Jackson, who revealed his interest in running for election as a "Senator" from the District, the Council voted to hold the elections in the fall of 1990.[72] But in agreeing to let the elections go forward, the Council diluted the impact that the would-be legislators could have. The initiative that the voters passed authorized the expenditure of public funds for salaries and office expenses for the new legislators,[73] but the Council decided that the "Senators" and "Representative" would have to "raise private donations to cover their own salaries and those of their staffs."[74] Even worse, the would-be legislators elected under the initiative as it was passed by the voters would not have taken their seats in Congress until admission of the District as a state.[75] As legislators-elect, they could legitimately have claimed authority to speak for the District on

67. *See* R. CORLEW, TENNESSEE: A SHORT HISTORY 95-104 (1981).

68. Tennessee's "senators" were elected after Congress refused to consider a bill to admit the state. These "senators" lobbied so effectively that Tennessee became a state 65 days after the election. V. FISCHER, ALASKA'S CONSTITUTIONAL CONVENTION 152-55 (1975).

69. *Id.; see also* W. HUNT, ALASKA, A BICENTENNIAL HISTORY 129-30 (1976).

70. Initiative No. 3 (1980), D.C. Law 3-171, § 4, 27 D.C. Reg. 4732 (1981) (codified as amended at D.C. CODE ANN. § 1-113(d) (Supp. 1989)).

71. The provisions calling for the election of shadow Representatives and Senators were amended by D.C. Law 4-138, § 2, 29 D.C. Reg. 2761 (1982) (codified as amended at D.C. CODE ANN. § 1-113(d) (Supp. 1989)); D.C. Law 5-105, § 2, 31 D.C. Reg. 3040 (1984) (codified as amended at D.C. CODE ANN. § 1-113(d) (Supp. 1989)); D.C. Law 6-1, § 2, 32 D.C. Reg. 1475 (1985) (codified as amended at D.C. CODE ANN. § 1-113(d) (Supp. 1989)); D.C. Law 7-2, § 2, 34 D.C. Reg. 2153 (1987) (codified as amended at D.C. CODE ANN. § 1-113(d) (Supp. 1989)); and D.C. Law 7-10, § 2, 34 D.C. Reg. 3286 (1987) (codified as amended at D.C. CODE ANN. § 1-113(d) (Supp. 1989)).

72. Bill 8-488, as amended by the Council on Feb. 27, 1990 (adopted by the Council on Mar. 27, 1990); McCall, *Statehood Lobbying Advances,* Wash. Post, Feb. 28, 1990, at B1, col. 1; McCall, *D.C. Votes 'Shadow' Lobbyists,* Wash. Post, Mar. 28, 1990, at A1, col. 1.

73. D.C. CODE ANN. § 1-117 (1987).

74. McCall (*Statehood Lobbying*), *supra* note 72. The elimination of public funding for the salaries and office expenses of the "Senators" and "Representative" was confirmed by an 8-5 vote in which the Council struck this item from the budget that had been recommended by the Mayor. Abramowitz, *Tax Relief Probable in District,* Wash. Post, Mar. 7, 1990, at D1, col. 6, D4, col. 6. In an age when campaign finance reform consists of attempting to remove the influence of private money on legislators, a law that requires a public official to raise his or her own salary from private sources seems odd.

75. D.C. CODE ANN. § 1-113 (Supp. 1989).

any national issue, not only statehood, and they would have enjoyed a certain degree of prestige associated with their election as proto-legislators.

The Council amended the initiative to specify the duties of these officials;[76] by listing only lobbying and reporting duties, the Council appears to have rendered them mere statehood lobbyists and may have undermined their claim to speak officially on national issues. Further, the sponsor of the amendments noted in a memorandum to other members of the Council, that the Statehood Admission Act pending in Congress provided for elections of federal legislators after statehood was congressionally approved, and that, therefore, "[u]nless 'Tennessee Plan' officials are successful candidates for office in the elections called for by H.R. 51, they will not actually be seated in Congress."[77] This approach is more timid than sending to Congress three officials who would claim the right to be seated immediately upon the admission of the District to the Union.

A more satisfactory partial measure to enhance the presence of the District in Congress would be a federal law giving the District one or two non-voting Senators, who could voice the District's concerns and participate in debate on all issues on the north side of the Capitol. Congress could accomplish this by simply enacting legislation, rather than a constitutional amendment.[78]

A constitutional amendment providing for voting representation in both Houses of Congress, however, would represent a measure far more effective than either electing statehood lobbyists or providing non-voting representation in the Senate. Perhaps the amendment that Congress proposed in 1978 failed because state legislators believed that the District's population, smaller than that of all but three states, did not warrant three federal legislators. If so, a new and more palatable constitutional amendment could provide the District with one voting member of the House and one voting member of the

76. Bill 8-488, § 2(b), adding D.C. CODE ANN. § 1-113(g).

77. Memorandum to All Councilmembers from Hilda Howland M. Mason (Feb. 26, 1990).

78. The law providing for a non-voting Delegate is an ordinary law, not a provision of the Constitution. *See* 2 U.S.C. § 25(a) (1988).

Senate,[79] in recognition of the District's unique status and relatively small population.[80]

An entirely different approach to enfranchising District residents in federal elections would be to permit them to vote for the federal legislators from Maryland. Congress could probably accomplish this by an ordinary act. Congress has already taken similar action in the Overseas Citizens Voting Rights Act of 1975,[81] which provides that citizens residing outside the United States shall have the right to cast absentee ballots in any federal election in the state in which they were last domiciled and could have voted.[82] District residents resemble American citizens overseas who have lost state domiciles. Because the last state in which they could have voted was Maryland, Congress could permit them to vote there.[83] Indeed, as Professor Raven-Hansen discovered,[84] District residents did vote in Maryland and Virginia congressional elections, and those elected represented them in Con-

79. My colleague William Eskridge has noted, in private conversation, that because of how the Senate operates, a single Senator has considerably more power than the fraction 1/100 seems to imply. He points out how effectively Senator Jesse Helms has affected the agenda of the Senate and the policies of some executive departments by the skillful use of his power to put holds on nominations, to block unanimous consent agreements, to organize filibusters, and to make points of order. *See* W. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 183 (3d ed. 1989) (discussing Helms' use of holds on nominations to extract concessions from the State Department); *see also id.* at 190 (discussing Helms' threat to tie up consideration of Small Business Administration legislation unless the Senate voted on amending the Constitution to allow school prayer).

80. This would change the number of Senators from even to odd. However, such a change would be of little significance because all Senators rarely are present to vote and the Senate has occasional vacancies, so the total voting on any given occasion is as likely to be odd as it is to be even. It might even be desirable to give the Senate an odd number of members to reduce the number of important occasions on which it will be necessary to call upon the Vice-President to break a tie. The fact that the number of Senators plus the Vice-President would be even is not problematic because the Vice-President can vote only to break a tie, not to make one. U.S. CONST. art. I, § 2, cl. 4.

Because an amendment might be a stepping stone to statehood rather than a final resting point for the political aspirations of the District, the amendment should provide that both it and the twenty-third amendment (providing electoral votes to District residents) would become void if Congress and the states admitted the District, or its residential portion, to the Union as a state. This additional clause would quiet arguments that these amendments *preclude* Congress from granting statehood to the District. *See D.C. Statehood Hearings Part 1, supra* note 39, at 341-44 (statement of Stephen J. Markman, Assistant Attorney General).

81. 42 U.S.C. § 1973dd-1 to -6 (1982).

82. *Id.* § 1973dd-1.

83. The Overseas Voting Rights Act is not a perfect precedent because only those who moved to the District from Maryland after reaching the age of 18 were eligible to vote in that state. But perhaps the historic nexus between Maryland and the District can be substituted constitutionally for the nexus between an American living overseas and the state in which he or she was last eligible to vote.

84. Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis,* 12 HARV. J. LEGIS. 167, 174 (1975).

gress from 1791, when the cession took effect, until 1800, when Congress passed legislation that had the perhaps unintentional effect of eliminating their right to vote.[85] What Congress has taken away, Congress can restore.[86]

Representative Stan Parris, an outspoken Republican opponent of statehood for the District, recently introduced in Congress a bill that would enact this approach. His legislation would give the District's Delegate the right to vote in Congress until the next congressional election. Thereafter, the legislation would enable District residents to vote in Maryland for federal legislators and Presidential electors.[87]

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85. Act of Feb. 27, 1801, ch. 15, 2 Stat. 103 (1801), *reprinted in* 1 D.C. CODE ANN. at 45 (1981); *see also* Raven-Hansen, *supra* note 84, at 174-76 (discussing at length the statute and its history).

86. Professor Raven-Hansen suggests that District residents may be entitled to vote for members of the House and Senate even *without* further action by Congress, much less a constitutional amendment. He suggests that the word "state" in article I, section 2 of the Constitution (providing that the House shall be composed of members chosen by the people of the several "States") and the seventeenth amendment (providing that there shall be two Senators from each "State") should properly be construed to include the District. Raven-Hansen, *supra* note 84, at 179-84. In addition, his analysis supports another argument for re-enfranchisement without further legislative action that he does not make. The gist of this second argument is that District residents may vote for federal legislators in Maryland elections, just as they did from 1791 through 1800, because the 1800 federal statute that has been thought for nearly two hundred years to have disenfranchised them did not actually have that purpose or effect. The statute continued Maryland and Virginia law as the law of the District until changed by act of Congress and thereby gave the District a background of law with respect to which citizens could order their affairs. Act of Feb. 27, 1801, ch. 15, 2 Stat. 103 (1801), *reprinted in* 1 D.C. CODE ANN. 45 (1981). In an effort to defeat this bill, its opponents argued that an implicit effect of the new law prevents District residents from voting in Maryland elections. Raven-Hansen, *supra* note 84, at 174-76. But the text of the bill says nothing at all about the voting rights of District residents. Perhaps the majority that passed the bill never accepted the opponents' parade of horribles, and the history of the last two centuries is based on a mistake that could still be rectified by the courts.

Representative Stan Parris believes that "[n]either Maryland nor the Congress appear to have originally intended to deprive the citizens of the District of Columbia of the right of the Federal franchise" and that that right "may not have been specifically denied." He notes that the issue "might well have been tested in the courts . . . but apparently has not been so tested." He suggests that "lack of exercise would not constitute a bar to their exercise at the present time," and concludes that these rights "may need to be revived by an action of law." *Memorandum in Support of Legislation to Restore the Rights of Residents of the District of Columbia to be Treated as Residents of the State of Maryland for the Purposes of Participation in Federal Elections,* by Rep. Stan Parris (Mar. 6, 1990). Representative Parris' analysis is consistent with Professor Raven-Hansen's history and implies that a test case, initiated by a District of Columbia resident, who attempts without success to register to vote for federal officials in Maryland, might still succeed.

87. H.R. 4193, 101st Cong., 2d Sess. (1990). Initial reactions to the bill were hostile. A spokeswoman for the District's Mayor said that it "wouldn't make much sense," the Republican representative whose Maryland district abuts the District said that it was not serious, and Rev. Jackson called it "another expression of colonialism." Jenkins, *Parris Bill Would Let*

2. Legislative Autonomy

The legislative subordination of the District to the will of Congress has three different aspects. First, while the 1973 Home Rule Act gives the District its own legislature,[88] it expressly denies the District's Council certain legislative powers enjoyed by the people's representatives in every state.[89] For example, the Act bars the Council from imposing an income tax on nonresident commuters who work in the District,[90] from reorganizing the structure or in any way changing the jurisdiction of the District's courts,[91] or from permitting the erection of buildings or towers higher than the limit set by Congress.[92]

Second, except for emergency legislation of short duration, no statute passed by the Council may become effective until at least thirty calendar days after it is transmitted to Congress.[93] The period is extended to sixty days for matters affecting the District's criminal laws.[94] During that period,

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D.C. Vote in Maryland Senate Race, Wash. Post., Mar. 7, 1990, at D1, col. 2, D2, col. 3. Constitutionally, the provision permitting District residents to vote for Maryland legislators appears to rest on somewhat stronger footing than the transitional provision temporarily giving the District its own voting representative in the House, because Eighteenth century precedent exists for District residents voting for Maryland legislators. Article I, section 2 of the United States Constitution specifies that a Representative must be an "Inhabitant of that State in which he shall have been chosen." Only Professor Raven-Hansen's argument that the word "State" in Article I includes the District could justify a federal statute to give an inhabitant of the District the right to vote in the House. But, as my editor Michael Fortunato has pointed out, if Representative Parris gives the word "State" that meaning, he must acknowledge that the District is already constitutionally entitled, without any statute, to a Representative and two Senators.

88. *See* Home Rule Act, *supra* note 10, § 401, 87 Stat. at 785 (1973) (codified as amended at D.C. CODE ANN. § 1-221 (1987)). This provision was aimed in the direction of fulfilling the expectation of James Madison that "a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed" to District residents. THE FEDERALIST NO. 43, at 218 (Wills ed. 1987).

89. Home Rule Act, *supra* note 10, § 602(a) (codified as amended at D.C. CODE ANN. § 1-233(a) (1987)) (express denial of certain legislative powers).

90. *Id.* § 602(a)(5) (codified as amended at D.C. CODE ANN. § 1-233(a)(5) (1987)) (bar to nonresident income tax).

91. *Id.* § 602(a)(4) (codified as amended at D.C. CODE ANN. § 1-233(a)(4) (1987)) (bar to reorganization of courts). Thus, even so minor a measure as increasing the monetary jurisdiction of the small claims branch of the local court from $750 to $2000 required an act of Congress rather than an act of the Council. *See* District of Columbia Retired Judge Service Act, Pub. L. No. 98-598, § 4, 98 Stat. 3142, 3143 (1984) (codified at D.C. CODE ANN. § 11-1321 (1989)).

92. Home Rule Act, *supra* note 10, § 602(a)(6) (codified as amended at D.C. CODE ANN. § 1-233(a)(6) (1987)) (bar to permitting erection of building exceeding height limit).

93. The period of "30-calendar-day[s]" excludes Saturdays, Sundays, holidays, and days in which Congress is not in session because of an adjournment or recess of more than three days. *Id.* § 602(c)(1) (codified as amended at D.C. CODE ANN. § 1-233(c)(1) (1987)).

94. *Id.* § 602(c)(2) (codified as amended at D.C. CODE ANN. § 1-233(c)(2) (1987)).

Congress may repeal the statute by passing a joint resolution, which requires Presidential concurrence to become effective.[95] No other city or state is required to present its local legislation to Congress for approval. Furthermore, for some subjects, important cultural and perhaps constitutional norms restrain congressional modification or negation of state legislation.[96]

Congress has gone even further to maintain control over the District's local laws in three controversial areas — criminal law, criminal procedure, and the treatment of prisoners. Resolutions to repeal any law passed by the Council are referred to the District of Columbia Committee in each House of Congress. Like many oversight committees in Congress, these committees, from time to time, sympathize with the concerns of those they oversee.[97] To prevent committees that are favorable toward home rule from bottling up repeal legislation in these three politically sensitive categories for longer than the statutory waiting period, Congress has provided that any one member of Congress may move to discharge the authorizing committee from

95. *Id.* § 602(c)(1) (codified as amended at D.C. CODE ANN. § 1-233(c)(1) (1987)). The President may sign the resolution after the thirty-day period has expired. *Id.*

96. Of course, Congress routinely overturns state law related to local legislation. For example, using its power over interstate commerce, Congress has barred the states from imposing cigarette labeling laws more stringent than the limitations of federal law. Federal Cigarette Labeling and Advertising Act, Pub. L. No. 89-92, 79 Stat. 282 (1965) (amended by Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, 88 (1970)). But there are other subjects, such as the regulation of marriage and the grounds for divorce, that jurists and scholars have thought should be reserved for state policymaking. "If the institutional interests of state governments in limiting federal intrusion into hitherto local spheres of concern are ordinarily taken into account in congressional actions, then the political process of federal legislation may be counted on to incorporate a consistent check against the full use of congressional power." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 315 (2d ed. 1988). On such matters, the District's Council appears to remain at a disadvantage compared to state legislatures because the customary and political constraints against national legislation do not appear operative. Furthermore, even in areas that Congress regulates concurrently with the states, the fifth amendment bars it from doing so on a state-by-state basis unless Congress can articulate a rational basis for the state-by-state distinctions. Congress could not, for example, bar stringent cigarette labeling laws in Iowa while permitting them in Kansas. Although the issue has never been tested, it seems likely that this "geographic rationality" limitation would not apply to the District. Because of the plenary power over the District given to Congress by the Constitution, article I, section 2, clause 17, Congress might, for example, repeal a District law imposing strict cigarette labeling requirements while permitting the states to impose their own restrictions.

97. From 1973 to 1986, the House District of Columbia Committee received 22 proposed resolutions of disapproval and it voted against all but one of them. HOUSE COMM. ON THE DISTRICT OF COLUMBIA, ACTIVITIES AND SUMMARY REPORT, H.R. DOC. NO. 99-1034, 99th Cong., 2d Sess. 38 (1986). It narrowly (8-6) passed the resolution disapproving the chanceries legislation. HOUSE COMM. ON THE DISTRICT OF COLUMBIA, ACTIVITIES AND SUMMARY REPORT, H.R. DOC. NO. 96-1539, 96th Cong., 2d Sess. 71-73 (1980). The Committee has even taken the step of approving statehood. *See supra* note 40 and accompanying text.

further consideration of the resolution.[98] The motion is highly privileged, and debate on it is limited to one hour, precluding a Senate filibuster.[99] If the motion passes, a maximum of ten hours of debate may follow, and a motion to limit further debate is not debatable.[100] A motion to recommit the resolution to committee is also not in order.[101] In essence, Congress has made it easy for a single member to force a vote on the floor to repeal any penal statute passed by the District's Council, something a single member could not do to advance almost any other category of legislation.[102]

The third type of legislative power that Congress wields over the District is an appropriation rider.[103] Congress must deal with District matters at least once a year to appropriate the revenues that the District has raised through local taxes and fees and to add any federal subsidy.[104] The annual review of the District's budget, therefore, has become an occasion on which members of Congress can force changes in District practices that Congress did not upset through the thirty-day review process under the Home Rule Act.[105] Thus, through the appropriation rider, Congress can reach District policies that local legislation never embodied, or policies embodied in acts of the Council that Congress did not overturn during the thirty-day period provided by the Home Rule Act. For example, Congress used an appropriation rider to force the District to restrict the scope of its human rights law, even though the law had been on the books for years and the period for review under the Home Rule Act had long since expired.[106]

If Congress wanted to loosen the federal reins on the District without granting the District's statehood petition, it could relax these legislative restrictions. First, Congress could eliminate or cut back the list of subjects on

98. *See* Home Rule Act, *supra* note 10, § 604(e) (codified as amended at D.C. CODE ANN. § 1-207(e) (1987)).

99. *Id.*

100. *Id.* § 604(h) (codified as amended at D.C. CODE ANN. § 1-207(h) (1987)).

101. *Id.* The original statute pertained to concurrent resolutions, but when Congress changed the procedure in 1984 to provide for congressional repeal of District laws by joint resolution, it specified that the expedited procedures established by the original statute would apply to joint resolutions. Act of Oct. 12, 1984, Pub. L. No. 98-473, § 131(g)-(h), 98 Stat. 1837, 1975 (codified as amended at D.C. CODE ANN. § 1-207(a)(2) (1987)).

102. Members of Congress have rarely invoked this power, most notably to stop the District's reform of its sex crimes legislation from going into effect. *See* H.R. Res. 208, 97th Cong., 1st Sess., 127 CONG. REC. 22,752-79 (1981).

103. *See supra* notes 18-20 and accompanying text.

104. Home Rule Act, *supra* note 10, § 446 (codified at D.C. CODE ANN. § 47-304 (1987)).

105. *Id.* § 602(c)(1)-(2) (codified at D.C. CODE ANN. § 1-233(c)(1)-(2) (1987)); *see also supra* notes 21-31 and accompanying text (illustrating Congress' use of appropriation riders).

106. Nation's Capital Religious Liberty and Academic Freedom Act, Pub. L. No. 100-462, 102 Stat. 2269-14 (1988). The Human Rights Law, D.C. Law 2-38, had entered into force in 1977. 24 D.C. Reg. 6038 (1977) (codified at D.C. CODE ANN. § 1-2520 (1987)).

which the Council may not legislate. This action would permit the District to impose a nonresident income tax, hardly a radical notion in view of the fact that such a tax is common in other parts of the country.[107] The District's imposition of such a tax could raise (in 1989 dollars) an estimated $300 million to $706 million,[108] figures which compare favorably with the current annual federal subsidy of approximately $430 million.[109] Indeed, in view of the federal payment that the District needs to balance its budget, some may view the prohibition on a nonresident income tax for the District of Columbia as little more than a subsidy for residents of suburban Washington by the taxpayers of the rest of the nation.

Congress could also use either of two methods to reduce its own power to repeal District legislation where the Council *is* allowed to act. First, Congress could repeal, in its entirety, the law that requires presentation of District legislation, that postpones the effective date of District legislation, and that provides a procedure for congressional review of District legislation.[110] Short of this, Congress could make congressional repeal of District legislation more difficult, so that repeal would follow only the most egregious instances of abuse by District legislators. For example, Congress could provide that, even for local laws affecting the criminal code or the handling of prisoners, it could discharge its District committees from further consideration of repealing resolutions only as a result of the action of a majority of the body, as is true for discharges of ordinary legislation.[111]

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107. From the District's point of view, substituting a nonresident income tax for the federal subsidy would replace an uncertain source of income with one on which the District could rely. Furthermore, although Congress could continue to impose legislative conditions on the expenditure of the District's locally raised funds, it may be politically more difficult to do so than to attach conditions to a federal subsidy. That is, members of Congress may think that they can justifiably legislate for the District because they provide the funds for part of its budget.

108. *Constitutional and Economic Issues Raised by D.C. Statehood: Hearings Before the Subcomm. on Fiscal Affairs and Health of the House Comm. on the District of Columbia,* 99th Cong., 2d Sess. 251, 315 (1986) (statements of Andrew F. Brimmer ($300 million) and Lucy J. Reuben ($706 million)) [hereinafter *Hearings on Constitutional and Economic Issues*].

109. 1990 Appropriations, *supra* note 31, 103 Stat. at 1267.

110. There is a risk that this reform could backfire. The 30-day period may impose some political or psychological barriers against congressional repeal of District legislation *after* that time has passed, and elimination of the period could lead some members of Congress to propose repeal of District legislation through federal statutes, even years after the local laws had gone into effect.

111. A majority of all members must sign a discharge petition in the House. W. BROWN, RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 248, 100th Cong., 2d Sess., Rule XXVII, cl. 4 (1988) [hereinafter HOUSE RULES]. In the Senate, discharge requires a majority vote of the body and has occurred only 14 times in history. W. OLESZEK, *supra* note 79, at 234. There are at least two precedents for applying ordinary discharge rules to resolutions disapproving actions of other bodies: (1) the D.C. Home Rule Act, which only invests

Alternatively, Congress could amend the discharge procedure to require a petition signed by some intermediate fraction of members, such as one-third.[112] Congress could also eliminate the time restrictions on debate, making it possible for a minority of Senators who cared enough to block a repeal resolution through a filibuster, as a minority can do with respect to most other legislation. It could abolish the privilege that attaches to disapproval resolutions, making it harder for their proponents to give them precedence over other congressional business. Furthermore, Congress could eliminate the rule that makes a motion to recommit out of order, enabling members to kill a repeal resolution through a relatively technical procedural vote, as they can do with other legislative matters.[113]

Legally, neither repeal of the restrictions on District legislative power nor elimination of a specified period for congressional review of District laws would protect the District's Council from federal second-guessing. Unless the District becomes a state, the United States Constitution would continue to give Congress the right to exercise plenary legislative authority over the District. Accordingly, Congress could overturn any act of the Council at any time. Most significantly, Congress could even repeal the Home Rule Act. However, that constitutional reserve power has laid dormant in the background since Congress passed the Home Rule Act in 1973. In seventeen years, Congress apparently has used the reserve power only once.[114]

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individual members with the power to discharge committees of disapproval resolutions affecting criminal or prison legislation; and (2) the procedure pursuant to which Congress may disapprove pay raises for itself and for senior executives and federal judges. The pay raises become effective unless Congress disapproves them by joint resolution within 30 days after the President recommends them, and no special discharge provisions make it easy to prevent a committee from stalling such a resolution. *See* Act of Dec. 19, 1985, Pub. L. No. 99-190, § 135(e), 99 Stat. 1185, 1322.

112. *See* Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 21(b)(2)(c)(ii), 94 Stat. 374, 394 (requiring signatures from one-fifth of the members of the House of Representatives before the Committee on Interstate and Foreign Commerce could be discharged of resolutions to disapprove proposed rules promulgated by the Federal Trade Commission).

113. A bill recently introduced by Rep. Ronald V. Dellums would amend the Home Rule Act by continuing to require submission of District legislation to Congress, but permitting such legislation to take effect on the date of transmittal to the House and Senate, and by repealing the special procedures for discharging the District Committees of legislation to repeal District laws. H.R. 3293, 101st Cong., 1st Sess. (1989).

114. Apparently, Congress recently used the reserve power to amend the D.C. Code to exempt certain universities from the long-standing prohibition against discrimination toward homosexuals. *See* Abramowitz, *supra* note 31. On that occasion, Congress amended section 1-2520 of the D.C. Code, enacted in 1977 without congressional objection, to nullify the prohibition on educational institutions from discriminating based on sexual orientation. Nation's Capital Religious Liberty and Academic Freedom Act, Pub. L. No. 101-168, § 141, 103 Stat. 1267, 1284 (1989) (Armstrong Amendment II). It was noted on the House floor that the amendment violated the spirit and principle of home rule, but no member reminded the House

Perhaps, having statutorily established *particular* limits on the legislative power of the Council and *particular* time limits on its power to review District legislation, Congress has persuaded itself that to invoke its constitutional reserve power to prevent the District from legislating on *other* subjects or to repeal District legislation years (as opposed to months) after enactment breaks all the rules of the game.[115] Although the home rule compact may not create a legally binding obligation, Congress seems reluctant to alter the rules it has set down. In the future, the psychological or symbolic power of an amended home rule compact may be as great as the power that the 1973 legislation has exercised in constraining congressional interference in District affairs. Of course there is a political dimension of breaking the compact as well. As a *New York Times* reporter once said:

> [m]ost Congressional Democrats are preparing to resist any attack on home rule. For a Democrat to support such an attack would entail heavy political risks, since home rule was an achievement of the civil rights movement and since limiting it would therefore arouse the ire of black politicians, and their heavily Democratic constituents, here [in Washington] and elsewhere.[116]

While making it less likely that members will formally overturn District legislation, Congress could also act to make it more difficult for federal legis-

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that the D.C. Human Rights Law had previously been before Congress for review and that Congress had let it stand. *See* 135 CONG. REC. H6543-51 (daily ed. Oct. 3, 1989).

One could argue that passage of the original Armstrong Amendment, which conditioned the District's annual appropriation on the Council's revision of a local law that had been on the books for years, also violated the basic compact of 1973. But passage of the amendment failed to amount to an exercise of the reserved constitutional power of Congress because Congress used its annual appropriation authority rather than its reserved power to impose this change on the District. Indeed, it is precisely because Congress used this indirect method in attempting to legislate for the District that it opened its action to constitutional challenge. *See* Clarke v. United States, 886 F.2d 404, 417 (D.C. Cir. 1989).

In 1989, Congress passed a bill prohibiting District of Columbia Superior Court judges from incarcerating persons for long periods of time for contempt of court. District of Columbia Civil Contempt Imprisonment Act of 1989, Pub. L. No. 101-97, 103 Stat. 633. The form of this action was an amendment to sections 11-741 and 11-944 of the D.C. Code, a law that is normally within the legislative authority of the Council. Even so, this was not an instance of congressional violation of the home rule compact because those sections of the D.C. Code had been written by Congress three years before home rule was implemented. District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, § 111, 84 Stat. 481, 487. Moreover, Congress had barred the District's Council from amending title 11 of the Code, including the sections pertaining to contempt, in the Home Rule Act. *See* Home Rule Act, *supra* note 10, § 602(a)(4) (codified as amended at D.C. CODE ANN. § 1-233(a)(4) (1987)).

115. Alternatively, Congress may have refrained, except on one occasion, from repealing District legislation more than a specified number of days after passage because it could achieve all of its objectives through appropriation riders. On this occasion, a federal court blocked enforcement of its rider. *See supra* note 114 and accompanying text.

116. Dionne, *supra* note 33.

lators to attach policy riders to District of Columbia appropriation bills. This would constitute an important reform because Congress has only expressly overturned two District laws since Home Rule began while it has attached riders to the District appropriations at least seventy-five times.[117]

Congress presently may attach riders to the District's annual appropriation because House and Senate rules, holding "legislation" in appropriation bills to be out of order for consideration by the legislature,[118] can be evaded in five ways.

First, appropriation bills generally originate in the House.[119] If the House Appropriations Committee includes in the bill a provision that requires a change in District law or policy[120] or if a member of the House proposes such a provision as a floor amendment, any member can make a point of order to challenge the provision as impermissible "legislation." Members of Congress may evade the prohibition on legislation, however, because the rules against legislating are not self-enforcing: no one, including the House leadership, has a duty to make a point of order against a rider, and if no one raises the point, Congress can adopt the rider.

A second, more common, evasion scenario involves the House Rules Committee. That body may include in its rule for floor action a waiver of points of order.[121] If a rule includes a waiver, no member may properly challenge a rider despite its inconsistency with the House rule prohibiting legislation in an appropriation bill.

Third, even if a point of order is permitted, the presiding officer may deny the challenge. Because of the vagueness of what constitutes "legislation" within the meaning of the House rule, the House leadership can allow a rider without admitting that Congress is ignoring its rules for the purpose of imposing a politically popular policy change on the District. Despite the ban on "legislation," a rider which *limits* the use of appropriated funds (barring them from being spent unless various conditions are met by the agency, here the District government) is in order unless the limitation rider "(1) impose[s]

117. *See infra Appendix.*

118. L. SLACK, SENATE MANUAL, S. DOC. NO. 1, 100th Cong., 1st Sess., Rule XVI, cl. 2 (1988) [hereinafter SENATE RULES]; HOUSE RULES, *supra* note 111, Rule XXI, cl. 2.

119. W. OLESZEK, *supra* note 79, at 52.

120. Any provision that directly or indirectly changes "existing law" must be specified in the appropriations committee's report on the bill. SENATE RULES, *supra* note 118, Rule XVI, cl. 2; HOUSE RULES, *supra* note 111, Rule XXI, cl. 3. However, the various appropriations subcommittees are not all equally conscientious in reporting legislative riders, and the full appropriations committees do not police their subcommittees in this respect. Telephone interview of Fred Mormon, House Appropriations Committee Staff, (July 26, 1989). Furthermore, the rules requiring reporting include no sanctions for non-compliance.

121. *See generally* BACH, SPECIAL RULES PROPOSING TO LIMIT FLOOR AMENDMENTS, 1981-87 (Cong. Research Serv., Apr. 15, 1988).

additional duties or burdens on executive branch officials; (2) interfere[s] with these officials' discretionary authority; or (3) require[s] officials to make judgments or determinations not required by existing law."[122] Members almost always carefully draft riders so that they constitute "limitations" on expenditures of the appropriated funds without running afoul of the three exceptions.[123] Clever drafting may enable the presiding officer to accept them despite a point of order from an objector.

The Senate, like the House, technically prohibits legislation in appropriation bills.[124] Nevertheless, if the House has already attached a legislative rider to an appropriation bill, the rider is not subject to a point of order in the Senate.[125] Furthermore, the Senate may then change the rider in any way it desires.[126]

Even if the House has not appended any riders to an appropriation bill, the Senate may initiate the process, thus producing the fourth and fifth possibilities for imposing such provisions. The first of these two procedures for insulating Senate-initiated riders from a rules-based challenge is rather arcane. After a challenger raises the point of order that a rider constitutes impermissible "legislation,"[127] any other Senator may interpose the defense that the rider is germane to legislative language in the bill that was transmitted from the House.[128] If the presiding officer rules that the rider meets a minimal "threshold" test of germaneness,[129] then he or she calls an immediate vote of the whole Senate to determine whether the rider is germane. If the Senate rules that the rider is "germane," then the ruling automatically defeats the point of order that the rider constitutes "legislation" because germane amendments to House legislation are acceptable on an appropriation measure.[130]

This device assists the proponents of riders in two ways. First, because the Senate rather than its presiding officer applies the "germaneness" test, the Senate is spared the awkwardness of overruling the presiding officer's judgment that the rider constitutes impermissible legislation. Second, be-

122. W. OLESZEK, *supra* note 79, at 54.

123. *Id.* at 53.

124. SENATE RULES, *supra* note 118, Rule XVI, cl. 2.

125. F. RIDDICK, SENATE PROCEDURE, S. DOC. NO. 2, 97th Cong., 1st Sess. 133 (1981).

126. A Senate amendment, however, must be germane to the House-passed bill as it stands when the amendment is offered. *Id.* The theory behind this exception to the Senate rule against legislation in an appropriation bill is that the Senate must maintain its ability to perfect House-passed language. *Id.* at 133.

127. Senate Rule XVI, clause 4, makes legislation in an appropriation bill subject to a point of order. SENATE RULES, *supra* note 118, Rule XVI, cl. 4.

128. W. OLESZEK, *supra* note 79, at 54-55.

129. *See infra* note 132.

130. *See supra* note 126.

cause the concept of germaneness is even more ambiguous than the definition of "legislation,"[131] the Senate also spares itself of any discomfort that it might experience in determining that a policy rider, such as an abortion prohibition, is not "legislation."[132] Thus, Senators frequently cast their votes on "germaneness" based on their views of the merits rather than the procedural propriety of the rider.[133]

The fifth device for adopting riders rests upon a possible exception to the Senate rule that provides that even non-legislative riders, those that are merely "limitations" on the use of appropriated funds, are improper if they "take effect or cease to be effective upon the happening of a contingency."[134] Under this possible exception,[135] a rider is nevertheless in order if use of the appropriated funds is contingent upon an act or event that would necessarily occur by a date certain within the period covered by the appropriation. This

131. Although the Senate's definition of "legislation" is unwritten, the Senate "use[s] tests for [the definition of legislation] similar to the House's." C. TIEFER, CONGRESSIONAL PRACTICE AND PROCEDURE 991 (1989).

132. A recent precedent has increased slightly the power of the Senate leadership to fend off legislative riders. After a Senator who favors a rider interposes the defense of germaneness to avoid a prior point of order, an opponent of the rider may make a second point of order that there is no language in the bill as it stands to which the amendment could *possibly* be germane. F. RIDDICK, *supra* note 125, at 130; *see also* 125 CONG. REC. 31,892-94 (1979). The presiding officer must rule on this point of order, and if he or she sustains it, the Senate can vote on germaneness only by overruling the presiding officer. However, a vote to overrule requires only a simple majority, enabling politically popular riders to survive this hurdle.

133. W. OLESZEK, *supra* note 79, at 55. Senator Brock Adams observed that his colleagues "view the rules [against legislation] primarily as a technical obstacle and translate a procedural vote into the underlying substantive issue." *Id.* Where the House has attached no legislative restrictions to an appropriation bill, the Senate would find it awkward to overrule the presiding officer's "threshold" ruling that a proposed rider was not germane to any House-passed language. On the other hand, where the House has attached legislative restrictions to the bill, Senators can maintain that even Senate language quite different from House language is nevertheless "germane" to the House-passed bill.

134. SENATE RULES, *supra* note 118, Rule XVI, cl. 4; *see* F. RIDDICK, *supra* note 125, at 152. The exception depends upon whether Congress subjects the non-legislative rider to one or more events that may or may not take place, such as the enactment of future legislation or the occurrence of an irregular natural event.

135. Technically, this exception is not a "precedent" because it centers on only informal advice from the Senate Parliamentarian to sponsors of riders and has never been determined by a vote of the Senate itself on a motion to overturn a ruling of its presiding officer. In the case of the original Armstrong Amendment, the presiding officer of the Senate ruled that the rider was acceptable, and the Senate confirmed the officer's judgment. However, at the request of the Majority Leader, the Senate passed a unanimous consent agreement that withdrew the point of order, vitiated the presiding officer's ruling, and retracted the Senate's vote. 134 CONG. REC. S9124-28 (daily ed. July 8, 1988). As a result, the status of this doctrine is now unclear. Precedents in the House of Representatives also forbid riders subject to contingencies (such riders are deemed "legislation"), and the House does not appear to have carved out an exception for contingencies certain to be resolved by a particular date. *See* HOUSE RULES, *supra* note 111, at 599.

exception provided the basis on which the Senate rationalized the propriety of the 1988 Armstrong Amendment, which Congress used to cut off all of the District's funds unless, by the "date certain" of December 31, 1988, the D.C. Council narrowed a provision in the D.C. Human Rights Law to enable religious institutions to discriminate against homosexuals.[136] Based on advice from the Senate Parliamentarian, the presiding officer overruled a point of order against the Armstrong Amendment, basing the ruling on the ground that the contingency would definitely be determined within the relevant fiscal year.[137]

Congress could restrict the exceptions to the rules against riders in several ways. First, it could simply recognize the District of Columbia as a semi-sovereign jurisdiction rather than an executive agency of the Federal Government; therefore, the procedures Congress uses for controlling executive departments through conditions and limitations on appropriated funds should not apply to the District's budget. In other words, Congress could allow the District's Council to spend, without federal review, the eighty-six percent of the District's budget that the District raises from non-federal revenue sources.[138] Alternatively, Congress could adopt rules flatly prohibiting

136. Nation's Capital Religious Liberty and Academic Freedom Act, Pub. L. No. 100-462, 102 Stat. 2269, 2269-7 (1988).

137. 134 CONG. REC. S9124 (daily ed. July 8, 1988). In 1989, Senator Armstrong again offered an amendment to prevent the District from applying its Human Rights Act to discrimination against homosexuals by Georgetown University and The Catholic University of America. Senator Armstrong recast his proposal as an amendment to the D.C. Code rather than as a non-legislative limitation on the District's appropriation because the United States Court of Appeals for the District of Columbia Circuit had declared the 1988 Armstrong Amendment to the District's appropriation unconstitutional. Clarke v. United States, 886 F.2d 404, 417 (D.C. Cir. 1989). In this form, the amendment, which had not been considered by the Committee on the District of Columbia, was subject to the possible objection that it was legislation in an appropriations bill. While noting this possible objection, Senator Brock Adams, the floor manager, did not object because "that would leave to [sic] an appeal of the ruling of the Chair." 135 CONG. REC. S11,107 (daily ed. Sept. 14, 1989). In fact, the Office of the Senate Parliamentarian told Senator Adams' office that the presiding officer would be advised to rule against the point of order because the Armstrong Amendment was germane to the portion of the House-passed bill which provided funding for higher education. Telephone interview with Steve Elmendorf, Office of Senator Brock Adams (Sept. 26, 1989). The House bill had no provisions dealing with Georgetown University or The Catholic University of America, with homosexuals, or with the D.C. human rights law, but the standards of germaneness applied in the Senate are considerably less strict than those used in the House. The new Armstrong Amendment passed both houses of Congress and became law. Pub. L. No. 101-168, § 141, 103 Stat. 1284 (1990).

138. The Constitution provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7. No need exists, however, for the 86% of the District's funds raised locally to pass through the Federal Treasury.

any provisions other than appropriations in District appropriation bills.[139] At the very least, Congress could cease conditioning the uses to which locally raised revenues are devoted.

In another approach, Congress could eliminate or tighten the five procedural exceptions to its rules against legislating in appropriation bills, either for District appropriations or for all appropriations.[140] Appropriation committee chairs could rule rider proposals out of order in committee markups. Although the present appropriation committees' rules do not expressly forbid legislation in such bills or invite points of order against such legislation, appropriation committee chairs could invoke "the rules of the chamber"[141] or, if necessary, move for adoption of new committee rules barring such legislation.[142] Congress could also amend committee and floor rules in order to make riders, adopted by an appropriations committee, subject to a point of order if the committee does not expressly describe and explain the substance of the riders in terms of the policy changes in the Committee's report.[143]

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139. Under this second option, for example, Congress could elect to appropriate funds or not to appropriate funds for health clinics, but it could not provide that no funds could be used for abortion.

140. D.C. home rule advocates may have allies. Since the 1977 Hyde Amendment debate restricting nationally federal funding for abortions others have urged tighter procedural control on legislation in the guise of appropriations, defeating review by the substantive committees which have oversight responsibilities over the agencies to which the appropriations are directed. *See* S. Res. 2, §§ 13, 16, 99th Cong., 1st Sess., 131 CONG. REC. 6-7 (1985); S. Res. 24, 99th Cong., 1st Sess., 131 CONG. REC. 329 (1985); S. Res. 32, § 8, 99th Cong., 1st Sess., 131 CONG. REC. 334 (1985); H.R. Res. 5, 98th Cong., 1st Sess., 129 CONG. REC. 34 (1983); DEMOCRATIC STUDY GROUP, SPECIAL REPORT: THE APPROPRIATION RIDER CONTROVERSY (Feb. 14, 1978).

141. Telephone interview with Charles Tiefer, Deputy Counsel to the Clerk of the House (July 13, 1989).

142. Senator Robert Byrd, who became chair of the Senate Appropriations Committee in 1989, seems less likely than his predecessors to tolerate riders. He has demonstrated his hostility to them over a period of years. *See, e.g.*, 134 CONG. REC. S9125 (daily ed. July 8, 1988) (Senator Byrd expressing disagreement with the ruling of the presiding officer that the Armstrong Amendment was not impermissible legislation); 125 CONG. REC. 31,892-94 (1979). In the long run, however, new rules or precedents are necessary for the appropriations committees and for the floors of both Houses of Congress. The House has a precedent for barring its Appropriations Committee from including in appropriation bills any matter that would encroach on the policy prerogatives of a particular substantive committee. Since 1983, a House rule has barred the Appropriations Committee, and all other committees except the Committee on Ways and Means, from reporting tax or tariff proposals. Tax or tariff riders in reported appropriation bills are subject to points of order. W. OLESZEK, *supra* note 79, at 55.

143. *See supra* note 142. In addition, the House of Representatives could build upon a reform it initiated in 1983. Under current House rules, as amended, before any appropriation riders, other than those recommended by the Appropriations Committee or those relating solely to dollar amounts, can be considered on the House floor, the floor manager may move that the Committee of the Whole (the full House sitting as the body which initially considers legislation) rise and report to the House. If carried, this motion preempts further amendments.

Second, the Chair of the House District of Columbia Committee could assume responsibility for making a point of order against every legislative rider, whether originating in the Appropriations Committee or on the floor, to a District of Columbia appropriation, unless barred by a rule waiving points of order. Moreover, the House Rules Committee could adopt an internal rule or a practice of never waiving points of order against riders to District of Columbia appropriations.

Third, points of order will not necessarily block impermissible riders and could be overruled by the presiding officer or the chamber itself. Therefore, Congress could adopt written, less ambiguous rules governing which appropriation riders are impermissible and which are valid "limitations" on the appropriations being made. For example, the Senate could adopt a more restrictive test of when an appropriation rider was germane to House-passed language. The Senate could also tighten its rule against amendments conditioning funds on contingencies by not excepting those contingencies which will occur by a date certain. If Congress will not bar riders to District of Columbia appropriation bills as a class, it should at least distinguish between amendments which merely reduce the amount of funds available, such as across the board percentage cuts, and those which attempt to impose legislative policy on the District, such as prohibiting the use of funds for abortions.[144] At a bare minimum, the Senate could instruct its Parliamentarian to adopt a stance regarding germaneness more akin to that applied in the House,[145] so that, for example, a provision in a House bill providing funds

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See 129 CONG. REC. H35-51 (1983). This procedure has significantly reduced the number of riders approved by the House. Telephone interview with Stanley Bach, Congressional Research Service (June 22, 1989). Congress could strengthen this procedure, however, by imposing the duty, rather than the option, on floor managers to move to rise or alternatively by providing that the chair of the relevant authorizing committee, such as the District of Columbia Committee, can make the motion.

144. This may indeed be the purpose of the existing distinction between impermissible "legislation" and permissible "limitations," but the distinction is rooted in case-by-case congressional precedents that are difficult to apply to new situations. The distinction has not worked in practice to prevent federal second-guessing of local policy decisions.

145. *See, e.g.*, 135 CONG. REC. H6939 (daily ed. Oct. 11, 1989) (a successful point of order raised on grounds of germaneness by the District's House Delegate against a rider that would have limited the degree to which the District could have given preference to its own residents on civil service employment). The Senate's less restrictive attitude toward germaneness affects House procedure as well because riders that could not originate in the House may be tacked on to appropriations in the Senate and then returned to the House as a result of Senate-House conferences. At that point, the House can disagree with the conference recommendation, but a conference recommendation can not be ruled out of order in the House on grounds of germaneness. HOUSE RULES, *supra* note 111, Rule XXVIII. One member of the House noted:

> If we are going to go through this practice of trying to ram through Senate amendments which would never be permissible here as amendments to an appropriation bill

generally for higher education would not be a sufficient predicate for a Senate amendment repealing human rights protections for college students.[146]

Fourth, the Senate could modify its practice of mooting points of order against riders through supervening challenges to their "germaneness." The Senate could provide that any claim that a rider, though legislative, is germane must be resolved by a ruling of the presiding officer, with a possible appeal to the body, rather than by a dispositive vote on whether the proposal is germane. This procedure could help to focus the Senate on the technical issue rather than the merits of the rider, thereby buttressing the procedural integrity of the Senate's action.[147]

Finally, appropriation riders adopted by the Senate but not by the House must eventually be brought back to the House floor. There, any member can insist that the House vote on the appropriations separately rather than as submerged in an overall vote on a conference report.[148] The Chair of the House District of Columbia Committee should insist on such a vote for every District of Columbia appropriation rider added by the Senate and accepted by the House conferees. Although the House might accept some of the Senate amendments, others would probably be defeated, and the House conferees would soon show greater resistance to the legislative riders proposed by their Senate colleagues.

3. Budget Authority

With respect to ordinary legislation, the District must wait for congressional review and, perhaps, the repeal that might follow. Congressional review, however, does not actually affect the overwhelming majority of District laws. On the other hand, the District's annual appropriation must endure a searching review by the appropriations committees on Capitol Hill, and it cannot become law without being affirmatively enacted by Congress.[149] As a result, even the eighty-six percent of the District's budget that the District raises through the imposition of local taxes and fees may not be spent without a federal review of the allocation of the funds. For purposes of budget approval, Congress treats the District as though it were a federal agency rather than a local government.

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because of our rule against legislating on an appropriation bill, we are simply giving the other body a tremendous whip hand over us in the legislative process.

135 CONG. REC. H6543 (daily ed. Oct. 3, 1989) (statement of Rep. Green).

146. *See supra* notes 124-33 and accompanying text.

147. *See supra* notes 127-33 and accompanying text.

148. HOUSE RULES, *supra* note 111, Rule XX.

149. Home Rule Act, *supra* note 10, § 446 (codified at D.C. CODE ANN. § 47-304 (1987)).

The most obvious step that Congress could take in the direction of greater local autonomy would be to allow the District's Council to appropriate the funds the District itself raises as the Council deems fit. Alternatively, Congress could treat the budget like other District bills, requiring the District to submit budget legislation to Congress for its information, review, and possible revision by affirmative legislation, but providing that budgets approved by the District's Council would become law if not overturned by an Act of Congress.

Unfortunately, the District's dependence on Congress to appropriate fourteen percent of the District's budget from the United States Treasury could render such a reform meaningless. The District's annual plea and need for a federal subsidy could prompt language in the subsidy legislation conditioning the federal payment in various ways, reallocating the part of the budget derived from local revenues, and even barring the District from spending its own funds for purposes disapproved by Congress.[150]

A bill recently introduced by Representative Dellums might reduce the risk of congressional alteration of the District's budget.[151] Under this bill, the federal subsidy payment would be authorized on a permanent basis pursuant to a statutory formula, and the District's Council, rather than Congress, would approve the budget.[152] Congress' subsidy appropriation would represent its only annual involvement in the budget process. With the line-item appropriations of the budget no longer before them, perhaps the appropriations committees would focus only on the District's needs and on whether the amount determined by the authorization formula had been correctly computed. Moreover, Congress would be less inclined to change the allocations of funds within the budget or to attach policy riders. If Congress continues to undertake policymaking for the District as part of its review of the federal payment, then perhaps the District should consider foregoing the federal payment and becoming economically independent of Congress, a task that would become much easier if Congress would eliminate the bar to imposition of a nonresident income tax.[153]

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150. *See, e.g.*, 1989 Appropriation, *supra* note 24, 102 Stat. at 2269-9 (providing that no funds, even those raised locally, could be used to perform abortions, except where the mother's life was endangered).

151. H.R. 3293, 101st Cong., 1st Sess. 1 § 2(b) (1990). Under this bill, Congress would perpetually authorize a federal payment amounting to 21% of the total tax revenue of the general fund of the District.

152. *Id.*

153. *See supra* notes 107-09 and accompanying text; *see also* H.R. 11303, 95th Cong., 1st Sess. § 1 (a bill to eliminate this bar failed on an 8-12 vote in the House District of Columbia Committee in 1978). *See generally Commuter Tax: Hearings and Markups on H.R. 11303 and*

The Dellums bill would only make the authorization of appropriations permanent; Congress would still have to appropriate the federal payment annually. A former minority staff director has criticized the bill on that ground.[154] Even if the Dellums bill passed, the House and Senate appropriations committees would have an annual occasion to legislate for the District, and they might be tempted to make use of it. Alternatively, Congress, in a single law, could authorize and appropriate for every future year a sum of money for the use of the District of Columbia, based on a percentage of locally raised revenues. A future Congress could repeal that law, reverting to annual appropriations, but if it did not do so, the appropriations committees would have no annual occasion on which to consider the District's morals legislation or any other District policy. While a nonconstitutional provision bars a bill to establish a permanent indefinite appropriation for the District, it could incur opposition from members of the appropriations committees because it would reduce their discretion.[155]

4. Judicial Self-Determination

An important characteristic distinguishing self-determining communities from those held in colonial rule is that the colonial ruler rather than the people in those territories usually selects the judges in colonially-governed territories. In this respect, the District more closely resembles a colony than a state. The people do not elect the judges, and the Mayor does not appoint them. Rather, the President of the United States nominates the judges and the United States Senate confirms them.[156] The President must select nominees from among three names proposed by a seven-member commission, of which only three members are selected by District government officials.[157] Federal law, rather than local law, determines the judicial term of office.[158]

Here too, some changes short of statehood could give the District greater autonomy. The one change most respectful of the principles of home rule would be to allow the District to select its judges through a method deter-

H.R. 10116 Before the Subcomm. on Fiscal and Gov't Affairs of the House Comm. on the District of Columbia, 95th Cong., 1st Sess. (1978).

154. King, *Here's What to Do About Home Rule — Now,* Wash. Post, Mar. 11, 1990 at B7, col. 6.

155. Telephone interview with Tim Leath, Senate Appropriations Committee staff, Mar. 14, 1990.

156. Home Rule Act, *supra* note 10, § 433, *reprinted in* 1 D.C. CODE ANN. 10 (Supp. 1989).

157. The President appoints one member of the commission, the Board of Governors of the D.C. Bar appoint two members, the Mayor of the District appoints two members, the Council appoints one member, and the chief judge of the federal district court appoints one member (a federal judge). *Id.* § 434, *reprinted in* 1 D.C. CODE ANN. 11.

158. *Id.* §§ 431, 432, *reprinted in* 1 D.C. CODE ANN. 8-10.

mined by the District's Council and to determine the judges' terms of office. Alternatively, Congress might choose a method through which the people of the District could select their judges. For example, Congress could substitute the Mayor for the President or the Council for the Senate in an appointment process.[159] At the very least, if Congress wants the judiciary selected through very indirect methods, it could reconstitute the selection commission to include only persons chosen, directly or indirectly, by the voters of the District.[160]

5. *Control Over Criminal Prosecution*

Except in the nation's capital, every state and city selects the officials who will prosecute local crimes.[161] In the District, however, the United States Attorney, rather than an official chosen by the District's officials or voters, prosecutes all crimes other than violations of minor regulations.[162] This arrangement not only symbolically insults the District, but it diffuses responsibility, allowing members of Congress to blame the District's local government for insufficient crime control while refusing to allow officials

159. Given the opportunity, the people of the District would probably retain an appointment process for judicial selection rather than change to direct election of judges. In the District's Statehood Constitutional Convention in 1982, little sentiment existed for electing judges, although a vigorous battle took place over whether appointed judges should be subject to popular votes in retention elections. *See* P. SCHRAG, *supra* note 37, at 204-07.

160. For example, some members might be choosen by the Mayor, some by the Chair of the Council, some by the full Council, and some by sitting District of Columbia judges. There seems to be little justification for giving a voice in selection of local judges to the chief judge of the federal system while excluding the chief judge of the system in which the local judge will serve.

161. "Local crimes" means offenses defined by the Council. There is nothing unusual, of course, in having United States Attorneys selected by the President prosecute crimes defined by Congress.

162. D.C. CODE ANN. § 23-101 (1989). Congress has forbidden the District's Council from enacting any "act . . . relating to . . . the duties or powers of the United States attorney." Home Rule Act, *supra* note 10, § 602(a)(8) (codified as amended at D.C. CODE ANN. § 1-233(a)(8) (1987)). It is not clear whether that provision of law literally prevents the Council from amending section 23-101 to give its attorney, the Corporation Counsel for the District of Columbia, concurrent authority to prosecute crimes. Perhaps such a grant of power to an official of the District would not even "relate to" (much less diminish) the powers of the United States Attorney who would, in principle, gain a cooperative colleague and not lose any authority. However, such a move by the District would give the appearance on Capitol Hill of a grab for power with potential for creating rivalries between the two prosecuting authorities. In this respect, it should be noted that any amendments by the Council to title 23 of the D.C. Code are given special scrutiny by Congress; Congress prevents the amendments from going into force pending a 60-day congressional review (compared with 30 days for other types of legislation). If reforms are made in this area, they almost certainly will have to come from Congress, not from the Council.

chosen by the District to decide which crimes to prosecute, what plea bargains to accept, and what sentences or sentencing alternatives to seek.

Ideally, Congress should transfer to the District the power to prosecute all local crimes, retaining for the Federal Government, of course, the power to prosecute violations of federal criminal statutes. Alternatively, Congress could authorize District officials to prosecute certain types of serious crimes, while reserving to the United States Attorney the authority to prosecute the most serious crimes.

6. The Evanescent Nature of Home Rule

A final respect in which the District's residents have fewer political rights than residents of states lies in the fact that, while Congress cannot revoke a state's admission to the Union or prevent a state from having the same political rights as all other states,[163] it can rescind even the limited autonomy that it has granted to the District.[164] Furthermore, the Home Rule Act rests upon such a frail political charter that Congress can undercut its limited grant of autonomy without paying the political price associated with its repeal or amendment. It can simply violate the Home Rule Act on an *ad hoc* basis.

For example, the Home Rule Act provides that Congress may repeal a statute passed by the Council within the thirty-day waiting period before the law becomes effective.[165] If Congress waited until the thirty-first day before repealing a law of the District, the repeal would still be effective. Some political fallout may result from this maneuver because the Home Rule Act has created expectations that Congress will not meddle with local laws after the thirty-day period has expired. However, no legal obstacle would bar this repeal because Congress has constitutional power to legislate for the District, and because no Congress has the power to bind its successors.[166] The existing political expectations that would be challenged are held primarily by District residents, and they have no voting representatives in Congress. In-

163. *See* Coyle v. Oklahoma, 221 U.S. 559 (1911) (Congress lacked the power to impose restrictions in Oklahoma's enabling statute that would deprive Oklahoma of its power to locate its own seat of government and thus render it unequal to other states).

164. The United States Constitution provides that Congress shall "exercise exclusive Legislation in all Cases whatsoever" over the District. U.S. CONST. art. I, § 8, cl. 17. In the exercise of this power, Congress has delegated some of its lawmaking authority to the District government. But nothing in the Constitution, except Article IV, which permits Congress to establish states, authorizes Congress to divest itself of its constitutional power.

165. Home Rule Act, *supra* note 10, § 601(c)(1) (codified as amended at D.C. CODE ANN. § 1-233(c)(1) (1987)); *see also supra* notes 93-96 and accompanying text.

166. For a delightful and exhaustive analysis of the legal and philosophical justifications for the prohibition on self-entrenching legislation, see Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity,* 1987 AM. B. FOUND. RES. J. 379.

deed, the frequency with which Congress does pass legislation for the District in the guise of appropriation riders reveals the insignificance of the political cost of breaking the home rule compact.

D. Statehood

Compared with retrocession, combinations with other jurisdictions, and the piecemeal approach, statehood obviously presents an attractive option. Not only would it provide the residents of the District with political rights fully equal to those of the residents of existing states, but the conferral of those rights would be permanent rather than subject to reversal when the political coalition that had produced reform began to dissolve.

Achieving statehood, however, seems much more difficult than obtaining incremental reform over a long period of time. A statehood vote would require legislators to offer District residents considerably more power immediately. Statehood, therefore, attracts simultaneous opposition from: all those who object to the likelihood of two more Democrats in the Senate; those who do not want their own states' influence in the National Legislature diluted even by two percent; those in Maryland and Virginia who want to avoid the possibility of a commuter tax on their incomes; those who think that the security of federal buildings would somehow be compromised if Congress gave up its right to re-nationalize the District's police force; those who believe that some basic principle makes the concept of a city-state unthinkable; those who think the District too "liberal;"[167] those District residents who believe that their taxes would go up more quickly if Congress no longer had to approve the District's budget; and those, if any, who would prefer not to live in a country that includes a state with a black governor, a majority- black state legislature, and in all possibility, two black United States Senators.[168]

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167. "What have we gotten by enacting home rule? . . . Let's either revoke or drastically restructure home rule — let's finally help the unfortunate residents of this festering liberal hellhole." 135 CONG. REC. H4918 (daily ed. Aug. 2, 1989) (statement of Rep. DeLay). *See also* Ayres, *Washington Council Backs Vote on Congress Delegation,* N.Y. Times, Feb. 28, 1990, at A20, col. 3 ("In the past, some of the most adamant opposition to statehood has come from conservatives in Congress. Those lawmakers have argued that the predominately Democratic city would send only liberals to Congress."). Ed Rollins, a strategist for the Republican Party, has noted that "[g]enerally, Republicans do not favor statehood [because] you're going to get two liberal Democrats [in the Senate] and keep getting them for the next 100 years." Devroy & Melton, *supra* note 42.

168. Senator Edward M. Kennedy has been quoted by his colleague Senator Orrin G. Hatch as saying that opposition to the failed constitutional amendment to give the District voting representation in Congress was based on antipathy to a constituency that was "too liberal, too urban, too black, and too Democratic," and that the arguments against the amend-

The fact that opponents of greater home rule can make three constitutional arguments against statehood that they could not make against incrementally-achieved greater home rule further diminishes the likelihood of achieving statehood. These arguments, however dubious, have drawn attention away from the merits of equal political rights for District residents and thereby obscured the issues.

The first of these arguments centers upon the language of article I, section 8, clause 17, of the Constitution. Some argue that when the framers of the Constitution permitted Congress to "exercise exclusive Legislation . . . over such District (not exceeding ten Miles square) as may, by Cession of particular States . . . become the Seat of the Government,"[169] they intended to make any such ceded land a permanent capital and to prevent Congress from granting statehood to any part of it.[170] Testifying against statehood on behalf of the United States Department of Justice, Assistant Attorney General Stephen J. Markman claimed that "[o]nce the District became the seat of government in the manner prescribed in this provision, Congress cannot by simple legislation permanently abrogate its constitutional power to exercise exclusive legislation [over it]."[171]

Markman's argument, however, is vulnerable in two respects. First, the power to exercise "exclusive" legislation over a territory obviously includes the power to delegate legislative authority, as in the Home Rule Act, and, almost though perhaps not quite as obviously, the power to make such a delegation permanent.[172] Second, Congress has already divested the Federal

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ment were "a cover for partisan politics or . . . racism." Hatch, *Foreword* to J. BEST, *supra* note 44, at vii-viii.

Until recently, an additional political obstacle to statehood was the persistent rumor that the District's Mayor, Marion S. Barry, Jr., used cocaine. A number of members of Congress were leery of appearing to be ready to vest additional power in a local government whose political leader might be a drug addict and whose administration had been marked by scandals. Some observers suggested that the arrest of the Mayor on drug charges on January 18, 1990, "would set back the already struggling campaign seeking statehood." Apple, *In Need of Minor Miracle,* N.Y. Times, Jan. 20, 1990, at 1, col. 1, at 11, col. 4. But the arrest and subsequent indictment of the Mayor, if they ultimately lead to his removal from office, could actually advance the cause of statehood by making it possible for members of Congress to support statehood without appearing to endorse Mayor Barry.

169. U.S. CONST. art. I, § 8, cl. 17.

170. No statehood proposal purports to eliminate a District of Columbia over which Congress would retain exclusive and plenary power. The statehood bill, on which the House District of Columbia Committee in 1987 reported, would only have shrunk the size of the District of Columbia to the principal governmental area, creating a state out of the residential portions. Article I of the Constitution sets a maximum area for the District, but it does not require the District to be as large as ten square miles.

171. *D.C. Statehood Hearings, Part 1, supra* note 39, at 342.

172. *See id.* at 384 (prepared statement of Prof. Jason I. Newman of Georgetown University Law Center). The reason that the second claim is not as obvious as the first is that Con-

Government of part of the territory of the District. In 1846, finding that "no more territory ought to be held under the exclusive legislation given to Congress over the District . . . than may be necessary and proper for the purposes of such a seat," Congress retroceded about a third of what had been the District of Columbia to Virginia.[173] This land became Arlington and part of Alexandria, Virginia. Under the Justice Department's theory, Congress must have unconstitutionally retroceded those portions of Virginia, which are therefore still part of the District. Confronted with this objection, Markman could say only that "[t]hat is a very good question, Congressman, and it is one of the more difficult questions that needs to be dealt with."[174]

The second constitutional argument against statehood rests upon the claim that even if Congress can divest itself of part of the District, it cannot do so without the consent of Maryland. The Constitution states that "no new State shall be formed or erected within the Jurisdiction of any other State . . . without the Consent" of the legislature of that state.[175] Objectors to statehood argue that because the part of the District that would be made into a new state was once ceded by Maryland, the consent of Maryland would be necessary before the District could become a state.[176] However, a literal interpretation of the Constitution provides little support for this theory because even if Maryland had clearly expressed some continuing interest in the District when it ceded its land to Congress in 1788, the District is surely not now "within the Jurisdiction" of Maryland, a state that has lacked authority over the territory for nearly two hundred years.[177]

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gress may lack the power to bind successor Congresses with legislation that is purportedly permanent. *See* Eule, *supra* note 166, at 379. But by dint of the constitutional authority to create states, U.S. CONST. art. IV, section 3, statehood legislation may be an exception to this principle. Many eyebrows would be raised if Congress purported to pass a statute repealing the law that admitted Oregon to the Union.

173. Act of July 9, 1846, ch. 35, 9 Stat. 35.

174. *D.C. Statehood Hearings Part I, supra* note 39, at 369 (statement of Stephen J. Markman, Assistant Attorney General). A taxpayer constitutionally challenged the retrocession in Phillips v. Payne, 92 U.S. 130 (1875), but the United States Supreme Court rejected the challenge on the ground that, whether or not the retrocession had been lawful, Virginia was the *de facto* sovereign and that the plaintiff was estopped from challenging such a sovereignty.

Professor Raven-Hansen has noted in private conversation that the First Congress, which included many of the Framers of the Constitution, also changed the boundaries of the District, enlarging them to include the mouth of a river. Act of Mar. 3, 1791, ch. 17, 1 Stat. 214. Although this Act appears not to have ceded any land, it does suggest that the Framers thought the District's boundaries less than immutable.

175. U.S. CONST. art. IV, § 3, cl. 1.

176. *See D.C. Statehood Hearings Part I, supra* note 39, at 343 (statement of Stephen J. Markman, Assistant Attorney General).

177. Professor Seidman has noted in private correspondence that the force of this argument depends on when, precisely, the new state had to be "within the jurisdiction" of the old state for the constitutional clause to be operative. Although the District is not presently within the

In addition, Professor Raven-Hansen has shown that the Maryland legislature used absolute and unconditional language to cede the land,[178] although clauses retaining reversionary interests in land, in the event the grantee no longer needed it for a particular purpose, were in common use at the time and were in fact used for grants of land to the Federal Government.[179] Raven-Hansen indicates that to whatever extent a state can be said to have an intention, Maryland's intention was to divest itself of any interest in the land. One could argue, of course, that no one in Maryland could have contemplated an eventual District bid for statehood and that therefore Maryland cannot be said to have had an intention to divest so completely its interest, or that because Maryland ceded its land for the limited purpose of creating a federal district, it imposed an "implied condition" on its land grant, the unconditional language of its cession statute notwithstanding.[180]

The final constitutional objection to statehood is that the twenty-third amendment, which grants three Presidential electors to the "District constituting the seat of Government of the United States,"[181] precludes elimination of the District of Columbia because the amendment would then be meaningless and equally precludes shrinkage of the District to the White House, Capitol, and Mall area because then a handful of people living in that small territory, such as the President and his or her spouse, could control three electoral votes.[182]

This argument, however, overlooks the fact that the twenty-third amendment was not self-executing. It authorized Congress to "direct" the method of selection of electors from the District and to "enforce this article by appropriate legislation."[183] The amendment became part of the Constitution on April 3, 1961, when its ratification by the legislatures of three-fourths of the states was certified.[184] Congress did not pass legislation providing for

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jurisdiction of Maryland, the land that now comprises the District was within Maryland in the eighteenth century. Should statehood admission be viewed as a separate act, because it occurs 200 years after cession, or as merely the second stage of a 200-year process?

178. The land was "forever ceded and relinquished to the Congress and Government of the United States, and full and absolute right and exclusive jurisdiction." Md. Act of 1791, ch. 45, *reprinted in* 1 D.C. CODE ANN. 33, 34-35 (1981).

179. *See Hearings on Constitutional and Economic Issues, supra* note 108, at 45-46 (prepared statement of Prof. Peter Raven-Hansen of George Washington University).

180. J. BEST, *supra* note 44, at 69.

181. U.S. CONST. amend. XXIII, § 1.

182. *See D.C. Statehood Hearings Part 1, supra* note 39, at 343 (statement of Stephen J. Markman, Assistant Attorney General).

183. U.S. CONST. amend. XXIII, § 2.

184. S. REP. NO. 869, 87th Cong., 1st Sess. 10 (1961).

the popular election of presidential electors until six months later.[185] If the United States had held a Presidential election before enabling legislation had been passed, the District would not have been able to participate.[186] Similarly, if, as part of the act admitting the District to the Union, Congress merely repealed the law that provides a method for choosing electors, the electoral status of what remained the District of Columbia would revert to what it was during the summer of 1961. If there happened to be any persons residing in it who did not vote in the states,[187] they would not be entitled to vote for presidential electors. Congress could then at its leisure propose repealing the twenty-third amendment, which would have no further utility.

The constitutional arguments against statehood are unpersuasive, but they are politically weighty. These arguments have enjoyed the support of the Department of Justice not only in the Reagan administration, but in several

185. Act of Oct. 4, 1961, Pub. L. No. 87-389, § 1(1), 75 Stat. 817, 817 (codified as amended at D.C. CODE ANN. § 1-1301 (1987)).

186. This is not an imaginative interpretation of the twenty-third amendment; Congress intended the amendment not to be self-executing. This colloquy took place in the House during debate on the resolution to propose the amendment:

> Mr. ROGERS of Colorado. But if the Congress fails to take any action whatsoever, the people would not be permitted to vote in the District of Columbia?
>
> Mr. MEADER. I think it would take affirmative action by the Congress before anyone could vote for electors in the District of Columbia. Does not the gentleman agree with me?
>
> Mr. ROGERS of Colorado. I agree it would take affirmative action, and that under the affirmative action the Congress could set the qualifications for electors or the voters.

106 CONG. REC. 12,560 (1960). Representative Meader made the further point that the language of the amendment authorized the District to "appoint," not elect, electors, just as article II, section 1 of the Constitution authorizes states to "appoint" electors in a manner directed by their legislatures. Indeed, a congressional committee had expressly rejected the language of the amendment resolution as originally introduced, which would have provided for the "people" of the District to "elect" presidential electors in a manner to be provided by Congress. *Id.* Congress subsequently chose to authorize the popular election of presidential electors, but the colloquy suggests that no particular District resident, including members of the presidential family, could legitimately expect, absent enabling legislation, to have a right to participate in the selection of presidential electors.

187. Presidents and their families have traditionally voted in the states in which they resided before they occupied the White House rather than in the District of Columbia. If there were other residents of the portion of the District that did not become a new state, they could vote in the new state by virtue of its Constitution. NEW COLUMBIA CONST. § 1110, 1 D.C. CODE ANN. 117, 162 (Supp. 1989). If New Columbia repealed that portion of its Constitution, Congress could nevertheless authorize such persons to vote for federal officers in New Columbia, just as it has permitted United States citizens living abroad to vote for federal officers in the states in which they formerly resided, notwithstanding state election laws to the contrary. 42 U.S.C. § 1973dd-1 (1982).

of its predecessors.[188] Members of Congress opposed to statehood echo them,[189] and they would provide good camouflage for a President who wanted to veto a statehood admission act without appearing to be a foe of home rule or voting representation in Congress.

III. THE REQUIREMENT OF STRATEGY

This analysis suggests that while statehood would provide both real power in the two Houses of Congress[190] and genuine self-determination for District residents, those seeking to achieve statehood face exceedingly difficult odds.[191] Moreover, statehood is not the only means to enhance the political liberty of those living in the District. Congress could reduce the extent to which it treats the District's residents like colonial subjects in many ways.[192]

Ironically, efforts to reform home rule may be politically damaging to the drive toward statehood. By improving its political autonomy through statutory reforms, the District may simultaneously undermine its most compelling arguments for equal treatment. For example, obtaining the right to have one voting member in each House of Congress would largely undermine the politically appealing claim of being subject to "taxation without representation." Achieving many of the assurances of self-determination described throughout this Article could considerably narrow the disparity be-

188. *See D.C. Statehood Hearings Part I, supra* note 39, at 354, 374 (statement of Stephen J. Markman, Assistant Attorney General, paraphrasing memoranda from Justice Department officials in the Kennedy and Carter administrations).

189. *See, e.g., D.C. Statehood, Part 2: Markups on H.R. 51 Before the House Comm. on the District of Columbia,* 100th Cong., 1st Sess. 90, 92 (prepared statement of Rep. Thomas J. Bliley, Jr.); *id.* at 126, 131 (prepared statement of Rep. Stan Parris); *id.* at 104, 107 (prepared statement of Rep. Larry Combest).

190. Statehood would bring the District greater influence over national affairs in other ways as well. For example, President George Bush held an "education summit" with the nation's governors, including those of Puerto Rico and the Virgin Islands, in September 1989. Although District schools have been experiencing one of the country's most severe crises, the District was excluded from the conference because it has no "governor." *D.C. Officials Dismayed at Lack of an Invitation,* Wash. Post, Sept. 28, 1989, at A4, col. 4.

191. Some members of Congress might prefer statehood for the District rather than a slow process of reform. Supporters of statehood might include those who believe in full self-determination for all Americans, those who think that Congress wastes too much time by debating local issues every year, and those who would prefer not to have to choose between voting their consciences to support a liberal District Council and avoiding frequent political exposure on issues that are often highly emotional. *Cf.* 135 CONG. REC. H6549 (daily ed. Oct. 3, 1989) (statement of Rep. Hoyer). Supporting the D.C. Council's ban on discrimination against homosexuals "is subject to a 30-second ad . . . and they can say, 'Steny Hoyer is for homosexuals,' and somehow put in fear those who will go to the polls and select [Hoyer]." *Id.*

192. Comparisons between the political status of the District and that of a colony have often been made. *See, e.g.,* S. SMITH, *supra* note 6. For a thumbnail description of Washington, D.C. as a colony, see P. SCHRAG, *supra* note 37, at 9-10.

tween the independence people have in the District and the independence people enjoy in the states, but at the cost of undercutting the drive toward full political freedom. Gradual reform through incremental improvements may be much easier to achieve than statehood, but it may make the achievement of statehood impossible.[193]

The sixty to forty vote for the initiative that led to the District's statehood petition[194] indicates that the people of the District support full membership in the Union. But construing that vote as a *strategic choice* in favor of statehood or as a genuine, deep, and continued commitment to a new political order would be fallacious. First, the political atmosphere has changed since the vote a decade ago.[195] Second, no one has put before the electorate an alternative strategy of seeking a gradual improvement in political rights. Third, the lack of congressional interest in statehood for the District has been mirrored by an apparent lack of interest in the District itself.

Aside from the lobbying efforts of Delegate Walter Fauntroy, the speeches of Reverend Jesse Jackson, and the educational endeavors of a stalwart band of activists who comprise the Statehood Commission,[196] the statehood issue has been barely visible since 1982. Until Reverend Jackson suggested his interest in running to become one of the District's "Senators," District newspapers and radio stations rarely discussed the issue. Few voluntary organizations have pressed for, or even endorsed, statehood. There have been no mass demonstrations supporting the concept.[197] The Council repeatedly

193. It is possible, of course, to make exactly the opposite argument, that statehood would become more likely after a period in which Americans became accustomed to a fully self-governing District of Columbia, particularly one that voted in Congress. But it seems more likely that the political imperative of granting the District statehood rests on the perceived injustice of its unequal status and, particularly, on the fact that District residents have no voting representation in Congress. If its moral claims to statehood based on its quasi-colonial status were removed, the District would probably have trouble making a claim on the national agenda.

194. D.C. Board of Elections and Ethics, Official Results of Nov. 4, 1980, General Election, at 003.000 (Table). The initiative is codified at D.C. CODE ANN. § 1-111 (1981).

195. Two subsequent votes provide even less clear indications that the District's residents favor statehood. The 1981 election of delegates to a statehood constitutional convention was not a vote on statehood because the ballot did not include the option of not holding such a convention; the only choice was among candidates for delegate. Similarly, the 53-47 vote ratifying the constitution drafted by the convention was not a vote on statehood, but only a vote supporting the proposed constitution in the event that the District became a state. *See* D.C. Board of Elections & Ethics, Election Results for Nov. 2, 1982.

196. The Statehood Commission is a public body established by the 1980 Statehood Initiative, charged with advancing the cause of District Statehood. D.C. CODE ANN. § 1-115 (1981).

197. Even a statehood rally that Reverend Jackson called for on Martin Luther King Jr.'s Birthday, 1990, "failed to materialize and instead became a news conference." *Loose Lips*, Wash. City Paper, Feb. 16, 1990, at 4, col. 1. The Mayor and Council of the District have

postponed the elections, called for in the 1980 initiative, for a Representative and Senators, who would become highly visible advocates for statehood on Capitol Hill.[198] Most importantly, neither the business nor the political leadership of the District has attempted to rally support for statehood among the people who have the political power to bring it about: the citizens of the fifty states. The constitutional amendment that would have given the District voting representation in Congress passed the Senate in 1978 primarily because the Senate viewed the amendment as a civil rights issue. Republican Senator Strom Thurmond and other Southern senators with substantial numbers of black constituents in their home states supported the amendment after Delegate Fauntroy took the issue on the road.[199] No one since has undertaken a comparable national political campaign on behalf of District statehood.

If incremental reform of home rule and statehood are mutually inconsistent objectives, the first step to move the District beyond the present drift would be to put the strategic choice into focus for the leadership and electorate of the District. After a period of public debate about alternative strategies, the people should be asked to decide whether they really want statehood, taking into account the likelihood that they will have to work harder to achieve it in the coming decade than they have to this point and that pressing for statehood may require foregoing other reforms that could undermine the District's moral claim to admission to the Union. This choice should be expressed through a new referendum, and the Council, or the people directly through an intiative campaign, should now set into motion the process of a new District-wide vote on statehood.[200]

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occasionally acted to support the District's statehood bid (for example, by enacting a less controversial state constitution than the one ratified by the voters). D.C. Act No. 7-19 (1987) (codified at D.C. CODE ANN. § 1-113 (Supp. 1989)); *see also* NEW COLUMBIA CONST., 1 D.C. CODE ANN. 117 (Supp. 1989) (enacted 1987). They have tended, however, to follow rather than lead the electorate on this issue. A voter initiative, rather than the Mayor or the Council, started the process of seeking statehood, and only three of the thirteen Council members sought office as delegates to the Constitutional Convention. The Mayor also chose not to run. P. SCHRAG, *supra* note 37, at 20-28.

198. Now the elections are to be held, but the District will require its officials and their staffs to be paid by privately raised funds. *See supra* note 74 and accompanying text.

199. *See* P. SCHRAG, *supra* note 37, at 23.

200. A new referendum is warranted in any event because no one submitted the Council's action in 1987, which replaced the proposed constitution that the voters ratified in 1982, with one drafted by the Council for voter approval. While voter approval is not legally necessary because Congress will dictate what constitution goes into effect or what procedures are necessary for putting a constitution into effect, a constitution ratified by the voters should not be changed without further voter approval. Indeed, the proposed constitution which the voters ratified specified that the constitution could be amended by the Council, but that the amend-

The new referendum should produce a reaffirmation of the desirability of statehood and a renewed commitment of energy to the task of obtaining it. Congress' actions over the last three or four years give the District no reason to expect that incremental reform will be forthcoming.[201] Furthermore, the ultimate argument against incremental reform and in favor of statehood is the revocability of any reforms not entrenched or perpetuated either by a constitutional amendment or by admission of the District to the Union.[202]

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ments should then be taken back to the voters in a referendum. NEW COLUMBIA CONST. art. XVIII, § 9, *reprinted in* 1 D.C. CODE ANN. at 116 (Supp. 1989) (proposed constitution).

201. Indeed, Congress appears remarkably hostile to such reforms. In 1989, when the Senate Energy and Natural Resources Committee defined the options to be considered by the voters in a plebiscite on the future of Puerto Rico, some Senators proposed that continued Commonwealth status, if that were chosen by Puerto Rican voters, should include a non-voting "Senate representative" with a staff of accredited Senate employees. The representative would not have been able to speak on the floor or to vote in committee. This proposal was defeated in the Committee because it might have set a precedent for granting similar privileges to the District of Columbia. Havemann, *Senate Voice for Puerto Rico Opposed,* Wash. Post, Aug. 2, 1989, at A8, col. 1. The Senate Energy and Natural Resources Committee did accept the concept of permitting the Commonwealth of Puerto Rico to have a "liaison office" whose staff would have the privileges enjoyed by employees of the Congressional Research Service rather than the privileges given to the staff members of Senate offices. Havemann, *Panel Passes Referendum on Puerto Rico's Status,* Wash. Post, Aug. 3, 1989, at A12, col. 1.

202. See *supra* notes 152-66 and accompanying text. My colleague Louis Michael Seidman argues that even statehood could not protect the present District against congressional legislation directed only at the new state's residents because the power of Congress under the commerce clause is essentially unbounded, "no Supreme Court case has held that discrimination among states is unconstitutional," and "the Court has permitted such discrimination even in the teeth of the express constitutional requirement of uniformity in the areas of bankruptcy and taxation." Seidman, *supra* note 31, at 407.

Seidman's arguments are ingenious but not entirely persuasive. First, while Seidman is correct in saying that the Court has never invalidated a federal statute effective only in one state, the Court appears never to have upheld such a law either. Indeed, the rarity, or perhaps total absence, of such legislation tends to suggest that Congress believes that legislating for particular states, as it routinely does for the District and the territories, would violate principles of equal protection. Second, while Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), rejected the view that certain state powers were immune under the tenth amendment from invasion by Congress, the issue of whether Congress could target only certain states for the application of federal law was not raised or addressed in that case. Finally, Seidman cites two cases for his proposition that the Court has on occasion permitted "such" discrimination, but in neither case was the application of federal law congruent with state boundaries. In the Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974), the federal law at issue applied not to one state, but to all of the states in a certain region, and to portions of three other contiguous states. In United States v. Ptasynski, 462 U.S. 74 (1983), the special tax exemption provided by Congress was described in a statute as one applicable to "Alaskan oil," *id.* at 77, but the Court made a point of noting, as it upheld the legislation, that this description was "not entirely accurate," *id.,* that "less than 20% of current Alaskan production is exempt" *id.,* from tax, that oil produced in "certain offshore territorial waters — beyond the limits of any State — is [also exempt]," and that *"[t]he exemption thus is not drawn on state political lines" id.* at 78 (emphasis added). The Court upheld rational distinctions based on *bona fide* geographical differences "based on neutral factors." *Id.* at 85. However,

While the liberty of the District's 600,000 residents could be enhanced in many ways short of statehood, statehood represents the best way of permanently securing for our fellow Americans residing in the Nation's Capital the political privileges that we who live in the fifty states have always taken for granted.

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the Court's explicit notation that Congress did not use state boundaries to define those geographical differences suggests that, in its view, federal legislation applicable only to one or two states would be of dubious validity.

Seidman also argues that Congress could circumvent a constitutional ban on state-by-state legislation by defining certain states descriptively rather than by naming them. Seidman, *supra* note 31, at 408. Courts would be quite capable, however, of determining whether the differences in applicable law were rationally related to the differences defined by the congressional descriptions. To use Seidman's example, there could be no reasonable justification for congressional approval of religiously-based discrimination against homosexuals only in states with large numbers of federal employees. *Id.* at 404-05.

APPENDIX*

Significant District of Columbia Appropriation Riders
Approved by Congress, FY 1975-1989

District of Columbia Appropriation Act, 1975, Pub. L. No. 93-405, 88 Stat. 822 (1974).

General Operating Expenses:

D.C. cannot spend more than $7,500 on "test borings and soil investigations."[203]

Human Resources:

Total reimbursement to St. Elizabeths Hospital shall not exceed the amount paid in FY 1970.[204]

Highways & Traffic:

No funds are available "for the purchase of driver-training vehicles."[205]

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* N.B. To aid the user of this *Appendix*, the act in which the restriction first appeared is in bold face print and the restriction heading is in italics.

203. District of Columbia Appropriation Act, 1975, Pub. L. No. 93-405, 88 Stat. 822, 823 (1974) (1975 Appropriation); District of Columbia Appropriation Act, 1976, Pub. L. No. 94-333, 90 Stat. 785, 786 (1975) (not to exceed $1875) (1976 Appropriation); District of Columbia Appropriation Act, 1977, Pub. L. No. 94-446, 90 Stat. 1490, 1491 (1976) (1977 Appropriation); District of Columbia Appropriation Act, 1978, Pub. L. No. 95-288, 92 Stat. 281, 282 (1977) (1978 Appropriation); District of Columbia Appropriation Act, 1979, Pub. L. No. 95-373, 92 Stat. 699, 700 (1978) (1979 Appropriation); District of Columbia Appropriation Act, 1980, Pub. L. No. 96-93, 93 Stat. 713, 714 (1979) (1980 Appropriation); District of Columbia Appropriation Act, 1981, Pub. L. No. 96-530, 94 Stat. 3121, 3122 (1980) (1981 Appropriation); District of Columbia Appropriation Act, 1982, Pub. L. No. 97-91, 95 Stat. 1173, 1173-74 (1981) (1982 Appropriation); District of Columbia Appropriation Act, 1983, Pub. L. No. 97-378, 96 Stat. 1925, 1926 (1982) (1983 Appropriation).

204. 1975 Appropriation, 88 Stat. at 824-25; 1976 Appropriation, 90 Stat. at 788; 1977 Appropriation, 90 Stat. at 1492; 1978 Appropriation, 92 Stat. at 284; 1979 Appropriation, 92 Stat. at 701 ($20,919,500 limit); 1980 Appropriation, 93 Stat. at 715 ($18,691,800 limit); 1981 Appropriation, 94 Stat. at 3123-24 ($21,348,700 limit); 1982 Appropriation, 95 Stat. at 1177 ($22,948,700 limit); 1983 Appropriation, 96 Stat. at 1928 ($24,748,700 limit); District of Columbia Appropriation Act, 1984, Pub. L. No. 98-125, 97 Stat. 819, 822 (1983) ($5,700,000 and $29,448,700 limits) (1984 Appropriation); Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,737 (1984) ($55,207,000 limit)) (1985 Appropriation); Act of Dec. 19, 1985, Pub. L. No. 99-190, 99 Stat. 1185, 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,089 (1985) ($55,207,000 limit)) (1986 Appropriation); Act of Oct. 30, 1986, Pub. L. No. 99-591, 100 Stat. 3341-180, 3341-185 ($71,200,000 limit) (1987 Appropriation).

205. 1975 Appropriation, 88 Stat. at 825; 1976 Appropriation, 90 Stat. at 788; 1977 Appropriation, 90 Stat. at 1492; 1978 Appropriation, 92 Stat. at 284; 1979 Appropriation, 92 Stat. at 702; 1980 Appropriation, 93 Stat. at 715; 1981 Appropriation, 94 Stat. at 3124; 1982 Appropriation, 95 Stat. at 1177; 1983 Appropriation, 96 Stat. at 1928; 1984 Appropriation, 97 Stat. at 822.

Environmental Services:

No funds are available for the collecting of ashes or miscellaneous refuse from hotels, businesses, or rooming/boarding houses.[206]

Capital Outlay:

The Woodrow Wilson High School swimming pool cannot be used after 9 p.m.[207]

General Provisions:

"[A]ll vouchers covering expenditures of appropriations . . . shall be audited before payment . . . ."[208]

An amount specified within this Act for particular purposes shall be considered the maximum amount which may be expended for said purpose or object.[209]

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206. 1975 Appropriation, 88 Stat. at 825; 1976 Appropriation, 90 Stat. at 789; 1977 Appropriation, 90 Stat. at 1492; 1978 Appropriation, 92 Stat. at 285; 1979 Appropriation, 92 Stat. at 702; 1980 Appropriation, 93 Stat. at 716; 1981 Appropriation, 94 Stat. at 3124; 1982 Appropriation, 95 Stat. at 1177; 1983 Appropriation, 96 Stat. at 1928; 1984 Appropriation, 97 Stat. at 822; 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,738 (1984)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,089 (1985)); 1987 Appropriation, 100 Stat. at 3341-185; District of Columbia Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-90, 1329-94 (1987) (1988 Appropriation); District of Columbia Appropriations Act, 1989, Pub. L. No. 100-462, 102 Stat. 2269, 2269-4 (1988) (1989 Appropriation).

207. 1975 Appropriation, 88 Stat. at 826.

208. 1975 Appropriation, 88 Stat. at 827 (§ 1); 1976 Appropriation, 90 Stat. at 790 (§ 1); 1977 Appropriation, 90 Stat. at 1493 (§ 102); 1978 Appropriation, 92 Stat. at 286 (§ 201); 1979 Appropriation, 92 Stat. at 703 (§ 201); 1980 Appropriation, 93 Stat. at 717 (§ 201); 1981 Appropriation, 94 Stat. at 3126 (§ 102); 1982 Appropriation, 95 Stat. at 1179 (§ 102); 1983 Appropriation, 96 Stat. at 1931 (§ 102); 1984 Appropriation, 97 Stat. at 825 (§ 102); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,739 (1984) (§ 102)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,090 (1985) (§ 102)); 1987 Appropriation, 100 Stat. at 3341-188 (§ 102); 1988 Appropriation, 101 Stat. at 1329-98 (§ 102); 1989 Appropriation, 102 Stat. at 2269-8 (§ 102).

209. 1975 Appropriation, 88 Stat. at 827 (§ 2); 1976 Appropriation, 90 Stat. at 790 (§ 2); 1977 Appropriation, 90 Stat. at 1494 (§ 103); 1978 Appropriation, 92 Stat. at 286 (§ 202); 1979 Appropriation, 92 Stat. at 703 (§ 202); 1980 Appropriation, 93 Stat. at 717 (§ 202); 1981 Appropriation, 94 Stat. at 3126 (§ 103); 1982 Appropriation, 95 Stat. at 1179 (§ 102); 1983 Appropriation, 96 Stat. at 1931 (§ 103); 1984 Appropriation, 97 Stat. at 825 (§ 103); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,739 (1984) (§ 103)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,090 (1985) (§ 103)); 1987 Appropriation, 100 Stat. at 3341-188 (§ 103); 1988 Appropriation, 101 Stat. at 1329-98 (§ 103); 1989 Appropriation, 102 Stat. at 2269-8.

No appropriation shall be used in connection with any regulation of the Public Service Commission requiring the installation of taxicab meters.[210]

No funds are available for payment of electric rates in excess of 2 cents per kilowatt-hour for street lighting.[211]

No funds shall be obligated for payment to any permanent employee if the total number of D.C. employees exceeds 39,619.[212]

No funds appropriated for educational purposes may be used for partisan political activities.[213]

District of Columbia Appropriation Act, 1977, Pub. L. No. 94-446, 90 Stat. 1490 (1976).

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210. 1975 Appropriation, 88 Stat. at 827 (§ 5); 1976 Appropriation, 90 Stat. at 791 (§ 5); 1977 Appropriation, 90 Stat. at 1494 (§ 106); 1978 Appropriation, 92 Stat. at 287 (§ 205); 1979 Appropriation, 92 Stat. at 704 (§ 205); 1980 Appropriation, 93 Stat. at 717 (§ 205); 1981 Appropriation, 94 Stat. at 3126 (§ 106); 1982 Appropriation, 95 Stat. at 1180 (§ 106); 1983 Appropriation, 96 Stat. at 1931 (§ 106); 1984 Appropriation, 97 Stat. at 825 (§ 106); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,739 (1984) (§ 106)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,090 (1985) (§ 106)).

211. 1975 Appropriation, 88 Stat. at 827 (§ 6); 1976 Appropriation, 90 Stat. at 791 (§ 6); 1977 Appropriation, 90 Stat. at 1494 (§ 107); 1978 Appropriation, 92 Stat. at 287 (§ 206); 1979 Appropriation, 92 Stat. at 704 (§ 206); 1980 Appropriation, 93 Stat. at 717 (§ 206).

212. 1975 Appropriation, 88 Stat. at 828 (§ 13); 1976 Appropriation, 90 Stat. at 791-92 (§ 13); 1977 Appropriation, 90 Stat. at 1495 (§ 114, limit of 35,145 employees); 1978 Appropriation, 92 Stat. at 288 (§ 213, limit of 36,000 employees); 1979 Appropriation, 92 Stat. at 705 (§ 213, limit of 37,161 employees); 1980 Appropriation, 93 Stat. at 718 (§ 213, limit of 37,886 employees); 1981 Appropriation, 94 Stat. at 3127 (§ 112, limit of 35,313 employees); 1982 Appropriation, 95 Stat. at 1180 (§ 112, limit of 32,950 employees); 1983 Appropriation, 96 Stat. at 1932 (§ 112, limit of 33,268 employees); 1984 Appropriation, 97 Stat. at 826 (§ 112, limit of 30,417 employees); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. CONF. REP. NO. 1088, 98th Cong., 2d Sess., *reprinted in* 130 CONG. REC. 27,379, 27,382 (1984) (§ 111, limit of 31,546 employees)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. CONF. REP. NO. 419, 99th Cong., 1st Sess., *reprinted in* 131 CONG. REC. 34,784, 34,786 (1985) (§ 111, limit of 32,511 employees)); 1987 Appropriation, 100 Stat. at 3341-189 (§ 110, limit of 33,549 employees); 1988 Appropriation, 101 Stat. at 1329-99 (§ 110, limit of 37,393 employees); 1989 Appropriation, 102 Stat. at 2269-8 to -9 (§ 110, limit of 38,471 employees).

213. 1975 Appropriation, 88 Stat. at 828 (§ 14); 1976 Appropriation, 90 Stat. at 792 (§ 14); 1977 Appropriation, 90 Stat. at 1495 (§ 115); 1978 Appropriation, 92 Stat. at 288 (§ 214); 1979 Appropriation, 92 Stat. at 705 (§ 214); 1980 Appropriation, 93 Stat. at 718 (§ 214); 1981 Appropriation, 94 Stat. at 3127 (§ 113); 1982 Appropriation, 95 Stat. at 1181 (§ 113); 1983 Appropriation, 96 Stat. at 1932 (§ 113); 1984 Appropriation, 97 Stat. at 826 (§ 113); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,739-40 (1984) (§ 112)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,091 (1985)); 1987 Appropriation, 100 Stat. at 3341-189 (§ 111); 1988 Appropriation, 101 Stat. at 1329-99 (§ 111); 1989 Appropriation, 102 Stat. at 2269-9 (§ 111).

Human Resources:

> $13,733,000 shall be available for the "care and treatment of the mentally retarded at Forest Haven."[214]

General Provisions:

> No funds shall be available for compensation to persons performing public affairs or public relations services unless approved by a resolution of the D.C. Council.[215]

District of Columbia Appropriation Act, 1978, Pub. L. No. 95-288, 92 Stat. 281 (1977).

Capital Outlay:

> No funds appropriated for the Washington Civic Center shall be obligated until the plans submitted by the Mayor and the Council are approved by the House and Senate Subcommittees on D.C. Appropriations.[216]
>
> No funds appropriated for the construction of the University of the District of Columbia shall be obligated until the master plan is approved by the Mayor, the Council, and the House and Senate Committees on Appropriations.[217]

District of Columbia Appropriation Act, 1979, Pub. L. No. 95-373, 92 Stat. 699 (1978).

General Provisions:

> No funds shall be paid for any judgment entered against the District of Columbia as a result of the 2 cents per kilowatt-hour limitation.[218]
>
> No funds are available for the compensation of any D.C. employee "whose name and salary are not available for public inspection."[219]

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214. 1977 Appropriation, 90 Stat. at 1492; 1978 Appropriation, 92 Stat. at 284 ($15,134,700); 1979 Appropriation, 92 Stat. at 701 ($15,504,700).

215. 1977 Appropriation, 90 Stat. at 1495 (§ 117).

216. 1978 Appropriation, 92 Stat. at 285-86; 1979 Appropriation, 92 Stat. at 703.

217. 1978 Appropriation, 92 Stat. at 286.

218. 1979 Appropriation, 92 Stat. at 704 (§ 207); 1980 Appropriation, 93 Stat. at 717 (§ 207).

219. 1979 Appropriation, 92 Stat. at 705 (§ 218); 1980 Appropriation, 93 Stat. at 719 (§ 218); 1981 Appropriation, 94 Stat. at 3127 (§ 116); 1982 Appropriation, 95 Stat. at 1181 (§ 116); 1983 Appropriation, 96 Stat. at 1933 (§ 116); 1984 Appropriation, 97 Stat. at 827 (§ 117); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,740 (1984) (§ 116)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,091 (1985) (§ 116)); 1987 Appropriation, 100 Stat. at 3341-190 (§ 115); 1988 Appropriation, 101 Stat. at 1329-99 (§ 115); 1989 Appropriation, 102 Stat. at 2269-9 (§ 115).

No funds in this appropriation shall be available "to support or defeat legislation pending before Congress or any State legislature."[220]

District of Columbia Appropriation Act, 1980, Pub. L. No. 96-93, 93 Stat. 713 (1979).

Human Support Services:

No funds shall be available for the summer youth jobs program until the House and Senate Subcommittees on D.C. Appropriations have approved the plan submitted by the Mayor and the Council detailing expenditures.[221]

General Provisions:

No funds shall be expended for the compensation of any D.C. employee "whose, name, title, grade, salary, past work experience, and salary history are not available for inspection" by the House or Senate Appropriations Committee or their representatives.[222]

No Federal funds may be used to perform abortions unless the mother is endangered, or a victim of rape or incest, and where the incident has been reported promptly to the police or the public health service. Contraceptives and procedures for termination of ectopic pregnancy are exempted.[223]

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220. 1979 Appropriation, 92 Stat. at 705 (§ 219); 1980 Appropriation, 93 Stat. at 719 (§ 219); 1981 Appropriation, 94 Stat. at 3127 (§ 117); 1982 Appropriation, 95 Stat. at 1181 (§ 117); 1983 Appropriation, 96 Stat. at 1933 (§ 117); 1984 Appropriation, 97 Stat. at 827 (§ 118); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,740 (1984) (§ 117)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,091 (1985) (§ 117)); 1987 Appropriation, 100 Stat. at 3341-190 (§ 116); 1988 Appropriation, 101 Stat. at 1329-99 (§ 116); 1989 Appropriation, 102 Stat. at 2269-9 (§ 116).

221. 1980 Appropriation, 93 Stat. at 715; 1981 Appropriation, 94 Stat. at 3124; 1982 Appropriation, 95 Stat. at 1177.

222. 1980 Appropriation, 93 Stat. at 719 (§ 216); 1981 Appropriation, 94 Stat. at 3127 (§ 114); 1982 Appropriation, 95 Stat. at 1181 (§ 114); 1983 Appropriation, 96 Stat. at 1933 (§ 114); 1984 Appropriation, 97 Stat. at 826 (§ 115); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,740 (1984) (§ 114)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,191 (1985) (§ 114)); 1987 Appropriation, 100 Stat. at 3341-189 (§ 113); 1988 Appropriation, 101 Stat. at 1329-99 (§ 113); 1989 Appropriation, 102 Stat. at 2269-9 (§ 113).

223. 1980 Appropriation, 93 Stat. at 719 (§ 220); 1981 Appropriation, 94 Stat. at 3127-28 (§ 118); 1982 Appropriation, 95 Stat. at 1181 (§ 118); 1983 Appropriation, 96 Stat. at 1933 (§ 118); 1984 Appropriation, 97 Stat. at 827 (§ 119); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,740 (1984) (§ 118)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. CONF. REP. NO. 419, 99th Cong., 1st Sess., *reprinted in* 131 CONG. REC. 34,784, 34,786 (1985) (§ 118)); 1987 Appropriation, 100 Stat. at 3341-190 (§ 117); 1988 Appropriation, 101 Stat. at 1329-99 (§ 117); 1989 Appropriation, 102 Stat. at 2269-9 (§ 117, eliminated exception for rape or incest victims and forbids use of funds for contraceptives and termination of ectopic pregnancy).

District of Columbia Appropriation Act, 1981, Pub. L. No. 96-530, 94 Stat. 3121 (1980).

Governmental Direction and Support:

Only "$500,000 of this appropriation shall be available for settlement of property damage claims not in excess of $1,500 each and personal injury claims not in excess of $5,000."[224]

General Provisions:

No funds shall be expended for consulting services hired through procurement contracts unless expenditures of those contracts "are a matter of public record and [are] available for public inspection," except where governed by existing law, "or under existing Executive order issued pursuant to existing law."[225]

District of Columbia Appropriation Act, 1982, Pub. L. No. 97-91, 95 Stat. 1173 (1981).

Governmental Direction and Support:

No funds "appropriated for the Office of Financial Management shall be apportioned and payable for debt service for short-term borrowing on the bond market."[226]

The D.C. Retirement Board shall provide Congress with "a quarterly report of the allocations of charges by fund and of expenditures of all funds."[227]

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224. 1981 Appropriation, 94 Stat. at 3122.

225. *Id.* at 3125 (§ 101); 1982 Appropriation, 95 Stat. at 1179 (§ 101); 1983 Appropriation, 96 Stat. at 1931 (§ 101); 1984 Appropriation, 97 Stat. at 825 (§ 101); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,739 (1984) (§ 101)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,090 (1985) (§ 101)); 1987 Appropriation, 100 Stat. at 3341-188 (§ 101); 1988 Appropriation, 101 Stat. at 1329-98 (§ 101); 1989 Appropriation, 102 Stat. at 2269-7 (§ 101).

226. 1982 Appropriation, 95 Stat. at 1174; 1983 Appropriation, 96 Stat. at 1926.

227. 1982 Appropriation, 95 Stat. at 1174; 1983 Appropriation, 96 Stat. at 1926; 1984 Appropriation, 97 Stat. at 820 (quarterly report to Council required); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,737 (1984) (same)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,089 (1985) (same)); 1987 Appropriation, 100 Stat. at 3341-182 (same); 1988 Appropriation, 101 Stat. at 1329-91 (same); 1989 Appropriation, 102 Stat. at 2269-1 (same).

Economic Development and Regulation:

The District will establish a special fund to assure that any funds "available to the Lottery and Charitable Games Control Board shall be derived from non-Federal" District revenues.[228]

Lottery and Charitable Games Enterprise Fund:

The D.C. Auditor "shall conduct a comprehensive audit on the financial status of the Fund," and shall provide the report to the Mayor, the D.C. Council Chairman, and Senate and House Subcommittees on D.C. appropriations.[229]

There shall be no advertising of lottery or charitable games on public transportation and at their stops and stations.[230]

The advertising, sale, operation, or playing of these games is forbidden in "the Federal enclave, and in adjacent public buildings and land controlled by the Shipstead-Luce Act, . . . as well as in the Old Georgetown Historic District."[231]

The Lottery Board shall make an annual report to the House and Senate Subcommittees on D.C. Appropriations at the end of the year detailing receipts and disbursements of the Board.[232]

Public Education System:

This appropriation is not available to subsidize the education of nonresidents at the University of the District of Columbia (UDC) unless the UDC Board of Trustees adopts a tuition rate schedule for nonresidents at a level no lower than the nonresident tuition rate charged at comparable schools in the metropolitan area.[233]

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228. 1982 Appropriation, 95 Stat. at 1174; 1983 Appropriation, 96 Stat. at 1931 (establishment of special fund deleted); 1984 Appropriation, 97 Stat. at 825 (same); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,739 (1984) (same)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,090 (1985) (same)); 1987 Appropriation, 100 Stat. at 3341-188 (same); 1988 Appropriation, 101 Stat. at 1329-97 (same); 1989 Appropriation, 102 Stat. at 2269-7 (same).

229. 1982 Appropriation, 95 Stat. at 1175.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 1176; 1983 Appropriation, 96 Stat. at 1927; 1984 Appropriation, 97 Stat. at 822; 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,738 (1984)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,089 (1985)); 1987 Appropriation, 100 Stat. at 3341-184; 1988 Appropriation, 101 Stat. at 1329-94; 1989 Appropriation, 102 Stat. at 2269-4.

Capital Outlay:

The Mayor shall not request "the advance of any moneys for new general fund capital improvement projects without the approval by resolution" of the D.C. Council.[234]

General Provisions:

"At the start of the fiscal year, the Mayor shall develop an annual plan" for borrowing from the U.S. Treasury. After each quarter, the Mayor will report to the Council and Congress "the actual borrowing and spending progress compared with projections."[235]

The Mayor shall not spend any monies borrowed for capital projects on operating expenses.[236]

No funds appropriated in this act may be used to implement a personnel lottery for hiring fire fighters or policemen.[237]

No funds appropriated may be used to transport any wastes generated by the D.C. municipal waste system for disposal at any public or private landfills, except those currently used in Virginia or Maryland, "until the appropriate State agency has issued the required permits."[238]

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234. 1982 Appropriation, 95 Stat. at 1179; 1983 Appropriation, 96 Stat. at 1930; 1984 Appropriation, 97 Stat. at 824.

235. 1982 Appropriation, 95 Stat. at 1181 (§ 119); 1983 Appropriation, 96 Stat. at 1933 (§ 119); 1984 Appropriation, 97 Stat. at 827 (§ 120); 1985 Appropriation, 98 Stat. 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,740 (1984) (§ 119)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,091 (1985) (§ 119)); 1987 Appropriation, 100 Stat. at 3341-190 (§ 118); 1988 Appropriation, 101 Stat. at 1329-100 (§ 118); 1989 Appropriation, 102 Stat. at 2269-9 (§ 118).

236. 1982 Appropriation, 95 Stat. at 1182 (§ 121); 1983 Appropriation, 96 Stat. at 1933 (§ 121); 1984 Appropriation, 97 Stat. at 827 (§ 121); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,740 (1984) (§ 121)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,091 (1985) (§ 121)); 1987 Appropriation, 100 Stat. at 3341-190 (§ 120); 1988 Appropriation, 101 Stat. at 1329-100 (§ 120); 1989 Appropriation, 102 Stat. at 2269-9 (§ 120).

237. 1982 Appropriation, 95 Stat. at 1182 (§ 122); 1983 Appropriation, 96 Stat. at 1933 (§ 122); 1984 Appropriation, 97 Stat. at 827 (§ 123); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,740 (1984) (§ 122)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,091 (1985) (§ 122)); 1987 Appropriation, 100 Stat. at 3341-190 (§ 121); 1988 Appropriation, 101 Stat. at 1329-100 (§ 121); 1989 Appropriation, 102 Stat. at 2269-9 (§ 121).

238. 1982 Appropriation, 95 Stat. at 1182 (§ 123); 1983 Appropriation, 96 Stat. at 1934 (§ 128); 1984 Appropriation, 97 Stat. at 828 (§ 129); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,740 (1984) (§ 128)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,091 (1985) (§ 128)); 1987 Appropriation, 100 Stat. at 3341-191 (§ 127).

No Federal funds shall be obligated or expended to procure passenger autos with an EPA estimated MPG average of less than 22, except for security, emergency rescue, or armored vehicles.[239]

District of Columbia Appropriation Act, 1983, Pub. L. No. 97-378, 96 Stat. 1925 (1982).

Water and Sewer Enterprise Fund:

All restrictions applying to general fund capital improvements under the heading of Capital Outlay "shall apply to projects approved under this heading." (E.g., expiration of authorization at the end of the fiscal year, no advance monies unless prior approval by a D.C. Council resolution.)[240]

Federal Payment to the District of Columbia:

None of the Federal payment shall be available until there are at least 3,880 uniformed permanent officers of the Metropolitan Police Department, excluding officers hired after August 19, 1982, under standards other than those in effect at that time.[241]

General Provisions:

"The Mayor shall not borrow any funds" from the United States Treasury unless he has prior approval by resolution from the D.C. Council, "identifying the projects and amounts to be financed with such borrowings."[242]

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239. 1982 Appropriation, 95 Stat. at 1182 (§ 125); 1983 Appropriation, 96 Stat. at 1934 (§ 125); 1984 Appropriation, 97 Stat. at 827 (§ 126); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,740 (1984) (§ 125)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,091 (1985) (§ 125)); 1987 Appropriation, 101 Stat. at 3341-190 (§ 124); 1988 Appropriation, 101 Stat. at 1329-100 (§ 124); 1989 Appropriation, 102 Stat. at 2269-10 (§ 124).

240. 1983 Appropriation, 96 Stat. at 1930; 1984 Appropriation, 97 Stat. at 824; 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,739 (1984)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,090 (1985)); 1987 Appropriation, 100 Stat. at 3341-187; 1988 Appropriation, 101 Stat. at 1329-97; 1989 Appropriation, 102 Stat. at 2269-7.

241. 1983 Appropriation, 96 Stat. at 1925; 1984 Appropriation, 97 Stat. at 819; 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,737 (1984)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,088 (1985)); 1987 Appropriation, 100 Stat. at 3341-180; 1988 Appropriation, 101 Stat. at 1329-90; 1989 Appropriation, 102 Stat. at 2269.

242. 1983 Appropriation, 96 Stat. at 1933 (§ 120); 1984 Appropriation, 97 Stat. at 827 (§ 121, deletes reference to U.S. Treasury); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,740 (1984) (§ 120)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,091 (1985) (§ 120)); 1987 Appropriation, 100 Stat. at 3341-190 (§ 119); 1988 Appropriation, 101 Stat. at 1329-100 (§ 119); 1989 Appropriation, 102 Stat. at 2269-9 (§ 119).

"None of the funds appropriated . . . may be obligated or expended by reprogramming except pursuant to advance approval" under the procedure set forth in House Report 96-443, which accompanied the D.C. Appropriation Act of 1980.[243]

Act of Oct. 12, 1984, Pub. L. No. 98-473, 98 Stat. 1837 (Continuing Resolution of 1985).

Public Safety and Justice:

The staffing levels of the Fire Department units shall be maintained according to Fire Dept. Rules and Regs. Article III, section 18 as then in effect.[244]

General Provisions:

Amends section 303(b) of the D.C. Self-Government and Government Reorganization Act to provide that amendments ratified by the registered electors shall take effect in 35 days, excluding weekends, holidays, and days when either House of Congress is not in session, after submission unless there is passed a joint resolution to the contrary within that period. In any case, a joint resolution passed and transmitted to the President within the 35-day period will repeal the amendment.[245]

Amends the second sentence of section 412(a) to read: "Except as provided in the last sentence of this subsection, the Council shall use acts for all legislative purposes."[246]

Amends the last sentence of section 412(a) to state that resolutions are to be used "(1) to express simple determinations, decisions, or directions of the Council of a special or temporary character; and (2) to approve or disapprove proposed actions" by administrative agencies in accordance with previous legislation. Much legislation must specifically authorize use of resolutions and the resolutions must be designed to implement that act.[247]

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243. 1983 Appropriation, 96 Stat. at 1933 (§ 123); 1984 Appropriation, 97 Stat. at 827 (§ 124); 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,740 (1984) (§ 123)); 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,091 (1985) (§ 123)); 1987 Appropriation, 100 Stat. at 3341-190 (§ 122); 1988 Appropriation, 101 Stat. at 1329-100 (§ 122); 1989 Appropriation, 102 Stat. at 2269-9 to -10 (§ 122).

244. 1985 Appropriation, 98 Stat. at 1837 (citing H.R. 5899, 98th Cong., 2d Sess., 130 CONG. REC. 23,737, 23,738 (1984)).

245. *Id.* (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., *reprinted in* 130 CONG. REC. 27,379, 27,382 (1984) (§ 131(b))).

246. *Id.* (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., *reprinted in* 130 CONG. REC. 27,379, 27,382 (1984) (§ 131(c)(1))).

247. *Id.* (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., *reprinted in* 130 CONG. REC. 27,379, 27,382 (1984) (§ 131(c)(2))).

Amends the second sentence of section 602(c)(1) to read that except as provided by paragraph (2), acts of the Council become law after 30 days, excluding weekends, holidays, and any day when neither House is in session because of "an adjournment sine die, a recess of more than three days, or an adjournment of more than three days." Any joint resolution passed by Congress within the 30 day period repeals that act upon becoming effective.[248]

Amends the third sentence of section 602(c)(1) by inserting "joint" in lieu of "concurrent."[249]

Amends the first sentence of 602(c)(2) to read that any act transmitted "with respect to any Act codified in title 22, 23, or 24" of the D.C. Code shall take effect 60 days after transmittal to the Speaker of the House and the President of the Senate. A joint resolution passed and sent to the President within the 60-day period shall repeal that act when it becomes law.[250]

Amends the second sentence of section 602(c)(2) to state that the provisions of such expedited procedures shall apply to these joint resolutions.[251]

Inserts a severability clause at the end of Part F, Title VII.[252]

Makes this section effective without limitation as to fiscal year.[253]

Designates Andrei Sakharov Plaza.[254]

Act of Dec. 19, 1985, Pub. L. No. 99-190, 99 Stat. 1185 (Continuing Resolution of 1986).

Public Safety and Justice:

Notwithstanding any other provisions of law, each employee who retired from the Fire Department before 2/15/80 and is on the date of the enactment of this Act receiving an annuity based on service with the

248. *Id.* (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., *reprinted in* 130 CONG. REC. 27,379, 27,382-83 (1984) (§ 131(d))).

249. *Id.* (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., *reprinted in* 130 CONG. REC. 27,379, 27,383 (1984) (§ 131(e))).

250. *Id.* (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., *reprinted in* 130 CONG. REC. 27,379, 27,383 (1984) (§ 131(f))).

251. *Id.* (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., *reprinted in* 130 CONG. REC. 27,379, 27,383 (1984) (§ 131(g))).

252. *Id.* (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., *reprinted in* 130 CONG. REC. 27,379, 27,383 (1984) (§ 131(l))).

253. *Id.* (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., *reprinted in* 130 CONG. REC. 27,379, 27,383 (1984) (§ 131(n))).

254. *Id.* (citing H.R. CONF. REP. NO. 1071, 98th Cong., 2d Sess., *reprinted in* 130 CONG. REC. 27,379, 27,384 (1984) (§ 133)).

Fire Department, shall receive a lump-sum payment equal to three percent of his/her annuity from the D.C. Retirement Board.[255]

Up to $50,000 shall be used to reimburse Fairfax County, Virginia, for expenses incurred in relation to Lorton Prison. Reimbursement shall be made every time the District asks the County to provide police, fire, rescue and related services for escape, riots, and similar disturbances involving the prison. The District shall make a quarterly report to the House and Senate Subcommittees on D.C. Appropriations regarding the amount and purpose of any reimbursements.[256]

No appropriated funds may be used to implement any plan which includes the closing of Engine Company No. 3, located at 439 New Jersey Avenue, Northwest.[257]

General Provisions:

The Public Service Commission is authorized to order and approve streetlight deregulation as provided in its opinion and order in Formal Case No. 813, provided that the provisions of this opinion and order are ratified and declared to be in effect as of 7/12/84 and "continue to be in effect until revoked or rescinded."[258]

"No State, or political subdivision thereof, in which a Member of Congress maintains a place of abode for the purposes of attending sessions of Congress [shall] impose a personal property tax with respect to [any] motor vehicle owned by such Member [or spouse,] . . . unless such Member represents such State or a district in such State." "Member of Congress" includes the delegates from Guam, D.C., the Virgin Islands, and the Resident Commissioner from Puerto Rico; "State" includes D.C.; and "personal property tax" means any tax imposed on an annual

255. 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,089 (1985)); 1987 Appropriation, 100 Stat. at 3341-183 (applied to 23 employees retiring between 11/24/84 and 5/13/85).

256. 1986 Appropriation, 99 Stat. at 1224 (citing H.R. CONF. REP. No. 419, 99th Cong., 1st Sess., *reprinted in* 131 CONG. REC. 34,784, 34,785-86 (1985)); 1987 Appropriation, 100 Stat. at 3341-183 (increased to $100,000 and included reimbursement to Prince William County); 1988 Appropriation, 101 Stat. at 1329-93 (same); 1989 Appropriation, 102 Stat. at 2269-3 (same).

257. 1986 Appropriation, 99 Stat. at 1224 (citing H.R. CONF. REP. No. 419, 99th Cong., 1st Sess., *reprinted in* 131 CONG. REC. 34,784, 34,785 (1985)); 1987 Appropriation, 100 Stat. at 3341-184; 1988 Appropriation, 101 Stat. at 1329-93; 1989 Appropriation, 102 Stat. at 2269-3.

258. 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,091 (1985) (§ 130)).

basis and levied on the basis of market or assessed value. This section shall apply to all taxable periods beginning on or after 1/1/85.[259]

Designates Raoul Wallenberg Place.[260]

None of the funds appropriated may be used to advertise for, or award payments to, contracted professional services as contained in object class 408 of the fiscal year 1986 budget at any level which would directly or indirectly exceed the 1985 level of expenditures or $21,780,000, whichever is lesser.[261]

Criminal Justice Initiative:

$20,000,000 shall be available for a prison within the District of Columbia, provided that D.C. shall award a design and construction contract on or before 10/15/86, and that D.C. proceeds with the design and construction of the prison without regard to the availability of Federal funds.[262]

Act of Oct. 30, 1986, Pub. L. No. 99-591, 100 Stat. 3341-180 (Continuing Appropriations of 1987).

Criminal Justice Initiative:

"[N]o funds are available for construction on the South part of Square E-1112" unless previously approved by the House and Senate Subcommittees on D.C. Appropriations.[263]

Governmental Direction and Support:

D.C. shall "identify the sources of funding for [the] Admission to Statehood from its own locally-generated revenues . . . [and] no revenues from Federal sources [may] be used to support the operations or activities of the Statehood Commission and the Statehood Compact Commission."[264]

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259. *Id.* (citing H.R. CONF. REP. No. 419, 99th Cong., 1st Sess., *reprinted in* 131 CONG. REC. 34,784, 34,786 (1985) (§ 131)); 1987 Appropriation, 100 Stat. at 3341-191 (§ 129, added prohibition of personal property taxes on leased or rented autos).

260. 1986 Appropriation, 99 Stat. at 1224 (citing H.R. 3067, 99th Cong., 1st Sess., 131 CONG. REC. 31,088, 31,092 (1985) (§ 131)).

261. *Id.* (citing H.R. CONF. REP. No. 419, 99th Cong., 1st Sess., *reprinted in* 131 CONG. REC. 34,784, 34,786 (1985) (§ 134)).

262. *Id.* (citing H.R. CONF. REP. No. 419, 99th Cong., 1st Sess., *reprinted in* 131 CONG. REC. 34,784, 34,784 (1985)); 1987 Appropriation, 100 Stat. at 3341-181; 1988 Appropriation, 101 Stat. at 1329-91; 1989 Appropriation, 102 Stat. at 2269-1.

263. 1987 Appropriation, 100 Stat. at 3341-181; 1988 Appropriation, 101 Stat. at 1329-91.

264. 1987 Appropriation, 100 Stat. at 3341-182; 1988 Appropriation, 101 Stat. at 1329-92; 1989 Appropriation, 102 Stat. at 2269-2.

Public Safety and Justice:

Within 30 days of this Act's effective date, D.C. "shall establish a free, 24-hour telephone information service whereby residents of the area" around Lorton Prison can promptly obtain information from D.C. officials regarding "all disturbances at the prison." D.C. shall advertise this service to those residents.[265]

No appropriated funds "may be used to implement [D.C.] Board of Parole notice of emergency and proposed rulemaking" as filed with the D.C. Register on 7/25/86.[266]

D.C. shall not "renovate or construct prison bed space at the Occoquan facilities of Lorton prison beyond the number of prison bed spaces . . . damaged or destroyed in the fire of 7/25/86."[267]

Public Education:

$1,146,000 shall be used to operate Antioch School of Law. The acquisition or merger of Antioch School of Law shall be previously approved by both the Board of Trustees for UDC and the D.C. Council, otherwise this money "shall be used solely for the repayment of the general fund deficit."[268]

General Provisions:

D.C. shall erect three signs on the corners of 16th and L and 16th and M Streets containing the words "Sakharov Plaza". The Soviet Embassy's new address is 1 Andrei Sakharov Plaza.[269]

Congress reaffirms the D.C. Council's authority to close part of 8th Street, Northwest and public alleys in Square 403.[270]

District of Columbia Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329-90 (1987).

Governmental Direction and Support:

The funds of the Statehood Commission and the Statehood Compact Commission shall not be "used for lobbying to support or defeat legislation pending before Congress or any State legislature."[271]

265. 1987 Appropriation, 100 Stat. at 3341-183; 1988 Appropriation, 101 Stat. at 1329-93; 1989 Appropriation, 102 Stat. at 2269-3.

266. 1987 Appropriation, 100 Stat. at 3341-184; 1988 Appropriation, 101 Stat. at 1329-93; 1989 Appropriation, 102 Stat. at 2269-3.

267. 1987 Appropriation, 100 Stat. at 3341-184.

268. *Id.*

269. *Id.* at 3341-192 (§ 132).

270. *Id.* (§ 133).

271. 1988 Appropriation, 101 Stat. at 1329-92; 1989 Appropriation, 102 Stat. at 2269-2.

Economic Development and Regulation:

"[U]p to $270,000 within the 15 percent set-aside for special programs within the Tenant Assistance Program shall be targeted for the single room occupancy initiative."[272]

General Provisions:

"No sole source contract with the [D.C.] government or any agency thereof may be renewed or extended without opening that contract to the competitive bidding process as set forth in Section 303 of the [D.C.] Procurement Practices Act of 1985 . . ."[273]

"Federal funds hereafter appropriated to the [D.C.] government shall not be subject to apportionment except to the extent specifically noted by statute."[274]

District of Columbia Appropriations Act, 1989, Pub. L. No. 100-462, 102 Stat. 2269 (1988).

Criminal Justice Initiative:

Construction of the prison in D.C. may not commence unless (1) "access and parking for construction vehicles are provided solely at a location other than city streets," (2) D.C. officials meet monthly with neighborhood representatives, (3) D.C. operates and maintains a free, 24-hour telephone information service for residents living in the area surrounding the prison so that they "can promptly obtain information . . . [regarding any] disturbances at the prison," and (4) D.C. advertise this service.[275]

Public Safety and Justice:

Staffing levels at two piece engine companies within the Fire Department shall be maintained according to Fire Dept. Rules and Regs. article III, section 18, until final adjudication by the relevant courts.[276]

Public Works:

The Taxicab Commission shall report to the Senate and House Appropriations Committees by 1/15/89 on a plan to "issue and implement regulations including but not limited to the age of the vehicles, frequency of inspection, and cleanliness of vehicles."[277]

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272. 1988 Appropriation, 101 Stat. at 1329-92; 1989 Appropriation, 102 Stat. at 2269-2.

273. 1988 Appropriation, 101 Stat. at 1329-101 (§ 130); 1989 Appropriation, 102 Stat. at 2269-11 (§ 130).

274. 1988 Appropriation, 101 Stat. at 1329-102 (§ 135).

275. 1989 Appropriation, 102 Stat. at 2269-1.

276. *Id.* at 2269-3.

277. *Id.* at 2269-4.

General Provisions:

"Notwithstanding any other provision of law, for purposes of zoning regulations," the premises on squares 4302-4305 and parcels 167/64-68 are an "eleemosynary institution" in accordance with the 12/23/86 decision of the Deputy Zoning Administrator, and "the current use of the premises is within the non-conforming use of rights as permitted by [the] Certificate of Occupancy."[278]

If the D.C. Council has adopted by 5/1/89 and implemented by 9/30/89, a "preference system that does not preclude the hiring of noncity residents," no funds provided or made available may be used to pay the salaries or expenses to implement or enforce a residency requirement with respect to D.C. Government employees.[279]

After this Act's date of enactment, D.C. shall not dismiss any employee "currently facing adverse job action for failure to comply with the residency requirement."[280]

No Federally appropriated funds shall be obligated or expended after 12/31/88 unless by that date, D.C. has not repealed D.C. Law 6-170, the Prohibition of Discrimination in the Provision of Insurance Act of 1986, or amended the law to allow for AIDS testing as a condition for acquiring all health, life and disability insurance without regard to the face value of such policies. Eligibility for coverage and premium costs shall be made according to ordinary practices.[281]

No appropriated funds for the Mayor shall be expended after 1/1/89, if, "using existing powers, the Department of Human Services has not implemented a system of mandatory reporting of individual abortions performed in [D.C.]" and categories of data similar to those of the National Center for Health Statistics; provided that the reporting does not require the name of the aborting woman or the abortion provider, that their names remain strictly confidential, and that the "data be used for statistical purposes only."[282]

No appropriated funds shall be obligated or expended after 12/31/88 unless by that date, the D.C. Council has amended section 1-2520 of the D.C. Code by adding the following subsection: "(3) [n]otwithstanding any other provision of the laws of [D.C.], it shall not be an unlawful discriminatory practice in [D.C.] for any educational institution that is affiliated with a religious organization or closely associated with the ten-

278. *Id.* at 2269-13 (§ 140(a)).
279. *Id.* (§ 141(a)).
280. *Id.* (§ 141(b)).
281. *Id.* (§ 143).
282. *Id.* (§ 144).

ets of a religious organization to deny, restrict, abridge, or condition — (A) the use of any fund, service, facility, or benefit; or (B) the granting of any endorsement, approval, or recognition, to any . . . persons that are organized for, or engaged in, promoting, encouraging, or condoning any homosexual act, lifestyle, orientation, or belief."[283]

283. *Id.* at 2269-14 (§ 145(b)).

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The District of Columbia Courts: A Judicial Anomaly

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THE DISTRICT OF COLUMBIA COURTS: A JUDICIAL ANOMALY*

*Theodore Voorhees***

During its eighteen decades the District of Columbia has had a history of many courts and endless judicial change. Normally, when tracing the history of an American court system one can start from its establishment on a certain date and find, subject to a few changes over the years, that it has retained its identity.[1] This is not the case with the courts of the District of Columbia.

Until very recently, the District's judicial system has evidenced little coherence, foresight, or planning. This is graphically illustrated by Congress's choice of nomenclature for the District's courts. Confusion resulted when Congress named the District's trial court the "Supreme Court."[2] Moreover, the name "court of appeals" has been applied to two neighboring, but separate courts.[3] Further examples include the establishment of

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1. *See, e.g.*, Bloodworth, *Remodeling the Alabama Appellate Courts*, 23 ALA. L. REV. 353, 353-55 (1971); Blume, *California Courts in Historical Perspective*, 22 HASTINGS L. REV. 121 (1970); Hammond, *Commemoration of the Two Hundredth Anniversary of the Maryland Court of Appeals: A Short History*, 38 MD. L. REV. 229 (1978); Heiberg, *Social Backgrounds of the Minnesota Supreme Court Justices: 1858-1968*, 53 MINN. L. REV. 901 (1969); Smith, *An Historical Sketch of Oregon's Supreme Court*, 55 OR. L. REV. 85 (1976); Williams, *Phases of Tennessee Supreme Court History*, 18 TENN. L. REV. 323 (1944); Comment, *The Kansas Court of Appeals*, 12 WASHBURN L. REV. 378 (1973).

2. Congress established the Supreme Court of the District of Columbia in 1863. Act of March 3, 1863, ch. 91, 12 Stat. 762. *See* notes 40-51 and accompanying text *infra*.

3. The Court of Appeals of the District of Columbia was established by Congress in 1893. Act of Feb. 9, 1893, ch. 74, 27 Stat. 434. The name was changed to the United States Court of Appeals for the District of Columbia in 1943, Act of June 7, 1943, ch. 426, 48 Stat. 926, and to the United States Court of Appeals for the District of Columbia Circuit in 1948. Act of June 25, 1948, ch. 646, 62 Stat. 870 (codified in 28 U.S.C. § 43 (1976)). In addition, there is the District of Columbia Court of Appeals, which corresponds to the supreme courts of the various states. *See* notes 85-89 and accompanying text *infra*. This court was origi-

"circuit courts"[4] serving no specified circuits and the creation of a "Superior Court"[5] when there were no inferior courts.

In a period of less than two centuries the District of Columbia has witnessed a procession of courts and court systems. Today, four courts predominate: the United States Court of Appeals for the District of Columbia Circuit;[6] the United States District Court for the District of Columbia;[7] the District of Columbia Court of Appeals;[8] and the Superior Court of the District of Columbia.[9] Each of them is to some degree an off-shoot of the District's first court, the Circuit Court of the District of Columbia, established by Congress in 1801.[10]

Congress's broad constitutional power to establish a judicial system for the District of Columbia[11] has provided it with the opportunity to experi-

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nally established as the Municipal Court of Appeals for the District of Columbia. Act of Apr. 1, 1942, ch. 207, § 6, 56 Stat. 194.

Two cases illustrate the confusion generated by the use of the name "court of appeals." In O'Donoghue v. United States, 289 U.S. 516 (1933), the Controller General reduced the salaries of two judges of the Court of Appeals of the District of Columbia. Congress had authorized the reduction of the salaries of judges serving on Article I courts pursuant to the Legislative Appropriation Act, ch. 314, § 107(a)(5), 47 Stat. 402 (1932). The Supreme Court held the Court of Appeals of the District of Columbia to be an Article III court, whose judges serve during good behavior and whose salaries may not be reduced. 289 U.S. at 551. *See* U.S. CONST. art. III, § 1. Subsequently, in Palmore v. United States, 411 U.S. 389 (1973), the Supreme Court ruled that the District of Columbia Court of Appeals and the Superior Court were Article I courts. The defendant had argued that only Article III courts were empowered to try felony prosecutions for violations of federal law. *Id.* at 393. In rejecting this contention, the Supreme Court held that persons convicted for violations of the D.C. Code have no right to have their cases heard by Article III judges. *Id.* at 407.

4. The first court established by Congress for the District of Columbia was the Circuit Court of the District of Columbia, Act of Feb. 27, 1801, ch. 15, § 3, 2 Stat. 105. *See* notes 14-39 and accompanying text *infra*. The District obtained a federal circuit court of appeals in 1948. *See* note 3 *supra*.

5. Congress established the Superior Court of the District of Columbia in 1970. District of Columbia Court Reform and Criminal Procedure Act of 1970, D.C. CODE § 11-901 (1973). *See* notes 80-84 and accompanying text *infra*.

6. 28 U.S.C. § 43(a) (1976).

7. In 1936, Congress changed the name of the Supreme Court of the District of Columbia to the District Court of the United States for the District of Columbia. Act of June 25, 1936, ch. 804, 49 Stat. 1921. In 1948, this court's name was changed to the United States District Court for the District of Columbia. Act of June 25, 1948, ch. 646, § 24, 62 Stat. 990. *See* notes 53-62 and accompanying text *infra*.

8. Originally created as the Municipal Court of Appeals for the District of Columbia, Act of Apr. 1, 1942, ch. 207, § 6, 56 Stat. 194, this court is now the "court of last resort" in the District of Columbia. D.C. CODE §§ 11-102, 11-721 (1973). *See* notes 85-89 and accompanying text *infra*.

9. D.C. CODE § 11-901 (1973). *See* notes 80-84 and accompanying text *infra*.

10. *See* note 4 *supra*. *See* Appendix for a schematic outline of the courts of the District of Columbia.

11. U.S. CONST. art. I, § 8, cls. 9, 17.

ment with, improve, and reform the District's court system. This review of the history of the District's courts will focus on some of the major issues now confronting American courts[12] and assess Congress's performance in dealing with them. The experience within the District should be particularly timely in light of the present, on-going critical reexamination of almost every aspect of judicial administration in the United States.[13]

The development of the District's courts may be conveniently separated into four eras: 1801-1863, the period of the Circuit Court; 1863-1893, the early years of the Supreme Court of the District of Columbia; 1893-1948, the period when the strictly federal courts emerged; and 1948 to date, the years during which the District obtained something in the nature of a state court system of its own.

I. THE CIRCUIT COURT: 1801-1863

By Act of Congress, the District of Columbia became the seat of the national government on the first Monday of December, 1800.[14] On February 27, 1801, Congress established the Circuit Court of the District of Columbia, consisting of a chief judge and two assistant judges.[15] One year later, Congress authorized the court's chief judge to hold a District Court of the United States with the same powers and jurisdiction enjoyed by the other United States District Courts.[16] Thus, the Circuit Court was both federal and local, and during its sixty-two years of existence it was the only court of general jurisdiction in the District of Columbia. Congress, ever

12. Five particular issues are within the general scope of this article: the importance of an independent judiciary freed from pressure by the executive or legislature; the question of a judge's tenure; removal of the disabled judge or the judge guilty of misbehavior in office; the desirability of specialized courts; and the future of the dual, federal-state court systems.

13. *See, e.g.*, Ashman & Lee, *Non-Lawyer Judges: The Long Road North*, CHI.-KENT L. REV. 565 (1977); Carbon, Berkson & Rosenbaum, *Court Reform in the Twentieth Century: A Critique of the Court Unification Controversy*, 27 EMORY L.J. 559 (1978); Ellis, *Court Reform in New York State: An Overview for 1975*, 3 HOFSTRA L. REV. 663 (1975); Kaminsky, *Available Compromises for Continued Judicial Selection Reform*, 53 ST. JOHN'S L. REV. 466 (1979); Leventhal, *A Modest Proposal for a Multi-Circuit Court of Appeals*, 24 AM. U.L. REV. 881 (1975); Meador, *The Federal Judiciary and its Future Administration*, 65 VA. L. REV. 1031 (1979); *Symposium: State Courts in the 1980s and Beyond*, 74 NW. U.L. REV. 711 (1979).

14. Act of July 16, 1790, ch. 28, § 1, 1 Stat. 130.

15. Act of Feb. 27, 1801, ch. 15, § 3, 2 Stat. 105. William Kilty of Maryland was appointed Chief Judge, and James Marshall of Virginia (brother of Chief Justice John Marshall) and William Cranch were appointed assistant judges. *See* Carne, *Life and Times of William Cranch, Judge of the District Circuit Court 1801-1855*, 5 REC. COLUM. HIST. SOC'Y 294 (1902); Cox, *Address to the District of Columbia Bar*, 23 WASH. L. REP. 498 (Mar. 2, 1895).

16. Act of Apr. 29, 1802, ch. 31, § 24, 2 Stat. 166.

preoccupied with national rather than local affairs, waited almost a century and a half before sorting out the District's courts and assigning them either purely local or federal roles.[17]

William Cranch, a staunch Federalist, served as chief judge of the Circuit Court from 1806 until 1855. The nephew of President John Adams' wife, Cranch had originally been appointed an associate judge on February 29, 1801, the eve of Adams' departure from office. Because of this lame duck appointment, Cranch was included among the "midnight judges" so bitterly condemned by Jefferson and the Republicans.[18]

Yet, despite his political antagonism toward Adams and the Federalists, Jefferson in 1806 appointed Cranch the chief judge of the Circuit Court. In so doing, Jefferson was faithful to his declaration that: "We are all Federalists; we are all Republicans . . . the sole criterion for appointment to office must be an affirmative answer to the questions: Is he honest? Is he capable? Is he faithful to the constitution?"[19] Jefferson, a president seldom praised for the promotion of nonpartisanship, set an important political example in making the Cranch appointment. Nevertheless, with merit selection for the judiciary many decades away, District of Columbia judges constantly had to battle both Congress and the executive to maintain their independence.

Cranch is best remembered outside of Washington, D.C., as the reporter for the Supreme Court of the United States. He published nine volumes of that Court's decisions while also reporting the opinions of the Circuit Court from 1801 until 1840.[20] Yet Cranch's greatest contribution was his performance as a stalwart, independent, and learned judge who served fifty-four years,[21] a record probably unmatched by any other American

17. The final stage of this process occurred with the passage of the District of Columbia Court Reform and Criminal Procedure Act of 1970, D.C. CODE §§ 11-101 to 11-2504, 23-101 to 23-1705 (1973). *See* notes 80-89, 108-24 and accompanying text *infra*.

18. For an account of the "midnight judges" appointments, see II A. BEVERIDGE, LIFE OF JOHN MARSHALL 559-64 (1916). In Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), decided two years after Cranch's appointment, Chief Justice John Marshall used the contest over the "midnight" appointments to establish the Supreme Court's power to declare acts of Congress unconstitutional. *Id.* at 176-78.

19. Carne, *supra* note 15, at 296.

20. *See* Cox, *supra* note 15, at 499. Cranch's D.C. cases were available in manuscript form but were not published until 1852. It is said that this gave the older practitioners, who seemed to remember every case that Cranch had decided, an advantage over their younger colleagues. *Id.*

21. "Chief Justice Cranch occupied a position in the District Court analogous to that of Chief Justice John Marshall in the Supreme Court and to him is generally given credit for the stability of the early court." Fishback, *Washington City, Its Founding and Development*, 20 REC. COLUM. HIST. SOC'Y 194 (1917).

jurist.[22] Illustrative of Cranch's caliber as a judge is perhaps the most famous proceeding to come before the Circuit Court. Jefferson had ordered the arrest of two men who were charged with treason for participating in the Burr conspiracy.[23] The detainees filed a petition for a writ of habeas corpus on the ground that they were arrested and detained without due process of law.[24] Although the Circuit Court's two associate judges rejected the petition, Cranch stood up to Jefferson with a ringing dissent:

> The worst of precedents may be established from the best of motives. We ought to be upon our guard lest our zeal for the public interest lead us to overstep the bounds of the law and the Constitution; for although we may thereby bring one criminal to punishment, we may furnish the means by which a hundred innocent persons may suffer.[25]

On appeal, Chief Justice Marshall and the Supreme Court agreed with Cranch, and the prisoners were released.[26] Thus, Judge Cranch demonstrated early in American judicial history the importance of a judiciary independent of the executive.

The final events occurring during the Circuit Court's existence caution against overreliance by the judiciary on protection from the legislature. In 1863 there was a severe conflict among the three branches of government, with the judiciary getting the worst of it. The judges of the Circuit Court at that time were Chief Judge James Dunlop and Associate Judges James S. Morsell and William M. Merrick.[27] All three judges had been appointed to serve during "good behavior."[28] Judge Merrick, however, was suspected of harboring Southern sympathies.[29] The spark that triggered

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22. Mr. Justice Holmes served 20 years on the Supreme Judicial Court of Massachusetts in addition to 29 years on the Supreme Court of the United States. Mr. Justice Douglas, who had the longest tenure on the Supreme Court, served 39 years. *See* L. FRIEDMAN, THE JUSTICES OF THE UNITED STATES SUPREME COURT (1969).

23. *See* M. MCGUIRE, AN ANECDOTAL HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, 1801-1976, at 8-9 (U.S. Gov't Print. Off. No. 726-549, 1977) (1976). For a full account of the Burr conspiracy, see 3 A. BEVERIDGE, *supra* note 18, at 274-545.

24. *See* United States v. Bollman and Swartwout, 1 D.C. (1 Cranch) 373 (1807).

25. *Id.* at 379 (Cranch, C.J., dissenting).

26. *See Ex parte* Bollman and Swartwout, 8 U.S. (4 Cranch) 75 (1807).

27. During its existence, the Circuit Court was the second most important court in the District of Columbia, surpassed only by the Supreme Court of the United States, which had come into existence 12 years earlier and heard appeals from the Circuit Court involving judgments of disputes exceeding $100. *See* Act of Feb. 27, 1801, ch. 15, § 8, 2 Stat. 103.

28. Act of Feb. 27, 1801, ch. 15, § 3, 2 Stat. 103. Yet, without regard to this provision, their offices were taken from them when Congress abolished the court in 1863. *See* notes 33-38 and accompanying text *infra*.

29. *See* M. MCGUIRE, *supra* note 23, at 41-42. *See generally*, W. WEBB & J. WOOL-

the conflict was Merrick's issuance of a writ of habeas corpus for the release of an underaged soldier. President Lincoln suspended the writ and Judge Merrick himself was placed under house arrest.[30]

This episode led to the District's first case of court-packing, a subject usually identified with President Franklin D. Roosevelt rather than with Lincoln.[31] Although Roosevelt was unsuccessful in his attempt to "pack" the membership of the Supreme Court, Lincoln encountered little difficulty in persuading Congress to abolish the Circuit Court and to create a substitute, all of whose members were to be appointed by the president.[32]

Lincoln's maneuver occurred in 1863 when the Union's fortunes were low and the safety of the capital was in danger. He was determined to have a court in the District of Columbia whose membership was unquestionably loyal.[33] There was, however, little basis for the suggestion that any member of the Circuit Court was in fact disloyal.[34] Nevertheless, Congress was persuaded to abolish the Circuit Court and to substitute in its place the Supreme Court of the District of Columbia.[35]

In this manner, three judges who had been appointed to serve during good behavior were forced out of office, without any proof of misbehavior, by the executive-legislative steamroller. This was a patent abridgment of the constitutional principle of separation of powers[36] and, of course, a direct violation of article III's command that federal judges hold office during good behavior.[37] To no one's surprise, Lincoln appointed four loyal Republicans to the new court.[38] Twenty years later, however, there was a partial reparation when President Cleveland reappointed Judge Merrick to the bench as a member of the successor court.[39]

DRIDGE, CENTENNIAL HISTORY OF THE CITY OF WASHINGTON, D.C. 725-26 (1892) [hereinafter cited as CENTENNIAL HISTORY].

30. *See* M. MCGUIRE, *supra* note 23, at 43.

31. *See generally* W. MURPHY, CONGRESS AND THE COURT 57-62 (1962).

32. *See* M. MCGUIRE, *supra* note 23, at 45-46.

33. *Id.*

34. *Id.* at 50.

35. Act of Mar. 3, 1863, ch. 91, 12 Stat. 762.

36. *See generally* L. FISHER, THE CONSTITUTION BETWEEN FRIENDS 7-15 (1978).

37. U.S. CONST. art. III, § 1.

38. The chief justice was David K. Cartter of Ohio, and the associate justices were Abram B. Olin of New York, Andrew Wylie of the District of Columbia, and George P. Fisher of Delaware. *See* M. MCGUIRE, *supra* note 23, at 45-46; HISTORY OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT IN THE COUNTRY'S BICENTENNIAL YEAR 2 (U.S. Gov't Print. Off. No. 726-548, 1977) (1976) [hereinafter cited as BICENTENNIAL HISTORY].

39. *See* M. MCGUIRE, *supra* note 23, at 50. *See also* CENTENNIAL HISTORY, *supra* note 29, at 726.

II. THE SUPREME COURT OF THE DISTRICT OF COLUMBIA: FIRST PERIOD — 1863-1893

The Supreme Court of the District of Columbia[40] was modeled after the Supreme Court of the State of New York.[41] Both were courts of first instance, but when they sat in "general term" (*en banc*) they served as an appellate court, hearing appeals from rulings of the individual judges. In the District, an appeal from a ruling of general term could be taken directly to the Supreme Court of the United States.[42] Judges of the District's Supreme Court were authorized by Congress to hold a District Court of the United States, with the same power and jurisdiction as other United States District Courts.[43]

Two years after the establishment of the new court, it received a rebuff from the executive branch equal to that delivered by President Lincoln to the Circuit Court. It occurred, however, under more dramatic circumstances. Following the assassination of Lincoln, Mary Surratt and seven male civilians were tried by a military tribunal for conspiracy to murder the President.[44] Five of the defendants, including Mrs. Surratt, were found guilty and sentenced to be hanged. The evidence tying Mrs. Surratt with the conspiracy was meager at best, and five of the nine members of the District's Supreme Court recommended that the penalty in her case be remitted. President Andrew Johnson, however, ordered the sentence to be carried out immediately.[45]

Well after midnight on the eve of the execution, Mrs. Surratt's lawyers called on Judge Wylie of the District's Supreme Court with a petition for a writ of habeas corpus. The petition alleged that the military tribunal had no jurisdiction to try Mrs. Surratt, a defense that was subsequently fully sustained by the Supreme Court of the United States in a similar case.[46] Judge Wylie ordered General Hancock, the Military Governor of the Dis-

40. Act of Mar. 3, 1863, ch. 91, 12 Stat. 762.

41. *See* Barnard, *Early Days of the Supreme Court of the District of Columbia*, 22 REC. COLUM. HIST. SOC'Y 1 (1919); Cox, *supra* note 15, at 502. *See also* Metropolitan R. Co. v. Moore, 121 U.S. 558 (1887). For an exhaustive study of the Appellate Division of the Supreme Court of New York, that state's intermediate appellate court, see Project, *The Appellate Division of the Supreme Court of New York: An Empirical Study of its Powers and Functions as an Intermediate State Court*, 47 FORDHAM L. REV. 929 (1979).

42. Act of Mar. 3, 1863, ch. 91, § 3, 12 Stat. 762.

43. *Id.*

44. *See* M. MCGUIRE, *supra* note 23, at 53-65. For a full account of the Lincoln assassination and the evidence of guilt of the alleged conspirators, see Mudd, *President Lincoln and his Assassination*, 50 REC. COLUM. HIST. SOC'Y 341 (1952) (Dr. Mudd is the grandson of the surgeon who operated on John Wilkes Booth).

45. *See* M. MCGUIRE, *supra* note 23, at 63.

46. *See Ex Parte* Milligan, 71 U.S. 1 (1866).

trict of Columbia and chairman of the military tribunal, to surrender Mrs. Surratt in court at ten o'clock the following day. Judge Wylie waited in court until eleven-thirty that morning when Attorney General James Speed, accompanied by General Hancock, finally appeared. They reported that the court's order could not be complied with since the President had suspended the writ. Then, ignoring the court's majority recommendation for mercy, the lack of proof of guilt, the issue of the military tribunal's jurisdiction, and the court order itself, the executive branch proceeded with the hanging of Mrs. Surratt.[47]

Essentially a local court, the Supreme Court of the District of Columbia adjudicated controversies of the type generally addressed in the state courts.[48] Two attributes, however, distinguished the District's Supreme Court from the state courts. First, the District of Columbia was a federal enclave subject to laws prescribed by Congress, and the local courts were established by acts of Congress.[49] Much of the confusing history of the District's courts and the lack of a sensible judicial system stemmed from the fact that Congress was a national legislature. As such, Congress devoted little time to the less important affairs of the city, however pressing they might have been to its residents.[50] Second, the Supreme Court of the District of Columbia had an extraordinary power, not possessed by state courts or the United States District Courts. It was authorized to issue process against heads of federal executive departments and to enforce their compliance with its judgments and decrees.[51] The full implications of such power went unrealized until well into the present century.[52]

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47. *See* M. MCGUIRE, *supra* note 23, at 63-64.

48. The Court also had, however, the powers of a federal court. Act of Mar. 3, 1863, ch. 91, § 3, 12 Stat. 763. *See* BICENTENNIAL HISTORY, *supra* note 38, at 2-3. *See generally* J. NOEL, THE COURT-HOUSE OF THE DISTRICT OF COLUMBIA 82-89 (2d ed. 1939). David K. Cartter, the first chief judge of the Supreme Court of the District of Columbia, was a staunch Ohio Republican. Cartter served on the court for 24 years and had the reputation of a fine jurist among his contemporaries. *See* Barnard, *supra* note 41, at 20-23; CENTENNIAL HISTORY, *supra* note 29, at 729. Thus, even though Lincoln played politics with judicial appointments he did not compound this error, as did many of his predecessors and successors, by appointing judges who were incompetent or second rate. *See generally* J. BORKIN, THE CORRUPT JUDGE (1962).

49. U.S. CONST. art. I, § 8.

50. For example, it took 100 years before Congress could be persuaded to establish a District of Columbia Code. *See* Cox, *Efforts to Obtain a Code of Laws for the District of Columbia*, 3 REC. COLUM HIST. SOC'Y 115 (1900).

51. Act of Mar. 3, 1863, ch. 91, § 3, 12 Stat 763. *See* E. Williams, *The Supreme Court of the District of Columbia 1863-1928*, 1 WASHINGTON PAST AND PRESENT: A HISTORY 226, 240 (J. Proctor ed. 1930) [hereinafter cited as Proctor].

52. It was not until the New Deal legislation that the executive branch found itself continually in court. *See, e.g.*, Schechter Poultry Corp. v. United States, 295 U.S. 495

III. The Supreme Court of the District of Columbia: Second Period — 1893-1948: The Emergence of a Federal Court System within the District

In 1893, Congress established a new federal court, the Court of Appeals of the District of Columbia,[53] and abolished the appellate jurisdiction of the District's Supreme Court.[54] The name of this new appellate court was changed in 1934 to the United States Court of Appeals for the District of Columbia,[55] and in 1948 to the United States Court of Appeals for the District of Columbia Circuit.[56] The Supreme Court of the District of Columbia, however, continued to exercise the powers of both a local and federal court of original jurisdiction until 1936 when it was given a federal name: the District Court of the United States for the District of Columbia.[57] Until 1970, that court remained heavily engaged in the adjudication of local controversies, sharing its local jurisdiction respecting certain civil and criminal matters with the Municipal Court of the District of Columbia.[58]

Until 1973, the United States District Court exercised exclusive jurisdiction over all felony cases arising in the District of Columbia, and concurrent jurisdiction with the Superior Court[59] or its predecessors over misdemeanors.[60] After the three year "take-over" period provided in the Court Reform and Criminal Procedure Act of 1970,[61] the Superior Court assumed jurisdiction over all criminal matters except for cases falling within the exclusive jurisdiction of the federal courts.[62] The organization of the District's two federal courts is now generally comparable with that of their sister courts in the other ten circuits.

Before leaving the developments in the federal court system, it should be noted that Congress has established certain specialized federal tribunals in

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(1935). *See generally* L. Fisher, *supra* note 36, at 22-26; W. Murphy, *supra* note 31, at 53-57.

53. Act of Feb. 9, 1893, ch. 74, 27 Stat. 434. The new court was empowered to review the orders and decrees of the Supreme Court and those of the Police Court. Subsequently it entertained appeals from the Municipal Court and the Juvenile Court. *See* Proctor, *supra* note 51, at 226, 243; Bicentennial History, *supra* note 38, at 3-14.

54. Act of Feb. 9, 1893, ch. 74, § 7, 27 Stat. 436. *See* Proctor, *supra* note 51, at 226.

55. Act of June 7, 1934, ch. 426, 48 Stat. 926.

56. 28 U.S.C. § 43(a) (1976).

57. Act of June 25, 1936, ch. 804, 49 Stat. 1921.

58. *See* notes 71 & 78-79 and accompanying text *infra*.

59. *See* notes 80-84 and accompanying text *infra*.

60. For the criminal jurisdiction of the United States District Court prior to the Court Reform Act, see D.C. Code § 11-306 (1961).

61. D.C. Code §§ 11-101 to 11-2504, 23-101 to 23-1705 (1973).

62. *Id.* § 11-923.

the District of Columbia. The first to be created was the United States Court of Claims, which antedates the Civil War.[63] It was followed in 1924 by the United States Tax Court,[64] and in 1948 by the United States Court of Customs and Patent Appeals.[65] In 1956 Congress established the United States Court of Military Appeals[66] and in 1971 the Temporary Emergency Court of Appeals.[67] These tribunals were created to adjudicate controversies in highly specialized areas.

IV. The Creation of a State Court System within the District of Columbia

During the District's short history there have been a series of local courts of limited jurisdiction. Quite often Congress's decision to create, abolish, or consolidate these courts has been guided primarily by political considerations.[68]

In 1801, Congress established the Justices of the Peace.[69] Although they started off inauspiciously with the appointment of the "midnight judges,"[70] the Justice of the Peace Court lasted for more than a century. In 1909, the name of the court was changed to the Municipal Court of the District of Columbia.[71] In 1801 Congress also established the Orphans Court for the District of Columbia.[72] This court was abolished in 1870 and its jurisdiction was transferred to the Supreme Court of the District of Columbia.[73] After a sojourn with the United States District Court, probate jurisdiction was transferred in 1970 to the Probate Division of the Superior Court.[74]

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63. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612 (1855) (current version at 28 U.S.C. § 171 (1976)). *See* Prelle, *History and Jurisdiction of the United States Court of Claims*, 19 Rec. Colum. Hist. Soc'y (1916).

64. The United States Tax Court, originally established as the Board of Tax Appeals in 1924, acquired the status of a court in 1954. 26 U.S.C. § 7441 (1976).

65. 28 U.S.C. § 211 (1976). Also established in 1948 was the United States Customs Court, which sits in New York City. *Id.* § 251.

66. 10 U.S.C. § 867 (1976).

67. The Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, § 211(b)(1), 85 Stat. 743, 749 (1971).

68. *See, e.g.*, notes 32-38 and accompanying text *supra*.

69. Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 103 (1801). *See* Bundy, *A History of the Office of Justice of the Peace in the District of Columbia*, 5 Rec. Colum. Hist. Soc'y 259 (1902). For an historical account of the jurisdiction of the Justices of the Peace, see Capital Traction Co. v. Hof, 174 U.S. 1, 16-18 (1899).

70. *See* note 18 *supra*.

71. Act of Feb. 17, 1909, ch. 134, 35 Stat. 623 (1909).

72. Act of Feb. 27, 1801, ch. 15, § 12, 2 Stat. 103 (1801). *See* Dennis, *Orphan's Court and Register of Wills, District of Columbia*, 3 Rec. Colum. Hist. Soc'y 210 (1899).

73. Act of June 21, 1870, ch. 141, § 5, 16 Stat. 160 (1870).

74. *See* D.C. Code § 11-2101 (1973).

The Criminal Court was established in 1838 to relieve the Circuit Court of the pressure of criminal trials.[75] It was abolished in 1863, however, and its jurisdiction was transferred to the District's Supreme Court.[76] In 1870 the Police Court was established and given jurisdiction over minor crimes.[77] In 1942 it was consolidated into the Municipal Court, which then exercised both civil and criminal jurisdiction.[78] The name of the Municipal Court was changed in 1962 to the Court of General Sessions of the District of Columbia.[79]

In 1970, Congress commenced a major reorganization of the District's courts with the passage of the Court Reform and Criminal Procedure Act of 1970.[80] This Act consolidated the Court of General Sessions with the District's Juvenile Court[81] and Tax Court.[82] The newly named Superior Court of the District of Columbia was given jurisdiction over all civil matters arising within the District of Columbia, except those within the exclusive jurisdiction of the federal courts.[83] It was further empowered to handle all criminal cases arising under any law applicable exclusively to the District.[84]

The history of the District's appellate court, the District of Columbia Court of Appeals, is relatively brief.[85] Its predecessor, the Municipal Court of Appeals, was established in 1942 to hear appeals from the Municipal Court.[86] At its inception the local appellate court was an intermediate court, since its decisions were reviewable by the United States Court of

75. Act of July 7, 1838, ch. 192, 5 Stat. 306 (1838).

76. Act of Mar. 3, 1863, ch. 91, § 16, 12 Stat. 762 (1863).

77. Act of June 17, 1870, Ch. 133, 16 Stat. 153 (1870).

78. Act of Apr. 1, 1942, ch. 207, 56 Stat. 190 (1942). *See* Paley v. Solomon, 59 F. Supp. 887 (D.D.C. 1945).

79. Act of Oct. 23, 1962, Pub. L. No. 87-873, 76 Stat. 1171 (1962). The jurisdiction of the court was increased to provide exclusive jurisidction over all civil claims not exceeding $10,000.

80. D.C. CODE §§ 11-101 to 11-2504, 23-101 to 23-1705 (1973 & Supp. 1977). *See* M.A.P. v. Ryan, 285 A.2d 310, 312 (D.C. 1971).

81. The Juvenile Court was established by Congress in 1906. Act of Mar. 19, 1906, ch. 960, § 1, 34 Stat. 73 (1906). Its purpose was to separate youthful offenders from the criminal procedures used for adults. *See* Thomas v. United States, 121 F.2d 905 (D.C. Cir. 1941).

82. Originally established as the Board of Tax Appeals, District of Columbia Revenue Act of 1937, ch. 690, 52 Stat. 673, the work of the Tax Court has been handled since 1970 by the Tax Division of the Superior Court. D.C. CODE §§ 47-2401 to 47-2413 (1973).

83. D.C. CODE § 11-921 (1973). *See generally* Moultrie, *District of Columbia Superior Court*, 28 CATH. U.L. REV. 717 (1979).

84. D.C. CODE § 11-923 (1973).

85. *See generally* Newman, *The State of the District of Columbia Court of Appeals*, 27 CATH. U.L. REV. 453 (1978).

86. Act of Apr. 1, 1942, ch. 207, § 6, 56 Stat. 194.

Appeals.[87] The Court Reform Act, however, significantly expanded its jurisdiction. The District of Columbia Court of Appeals is now a court of last resort, hearing all appeals from the Superior Court and exercising review authority over decisions of the city's mayor and administrative agencies.[88] Its decisions are subject to review only by the Supreme Court of the United States.[89] In essence, the District of Columbia Court of Appeals has the same power and stature as the supreme courts of the several states.

V. THE COURTHOUSES

Even such a condensed history of the District of Columbia court system as this one would be incomplete without at least a short account of the courthouses in which the judiciary has functioned.

Prior to the burning of the Capitol by the British in 1814, the Circuit Court often shared with the Supreme Court a room in the basement of the Capitol.[90] That courtroom was described as "little better than a dungeon."[91] During much of the time between 1814 and 1822, the Circuit Court was virtually homeless, Congress having failed to provide funds for a court building.[92] Finally, in 1823, a courtroom was provided in the District's City Hall. Although the City Hall which was to house the courts in Judiciary Square originally belonged to the local government, the federal government took over part of it for the Circuit Court.[93] For more than a century, all the federal and local courts within the District, with the exception of the Supreme Court of the United States, were housed in Judiciary Square.[94]

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87. Act of Apr. 1, 1942, ch. 207, § 8, 56 Stat. 196. Review by the federal court of appeals was discretionary in nature. As an intermediate appellate court, the Municipal Court of Appeals performed "error" review as opposed to the "institutional" review function of the United States Court of Appeals. *See* Newman, *supra* note 85, at 455. *See generally* Davidson v. Jones, 34 A.2d 261, 262 (D.C. 1943).

88. *See* D.C. CODE §§ 11-102, 11-721 & 11-722 (1973).

89. *Id.* § 11-102.

90. *See* J. NOEL, *supra* note 48, at 11.

91. II W. BRYAN, HISTORY OF THE NATIONAL CAPITAL 83 (1914).

92. *See* J. NOEL, *supra* note 48, at 11-12.

93. *Id.* at 32. Later more courtrooms were made available to the judiciary in City Hall.

> Although the rooms are newly furbished, old memories of wrong and injustice linger there like the odor of mould. "The law was given to men, not to angels" (Talmud). Hence there are records of crime unpunished and innocence unvindicated, of wrong where the law aided, memories of affliction stronger than the grave and of hatred stretching its soiled hands to break the quiet of the tomb. All these dwell about the new court-rooms as the old.

Id. at 34.

94. The account of the Judiciary Square courthouses contained in the remainder of this section is based upon the recollections of Mr. George Fisher, Clerk of the United States Court of Appeals for the District of Columbia Circuit; Mr. Alexander L. Stevas, Clerk of the

The Supreme Court of the District of Columbia moved into the City Hall in 1863 at the time the Circuit Court was abolished.[95] The General Term (which ultimately became the United States District Court for the District of Columbia) held its sessions for a time across the street at Building D (now occupied by the Court of Military Appeals) before finally moving in 1952 to the United States Court House on John Marshall Place.

The Special Term of the Supreme Court of the District of Columbia (which in 1936 became known as the District Court of the District of Columbia) remained in the City Hall until it moved in 1952 to the new Federal Court House on John Marshall Place. It also had courtrooms in the A Building at 515 Fifth Street, N.W., and the Esso Building at 3rd and Constitution Avenue, N.W.

As the number of judges of the Superior Court increased, building space was appropriated whenever it could be found in or about Judiciary Square. Building E at 601 Indiana Avenue, N.W., Building F at 613 Indiana Avenue and the Pension Building on F Street between Fourth and Fifth Streets, N.W., provided chambers and courtrooms. The Pension Building alone provided seventeen courtrooms. In 1978 the Superior Court moved to the new District of Columbia Court House at 500 Indiana Ave., N.W.

The Municipal Court of Appeals, which in 1968 became known as the District of Columbia Court of Appeals, had its courtroom on the top floor of the B Building at 409 Fourth Street, N.W. In 1978, that court accompanied the Superior Court in the move to the new District of Columbia Court House at 500 Indiana Ave., N.W.

Thus, despite the great disadvantages that the courts of the District suffered over a period of many years from wholly inadequate and decentralized housing, the courts now are enjoying modern facilities that add greatly to their efficiency. The rapid increase in the case loads of the federal courts, however, makes it evident that the "new courthouse," now nearly three years old, will soon require enlargement or replacement.

VI. The Great Responsibility of the District of Columbia Courts

Every year the courts of the District of Columbia are called upon to adjudicate dramatic controversies which are often of great significance to the whole nation. While this article cannot review all of the important

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District of Columbia Court of Appeals; and Mr. Joseph M. Burton, Clerk of the Superior Court of the District of Columbia.

95. *See* notes 27-38 and accompanying text *supra*.

cases of the past, several broad types of controversies deserve mention as illustrations of the unique role which is played by the District's courts.

Although the combined civil caseloads of the District's federal and local courts greatly exceed their criminal cases in number, it is the latter which comes to the public mind whenever the subject of "the law" is raised. In the Prohibition Era (1919-1934), for example, the District of Columbia was at the center of a challenge to the continuing existence and enforcement of the eighteenth amendment.[96] The courts were flooded with "liquor cases" which threatened to destroy their reputation, but were saved at the eleventh hour by the ratification of "Repeal."[97]

As the national revenues move toward being counted in terms of trillions of dollars, also increasing are the dangers of massive corruption. The courts of the nation's capital must carry the burden of providing a forum for prosecution when that becomes needed. A notorious case in point was the trial of Secretary of the Interior Albert B. Fall for accepting a bribe in the Teapot Dome scandal.[98] Even today, the General Services Administration has provided yet another scene of dishonesty by government officials. Unless there exists complete integrity and competence in the courts of the District, confidence in the federal government itself will constantly erode. But even the efforts by the courts to ferret out corruption are sometimes frustrated. Periodically, congressional legislation will trigger crises that impose severe challenges upon the very functioning of the courts. The notorious Volstead Act was one,[99] and the recent surge of regulatory activities is another.[100]

The classic illustration of the need for a strong judiciary is, of course, Watergate. The charges against members of the Nixon administration, bent on taking the law into their own hands, posed enormous difficulties for the judges of the local courts before whom their prosecutions were presented. Those courts proved steadfast and courageous, and Judge Sirica gained and deserved the approbation of the whole country.[101]

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96. U.S. CONST. amend. XVIII. Deserving of more than a small footnote in District of Columbia history was the reign of Mabel Walker Wildebrandt, Assistant Attorney General from 1921-1929 in charge of enforcing the prohibition law. Many years before "women's liberation," she brought to the District's courts a crusading spirit that is unmatched even today.

97. U.S. CONST. amend. XXI.

98. Fall v. United States, 49 F.2d 506 (D.C. App. 1931).

99. National Prohibition Act, ch. 85, § 1, 41 Stat. 305 (1919) (codified at 27 U.S.C. §§ 1-89 (1976).

100. Laws governing civil rights, consumer rights, occupational health and safety, and environmental protection may be cited as examples.

101. Nixon v. Sirica, 487 F.2d 700 (D.C. Cir. 1973).

On the civil side, the role of the District's courts has also been of transcendent importance. During the New Deal period, Congress enacted a complex legislative program at the behest of President Roosevelt. Much of it was controversial and the country was in a highly divisive mood. The prompt testing of the constitutionality of much of the legislation and clear decisive rulings from the courts dispelled the clamor and uncertainty which at first prevailed.[102]

Additionally, compliance with federal law depends heavily upon the equitable arm of the courts, and not infrequently that of the courts of the District. One of the most dramatic cases in District of Columbia court history was the trial of John L. Lewis who refused to comply with an injunction in a labor dispute.[103]. Equally heated was the controversy surrounding President Truman's attempted seizure of the steel mills.[104] The high caliber of the judiciary within the District has insured the enforcement of congressional legislation and the fairness of governmental regulation as well.[105]

The presence of the federal regulatory agencies in Washington accounts for a large percentage of the litigation in its courts. The Federal Trade Commission, the Civil Rights and Antitrust Divisions of the Department of Justice, the Environmental Policy Administration, and the National Labor Relations Administration are well known in the District's courtrooms, and the same is, of course, true of the many other agencies as well. The burden of the congressional determination to regulate the social, financial, and industrial affairs of the nation has fallen heavily on the courts at the seat of the government.[106]

VII. Marks of Progress

The sweeping court reforms enacted by Congress during the last decade have gone a long way toward resolving the problems that have plagued the District's courts in recent years.[107] This final section will summarize

102. *See, e.g.*, Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935); Nortz v. United States, 294 U.S. 317 (1935); Perry v. United States, 294 U.S. 330 (1935).

103. United States v. United Mine Workers of America, 70 F. Supp. 42 (D.D.C. 1946), *aff'd*, 330 U.S. 258 (1947).

104. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

105. *See, e.g.*, Cafeteria & Restaurant Workers Union Local 473 v. McElroy, 284 F.2d 173 (1960), *aff'd*, 367 U.S. 887 (1961).

106. *See, e.g.*, National Prohibition Act, 27 U.S.C. § 1 (1976); Securities Exchange Act of 1934, 15 U.S.C. § 78a (1976); Labor Management Relations Act of 1947, 29 U.S.C. § 141 (1976).

107. *See* note 12 *supra*.

briefly the changes resulting from the legislation affecting the District's local and federal courts.

A. Merit Selection

Prior to the District of Columbia Self-Government and Governmental Reorganization Act,[108] all judges of the District's courts were nominated by the President and appointed with Senate approval.[109] The Self-Government Act established a Judicial Nomination Commission to advise the President on appointments to the Superior Court and District of Columbia Court of Appeals. The Commission is charged with recommending three qualified candidates for each impending or existing vacancy without regard to party membership.[110] If none of the Commission's recommendations is acted upon by the President within sixty days, the Commission may nominate one of the candidates subject to senate approval.[111] The absence of political sponsorship should remove any necessity for judicial participation in politics.

The success of the District's merit system has lent encouragement to President Carter's determination to employ a similar system throughout the federal judiciary.[112] An important first step was the appointment of a judicial nominating commission to recommend candidates for United States Circuit Court judgeships.[113] Some progress has also been made to-

108. Pub. L. No. 93-198, 87 Stat. 774 (1973). *See generally* McKay, *Separation of Powers in the District of Columbia Under Home Rule*, 27 CATH. U.L. REV. 515 (1978); Newman & DePuy, *Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act*, 24 AM. U.L. REV. 537 (1975).

109. *See* D.C. CODE § 11-1501(a) (1973).

110. D.C. CODE § 11-434 (Supp. V 1978). The literature on the judicial selection process in other states is voluminous. *See, e.g.*, Adamany & Dubois, *Electing State Judges*, 1976 WIS. L. REV. 731; Hannah, *Competition in Michigan's Judicial Elections: Democratic Ideals vs. Judicial Realities*, 24 WAYNE L. REV. 1267 (1978); Hays, *Selection of Judges in Oklahoma*, 2 TULSA L.J. 127 (1965); Henderson & Sinclair, *The Selection of Judges in Texas*, 5 HOUSTON L. REV. 430 (1968); Kaminsky, *supra* note 13; Seiler, *Judicial Selection in New Jersey*, 5 SETON HALL L. REV. 721 (1974); Note, *Judicial Selection in the States: A Critical Study with Proposals for Reform*, 4 HOFSTRA L. REV. 267 (1976).

111. D.C. CODE tit. 11, § 434 appendix (Supp. V 1978).

112. *See Symposium, Federal Judicial Selection: The Problems and Achievements of Carter's Merit Plan*, 62 JUDICATURE 465 (May 1979).

113. The United States Circuit Judge Nominating Commission was established by President Carter on February 14, 1977. Exec. Order. No. 11,972, 3 C.F.R. 96 (1978). *See* Berkson, Carbon & Neff, *A Study of the U.S. Circuit Judge Nominating Commission: Findings, Conclusions and Recommendations*, 63 JUDICATURE 104 (Sept. 1979). *See also* Fish, *Merit Selection and Politics: Choosing a Judge of the United States Court of Appeals for the Fourth Circuit*, 15 WAKE FOREST L. REV. 635 (1979).

ward the creation of nominating commissions for the United States District Courts.[114]

B. Judicial Tenure

In providing that the District of Columbia judges should serve fifteen year terms,[115] Congress rejected the system of lifetime appointments enjoyed by federal judges. Nevertheless, it declined to readopt the shorter ten-year term that local judges had been serving prior to the establishment of the Superior Court.[116] The fifteen year term is proving to be a viable intermediate solution to the complex problem of length of tenure.[117]

The District's Commission on Judicial Disabilities and Tenure was also established by the Self-Government Act.[118] Comprised of seven members serving staggered terms,[119] the Commission is empowered to remove judges from the two local courts when it finds that a judge has become physically disabled or is guilty of misbehavior in office.[120]

An equally important function of the Commission is to evaluate the performance of judges seeking reappointment.[121] If the Commission determines that a judge is unqualified for further service, no second appointment is permissible.[122] If a judge is found by it to be qualified, the President is empowered to make or refuse the appointment.[123] If the Commission finds, however, that the applicant is either well qualified or exceptionally well qualified, the judge obtains the second term without further action by the President.[124]

C. Court Unification

There have been wide differences of opinion as to the usefulness of specialized courts.[125] Although Congress has frequently established such

114. *See* Exec. Order No. 12,097, 3 C.F.R. 254 (1979), prescribing the standards for merit selection of United States District Court Judges.

115. D.C. CODE § 11-1502 (1973).

116. Act of Dec. 23, 1963, Pub. L. No. 88-241, § 1, 77 Stat. 484.

117. *See generally* Comment, *Judicial Tenure in the District of Columbia*, 27 CATH. U.L. REV. 543 (1978).

118. D.C. CODE § 11-431(d)(1) appendix (Supp. 1978).

119. *Id.*

120. D.C. CODE § 11-432 appendix (Supp. 1978).

121. *See* Comment, *supra* note 117, at 560-62.

122. D.C. CODE § 11-433(c) appendix (Supp. 1978).

123. *Id.*

124. *Id.*

125. *See, e.g.*, Ashan & Parness, *The Concept of a Unified Court System*, 24 DE PAUL L. REV. 1 (1974); Carbon, Berkson & Rosenbaum, *supra* note 13; Elston, *Administration of the Courts in Arkansas: Challenge, Performance and Prospects*, 30 ARK. L. REV. 235 (1976); Elrod, *Practicing Law in a Unified Kansas Court System*, 16 WASHBURN L.J. 260 (1977); Gaxell, *Lower-Court Unification in the American States*, 1974 ARIZ. ST. L.J. 653; Greenhill &

tribunals in the District, there has been a growing conviction within the profession that such a division of judicial labor is unwise[126] and that justice is more efficiently administered in a single, unified court.[127] In creating the Superior Court of the District of Columbia, Congress accepted the latter view and the abolition of numerous specialized courts within the District has been the result.[128]

To enable the Superior Court to deal with its vastly expanded jurisdiction and to exercise its powers as a unified court, the 1970 Court reform Act increased the number of its judges to forty-four.[129] With its acceptance of modernization,[130] the court has begun to set an example of efficiency and effectiveness for federal and state courts throughout the country.[131] Today, there is a growing interest in the development of new ways of resolving disputes, and perhaps we may see a revival of some new forms of specialized courts.[132] The Superior Court of the District of Columbia, however, now stands as a model deserving of a long trial before turning back toward a fragmented system.

VIII. The Future of the Federal-State Court System

There may be grounds for reservations concerning Congress's establishment in 1970 of separate federal and local court systems in the District of Columbia. For seventeen decades the United States District Court and its predecessors exercised jurisdiction over all federal and nearly all local matters.[133] The United States Court of Appeals for the District of Columbia Circuit and its predecessors had similarly broad jurisdiction.[134] Thus,

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Odam, *Judicial Reform of Our Texas Courts — A Reexamination of Three Important Aspects*, 23 Baylor L. Rev. 204 (1971); Comment, *Trial Court Consolidation in California*, 21 U.C.L.A. L. Rev. 1801 (1974); Note, *Judicial Reform in West Virginia: The Magistrate Court System*, 79 W. Va. L. Rev. 304 (1977).

126. For an example of an extremely fragmented court system, see Le Clerq, *The Tennessee Court System*, 8 Memphis St. U.L. Rev. 185 (1978).

127. For an examination of state reorganizations, see Berkson, Carbon & Rosenbaum, *Organizing the State Courts: Is Structural Consolidation Justified?*, 45 Brooklyn L. Rev. 1 (1978).

128. *See* notes 70-90 and accompanying text *supra*.

129. D.C. Code § 11-903.

130. *See generally* Moultrie, *supra* note 83.

131. For recent examinations of the case overloads of federal and state courts, see Marcus, *Judicial Overload: The Reasons and the Remedies*, 28 Buffalo L. Rev. 111 (1979); Sheran & Isaacman, *State Cases Belong in State Courts*, 12 Creighton L. Rev. 1 (1978).

132. For an interesting proposal concerning dispute resolution, see Crastley, *Community Courts: Offering Alternative Dispute Resolution within the Judicial System*, 3 Vermont L. Rev. 1 (1978).

133. *See* notes 40-62 and accompanying text *supra*.

134. *See* notes 53-56, 89-93 and accompanying text *supra*.

at both the trial and the appellate levels, the semiunified system continued long after each of the two federal tribunals had become identified as such.

By 1970, however, both federal courts were heavily overburdened.[135] It was perhaps logical for Congress to relieve their caseload by a massive transfer of their local jurisdiction to the previously "inferior" District of Columbia courts.[136] At that time there may have been little reason for Congress to question the wisdom of departing from the unified experience and adopting a dual system similar to that found in the states.

In the last decade, however, there have been two developments that promise to bring the federal and state courts much closer together. The first concerns the increased workload of the federal courts.[137] That case burden has, in turn, forced the state courts to adjudicate matters formerly considered exclusively federal.[138] The second development has been the vast financial support extended to state courts by the federal government since the passage of the Law Enforcement Assistance Administration Act of 1969.[139] Despite all the constitutional protections afforded the states,[140] state courts are now heavily dependent upon the largess of the federal government.[141]

Thus, state courts may face an absorption into the federal court system partly because their dependence upon federal funds will permit inroads into their independence by the federal bureaucracy. Perhaps more important, however, is the inability of the federal courts to handle the litigation spawned by the legislative programs Congress continues to thrust upon

135. *See* HOUSE COMM. OF THE DISTRICT OF COLUM., REPORT ON THE REORGANIZATION OF THE COURTS OF THE DISTRICT OF COLUMBIA, H.R. REP. NO. 907, 91st Cong., 2d Sess. (1970).

136. When Congress finally established the District of Columbia Code in 1901, it provided that the judicial power be vested in "inferior courts, namely, justices of the peace and the police court," and "Superior Courts, namely, the Supreme Court of the District of Columbia, the Court of Appeals of the District of Columbia and the Supreme Court of the United States." Act of Mar. 3, 1901, ch. 854, 31 Stat. 1189. In 1963 the "inferior courts" had become the Court of General Sessions and the Juvenile Court, while the "superior courts" were the District of Columbia Court of Appeals, the United States District Court for the District of Columbia, the United States Court of Appeals for the District of Columbia Circuit, and the Supreme Court of the United States. Act of Dec. 23, 1963, 77 Stat. 478.

137. *See, e.g.*, FEDERAL JUDICIAL CENTER, CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS (S. Flanders ed. 1977); Haworth & Meador, *A Proposed New Federal Intermediate Appellate Court*, 12 U. MICH. J.L. REF. 201 (1978).

138. *See* note 131 *supra*. *See also* Kagan, Cartwright, Friedman & Wheller, *The Evolution of State Supreme Courts*, 76 MICH. L. REV. 961 (1978).

139. 42 U.S.C. §§ 3701-3796 (1976).

140. U.S. CONST. amend. X.

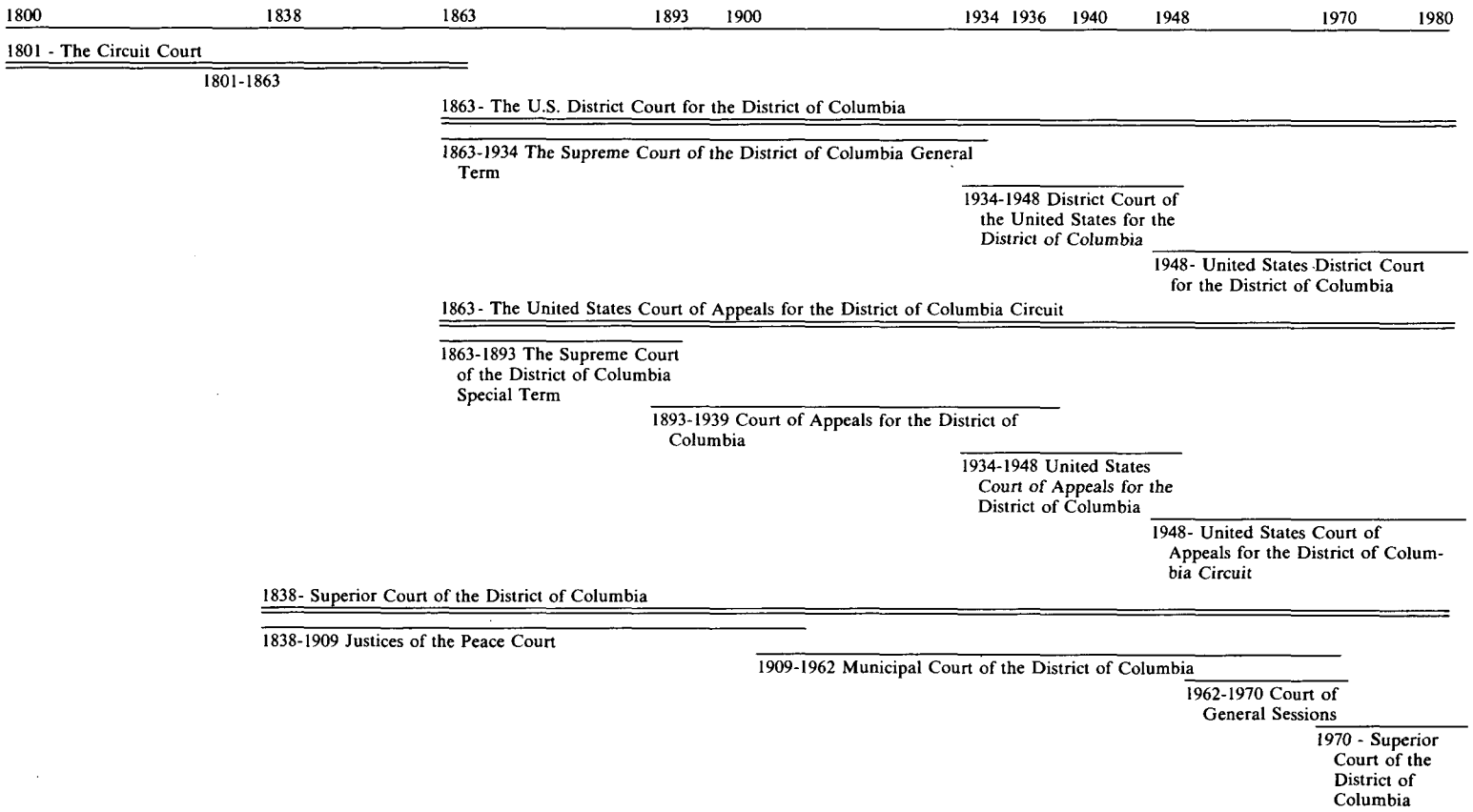
141. Address by Daniel J. Meador, Assistant Attorney General, The Federal Government and the State Courts, delivered to the National College of the State Judiciary (Oct. 14, 1977).

them.[142] As Assistant Attorney General Meador has pointed out, we are witnessing a forced take-over by the much larger state court system of many responsibilities once regarded as strictly those of the federal courts.[143]

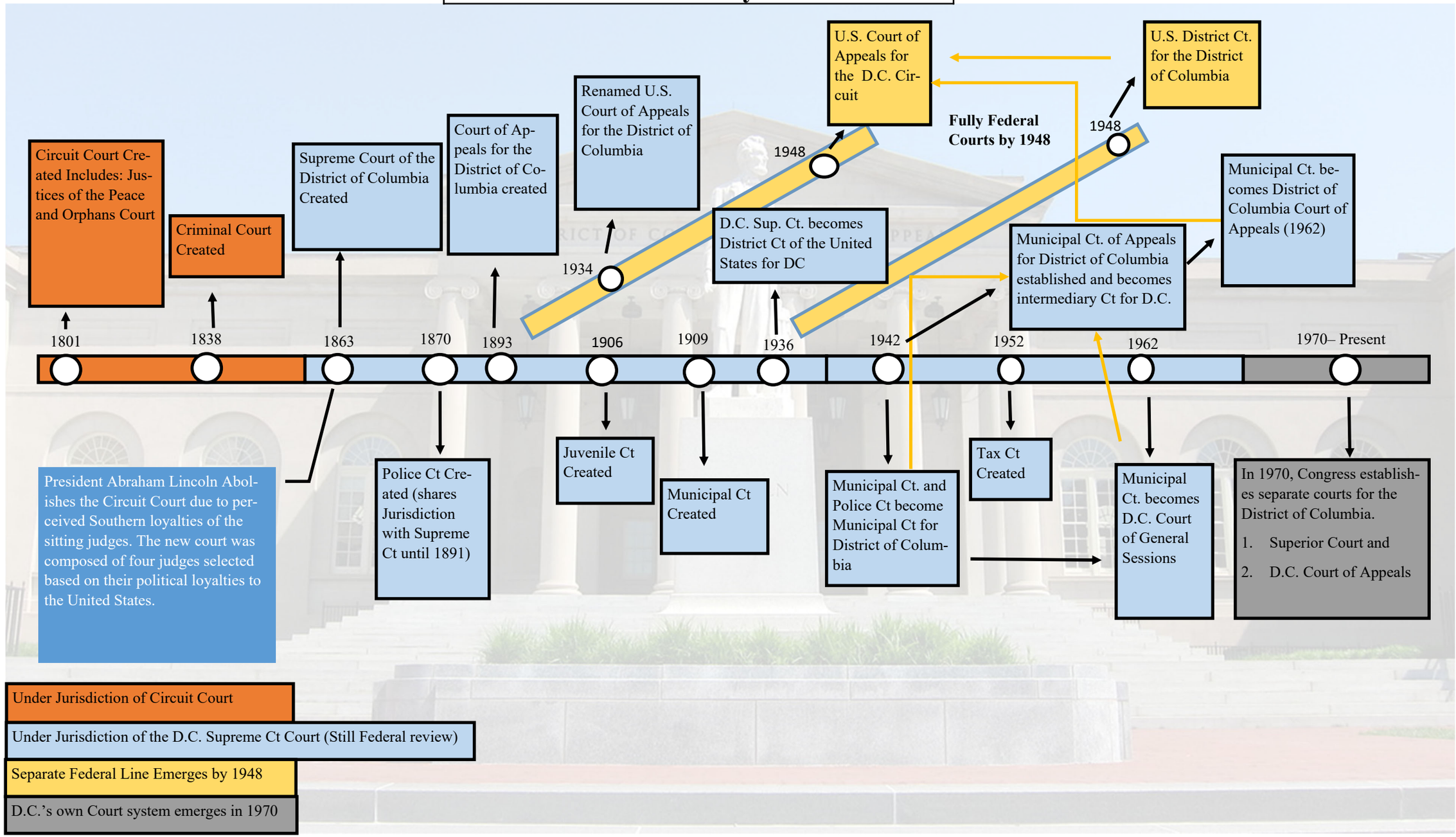
The District of Columbia has had long experience in handling both federal and local matters without resort to separate court systems. The history of its courts suggests that an eventual unification of all the nation's courts might be an acceptable solution to the problems presently confronting the federal judiciary.

142. Federal Legislation dealing with the environment, civil rights, energy, and consumer protection are prime causes for the caseload burden now overwhelming the federal judiciary. *See* note 131 & 137 *supra*.

143. *See* Meador, *supra* note 141.


1800
1838
1863
1893
1900
1934
1936
1940
1948
1970
1980
1801 - The Circuit Court
1801-1863
1863- The U.S. District Court for the District of Columbia
1863-1934 The Supreme Court of the District of Columbia General Term
1934-1948 District Court of the United States for the District of Columbia
1948- United States District Court for the District of Columbia
1863- The United States Court of Appeals for the District of Columbia Circuit
1863-1893 The Supreme Court of the District of Columbia Special Term
1893-1939 Court of Appeals for the District of Columbia
1934-1948 United States Court of Appeals for the District of Columbia
1948- United States Court of Appeals for the District of Columbia Circuit
1838- Superior Court of the District of Columbia
1838-1909 Justices of the Peace Court
1909-1962 Municipal Court of the District of Columbia
1962-1970 Court of General Sessions
1970 - Superior Court of the District of Columbia

DC Courts History Timeline



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