DCBAR

2023
District of Columbia
Judicial & Bar Conference

APRIL 28, 2023

Examining Elements of Statehood through the Home Rule Act

April 28, 2023
2:15 p.m. – 3:45 p.m.

Continuing Legal Education

Examining Elements of Statehood Through the Home Rule Act

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Examining Elements of Statehood Through the Home Rule Act

About the Speakers

Joanne Chan is a Senior Assistant General Counsel and Head of State Legal Affairs at the Pharmaceutical Research and Manufacturers of America (PhRMA). Prior to joining PhRMA, she was Corporate Counsel for Regulatory & Compliance at United Therapeutics Corporation and an associate at King & Spalding LLP. Joanne received a J.D. from Georgetown University Law Center, an M.P.H. from the Johns Hopkins Bloomberg School of Public Health, and a B.S.F.S. from Georgetown University's Walsh School of Foreign Service.

Brandi Howard is a partner with McGuireWoods LLP, whose practice focuses on representing corporate and individual clients in government investigations and complex commercial trial and appellate litigation. Brandi was named among the National Bar Association's "Top 40 Under 40" in 2022, and has been named a top 40 under 40 lawyer in Washington, D.C. by The National Black Lawyers since 2021.

Brandi's investigations practice involves defending clients in government investigations conducted by regulatory and enforcement bodies involving healthcare fraud, consumer protection, antitrust, and anti-money laundering issues and in congressional investigations often involving consumer protection and employment issues.

Brandi's litigation practice involves defending and representing clients in routine and high stakes litigation. Brandi represents clients in cases involving the False Claims Act; constitutional issues such as free speech, religious freedom, and sovereign immunity; and breach of contract and consumer protection cases.

Melissa Martinez is a partner with McGuireWoods LLP. Melissa regularly represents Fortune 100 companies in complex business litigation matters. Her practice focuses on commercial litigation, environmental torts, business torts, contractual disputes, fiduciary matters, and intellectual property litigation. She has handled consumer litigation cases involving TILA, RESPA, FDCPA, FCRA, and state consumer protection statutes. She has experience in trial and appellate matters in both federal and state courts.

Melissa serves as chair of the firm's Asian Lawyers Network, on the steering committee of the firm's Appellate Justice Initiative and as co-chair of the firm's Consumer & Retail Financial Product Litigation Subteam.

Before entering private practice, Melissa was a judicial intern and law clerk to the Honorable Andre M. Davis in the U.S. District Court for the District of Maryland (2007, 2008-2009) and the U.S. Court of Appeals for the Fourth Circuit (2009-2010). A full professional profile can be found here.

Abram Pafford, a partner with McGuireWoods LLP, is an experienced litigator who represents government contractors across the full spectrum of government contract matters, including litigation, appeals, administrative proceedings and investigations. As a member of the firm's nationally recognized Government Investigations and White Collar department, Abe prosecutes claims arising under the Contract Disputes Act, defends against False Claims Act lawsuits initiated by the Department of Justice, and represents protestors and intervenors in pre-award and post-award bid protests before the United States Court of Federal Claims and the GAO.

Abe has also represented government contractors in a variety of administrative settings, including matters relating to the protection of proprietary contractor information under the Freedom of Information Act, the disputed status of contractors and subcontractors under the Small Business Administration's size regulations, and the defense of contractors facing potential exclusion from federal or state contracting pursuant to agency debarment proceedings.

A full professional profile can be found here.

TAB ONE

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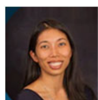
Examining Elements of Statehood through the Home Rule Act

The District of Columbia Judicial & Bar Conference

April 28, 2023

CONFIDENTIAL 1

Introduction to the Presenters



Joanne Chan
Assistant General Counsel and Head of State Legal Affairs
Pharmaceutical Research and Manufactures of America (PhRMA)

Joanne is an Assistant General Counsel and Head of State Legal Affairs at the Pharmaceutical Research and Manufacturers of America (PhRMA). Joanne is also an adjunct professor of law at Georgetown University Law Center. Prior to joining PhRMA, she was Corporate Counsel for Regulatory & Compliance at United Therapeutics Corporation and an associate at King & Spalding LLP. She has also served as a Law Clerk at the Public Defender Service for the District of Columbia and was an intern to the Honorable Gladys Kessler in the U.S. District Court for the District of Columbia. Joanne received a J.D., cum laude, from Georgetown University Law Center, an M.P.H. from the Johns Hopkins Bloomberg School of Public Health, and a B.S.F.S., magna cum laude, from Georgetown University's Walsh School of Foreign Service.

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Brandi's practice focuses on representing corporate and individual clients in government investigations and complex commercial trial and appellate litigation. Brandi was named among the National Bar Association's "Top 40 Under 40" in 2022, and has been named a top 40 under 40 lawyer in Washington, D.C. by The National Black Lawyers since 2021. Brandi's investigations practice involves defending clients in government investigations conducted by regulatory and enforcement bodies involving healthcare fraud, consumer protection, antitrust, and anti-money laundering issues and in congressional investigations often involving consumer protection and employment issues. Her litigation practice involves defending and representing clients in routine and high stakes litigation. Brandi represents clients in cases involving the False Claims Act; constitutional issues such as free speech, religious freedom, and sovereign immunity; and breach of contract and consumer protection cases.

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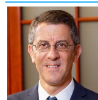
Melissa regularly represents Fortune 100 companies in complex business litigation matters. Her practice focuses on commercial litigation, environmental torts, business torts, contractual disputes, fiduciary matters, and intellectual property litigation. She has experience in trial and appellate matters in both federal and state courts. Melissa serves as chair of the firm's Asian Lawyers Network, on the steering committee of the firm's Appellate Justice Initiative and as co-chair of the firm's Consumer & Retail Financial Product Litigation Subteam. Before entering private practice, she was a judicial intern and law clerk to the Honorable Andre M. Davis in the U.S. District Court for the District of Maryland (2007, 2008-2009) and the U.S. Court of Appeals for the Fourth Circuit (2009-2010).



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Abe focuses his practice on protecting the rights and interests of companies and individuals who face disputes or conflicts with the federal government in its role as purchaser, prosecutor, and chief regulator. For more than twenty years, Abe has represented government contractors, participants in regulated industries, and companies and individuals targeted for federal investigation or prosecution, consistently achieving successful results for clients confronting difficult odds. As a member of the firm's nationally recognized Government Investigations and White Collar department, Abe prosecutes claims arising under the Contract Disputes Act, defends against False Claims Act lawsuits initiated by the Department of Justice, and represents protestors and intervenors in pre-award and post-award bid protests before the United States Court of Federal Claims and the GAO. Abe has also represented government contractors in a variety of administrative settings.

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The Home Rule Act

The Home Rule Act, originally termed the District of Columbia Self-Government and Governmental Reorganization Act and enacted in 1973, was an opportunity for the District of Columbia to govern its local affairs, given that, Article I, Section 8 of the U.S. Constitution grants the U.S. Congress exclusive Legislation over the District "in all cases whatsoever."

Before Home Rule, residents in D.C. had been trying to obtain some self-governance for a long while, with at least six bills having previously been introduced in Congress to provide some form of home rule, none of which ever passed. In 1961, the Twenty-Third Amendment to the United States Constitution gave D.C. residents the power to participate in presidential elections.

The Home Rule Act

Using the Twenty-Third Amendment as a base, District residents sought more power and autonomy for the District which led to the enactment of the Home Rule Act, to:

> Reorganize the governmental structure of the District of Columbia, to provide a charter for local government in the District of Columbia subject to acceptance by a majority of the registered qualified electors in the District of Columbia, to delegate certain recommendations of the commission on the organization of the government of the District of Columbia, and for other purposes.

The Home Rule Act

The intent was to give the Council of the District of Columbia broad authority to legislate upon all rightful subjects of legislation within the District.

The Act itself states:

> "The intent of Congress is to delegate certain legislative powers to the government of the District of Columbia; authorize the election of certain local officials by the registered qualified electors in the District of Columbia; grant to the inhabitants of the District of Columbia powers of local self-government; to modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve congress of the burden of legislating upon essentially local District matters."

The Home Rule Act

The Home Rule Act established the District's Charter, the creation of the D.C. Council, the Judicial Powers of the D.C. Court of Appeals and the Superior Court, including how judges will be nominated by the President after being referred by the D.C. Judicial Nomination Commission, which is also established by the Act, and it established budgeting and financial management laws, independent agencies, and the Advisory Neighborhood Councils, which we call Advisory Neighborhood Commissions now.

Importantly, however, the Act states that the US Congress retains "the right, at any time, to exercise its constitutional authority as legislature for the District."

Tension after Home Rule

Home Rule ultimately created a very strained relationship between the District and Congress. The District gained authority over some of its affairs, but still not at the level of other US citizens of recognized states. Additionally, the District was now under the supervision of an entity where it had no voting authority to influence decision making related to the district.

In an attempt to remedy the fact that the District lacked a voice in voting affairs, Congress proposed a constitutional amendment that was set to give District residents voting representation in the House and the Senate. Nonetheless, the amendment failed ultimately in 1985 after only 16 of the 38 state votes needed for ratification of the District's proposed amendment voted in favor of approval. After the District's proposed Amendment failed, discord arose between the District and Congress, as Congress began to disagree with the political judgments of the elected D.C. Council and increasingly used or threatened to use its reserved powers to regulate the District.

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Tension After Home Rule

For example, in 1989, the Council abandoned a controversial gun control bill that would allow shooting victims or their families to recover monetary damages from handgun manufacturers or distributors, no matter who was at fault. However, the Council abandoned the bill after the ranking Republican on the House District Committee threatened to offer a resolution to overturn the law if the Council passed it. Congress has consistently exercised a significant measure of control over District affairs by attaching conditions, colloquially known as "riders," to its annual approval of the District's budget.

To date, the District's journey toward autonomy remains unrealized as District residents still do not receive any substantial political representation in Congress and are foreclosed from rights guaranteed to the States.

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Early Cases Interpreting Home Rule

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Home Rule in the Court

- *Kopff v. D.C. Alcoholic Beverage Control Board*, 381 A.2d 1372 (D.C. 1977)

Issue:
Whether the Alcoholic Beverage Control Board's renewal of a liquor license complied with the notice requirements of the Advisory Neighborhood Commission's Act ("ANC Act") and the Home Rule Act.

Facts:
A restaurant operator sought to renew its liquor license by filing an application with the Alcoholic Beverage Control Board. Initially, the Board posted and published notices of the hearing on the application. When the Board rescheduled the hearing, it published notice of the new hearing schedule, but it did not post notice on the property premises. After the hearing, the Board approved the application for a renewed liquor license.

Holding:
The D.C. Court of Appeals held that the Alcoholic Beverage Control Board erred when it failed to give the advisory neighborhood commissions proper notice of the rescheduled hearing, in the manner provided under the Home Rule Act and the Advisory Neighborhood Commission's Act ("ANC Act"), which is an Act that creates commissions tasked with advising rule-making agencies on matters of government policy. In construing the ANC Act, The Court held that courts may refer to the terms of the Home Rule Act to ascertain the intent of the D.C. Council in enacting D.C. statutes. Specifically, the D.C. Court of Appeals determined the D.C. Council's intent in enacting the ANC Act by looking at the parallel terms in the Home Rule Act.

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Home Rule in the Court

- *Citizens Association of Georgetown v. Zoning Commission of D.C.*, 392 A.2d 1027 (D.C. 1978)

Issue:
The issue in this case is to determine with which standards the District's comprehensive plan, pursuant to the Home Rule Act, must comply. Additionally, while the District does not have a comprehensive plan in effect at the time of this litigation, what standards must the district apply to determine the propriety of zoning done by the Zoning Commission?

Facts:
This case is an appeal of a series of orders issued by Zoning Commission of the District of Columbia in rule-making proceedings. Developers, clamoring to develop real estate near the Georgetown Waterfront, announced plans for the area. The Citizens Association of Georgetown and others petitioned the Zoning Commission to adopt an interim amendment to the zoning regulations to prevent the construction.

Holding:
The District of Columbia Court of Appeals held that, while the District's comprehensive plan does not yet exist, compliance with the comprehensive plan provision of the Home Rule Act requires solely that the Commission "zone on a uniform and comprehensive basis." *Id. at 1035–36.*

Home Rule in the Court

- *McIntosh v. Washington*, 395 A.2d 744 (D.C. 1978)

Issue:
Whether the D.C. Council's enactment of the Firearms Act violated the Home Rule Act.

Facts:
Appellants sought a judgment from the D.C. Court of Appeals that the D.C. Council's enactment of the Firearms Act was an unauthorized exercise of the legislative powers delegated to the Council by the Home Rule Act.

Holding:
The D.C. Council had the authority to enact the Firearms Act because Congress delegated legislative powers to the D.C. Council through the Home Rule Act. The Court construed the Home Rule Act's prohibition on the Council's enactment of any legislation relating to criminal procedure and crimes and treatment of prisoners, within two years from the election of Council members, as a mere constraint. The Court narrowly construed the prohibition in the Home Rule Act as pertaining only to legislation directly relating to the identified Titles of the Home Rule Act—not to legislation dealing with the subject matter of any provision in those identified Titles.

Home Rule in the Court

➢ *Bishop v. D.C.*, 401 A.2d 955 (D.C. 1979), on reh'g, 411 A.2d 997 (D.C. 1980)

Issue:
Whether the D.C. Council could impose a tax that effectively levied on the gross income of nonresidents.

Facts:
The D.C. Council enacted the Revenue Act of 1975, which in part allowed D.C. to impose an unincorporated business tax on unincorporated professionals and personal business services. One consequence of this Act was the permitted taxation of non-D.C-resident individuals who operated their businesses or exercised their professions in D.C.

Holding:
The Court held that the relevant portion of the Revenue Act was an invalid exercise of the D.C. Council's legislative authority under the Home Rule Act because the Home Rule Act prevents D.C. from enacting a commuter tax, which is a levy upon individuals who do not live in a jurisdiction but work in that jurisdiction on a daily basis. The Court clarified that it was limiting its ruling to a prohibition from D.C.'s taxation of the net personal income of nonresidents.

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Home Rule in the Court

➢ *D.C. v. Sullivan*, 436 A.2d 364 (D.C. 1981)

Issue:
Whether the Superior Court has jurisdiction to hear a petition seeking the review of an administrative agency's findings of violations of the Traffic Adjudication Act (the "TAA").

Facts:
The appellees contested an administrative agency's findings that each of them violated the TAA. The appellees sought review of the administrative agency's findings with the D.C. Superior Court, but the Superior Court held that, while in the past it had jurisdiction over such petitions, after the enactment of the TAA, it no longer had jurisdiction to hear the petition.

Holding:
The Court held that D.C. superior courts have jurisdiction over appeals under the TAA because the TAA is a valid exercise of the D.C. Council's delegated legislative authority under the Home Rule Act. Citing *McIntosh*, see *supra*, the Court reiterated that the D.C. Council is not prohibited from enacting statutes dealing with specific offenses. Recognizing that the TAA "does not purport to change the criminal jurisdiction or the specific responsibilities of the Superior Court or the Court of Appeals," the Court held that "the Superior Court's trial level jurisdiction of criminal cases remains intact," and the only change is that "certain violations no longer constitute criminal offenses." Accordingly, the superior court had jurisdiction to hear petitions regarding the violation of the TAA.

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Home Rule in the Court

- *Gary v. United States*, 499 A.2d 815 (D.C. 1985)

Issue:
"The principal issue presented for decision in these cases is the impact of *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), on the one "House of Congress" veto provision of the D.C. Self-Government and Governmental Reorganization Act, D.C. Code §§ 1–201 to –295 (1981) ("Home Rule Act") and the consequences upon the convictions on appeal in these cases." *Id*. at 817

Facts:
Individuals convicted for rape and carnal knowledge argued that the D.C. Code provisions, under which they were convicted, had been repealed by the adoption of the District of Columbia Sexual Reform Act of 1981, since the "veto" of that Act by the House of Representatives was legally void. The third individual argued that the one house veto provision was invalid, unseverable, and that without the one house veto, the Home Rule Act would not have been passed by Congress. The appellants thus contended the government of the District of Columbia was without authority to enact the statute for which they were convicted of violating.

Holding:
The District of Columbia Court of Appeals held that none of the appellants were entitled to relief. The action taken by Congress in exercising the one house veto provision is not authorized by any of these exceptions. The Court found that the one house of Congress legislative veto provision in the Home Rule Act was unconstitutional.

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Home Rule in the Court

- *United States v. Alston*, 580 A.2d 587 (D.C. 1990)

Issue:
"The issue in this appeal is whether the Council of the District of Columbia ha[d] authority under the District of Columbia Self–Government and Governmental Reorganization Act (Home Rule Act) to pass successive, substantially identical emergency acts to preserve the status quo while identical legislation enacted by the Council after two readings is pending before Congress for review." *Id.* at 588.

Facts:
Appellee was charged in two separate multi-count indictments for armed possession of cocaine with intent to distribute and possession of a firearm during the commission of a dangerous offense. The court below granted Appellee's motions to dismiss these charges of the indictments and ruled in Appellee's favor, "relying on case law from *District of Columbia v. Washington Home Ownership Council, Inc.* (Washington Home), 415 A.2d 1349 (D.C.1980) (*en banc*), that upon the expiration of the 'Law Enforcement Emergency Amendment Act of 1989,' the D.C. Council was without authority to pass a second substantially identical emergency act to maintain the status quo until an identical temporary act took effect following congressional review." *Id.* at 588-89.

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Home Rule in the Court

- (continuation) *United States v. Alston*, 580 A.2d 587 (D.C. 1990)

Holding:
The District of Columbia Court of Appeals "h[e]ld that where the Council has determined that emergency legislation should remain in effect for more than ninety days and taken all reasonable actions to assure that its legislation, in a form enacted after two readings, is presented to Congress for review without unreasonable delay, the Council acts within its legislative authority under the Home Rule Act. . .." *Id.* at 599. The Council may "enact[] a successive substantially similar emergency act in order to maintain the status quo during the congressional review period." *Id.* The Council's Second Emergency Act was a valid enactment.

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Home Rule in the Court

- *Wilson v. Kelly*, 615 A.2d 229 (D.C. 1992)

Issue:
Whether the D.C. Council has power to erect its own mechanism of individualized contract review by use of its resolution authority.

Facts:
Chairman of the Council of the District of Columbia sought declaratory judgment against the mayor in the District of Columbia Superior Court. The Superior Court ruled in favor of the mayor and the chairman appealed. The Home Rule Act granted the Council limited power, through the use of resolutions, to approve or disapprove proposed actions of the Mayor and other District government entities. The provision at issue specified that "no contract for goods or services worth over $1,000,000 may be awarded until after the Council has approved the proposed contract award." Prior to award, the Mayor was to submit the proposed contract to the Council. Absent any objection by three members of the Council, the Council would vote to approve or disapprove the contract by resolution. If no objection was made to a contract within seven days, or if an objection was made and no resolution of disapproval adopted within twenty-one days, the contract was automatically deemed to be approved.

Holding:
The D.C. Council had no power to erect its own mechanism of individualized contract review by use of its resolution authority because that Home Rule Act's provisions did not include a delegation of that authority to the D.C. Council.

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Case Law Expanding the Concept of Home Rule

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Case Law Expanding the Concept of Home Rule

In recent years, there have been several cases where state and federal courts construed or applied the Home Rule Act in a manner that strengthens D.C.'s ability to govern its own affairs.

- *Lucas v. U.S. Government*, 268 F.3d 1089 (D.C. Cir. 2001):

  Holding that employees in the D.C. Department of Corrections are not entitled to federal competitive employment status because D.C. statutes established a municipal personnel system that is set apart from the federal government. Noting that while the Home Rule Act contains provisions for work- sharing between D.C. and the U.S., that provision does not contradict the D.C. statutes' recognition of the D.C. Department of Corrections employees as municipal personnel. Holding that this construction of the Home Rule Act and the D.C. statutes enforces "Congress' intention to have an autonomous personnel system for District government employees."

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Case Law Expanding the Concept of Home Rule

- *Myerson v. U.S.*, 98 A.3d 192 (D.C. 2014):

  Narrowly construing the term "federal function" in the Home Rule Act, holding that the term "only pertains to those activities that explicitly impact the federal government's ability to operate," and concluding that the enforcement of traffic laws on a local street is not a "federal function."

- *Zukerberg v. District of Columbia Board of Elections and Ethics*, 97 A.3d 1064 (D.C. 2014):

  Holding that the D.C. Council's decision to hold an election for the office of the Attorney General does not violate the Home Rule Act, but stating that the D.C. Council's "understanding of its conferred powers under the Home Rule Act . . . 'is not entitled to weight beyond the inherent persuasiveness of the position taken in a particular instance.'"

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Case Law Expanding the Concept of Home Rule

- *Woodroof v. Cunningham*: 147 A.3d 777 (D.C. 2016):

  Broadly construing the Home Rule Act and holding that the Home Rule Act does not prevent the D.C. Council from changing the District's substantive law "even if those changes do 'affect the jurisdiction of the courts in a sense.'" Further holding that the D.C. Council does not impermissibly expand D.C. courts' jurisdiction "when it gives the court authority to hear a new kind of case that falls within the courts' preexisting jurisdiction, broadly defined."

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Case Law Expanding the Concept of Home Rule

- *Escobar v. District of Columbia Department of Health*, 241 A.3d 244 (D.C. 2020):

  Strengthening the D.C. Council's power to modify D.C. courts' jurisdiction by holding that the Home Rule Act was not violated when the D.C. Council deleted the D.C. Court of Appeals' de novo jurisdiction to review an administrative determination that a dog is a "dangerous dog" or a "potentially dangerous dog." The D.C. Court of Appeals thus held that initial review of the administrative proceedings lies with the superior courts, subject to appeal to the D.C. Court of Appeals.

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Case Law Expanding the Concept of Home Rule

- *District of Columbia v. Towers*, 260 A.3d 690 (D.C. 2021):

  Recognizing the D.C. Mayor's authority under the Home Rule Act to declare a state of public health emergency, and upholding the D.C. Council's enactment of a moratorium on evictions during the period of the public health emergency.

- *Public Media Lab, Inc. v. District of Columbia*, 276 A.3d 1 (D.C. 2022):

  Upholding the D.C. Council's broad definition of the term "emergency circumstances" under the Home Rule Act, by defining the term as "'a situation that adversely affects the health, safety, welfare, or economic well-being of the District, its residents, [or] its businesses,' such that delay resulting from the ordinary legislative process 'would adversely affect the circumstances which the legislation is intended to protect.'" Holding that the court owes "substantial deference" to the D.C. Council's determination that emergency circumstances exist.

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Case Law Expanding the Concept of Home Rule

- *Conrad v. D.C. Alcoholic Beverage Control Board*, 287 A.3d 635 (D.C. 2023):

  Relying on both the corresponding D.C. statute and *Kopff* decision, finding that the D.C. Alcoholic Beverage Control Board failed to give great weight to the recommendation of the ANC in determining whether a liquor license should be renewed. The Court reiterated that "[g]reat weight requires acknowledgment of the Commission as the source of the recommendations and explicit reference to each of the Commission's issues and concerns."

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Case Law Limiting the Concept of Home Rule

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Case Law Limiting the Concept of Home Rule

- *Marijuana Policy Project v. U.S.*, 304 F.3d 82 (D.C. Cir. 2002):

  Holding that a D.C. appropriations act rider (known as the Barr Amendment), which banned expenditures enacting any D.C. law reducing penalties associated with marijuana, was a valid exercise of Congress' restriction on D.C. legislative authority because "through the Home Rule Act, Congress delegated some, but not all, of its Article I 'exclusive' legislative authority over the District of Columbia to the D.C. Council."

- *Brizill v. District of Columbia Board of Elections and Ethics*, 911 A.2d 1212 (D.C. 2006):

  Holding that allowing gambling devices, such as video lottery terminals, inside D.C. exceeds the legislative powers vested in D.C. by the Home Rule Act because it would contradict the federal statute prohibiting the use of any gambling device within D.C. and certain U.S. territories and possessions. Further holding that, under the Home Rule Act, the D.C. Council does not have the authority to amend or repeal any federal statute that is of broader application—i.e., a federal statute that is not applicable exclusively to D.C.

Case Law Limiting the Concept of Home Rule

On the other hand, courts have not shied away from using the Home Rule Act to define a more limited boundary for D.C. authority over affairs within its borders.

- *Robertson v. District of Columbia*, 269 A.3d 1022 (D.C. 2022):

  Holding that D.C. Courts employees are not considered D.C. employees, "even though the D.C. Courts is the District's 'local court system,'" and holding that D.C. Courts non-judicial employees "are foreclosed from pursuing employment-discrimination claims through city or state antidiscrimination or human rights laws" because under the Home Rule Act and the Court Reorganization Act, it is clear that Congress' "overall intent [was] to vest 'final authority' over the operations of the D.C. Courts in the Chief Judges and the Joint Committee."

- *Lumen Eight Media Group, LLC v. District of Columbia*, 279 A.3d 866 (D.C. 2022):

  Stating that, "[a]lthough the Home Rule Act gives the Council general authority to enact emergency legislation in appropriate circumstances[,] the District has not suggested that the Mayor or her delegate has general authority to promulgate emergency rules," and holding that the D.C. Mayor has no authority to issue emergency rules related to signs.

Home Rule and the Healthcare Industry

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Home Rule and Healthcare

- In 1998, the U.S. Congress prohibited D.C. from using its local funding to support syringe exchange programs, which are programs targeted to prevent the spread of HIV and Hepatitis C among individuals who inject drugs. It was not until 2007 that then President Bush signed an omnibus spending bill that lifted what was effectively a nine-year ban against D.C.'s ability to allocate its non-federal funds for this particular public health program.

- Further, under current law, D.C. is prohibited from using local funds to provide abortion services. This prohibition began in 1996 and was temporarily lifted in 2009, when then President Obama rescinded from the 2010 federal budget, the ban on D.C.'s abortion appropriations.16 The abortion coverage ban was re-imposed, however, in the 2011 federal budget, and the ban remains in effect to this day.

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Home Rule and Healthcare

- *Protest of: Group Insurance Administration, Inc.*, 1992 WL 683794 (D.C.C.A.B. Mar. 25, 1992)

Issues:

Whether federal statutes are instructive in construing counterpart statutes enacted by the D.C. Council and whether the D.C. Contract Appeals Board has authority to issue interim relief.

Facts:
A health care service provider protested the Contract Appeals Board's choice of provider, claiming that the chosen provider was not a responsible contractor, thus the award to it was invalid. The protesting provider sought interim relief pending the Contract Appeals Board's review of the protest, but such interim relief was beyond the powers delegated to the Contract Appeals Board.

Holding:
The D.C. Contract Appeals Board is the exclusive hearing forum over procurement challenges, including the procurement of health care service provider and the Board applies the procurement rules and procedures of the D.C. Council's Procurement Practices Act of 1985, which was enacted shortly after the D.C. Council was empowered to determine the statutory policies of D.C., pursuant to the Home Rule Act. In construing the D.C. Procurement Practices Act, the D.C. Contract Appeals Board referenced the federal procurement statute and federal accounting office's decisions relevant to the federal statute. The D.C. Contract Appeals Board concluded that, similar to its federal counterpart, the D.C. Contract Appeals Board did not have authority to grant interim relief, such as by staying the performance of a contract pending a decision on protest, because there was no "clear and express statutory language providing the Board [that] authority."

Home Rule and Healthcare

- *Marijuana Policy Project v. U.S.*, 304 F.3d 82 (D.C. Cir. 2002)

Issue:
Whether Congress can restrict or prevent the enforcement of a policy enacted through the ballot initiative process by passing a contradictory rider in a federal appropriations act.

Facts:
A medical rights advocacy group brough a lawsuit, challenging, on First Amendment grounds, federal legislation that denied the District of Columbia authority to "enact any law" reducing penalties associated with possession, use or distribution of marijuana. The U.S. District Court for the District of Columbia held that the rider was unconstitutional because it interfered with D.C. citizens' First Amendment rights to utilize the ballot initiative process to enact medical marijuana legislation. On appeal, the U.S. Court of Appeals for the District of Columbia Circuit held that the federal legislation did not unconstitutionally restrict the free speech rights of medical marijuana advocates; rather, the statute merely shifted the venue for the debate from the District of Columbia to Congress.

Holding:
A rider in a federal appropriations bill, restricting D.C.'s authority to enact laws concerning marijuana use, does not unconstitutionally interfere with D.C. citizens' rights to enact legislation through the ballot initiative process.

Home Rule and Healthcare

- *Flannery v. D.C. Department of Health*, No. 22cv3108 (2022)

Issue:

Whether D.C. violated the U.S. Constitution and the Home Rule Act when it issued 90-day emergency amendments and emergency orders during the COVID-19 pandemic, thereby evading congressional review and judicial scrutiny.

Facts:

Beginning in March 2020, the D.C. Council issued a series of 90-day emergency amendments and the D.C. Mayor issued corresponding emergency orders. In March 2021, the D.C. Mayor required private establishments to impose a mask requirement and to check customers' vaccination status. One restaurant refused to comply with the Mayor's orders, incurring penalty threats for violation of pandemic-related regulations, including a levy that the D.C. Department of Health tried to impose.

Home Rule and its Impact on Real Estate Development in the District

Home Rule and Development within the District

Construction companies have shown a strong interest in expanding the D.C. legislators' powers under the home rule act, with some industry leaders actively advocating for D.C. statehood altogether. Companies affected by zoning and land use regulations state that greater governmental autonomy for D.C. will advance land use and real estate development in the area.

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Home Rule and Development within the District

➢ *Appeal of Fry & Welch Associates*, 1997 WL 434422 (D.C.C.A.B. July 31, 1997)

Issue:

Whether the Department of Administrative Services has authority to resolve D.C.'s claims against construction contractors.

Facts:

D.C. contracted with a construction company and an architectural company for the construction needs related to an educational facility project. D.C. was unsatisfied with the contractors' services because it observed defects in the project. Consequently, D.C. terminated the construction company's services. The construction company filed a complaint against D.C., and D.C. filed a counterclaim.

D.C. subsequently also initiated a complaint against the architectural company. The Board held that D.C. had the authority to pursue its claims against the construction company and the architectural company under the PPA.

Holding:

The Department of Administrative Services ("DAS") Director has authority to resolve D.C.'s claims against construction and architectural contractors according to the dispute mechanism in the Procurement Practices Act ("PPA"), which was enacted by the D.C. Council under its authority in the Home Rule Act. Further, the Contract Appeals Board has authority to review de novo the DAS Director's decision. In such proceedings, both the substantive and procedural rights of the contractors are determined under the PPA.

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Home Rule and Development within the District

- *Powell Goldstein, LLP v. Office of Tax & Revenue*, 2007 WL 2198224 (D.C.O.A.H. Apr. 30, 2007)

Issue:

Whether an arena tax is an impermissible tax because its application results in a tax on the income of persons not residing in D.C.

Facts:

The D.C. government imposed an arena exaction tax to finance the reimbursement of certain predevelopment costs borne by the D.C. government in the development of the downtown arena. Powell Goldstein, LLP asserted that it was not required to pay the arena tax because the arena tax would tax the personal net income of members of the professional partnership who were not D.C. residents.

Holding:

The D.C. government may impose a development tax, even on an unincorporated business with non-resident members, if the tax is a charge against the gross income of the unincorporated business. The Court held that the arena tax is not a fee because it worked more for the benefit of the general public, rather than the owners of the stadium.

The Court held that the arena tax is not an impermissible tax on personal net income, which would be violative of the Home Rule Act if imposed on persons not residing in DC. Rather, the arena tax is permissible because it is a charge against the company's gross receipts.

Home Rule and Energy

Home Rule and the Energy Sector

- *In re Applications for Approval of Biennial Underground Infrastructure Improvement Projects Plans & Financing Orders*, 2017 WL 6368047, at *1–2, 20, 41 (D.C.P.S.C. Nov. 9, 2017)

Issue:

Whether the D.C. Council can delegate the power to set energy rates to an entity other than the Public Utility Commission.

Facts:

On May 2017, the Mayor of D.C. signed into law the 2017 Electric Company Infrastructure Improvement Financing Emergency Amendment Act, which authorized the collection and use by D.C. and the Potomac Electric Power Company (Pepco) of various charges to finance undergrounding certain electric power lines and ancillary facilities. When D.C. and Pepco filed an application for a financing order with the Commission, pursuant to the 2017 Act, four petitions for intervention were filed, contesting the validity of the application. One of the intervenors, the Apartment and Office Building Association of Metropolitan Washington (AOBA), argued that the 2017 Act was unconstitutional because under the D.C. Home Rule Act, the Commission had exclusive authority to determine energy-related charges, thus any attempt by the D.C. Council to set rates would be void. The Commission refrained from addressing AOBA's argument for lack of jurisdiction.

Holding:

The Commission refused to decide the issue concerning the constitutionality of the Act, holding that "state agencies do not have the jurisdiction to review the constitutionality of statutes and that the judiciary alone possesses the inherent power to resolve constitutional questions." The Commission held that the Act was entitled to the presumption of constitutionality until a judicial declaration of invalidity. *See Apartment & Office Bldg. Assoc. of Metropolitan Wa. v. Pub. Serv. Comm'n, infra* for the discussion on AOBA's subsequent reiteration of their argument before the D.C. Court of Appeals.

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Home Rule and the Energy Sector

- *Apartment and Office Building Association of Metropolitan Washington v. Public Service Commission*, 203 A.3d 772 (D.C. 2019):

Issue:

Whether the D.C. Council can delegate the power to set energy rates to an entity other than the Public Utility Commission.

Facts:

This case arises from the Commission's decision in In re Applications for Approval of Biennial Underground Infrastructure Improvement Projects Plans & Financing Orders, 2017 WL 6368047, at *1–2, 20, 41 (D.C.P.S.C. Nov. 9, 2017) (see above).

AOBA brought its constitutional challenge before the Court of Appeals of D.C., again asserting that the D.C. Council's 2017 Act violated the Home Rule Act.

Holding:

The D.C. Council's 2017 Electric Company Infrastructure Improvement Financing Emergency Amendment Act does not violate the Home Rule Act because the pertinent language of the 2017 Act was taken from the Public Utilities Act of 1913, which is an act that predates the Home Rule Act, grants the Public Utilities Commission its ratemaking authority, and remains presently in effect despite the later enactment of the Home Rule Act.

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Home Rule and Law Enforcement in the District

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Home Rule and Law Enforcement in the District

- *In re: BFI Waste Services, LLC*, 2006 WL 5156735 (D.C.O.A.H. Jan. 1, 2006)

Issue:

Whether the Mayor can delegate policing powers that a D.C. statute vests in the Mayor's office.

Facts:

The D.C. metropolitan police department issued notices of violation to a waste services company, alleging violations of the Litter Control Administration Act. When the Act was amended in 2000, it identified the Mayor as the as the enforcement authority. Subsequent to the amendment, the Mayor delegated the enforcement authority under the Act to the metropolitan police department. The instant case concerns the issue whether the metropolitan police department has the authority to enforce the Act under the authority of the Mayor's order. The Court held that the Home Rule Act vests broad powers of delegation in the Mayor, thus the delegation of authority to the metropolitan police department was valid.

Holding:

D.C. has the authority to delegate policing powers to the metropolitan police department for the purpose of enforcing provisions of particular local regulations, such as the Litter Control Administration Act, and this delegation of powers does not need to comply with the notice-and-comment rulemaking requirements under the D.C. Administrative Procedure Act.

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Home Rule and Law Enforcement in the District

- *Fraternal Order of Police Metropolitan Police Department Labor Committee v. District of Columbia*, No. 21-CV-0511, 2023 WL 2317584 (D.C. Mar. 2, 2023)

Issue:

Whether the Mayor's proposed police reform legislation, requiring public disclosure of officer body worn camera footage in police involved shootings and deaths, was violative of the separation of powers doctrine and the officers' substantive due process rights.

Facts:

Fraternal Order of Police challenged regulations of body worn cameras (BWC footage) as violative of the Home Rule Act. Under the District's Home Rule Charter, the Mayor — the head of the Executive Branch — does not have exclusive authority to direct the activities of agencies of the Executive Branch such as the MPD. Rather, under § 404(b) of the Charter, codified at D.C. Code § 1-204.04(b), "[t]he Council shall have authority to create, abolish, or organize any office, agency, department, or instrumentality of the government of the District *and to define the powers, duties, and responsibilities of any such office, agency, department, or instrumentality*." *Fraternal Ord. of Police Metro. Police Dep't Lab. Comm. v. D.C.*, No. 21-CV-0511, 2023 WL 2317584, at *9 (D.C. Mar. 2, 2023).

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Home Rule and Law Enforcement in the District

- *Fraternal Order of Police Metropolitan Police Department Labor Committee v. District of Columbia*, No. 21-CV-0511, 2023 WL 2317584 (D.C. Mar. 2, 2023)

Facts (cont.):

"Regarding the MPD, this authority of the Council is recognized by D.C. Code § 5- 127.01, a provision that specifically 'authorize[s] and empower[s the Council] to make and modify ... all needful rules and regulations for the proper government, conduct, discipline, and good name of [the] Metropolitan Police force.'" The Council has exercised that authority through a number of pieces of legislation regulating how MPD carries out its enforcement duties, *see, e.g.*, D.C. Code § 5-115.01(a) (limiting police questioning of arrestees to three hours) and § 5- 123.01(a) (prohibiting MPD members from affiliating with organizations advocating strikes), including through measures amended by the Temporary Act, *see* 67 D.C. Reg. at 9921 (amending D.C. Code § 5-125.01 (1986)) (noting the Council's intent to "unequivocally ban the use of neck restraints by law enforcement and special police officers"). *Id.* at *9.

Holding:

Footage and names of police officers who were involved in officer-involved death or serious use of force did not violate the separation of powers doctrine and union members' right to privacy as a matter of substantive due process, where union alleged that the mandated release of bodycam footage might cause its members to suffer reputational, physical, and psychological harms. The D.C. Court of Appeals stated that that "[t]he right to decide how to treat information about public police activities belongs to the government and is not a right belonging to individual officers, much less a *fundamental* right of FOP members." The Mayor's authority as executive to administer the BWC Program through MPD not separation of powers violation.

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Home Rule and Law Enforcement in the District

On March 8, 2023, the Senate passed a resolution to veto a law passed by the D.C. Council, which amended D.C.'s century-old criminal code and expanded the powers of the metropolitan police department. The House of Representatives had previously passed the resolution on February 9, 2023.

The move was encouraged in part, by D.C. Mayor's initial veto of the law, which veto was nullified by the D.C. Council.

On March 20, 2023, President Biden backed Congress by signing into law the nullification of the D.C. Council's revised criminal code.

The District is still under Congress' scrutiny on the issues of crime and public safety. Congress is currently reviewing a bill to overturn another piece of D.C. legislation, the Comprehensive Policing and Justice Reforms Act. On March 30, 2023, President Biden announced that if the bill passes in Congress, he will veto the resolution because "Congress should respect D.C.'s right to pass measures that improve public safety and public trust."

Home Rule and the Childcare Industry within the District

Home Rule and Childcare in the District

- *Sanchez v. Office of State Superintendent of Education*, 45 F.4th 388 (D.C. Cir. 2022, cert. denied sub nom. *Sanchez v. D.C. Off. of State Superintendent of Educ.*, 143 S. Ct. 579 (2023)

Issue:

Whether D.C.'s Office of the State Superintendent of Education ("OSSE") can issue regulations requiring degrees for childcare workers.

Facts:

Childcare providers and parent with two children in daycare brought action against District of Columbia and its OSSE, challenging OSSE regulations requiring many childcare workers to obtain an associate's degree or its equivalent in a field related to early-childhood education, on the ground the regulations resulted from an unconstitutional delegation of power, under both the Constitution and the Home Rule Act, and violated due process and equal protection. OSSE regulations requiring early childhood education degrees for workers was affirmed under rational basis review.

Holding:

The Court of Appeals for the District of Columbia Circuit held that, assuming arguendo without deciding that the nondelegation doctrine applies under the Home Rule Act, the Court found that regulation requiring degrees for childcare workers was satisfied here.

Home Rule and Voting Rights

Home Rule and Voting Rights

In March 2023, the D.C. Council enacted a law that allows noncitizens to vote in local elections.

National opposition to the local law triggered a review by the U.S. Congress, preventing enforcement of the local law unless and until the U.S. Congress approves the law. While the House of Representatives has approved the local law, the Senate has not yet voted on the matter.

Meanwhile, a national non-profit legal organization has filed suit, claiming that the local law violates a U.S. Supreme Court's previous ruling that voting is reserved for U.S. citizens.

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TAB TWO

Examining Elements of Statehood Using the Home Rule Act

What is the Home Rule Act?

The Home Rule Act, originally termed the District of Columbia Self-Government and Governmental Reorganization Act and enacted in 1973, was an opportunity for the District of Columbia to govern its local affairs, given that, Article I, Section 8 of the U.S. Constitution grants the U.S. Congress exclusive Legislation over the District "in all cases whatsoever."

Before Home Rule, residents in D.C. had been trying to obtain some self-governance for a long while, with at least six bills having previously been introduced in Congress to provide some form of home rule, none of which ever passed. In 1961, the Twenty-Third Amendment to the United States Constitution gave D.C. residents the power to participate in presidential elections.[1] Using the Twenty-Third Amendment as a base, District residents sought more power and autonomy for the District which led to the enactment of the Home Rule Act, to:

> Reorganize the governmental structure of the District of Columbia, to provide a charter for local government in the District of Columbia subject to acceptance by a majority of the registered qualified electors in the District of Columbia, to delegate certain recommendations of the commission on the organization of the government of the District of Columbia, and for other purposes.[2]

The intent was to give the Council of the District of Columbia broad authority to legislate upon all rightful subjects of legislation within the District.[3]

- In fact, the Act itself states:
    - "The intent of Congress is to delegate certain legislative powers to the government of the District of Columbia; authorize the election of certain local officials by the registered qualified electors in the District of Columbia; grant to the inhabitants of the District of Columbia powers of local self-government; to modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve congress of the burden of legislating upon essentially local District matters."[4]
- The Home Rule Act established the District's Charter, the creation of the D.C. Council, the Judicial Powers of the D.C. Court of Appeals and the Superior Court, including how judges will be nominated by the President after being referred by the D.C. Judicial Nomination

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[1] U.S. CONST. amend. XXIII; Philip G. Schrag, The Future of District of Columbia Home Rule, 39 Cath. U. L. Rev. 311, 312 (1990)

[2] District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93–198, 87 Stat. 774 (1973) (hereinafter referred to as the "Home Rule Act").

[3] D.C. Code § 1-201.02; § 1-203.02.

[4] *Id.* at § 102.

Commission, which is also established by the Act, and it established budgeting and financial management laws, independent agencies, and the Advisory Neighborhood Councils, which we call Advisory Neighborhood Commissions now.[5]

- Importantly, however, the Act states that the US Congress retains "the right, at any time, to exercise its constitutional authority as legislature for the District."[6]

Home Rule ultimately created a very strained relationship between the District and Congress. The District gained authority over some of its affairs, but still not at the level of other US citizens of recognized states. Additionally, the District was now under the supervision of an entity where it had no voting authority to influence decision making related to the district.

In an attempt to remedy the fact that the District lacked a voice in voting affairs, Congress proposed a constitutional amendment that was set to give District residents voting representation in the House and the Senate. Nonetheless, the amendment failed ultimately in 1985 after only 16 of the 38 state votes needed for ratification of the District's proposed amendment voted in favor of approval.[7] After the District's proposed Amendment failed, discord arose between the District and Congress, as Congress began to disagree with the political judgments of the elected D.C. Council and increasingly used or threatened to use its reserved powers to regulate the District.

For example, in 1989, the Council abandoned a controversial gun control bill that would allow shooting victims or their families to recover monetary damages from handgun manufacturers or distributors, no matter who was at fault. However, the Council abandoned the bill after the ranking Republican on the House District Committee threatened to offer a resolution to overturn the law if the Council passed it.[8] Congress has consistently exercised a significant measure of control over District affairs by attaching conditions, colloquially known as "riders," to its annual approval of the District's budget.[9]

To date, the District's journey toward autonomy remains unrealized as District residents still do not receive any substantial political representation in Congress and are foreclosed from rights guaranteed to the States.

How did early cases discussing the Home Rule Act construe its terms?

Under the Home Rule Act, the Council of the District has no authority to "enact any act to amend or repeal any Act of Congress, which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District." D.C. Code § 1-206.02(a)(3). Another provision of the Home Rule Act bars the Council from enacting "any act, resolution, or rule . . . relating to the organization and jurisdiction of the District of Columbia courts." *Id.* at § 1-206.02(a)(4).

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[5] *See generally* the Home Rule Act.
[6] *Id.* at § 601.
[7] https://www.nytimes.com/1985/08/22/us/time-runs-out-for-district-of-columbia-proposal.html
[8] Abramowitz & Pianin, D.C. Shelves Gun Law to Placate Hill, Wash. Post, July 12, 1989 (https://www.washingtonpost.com/archive/politics/1989/07/12/dc-shelves-gun-law-to-placate-hill/a082467a-6669-47df-a2d1-935989c105a6/)
[9] Examples of Congressional Budget Riders are attached in Appendix A.

- *Kopff v. D.C. Alcoholic Beverage Control Board*, 381 A.2d 1372 (D.C. 1977)

  Issue:
  Whether the Alcoholic Beverage Control Board's renewal of a liquor license complied with the notice requirements of the Advisory Neighborhood Commission's Act ("ANC Act") and the Home Rule Act.

  Facts:
  A restaurant operator sought to renew its liquor license by filing an application with the Alcoholic Beverage Control Board. Initially, the Board posted and published notices of the hearing on the application. When the Board rescheduled the hearing, it published notice of the new hearing schedule, but it did not post notice on the property premises. After the hearing, the Board approved the application for a renewed liquor license.

  Holding:
  The D.C. Court of Appeals held that the Alcoholic Beverage Control Board erred when it failed to give the advisory neighborhood commissions proper notice of the rescheduled hearing, in the manner provided under the Home Rule Act and the Advisory Neighborhood Commission's Act ("ANC Act"), which is an Act that creates commissions tasked with advising rule-making agencies on matters of government policy. In construing the ANC Act, The Court held that courts may refer to the terms of the Home Rule Act to ascertain the intent of the D.C. Council in enacting D.C. statutes. Specifically, the D.C. Court of Appeals determined the D.C. Council's intent in enacting the ANC Act by looking at the parallel terms in the Home Rule Act.

- *McIntosh v. Washington*, 395 A.2d 744 (D.C. 1978)

  Issue:
  Whether the D.C. Council's enactment of the Firearms Act violated the Home Rule Act.

  Facts:
  Appellants sought a judgment from the D.C. Court of Appeals that the D.C. Council's enactment of the Firearms Act was an unauthorized exercise of the legislative powers delegated to the Council by the Home Rule Act.

  Holding:
  The D.C. Council had the authority to enact the Firearms Act because Congress delegated legislative powers to the D.C. Council through the Home Rule Act. The Court construed the Home Rule Act's prohibition on the Council's enactment of any legislation relating to criminal procedure and crimes and treatment of prisoners, within two years from the election of Council members, as a mere constraint. The Court narrowly construed the prohibition in the Home Rule Act as pertaining only to legislation directly relating to the identified Titles of the Home Rule Act—not to legislation dealing with the subject matter of any provision in those identified Titles.

- *Bishop v. D.C.*, 401 A.2d 955 (D.C. 1979), on reh'g, 411 A.2d 997 (D.C. 1980)

  Issue:
  Whether the D.C. Council could impose a tax that effectively levied on the gross income of nonresidents.

  Facts:
  The D.C. Council enacted the Revenue Act of 1975, which in part allowed D.C. to impose an unincorporated business tax on unincorporated professionals and personal business services. One consequence of this Act was the permitted taxation of non-D.C-resident individuals who operated their businesses or exercised their professions in D.C.

  Holding:
  The Court held that the relevant portion of the Revenue Act was an invalid exercise of the D.C. Council's legislative authority under the Home Rule Act because the Home Rule Act prevents D.C. from enacting a commuter tax, which is a levy upon individuals who do not live in a jurisdiction but work in that jurisdiction on a daily basis. The Court clarified that it was limiting its ruling to a prohibition from D.C.'s taxation of the net personal income of nonresidents.

- *D.C. v. Washington Home Ownership Council, Inc.*, 415 A.2d 1349 (D.C. 1980)

  Issue:
  Whether the D.C. Council can renew an emergency order past the initial 90-day effective period.

  Facts:
  A homeowners organization sought declaratory judgment and injunctive relief, challenging the validity of a series of emergency acts enacted by the D.C. Council to impose a moratorium on the conversion of rental property to condominium and cooperative units, and regulating the sale of converted units.

  Holding:
  Holding that the Court's central role in construing the Home Rule Act is to interpret it "without undue deference to either legislative body, but always with a central focus: the intent of Congress." As such, the Court enjoined the D.C. Council's emergency order, reasoning that when the D.C. Council enacts legislation in response to emergency circumstances the legislation is to be effective for a period not exceeding 90 days, and the D.C. Council has no authority to pass another substantially identical emergency act in response to the same emergency.

- D.C. v. Sullivan, 436 A.2d 364 (D.C. 1981)

  Issue:
  Whether the Superior Court has jurisdiction to hear a petition seeking the review of an administrative agency's findings of violations of the Traffic Adjudication Act (the "TAA").

Facts:
The appellees contested an administrative agency's findings that each of them violated the TAA. The appellees sought review of the administrative agency's findings with the D.C. Superior Court, but the Superior Court held that, while in the past it had jurisdiction over such petitions, after the enactment of the TAA, it no longer had jurisdiction to hear the petition.

Holding:
The Court held that D.C. superior courts have jurisdiction over appeals under the TAA because the TAA is a valid exercise of the D.C. Council's delegated legislative authority under the Home Rule Act. Citing *McIntosh*, see *supra*, the Court reiterated that the D.C. Council is not prohibited from enacting statutes dealing with specific offenses. Recognizing that the TAA "does not purport to change the criminal jurisdiction or the specific responsibilities of the Superior Court or the Court of Appeals," the Court held that "the Superior Court's trial level jurisdiction of criminal cases remains intact," and the only change is that "certain violations no longer constitute criminal offenses." Accordingly, the superior court had jurisdiction to hear petitions regarding the violation of the TAA.

- *Gary v. United States*, 499 A.2d 815 (D.C. 1985)

Issue:
"The principal issue presented for decision in these cases is the impact of *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), on the one "House of Congress" veto provision of the D.C. Self-Government and Governmental Reorganization Act, D.C. Code §§ 1–201 to –295 (1981) ("Home Rule Act") and the consequences upon the convictions on appeal in these cases." *Id*. at 817

Facts:
Individuals convicted for rape and carnal knowledge argued that the D.C. Code provisions, under which they were convicted, had been repealed by the adoption of the District of Columbia Sexual Reform Act of 1981, since the "veto" of that Act by the House of Representatives was legally void. The third individual argued that the one house veto provision was invalid, unseverable, and that without the one house veto, the Home Rule Act would not have been passed by Congress. The appellants thus contended the government of the District of Columbia was without authority to enact the statute for which they were convicted of violating.

Holding:
The District of Columbia Court of Appeals held that none of the appellants were entitled to relief. The action taken by Congress in exercising the one house veto provision is not authorized by any of these exceptions. The Court found that the one house of Congress legislative veto provision in the Home Rule Act was unconstitutional.

- United States v. Alston, 580 A.2d 587 (D.C. 1990)

  Issue:
  "The issue in this appeal is whether the Council of the District of Columbia ha[d] authority under the District of Columbia Self–Government and Governmental Reorganization Act (Home Rule Act) to pass successive, substantially identical emergency acts to preserve the status quo while identical legislation enacted by the Council after two readings is pending before Congress for review." *Id.* at 588.

  Facts:
  Appellee was charged in two separate multi-count indictments for armed possession of cocaine with intent to distribute and possession of a firearm during the commission of a dangerous offense. The court below granted Appellee's motions to dismiss these charges of the indictments and ruled in Appellee's favor, "relying on case law from *District of Columbia v. Washington Home Ownership Council, Inc.* (Washington Home), 415 A.2d 1349 (D.C.1980) (*en banc*), that upon the expiration of the 'Law Enforcement Emergency Amendment Act of 1989,' the D.C. Council was without authority to pass a second substantially identical emergency act to maintain the status quo until an identical temporary act took effect following congressional review." *Id.* at 588-89.

  Holding:
  The District of Columbia Court of Appeals "h[e]ld that where the Council has determined that emergency legislation should remain in effect for more than ninety days and taken all reasonable actions to assure that its legislation, in a form enacted after two readings, is presented to Congress for review without unreasonable delay, the Council acts within its legislative authority under the Home Rule Act. . .." *Id.* at 599. The Council may "enact[] a successive substantially similar emergency act in order to maintain the status quo during the congressional review period." *Id.* The Council's Second Emergency Act was a valid enactment.

- Citizens Association of Georgetown v. Zoning Commission of D.C., 392 A.2d 1027 (D.C. 1978)

  Issue:
  The issue in this case is to determine with which standards the District's comprehensive plan, pursuant to the Home Rule Act, must comply. Additionally, while the District does not have a comprehensive plan in effect at the time of this litigation, what standards must the district apply to determine the propriety of zoning done by the Zoning Commission?

  Facts:
  This case is an appeal of a series of orders issued by Zoning Commission of the District of Columbia in rule-making proceedings. Developers, clamoring to develop real estate near the Georgetown Waterfront, announced plans for the area. The Citizens Association of Georgetown and others petitioned the Zoning Commission to adopt an interim amendment to the zoning regulations to prevent the construction.

<u>Holding:</u>
The District of Columbia Court of Appeals held that, while the District's comprehensive plan does not yet exist, compliance with the comprehensive plan provision of the Home Rule Act requires solely that the Commission "zone on a uniform and comprehensive basis." *Id. at 1035–36.*

- [*Wilson v. Kelly*], 615 A.2d 229 (D.C. 1992)

<u>Issue:</u>
Whether the D.C. Council has power to erect its own mechanism of individualized contract review by use of its resolution authority.

<u>Facts:</u>
Chairman of the Council of the District of Columbia sought declaratory judgment against the mayor in the District of Columbia Superior Court. The Superior Court ruled in favor of the mayor and the chairman appealed. The Home Rule Act granted the Council limited power, through the use of resolutions, to approve or disapprove proposed actions of the Mayor and other District government entities. The provision at issue specified that "no contract for goods or services worth over $1,000,000 may be awarded until after the Council has approved the proposed contract award." Prior to award, the Mayor was to submit the proposed contract to the Council. Absent any objection by three members of the Council, the Council would vote to approve or disapprove the contract by resolution. If no objection was made to a contract within seven days, or if an objection was made and no resolution of disapproval adopted within twenty-one days, the contract was automatically deemed to be approved.

<u>Holding:</u>
The D.C. Council had no power to erect its own mechanism of individualized contract review by use of its resolution authority because that Home Rule Act's provisions did not include a delegation of that authority to the D.C. Council.

How have state and federal courts construed the Home Rule Act in Recent Years?

A. Construction in favor of expanding the concept of D.C. statehood

In recent years, there have been several cases where state and federal courts construed or applied the Home Rule Act in a manner that strengthens D.C.'s ability to govern its own affairs.

- *Conrad v. D.C. Alcoholic Beverage Control Board*, 287 A.3d 635 (D.C. 2023): Relying on both the corresponding D.C. statute and *Kopff* decision, finding that the D.C. Alcoholic Beverage Control Board failed to give great weight to the recommendation of the ANC in determining whether a liquor license should be renewed. The Court reiterated that "[g]reat weight requires acknowledgment of the Commission as the source of the recommendations and explicit reference to each of the Commission's issues and concerns."
- <u>*Public Media Lab, Inc. v. District of Columbia*</u>, 276 A.3d 1 (D.C. 2022): Upholding the D.C. Council's broad definition of the term "emergency circumstances" under the Home

Rule Act, by defining the term as "'a situation that adversely affects the health, safety, welfare, or economic well-being of the District, its residents, [or] its businesses,' such that delay resulting from the ordinary legislative process 'would adversely affect the circumstances which the legislation is intended to protect.'" Holding that the court owes "substantial deference" to the D.C. Council's determination that emergency circumstances exist.

- District of Columbia v. Towers, 260 A.3d 690 (D.C. 2021): Recognizing the D.C. Mayor's authority under the Home Rule Act to declare a state of public health emergency, and upholding the D.C. Council's enactment of a moratorium on evictions during the period of the public health emergency.
- Escobar v. District of Columbia Department of Health, 241 A.3d 244 (D.C. 2020): Strengthening the D.C. Council's power to modify D.C. courts' jurisdiction by holding that the Home Rule Act was not violated when the D.C. Council deleted the D.C. Court of Appeals' de novo jurisdiction to review an administrative determination that a dog is a "dangerous dog" or a "potentially dangerous dog." The D.C. Court of Appeals thus held that initial review of the administrative proceedings lies with the superior courts, subject to appeal to the D.C. Court of Appeals.
- Apartment & Office Building Association of Metropolitan Washington v. Public Service Commission of the District of Columbia, 203 A.3d 772 (D.C. 2019): Holding that a law (the Electric Company Infrastructure Improvement Financing Act or ECIIFA) predating the Home Rule Act can be the basis for an administrative agency's authority, unless it is subsequently amended by the D.C. Council. Specifically holding that the ECIIFA vests the Public Service Commission with ratemaking authority.
- Woodroof v. Cunningham: 147 A.3d 777 (D.C. 2016): Broadly construing the Home Rule Act and holding that the Home Rule Act does not prevent the D.C. Council from changing the District's substantive law "even if those changes do 'affect the jurisdiction of the courts in a sense.'" Further holding that the D.C. Council does not impermissibly expand D.C. courts' jurisdiction "when it gives the court authority to hear a new kind of case that falls within the courts' preexisting jurisdiction, broadly defined."
- Myerson v. U.S., 98 A.3d 192 (D.C. 2014): Narrowly construing the term "federal function"[10] in the Home Rule Act, holding that the term "only pertains to those activities that explicitly impact the federal government's ability to operate," and concluding that the enforcement of traffic laws on a local street is not a "federal function."
- Zukerberg v. District of Columbia Board of Elections and Ethics, 97 A.3d 1064 (D.C. 2014): Holding that the D.C. Council's decision to hold an election for the office of the Attorney General does not violate the Home Rule Act, but stating that the D.C. Council's "understanding of its conferred powers under the Home Rule Act . . . 'is not entitled to weight beyond the inherent persuasiveness of the position taken in a particular instance.'"
- Lucas v. U.S. Government, 268 F.3d 1089 (D.C. Cir. 2001): Holding that employees in the D.C. Department of Corrections are not entitled to federal competitive employment status because D.C. statutes established a municipal personnel system that is set apart from the federal government. Noting that while the Home Rule Act contains provisions for work-sharing between D.C. and the U.S., that provision does not contradict the D.C. statutes'

[10] D.C. Code § 1-206.02(a)(3) states that the D.C. Council has no authority to pass any act to amend or repeal any act of the U.S. Congress that concerns the "functions or property of the United States or which is not restricted in its application exclusively in or to the District."

recognition of the D.C. Department of Corrections employees as municipal personnel. Holding that this construction of the Home Rule Act and the D.C. statutes enforces "Congress' intention to have an autonomous personnel system for District government employees."

B. Construction in favor of limiting the concept of D.C. statehood

On the other hand, courts have not shied away from using the Home Rule Act to define a more limited boundary for D.C. authority over affairs within its borders.

- *Robertson v. District of Columbia*, 269 A.3d 1022 (D.C. 2022): Holding that D.C. Courts employees are not considered D.C. employees, "even though the D.C. Courts is the District's 'local court system,'" and holding that D.C. Courts non-judicial employees "are foreclosed from pursuing employment-discrimination claims through city or state antidiscrimination or human rights laws" because under the Home Rule Act and the Court Reorganization Act, it is clear that Congress' "overall intent [was] to vest 'final authority' over the operations of the D.C. Courts in the Chief Judges and the Joint Committee."
- *Lumen Eight Media Group, LLC v. District of Columbia*, 279 A.3d 866 (D.C. 2022): Stating that, "[a]lthough the Home Rule Act gives the Council general authority to enact emergency *legislation* in appropriate circumstances[,] the District has not suggested that the Mayor or her delegate has general authority to promulgate emergency rules," and holding that the D.C. Mayor has no authority to issue emergency rules related to signs.
- *Brizill v. District of Columbia Board of Elections and Ethics*, 911 A.2d 1212 (D.C. 2006): Holding that allowing gambling devices, such as video lottery terminals, inside D.C. exceeds the legislative powers vested in D.C. by the Home Rule Act because it would contradict the federal statute prohibiting the use of any gambling device within D.C. and certain U.S. territories and possessions. Further holding that, under the Home Rule Act, the D.C. Council does not have the authority to amend or repeal any federal statute that is of broader application—i.e., a federal statute that is not applicable exclusively to D.C.
- *Marijuana Policy Project v. U.S.*, 304 F.3d 82 (D.C. Cir. 2002): Holding that a D.C. appropriations act rider (known as the Barr Amendment), which banned expenditures enacting any D.C. law reducing penalties associated with marijuana, was a valid exercise of Congress' restriction on D.C. legislative authority because "through the Home Rule Act, Congress delegated some, but not all, of its Article I 'exclusive' legislative authority over the District of Columbia to the D.C. Council."
- *American Federation of Government Employees v. District of Columbia Financial Responsibility and Management Assistance Authority*, 133 F. Supp. 2d 75 (D.D.C. 2001): Holding that Congress may "freely repeal" any actions of the D.C. Council, including terms in a collective bargaining agreement between the D.C. Council and its employees, because Congress' exercise of its power is not limited by the Contracts Clause.

How has the Home Rule Act affected industries in D.C.?

A. Healthcare

The U.S. Congress has a history of strictly regulating healthcare-related policies sought to be enacted by the D.C. Council or enforced by the executive branch. This raises particularly concerning issues when considering public health policies.

- During the COVID-19 pandemic, the extent of the D.C. Council's and the D.C. Mayor's authority to exercise control over their jurisdiction was unclear. As recent as October 2022, disputes regarding the propriety of the D.C. Mayor's emergency actions have been raised.[11]

- In June 2018, the D.C. Council passed legislation that created a D.C.-level individual insurance requirement, mirroring the repealed mandatory individual insurance under the Affordable Care Act.[12] Not long thereafter, in July 2018, the U.S. Congress approved riders to the 2019 appropriations bill to prevent D.C. from implementing the new law.[13]

- In 1998, the U.S. Congress prohibited D.C. from using its local funding to support syringe exchange programs, which are programs targeted to prevent the spread of HIV and Hepatitis C among individuals who inject drugs.[14] It was not until 2007 that then President Bush signed an omnibus spending bill that lifted what was effectively a nine-year ban against D.C.'s ability to allocate its non-federal funds for this particular public health program.[15]

- Further, under current law, D.C. is prohibited from using local funds to provide abortion services. This prohibition began in 1996 and was temporarily lifted in 2009, when then President Obama rescinded from the 2010 federal budget, the ban

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[11] See discussion of *Flannery v. D.C. Department of Health infra*.

[12] Jodi Kwarciany, DC Created a Local Solution to Preserve Health Coverage Gains. Congress Should Not Interfere., DC Fiscal Policy Inst. (Jul. 27, 2018), https://www.dcfpi.org/all/dc-created-a-local-solution-to-preserve-health-coverage-gains-congress-should-not-interfere/.

[13] Leighton Ku, The District Of Columbia Is Trying To Preserve Health Insurance Coverage; Congress Is Trying To Interfere, Health Affairs (Jul. 23, 2018), https://www.healthaffairs.org/do/10.1377/forefront.20180722.933880/full/; Jenna Portnoy & Peter Jamison, House Republicans target District over effort to prop up Affordable Care Act, The Washington Post (Jul. 19, 2018), https://www.washingtonpost.com/local/dc-politics/house-republicans-target-district-over-effort-to-prop-up-affordable-care-act/2018/07/19/475de70c-8b60-11e8-8aea-86e88ae760d8_story.html.

[14] Naomi Long & Bill Piper, Congress Lifts Washington, DC Syringe Funding Ban, Drug Policy Alliance (Dec. 25, 2007, https://drugpolicy.org/news/2007/12/congress-lifts-washington-dc-syringe-funding-ban.

[15] *Id.*

on D.C.'s abortion appropriations.[16] The abortion coverage ban was re-imposed, however, in the 2011 federal budget, and the ban remains in effect to this day.[17]

- In fact, funding aside, when the U.S. Supreme Court relegated to the states the authority to legalize abortions in *Dobbs v. Jackson Women's Health Organization*,[18] D.C. was left with limited remedies because it is not a state, and the Home Rule Act cabins the D.C. Council's acts within the confines of the U.S. Constitution and federal laws. In other words, it is unclear whether an act by the D.C. Council, legalizing abortion, would be permissible under the Home Rule Act.

- In 2014, D.C. voters sought to legalize cannabis use in D.C., but the U.S. Congress restricted the enforcement of that bill by enacting a rider in the omnibus funding bill, preventing D.C. from taxing and regulating cannabis use in the market.[19] As of March 2022, the rider (known popularly as the Harris Rider) remains in the omnibus funding bill, and D.C. continues to be restrained in its full control over its cannabis market.[20]

Some illustrative decisions follow:

- *Flannery v. D.C. Department of Health*, No. 22cv3108[21]

  Issue:
  Whether D.C. violated the U.S. Constitution and the Home Rule Act when it issued 90-day emergency amendments and emergency orders during the COVID-19 pandemic, thereby evading congressional review and judicial scrutiny.

  Facts:
  Beginning in March 2020, the D.C. Council issued a series of 90-day emergency amendments and the D.C. Mayor issued corresponding emergency orders. In March 2021, the D.C. Mayor required private establishments to impose a mask requirement and to check customers' vaccination status. One restaurant refused to comply with the Mayor's orders, incurring penalty threats for violation of

[16] Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10 § 1572, 125 Stat. 38, 138 (2011); Omnibus Appropriations Act, 2009, Pub. L. No. 111-8, § 820, 123 Stat. 524, 700 (2009); National Women's Law Center, The D.C. Abortion Coverage Ban Threatens Women's Health (June 2014) https://nwlc.org/wpcontent/uploads/2015/08/the_d.c._abortion_coverage_ban_threatens_womens_health.pdf.
[17] National Women's Law Center, The D.C. Abortion Coverage Ban Threatens Women's Health (June 2014) https://nwlc.org/wpcontent/uploads/2015/08/the_d.c._abortion_coverage_ban_threatens_womens_health.pdf.
[18] 142 S. Ct. 2228 (2022).
[19] Natalie Fertig, Democratic-led Congress keeps ban on D.C. weed, Politico (Mar. 9, 2022), https://www.politico.com/news/2022/03/09/congress-bans-dc-weed-00015583; Karina Elwood, D.C. wants to bring marijuana gifting shops into the medial market, The Washington Post (Dec. 27, 2022), https://www.washingtonpost.com/dc-md-va/2022/12/27/dc-medical-marijuana-market-bill/.
[20] *Id.*
[21] This case was filed before the U.S. District Court for the District of Columbia on October 13, 2022, and is currently still undergoing briefing by the parties.

pandemic-related regulations, including a levy that the D.C. Department of Health tried to impose.

- *Marijuana Policy Project v. U.S.*, 304 F.3d 82 (D.C. Cir. 2002)

  Issue:
  Whether Congress can restrict or prevent the enforcement of a policy enacted through the ballot initiative process by passing a contradictory rider in a federal appropriations act.

  Facts:
  A medical rights advocacy group brough a lawsuit, challenging, on First Amendment grounds, federal legislation that denied the District of Columbia authority to "enact any law" reducing penalties associated with possession, use or distribution of marijuana. The U.S. District Court for the District of Columbia held that the rider was unconstitutional because it interfered with D.C. citizens' First Amendment rights to utilize the ballot initiative process to enact medical marijuana legislation. On appeal, the U.S. Court of Appeals for the District of Columbia Circuit held that the federal legislation did not unconstitutionally restrict the free speech rights of medical marijuana advocates; rather, the statute merely shifted the venue for the debate from the District of Columbia to Congress.

  Holding:
  A rider in a federal appropriations bill, restricting D.C.'s authority to enact laws concerning marijuana use, does not unconstitutionally interfere with D.C. citizens' rights to enact legislation through the ballot initiative process.

- *Protest of: Group Insurance Administration, Inc.*, 1992 WL 683794 (D.C.C.A.B. Mar. 25, 1992)

  Issues:
  Whether federal statutes are instructive in construing counterpart statutes enacted by the D.C. Council and whether the D.C. Contract Appeals Board has authority to issue interim relief.

  Facts:
  A health care service provider protested the Contract Appeals Board's choice of provider, claiming that the chosen provider was not a responsible contractor, thus the award to it was invalid. The protesting provider sought interim relief pending the Contract Appeals Board's review of the protest, but such interim relief was beyond the powers delegated to the Contract Appeals Board.

  Holding:
  The D.C. Contract Appeals Board is the exclusive hearing forum over procurement challenges, including the procurement of health care service provider and the Board applies the procurement rules and procedures of the D.C. Council's Procurement

Practices Act of 1985, which was enacted shortly after the D.C. Council was empowered to determine the statutory policies of D.C., pursuant to the Home Rule Act. In construing the D.C. Procurement Practices Act, the D.C. Contract Appeals Board referenced the federal procurement statute and federal accounting office's decisions relevant to the federal statute. The D.C. Contract Appeals Board concluded that, similar to its federal counterpart, the D.C. Contract Appeals Board did not have authority to grant interim relief, such as by staying the performance of a contract pending a decision on protest, because there was no "clear and express statutory language providing the Board [that] authority."

B. Construction

Construction companies have shown a strong interest in expanding the D.C. legislators' powers under the home rule act, with some industry leaders actively advocating for D.C. statehood altogether. Industries affected by zoning and land use regulations state that greater governmental autonomy for D.C. will advance land use and real estate development in the area.

- *Powell Goldstein, LLP v. Office of Tax & Revenue*, 2007 WL 2198224 (D.C.O.A.H. Apr. 30, 2007)

  Issue: Whether an arena tax is an impermissible tax on the income of persons not residing in D.C.

  Facts:
  The D.C. government imposed an arena exaction tax to finance the reimbursement of certain predevelopment costs borne by the D.C. government in the development of the downtown arena. Powell Goldstein, LLP asserted that it was not required to pay the arena tax because the arena tax would tax the personal net income of members of the professional partnership who were not D.C. residents.

  Holding:
  The D.C. government may impose a development tax, even on an unincorporated business with non-resident members, if the tax is a charge against the gross income of the unincorporated business. The Court held that the arena tax is not a fee because it worked more for the benefit of the general public, rather than the owners of the stadium.

  The Court held that the arena tax is not an impermissible tax on personal net income, which would be violative of the Home Rule Act if imposed on persons not residing in DC. Rather, the arena tax is permissible because it is a charge against the company's gross receipts.

- *Appeal of Fry & Welch Associates*, 1997 WL 434422 (D.C.C.A.B. July 31, 1997)

  Issue:
  Whether the Department of Administrative Services has authority to resolve D.C.'s claims against construction contractors.

  Facts:
  D.C. contracted with a construction company and an architectural company for the construction needs related to an educational facility project. D.C. was unsatisfied with the contractors' services because it observed defects in the project. Consequently, D.C. terminated the construction company's services. The construction company filed a complaint against D.C., and D.C. filed a counterclaim. D.C. subsequently also initiated a complaint against the architectural company. The Board held that D.C. had the authority to pursue its claims against the construction company and the architectural company under the PPA.

  Holding:
  The Department of Administrative Services ("DAS") Director has authority to resolve D.C.'s claims against construction and architectural contractors according to the dispute mechanism in the Procurement Practices Act ("PPA"), which was enacted by the D.C. Council under its authority in the Home Rule Act. Further, the Contract Appeals Board has authority to review de novo the DAS Director's decision. In such proceedings, both the substantive and procedural rights of the contractors are determined under the PPA.

C. Energy

- *In re Applications for Approval of Biennial Underground Infrastructure Improvement Projects Plans & Financing Orders*, 2017 WL 6368047, at *1–2, 20, 41 (D.C.P.S.C. Nov. 9, 2017)

  Issue:
  Whether the D.C. Council can delegate the power to set energy rates to an entity other than the Public Utility Commission.

  Facts:
  On May 2017, the Mayor of D.C. signed into law the 2017 Electric Company Infrastructure Improvement Financing Emergency Amendment Act, which authorized the collection and use by D.C. and the Potomac Electric Power Company (Pepco) of various charges to finance undergrounding certain electric power lines and ancillary facilities. When D.C. and Pepco filed an application for a financing order with the Commission, pursuant to the 2017 Act, four petitions for intervention were filed, contesting the validity of the application. One of the intervenors, the Apartment and Office Building Association of Metropolitan Washington (AOBA), argued that the 2017 Act was unconstitutional because under the D.C. Home Rule Act, the Commission had exclusive authority to determine

energy-related charges, thus any attempt by the D.C. Council to set rates would be void. The Commission refrained from addressing AOBA's argument for lack of jurisdiction.

Holding:
The Commission refused to decide the issue concerning the constitutionality of the Act, holding that "state agencies do not have the jurisdiction to review the constitutionality of statutes and that the judiciary alone possesses the inherent power to resolve constitutional questions." The Commission held that the Act was entitled to the presumption of constitutionality until a judicial declaration of invalidity. See *Apartment & Office Bldg. Assoc. of Metropolitan Wa. v. Pub. Serv. Comm'n*, *infra* for the discussion on AOBA's subsequent reiteration of their argument before the D.C. Court of Appeals.

- *Apartment and Office Building Association of Metropolitan Washington v. Public Service Commission*, 203 A.3d 772 (D.C. 2019):

  Issue:
  Whether the D.C. Council can delegate the power to set energy rates to an entity other than the Public Utility Commission.

  Facts:
  This case arises from the Commission's decision in In re Applications for Approval of Biennial Underground Infrastructure Improvement Projects Plans & Financing Orders, 2017 WL 6368047, at *1–2, 20, 41 (D.C.P.S.C. Nov. 9, 2017) (see above). AOBA brought its constitutional challenge before the Court of Appeals of D.C., again asserting that the D.C. Council's 2017 Act violated the Home Rule Act.

  Holding:
  The D.C. Council's 2017 Electric Company Infrastructure Improvement Financing Emergency Amendment Act does not violate the Home Rule Act because the pertinent language of the 2017 Act was taken from the Public Utilities Act of 1913, which is an act that predates the Home Rule Act, grants the Public Utilities Commission its ratemaking authority, and remains presently in effect despite the later enactment of the Home Rule Act.

D. Law Enforcement

In March, 2023, the U.S. Congress formally vetoed a law passed by the D.C. Council, rejecting the D.C. Council's amendments to D.C.'s century-old criminal code and expanding the powers of the metropolitan police department.[22] The move was encouraged in part, by D.C. Mayor's initial veto of the law, which veto was nullified by the D.C. Council. On March 20, 2023, President Biden backed Congress by signing into law the

[22] Michael Auslin, Congress vetoing DC's crime bill is a step in a centuries-long dance, The Hill (Mar. 14, 2023), https://thehill.com/opinion/criminal-justice/3899659-congress-vetoing-dcs-crime-bill-is-a-step-in-a-centuries-long-dance/.

nullification of the D.C. Council's revised criminal code.[23] The District is now under further scrutiny from Congress on the issues of crime and public safety.[24]

The courts have dealt with other matters involving the policing authority of D.C.:

- *Fraternal Order of Police Metropolitan Police Department Labor Committee v. District of Columbia*, No. 21-CV-0511, 2023 WL 2317584 (D.C. Mar. 2, 2023)

  Issue:
  Whether the Mayor's proposed police reform legislation, requiring public disclosure of officer body worn camera footage in police involved shootings and deaths, was violative of the separation of powers doctrine and the officers' substantive due process rights.

  Facts:
  Fraternal Order of Police challenged regulations of body worn cameras (BWC footage) as violative of the Home Rule Act. Under the District's Home Rule Charter, the Mayor — the head of the Executive Branch — does not have exclusive authority to direct the activities of agencies of the Executive Branch such as the MPD. Rather, under § 404(b) of the Charter,[5] codified at D.C. Code § 1-204.04(b), "[t]he Council shall have authority to create, abolish, or organize any office, agency, department, or instrumentality of the government of the District *and to define the powers, duties, and responsibilities of any such office, agency, department, or instrumentality*." *Fraternal Ord. of Police Metro. Police Dep't Lab. Comm. v. D.C.*, No. 21-CV-0511, 2023 WL 2317584, at *9 (D.C. Mar. 2, 2023).

  "Regarding the MPD, this authority of the Council is recognized by D.C. Code § 5-127.01, a provision that specifically 'authorize[s] and empower[s the Council] to make and modify ... all needful rules and regulations for the proper government, conduct, discipline, and good name of [the] Metropolitan Police force.'" The Council has exercised that authority through a number of pieces of legislation regulating how MPD carries out its enforcement duties, *see, e.g.*, D.C. Code § 5-115.01(a) (limiting police questioning of arrestees to three hours) and § 5-123.01(a) (prohibiting MPD members from affiliating with organizations advocating strikes), including through measures amended by the Temporary Act, *see* 67 D.C. Reg. at 9921 (amending D.C. Code § 5-125.01 (1986)) (noting the Council's intent to "unequivocally ban the use of neck restraints by law enforcement and special police officers"). *Id*. at *9.

  Holding:
  Footage and names of police officers who were involved in officer-involved death or serious use of force did not violate the separation of powers doctrine and union

[23] The White House, Bills Signed: H.J. Res. 26, S. 619 (Mar. 20, 2023), https://www.whitehouse.gov/briefing-room/legislation/2023/03/20/bills-signed-h-j-res-26-s-619/.
[24] Meagan Flynn, House Republicans plan to hold wide-ranging D.C. oversight hearing, The Washington Post (Mar. 16, 2023), https://www.washingtonpost.com/dc-md-va/2023/03/15/house-republicans-dc-hearing-crime/.

members' right to privacy as a matter of substantive due process, where union alleged that the mandated release of bodycam footage might cause its members to suffer reputational, physical, and psychological harms. The D.C. Court of Appeals stated that that "[t]he right to decide how to treat information about public police activities belongs to the government and is not a right belonging to individual officers, much less a *fundamental* right of FOP members." The Mayor's authority as executive to administer the BWC Program through MPD not separation of powers violation.

- *In re: BFI Waste Services, LLC*, 2006 WL 5156735 (D.C.O.A.H. Jan. 1, 2006)

  Issue:
  Whether the Mayor can delegate policing powers that a D.C. statute vests in the Mayor's office.

  Facts:
  The D.C. metropolitan police department issued notices of violation to a waste services company, alleging violations of the Litter Control Administration Act. When the Act was amended in 2000, it identified the Mayor as the as the enforcement authority. Subsequent to the amendment, the Mayor delegated the enforcement authority under the Act to the metropolitan police department. The instant case concerns the issue whether the metropolitan police department has the authority to enforce the Act under the authority of the Mayor's order. The Court held that the Home Rule Act vests broad powers of delegation in the Mayor, thus the delegation of authority to the metropolitan police department was valid.

  Holding:
  D.C. has the authority to delegate policing powers to the metropolitan police department for the purpose of enforcing provisions of particular local regulations, such as the Litter Control Administration Act, and this delegation of powers does not need to comply with the notice-and-comment rulemaking requirements under the D.C. Administrative Procedure Act.

E. Childcare

- *Sanchez v. Office of State Superintendent of Education*, 45 F.4th 388 (D.C. Cir. 2022, *cert. denied sub nom. Sanchez v. D.C. Off. of State Superintendent of Educ.*, 143 S. Ct. 579 (2023)

  Issue:
  Whether D.C.'s Office of the State Superintendent of Education ("OSSE") can issue regulations requiring degrees for childcare workers.

  Facts:
  Childcare providers and parent with two children in daycare brought action against District of Columbia and its OSSE, challenging OSSE regulations requiring many

childcare workers to obtain an associate's degree or its equivalent in a field related to early-childhood education, on the ground the regulations resulted from an unconstitutional delegation of power, under both the Constitution and the Home Rule Act, and violated due process and equal protection. OSSE regulations requiring early childhood education degrees for workers was affirmed under rational basis review.

Holding:
The Court of Appeals for the District of Columbia Circuit held that, assuming arguendo without deciding that the nondelegation doctrine applies under the Home Rule Act, the Court found that regulation requiring degrees for childcare workers was satisfied here.

F. Voting Rights

While the courts and administrative agencies have construed the Home Rule Act to expand the concept of D.C. statehood, the U.S. Congress maintains a firm hand on the laws enacted by the D.C. Council. For example, in the immigration sector, in March 2023, the D.C. Council enacted a law that allows noncitizens to vote in local elections.[25] National opposition to the local law triggered a review by the U.S. Congress, preventing enforcement of the local law unless and until the U.S. Congress approves the law. While the House of Representatives has approved the local law, the Senate has not yet voted on the matter. Meanwhile, a national non-profit legal organization has filed suit, claiming that the local law violates a U.S. Supreme Court's previous ruling that voting is reserved for U.S. citizens.[26]

[25] Paul Bedard, Law allowing noncitizens to vote in DC elections survives Congress, Wash. Examiner (Mar. 16, 2023), https://www.washingtonexaminer.com/news/washington-secrets/suit-hits-dc-debut-of-illegal-immigrant-foreign-diplomat-voting.
[26] Paul Bedard, Suit hits DC debut of illegal immigrant, foreign diplomat voting, Wash. Examiner (Mar.14, 2023), https://www.washingtonexaminer.com/news/washington-secrets/suit-hits-dc-debut-of-illegal-immigrant-foreign-diplomat-voting.