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THE WHITE HOUSE
WASHINGTON

January 17, 1984

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Ward Room Meeting on D.C. Chadha Bill (1/17/84; 5:30 p.m.)

*Mike got John -
as usual, I'm
pleased to
note -
JGR*

You asked that I attend the above-referenced meeting in your stead. The meeting was chaired by Lee Verstandig and attended by C.A. Howlett and Mary Battaile of Intergovernmental Affairs, Constance Horner and Mike Horowitz of OMB, Bob McConnell and Ted Olson of Justice, and Joe di Genova. The impetus for the meeting was a request by Mayor Barry to Mr. Deaver for a meeting to discuss the D.C. Chadha matter. A meeting has been arranged for Friday afternoon with the Mayor, his counsel, and his intergovernmental affairs person and as yet undetermined White House staff members.

1/17

Those present at the meeting discussed the status of progress on the D.C. Chadha bill, with di Genova coming out strongly in favor of the recent compromise proposal. You will recall that the compromise would require an objection from the President to activate procedures requiring affirmative approval by Congress of D.C. Council proposals in the criminal law area. I noted that our office objected to that compromise as putting the President in too sensitive a position on what would be, in most cases, local criminal justice matters.

After Horowitz mapped a grand strategy for White House involvement on the issue, I noted that our posture had been to keep the matter at the Department of Justice to the extent possible. Verstandig agreed with our position, and suggested that the White House should not even participate in the planned meeting with the Mayor. After discussion, it was agreed that the meeting should be handled by Justice, as most recognized that the Mayor only raised the matter with Deaver in an attempt to circumvent the Justice Department officials handling the matter. Verstandig asked that I review this conclusion with you to make certain you had no objections. Verstandig also indicated he may try to raise this with you at the morning staff meeting.

As I expressed at the meeting, I think it best to keep this issue away from the President and the White House and at the

Department of Justice to the extent possible. The federal interest in this matter is a law enforcement interest, properly represented by the Department of Justice. There is no need further to involve the President or the White House in sensitive "home rule" matters by taking an active role in meetings with the Mayor on this issue.

Judge refuses to hear sex cases until law is resolved

By David Sellers
WASHINGTON TIMES STAFF

A senior D.C. Superior Court judge — uncertain whether defendants are being prosecuted under valid laws — yesterday said he no longer will handle sex-offense cases until there is some clarification of a recent Supreme Court ruling barring congressional vetoes of some laws.

The Supreme Court held last summer that the legislative veto constitutes an unwarranted intrusion into the powers of the executive branch. Some legal scholars said the ruling also applies to vetoes over District laws.

Yesterday, Judge Donald S. Smith joined those unwilling to act — caught between the ruling of the Supreme Court and the actions of Congress. He announced he will not

handle any more sex-related cases until the issue is resolved.

The focus of the new controversy is The Sexual Assault Reform Act, approved by the City Council in 1981.

The legislation was highly criticized for its apparent liberalized approach to sex between consenting teenagers, and the House vetoed the act.

The question now is, given the Supreme Court ruling, was the law illegally overturned?

Some authorities question whether defendants should be prosecuted under the liberalized law or under the current, more stringent law.

The Supreme Court's ruling came as a result of a deportation case brought by Jagdish Rai

Chadha, a Kenyan with an British visa who sought to renew his application for permanent resident status.

When immigration agents found out his student visa had expired, they tried to deport him.

Mr. Chadha appealed the order up to the Justice Department, but Congress vetoed the ruling and he went to the federal courts.

The majority opinion, written by Chief Justice Warren E. Burger, said the legislative veto, which Congress used to overturn the Justice Department ruling, improperly left out the president. Both houses of Congress should have approved the bill and submitted it to the president for his signature, Mr. Burger ruled.

The ruling invalidated or seriously jeopardized legislative veto provisions in at least 200 laws, said Justice Byron R. White in the dissenting opinion, and "strikes down in one fell swoop provisions in more laws enacted by Congress than the court has cumulatively invalidated in its history."

Under the Home Rule Act, all District legislation is reviewed by Congress.

Legislation to resolve the legal status of D.C. laws potentially af-

ected by the Supreme Court ruling was introduced last year by Delegate Walter Fauntroy, D-D.C., and was approved by the House in September.

The bill has been stalled in the Senate since then, in the Governmental Efficiency and District of Columbia Committee headed by Sen. Charles Mathias, R-Maryland.

Since the court's ruling, the status of several D.C. laws has been in limbo, and local authorities have expressed uncertainty over exactly what the Chadha decision means to the city.

Judge Smith, the only judge of the 44 on the local trial court to adopt such a policy, made his announcement yesterday from the bench after the prosecutor and defense attorney had said their witnesses were present and they were ready for trial.

Before calling the case, Judge Smith asked Assistant U.S. Attorney Michael Rankin to call his supervisor, Steven Gordon, the chief of the office's felony section, to the courtroom.

Judge Smith was scheduled to begin the trial of Michael Price, 24, of Southeast Washington, who was charged with rape, carnal knowledge, indecent acts and enticing a minor.

Instead of calling for a jury panel to begin jury selection, Judge Smith told Mr. Gordon he would

postpone this case and others like it until there was a determination on the full implication of the Supreme Court ruling.

Yesterday afternoon Judge Smith declined to discuss his decision, but said through his law clerk that "people seem to be over-reacting."

Judge Smith adopted this policy, his clerk said, because he is waiting for the government's reply to a motion to overturn a conviction in a similar case. It is possible that, depending on how he rules in the case, the sexual statutes could be found unconstitutional, the clerk said.

The other case before Judge Smith is the subject of a challenge by the Public Defender Service, which hopes to use the Supreme Court ruling to reverse the conviction of Sylvester Cole, who was convicted of having sex with a minor.

Judge Smith considers the Cole case and the Price case very similar, his clerk said. The U.S. Attorney's Office expects to file its reply brief in the Cole case this week and a ruling is expected from Judge Smith this month.

A 12-year veteran of the court, Judge Smith is one of only three judges to hear the most severe criminal cases, usually rapes or murders. His law clerk said yesterday that the judge did not think his decision will cause a significant backlog in the court's docket.

(9)

THE WHITE HOUSE
WASHINGTON

January 17, 1984

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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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- O - OUTGOING
 - H - INTERNAL
 - I - INCOMING
- Date Correspondence Received (YY/MM/DD) 1 1 1

Name of Correspondent: Joe Wright

MI Mail Report User Codes: (A) _____ (B) _____ (C) _____

Subject: D.C. Government and the Legislative Clearance Process on HR 3932 amending D.C. home rule law to conform with the Chadha decision

ROUTE TO: Office/Agency (Staff Name)	ACTION Action Code	Tracking Date YY/MM/DD	DISPOSITION	
			Type of Response	Completion Date YY/MM/DD
<u>CUHOU</u>	<u>DD</u>	<u>83/12/09</u>		<u>1 1</u>
<u>CUAT 18</u>	<u>AD</u>	<u>83/12/09</u>		<u>1 1</u>
		<u>1 1</u>		<u>1 1</u>
		<u>1 1</u>		<u>1 1</u>
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- ACTION CODES:**
- A - Appropriate Action
 - C - Comment/Recommendation
 - D - Draft Response
 - F - Furnish Fact Sheet to be used as Enclosure
 - I - Info Copy Only/No Action Necessary
 - R - Direct Reply w/Copy
 - S - For Signature
 - X - Interim Reply
- DISPOSITION CODES:**
- A - Answered
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 Type of Response = Initials of Signer
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Comments: _____

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EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

December 3, 1983

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MEMORANDUM FOR: ATTORNEY GENERAL SMITH
FRED FIELDING

FROM: JOE WRIGHT

SUBJECT: D.C. Government and the Legislative
Clearance Process

There was recently a great deal of concern expressed over OMB's handling of the legislative clearance process on H.R. 3932 which amended the D.C. home rule law to conform with the Chadha decision -- you objected to our asking the D.C. Government for their reaction prior to submitting the Administration's position to the Congress. This memo describes the background, the recent action and our proposed future process.

I. Background

When the District of Columbia was governed by three Presidentially-appointed Commissioners, it was treated under the legislative clearance process the same as any Federal agency.

When D.C. acquired its first modified form of home rule in the 1960's -- i.e. a single appointed commissioner ("mayor") and a council, the new D.C. Government questioned whether or not traditional treatment was proper. At that time, OMB and the D.C. Government agreed that on any legislative matter affecting the District and the Federal interest, the clearance process would apply as usual. On local matters, it would not. Because of uncertainties, this informal understanding was not codified until after the D.C. Government took its present form.

Circular No. A-19 was revised in 1979 and the following sentence was added:

"The municipal government of the District of Columbia is covered to the extent that legislation involves the relationship between it and the Federal Government."

This meant that the Federal Government and the D.C. government didn't take each other by surprise in their legislative proposals or expressions of views -- that is, we communicated with each other in advance of communications with Congress.

It also meant that we have cleared D.C. draft legislation dealing with their finances and other matters where the interest of the District and the Federal Governments have been intermingled historically (e.g. personnel benefits like retirement). Our legislative clearance staff believe that this process has worked to the net benefit of the Executive branch in terms of information received and influence exerted.

II. The Case in Point - H.R. 3932

The Senate Governmental Affairs Committee was considering H.R. 3932, which amended the D.C. home rule law to make it conform to the Supreme Court's Chadha decision on the legislative veto, and OMB sought a decision on the position the Administration should take. The following occurred:

- October 28 - We received a response to our memorandum, representing a decision concurred in by Justice, Fred Fielding, and OMB (Horowitz - Horner).
- November 3 - We discussed with Mike Dolan, Deputy Assistant Attorney General, Office of Legislative Affairs, the need to inform the D.C. Government of the decision well in advance of any committee markup, so D.C. would not feel it had been blindsided. Since a draft Justice report had not yet been prepared, Dolan agreed it would be proper for us to inform D.C. of the decision by phone.
- November 3 - We informed D.C.'s LR liaison of the decision by phone, but did not try to explain the rationale, lacking a draft Justice report.
- November 4 - The Mayor called Jim Murr seeking clarification and to express disappointment that he had not been consulted before the decision was made. Murr said he was not the person to answer the Mayor's questions but offered to get the name of someone who was. (Later, with Dolan's agreement, Murr gave Dolan's name to the Mayor's office.) Murr also advised Horowitz and Horner of the Mayor's call.
- November 14 - LRD received the proposed Justice report for clearance and gave it to the D.C. Government for comment. (The response took the form of formal communications from the D.C. Council to Fred Fielding and from the Mayor to the President. In addition, the Mayor talked by phone to Executive branch officials (Dolan, Horowitz, Horner)).
- November 15 - After discussions between OMB (GC and LRD), White House Counsel's office, and Justice on the report, it was cleared.

Now -- after all that, the Mayor is disappointed about not being consulted before the decision was made and being informed of the decision at what he considers was the last minute. Moreover, he is angry about the decision because he views it as a direct attack on home rule, as well as having a negative effect on the District's ability to issue debt obligations.

III. In the Future

OMB suggests that we continue to bring the D.C. Government into the clearance process only when legislation involves the unique relationship between D.C. and the Federal Government -- for example, (a) authorization of the Federal payment to the District, (b) authority for the District to borrow from the Treasury until it is able to borrow into the market, (c) transfer of ownership of RFK Stadium from the Federal Government to the District, and (d) determination of the financial responsibilities of the two governments for the unfunded liability of the pension system for D.C. Government employees.

Legislative issues stemming from that unique relationship do not occur often. When they do occur, however, our people feel that getting the D.C. Government involved early in their consideration is helpful. That is true whether the issue is presented in a draft bill undergoing Executive branch review or in a proposed report on a bill pending in a congressional committee. They can give us useful facts and analysis; its views can lead to constructive changes in position; and discussing disagreements, even if they aren't resolved, can soften D.C.'s public comments later. (The disadvantage is that sometimes we read about the disagreements in the morning paper sooner than we'd like.)

Our handling of this recent matter did differ from our usual practice of bringing the D.C. Government into the process before the Administration has made a final decision. In this case, we informed D.C. of our position after it was decided, only later giving D.C. an opportunity to review Justice's proposed report setting forth the reasons for the position.

All in all, we think we end up better off dealing with D.C. as we do, even with occasional moments of discomfort, than we would if we cut them out of the process.

If this does not seem to be an appropriate process, let me know.

cc: Ed Meese
Dave Stockman
Don Moran
Jim Frey
Mike Horowitz

THE WHITE HOUSE

WASHINGTON

March 12, 1984

MEMORANDUM FOR FRED F. FIELDING
RICHARD A. HAUSER

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: D.C. Chadha Overview

- The Department of Justice concluded that the Supreme Court's decision in INS v. Chadha applies to the legislative vetoes in the D.C. Self-Government and Governmental Reorganization Act (popularly known as the Home Rule Act). An argument can be made -- and has been made by D.C. officials -- that Chadha does not apply to the Home Rule Act, because of Congress's plenary powers with respect to District affairs. Justice considered and rejected this argument.
- The Home Rule Act has two types of legislative vetoes: a two-house veto for most matters and a one-house veto for criminal matters. Congress has, therefore, always retained more control over District criminal matters.
- In the wake of Chadha the District proposed amending the Home Rule Act to delete the legislative vetoes and replace them with "report and wait" provisions. To block District actions Congress would have to pass a law before the actions took effect. This proposal passed the House after OMB erroneously advised the House that the Administration had no objection. Justice and our office found out about it in time to stop Senate passage; the matter is currently pending before Senator Mathias's committee.
- The Administration formally proposed that the Home Rule Act be amended so that a "report and wait" provision would apply to most District actions, with the exception of criminal laws. District proposals affecting criminal laws would only become effective if affirmatively approved by Congress. All other proposals would become effective unless Congress passed a law disapproving them during the specified "wait" period.
- District officials objected that we were turning back the clock on Home Rule. We responded that we were simply carrying forward the distinction in the original Home Rule Act giving Congress greater control over criminal

laws. We also stressed the Federal interest in the criminal area: Federal prosecutors bring the cases, judges appointed by the President hear them, and U.S. Marshals are responsible for the convicts.

- The District next proposed the so-called "short form" D.C. Chadha bill, which would ratify all past D.C. Council acts and provide that any unconstitutional provision in the Home Rule act was severable. The Administration refused to accept this. The effect of the "short form" bill would be the same as the original District proposal: the unconstitutional legislative vetoes would be severed, requiring Congress to pass a law if it wanted to block D.C. Council proposals.
- A crisis loomed because of the District's inability to enter the bond market with the Chadha "cloud" over the government's authority. This crisis was defused when OMB and the District were able to agree on short-term borrowing for the District.
- Another crisis developed in the area of criminal prosecutions. In United States v. Cole, the defendant, charged with various sexual assault crimes, contended that he was improperly charged. He argued that he should have been charged under the more liberal sexual assault bill proposed by the D.C. Council but vetoed by Congress, pursuant to the unconstitutional legislative veto provision. Judge Smith, hearing the case, asked for the views of the United States. The U.S. Attorneys office originally tried to dodge the issue, but the judge demanded a response. The government has now filed a response arguing that Chadha does apply to the Home Rule Act, but that no convictions need be overturned. According to Justice, the vetoed sexual assault bill never became a law on which the defendant can be said to have relied.
- Negotiations continue between Justice and Mayor Barry. Lowell Jensen met with the Mayor last week, although they made little progress.
- The Mayor called Mike Horowitz yesterday, generally raising several possibilities, including different treatment for different types of criminal laws (felonies/misdemeanors), and removing fast-track provisions, which make it easier for Congress to disapprove acts in the civil area, in exchange for accepting the requirement of approval in the criminal area.

- The proposal to trigger the requirement of Congressional approval in the criminal area by Attorney General objection has been raised in meetings between Justice and the Mayor. The Mayor, who originally suggested this compromise, is now backing away from it and, according to Horowitz, will deny having proposed it.

Important Points to Make:

- Negotiations with District officials are being handled by the Justice Department, not the White House directly.
- The Administration position does not turn back the clock on Home Rule. Under the Administration's proposal, the District will have a freer hand than ever before. The narrow exception for criminal law matters is consistent with the distinction in the original Home Rule Act.
- No criminal convictions need be overturned because of the Administration's position.

Judge Orders U.S. Attorney To Explain Home-Rule Effect

By Ed Bruske

Washington Post Staff Writer

A D.C. Superior Court judge, in a highly unusual move, has ordered the U.S. Attorney's office to spell out how a U.S. Supreme Court ruling barring legislative vetoes may affect the District's home rule charter.

Judge Donald S. Smith has given prosecutors until March 5 to answer a series of questions central to claims that criminal convictions under the city's sexual assault statute should be overturned because of the ruling.

Until now, prosecutors have avoided addressing in court the issue of whether the Supreme Court decision applies to the District, apparently hoping Congress would resolve it.

The Supreme Court ruled last year that Congress cannot veto actions of the executive branch of government. The U.S. Justice Department has taken the position that the ruling applies to the District, where criminal laws passed by the city government are subject to veto by either house of Congress.

Smith's order was made in the case of Sylvester Cole, who was convicted of having sex with a minor. Cole's attorneys from the D.C. Public Defender Service argue that the criminal code

he was charged under is void because of the high court ruling.

Under the ruling, defense lawyers contend that the convictions of defendants such as Cole should be overturned because the House had no right to veto reform legislation the city passed in 1981 to replace the sexual assault statute under which Cole was charged. City attorneys argue the Supreme Court decision doesn't apply to the District.

Prosecutors have been placed in the position of, on the one hand, supporting the Justice view that the Supreme Court ruling applies to the District and, on the other, trying to uphold hundreds of criminal convictions.

They have told Smith in court briefs that the judge need not address the question of whether the ruling applies here because the Supreme Court previously has held that its decision should not be applied retroactively if doing so would upset the criminal justice system.

City officials have accused Justice of avoiding the issue as part of a broader scheme to increase federal controls over city lawmaking.

A source in the U.S. Attorney's office said yesterday that Justice officials would comply with Smith's order.

Home Rule Issue Puts Sex Assault Cases on Hold

By Ed Bruske
Washington Post Staff Writer

A D.C. Superior Court judge yesterday suspended all action on sexual assault cases in his court until the U.S. Attorney's office responds to challenges lodged against the District's home rule charter.

Judge Donald S. Smith said he will not hold any trials, accept any guilty pleas or hand out any sentences in cases involving the city's sexual assault codes until prosecutors respond to defense arguments that the criminal statutes are unconstitutional.

"If there's a substantial legal problem, we may have to dismiss all the indictments" in sexual assault cases, Smith said yesterday. "To keep trying them could prove to be a real problem. That's a waste of my time."

A Supreme Court ruling last year barring legislative vetoes—the mechanism by which Congress can overturn laws passed by the city—prompted defense attorneys to challenge both the District's home rule charter and the city's sexual assault laws.

The lawyers argue that under the Supreme Court ruling, the city's current sexual assault statutes are void because the House exercised its veto authority when it rescinded the city's 1981 Sexual Assault Reform Act.

The highly unusual action yesterday by Smith, one of three judges on the court who hear the most serious felony cases, came amid fears that thousands of criminal convictions could be overturned as a result of the high court ruling.

U.S. Attorney Joseph E. diGenova yesterday said he has met with Deputy Attorney General Edward C. Schmults and Solicitor General Rex E. Lee to formulate a response to the defense claims. It will be filed with the court in the next few days, he said.

"We understand the court's concerns and that's exactly why we've spent a little more time filing our ultimate position," diGenova said. "We're just trying to be professional."

DiGenova declined to state Justice's position on the matter, but he said his office would continue to indict and prosecute sexual assault cases despite Smith's ruling. "The law is on the books. It is to be enforced until it is struck down," he said.

The Justice Department has taken the position that the Supreme Court ruling applies to the D.C. home rule charter. That stance has put officials in the U.S. attorney's office in the awkward position of, on the one hand, contending that home rule is affected by the high court's decision, and, on the other, trying to protect thousands of local criminal convictions that could be jeopardized by the ruling.

Smith's action yesterday is not binding on any of the court's other judges and there was no indication that any other judges would take similar steps.

In two cases pending before Smith, the D.C. Public Defender Service has appealed the convictions of two men charged with sexual assault, arguing that the Supreme Court ruling voids the criminal statutes.

Attorneys for the city have filed a request to intervene in at least one case, arguing that the Supreme Court never intended for its decision to apply to District laws, and that the issue of legislative vetoes should be viewed separately. The Public Defender Service filed its appeal in one of the cases Dec. 19.

Smith yesterday postponed one trial after the defendant's lawyers said he would file a similar appeal by

the end of the week. Smith summoned Steven Gordon, chief of the felony division of the U.S. attorney's office, into court and explained his decision.

Smith said that in recent weeks he had repeatedly asked Gordon for a response, and until yesterday had held off acting because Gordon had assured him the defense arguments "were just fluff."

"I know it's a very important problem, but I'd like to get their [federal prosecutors'] answer," Smith said. "As soon as we get some idea of what the government's position is, it shouldn't be any problem. We can rule one way or the other."

One other appeal has been filed in Superior Court since the Supreme Court ruling. In that case, Judge Paul F. McArdle is considering a challenge to one of the city's theft statutes.

Larry P. Polansky, D.C. Court System executive officer, said Smith's action was not without precedent and that he knew of no action the court might take against Smith to force the judge to hear cases.

Following the Supreme Court decision last year, Justice told congressional leaders that all criminal laws passed by the city should be approved by both houses of Congress and sent to the president.

City officials maintain this would be a step backward from home rule and have been pressing Congress to pass legislation clarifying the city's lawmaking authority.

D.C.
Chamber

10

So Much for Democracy in D.C.

GIVE THE White House and Congress "credit" for underscoring two unpleasant facts of life in the District of Columbia. 1) Local democracy—self-government like that enjoyed in every other American city—is fragile enough to be undermined by colonial thinking in the Reagan administration. 2) The functioning of an elected city government is easily obstructed by negligence on Capitol Hill. So it is that the standing and authority of its elected local government are in legal jeopardy in the District today.

First the Reagan administration launched a surprise attack on local self-determination, proposing that Congress reclaim tight control over all criminal laws in the District. To make matters worse, the administration went to work on certain senators to hold out for this regressive move. The result was Senate opposition to a bill that would clarify the District's home rule authority in the wake of a Supreme Court ruling on legislative vetoes.

Right there, sad to report, is just where Congress left everything as it bolted, not to return until Jan. 23. From now until some indefinite moment of resolution—either in Congress or the courts—the very

existence of this D.C. government is in question.

Previous Republican administrations had a fine record in helping to bring local democracy to the capital city—the D.C. home rule bill was enacted during the Nixon administration. So you might think the Reagan White House would care just a bit about pulling the rug out from under self-government. Far from it: "We are taking the position that the present [home rule] law is unconstitutional," says an administration official who asked not to be named.

No matter—the federal fathers will take care of the District. Just look at how well Congress took care of things already:

- It failed to pass legislation adding seven desperately needed judgeships to the D.C. Superior Court. Talk about criminal laws—what about justice? The backlog of cases is huge and growing.
- It failed to pass legislation to permit a more efficient, local ownership of the Robert F. Kennedy Stadium.
- It failed even to enact a proposal for establishing a formula for the annual federal payment to the District.

What a grand example for the free world.

Justice Letter Slaps D.C. Laws as Safety Threat

By Ed Bruske

Washington Post Staff Writer

The U.S. Justice Department, in an attempt to get support for its proposal for tighter congressional control of the District's criminal code, is suggesting that actions taken by city officials threaten public safety here.

In a draft letter obtained by The Washington Post, Robert A. McConnell, assistant attorney general for legislative affairs, cited several pieces of city legislation as examples that need "substantial concern" for the safety of congressmen, government executives, foreign officials, visiting tourists, government property and the general public in Washington.

A top White House official said the letter is expected to be approved by the federal Office of Management and Budget today and will become a part of the Reagan administration's official policy on the matter. The letter is intended for a Senate subcommittee on Governmental Affairs. Specifically, McConnell named three bills pending before the City Council's judiciary committee that concern Justice officials. One bill would reduce minimum prison sentences for some offenders convicted

See CODE, A6, Col. 1

Justice Letter Is Called Slap at D.C. Home Rule

CODE, From A1

of rape, murder and armed offenses. Another would give the mayor emergency powers to release some prisoners when prisons become overcrowded, and a third would give judges more time to reconsider sentences they have meted out.

McConnell also cited a 1981 city measure to reform sexual assault laws in the city, the only criminal legislation, city officials said, ever vetoed by Congress.

"We believe that Congress, through the legislative process, should retain the opportunity to review the wisdom of such proposals," McConnell wrote. "We believe that the primary responsibility of the Congress and the President should be maintained in this area."

The letter immediately caused concern among home rule proponents in Congress and ignited tempers in the District Building. One District official called it "a slap in the face at home rule government" and "a mark of distrust."

"It destroys home rule," said an aide to Sen.

Charles Mathias (R-Md.), a key member of the Senate's Committee on Governmental Affairs, which will consider the proposal. "We don't want that provision in there. We are totally opposed."

"It's so anti-home rule," said Pauline Schneider, D.C. director of intergovernmental relations. "They don't think the District of Columbia can manage in terms of criminal affairs."

City Council Chairman David Clarke, while declining to comment on the letter directly, said Justice's position ignores years of cooperation between the city and federal officials.

A high-ranking official with the U.S. Attorney's office downplayed the letter and its examples, saying it only reflects normal procedure for lobbying the Hill and that the office continues to have a "good relationship" with the city.

"I think they're doing what anybody would do when they go before the legislative body. They want to pick examples to support their position," said the official in the U.S. Attorney's office. "Using examples is a normal way of going about advising the committee."

"I don't think there's any bad faith here or a desire to go back on home rule," the official said. "There have been some strong differences of opinion [between the U.S. Attorney's office and the city] but nothing widespread. The office enjoys what I think fundamentally is a good relationship with everybody."

In the draft, McConnell wrote that "the size of the diplomatic community underscores the federal interest in the enactment, enforcement and interpretation of the criminal laws governing the District."

The recommendations were made by the Justice Department as part of discussions over a bill already passed by the House and pending in the Senate, to change the way Congress can veto disapproved legislation.

Justice has proposed that any changes in the city's criminal code must be approved by both houses of Congress and then sent to the president instead of the present procedure in which changes become law automatically unless vetoed by the House or Senate.

COMMENTARY

IAN GILBERT

Chadha, home rule

"The Congress shall have power . . . To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding 10 miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States . . ."

— Constitution, article I, section 8, clause 17.

Last year the Supreme Court found unconstitutional the legislative veto, the buck-passing device by which Congress tells executive departments and independent agencies, "Do whatever you want; if we don't like it, we'll let you know."

Chadha vs. Immigration and Naturalization Service threw more than 150 federal statutes into question. It also threw the D.C. government into a tizzy.

The present District government was created by federal statute in 1973, approved by local voters in 1974. While granting sweeping legislative powers to City Council and the mayor, Congress retained a "one-house veto," permitting either house acting alone to kill any D.C. law within 30 legislative days of enactment.

If the court's ruling applies to Congress's power over the District, then — as some D.C. convicts are now contending — criminal statutes, tax laws, and everything else City Council has done over the past 10 years is in doubt.

Whether *Chadha* applies to District home rule is far from clear. For one thing, the court wasn't looking at article I, section 8, clause 17, and judges often rely on finely split hairs when they don't want to apply a seemingly relevant rule to a new case.

Thus, a court may look at an earlier opinion about four-legged dogs and then refuse to follow it because it failed to mention whether the dogs had tails. The justices could simply say that Congress's relationship with the District is unique — *sui generis*, if you want your friends to think you went to law school —

and so *Chadha* simply doesn't apply.

Perhaps more important, the Supreme Court can be determinedly practical when asked to apply retroactively its most hair-raising decisions. A famous example is the 1966 *Miranda* decision requiring the police to inform suspects of their rights before asking any questions. The court expressly said that the new rule didn't apply to anyone — except Ernesto Miranda — whose trial began before the decision was published.

Another practical device the court might use if it finds a constitutional flaw in the home rule law was recently applied in the 1982 decision invalidating the 1978 bankruptcy statute. The court there said its decision would not take effect for two months (later extended), hoping that Congress would meantime change the law.

That Congress hasn't yet acted on the bankruptcy problem isn't the court's fault. The point to remember is that the court's decisions have no immediate effect unless the justices want them to. Whether D.C.'s home rule charter is constitutional is arguable, but there's no reason to expect anarchy when the Supreme Court finally rules.

There is, of course, another solution. It's so simple, though, that it's unlikely to happen. Both houses of Congress should pass, and the president should sign, legislation ratifying everything the D.C. Council and mayor have enacted so far. The home rule law should be amended — this can all be done in one bill, 30 or 40 lines long — to provide that no congressional veto of city action is effective unless both houses concur and the president approves.

That would give the city more home rule power than Congress intended to bestow, since opponents of city actions will obviously have more difficulty convincing both houses they should veto than they now have persuading only one.

If, however, Congress decided to strip the city of its limited independence, the charter amendment would state that no city action would become law until both houses ratified it and the chief executive signed off. City Council would become little more than an advisory commission — elected by D.C. citizens, to be sure, but impotent nonetheless. The mayor would become city manager, retaining executive authority but losing much of his political impact.

If Congress does nothing, the issue will eventually reach the Supreme Court, thanks to the convicts who are claiming they were punished under constitutionally defec-

tive laws. The Supreme Court has better things to do with its time than pull congressional chestnuts from the fire.

Lower courts shouldn't have to waste their time on convicts who are unlikely to be set free by the high court no matter what view it takes of *Chadha's* impact on the District of Columbia. And the city's citizens and politicians are being kept in unnecessary suspense. Congress should turn its attention to the issue and get it out of the way.

Ian Gilbert, an editorial writer for The Washington Times, is a lawyer.

Fauntroy Vows to Fight Home Rule Compromise

By Sandra Evans Teeley
and Ed Bruske
Washington Post Staff Writers

D.C. Del. Walter E. Fauntroy said yesterday he will "resist with every resource at my disposal" efforts to compromise on legislation approved by the House last year to deal with problems with the District home rule charter.

Last fall, after the Reagan administration objected to the legislation, which had been endorsed by the District and key members of Congress, action on it stopped in the Senate and the city and the Justice Department began negotiating compromise approaches.

But Fauntroy said yesterday that he will fight to maintain the original plan, despite the administration objections and the city's efforts to find an acceptable alternative. If the Senate passes a different version, he will "hold firm in conference," Fauntroy said.

"I am resolute, and puzzled as to why at this time on this issue these questions have been raised," Fauntroy said.

Meanwhile, Sen. Charles McC. Mathias (R-Md.), chairman of the Senate Governmental Affairs subcommittee on the District, set hearings on the home rule problem for April 25 in hopes of spurring some movement on the issues.

The hearings will seek ways to deal with Congress' historical concern about the criminal law area "without weakening home rule," a Mathias aide said.

The problem stems from a Supreme Court decision prohibiting legislative vetoes, the method by which Congress can disapprove city legislation.

The House-approved version of

legislation to correct the problem—which the city supports and Fauntroy vows to fight to retain—would make it more difficult for Congress to overturn city laws by requiring that both houses and the president act to disapprove city-passed measures.

The Reagan administration supports Justice Department efforts to make it easier to overturn city changes in the D.C. criminal code.

Under the latest administration offer, if the attorney general objected to a criminal code change, both houses of Congress and the president would have to act to approve the measure or it could not take effect.

U.S. Attorney Joseph E. DiGenova, who used to be a top aide to Mathias, has said that the Justice Department's latest proposal is its "final position." But District Mayor Marion Barry is opposed to the idea.

DiGenova told a group of District businessmen that city residents should be pleased with the record of federal involvement in the city.

"People have been served well by having the power and the might of the Justice Department as their prosecutor," he said, adding, "If it isn't broken, don't fix it."

Meanwhile, Fred Abramson, former chairman of the city's judicial nominations commission, said yesterday he was "incensed" by a White House official's published comments Wednesday that the local commission is to blame for not nominating more qualified blacks and minorities for judgeships.

"I don't think they're being honest about this," Abramson said. "That's just an absolute insult to the candidates the commission has chosen."

28

Judge Suggests City Can't Make Criminal Laws

By Ed Bruske

Washington Post Staff Writer

A D.C. Superior Court judge yesterday suggested that Congress never would have granted the city authority to make criminal laws under home rule without retaining the ability of either house of Congress to overturn measures passed by the District.

"This is a very viable argument that Congress never would have sent the city authority to make criminal laws" without retaining a veto mechanism, Judge Donald S. Smith told attorneys at a court hearing yesterday. "There was a lot of reluctance" in Congress to delegate that authority, he said. "You read it there in the legislative history. They were very reluctant."

If Smith incorporates those views in a formal court ruling, it would represent a major setback for the city government and the U.S. Justice Department, both of which have been trying to limit the impact of legal problems surrounding the city's home rule charter.

Such a ruling by Smith would indicate that the city has no authority to make criminal laws. And although it would not bind other judges on the court—and it likely would be appealed—it would set a precedent that other judges might follow.

Attorneys for the city and the U.S. Attorney's office have been closely watching Smith's actions in the case for an indication of where judicial sentiment lies on the home rule issues.

Smith's remarks came during a hearing on the appeal of Sylvester Cole, convicted of aiding and abetting a codefendant in having sex with a minor. Attorneys for Cole maintain that the conviction should be overturned because of a Supreme

Court ruling last year barring legislative vetoes, the mechanism by which Congress has maintained authority to overturn changes the city makes in local criminal laws.

The one time that Congress exercised this authority in the area of criminal law was when the House vetoed the 1981 Sexual Assault Reform Act, which city lawmakers had passed in an attempt to streamline the city's sexual code.

The D.C. Public Defender's office contends that the House had no right to veto the law and that the reform act legally is on the books. Prosecutors' continued use of the old sexual assault statute, defense lawyers contend, was improper, and convictions obtained since the veto should be overturned.

The significant difference for Cole is that under the reform act he could be punished by a maximum of 20 years in prison, while he currently faces a life term.

One official in the U.S. Attorney's office said he "would be shocked" if Smith did not rule along the lines he suggested yesterday, raising the specter of the city's theft and sexual assault statutes—both passed by the District government since home rule was granted in 1973—falling by the wayside.

Smith could, however, be preempted by another Superior Court judge, Robert A. Shuker, who is expected to rule on a similar appeal before March 28, when the case over which he is presiding is scheduled to go to trial. At a hearing earlier this week, Shuker voiced similar concerns about Congress' intent when it granted the city authority over criminal code changes.

Some of prosecutors' worst fears about possible fallout from legal problems with the city's charter are beginning to come true in the city's courts, where appeals questioning the validity of D.C. criminal codes are streaming in.

Between 50 and 70 such appeals have been filed, and one prosecutor said these are "only the beginning." Concerns are mounting among attorneys for the federal government and the city that the situation will turn to chaos.

U.S. Attorney Michael W. Farrell, arguing that the Supreme Court ruling applies to home rule, yesterday conceded in court that the congressional veto of the sexual assault reform act was improper, but told Smith that the Supreme Court's ruling should not be applied retroactively and that the convictions should stand.

John H. Suda, principal deputy D.C. Corporation Counsel, argued that the Supreme Court ruling does not apply to D.C. home rule because Congress has exclusive jurisdiction over the District and can delegate its lawmaking authority to city officials as it chooses.

Officials have expressed hope that Congress will legislate a remedy to the city's charter, but even if that is done, they say, hundreds of appeals will likely be brought—and several thorny legal issues will remain—before a definitive ruling on home rule can be reached by the courts.

"Until we see some judicial guidance, we're at as much of a loss as anyone to know what to do that isn't judicially offensive," said one Justice Department official. "We're just waiting for one judge to rule so that we can take it up to the court of appeals as quickly as possible."

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White House Backs Justice No Help for D.C. Home Rule

By Ed Bruske
and Sandra Evans Teeley
Washington Post Staff Writers

The White House will stand behind efforts to tighten executive branch controls over District of Columbia lawmaking and, as long as President Reagan remains in office, will oppose the city's push for authority to appoint judges and prosecute local crimes, a senior White House official said yesterday.

"We just want to make sure the Justice Department is comfortable with the criminal provisions that are passed" by the city government, said the official, who agreed to be interviewed with the understanding that he would not be named.

In the decade since home rule was enacted, the Justice Department and the executive branch have had no official involvement in such local

legislation, though Congress has had the opportunity to review and overturn D.C. laws.

The administration also would like to have increased White House authority to find and choose candidates for city judgeships and favors lifting requirements that judicial candidates live in the District, the official said.

Currently, a judicial nominations commission picks three candidates for each vacancy, and the president nominates one of them. Former president Jimmy Carter supported shifting appointment authority to the District's mayor, and the idea has been endorsed by a number of congressmen, including some key Republicans.

"The administration has not been convinced that the federal presence

[in the District] is not unique and shouldn't be preserved," the White House official said yesterday. "I guess that rankles people who want D.C. to be a state, but there is a difference in this community."

The official acknowledged that administration policy on home rule would not advance local autonomy, but denied that it represents a reversal.

"We're not against home rule," he said. "We're not trying to turn back the clock."

The administration's push for legislation tightening controls on changes in the city's criminal code corresponds with Congress' original intent when it granted local authorities home rule more than a decade ago, the official said.

City and Justice Department officials were at an impasse again yesterday in their attempt to resolve home rule problems that arose because of a Supreme Court ruling barring legislative vetoes, the mechanism by which Congress has retained authority to overturn laws passed by the city government.

The administration's preferred approach would have Congress and the president act affirmatively on every legislative change in the D.C. criminal code. The city wants all legislation to go into effect automatically unless both houses of Congress and the president disapprove it. The two sides have been trying since last fall to reach a compromise approach to present to Congress.

On Friday, Justice rejected the city's most recent proposal to lengthen

the review period during which Congress can overturn D.C. legislation.

A proposal approved earlier by Justice and the White House to establish a "trigger" mechanism—requiring Congress and the president to affirm any criminal code change determined to involve a federal interest—is "not something [Mayor Barry] wants to buy into," said Pauline Schneider, D.C. director of inter-governmental relations.

If the Justice Department and the city ever do come to an agreement, the proposal then is likely to run into trouble in the House, which last year approved the city's preferred version.

House District Committee Chairman Ronald V. Dellums (D-Calif.) and D.C. Del. Walter E. Fauntroy "will never agree to any diminution of home rule authority," said committee majority staff director Edward C. Sylvester.

Fauntroy recently criticized the White House for not appointing more blacks and other minorities to D.C. judgeships.

The Reagan administration will resist any effort to impose "racial quotas" on the city's courts, the White House official said yesterday, and he blamed the city's judicial nominations commission for failing to nominate more qualified minority candidates for judgeships. He criticized the commission for rejecting judicial candidates sought out and supported by the White House, including blacks, he said.

"The court should have the very best that we can find," he said. "The first requirement is competence and ability, and it has nothing to do with the demographics of a community."

Schneider and the White House official said that the stalemate over home rule not only has created uncertainty in the city's courts, where defense attorneys have challenged the validity of some criminal laws under the Supreme Court's findings, but could lead to direct financial losses for the District.

Unless the legal issues clouding home rule are resolved by June 1, the city will forfeit upward of \$385,000 it already has spent on the planned issuance of moderate-housing revenue bonds. About \$30 million to purchase the bonds is being held in escrow pending a resolution of the legal issues. According to documents recently obtained by The Washington Post, those funds would revert to the purchaser on June 1 and no bonds would be issued.

28

Mathias Seeks Home Rule Settlement

Reagan Administration, District at Loggerheads

By Sandra Evans Teeley and Ed Bruske
Washington Post Staff Writers

Sen. Charles McC. Mathias (R-Md.), fed up with a stalemate in negotiations between the Reagan administration and the District government over needed changes in the Home Rule Act, has decided to step into the fray and try to force action on the issue, a Mathias aide said yesterday.

Meanwhile, U.S. Attorney Joseph diGenova said that the Justice Department has gone as far as it will go in compromising on home rule matters and has given the city its "final position," one that city officials say Mayor Marion Barry already has found totally unacceptable.

Mathias, chairman of the Senate Governmental Affairs subcommittee on the District, will call the different parties to Capitol Hill for public hearings on the issue "to really make these people settle down and discuss it," an aide to the senator said yesterday.

"That's terrific," said Pauline Schneider, D.C. director of intergovernmental relations. Schneider said that, while Mathias had made no commitment, his staff had indicated earlier he would be favorably disposed to acting on the city's latest proposal, which was just rejected by the Justice Department.

District officials had hoped Mathias, who until now has stayed on the sidelines, would act on their behalf if the administration maintained its hardline approach. The city stands to lose financially from the impasse and has few bargaining chips to take to the negotiating table.

Mathias suspended subcommittee work last fall on legislation to resolve the home rule problems when the Justice Department objected to a plan backed by the city and key congressmen and senators.

Since then, the two sides have been trying to fashion a compromise to present to Mathias' subcommittee, but this week were as far apart as ever, with each rejecting the latest proposals of the other.

"He wants to get all of the material on the record so people can see where they disagree," Mathias' aide said.

But diGenova said, "I not sure the hearings will be of any benefit . . . I would not expect the department to go any further than [it's latest proposal], and I don't think they should."

The home rule problem arose last summer because of a Supreme Court ruling barring legislative vetoes, the mechanism by which Congress has retained authority to overturn laws passed by the city government.

The Justice Department wants Congress and the president to act affirmatively on certain changes in the D.C. criminal code.

The District wants all legislation to go into effect automatically unless both houses of Congress and the president disapprove it, a procedure that would make it much more difficult for legislation to be overturned.

Last week, the Justice Department rejected a city proposal incorporating an extended congressional review period into its approach and making it easier to bring resolutions of disapproval to a vote in each house.

Instead, the department advanced a plan by which criminal code changes opposed by the attorney general could be enacted only by an affirmative vote of Congress and the signature of the president.

Schneider said that proposal—giving the executive branch almost unlimited veto power over D.C. criminal legislation—was one the mayor "categorically would not accept."

On Tuesday, a senior White House official told The Washington Post that the White House is fully behind efforts to make sure the Justice Department "is comfortable with the criminal provisions" the D.C. government passes in the future.

In addition, on Monday the administration officially knocked down an idea that the city had counted on

as a fallback position in case a final compromise could not be reached before the current Congress adjourns later this year. That proposal, originally presented to Congress last fall, was intended as a stop-gap measure to enable the city to issue bonds.

It would have verified all previously enacted laws and stated that if a court ruled the legislative veto provision of the Home Rule Act invalid the entire act would not be overturned.

Robert A. McConnell, assistant attorney general for legislative affairs, wrote to Senate Governmental Affairs Chairman William Roth (R-Del.) on Monday stating the admin-

istration's opposition to that proposal. Using such a procedure could result in D.C. Council actions becoming law without any congressional review, he said.

City officials hope that Mathias' involvement will help produce a more conciliatory attitude on the part of the administration.

House members, who last year won approval of the legislation preferred by the city, have been urging the District not to back down and not give up any home rule authority. Ironically, this means that city officials might end up having to sell a compromise they find unsavory to their friends in the House.

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An Assault on Home Rule

FOR NATIONAL consumption, the White House story is that the administration is somehow protecting the country by taking over responsibilities for fighting crime in the District and moving for new yes-or-no authority over changes in local criminal laws. In fact, President Reagan is making a high-powered assault on local democracy. He seeks tighter controls over the city's enactment of criminal laws and new power to choose candidates for local judgeships. He even wants to do away with a requirement that exists here and in every state for judges to live in the jurisdiction in which they sit.

A senior White House official says, "We just want to make sure the Justice Department is comfortable with the criminal provisions that are passed" by the city government.

Comfortable? Does not the administration realize that its latest local initiative leaves to the uninformed imagination a picture of black people and mindless liberals wallowing in crime they can't begin to control? The stereotype thus perpetuated is not only disgraceful but also dead wrong. Crime is

no worse here than in most other cities in the country. The local police department matches any other in effectiveness, technological sophistication and leadership over the decade since the District was allowed to elect its mayor and council.

The intent of Republicans and Democrats in both houses of Congress who worked on a home rule charter for the District was to allow locally elected people to perform local lawmaking functions. The charter reserved general oversight authority to Congress.

The White House official insists that "we're not trying to turn back the clock," that while all of this apparently "rankles people who want D.C. to be a state," there is "a difference in this community." But you don't have to support statehood to recognize an attempt to return to the old plantation government. It is an insult to D.C. residents who live, pay taxes and serve their country without representation in any votes on the floors of the House or Senate. It is an invasion of Congress' authority as stated in the city's charter. Congress should resist.

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Philip A. Lacovara

Dear —

Congratulations
on the recent
arrival!

Hope everything
is going well.

J.

ATTACHMENT 1

BACKGROUND INFORMATION ON A-76 COST SAVINGS

Through OMB's management review process, we identified 19,201 FTE reductions and \$451.9 million in A-76 savings that could be achieved by 1988 in non-Defense agencies. The savings estimates were extremely conservative and several agencies received no projected reductions. However, all savings were premised on implementation of the Circular and inclusion in the budget — a task many are still avoiding.

In the course of our most recent analysis of the Grace Commission's recommendations, we made our own estimate of FTE savings available if the A-76 program were accelerated within reason.

Savings through 1987

<u>Civilian Agencies</u>	<u>FTEs Studied</u>	<u>FTEs Saved</u>	<u>Dollars (millions)</u>
1985-87 Budget projection	33,000	15,235	\$272.0
Program accelerated beginning in 1985 and GSA savings reflected in charges to agencies	<u>39,000</u>	<u>15,945</u>	<u>154.7*</u>
Total	72,000	31,180	\$426.7
<u>Department of Defense</u>			
1985-87 Budget projection	30,000	reprgm	reprgm
Program accelerated with no reprogramming	<u>15,000</u>	<u>18,585</u>	<u>296.3</u>
Total	45,000	18,585	\$296.3
Grand Total	117,000	49,765	\$723.0

This still represents only 5% of the Federal civilian work force.

In the outyears, these savings will grow, as the program can be accelerated further (we estimate approximately 500,000 FTEs in commercial activities; under the current rate of review, cost studies would be completed over a 20-25 year cycle, rather than the 4 years required by A-76). Sizeable room for improvement exists, but our first step must be to increase agency support and compliance.

Presidential and Cabinet assistance for A-76 is vital for its implementation and for the attainment of its cost savings.

* Savings are spread out over 2-year periods after year A-76 study initiated. Hence, 1985-87 dollar savings from accelerated program are smaller than those available from current efforts. In outyears, the accelerated program should generate substantial additional cuts.

Hughes Hubbard & Reed

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March 27, 1984

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WRITER'S DIRECT DIAL NUMBER:

The Honorable Richard A. Hauser
Deputy Counsel to the President
The White House
Washington, D.C. 20500

Dear Dick:

Because of your interest in the District of Columbia affairs, I thought you might like to see a copy of the brief that a division of the District of Columbia Bar is asking the Board of Governors for permission to file with the District Court here, supporting the validity of the Home Rule Act, despite the presence of the legislative veto provisions.

With best regards.

Sincerely,



Philip A. Lacovara

Enclosures

David B. Isbell
President

Marna S. Tucker
President-Elect

Elizabeth Medaglia
Secretary

James E. Coleman Jr.
Treasurer



Katherine A. Mazzaferri
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David B. Dorsey
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MEMORANDUM

TO: Members of the Board of Governors

FROM: Lynne M. Lester *LM*
Administrative Assistant, Divisions Office

DATE: March 26, 1984

SUBJECT: Proposed Amicus Curiae Brief Relating to Challenges
to the District of Columbia Self-Government and
Governmental Reorganization Act

Pursuant to the Division Guidelines No. 13, Section a, the enclosed proposed public statement is being sent to you by _____
Division 6 -- District of Columbia Affairs

a (iii): "No later than seven (7) days before the statement is to be submitted to the legislative or governmental body, the Division will forward (by mail or otherwise) a one-page summary of the comments, the full text of the comments, and the full text of the legislative or governmental proposal to the Administrative Assistant for Divisions, and the one-page summary and the full text of the proposal to the Chairperson of each Division steering committee and any other D.C. Bar committee that appear to have an interest in the subject matter of the comments. The Administrative Assistant for Divisions shall help with the distribution, if requested, and shall forward a copy of the one-page summary to each member of the Board of Governors....If no request is made to the Administrative Assistant for Divisions within the seven-day period by at least three (3) members of the Board of Governors, or by a majority vote of any steering committee or committee of the D.C. Bar, that the proposed statement be placed on the agenda of the Board of Governors, the Division may submit its comments to the appropriate federal or state legislative or governmental body at the end of the seven-day period."

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a (vi): "The Board of Governors may request that the proposed comments be placed on the agenda of the Board of Governors for the following two reasons only:

(a) The matter is so closely and directly related to the administration of justice that a special meeting of the Bar's membership pursuant to Rule VI, Section 2, or a special referendum pursuant to Rule VII, Section 1, should be called, or (b) the matter does not relate closely and directly to the administration of justice, involves matters which are primarily political, or as to which evaluation by lawyers would not have particular relevance.

a (v): "Another Division or Committee of the Bar may request that the proposed set of comments by a Division be placed on the Board's agenda only if such Division or Committee believes that it has greater or coextensive expertise in or jurisdiction over the subject matter, and only if (a) a short explanation of the basis for this belief and (b) an outline of proposed alternate comments of the Division or Committee are filed with both the Administrative Assistant for Divisions and the commenting Division's Chairperson. The short explanation and outline of proposed alternate comments will be forwarded by the Administrative Assistant for Divisions to the Board of Governors."

a (vi): "Notice of the request that the statement be placed on the Board's agenda lodged with the Administrative Assistant for Divisions by any Board member may initially be telephoned to the Administrative Assistant (who will then inform the commenting Division), but must be supplemented by a written objection lodged within seven days of the oral objection."

Please call me by 5:00 p.m., Monday, April 2, 1984 if you wish to have this matter placed on the Board of Governors' agenda for Tuesday, April 10, 1984. I can be reached at the D.C. Bar at 638-1500 between 9:00 a.m. and 4:00 p.m. on Mondays through Fridays.

Enclosures

cc:

Katherine A. Mazzaferri, Esq. (w/enclosures)

DIVISION VI (DISTRICT OF COLUMBIA AFFAIRS)
DISTRICT OF COLUMBIA BAR

March 23, 1984

HAND DELIVERY

Ms. Lynne Lester
Administrative Assistant for Divisions
District of Columbia Bar
1426 H. Street, N.W. - 8th floor
Washington, D.C. 20005

RE: Amicus Curiae Brief of Division VI (D.C. Affairs)
relating to challenges to the District of Columbia
Self-Government and Governmental Reorganization Act.

Dear Lynne:

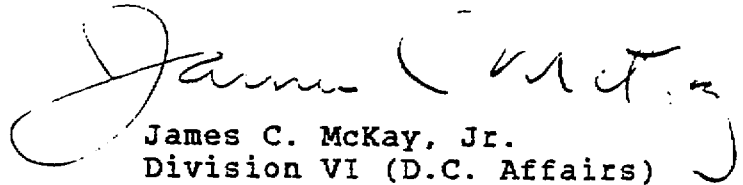
Division VI (District of Columbia Affairs) has prepared and approved through its Steering Committee the enclosed Amicus Curiae brief on the case of Dimond v. District of Columbia, with appropriate motion, which is pending before the U.S. District Court for the District of Columbia.

The brief is restricted to three areas: (1) the importance of the Self-Government Act to the citizens of the District; (2) the constitutionality of Congress's delegation of legislative authority; and (3) the severability of the challenged legislative veto provisions of the Act.

We believe that these issues closely involve the administration of justice as they bring into question the vitality of home rule in the District of Columbia. Moreover, it is our belief that Division VI (District of Columbia Affairs) possesses substantial expertise in the areas involved.

A brief summary of the position taken in the brief is enclosed. The motion to file the amicus brief includes the standard disclaimer language verbatim.

Sincerely yours,



James C. McKay, Jr.
Division VI (D.C. Affairs)
Steering Committee
1341 G Street, N.W., S. 510
Washington, D.C. 20002
724-8188

Enclosures

SUMMARY OF AMICUS CURIAE BRIEF

The brief contains three parts. Part I contains a summary of the most significant legislative provisions of the Self-Government Act and the most important legislative enactments of the Council of the District of Columbia since home rule. Part II argues that Congress's delegation to the Council of the District of Columbia under the Self-Government Act of the power to repeal or amend Acts of the Congress applicable exclusively to the District of Columbia was a correct exercise of its authority under Article I, Section 8, Clause 17 of the Constitution to "exercise exclusive legislation" over the District of Columbia. Part III argues that the provisions in Section 602(c) of the Self-Government Act that empower Congress to disapprove acts of the Council by legislative veto are severable from the remainder of the Act.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

EILEEN DIMOND, et al., :
Plaintiffs, :
v. : Civil Action No. 83-1938
DISTRICT OF COLUMBIA, et al., :
Defendants. :

MOTION OF DIVISION VI OF THE DISTRICT OF COLUMBIA BAR
FOR LEAVE TO FILE A BRIEF AS AN AMICUS CURIAE

The undersigned members of the Steering Committee of Division VI (District of Columbia Affairs) of the District of Columbia Bar respectively move for leave to file a brief as an Amicus Curiae.*

INTEREST OF APPLICANTS

Division VI of the District of Columbia Bar is the division concerned with issues relating to the laws and government of the District of Columbia. The Division has had a longstanding interest in the operation of the District under home rule. We have focused on our particular area of expertise--the interpretation of the District of Columbia Self-Government and Governmental Reorganization Act and the impact of the home rule government on the District of

*The views expressed herein represent only those of Division VI (District of Columbia Affairs) of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

Columbia. We take the position that the Self-Government Act is valid. The action in question, in our view, poses a potential threat to the effective operation of the District Government under home rule to the extent that arguments presented challenge the authority of the Council of the District of Columbia to exercise the legislative power of the District pursuant to the Self-Government Act.

CONCLUSION

Because of our interest and for the reasons stated in the accompanying Memorandum of Points and Authorities, we respectfully request that our motion to file a brief as Amicus Curiae be granted.

Respectfully submitted,

Jacquelyn V. Helm
Bar No. 965228

Cynthia A. Giordano
Bar No. 290973

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Members of the Steering Committee
Division VI (D.C. Affairs) of the
District of Columbia Bar

UNITED STATES DISTRICT COURT
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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE
MOTION OF DIVISION VI OF THE DISTRICT OF COLUMBIA BAR
FOR LEAVE TO FILE A BRIEF AS AN AMICUS CURIAE

The decision whether to permit the filing of a brief amicus curiae is within the sound discretion of the Court. See 4 Am.Jur.2d Amicus Curiae, §§1-3. The sole purpose of the motion is to provide a detailed analysis of the issues with broad implications for home rule for the benefit of the Court. The District Court has permitted the filing of amicus briefs by bar organizations in other cases involving the public interest. See, e.g., Christopher v. Mitchell, 318 F.Supp. 994 (D.C.D.C. 1970), vacated, 401 U.S. 902 (1971); Public Citizen v. Sampson, 379 F.Supp. 662 (1974), aff'd, 169 U.S.App.D.C. 301, 515 F.2d 1018 (1975).

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ORDER

Upon consideration of the motion of Division VI of the District of Columbia Bar to file a brief as an Amicus Curiae, it is

ORDERED that the motion be, and is hereby, granted.

UNITED STATES DISTRICT JUDGE

Date: _____

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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AMICUS CURIAE BRIEF OF DIVISION VI OF THE
DISTRICT OF COLUMBIA BAR (DISTRICT OF COLUMBIA AFFAIRS)

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AMICUS CURIAE BRIEF OF DIVISION VI OF THE
DISTRICT OF COLUMBIA BAR (DISTRICT OF COLUMBIA AFFAIRS)

PRELIMINARY STATEMENT

This action challenges the authority of the District of Columbia Government to exercise its legislative authority under the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973), (hereinafter the "Self-Government Act"). Since the issues in this case have far reaching ramifications for the vitality of home rule in the District of Columbia, Part I of this brief begins with an assesment of the impact of the Self-Government Act on the District of Columbia. Part II will show that Congress possessed the power to delegate local legislative authority to the District Government, including the authority to repeal Acts of Congress applicable exclusively to the District. And Part III will demonstrate the severability of the challenged provisions of the Self-Government Act.

UNITED STATES DISTRICT COURT
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AMICUS CURIAE BRIEF OF DIVISION VI OF THE
DISTRICT OF COLUMBIA BAR (DISTRICT OF COLUMBIA AFFAIRS)

PRELIMINARY STATEMENT

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Our brief will be restricted to three areas. These are (1) the impact of the Self-Government Act on the District of Columbia; (2) the power of Congress to delegate to the District Government the authority to repeal congressional enactments applicable exclusively to the District; and (3) the severability of the challenged provisions of the Self-Government Act.

I.

The Self-Government Act has had an
Inestimable Impact on the District of Columbia

The enactment of the Self-Government Act is perhaps the most significant legislative act in the history of the District of Columbia. The act, which represents the culmination of more than 25 years of legislative debate, affects directly the lives of all of those who live in, work in, or visit the District. In the 9 years since its effective date, the Council of the District of Columbia has enacted 725 permanent laws pursuant to the authority delegated to it by the Act.¹ Should the validity of the Self-Government Act as a whole be successfully challenged, unimaginable chaos would result, as the myriad rights, duties and programs established by those acts--and the actions taken pursuant to those acts--would be subject to question.

The Self-Government Act places primary responsibility for administering the District Government in a popularly elected Mayor,² and primary legislative responsibility in a 13-member locally elected legislature, the Council of the the District of Columbia.³ Apart from establishing

1. A complete list of those laws is contained in Appendix A to this brief.

2. Self-Government Act, §401, D.C. Code, §1-242.

3. Id. §422, D.C. Code, §1-221.

the elected Mayor/Council form of government, the Act also created the Judicial Nomination Commission, which governs selection of local judges;⁴ the Advisory Neighborhood Commissions, which are designed to provide greater community input into District affairs;⁵ and the Office of the D.C. Auditor, who is charged with the responsibility from conducting a thorough annual audit of the accounts and operations of the government.⁶ Primary responsibility for local planning was transferred from the federal government to the Mayor and the Council,⁷ and the functions and composition of the National Capital Planning Commission were drastically revised.⁸ In addition, the Act established as independent agencies of the District Government, the Board of Elections, the Zoning Commission, the Public Service Commission, the Armory Board, and the Board of Education.⁹ The Redevelopment Land Agency, the National Capital Housing Authority, and the Manpower Administration

4. Id. §434, D.C. Code, title 11, app. at 621.

5. Id. §738, D.C. Code, §1-251.

6. Id. §455, D.C. Code, §47-117.

7. Id. §423, D.C. Code, §1-244.

8. Id. §203, D.C. Code, §§1-202, 1-2003 to 1-2006.

9. Id. §§491 to 495, D.C. Code, §§1-1303; 5-412; 43-402; 2-302; 31-101.

were established as instrumentalities of the District, rather than the federal government by the Self-Government Act.¹⁰

In addition to the significance of the legislation contained in the Self-Government Act itself, the elected legislative body spawned by the passage of the Act has enacted over 700 legislative measures. These acts of the Council affect life in the District of Columbia from the moment of birth to the instant of death, and afterwards. Policy determinations by the Council decided questions of parentage,¹¹ how a birth is recorded,¹² and who may assist in the delivery.¹³ Other legislative measures set standards to protect against child abuse and neglect,¹⁴ govern the payment of child support,¹⁵ expand the range of

10. Id. §§204, 201, 202, D.C. Code, §5-804; D.C. Code, §5-102; D.C. Code, §1-203.

11. D.C. Law 1-107, District of Columbia Marriage and Divorce Act (eff. Apr. 7, 1977).

12. D.C. Law 4-34, Vital Records Act of 1981 (eff. Oct. 8, 1981).

13. D.C. Law 5-48, Health Care and Community Residence Facility Hospice and Home Care Licensure Act of 1983 (eff. Feb. 24, 1984).

14. D.C. Law 2-22, title IV, Neglect Proceedings Amendment Act of 1977, title V, Prevention of Child Abuse and Neglect Act of 1977 (eff. Sep. 23, 1977).

15. D.C. Law 1-92, District of Columbia Paternity and Child Support Amendment Act (eff. Mar. 29, 1977).

educational and job opportunities,¹⁶ and benefits,¹⁷ and determine the legal age of majority.¹⁸ Such ordinary aspects of daily living as how much rent is owed,¹⁹ the wages paid for work performed,²⁰ the range of hospital

16. D.C. Law 1-36, District of Columbia Postsecondary Education Reorganization Act Amendments (eff. Nov. 1, 1975); D.C. Law 2-152, School Transit Subsidy Act of 1978 (eff. Mar. 3, 1979); D.C. Law 1-95, Minority Contracting Act of 1976 (eff. Mar. 29, 1977); D.C. Law 3-91, Minority Contracting Act Amendments of 1980 (eff. Sep. 13, 1980); D.C. Law 4-167, Minority Contracting Acts of 1976 Amendments Act of 1972 (eff. Mar 9, 1983); D.C. Law 3-46, Youth Employment Act of 1979 (eff. Jan 5, 1980); D.C. Law 4-124, Youth Employment Act of 1979 Amendment Act of 1983 (eff. Jul. 2, 1982); D.C. Law 4-193, Youth Employment Act of 1979 Amendments/Job Skills and Placement Programs for Public Housing Residents Act of 1982 (eff. Mar. 10, 1983).

17. D.C. Law 1-32, District of Columbia Minimum Wage Amendments Act of 1975 (eff. Nov. 1, 1975); D.C. Law 2-129, District of Columbia Unemployment Compensation Act Amendments of 1979 (eff. Mar. 3, 1979); D.C. Law 3-77, District of Columbia Worker's Compensation Act of 1979 (eff. Jul. 1, 1980); D.C. Law 4-102, District of Columbia Workers' Compensation Act of 1982 (eff. Apr. 22, 1982); D.C. Law 4-147, Unemployment Trust Fund Revenue and Conformity Act of 1982 (eff. Sep. 17, 1982); D.C. Law 5-3, District of Columbia Unemployment Compensation Act Amendment Act of 1983 (eff. May 7, 1983).

18. D.C. Law 1-75, District of Columbia Age of Majority Act (eff. Jul. 22, 1976).

19. D.C. Law 2-54, Rental Housing Act of 1977 (eff. Dec. 15, 1977); D.C. Law 3-106, Rental Housing Act of 1977 Extension Act of 1980 (eff. Sep. 26, 1980); D.C. Law 3-131, Rental Housing Act of 1980 (eff. Mar. 4, 1981); D.C. Law 4-26, Rental Housing Act of 1980 (eff. Mar. 4, 1981); D.C. Law 4-26, Rental Housing Act of 1980 Amendments Act of 1981 (eff. Aug. 1, 1981)

20. D.C. Law 1-32, District of Columbia Minimum Wage Amendments Act of 1975 (eff. Nov. 1, 1975).

services available,²¹ the confidentiality of mental health records,²² who may marry and when (as well as the legal bases for divorce),²³ the price of automobiles²⁴ and credit card fees,²⁵ who may incorporate a business,²⁶ and the availability of home ownership²⁷--all have been the subject of recent local legislation. Changes have been made, as well, in establishing an official definition

21. D.C. Law 5-48, Health Care and Community Residence Facility, Hospice and Home Care Licensure Act of 1983 (eff. Feb. 24, 1984); D.C. Law 3-99, District of Columbia Certificate of Need Act of 1980 (eff. Sep. 15, 1980); D.C. Law 1-134, D.C. General Hospital Commission Act (eff. May 13, 1977); D.C. Law 2-89, D.C. General Hospital Commission Act Amendments of 1978 (eff. Jun. 30, 1978); D.C. Law 3-65, District of Columbia Newborn Screening Requirement Act of 1979 (eff. Apr. 29, 1980).

22. D.C. Law 1-136, District of Columbia Mental Health Information Act of 1978 (eff. Mar. 3, 1979).

23. D.C. Law 1-107, District of Columbia Marriage and Divorce Act (eff. Apr. 7, 1977).

24. D.C. Law 3-135, Motor Vehicle Finance Charge Amendments Act of 1980 (eff. Mar. 5, 1981).

25. D.C. Law 5-62, Interest Rate Amendment Act (eff. Mar. 14, 1984); D.C. Law 4-70, Consumer Credit Interest Rate Amendments Act of 1981 (eff. Mar. 10, 1982).

26. D.C. Law 2-117, District of Columbia Business Corporation Act Amendments of 1978 (eff. Oct. 13, 1978).

27. D.C. Law 3-38, Interest Rate Modification Act of 1978 (eff. Nov. 20, 1979); D.C. Law 5-62, Interest Rate Amendment Act of 1973 (eff. Mar. 14, 1984); D.C. Law 2-135, District of Columbia Housing Finance Agency Act (eff. Mar. 3, 1979); D.C. Law 4-44, Home Purchase and First Right Assistance Fund Act Amendments Act of 1971 (eff. Oct. 25, 1981); D.C. Law 4-28, District of Columbia Housing Finance Agency Act Amendments Act of 1971 (eff. Aug. 5, 1981).

of death,²⁸ determining what means can be used to prevent the unnecessary prolonging of life against a person's expressed wishes,²⁹ deciding how wills are made and estates administered³⁰ concerning the disposition of bodies and body parts,³¹ and aiding the discovery of legitimate heirs.³²

One of the most prolific areas of legislative action since the enactment of the Self-Government Act has been in the area of tax reform. The Council has enacted numerous revision measures in the areas of income tax, real property tax, sales tax, personal property tax, and business taxation.

Perhaps the most important tax reform measures to date have dealt with the District's individual income tax. Prior to home rule, the District's income tax had not been comprehensively revised since 1947. At first, a number of minor measures were adopted to address the need for a more

28. D.C. Law 4-68, Uniform Determination of Death Act of 1981 (eff. Feb. 25, 1982).

29. D.C. Law 4-69, Natural Death Act of 1971 (eff. Feb. 25, 1982).

30. D.C. Law 3-72, District of Columbia probate Reform Act of 1980 (eff. Jun. 24, 1980).

31. D.C. Law 3-145, District of Columbia Tissue Bank Act Amendments of 1980 (eff. Mar. 5, 1981); D.C. Law 3-145, District of Columbia Tissue Bank Act Amendments of 1980 (eff. Mar. 5, 1981); D.C. Law 4-199, Christmas Tree Act of 1982 (eff. Mar. 10, 1983).

32. D.C. Law 3-72, District of Columbia Probate Reform Act of 1980, eff. Jun. 24, 1980.

modern statute. The Revenue Act of Fiscal Year 1978, D.C. Law 1-124 (eff. Apr. 19, 1977) brought the District's itemized deductions into greater conformity with the federal tax code in such areas as interest deductions, deductions for taxes paid, medical expense deductions, alimony, and child care. The Act to provide certain deductions for deed recordation taxes and motor vehicle fees and for the accelerated payments of taxes on insurance premium receipts, D.C. Law 2-18 (eff. Sep. 23, 1977), as the name implies, further expanded allowable income tax deductions. The District of Columbia Charitable Organizations Conformity Tax Act of 1978, D.C. Law 2-147 (eff. Mar. 3, 1979), conformed the District's income tax exemption for charitable organizations to that of the federal tax code as it relates to permitted political activities. The Tax Return Confidentiality Act of 1978, D.C. Law 2-158 (eff. Mar. 6, 1979), expanded the scope of the confidentiality provisions of District law and increased the penalty for a violation of such confidentiality.

A more complete and comprehensive revision of the District's individual income tax law was adopted by the Council in 1982. The District of Columbia Individual, Estates and Trusts Federal Conformity Tax Act of 1982, D.C. Law 4-118 (eff. Jun. 11, 1982), effective for tax years beginning after December 31, 1981, adopted the federal definitions of "gross income" and "adjusted gross income"

and conformed District law to most of the federal itemized deductions, in effect for tax year 1981. The major areas of this conformity included adoption of the federal treatment of the dividend exclusion, Keogh Plans, IRA accounts, deductions for TIAA and CREF contributions, taxation of annuities, exclusions for scholarships and fellowships, deductions for moving expenses, tax treatment of reduced military retirement pay and supplemental railroad retirement annuities, charitable contributions, credits for political Campaign contributions, and interest exclusion for All Savers Certificates. This conformity was continued by the amendments made by the District of Columbia Income and Franchise Tax Conformity Act of 1983, D.C. Law 5-32 (eff. Oct. 8, 1983), which included adoption of a reduction in the allowable casualty loss deduction, expansion of the deduction for adoption expenses, expansion of the depreciation deduction, repeal of the increase in personal property accelerated cost recovery rates for personal property placed in service in or after 1985, and reduction in the exclusion of payments received as unemployment compensation.

Second only to the individual income tax in the breadth of changes enacted is the District's real property tax. Under the District of Columbia Real Property Tax Revision Act of 1974, Pub. L. 93-407, 88 Stat. 1051 (1974), enacted by Congress, all taxable real property in the District was

taxed at the rate of \$1.83 per \$100 of assessed value. The Residential Property Tax Relief Act of 1977, D.C. Law 2-45 (eff. Feb. 28, 1978), established a \$6,000 deduction from the assessed value of single family and cooperative owned residential property. This deduction was later increased to \$9,000 by the District of Columbia Renters and Homeowners Tax Reduction Act of 1978. D.C. Law 2-130 (eff. Mar. 3, 1979). The Homeowners Deduction Application Act, D.C. Law 4-129 (eff. Jul. 24, 1982), revised the manner in which the deduction is granted by making the deduction, once granted, good for 5 years at a time, rather than requiring yearly application. The Property Tax Deferral Reform Act of 1978, D.C. Law 2-119 (eff. Oct. 13, 1978) increased the maximum allowable amount of increased taxes plus interest on certain residential property upon which payment may be deferred until the house is sold or otherwise transferred. The Real Property Tax Deferral Simplification Act of 1982, D.C. Law 4-129 (eff. Jul. 24, 1982), further revised this deferral program to allow the transfer of property on which taxes had been deferred, to family members without having the taxes come due and removed the income limitations on persons qualifying for participation in this program. Finally, the real property in the District was subdivided into classes for purposes of taxation with a separate tax rate applied to each class. The District of Columbia Renters and Homeowners Tax Reduction Act of 1978, D.C. Law 2-130 (eff. Mar. 3,

1979) established two classes of real property, and this was expanded to a three class system by the Real Property Tax Classification Act for Tax Year 1980, D.C. Law 3-37 (eff. Nov. 20, 1979).

Important legislative changes in other tax areas include an increase in the sales and use tax rate from 5% to 6%,³³ the imposition of a sales and use tax rate on motor vehicle parking from,³⁴ a repeal of the 2% sales and use tax rate on food,³⁵ an increase in the types of medical equipment exempt from the sales and use tax,³⁶ the creation of a 1% tax on the transfer for real property,³⁷ the creation of a nightly hotel occupancy tax,³⁸ increases in the per gallon tax on motor vehicle fuels,³⁹ an

33. D.C. Law 3-92, District of Columbia Revenue Act of 1980 (eff. Sep. 13, 1980).

34. D.C. Law 1-23, Revenue Act of 1975 (eff. Oct. 21, 1975); D.C. Law 1-70, Revenue Act of 1976 (eff. Jun. 15, 1976).

35. Id.

36. D.C. Law 4-133, Medical Equipment Sales Tax Exemption Act of 1982 (eff. Aug. 14, 1982).

37. D.C. Law 3-92, District of Columbia Revenue Act of 1980 (eff. Sep. 13, 1980).

38. D.C. Law 2-58, Hotel Occupancy and Surtax on Corporations and Unincorporated Business Tax Act of 1977 (eff. Mar. 16, 1978); D.C. Law 4-137, The Hotel Occupancy Tax Increase Act of 1982 (eff. Aug. 14, 1972).

39. D.C. Law 1-23, Revenue Act of 1975 (eff. Oct. 21, 1975).

increase in the gross receipts tax on public utilities,⁴⁰ and a change in the manner in which financial institutions are taxed by repealing the gross receipts tax applicable to them and replacing it with a franchise tax and a personal property tax.⁴¹

The scope and implementation of the local tax laws have been dramatically changed by these legislative measures. Perhaps, more importantly, the relative liability of District taxpayers has shifted substantially in the years since the enactment of the Self-Government Act. For example, the numerous changes made in the property tax have not only lowered the rate and created three tax rate categories, but also have provided tax relief to certain groups of homeowners through the circuit breaker provision for senior citizens, the circuit breaker provision for low income persons, the homestead exemption, and the tax deferral program. Simply identifying what taxes are owned and by whom under a reversion to the the pre-home rule tax laws, should such reversion occur, would be a Herculean task

40. D.C. Law 5-14, District of Columbia Revenue Act of 1983 (eff. Jun. 22, 1983).

41. D.C. Law 3-95, District of Columbia Financial Institutions Tax Act of 1980 (eff. Sep. 13, 1980); D.C. Law 4-150, International Banking Facilities Tax, District of Columbia Redevelopment Act of 1945 Act amendments, and Cable Television Communications Act of 1982 Technical Clarification Amendment Act of 1982 (eff. Sep. 17, (1982)).

and would throw into question the legal liabilities of all District taxpayers and the government for years to come.

Another area of significant local legislative activity has been the area of criminal code reform. Under the Self-Government Act, the transfer of primary legislative authority to the District over the criminal code was delayed until 1979.⁴² Although the time span of local authority over criminal code offenses has been relatively short, major legislative measures in this area have been enacted due, in large part, to the critical need for reform. As the chairmen of the House Subcommittee on Judiciary and the Senate Subcommittee on Governmental Efficiency and the District of Columbia pointed out in their joint letter, dated December 5, 1978, transferring this criminal code authority:

The present criminal law of the District of Columbia is an outdated relic of mosaic statutes, cases, and administrative interpretations passed into law, in a piecemeal fashion, over a period of time that stretches from 1901 to the present. Time has changed the social mores and standards by which we live today. The criminal laws of the District have not kept pace with that change.

During the past several years under the home rule form of government, significant changes have indeed been made. The District of Columbia Theft and White Collar Crimes Act of 1982, D.C. Law 4-122 (eff. Dec. 1, 1982), completely

42. Self-Government Act, §602(a)(9), D.C. Code, 1-227(a)(9), delayed the Council's authority over titles 22, 23, and 24 of the D.C. Code.

overhauled the criminal law on bribery, obstructing justice, embezzlement, larceny, receiving stolen goods, perjury and related offenses, and, of course, theft and fraud. This legislation also added new offenses, such as shoplifting, trafficking in stolen property, and commercial piracy, changed the criminal penalties imposed for certain crimes against senior citizens, and repealed the local criminal libel statutes.

The District of Columbia Bail Amendment Act of 1982, D.C. Law 4-152 (eff. Sep. 17, 1982), changed the preventive detention statutes, increased the time period during which a parole or probation violator could be detained, and permitted the detention of any person charged with first degree murder who poses a danger to the community or is likely to flee. Similar legislation had been introduced in Congress before the transfer of criminal authority, but had not been acted upon. The District of Columbia Sentencing Improvements Act of 1981, D.C. Law 4-202 (eff. Mar. 10, 1983), reinstated split sentencing the District, set standards promoting the use of restitution and community service as a sentencing option, and contained a number of other procedural reforms. The District of Columbia Criminal Statute of Limitations Act of 1983, D.C. Law 4-104 (eff. Apr. 30, 1982) established, for the first time, a local statute of limitation for criminal offenses, including special provisions extending the statute of limitations for fraud, official misconduct, and fiduciary trust crimes.

The District of Columbia Mandatory-Minimum Sentences Initiative Act of 1981, D.C. Law 4-166 (eff. Mar. 9, 1983), passed by the citizens of the District by a citywide vote, imposed, as the name implies, mandatory minimum sentences upon persons convicted of committing certain crimes while armed and certain drug offenses. The District of Columbia Protection of Minors Act of 1982, D.C. Law 4-173 (eff. Mar. 9, 1982), prohibited persons from using a minor in sexual performances or promoting sexual performances by minors, the Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982, D.C. Law 4-203 (eff. Mar. 10, 1983), the District of Columbia Repeal of the Death Penalty Act of 1980, D.C. Law 3-113 (eff. Feb. 26, 1981), and the Control of Prostitution and Sale of Controlled Substances in Public Places Criminal Control Act of 1981, D.C. Law 4-57 (eff. Dec. 10, 1981) are other examples of criminal legislation recently enacted by the Council.

Collectively, these legislative actions, together with related criminal law measures, such as the District of Columbia Uniform Controlled Substances Act of 1981, D.C. Law 4-29 (eff. Aug. 5, 1981), and the Drug Paraphernalia Act of 1982, D.C. Law 4-149 (eff. Sep. 17, 1982), have radically changed the operations of the local criminal justice system in the years since the advent of home rule.

Another major enactment in the criminal area was the District of Columbia Traffic Adjudication Act, D.C. Law 2-104 (eff. Sep. 28, 1981), which decriminalized all parking

and minor moving traffic violations and established a mechanism for the administrative adjudication of these offenses. Over 500,000 of cases have been adjudicated by the Bureau of Traffic Adjudication, rather than the Superior Court, under this act since 1978.

The more than 700 measures enacted by the Council and the voters of the District of Columbia during the past several years not only reflect local concerns and priorities, but also relieve the Congress of the burden of legislating on strictly local, and oft-times somewhat trivial, matters, when viewed in the context of Congress's national legislative agenda. In transferring primary legislative authority over local affairs to the District, the Council was empowered to act not only in the capacity of a "state" and "county" legislature, but also in the capacity of a municipal legislature. A quick review of some of the legislative measures enacted by the Council, as well as the ones mentioned above, illustrates the extent to which the transfer of primary legislative authority has achieved the goal of "relieving Congress of the burden of legislating upon essentially local matters." Self-Government Act, §102(a), D.C. Code, §1-201(a); see McIntosh v. Washington, D.C. App., 395 A.2d 744, 753 (1978).

During the past several years, the Council has enacted legislation governing the proper display of the District

flag,⁴³ naming bridges and other public places,⁴⁴ establishing boundaries for Advisory Neighborhood single member districts,⁴⁵ regulating public conduct on public passenger vehicles,⁴⁶ setting surveyor user and notary public charges,⁴⁷ prohibiting smoking in public places,⁴⁸ controlling noise pollution and the public conduct of animals and their owners,⁴⁹ regulating the use of lie detectors,⁵⁰ establishing air quality and soil

43. D.C. Law 4-121, the District of Columbia Flag Display Act of 1982 (eff. Jul. 1, 1982).

44. D.C. Law 4-56, Community Park West Designation Act of 1981 (eff. Dec. 10, 1981); D.C. Law 4-192, Windon Place, Northwest, Designation Act of 1982 (eff. Mar. 10, 1983).

45. D.C. Law 5-13, Advisory Neighborhood Commission Boundaries Act of 1983 (eff. Jun. 22, 1983).

46. D.C. Law 1-18, Act To Regulate Public Conduct on Public Passenger Vehicles (Sep. 23, 1975).

47. D.C. Law Surveyor User Charges Act of 1978 (eff. Mar. 3, 1979); D.C. Law 5-52, Notaries Public Fee Act of 1983 (eff Mar. 8, 1984).

48. D.C. Law 3-22, District of Columbia Smoking Restriction Act of 1979 (eff. Sep. 28, 1979).

49. D.C. Law 3-30, Animal Control Act of 1979 (eff. Sep. 18, 1979); D.C. Law 3-97, Animal Control Act Amendments of 1980 (eff. Sep. 16, 1980); D.C. Law 2-53, District of Columbia Noise Control Amendments Act of 1979 (eff. Sep. 28, 1979).

50. D.C. Law 2-154, Prevention of the Administration of Lie Detections Procedures Act of 1978 (Mar. 6, 1979).

erosion and sedimentary standards,⁵¹ proscribing the use of lead-based paints,⁵² regulating the conduct of second hand dealers, hearing aid dealers, health spa facilities, public accountants, pharmacists, real estate brokers, midwives, beauty shop and barber facilities and other business professionals and occupations,⁵³ regulating the removal of abandoned automobiles and the height, size, and type of materials used in enclosed outdoor sidewalk cafes,⁵⁴ setting threshold eligibility standards and payment levels for families receiving Aid to Families with

51. D.C. Law 2-23, Soil Erosion and Sedimentation Control Act of 1977 (eff. Sep. 28, 1977); D.C. Law 2-133, Air Quality Control Regulations Amendment No. 3 of 1979 (eff. Mar. 3, 1979); D.C. Law 2-151, Air Quality Amendment Act No. 2 of 1978 (eff. Mar. 6, 1979); D.C. Law 4-143, District of Columbia Soil and Water Conservation Act of 1978 (eff. Sep. 14, 1982).

52. D.C. Law 2-28, Public Property Lead Elimination Act of 1977 (eff. Sep. 28, 1977); D.C. Law 5-35, Lead Based Paint Poisoning Prevention Act of 1983 (eff. Sep. 8, 1983).

53. D.C. Law 4-15, Secondhand Dealers Regulations and Rental Housing Act of 1980 Clarification Act of 1981 (eff. Jul. 14, 1981); D.C. Law 3-137, District of Columbia Beauty Shop and Barber Facilities Operation Extension Act of 1980 (eff. Mar. 5, 1981); D.C. Law 3-98, District of Columbia Pharmacist and Pharmacy Regulation Act of 1980 (eff. Sep. 16, 1980); D.C. Law 2-59, District of Columbia Public Accountancy Act of 1988 (eff. Mar. 15, 1978); D.C. Law 2-33, Hearing Aid Dealers and Consumers Act of 1977 (eff. Sep. 26, 1977); D.C. Law 5-48, Health Care and Community Residence Facility, Hospice and Home Care Licensure Act of 1983 (eff. Feb. 24, 1984); D.C. Law 1-62, Health Spa Consumer Protection Act (eff. Apr. 15, 1976); DC. Law 4-209, District of Columbia Real Estate Licensure Act of 1982 (eff. Mar. 10, 1983).

54. D.C. Law 4-146, Abandoned or Unauthorized Vehicle Removal and District of Columbia Public Assistance Act Amendment Act of 1982 (eff. Sep. 15, 1982); D.C. Law 4-148, Enclosed Sidewalk Cafe Act of 1982 (eff. Sep. 14, 1982).

Dependent Children assistance,⁵⁵ establishing minimum medigap insurance requirements,⁵⁶ regulating the use of security alarm systems and the management of the Washington Convention Center,⁵⁷ providing standards for harbor and boating safety,⁵⁸ and regulating the titling of boats.⁵⁹

These are some examples of the myriad enactments by the Council under home rule. These laws pervade nearly every facet of the lives of the citizens of the District. They have created a multitude of rights, duties and liabilities and are the basis of countless administrative adjudications, trials, and other official actions.

55. D.C. Law 3-3, Public Assistance Payments Act of 1979 (eff. Jun. 7, 1979); D.C. Law 4-79, Aid to Families with Dependent Children Federal Conformity Act of 1981 (eff. Mar. 16, 1982); D.C. Law 4-101, District of Columbia Public Assistance Act of 1982 (eff. Apr. 6, 1982); D.C. Law 4-209, District of Columbia Public Assistance Act of 1982 Personal Needs Allowance Amendments Act of 1982 (eff. Mar. 10, 1983); D.C. Law 2-97, Amendment Eligibility Regulations for AFDC by Reason of the Unemployment of the Father Act of 1978 (eff. Aug. 12, 1978).

56. D.C. Law 5-12, Medicare Supplement Insurance Act of 1983 (eff. Jun. 22, 1983).

57. D.C. Law 3-107, Security Alarm Systems Regulations Act of 1980 (eff. Sep. 25, 1980); D.C. Law 5-54, Washington Convention Center Management Act of 1978 Amendment Act of 1983 (eff. Mar. 14, 1984).

58. D.C. Law 3-25, Harbor and Boating Safety Act of 1978 (eff. Sep. 28, 1979).

59. D.C. Law 5-58, District of Columbia Board Titling Act of 1983 (eff. Mar. 14, 1984).

II.

Congress's Delegation of Authority to the District Government to Repeal Acts of Congress Applicable Exclusively to the District was a Valid Exercise of its Constitutional Authority

The Self-Government Act plainly gives the District Government the authority not only to enact new local legislation, but also to enact legislation to amend or repeal Acts of Congress applicable exclusively to the District. The basic delegation of legislative authority, though subject to specific limitations, is very broad:

Except as provided in sections 601, 602, and 603 [D.C. Code, §§1-206, 1-233, 47-313], the legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act subject to all the restrictions and limitations imposed upon the States by the tenth section of the first article of the Constitution of the United States.

Self-Government Act, Section 302; D.C. Code, §1-204.

(Emphasis added.)

An examination of one of the specific limitations on this authority leaves no doubt as to the congressional intent. Section 602(a)(3), prohibits the Council from:

. . . "enact[ing] any act, or 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, §1-233(a)(3). This provision necessarily implies that the Council possesses the authority to "amend or repeal" an Act of Congress which is "restricted in its

application exclusively in or to the District," provided that this was not barred by another specific limitation. See District of Columbia v. Greater Washington Central Labor Council, D.C. App., 442 A.2d 110 (1982), cert. denied, 103 S.Ct. 1282 (1983), which upheld the authority of the Council to repeal an Act of the Congress that had made the federal Longshoremen and Harbor Worker's Act applicable to the District of Columbia. The conclusion that Congress gave the District Government this authority is confirmed by an examination of the legislative history of the Act.⁶⁰

Nor is there any merit in the argument that Congress lacked the constitutional power to delegate this authority to the District Government. In enacting the Self-Government Act, Congress exercised its power under Article I, Section 8, Clause 17, of the Constitution "[t]o exercise exclusive legislation in all cases whatsoever" over the District of Columbia. For over 30 years, it has been settled that this clause authorized Congress to delegate its legislative

60. See, e.g., Markup of Subcommittee Discussion Draft No 1, May 21, 1973) (Markup of Full Committee Draft, July 7, 1973), reprinted in Staff of the House District of Columbia Committee, Home Rule for the District of Columbia, Background and Legislative History of H.R. 9056, H.R. 9682, and Related Bills Culminating in the District of Columbia Self-Government and Governmental Reorganization Act, 93d Cong., 2d Sess. (Committee Print 1974) (hereinafter, "Home Rule History") at 1035-1037; D.C. Committee Request of Rules Committee for Rule to Take up H.R. 9682 on the Floor, October 2, 1973), Home Rule History at 1777-1778.

power over the District to a local government. In District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953), the Supreme Court upheld the validity of the Organic Act of February 21, 1871, 16 Stat. 419, which had created the short-lived Legislative Assembly of the District of Columbia. Although the Organic Act, as the Self-Government Act, contained certain specific limitations, the basic grant of legislative power was stated in virtually identical language:

. . . "[T]he legislative power of the District shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this Act subject to all the restrictions and limitations imposed upon the States by the tenth section of the first article of the Constitution of the United States.

Organic Act, §18, 16 Stat. 423; Self-Government Act, §302, D.C. Code, §1-204 (1981). Therefore, the decision in John R. Thompson, Inc. applies with full force to Congress's grant of legislative authority to the District under the Self-Government Act.⁶¹ The great breadth of Congress's

61. There is little question that the Organic Act empowered the Legislative Assembly to amend or repeal Acts of Congress applicable exclusively to the District, subject to specific limitations. This conclusion is implicit in various sections of the Organic Act, which gave the Legislative Assembly the power, for example, "to provide for the appointment of as may justices of the peace and notaries public for said District as may be deemed necessary, to define their jurisdiction and prescribe their duties" (§24); "to pass laws modifying the practice [of the judicial courts of the District]" but not changing their organization (§25); "to create by general law, modify, repeal, or amend, within said District, corporations aggregate for religious, (Footnote continued on next page.)

authority to delegate its legislative power was reaffirmed in the more recent decision of Palmore v. United States, 411 U.S. 389, 389 (1973).

It has been suggested that the Supreme Court's decision in Immigration and Naturalization Service v. Chadha, 462 U.S. ___, 103 S.Ct. 2764 (1983), requires acts of the Council repealing Act of Congress applicable exclusively to the District to be presented to the President under Article I, Section 7 of the Constitution. However, nothing in the holdings of Chadha--or the two decisions of similar effect in the D.C. Circuit Court that were affirmed by the Supreme Court--Consumer Energy Council of America v. Federal Energy Regulation Commission, 218 U.S.App.D.C. 34, 44, 673 F.2d 425, 435 (1982), aff'd sub nom. Process Gas Consumers Group v. Consumers Energy Council of America, 463 U.S. ___, 103 S.Ct. 3556 (1983) and Consumers Union of the United States, Inc. v. Federal Trade Commission, 223 U.S.App.D.C. 386, 691 F.2d 575 (1982), aff'd, 463 U.S. ___, 103 S.Ct. 3556 (1983)--would preclude Congress from delegating legislative authority over the District to the Council and Mayor in a

(Footnote continued from previous page.)
charitable, educational, industrial, or commercial purposes, and to define their powers and duties (§28). Act of Feb. 21, 1871, 16 Stat. 424-425, reprinted in D.C. Code, vol I, p. 98-99 (1981). See Newman & Depuy, Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act, 24 Amer. Univ. L. R. 537, 724-744 (1975) for a list and summary of the Acts of the Legislative Assembly.

manner that excludes the President from a role in the exercise of this delegated authority.⁶²

Chadha, Consumer Energy Council, and Consumers Union dealt with the extent to which Congress could retain control over a delegation once made. They did not decide the issue of whether Congress could make the delegation in the first place. In Chadha the Court simply voided Congress's attempt to retain the power to overrule the exercise of this authority, stating that "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked." 103 S.Ct. 2784-88. As Chadha makes clear, the President's authority to veto Acts of Congress under Article I, Section 7 was intended as a procedural safeguard against Congress's exercise of the legislative power. It is not an inherent executive function. See Buckley v. Valeo, 424 U.S. 1, 285 (1976) ("the President's veto power, which gives him an important role in the legislative process, was obviously not

62. Section 404(e) of the Self-Government Act originally gave the President the authority to reinstitute a mayoral veto that had been overridden by a vote of two-thirds of the Council. See D.C. Code, §1-144(e) (Supp. V, 1978). The power was exercised only once--when President Ford reinstated Mayor Washington's veto of the Act 1-88 of the Council, the Shop-Book Rule Act on the grounds that it infringed upon the rulemaking powers of the D.C. Courts guaranteed under the Self-Government Act. See 12 Weekly Comp. of Pres. Doc 301 (Feb 27, 1976). At the request of President Carter, Congress deleted this provision by enacting Pub. L. 95-526, §1(2)(A)(i), 92 Stat. 2023 (1978). See H.R. Rep. No. 95-1104, 95th Cong., 2d Sess. at 3 (1978); S. Rep. No. 95-1291, 95th Cong., 2d Sess. at 3 (1978).

considered an inherently executive function") (White, J. concurring in part and dissenting in part); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) ("[t]he Executive, except for recommendation and veto, has no legislative power.") (Jackson, J., concurring) (Emphasis added). Indeed, the court in Chadha rejected the argument that the delegation to the Attorney General would constitute an unconstitutional delegation of lawmaking authority, despite the fact that the action of the Attorney General had identical effect as private Acts of Congress suspending deportation proceedings. 103 S.Ct. 2785 n. 16.

In conclusion, the text and legislative history of the Self-Government Act make it clear that Congress intended to delegate to the Council of the District of Columbia the power to amend or repeal Acts of Congress applicable exclusively to the District. The decision of the Supreme Court in John R. Thompson, Co. upholding the power of Congress to delegate legislative authority to the District Government over local matters has not been overruled by Chada or any other decision.

III.

The Challenged Provisions of the Self-Government Act Are Severable from the Remainder of the Act

A careful examination of the text and legislative history of the Self-Government Act makes it clear that the challenged provisions of the Self-Government Act⁶³ are severable from the remainder of the Act. It is of no significance that the Act does not contain a routine severability clause.⁶⁴ In Consumer Energy Council, the Court found the legislative veto provision of the Natural Gas Pricing Act severable although the Act contained no severability clause. The court saw little significance in the absence of such a clause. It stated that "[w]hatever relevance such an explicit clause might have in creating a presumption of severability, . . . the ultimate determination of severability will rarely turn on the presence or absence of such a clause." 218 U.S.App.D.C. at 51, 673 F.2d at 42, quoting United States v. Jackson, 390

63. The challenged provisions are those portions of Section 602(c) of the Act, D.C. Code, §1-227(c), that permit Congress to disapprove acts of the Council.

64. The version passed by the Senate contained such a clause. See S. 1435, §1101, 93d Cong., 1st Sess. (1973). See Home Rule History at 2714. However, the version passed by the House lacked one. See H.R. 9682, 93d Cong., 1st Sess. (1973), Home Rule History at 2229-2357. The clause was dropped during conference without explanation. See H.R. Rep. 93-703, 93d Cong., 1st Sess. (1973), Home Rule History at 2940-3029.

U.S. 570, 585 n. 27 (1968); accord, 2 C. Sands, Sutherland Statutory Construction, §§44.08, 44.09 (1973).

The basic rule with respect to severability, quoted in Chadha, 103 S.Ct. at 2774, and recently reaffirmed by the Supreme Court in Buckley v. Valeo, 424 U.S. 1, 108 (1976) is:

Unless it is evident that the legislature would not have enacted those provisions which are within its power, independent of that which is not, the invalid part may be dropped, if what is left is fully operative as a law.

Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234 (1932). More generally stated: "The cardinal principle of statutory construction is to save and not to destroy." Tilton v. Richardson, 403 U.S. 672, 684 (1971), quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). A corollary rule, stated by the Supreme Court in Chadha is that: "[a] provision is further presumed severable if what remains after severance is fully operable as a law." 103 S.Ct 15 2775. (Emphasis added; citation omitted.)

The primary purposes stated by Congress in enacting the Self-Government Act were:

. . . 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; 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.

Self-Government Act, §102(a), D.C. Code, §1-201(a). Of these purposes, "the core and primary purpose of the Self-Government Act was to 'relieve Congress of the burden of legislating upon essentially local matters'". McIntosh v. Washington, D.C. App., 395 A.2d 744, 753 (1978). As the statement in Part I, supra, of the social impact of the Act has demonstrated, the Self-Government Act has admirably served to accomplish this primary goal.

Parts of one subsection of the Self-Government Act are challenged--namely, the provisions in Section 602(c) of the Act that permit Congress to disapprove acts of the Council.⁶⁵ Even if this challenge is found to have

65. Section 602(c) (with exceptions not applicable here) requires the Chairman of the Council to transmit to the Speaker of the House of Representatives, and the President of the Senate a copy of each act passed by the Council and presented to the Mayor and provides that:

. . . [N]o such act shall take effect until the end of the 30-day period (excluding Saturdays, Sundays, and holidays, and any day on which neither House is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days) beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate and then only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act. (Emphasis added.)

D.C. Code, §1-233(c)(1).

A similar, though stricter, procedure applies to acts of the Council amending Titles 22, 23 or 24 of the D.C. Code (relating to criminal law and procedure). These acts may take effect "only if during such 30-day period one House of Congress does not adopt a resolution disapproving such act." D.C. Code, §1-233(c)(2).

merit, the legislative history of the Self-Government Act reveals that, although the question of congressional control over the District was the subject of much debate, it is hardly "evident" that Congress would not have passed the Act without Section 602(c). This is confirmed by an examination of the text of the Act as a whole, which contains many provisions other than Section 602(c) which retain congressional control over the District's legislative process. Moreover, there is no doubt whatsoever that in the absence of Section 602(c), the Act remains "fully operable as a law" and, therefore, that the provisions are "presumed severable."

The legislative veto provisions in Section 602(c) are not necessary to any of the primary purposes stated by Congress. Moreover, an examination of the legislative history of Section 602(c) shows that it was not a crucial, or even significant, factor in the enactment of the legislation.

A legislative veto provision was contained in the version of the Self-Government Act passed by the Senate. See S. 1435, §325(g)(2)(A), 93d Cong. 1st Sess. (1973), Home Rule History at 2646. The Senate bill, however, only made the legislative veto procedure applicable to acts of the Council exercising functions "not heretofore legally exercisable by the Commissioner of the District of Columbia

. . . or the District of Columbia Council . . ." under the provisions of Reorganization Plan No. 3 of 1967. S. 1435, §325(g) (1973), Home Rule History at 2646. See S. Rep. No. 93-219, 93d Cong., 1st Sess. 6 (1973), Home Rule History at 2726.⁶⁶ This limited legislative veto provision was explained by Senator Eagleton during the debate on the floor of the Senate; however, it was not otherwise discussed. Senator Eagleton's main arguments in support of the Act were, first, that it was a matter of fundamental democracy and, second, that it would relieve Congress of local legislative burdens. See 119 Cong Rec. 22948, Home Rule History at 2754-2756.

The version reported by the House District of Columbia Committee did not contain a legislative veto provision. See H.R. 9682, 93d Cong., 1st Sess. (1973), Home Rule History at 1224; H.R. Rep. No. 93-482, 93d Cong., 1st Sess. (1973), Home Rule History at 1435. However, when the bill came up for debate on the floor of the House, its sponsors offered a Committee Substitute to H.R. 9682, which contained a provision, §602(c), permitting congressional veto of all Council acts by concurrent resolutions. See Home Rule

66. The reorganization plan delegated to the former District of Columbia Council authority over about 430 specific areas that was described as "quasi-legislative". See Reorganization Plan No. 3 of 1967, 3 C.F.R. 1026 (1966-70 Comp.), reprinted in D.C. Code, vol. 1, at 130, 164 (1981).

History at 2229, 2318-2319. See 119 Cong. Rec. 33353 (1973) (statement of Rep. Diggs), Home Rule History at 2083.

The debate on the House floor makes it clear that the legislative veto mechanism was not considered an important part of the bill. Its proponents mentioned it as one of a number of protections of congressional prerogative in the Act. See remarks of Rep. Diggs, 119 Cong. Rec. 33355 (1973), Home Rule History at 2084; remarks of Rep. McKinney, 119 Cong. Rec. 33678-33679 (1973), Home Rule History at 2154. It was criticized by other supporters. See remarks of Rep. Harrington, 119 Cong. Rec. 33612-33613 (1973), Home Rule History at 2216.

Most significantly, the opponents of the bill argued that the provision was unworkable and therefore useless. Congressman Broyhill, an ardent opponent of home rule, stated that "[t]his 30-day, so-called veto power that is provided for in the committee substitute is somewhat of a farce, because we know that theoretically we can legislate an act of Congress to repeal any act of this council." 119 Cong. Rec. 33642 (1973), Home Rule History at 2382. Congresswoman Green of Oregon, another opponent of home rule, had similar misgivings about the utility of the legislative veto provision. See 119 Cong. Rec. 33389, 33666 (1973); Home Rule History at 2183, 2451. Nothing in the House debate indicated that the presence of this provision was a deciding factor in any member's vote.

The Conference Committee adopted a version similar to the House version, except that it permitted a single House of Congress to veto acts amending Titles 22 to 24 of the D.C. Code relating to criminal law and procedure. See H.R. Rep. No. 93-703, 93d Cong., 1st Sess. 72, 75 (1973); Home Rule History at 3010, 3013.

Although the legislative history did show concern over the preservation of Congress's constitutional authority over the District and a desire to reserve certain areas, these objectives are adequately achieved by provisions in the Act other than Section 602(c). Foremost is Section 601, D.C. Code, §1-206, which provides that:

Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.

This recognition that Congress could enact legislation relating to the District on any matter at any time, regardless of any act of the Council certainly was sufficient to protect Congress's legislative responsibility over the District under Article I, Section 8, Clause 17 of the Constitution.

In addition, Congress retained the ultimate authority over the District's budget under Section 603(a) of the Act, D.C. Code, §47-313(a):

Nothing in this Act shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the federal Office of Management and Budget, and the Comptroller General of the United States in the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia government.

As the D.C. Court of Appeals recently observed, "[i]n the budget process, by contrast [to the ordinary legislative process] Congress has retained a key role: appropriations for the District depend on an affirmative congressional act." Convention Center Referendum Committee v. District of Columbia Board of Elections and Ethics, D.C. App., 441 A.2d 889, 906 (1981)(en banc).

Finally, Section 602(a) and (b) contain a number of specific substantive limitations on the Council's authority, reserving these areas to Congress. Specifically, Section 602(a), states that the Council has no authority to (1) "impose any tax on property of the United States or any of the several states"; (2) "lend the public credit for support of any private undertaking"; (3) "enact any act, or 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", see District of Columbia v. Greater Washington Central Labor Council, D.C. App., 442 A.2d 110 (1982), cert. denied, 103 U.S. 1282 (1983); (4) "enact any

act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts)", see District of Columbia v. Sullivan, D.C. App., 436 A.2d 364 (1981); Capitol Hill Restoration Society, Inc. v. Moore, D.C.App., 410 A.2d 184 (1979); (5) "impose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District . . .", see Bishop v. District of Columbia, D.C.App., 411 A.2d 997, 999 (en banc), cert. denied, 446 U.S. 966, (1980); (6) "enact any act, resolution, or rule which permits the building of any structure within the District of Columbia in excess of the height limitations [Capitol Building]"; (7) "enact any act, resolution, or regulation with respect to the Commission on Mental Health"; (8) "enact any act or regulation relating to the United States District Court for the District of Columbia or any other court of the United States in the District other than the District courts, or relating to the duties or powers of the United States Attorney or the United States Marshal for the District of Columbia"; or (9) until 1979, enact legislation with respect to Titles 22 to 24 of the D.C. Code relating to criminal law and procedure, see McIntosh v. Washington, D.C.App., 395 A.2d 749, 751-54 (1978).

In addition, Section 602(b), D.C. Code, §1-233(b), provides that "[n]othing in this Act shall be construed as

vesting in the District government any greater authority over the National Zoological Park, the National Guard of the District of Columbia, the Washington Aqueduct, the National Capital Planning Commission, or, except as otherwise specifically provided in this Act, over any federal agency, than was vested in the Commissioner prior to the effective date of this act [January 2, 1975]." See District of Columbia v. Greater Washington Central Labor Council, *supra*.

Compared to the substantive limitations on the Council's legislative power imposed by Sections 601, 602(a) and (b), and 603, the procedural requirement for a 30-day congressional layover period is insignificant.

It is also significant that, of the 725 permanent acts transmitted to the Congress pursuant to Section 602(c), only two have been disapproved.⁶⁷ This shows that as a

67. The first occasion was the adoption of a concurrent resolution disapproving Council Act 3-120, the Location of Chanceries Amendment Act of 1979. S. Con. Res. 63, 96th Cong., 1st Sess., 93 Stat. 1435 (1979). See H.R. Rep. No. 96-728, 96th Cong., 1st Sess. 1-2 (1979); S. Rep. No. 96-533, 96th Cong., 1st Sess. 1-2 (1979). See also, Staff of the House District of Columbia Committee, Location of Chanceries Oversight Hearing and Markup, 96th Cong., 1st Sess (1979); Staff of the Senate Subcommittee on Governmental Efficiency and the District of Columbia of the Committee on Governmental Affairs, Resolution to Disapprove Location of Chanceries Amendment Act of 1979, 96th Cong. 1st Sess (1979). The second occasion was the adoption by the House of Representatives of a resolution disapproving Act 4-69, the Sexual Assault Reform Act of 1981. H. Res. 208, 97th Cong. 1st Sess. (1981), 127 Cong. Rec. H6736 (Oct. 1, 1981). See 127 Cong. Rec. H6736 to H6762 (Oct. 1, 1981); see also, Staff of the House D.C. Committee, Sexual Assault Reform Act of 1981, 97th Cong., 1st Sess. (1981).

matter of practice, the provision is not a significant feature of the Act.

Therefore, it is clear from an examination of the text and legislative history of the Self-Government Act that, if Section 602(c) were to be declared invalid, it cannot be demonstrated that "it is evident that the legislature would not have enacted those provisions which are within its power, independent of that which is not" under the test of severability pronounced by the Supreme Court. Furthermore, to invalidate a complex Act with over 100 sections because of a challenge to a small portion of one section, would run completely counter to the "cardinal principle of statutory construction" which is "to save and not destroy." See also, Barry v. Board of Elections and Ethics, 448 F.Supp. 1249, 1255 (D.C.D.C.), appeal dismissed, 188 U.S.App.D.C. 432, 580 F.2d 695 (D.C. Cir. 1978), which invalidated and severed Section 15(b) of the D.C. Election Act, which was added by Section 751 of the Self-Government Act. See D.C. Code, §1-1115(b) (Supp. V, 1978).

In addition, under the test in Chadha, an Act must be "presumed severable if what remains after severance is fully operable as a law." 103 S.Ct 15 2775. There can be no doubt that the Self-Government Act is fully operable without the challenged provisions in Section 602(c). The remaining provisions of Section 602(c), which require the Chairman of the Council to transmit all permanent acts of the Council to

the Speaker of the House and President of the Senate and that require such acts to lay before Congress for a 30-legislative day period before such acts may take effect, would still be valid. During this period, Congress could, of course, enact legislation preventing the act from taking effect. If Congress takes no action within this period, the act would take effect automatically, as have all but two of the 725 acts that were transmitted. As discussed above, even if Congress failed to take legislative action during the layover period, it would still have the authority under Section 601 to amend or repeal any act of the Council at any time. Thus, there is no question that the Act is "fully operable" without the provision; therefore, it is presumed to be severable.

In sum, the primary purpose of the Self-Government Act was to "relieve Congress of the burden of legislating upon essentially local matters". Id. §102(a), D.C. Code, §1-201(a). As Part III will demonstrate, this goal has been accomplished. The Self-Government Act forms the legal basis for the elected Mayor/Council form of Government, the creation and transfer of numerous agencies and functions, and the subsequent enactment of 725 permanent legislative measures. Given the broad scope of the Self-Government Act, a finding that the somewhat duplicative provisions in Section 602(c) are invalid should not presume the invalidity of the Self-Government Act as a whole.

CONCLUSION

Division VI (District of Columbia Affairs) of the District of Columbia Bar is concerned with issues relating to the laws of the District of Columbia. We have focused on our particular area of expertise--the interpretation of the District of Columbia Self-Government and Governmental Reorganization Act and the impact of home rule on the lives of District residents, businesses, and visitors. A basic understanding of this impact is fundamental to a determination of the issues in this case and to an assessment of the ramifications of such determinations.

We submit that that the Self-Government Act is valid, and that the court should reject the challenges to it.

Respectfully submitted,

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