PAROLE, JURY, AND JUDICIAL BILLS

HEARING AND MARKUPS

BEFORE THE

SUBCOMMITTEE ON
JUDICIARY AND EDUCATION

AND THE

COMMITTEE ON
THE DISTRICT OF COLUMBIA
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

ON

H.R. 2050

TO TRANSFER PAROLE AUTHORITY TO THE D.C. PAROLE BOARD

OCTOBER 1, 10, 17, 22, 1985

H.R. 2946

D.C. JURY SYSTEM ACT

OCTOBER 22, 1985

H.R. 3370, and H.R. 3578

SECUTORIAL AND JUDICIAL EFFICIENCY ACT OF 1985

OCTOBER 1, 10, 17, 22, 1985

Serial No. 99–10

ed for the use of the Committee on the District of Columbia

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HEARING AND MARKUPS

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Legal authority for the allocation of parole jurisdiction between the Federal and District of Columbia governments is determined by title 24, section 209 of the District of Columbia Code. Congress enacted this provision in 1934 when it amended the 1932 "Board of Indeterminate Sentence and Parole" for the District of Columbia Act. That act authorized indeterminate sentencing for offenders connected with crimes in the District of Columbia and created the District of Columbia Board of Parole.

Pursuant to section 24–209, parole authority is governed by an offender's place of confinement. Thus, if an offender convicted of District of Columbia offenses was confined in a Federal facility, the U.S. Parole Board exercised parole authority over that offender.

Legislative hearings on this issue revealed that section 24–209 was a major problem in the allocation of parole authority. H.R. 2050 evolves from this provision. Section 24–209 is both antiquated and ambiguous. It has resulted in significant administrative and legal problems. Moreover, after more than 50 years, courts have yet to reach a consensus about the scope of parole authority allocated by section 24–209.

This presently existing tension is exacerbated by congressional passage by Public Law 98–473, the Comprehensive Crime Control Act of 1983, which abolished Federal parole and the U.S. Parole Commission in 1991.

In view of congressional enactment of the District of Columbia Self-Government and Reorganization Act in 1973, and the subsequent creation of a local government, the committee determined that the District, like States, should exercise parole jurisdiction over offenders of its laws, regardless of place of confinement.

This remedy would resolve existing legal disputes and facilitate certain administrative problems, particularly as the present parole system affects female District of Columbia offenders confined to Federal prisons.

MERVYN M. DYMALLY,
Chairman.

HEARING ON H.R. 2050 AND H.R. 3370

TUESDAY, OCTOBER 1, 1985

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON JUDICIARY AND EDUCATION,
COMMITTEE ON THE DISTRICT OF COLUMBIA,
Washington, DC.

The subcommittee met, pursuant to call, at 9:10 a.m., in room 1310, Longworth House Office Building, Hon. Mervyn M. Dymally (chairman of the subcommittee) presiding.

Present: Representatives Dymally, Wheat, and Bliley.

Staff present: Donald Temple, senior staff counsel; and Ronald Hamm, minority staff assistant.

[The bill H.R. 2050 follows, along with a summary background and section-by-section analysis.]

[The bill H.R. 3370 follows, along with a section-by-section analysis.]

I

99TH CONGRESS
1ST SESSION

H. R. 2050

To give to the Board of Parole for the District of Columbia exclusive power and authority to make parole determinations concerning prisoners convicted of violating any law of the District of Columbia, or any law of the United States applicable exclusively to the District.

IN THE HOUSE OF REPRESENTATIVES

APRIL 16, 1985

Mr. DYMALLY introduced the following bill; which was referred to the Committee on the District of Columbia

---

A BILL

To give to the Board of Parole for the District of Columbia exclusive power and authority to make parole determinations concerning prisoners convicted of violating any law of the District of Columbia, or any law of the United States applicable exclusively to the District.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The first sentence of the first section of the Act entitled "An Act to reorganize the system of parole of prisoners convicted in the District of Columbia", approved July 17, 1947 (D.C. Code, sec. 24–201a; 61 Stat. 378), is amended by striking out "for the penal and correctional insti-

tutions of the District of Columbia" and inserting in lieu thereof "for prisoners convicted of violating any law of the District of Columbia or any law of the United States applicable exclusively to the District of Columbia".

SEC. 2. The Act entitled "An Act to establish a Board of Indeterminate Sentence and Parole for the District of Columbia and to determine its functions, and for other purposes", approved July 15, 1932 (D.C. Code, sec. 24–203 through sec. 24–209; 47 Stat. 696–699), is amended—

(1) in section 6 (D.C. Code, sec. 24–206)—

(A) by striking out "(a)" in subsection (a); and

(B) by striking out subsection (b); and

(2) by striking out section 10 (D.C. Code, sec. 24–209) and inserting in lieu thereof the following new section:

"SEC. 10. The Board of Parole for prisoners convicted of violating any law of the District of Columbia or any law of the United States applicable exclusively to the District of Columbia (created pursuant to the first section of the Act entitled 'An Act to reorganize the system of parole of prionsers convicted in the District of Columbia', approved July 17, 1947 (D.C. Code, sec. 24–201a; 61 Stat. 378) has exclusive power and authority, subject to the provisions of this Act, to release on parole, to terminate the parole of, and

to modify the terms and conditions of the parole of, any prisoner convicted of violating a law of the District of Columbia, or a law of the United States applicable exclusively to the District of Columbia, regardless of the institution in which the prisoner is confined.".

SEC. 3. Section 304(a) of the District of Columbia Law Enforcement Act of 1953 (D.C. Code, sec. 4–134(a); 67 Stat. 100) is amended by striking out ", or the United States Board of Parole has authorized the release of a prisoner under section 6 of that Act, as amended (D.C. Code, sec. 24–206),".

SEC. 4. (a) After the date of enactment of this Act, individuals convicted of violating both a law of the District of Columbia (including any law of the United States applicable exclusively to the District) and a law of the United States shall be given separate and distinct sentences for such convictions.

(b) The United States Parole Commission shall retain parole authority over individuals who, prior to the date of enactment of this Act, received unified sentences for violations of both a law of the District of Columbia (including any law of the United States applicable exclusively to the District of Columbia) and a law of the United States.

SEC. 5. Within one year after the date of the enactment of this Act, the Board of Parole for the District of Columbia,

under applicable guidelines, shall make parole eligibility determinations and shall set a date certain for full parole hearings for all individuals brought within the parole authority of such Board under this Act. Each such individual shall be notified in writing of any determinations made under this section.

SEC. 6. (a) Except as provided in subsection (b), the provisions of this Act shall take effect on the date of the enactment of this Act.

(b) The amendments made by sections 1, 2, and 3 of this Act shall take effect one year after the date of the enactment of this Act.

○

COMMITTEE ON THE DISTRICT OF COLUMBIA
SUBCOMMITTEE ON JUDICIARY AND EDUCATION

SUMMARY BACKGROUND
ON
H.R. 2050

H.R. 2050 is a bill which would transfer parole authority from the United States Parole Commission to the District of Columbia Parole Board over prisoners convicted exclusively of District of Columbia laws and confined in Federal correctional institutions.

Presently, Federal prisons house over 2,000 District of Columbia prisoners. D.C. Code Section 24-209 vests authority over D.C. Code offenders confined in Federal prisons with the United States Parole Commission. Prisoners housed in local penal facilities are subject to D.C. Parole Board Authority. Thus, the place of a D.C. Code offender's confinement determines parole authority. Moreover, courts have not yet decided whether Federal or District of Columbia parole standards should be applied to parole determinations of D.C. Code offenders in Federal prisons.

On its face, D.C. Code Section 24-209 is contrary to current Federal-State practices. All States which house their prisoners in Federal correctional facilities retain parole authority over them. This issue is further complicated by the fact that all female D.C. Code offenders sentenced to greater than one year terms are confined exclusively to Federal penal institutions.

In respective law suits, male and female offenders convicted ot District of Columbia laws and confined to Federal correctional facilities have challenged the constitutionality of Section 24-209. In January, 1972, Lana Garnes, female District of Columbia offender, challenged the constitutionality of the parole process. Lana Phoebe Garnes, et al v. Patricia Taylor et al, Civil Action No. 159-72 (D.D.C. Dec. 10, 1976). This case was settled and dismissed in December, 1976 pursuant to a stipulation commonly known as the Garnes Decree. Implementation of the Garnes Decree met numerous procedural and technical difficulties. The Garnes Decree was finally implemented in May 1983. Pursuant to the implementation agreement, female offenders of District of Columbia laws assigned to Federal corrections facilities may elect to transfer back into District of Columbia corrections systems within nine months of their parole eligibility dates. Once transferred, the District of Columbia Board of Parole exercises parole authority over such offenders.

In 1980, Michael Cosgrove, on behalf of male offenders of District of Columbia laws assigned to Federal correctional facilities, challenged the application of Federal parole guidelines to decisions of their parole. Michael Cosgrove, et al v. William French Smith et al 697F2d 1125 (1983).

On March 31, 1981 U.S. District Court Judge Norma Holloway Johnson granted summary judgment to the Government. She held that different treatment of male D.C. Code offenders in Federal prisons violated neither the U.S. Constitution nor the applicable statute. On January 11, 1982 the U.S. Court of Appeals, District of Columbia Circuit, reversed the District Court's grant of summary judgement. The court found that the facts below were "woefully inadequate" to support a summary judgement decision. The Cosgrove case was remanded, a status hearing has been held and trial on the issue is pending.

Based on the foregoing, it is ascertainable that the problems associated with H.R. 3369 are its ambiguity and antiquity. The provision's ambiguity is largely related to an absence of clear legislative history. The Court of Appeals stated that courts have reached no clear consensus about the scope of authority centered by Section 24-209: It added "the import of Section 24-209 is an open question for us, despite-and complicated by-the fact that the statute is more than forty years old." Cosgrove v. Smith 697 F 2d 1125, 1132 (1983). Thus, after almost 50 years, legislative reconsideration of Section 24-209 is required in order to resolve existing ambiguities regarding the provision's legislative intent and to consider the self-governing and equity implications of the Home Rule Act of 1973.

Given this background, on March 24, 1983 Congressman Mervyn M. Dymally, Walter E. Fauntroy and George W. Crockett introduced H.R. 2319, a bill to transfer parole authority from the U.S. Parole Commission to the D.C. Parole Board, over D.C. Code offenders, regardless of place of confinement.

On May 3, 1983 the Committee on the District of Columbia, Subcommittee on Judiciary and Education held a hearing on H.R. 2319. On June 23, 1983 the Subcommittee favorably reported a clean bill, H.R. 3369 to the Full Committee. On July 25, the Full House of Representatives passed H.R. 3369 by voice vote. On July 26, 1983 the bill was referred to the Senate, where no action was taken.

Since 1983, the parole problem has still not been fully resolved. In this connection, three recent developments influence the need for Congressional reconsideration of this legislation.

On October 12, 1984, the President signed Public Law 98-473, the Comprehensive Crime Control Act of 1984, incorporated into a Continuing Resolution. This law abolishes Federal parole five years after its effective date. In the Act, Congress did not address the implications of abolishing Federal parole on the power given to the United States Parole Commission over D.C. Code offenders in Section 24-209 of the D.C. Code.

Also, the Act did not address the issue of which parole authority would vest over D.C. Code offenders in Federal penal institutions at the expiration of the five year period. Unless Congress acts otherwise, five years after the effective date of the Act, the U.S. Parole Commission will cease to exist and there will be no obvious answer to this question.

Second, consistent with Senator Spector's oversight hearings in the 98th Congress on D.C. Parole Board review standards and Senator Spector's and the U.S. Attorney for D.C.'s recommendations, the D.C. Parole Board has appropriately revised its parole review standards. Third, the U.S. Attorney expressed concern in 1983" prior to considering H.R. 3369. As stated above, the Crime Control Act is now Public Law. However, as passed, it does not appropriately address related D.C. parole issues.

Fourth, on July 15, 1985, citing massive overcrowding, U.S. District Court Judge William B. Bryant by court order, prohibited the city from sending and new prisoners to the jail as of August 24. On August 22, the judge agreed to delay the order and the city agreed to reduce the jail population by 60 persons every two weeks until November 22, 1985 primarily by sending all newly sentenced prisoners to Federal facilities amongst other options. The court sanctioned stipulation provided that if the jail population exceeded specified levels for more than two days, a ban on admitting new inmates would immediately go into effect. Thus, an increased number of D.C. Code offenders would be confined in the Federal penal system and become subject to Federal parole standards.

Sanctioned agreement provided that if the jail population exceeded specified levels for more than two days, a ban on admitting new inmates would immediately go into effect. Thus, an increased number of D.C. Code offenders would be confined in the Federal penal system and become subject to the Federal parole standards.

Given the above developments, Subcommittee consideration of D.C. parole authority and legislation to correct longstanding policy and constitutional concerns is timely indeed.

SECTION BY SECTION ANALYSIS
OF
H.R. 2050

Section 1 — Would amend Section 24-201(a), "Board of Parole..." to extend the Board's authority over all violators of D.C. law or U.S. laws applicable exclusively to the District of Columbia, regardless of place of confinement.

Section 2(1) — Would amend Section 24-206, "Hearing after arrest; confinement in non-District institution" by deleting subsection (6) regarding the authority of the U.S. Parole Commission.

Section 2(2) — Would amend Section 209 by substituting language enumerating the expressed powers of the D.C. Parole Board over violators of D.C. laws or U.S. laws applicable exclusively to the District of Columbia.

Section 3 — Would amend Section 4-134a of the D.C. Code, which requires notice of release of a prisoner to be given to the Chief of Police by deleting language requiring the U.S. Parole Board to give similar notice.

Section 4(a) — Provides that separate sentences be given to offenders convicted of violating both D.C. law and Federal law.

Section 4(b) — Provides that the U.S. Board shall retain parole authority over offenders convicted of violating both laws of D.C. and the United States, until the effective date of this Act.

Section 5 — Provides that within one year of the enactment of this Act, the D.C. Parole Board shall make parole eligibility determinations and reschedule dates for parole hearing for individuals brought under the Parole authority of the D.C. Board, pursuant to this Act.

Section 6(a) — Provides that substantive amendments in Section 1, 2 and 3 - transferring parole authority to the District - shall take effect one year from the date of enactment.

Section 6(b) — Provides that amendments in Section 4 and 5 shall take effect on the date of the enactment of the Act.

I

99TH CONGRESS
1ST SESSION

H. R. 3370

To require criminal prosecutions concerning violations of the laws of the District of Columbia to be conducted in the name of the District, to provide permanent authority for hearing commissioners in the District of Columbia courts, to modify certain procedures of the District of Columbia Judicial Nomination Commission and the District of Columbia Commission on Judicial Disabilities and Tenure, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 19, 1985

Mr. DYMALLY introduced the following bill; which was referred to the Committee on the District of Columbia

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A BILL

To require criminal prosecutions concerning violations of the laws of the District of Columbia to be conducted in the name of the District, to provide permanent authority for hearing commissioners in the District of Columbia courts, to modify certain procedures of the District of Columbia Judicial Nomination Commission and the District of Columbia Commission on Judicial Disabilities and Tenure, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia Prosecutorial and Judicial Efficiency Act of 1985".

SEC. 2. CONDUCT OF PROSECUTIONS IN THE DISTRICT.

(a) CONDUCT OF PROSECUTIONS.—Section 23–101 of title 23 of the District of Columbia Code is amended by striking out subsections (c), (d), (e), and (f), and inserting in lieu thereof the following:

"(c) Except as otherwise provided by law, all other criminal prosecutions for offenses under the laws of the District of Columbia and the laws of the United States applicable exclusively to the District of Columbia shall be conducted in the name of the District of Columbia by the United States Attorney for the District of Columbia or his or her assistants.

"(d) Notwithstanding any other provision of law, prosecutions for offenses under the laws of the District of Columbia and the laws of the United States applicable exclusively to the District of Columbia shall be conducted in the name of the District of Columbia.".

(b) LIMITATION ON JOINDER OF OFFENSES UNDER DISTRICT AND FEDERAL LAW.—

(1) Section 11–502 of the District of Columbia Code is amended by striking out paragraph (3).

(2) Section 23–311 of the District of Columbia Code is amended by striking out subsection (b) and by redesignating subsection "(c)" as subsection "(b)".

(c) EFFECT OF CHANGES IN CONDUCT OF PROSECUTIONS IN THE DISTRICT.—No prosecution, administrative action, or other proceeding lawfully commenced under any law of the United States, any law of the United States applicable exclusively to the District of Columbia, or any law of the District of Columbia shall abate solely by reason of the taking effect of any provision of subsections (a) or (b), but such action or proceeding shall be continued with such substitutions as to parties as may be appropriate.

(d) ANNUAL REPORT ON PROSECUTIONS.—Not later than March 1 of each year, the United States attorney for the District of Columbia shall submit, to the Mayor of the District of Columbia and the District of Columbia Council, an annual report concerning prosecutions, under the laws of the District of Columbia and the laws of the United States applicable exclusively to the District of Columbia, conducted by the Office of the United States attorney for the District of Columbia in the previous calendar year. Such report shall include the number of prosecutions and convictions by category and nature of offense, and shall include any recommendations concerning the criminal justice system in the District of Columbia.

(e) ASSIGNMENT OF ASSISTANT CORPORATION COUNSELS AS SPECIAL ASSISTANT UNITED STATES ATTORNEYS.—The Corporation Counsel of the District of Columbia

shall detail to, and maintain on a rotational basis in, the Office of the United States attorney for the District of Columbia, not less than ten assistant Corporation Counsels for periods of service in such office of not less than 120 days. The United States attorney for the District of Columbia shall accept the services of not less than ten assistant Corporation Counsels for periods of not less than 120 days and shall utilize such assistant Corporation Counsels within such office on the same basis as the services of attorneys of agencies of the Federal Government are utilized by such office on a periodic basis as special assistant United States attorneys for the District of Columbia. The Corporation Counsel of the District of Columbia and the United States attorney for the District of Columbia may enter into such agreements, consistent with this subsection, as are necessary to carry out the purposes of this subsection.

SEC. 3. HEARING COMMISSIONERS.

Section 11–1732 of title 11 of the District of Columbia Code is amended to read as follows:

"**§ 11-1732. Hearing commissioners.**

"(a) The chief judge of the Superior Court may appoint and remove hearing commissioners who shall serve in the Superior Court and shall perform the duties enumerated in subsection (c) of this section and such other duties as are consistent with the Constitution and laws of the United

States and of the District of Columbia and are assigned by rule of the Superior Court.

"(b) No individual may be appointed or serve as a hearing commissioner under this section unless he or she has been a member of the bar of the District of Columbia for at least three years.

"(c) A hearing commissioner, when specifically designated by the chief judge of the Superior Court, may perform the following functions:

"(1) Administer oaths and affirmations and take acknowledgments.

"(2) With the consent of the parties, determine conditions of release and pretrial detention pursuant to the provisions of title 23 of the District of Columbia Code (relating to criminal procedures).

"(3) With the consent of the parties, conduct preliminary examinations in all criminal cases to determine if there is probable cause to believe that an offense has been committed and that the accused committed it.

"(4) With the consent of the parties involved, make findings and recommendations in uncontested proceedings, and in contested hearings in the civil, criminal and family divisions of the Superior Court. A rehearing of the case, or a review of the hearing com-

missioner's findings and recommendations, may be made by a judge of the appropriate division sua sponte. The findings and recommendations of the hearing commissioner shall when approved by a judge of the appropriate division constitute a final order of the Superior Court.

"(5) With the consent of the respondent, make findings and recommendations in any nonjury traffic infraction matters in the Superior Court. A rehearing of the case, or a review of the hearing commissioner's findings and recommendations, may be made by a judge of the Superior Court sua sponte. The findings and recommendations of the hearing commissioner when approved by a judge of the Superior Court shall constitute a final order of the Superior Court.".

SEC. 4. APPOINTMENT OF EXECUTIVE OFFICER OF THE DISTRICT OF COLUMBIA COURTS.

Section 1703(b) of title 11 of the District of Columbia Code is amended to read as follows:

"(b) The Executive Officer shall be appointed, and subject to removal, by the Joint Committee on Judicial Administration with the approval of the chief judges of the District of Columbia courts. In making such appointment the Joint Committee shall consider experience and special training in

administrative and executive positions and familiarity with court procedures.".

SEC. 5. REPEAL OF AUTOMATIC DISBARMENT PROVISIONS.

Section 11–2503 of title 11, District of Columbia Code is repealed.

SEC. 6. MANDATORY RETIREMENT AGE OF JUDGES.

(a) AMENDMENT TO HOME RULE ACT.—Section 431(c) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by striking out "seventy" and inserting in lieu thereof "seventy-four".

(b) AMENDMENT TO THE D.C. CODE.—Section 11–1502 of title 11 of the District of Columbia Code, is amended by striking out "70" and inserting in lieu thereof "74".

SEC. 7. APPOINTMENT PANEL FOR THE BOARD OF TRUSTEES OF THE PUBLIC DEFENDER SERVICE.

(a) COMPOSITION OF APPOINTMENT PANEL.—Section 1–2703 of the Act is amended in subsection (b)(1)—

(1) by striking out subparagraphs (A) and (B); and

(2) by redesignating subparagraphs (C), (D), and (E) as subparagraphs (A), (B), and (C), respectively.

(b) PRESIDING OFFICER.—Section 1–2703 of the Act is amended in subsection (b)(2) by striking out "Chief Judge of the United States Court of Appeals for the District of Columbia Circuit" and inserting in lieu thereof "Chief Judge of the District of Columbia Court of Appeals".

SEC. 8. REORGANIZATION OF AUDIT RESPONSIBILITY.

(a) AUDITOR-MASTER.—Section 1724 of title 11 of the District of Columbia Code is amended—

(1) by striking out "(1) audit and state fiduciary accounts,"; and

(2) by respectively redesignating clauses (2) and (3) as clauses "(1)" and "(2)".

(b) REGISTER OF WILLS.—Section 2104(a) of title 11 of the District of Columbia Code is amended—

(1) in paragraph (2) by striking out "and" after the semicolon;

(2) in paragraph (3) by striking out the period and inserting in lieu thereof "; and"; and

(3) by inserting at the end thereof the following new paragraph:

"(4) audit and state fiduciary accounts.".

SEC. 9. ELIMINATION OF DUPLICATE JUDICIAL FINANCIAL REPORTING REQUIREMENT.

Section 303 of the Ethics in Government Act of 1978 (28 U.S.C. App. 301) is amended by inserting at the end thereof the following new subsection:

"(h) The provisions of this Act shall not apply to any judicial officer or employee of the Superior Court of the District of Columbia or the District of Columbia Court of Appeals .".

SEC. 10. CERTIFICATION OF QUESTIONS OF LAW.

Subchapter II of Chapter 7, title 11, of the District of Columbia Code is amended by inserting after section 11–722 the following new section:

"§ Sec. 11–723. Certification of Questions of Law.

"(a) The District of Columbia Court of Appeals may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or the highest appellate court of any State, if there are involved in any proceeding before any such certifying court questions of law of the District of Columbia which may be determinative of the cause pending in such certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the District of Columbia Court of Appeals.

"(b) This section may be invoked by an order of any of the courts referred to in subsection (a) upon the court's motion or upon motion of any party to the cause.

"(c) A certification order shall set forth (1) the question of law to be answered; and (2) a statement of all facts relevant to the questions certified and the nature of the controversy in which the questions arose.

"(d) A certification order shall be prepared by the certifying court and forwarded to the District of Columbia Court of Appeals. The District of Columbia Court of Appeals may require the original or copies of all or such portion of the

record before the certifying court as are considered necessary to a determination of the questions certified to it.

"(e) Fees and costs shall be the same as in appeals docketed before the District of Columbia Court of Appeals and shall be equally divided between the parties unless precluded by statute or by order of the certifying court.

"(f) The District of Columbia Court of Appeals may prescribe the rules of procedure concerning the answering and certification of questions of law under this section.

"(g) The written opinion of the District of Columbia Court of Appeals stating the law governing any questions certified under subsection (a) shall be sent by the clerk to the certifying court and to the parties.

"(h)(1) The District of Columbia Court of Appeals, on its own motion or the motion of any party, may order certification of questions of law to the highest court of any State under the conditions described in subsection (a).

"(2) The procedures for certification from the District of Columbia to a State shall be those provided in the laws of that State.".

SEC. 11. PUBLIC ACCESS TO MATERIALS OF JUDICIAL NOMINATION COMMISSION.

Section 434(c)(3) of the Act is amended by striking out the last sentence and inserting in lieu thereof "Information, records, and other materials furnished to or developed by the

Commission in the performance of its duties under this section shall be privileged and confidential. The District of Columbia Freedom of Information Act and section 522 of title 5, United States Code, (known as the Freedom of Information Act) shall not apply to any such materials.

SEC. 12. MEETINGS OF THE JUDICIAL NOMINATION COMMISSION.

Section 434(c)(1) of the Act is amended by inserting at the end thereof "Meetings of the Commission may be closed to the public. Section 742 of this Act shall not apply to meetings of the Commission.".

SEC. 13. PUBLIC ANNOUNCEMENT OF JUDICIAL RECOMMENDATIONS.

Section 434(d) of the Act is amended by inserting at the end thereof the following new paragraph:

"(4) Upon submission to the President, the name of any individual recommended under this subsection shall be made public.".

SEC. 14. DISCLOSURE OF CERTAIN INFORMATION TO THE JUDICIAL NOMINATION COMMISSION.

Section 11–1528 of the District of Columbia Code is amended by striking out all of subsection (a) and inserting in lieu thereof the following:

(a)(1) Subject to paragraph (2), the filing of papers with, and the giving of testimony before, the Commission shall be

privileged. Subject to paragraph (2), hearings before the Commission, the record thereof, and materials and papers filed in connection with such hearings shall be confidential.

(2)(A) The judge whose conduct or health is the subject of any proceedings under this subchapter may disclose or authorize the disclosure of any information under paragraph (1).

(B) With respect to a prosecution of a witness for perjury or on review of a decision of the Commission, the record of hearings before the Commission and all papers filed in connection with such hearing may be disclosed to the extent required for such prosecution or review.

(C) Upon request, the Commission may disclose, on a privileged and confidential basis, to the District of Columbia Judicial Nomination Commission any information under paragraph (1) concerning any judge being considered by such nomination commission for elevation to the District of Columbia Court of Appeals or for chief judge of a District of Columbia court.".

SEC. 15. REAPPOINTMENT TO JUDICIAL OFFICE.

Section 433(c) of the Act is amended—

(1) in the first sentence by striking out "three months" and inserting in lieu thereof "six months"; and

(2) in the second sentence, by striking out "thirty" and inserting in lieu thereof "sixty".

SEC. 16. MODIFICATION OF JUDICIAL REAPPOINTMENT EVALUATION CATEGORIES.

Section 433(c) of the Act is amended in the third sentence by striking out "exceptionally well-qualified or".

SEC. 17. EFFECTIVE DATES.

(a) GENERAL PROVISION.—Except as provided in subsection (b), the provisions of this Act shall take effect on the date of enactment of this Act.

(b) EXCEPTION.—Section 2(e) shall take effect 90 days after the date of enactment of this Act.

O

SECTION BY SECTION ANALYSIS
OF
H.R. 3370

Section 1 SHORT TITLE.
Provides Short Title of Bill: "District of Columbia Prosecutorial and Judicial Efficiency Act of 1985."

Section 2(a) CONDUCT OF PROSECUTIONS IN THE DISTRICT OF COLUMBIA.
Would require criminal prosecutions for District of Columbia criminal offenses to be brought by the United States Attorney for the District of Columbia in the name of the District of Columbia.

(b) Would repeal Section 11-502(3) in title 11 of the District of Columbia Code which provides the United States District Court for the District of Columbia jurisdiction over "any offense under any law applicable exclusively to the District of Columbia which is joined in the same action or indictment with any federal offense."

(c) Provides that no prosecution under any District of Columbia laws should abate by reason of Sections (a) and (b)

(d) Would require the U.S. Attorney for the District of Columbia to submit an annual report to the Mayor and the City Council concerning prosecutions, convictions by category and nature of offense.

(e) Would require the Corporation Counsel for the District of Columbia to detail to, on a rotation basis in the Office of the U.S. Attorney General for the District of Columbia not less than ten assistant Corporation Counsels for not less than 120 days per year, similar to Federal executive agency rotations of attorneys in the U.S. Attorney's office.

Section 3 HEARING OFFICERS.
Would provide permanent authority and guidelines for appointment and authority of hearing officers in the District of Columbia Superior Court.

Section 4 APPOINTMENT OF EXECUTIVE OFFICER OF THE DISTRICT OF COLUMBIA COURTS.
Would amend Section 1703(b), title 11 of the District of Columbia Code, to eliminate the requirement that the Executive Officer of the District of Columbia Courts be appointed from a list of candidates submitted by the Director of the Administrative Office of the United States courts.

Section 5 REPEAL OF AUTOMATIC DISBARMENT PROVISIONS.
Would repeal Section 11-2503, title 11 District of Columbia Code to remove its automatic disbarment requirement. As a result of such an amendment, Section 15 of Rule XI of the rules governing the Bar of the Court of Appeals for District of Columbia and DR 1-102 (1)(4) of the Code of Professional Responsibility would apply.

Section 6 MANDATORY RETIREMENT AGE OF JUDGES.
Would amend Section 431(c) of the District of Columbia Self Government and Governmental Reorganization Act (hereafter "the Act") to comply with P.L. 93-198 which amended Section 1502 of title 11, District of Columbia Code. This law changes the mandatory retirement age for District of Columbia Court Judges from 70 to 74.

Section 7 — APPOINTMENT PANEL FOR THE BOARD OF TRUSTEES OF THE PUBLIC DEFENDER SERVICE.
Would amend the Section 2703 of Title I, District of Columbia Code, to remove all Federal representation from the appointment panel for the Board of Trustees of the Public Defender Service.

Section 8 — REORGANIZATION OF AUDIT RESPONSIBILITY
Would amend Sections 1724 and 2104 of title 11 of the District of Columbia Code to integrate the Auditor Master's office within the Probate Division of the District of Columbia Superior Court.

Section 9 — ELIMINATION OF DUPLICATE JUDICIAL FINANCIAL REPORTING REQUIREMENT.
Would amend Section 303 of the Ethics in Government Act of 1978, (28 U.S.C. App. 301). This would result in judges of District of Columbia Courts being required to file financial disclosure reports exclusively with the District of Columbia Judicial Disabilities and Tenure Commission.

Section 10 — CERTIFICATION OF QUESTIONS OF LAW.
Would amend subchapter II of Chapter 7, title 11 District of Columbia Code, to provide the District of Columbia Court of Appeals authority to answer certain undecided questions of of District of Columbia law that may be determinative of proceedings pending in the certifying court.

Section 11 — PUBLIC ACCESS TO MATERIALS OF JUDICIAL NOMINATION COMMISSION.
Would amend Section 434(c)(3) of the Act to exempt materials relevant to the judicial nomination consideration process from the Federal and District of Columbia Freedom of Information Acts.

Section 12 — MEETINGS OF THE JUDICIAL NOMINATION COMMISSION.
Would amend Section 434(c) of the Act to allow the Judicial Nomination Commission to hold closed meetings in its consideration process. It also exempts the Commission from Section 742 of the Act

Section 13 — PUBLIC ANNOUNCEMENT OF JUDICIAL RECOMMENDATIONS.
Would amend 434(d) of the Act to require the Commission to make a public announcement of its Judicial Recommendations when it submits the recommendation to the President.

Section 14 — DISCLOSURE OF CERTAIN INFORMATION TO THE JUDICIAL NOMINATION COMMISSION.
Would amend Section 11-1528 of the District of Columbia Code to authorize the District of Columbia Judicial Disability and Tenure Commission to disclose to the District of Columbia Judicial Nomination Commission information relating to the nomination of any candidate for chief judgeship or appellate judge.

Section 15 — REAPPOINTMENT TO JUDICIAL OFFICE.
Would amend Section 433(c) of the Act to require judges seeking reappointment to state their intention for an additional term of six months or 180 days prior to the expiration of their current term of office.

Would also require the Tenure Commission to prepare and to the President a written evaluation of the declaring candidate's performance during his or her present term of office not less than sixty (60) days prior to the expiration of the candidate's term of office.

Section 16 — MODIFICATION OF JUDICIAL REAPPOINTMENT EVALUATION CATEGORIES.
Would amend Section 433(c) of the Act to eliminate judicial reappointment evaluation category of "exceptionally well qualified."

Section 17 — EFFECTIVE DATES.
Except for Section 2(e), the provisions of the bill would become effective immediately.

Mr. DYMALLY. Good morning.

The Subcommittee on Judiciary and Education of the Committee on the District of Columbia is hereby called to order.

The hearing is convened to consider two bills: H.R. 2050 and H.R. 3370.

H.R. 2050 is a reintroduction of H.R. 3369, a bill introduced and passed by the House of Representatives in the 98th Congress. As I stated at our subcommittee hearing then, this bill is proposed as a necessary legislative remedy to a constitutional and administrative dilemma.

At present there are over 1,400 District of Columbia Code offenders held in Federal Bureau of Prison facilities. Male District of Columbia Code offenders are placed in Federal facilities for selective custody and various other reasons. Female District of Columbia Code offenders sentenced to greater than 1-year terms are placed in Federal facilities due to the absence of a facility for female offenders in the District of Columbia. Most of these female offenders are confined at Alderson, WV, over 300 miles from the District of Columbia and, as I understand, a ride of about 8 hours.

Under present law, at section 24-209 of the District of Columbia Code, the place of an offender's confinement determines parole authority. This law is contrary to current Federal-State parole practices. According to the U.S. Parole Commission, the District of Columbia is the only government housing inmates in Federal correctional institutions which does not retain parole authority. This has resulted in the filing of several Federal lawsuits by both male and female District of Columbia Code offenders in Federal prisons.

In setting the tone for this hearing, several points of interest are in order and will be given serious scrutiny. Since our last hearing more than 2 years ago, the District of Columbia has revised its parole guidelines, consistent with certain recommendations made by Senator Specter and the U.S. attorney for the District of Columbia, Mr. Joseph diGenova. The prison overcrowding problem in the District has resulted in an increased number of D.C. inmates being transferred to Federal prisons. Further, Congress recently passed the Comprehensive Crime Control Act of 1983, which would abolish Federal parole and the U.S. Parole Commission in 1991. One must question the cumulative implication of these changes on the rights of D.C. inmates in Federal prisons.

Also of note, section 24-209 became law almost 50 years ago and 40 years prior to the Home Rule Act. Its language remains ambiguous. For example, neither this provision nor its legislative history answers whether the U.S. Parole Commission should apply D.C. parole standards in its parole consideration of District of Columbia Code offenders. Given this history, appropriate amendment would seem overdue.

Lawsuits filed in response to this provision remain unsolved and continue to consume time and expense. This legislation provides a practical and legally sound remedy to this longstanding problem.

H.R. 3370, the Prosecutorial and Judicial Efficiency Act of 1985, is a bill which evolves in large part from recommendations of the D.C. Court Study Committee under the chairmanship of Mr. Charles Horsky, the D.C. courts and private counsel.

This bill seeks to clarify that District of Columbia Code matters do not "arise under" the laws of the United States, and District of Columbia Code offenders are crimes against the District of Columbia, not against the United States. Additionally, it focuses on problems related to the exercise of pendent jurisdiction in the criminal context.

While it does not transfer prosecutorial functions, it provides a major legal clarification in the prosecutorial process. Generally, H.R. 3370, if passed, would enhance the experience and exposure of assistant corporation counsels; authorize hearing commissioners for the court on a permanent basis; improve judicial nomination and tenure commissioners procedures and other matters.

I look forward to testimony on both these bills. At the end of the hearing, the subcommittee will recess and markup will take place subject to the call of the Chair.

Our first witness today is Mrs. Rolark, who has, I understand, an early appointment at city hall.

Mrs. Rolark, welcome. We are most anxious to hear you.

Mrs. ROLARK. Thank you, Mr. Chairman. Good morning, Mr. Chairman and other members of the committee.

Mr. DYMALLY. Mrs. Rolark, will you introduce yourself for the record, please?

[The prepared statement of Mr. Dymally follows:]

OPENING STATEMENT
OF
MERVYN M. DYMALLY
COMMITTEE ON THE DISTRICT OF COLUMBIA
CHAIRMAN, SUBCOMMITTEE ON JUDICIARY AND EDUCATION
ON
H.R. 2050 AND H.R. 3370
TUESDAY, OCTOBER 1, 1985
9:00 A.M.

GOOD MORNING!

THE SUBCOMMITTEE ON JUDICIARY AND EDUCATION OF THE COMMITTEE ON THE DISTRICT OF COLUMBIA IS CALLED TO ORDER.

THE HEARING IS CONVENED TO CONSIDER TWO BILLS: H.R. 2050 AND H.R. 3370.

H.R. 2050 IS A REINTRODUCTION OF H.R. 3369, A BILL INTRODUCED AND PASSED BY THE HOUSE OF REPRESENTATIVES IN THE 98TH CONGRESS. AS I STATED AT OUR SUBCOMMITTEE HEARING THEN, THIS BILL IS PROPOSED AS A NECESSARY LEGISLATIVE REMEDY TO A CONSTITUTIONAL AND ADMINISTRATIVE DILEMMA.

AT PRESENT THERE ARE OVER 1,400 DISTRICT OF COLUMBIA CODE OFFENDERS HELD IN FEDERAL BUREAU OF PRISON FACILITIES. MALE DISTRICT OF COLUMBIA CODE OFFENDERS ARE PLACED IN FEDERAL FACILITIES FOR SELECTIVE CUSTODY AND VARIOUS OTHER REASONS. FEMALE DISTRICT OF COLUMBIA CODE OFFENDERS SENTENCED TO GREATER THAN ONE YEAR TERMS ARE PLACED IN FEDERAL FACILITIES DUE TO THE ABSENCE OF A FACILITY SPECIFICALLY FOR FEMALE OFFENDERS. MOST OF THESE FEMALE OFFENDERS ARE CONFINED AT ALDERSON, WEST VIRGINIA, OVER 300 MILES FROM THE DISTRICT OF COLUMBIA.

UNDER PRESENT LAW AT SECTION 24-209 OF THE DISTRICT OF COLUMBIA CODE, THE PLACE OF AN OFFENDER'S CONFINEMENT DETERMINES PAROLE AUTHORITY. THIS LAW IS CONTRARY TO CURRENT FEDERAL-STATE PAROLE PRACTICES. ACCORDING TO THE UNITED STATES PAROLE COMMISSION, THE DISTRICT OF COLUMBIA IS THE ONLY GOVERNMENT HOUSING INMATES IN FEDERAL CORRECTIONAL INSTITUTIONS WHICH DOES NOT RETAIN PAROLE AUTHORITY. THIS HAS RESULTED IN THE FILING OF SEVERAL FEDERAL LAWSUITS BY BOTH MALE AND FEMALE DISTRICT OF COLUMBIA CODE OFFENDERS IN FEDERAL PRISONS.

IN SETTING THE TONE FOR THIS HEARING, SEVERAL POINTS OF INTEREST ARE IN ORDER AND WILL BE GIVEN SERIOUS SCRUTINY. SINCE OUR LAST HEARING MORE THAN TWO YEARS AGO, THE DISTRICT OF COLUMBIA HAS REVISED ITS PAROLE GUIDELINES, CONSISTENT WITH CERTAIN RECOMMENDATIONS MADE BY SENATOR ARLEN SPECTOR AND UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA, JOSEPH DIGENOVA. THE PRISON OVERCROWDING PROBLEM IN THE DISTRICT HAS RESULTED IN AN INCREASED NUMBER OF DISTRICT OF COLUMBIA INMATES BEING TRANSFERRED TO FEDERAL PRISONS. FURTHER, CONGRESS RECENTLY PASSED THE COMPREHENSIVE CRIME CONTROL ACT OF 1983, WHICH WOULD ABOLISH FEDERAL PAROLE AND THE UNITED STATES PAROLE COMMISSION IN 1991. ONE MUST QUESTION THE CUMULATIVE IMPLICATION OF THESE CHANGES ON THE RIGHTS OF DISTRICT OF COLUMBIA INMATES IN FEDERAL PRISONS.

ALSO OF NOTE, SECTION 24-209 BECAME LAW ALMOST 50 YEARS AGO AND 40 YEARS PRIOR TO THE HOME RULE ACT. ITS LANGUAGE REMAINS AMBIGUOUS. FOR EXAMPLE, NEITHER THIS PROVISION NOR ITS LEGISLATIVE HISTORY ANSWERS WHETHER THE UNITED STATES PAROLE COMMISSION SHOULD APPLY DISTRICT OF COLUMBIA PAROLE STANDARDS IN ITS PAROLE CONSIDERATION OF DISTRICT OF COLUMBIA CODE OFFENDERS. GIVEN THIS HISTORY, APPROPRIATE AMENDMENT WOULD SEEM OVERDUE.

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LAW SUITS FILED IN RESPONSE TO THIS PROVISION REMAIN UNSOLVED AND CONTINUE TO CONSUME TIME AND EXPENSE. THIS LEGISLATION PROVIDES A PRACTICAL AND LEGALLY SOUND REMEDY TO THIS LONGSTANDING PROBLEM.

H.R. 3370, THE PROSECUTORIAL AND JUDICIAL EFFICIENCY ACT OF 1985, IS A BILL WHICH EVOLVES IN LARGE PART FROM RECOMMENDATIONS OF THE DISTRICT OF COLUMBIA COURT STUDY COMMITTEE UNDER THE CHAIRMANSHIP OF MR. CHARLES HORSKY, THE DISTRICT OF COLUMBIA COURTS AND PRIVATE COUNSEL.

THIS BILL SEEKS TO CLARIFY THAT DISTRICT OF COLUMBIA CODE MATTERS DO NOT "ARISE UNDER" THE LAWS OF THE UNITED STATES AND DISTRICT OF COLUMBIA CODE OFFENDERS ARE CRIMES AGAINST THE DISTRICT OF COLUMBIA, NOT AGAINST THE UNITED STATES. ADDITIONALLY, IT FOCUSES ON PROBLEMS RELATED TO THE EXERCISE OF PENDENT JURISDICTION IN THE CRIMINAL CONTEXT.

WHILE IT DOES NOT TRANSFER PROSECUTORIAL FUNCTIONS, IT PROVIDES A MAJOR LEGAL CLARIFICATION IN THE PROSECUTORIAL PROCESS. GENERALLY, H.R. 3370, IF PASSED, WOULD ENHANCE THE EXPERIENCE AND EXPOSURE OF ASSISTANT CORPORATION COUNSELS; AUTHORIZE HEARING COMMISSIONERS FOR THE COURT ON A PERMANENT BASIS, IMPROVE JUDICIAL NOMINATION AND TENURE COMMISSIONERS PROCEDURES AND OTHER MATTERS.

I LOOK FORWARD TO TESTIMONY ON BOTH THESE BILLS. AT THE END OF THE HEARING, THE SUBCOMMITTEE WILL RECESS AND MARK-UP WILL TAKE PLACE SUBJECT TO THE CALL OF THE CHAIR.

OUR FIRST WITNESS TODAY, REPRESENTING MAYOR BARRY IS MR. JOHN H. SUDA, ACTING CORPORATION COUNSEL AND MR. WALTER B. RIDLEY, RECENTLY APPOINTED CHIAR OF THE DISTRICT OF COLUMBIA PAROLE BOARD.

STATEMENT OF HON. WILHELMINA ROLARK, MEMBER, D.C. CITY COUNCIL

Mrs. ROLARK. I am Wilhelmina Rolark, and I am a member of the D.C. City Council and presently sit as Chair of the Committee on the Judiciary of the City Council of the District of Columbia.

I am pleased to appear before you today to offer my comments on H.R. 2050, which would transfer parole authority over D.C. offenders housed in Federal prisons from the U.S. Parole Commission to the D.C. Parole Board.

In my capacity as Chair of the Committee on the Judiciary I have direct oversight authority for the parole board, and consequently, am keenly interested in improving the efficiency and uniformity of the administration of justice in the District of Columbia. To that end, I fully support H.R. 2050, which will grant the D.C. Parole Board exclusive authority to make parole determinations for all offenses committed in the District of Columbia.

I support this legislation for two reasons. First, the interest of District citizens can best be protected if the legal relationship to the Federal system is both consistent and well defined. Because of the existing bifurcated system of criminal justice, District of Columbia Code offenders are particularly prejudiced by different Federal and local standards at any stage of the criminal justice process—from bail to parole. There must be consistency and equality concerning parole determinations for these District of Columbia Code offenders. The only way to ensure such is for complete parole authority to be vested in the D.C. Parole Board.

My second reason for supporting this legislation has to do with home rule. I have repeatedly stated that District officials, those of us who are elected and those of us who are nonelected, must decide what is in the best interest of District of Columbia citizens. I strongly believe that all criminal justice functions should be transferred to the District including prosecutorial authority, appointment of judges, an independent jury system, and parole determinations. Indeed, H.R. 2050 is reasonable and consistent with home rule in that it permits the District of Columbia to finally be treated like most of the 50 States that may send State code violators to Federal prisons.

Further, in the Home Rule Act, Congress did in fact delegate to the District government the power to define local offenses and ratified the view of the District of Columbia Code as a compilation of non-Federal, State-like laws in its restructuring of the court system in the District pursuant to the Court Reform Act. The D.C. circuit has interpreted the Court Reform Act to give local courts in the District full responsibility for the development of the District's own law. Thus, H.R. 2050 is a confirmation of Federal legislative and judicial intent with regard to establishing local authority in the criminal justice system.

The bifurcated authority that now exists regarding release of a District prisoner on parole, termination of parole or modification of the terms and conditions of parole can only result in disparate treatment. There are about 1,700 male and female District of Columbia Code violators who are presently confined to Federal correctional facilities. Male offenders are placed in Federal institutions

for selective custody, protective confinement and various other reasons. Female offenders sentenced to terms greater than 1 year are placed in Federal facilities which are located—for want of suitable correctional facilities in the Washington area—presently the majority of them are sentenced to Alderson, which, as you have stated, is well over 300 miles from the District.

District of Columbia offenders placed in Federal facilities, both male and female, spend more time in prison than do D.C. offenders housed at Lorton, primarily due to the different standards for parole release applicable in the Federal and local systems. In the case of women, the Garnes decree, enacted in 1976, was intended to cure this anomaly. Pursuant to that decree, once a D.C. female offender is deemed parole eligible, the Federal parole authorities must review her case and send a package of materials to the District authorities to determine whether she is a suitable candidate for parole release. The D.C. authorities must then determine where her case should be heard by the D.C. Parole Board for a parole decision. Often D.C. authorities rely heavily on preliminary decisions rendered by the U.S. Parole Commission based at Alderson.

The intervention of the U.S. Parole Commission at the initial stage of parole evaluation, then, often results in longer sentences for the women involved. This situation can only be fully remedied by transferring control to a single authority.

Finally, Mr. Chairman, in conclusion, I would urge this committee to consider the role of the D.C. Council and executive branch in determining the effective date of implementing a transfer of authority. The transfer of parole functions would certainly have a budgetary impact, and we should have an opportunity to make the necessary adjustments.

Mr. Chairman, I want to commend you for introducing this important piece of legislation and urge the committee to support it.

Thank you very much for this opportunity to testify. And I also want to personally thank you for allowing me to come on early due to the fact that I must go to session.

[The prepared statement of Mrs. Rolark follows:]

STATEMENT OF COUNCILMEMBER WILHELMINA J. ROLARK
BEFORE
THE HOUSE SUBCOMMITTEE ON JUDICIARY AND EDUCATION
OF THE HOUSE COMMITTEE ON THE DISTRICT OF COLUMBIA

OCTOBER 1, 1985

GOOD MORNING. MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE, I AM PLEASED TO APPEAR BEFORE YOU TODAY TO OFFER MY COMMENTS ON H.R. 2050, WHICH WOULD TRANSFER PAROLE AUTHORITY OVER DISTRICT OF COLUMBIA OFFENDERS HOUSED IN FEDERAL PRISONS FROM THE UNITED STATES PAROLE COMMISSION TO THE DISTRICT OF COLUMBIA PAROLE BOARD.

IN MY CAPACITY AS CHAIR OF THE COMMITTEE ON THE JUDICIARY I HAVE DIRECT OVERSIGHT AUTHORITY FOR THE PAROLE BOARD, AND CONSEQUENTLY, AM KEENLY INTERESTED IN IMPROVING THE EFFICIENCY AND UNIFORMITY OF THE ADMINISTRATION OF JUSTICE IN THE DISTRICT OF COLUMBIA. TO THAT END, I FULLY SUPPORT H.R. 2050, WHICH WILL GRANT THE DISTRICT OF COLUMBIA PAROLE BOARD EXCLUSIVE AUTHORITY TO MAKE PAROLE DETERMINATIONS FOR ALL OFFENSES COMMITTED IN THE DISTRICT OF COLUMBIA.

I SUPPORT THIS LEGISLATION FOR TWO REASONS. FIRST, THE INTEREST OF DISTRICT CITIZENS CAN BEST BE PROTECTED IF THE LEGAL RELATIONSHIP TO THE FEDERAL SYSTEM IS BOTH CONSISTENT AND WELL DEFINED. BECAUSE OF THE EXISTING BIFURCATED SYSTEM OF CRIMINAL JUSTICE, D.C. CODE OFFENDERS ARE PARTICULARLY PREJUDICED BY DIFFERENT FEDERAL AND LOCAL STANDARDS AT ANY STAGE OF THE CRIMINAL JUSTICE PROCESS - FROM BAIL TO PAROLE. THERE MUST BE CONSISTENCY AND EQUALITY CONCERNING PAROLE DETERMINATIONS FOR D.C. CODE OFFENDERS. THE ONLY WAY TO ENSURE SUCH CONSISTENCY IS FOR COMPLETE PAROLE AUTHORITY TO BE VESTED IN THE DISTRICT OF COLUMBIA PAROLE BOARD.

MY SECOND REASON FOR SUPPORTING THIS LEGISLATION HAS TO DO WITH HOME RULE. I HAVE REPEATEDLY STATED THAT DISTRICT OFFICIALS - ELECTED AND NONELECTED - MUST DECIDE WHAT IS IN THE BEST INTEREST OF DISTRICT CITIZENS. I STRONGLY BELIEVE THAT ALL CRIMINAL JUSTICE FUNCTIONS SHOULD BE TRANSFERRED TO THE DISTRICT INCLUDING PROSECUTORIAL AUTHORITY, APPOINTMENT OF JUDGES, AN INDEPENDENT JURY SYSTEM, AND PAROLE DETERMINATIONS. INDEED, H.R. 2050 IS REASONABLE AND CONSISTENT WITH HOME RULE, IN THAT IT PERMITS THE DISTRICT OF COLUMBIA TO BE TREATED LIKE MOST OF THE 50 STATES THAT MAY SEND STATE CODE VIOLATORS TO FEDERAL PRISONS.

FURTHER, IN THE HOME RULE ACT, CONGRESS DID IN FACT DELEGATE TO THE DISTRICT GOVERNMENT THE POWER TO DEFINE LOCAL OFFENSES, AND RATIFIED THE VIEW OF THE D.C. CODE AS A COMPILATION OF NONFEDERAL, STATE-LIKE LAWS IN ITS RESTRUCTURING OF THE COURT SYSTEM IN THE DISTRICT PURSUANT TO THE COURT REFORM ACT. THE D.C. CIRCUIT HAS INTERPRETED THE COURT REFORM ACT TO GIVE LOCAL COURTS IN THE DISTRICT FULL RESPONSIBILITY FOR THE DEVELOPMENT OF THE DISTRICT'S OWN LAW. THUS, H.R. 2050 IS A CONFIRMATION OF FEDERAL LEGISLATIVE AND JUDICIAL INTENT WITH REGARD TO ESTABLISHING LOCAL AUTHORITY IN THE CRIMINAL JUSTICE SYSTEM.

THE BIFURCATED AUTHORITY THAT NOW EXISTS REGARDING RELEASE OF A DISTRICT PRISONER ON PAROLE, TERMINATION OF PAROLE OR MODIFICATION OF THE TERMS AND CONDITIONS OF PAROLE CAN ONLY RESULT IN DISPARATE TREATMENT. THERE ARE ABOUT 1700 MALE AND FEMALE D.C. CODE VIOLATORS WHO ARE PRESENTLY CONFINED TO FEDERAL CORRECTIONAL FACILITIES. MALE OFFENDERS ARE PLACED IN FEDERAL INSTITUTIONS FOR SELECTIVE CUSTODY, PROTECTIVE CONFINEMENT AND VARIOUS OTHER REASONS. FEMALE OFFENDERS SENTENCED TO TERMS GREATER THAN ONE YEAR ARE PLACED

IN FEDERAL FACILITIES FOR WANT OF SUITABLE CORRECTIONAL FACILITIES IN THE WASHINGTON AREA. THE MAJORITY OF THESE FEMALE OFFENDERS ARE SENTENCED TO ALDERSON, WEST VIRGINIA, OVER 300 MILES FROM THE DISTRICT.

DISTRICT OF COLUMBIA OFFENDERS PLACED IN FEDERAL FACILITIES, BOTH MALE AND FEMALE, SPEND MORE TIME IN PRISON THAN DO D.C. OFFENDERS HOUSED AT LORTON, PRIMARILY DUE TO THE DIFFERENT STANDARDS FOR PAROLE RELEASE APPLICABLE IN THE FEDERAL AND LOCAL SYSTEM. IN THE CASE OF THE WOMEN, THE GARNES DECREE, ENACTED IN 1976, WAS INTENDED TO CURE THIS ANOMALY. PURSUANT TO THAT DECREE, ONCE A D.C. FEMALE OFFENDER IS DEEMED PAROLE ELIGIBLE, THE FEDERAL PAROLE AUTHORITIES MUST REVIEW HER CASE AND SEND A PACKAGE OF MATERIALS TO THE DISTRICT AUTHORITIES TO DETERMINE WHETHER SHE IS A SUITABLE CANDIDATE FOR PAROLE RELEASE. THE D.C. AUTHORITIES MUST THEN DETERMINE WHETHER HER CASE SHOULD BE HEARD BY THE D.C. PAROLE BOARD FOR A PAROLE DECISION. OFTEN D.C. AUTHORITIES RELY HEAVILY ON PRELIMINARY DECISIONS RENDERD BY THE U.S. PAROLE COMMISSION, BASED AT ALDERSON.

THE INTERVENTION OF THE U.S. PAROLE COMMISSION AT THE INITIAL STAGE OF PAROLE EVALUATION, THEN, OFTEN RESULTS IN LONGER SENTENCES FOR THE WOMEN INVOLVED. THIS SITUATION CAN ONLY BE FULLY REMEDIED BY TRANSFERRING CONTROL TO A SINGLE AUTHORITY.

IN CONCLUSION, I WOULD URGE THIS COMMITTEE TO CONSIDER THE ROLE OF THE DISTRICT OF COLUMBIA COUNCIL AND EXECUTIVE BRANCH IN DETERMINING THE EFFECTIVE DATE OF IMPLEMENTING A TRANSFER OF AUTHORITY. THE TRANSFER OF PAROLE FUNCTIONS WOULD CERTAINLY HAVE A BUDGETARY IMPACT, AND WE SHOULD HAVE AN OPPORTUNITY TO MAKE THE NECESSARY ADJUSTMENTS. MR. CHAIRMAN, I COMMEND YOU FOR INTRODUCING THIS IMPORTANT LEGISLATION AND URGE THE COMMITTEE TO SUPPORT IT.

Mr. DYMALLY. Mrs. Rolark, I have a few questions, but first let me join you in your wish that the entire prosecutorial system be transferred over to the District of Columbia. This administration believes in local control for a number of programs, except the judicial system in the District of Columbia. In that instance, they believe in the Federal system. They want to privatize the FCC, I understand, but they don't want to turn over the judicial system to the District of Columbia. So I share your frustration.

Let me ask you a question. What is the latest development regarding facilities for women inmates in the District of Columbia?

Mrs. ROLARK. There has been no change of that. It is still the same. The women are still housed at Alderson, those who are sentenced for more than a year.

Mr. DYMALLY. Does the city council have any plans?

Mrs. ROLARK. Well, the city council is concerned about that. I am particular. We have had hearings and all the rest, but due to the entire—well, due to the bifurcated system in the first place, and then to the entire problems that we are now having. And the fact that we now have a commission that is studying the whole issue involving correctional facilities that we have placed in place on this point, we have sort of backed off.

Mr. DYMALLY. Are you lacking in money or space or all of the above?

Mrs. ROLARK. All of the above. You see, personally, you know, I have the view that we do not need additional facilities, correctional facilities, within the urban setting which is the District of Columbia. I feel that this would be a misjudgment on the part of any official to do that.

Mr. DYMALLY. That was the recommendation of the commission, was it not? At least the preliminary recommendation?

Mrs. ROLARK. The recommendation of the commission is for not prison. That is correct. They are going to the system of alternatives, which I personally favor. Because I feel that we have not really been as innovative and exploratory as we may have in the consideration of alternatives to incarceration within the District of Columbia.

We have outstanding examples throughout the United States of forms of alternatives that we have not even tried.

Mr. DYMALLY. Would one of the alternatives be the acquisition of Federal land in one of the neighboring States?

Mrs. ROLARK. Well, alternatives, the way I view it, Mr. Dymally, are alternatives to incarceration itself.

Mr. DYMALLY. Yes. Fine.

In your statement you addressed the whole question of parole with reference to H.R. 2050. Do you have any views on H.R. 3370, or did you come prepared to respond to that?

Mrs. ROLARK. No, I didn't come prepared to respond to that.

Mr. DYMALLY. Can we send you some questions on that, Mrs. Rolark?

Mrs. ROLARK. Yes, you can.

Mr. DYMALLY. Fine. Thank you.

Mrs. ROLARK. And I would be very happy to respond.

Mr. DYMALLY. Is the council in the process of considering new sentencing guidelines?

Mrs. ROLARK. Well, you know the judges of the District of Columbia have a sentencing guidelines commission on which I sit, and so does Council Chair Clark. We have been meeting regularly. We have legislation before us, but we are considering drafting of the legislation but we have backed off in view of the fact that the judges themselves have established—that is, Chief Judge Moultrie and the sentencing guidelines commission, on which both of us sit. We are presently still having our meetings and considering that.

Also, Judge Moultrie has placed into being an alternatives commission. A subcommittee of that committee deals with alternatives. So you see, the courts along with us are viewing both of these matters.

Mr. DYMALLY. How much time and money do you think you need to effect that whole transfer system?

Mrs. ROLARK. How much time? The transfer parole authority, I haven't considered the time frame. But I will and let you know.

Mr. DYMALLY. Thank you very much.

Mrs. ROLARK. I mean, I would really have to talk with our budgetary people. I would like to confer with our budgetary authorities on that.

Mr. DYMALLY. Good.

Mrs. ROLARK. In order to give you an answer that would be, you know, an intelligent answer considering all of the factors involved, the executive as well as the legislative. But I will answer that.

Mr. DYMALLY. Has your oversight committee rendered any opinion on the recently adopted guidelines of the D.C. Parole Board?

Mrs. ROLARK. No, I don't think they have considered them. They are getting ready to go into hearings, you know, public hearings, beginning this month. But they haven't considered anything thus far except the whole issue of whether a jail is in fact needed to address the problem of overcrowding and alternatives.

Mr. DYMALLY. What is your opinion about amending the law so that D.C. violations will be brought in the name of the District of Columbia; in other words, it would be *District of Columbia* v. *John Doe,* rather than *United States* v. *John Doe*?

Mrs. ROLARK. Well, of course I agree with anything that gives us a higher image as performing State functions, and that would do that. So I agree with that.

Mr. DYMALLY. I am glad to hear you say that. Most of the people we have spoken to share your view. There are some who take another view based on principle. They claim that they don't want half of the cake; they want the whole cake. In other words, if they can't get the whole judicial system, they just don't want it piecemeal.

Our difficulty is that—first we have difficulty getting the U.S. Department of Justice to even respond to a letter regarding the transfer. They have opposed the legislation. They have said they are not ready to address it, and yet they address all the other issues affecting local control of just about every conceivable scenario.

Mrs. ROLARK. That is correct. There is no question.

Mr. DYMALLY. So what we are trying to do is to see if we could just be as pragmatic as we can and take a little piece here and there as best we can. So your colleagues ought to know that we

share your view of a total transfer, but it is impossible under this administration to do it.

Mrs. ROLARK. Yes.

Mr. DYMALLY. Well, we thank you very much. We may have a couple more questions and we know of your rush. If so, we will send them to you so that you can respond.

Mrs. ROLARK. Oh, yes. All right, then.

Mr. DYMALLY. We thank you very much for coming.

Mrs. ROLARK. And I thank you for allowing me this privilege to appear before you.

Mr. DYMALLY. Mr. Suda, and Mr. Ridley.

Would the witnesses identify themselves for the record, please?

Mr. SUDA. My name is John Suda, and I am acting corporation counsel for the District of Columbia.

Mr. RIDLEY. My name is Walter Ridley, and I am chairman of the D.C. Board of Parole.

STATEMENTS OF JOHN H. SUDA, ACTING CORPORATION COUNSEL, DISTRICT OF COLUMBIA; AND WALTER RIDLEY, CHAIRMAN OF THE D.C. BOARD OF PAROLE

STATEMENT OF JOHN H. SUDA

Mr. SUDA. Mr. Chairman and members of the subcommittee, I am pleased to appear before you today on behalf of the Mayor of the District of Columbia, to testify on a draft bill entitled, "District of Columbia Prosecutorial and Judicial Efficiency Act of 1985." The bill deals with many different issues, several of which would impact on the quality of the District's self-government. It is to these issues alone that I will address my remarks.

The most significant provision of this bill from a home rule perspective is section 2, which would provide that prosecutions of criminal laws of the District of Columbia and criminal laws of the United States which are applicable solely to the District of Columbia be carried out in the name of the District of Columbia rather than in the name of the United States. However, prosecutions under these laws would still be conducted by the U.S. attorney for the District of Columbia. Section 2 would further provide for the temporary appointment on a rotational basis of 10 assistant corporation counsels to the U.S. attorney's office, ostensibly for the purpose of prosecuting these offenses.

As this office testified before this subcommittee 2 years ago, the transfer of prosecutorial and other authority related to the administration of justice from the Federal to the D.C. government should not be piecemeal. That is, if the District is to be given authority over criminal prosecutions, over prisoners, and over the selection of judges, such authority should be conveyed at the same time in the same bill. Of these three areas, this bill deals solely with the transfer of prosecutorial authority, but does little to facilitate that transfer.

The bill would make a purely symbolic change in the name of the party prosecuting the offense. The U.S. attorney would nonetheless retain full authority over the conduct of the prosecutions. At the same time, the office of the corporation counsel would be expected to augment the U.S. attorney's staff.

While we have long encouraged measures which will lead to the transfer of full authority over criminal prosecutions, this measure is not, in our view, a positive step toward prosecutorial autonomy for the District of Columbia. Though opponents of the transfer of prosecutorial authority have argued that the corporation counsel's office lacks the experience necessary to handle these prosecutions, we believe those objections are unfounded and that the training which is the apparent object of this bill is unnecessary.

As this office has written in the past to the chairman of this subcommittee, the office of the corporation counsel has existed continuously, under a variety of titles, for over 160 years, during which time it has handled a broad variety of legal matters: criminal, civil and administrative. Because of the unique nature of the District of Columbia the office has functioned as a State attorney general's office, as well as a municipal legal office. We have a highly qualified and experienced staff with attorneys from some of the best law schools in the country with previous experience at Federal and State government levels and in the private sector. Moreover, a meaningful transfer of prosecutorial authority over serious criminal offenses will require the office to increase dramatically in size. Among the new hires necessitated by the transfer it is expected that there would be a substantial number of experienced criminal lawyers.

In sum, the executive branch of the D.C. government is anxious to continue exploring the best means of transferring prosecutorial authority to the District. However, section 2 of this draft bill in our opinion falls short of that goal.

Several other provisions of the draft bill merit recognition as being consistent with the goal of complete home rule for the District of Columbia. Section 4 of the bill would place within the authority of the D.C. courts the selection and appointment of the executive officer of the courts. At present the executive officer must be selected from among individuals nominated by the director of the administrative office of the U.S. courts, a Federal agency. Similarly, section 7, regarding appointments to the Board of Trustees of the Public Defender Service, would remove from the appointing panel the chief judge of the U.S. Court of Appeals for the District of Columbia and would add the chief judge of the D.C. court of appeals.

Finally, we support section 10 of the proposed bill. This provision would establish a mechanism by which the Supreme Court, any U.S. court of appeals, or the highest court of any State might certify to the D.C. court of appeals controlling questions of D.C. law. This provision recognizes the highest court of the District of Columbia as the primary authority on questions of D.C. law.

In conclusion, the executive branch of the D.C. government has supported and will continue to support legislative proposals which further the goal of self-determination for the District and its citizens. We cannot, however, support section 2 of this draft bill, which purports to move in the direction of full home rule, but, in reality, does not further the cause of local autonomy. We support sections 4, 7, and 10 for the reasons I have outlined. We take no position on the remaining provisions of the bill, which deal, in our view, with internal administration of the courts and the judicial appointment

process, except to note that section 6 has already been enacted as a provision of Public Law 98-235.

In regard to H.R. 2050 I might add that I support H.R. 2050 on behalf of the executive of the District of Columbia, and I further support the remarks that you will hear from Mr. Ridley on that bill.

Again, thank you for this opportunity to speak.

[The prepared statement of Mr. Suda follows:]

TESTIMONY OF JOHN H. SUDA

ACTING CORPORATION COUNSEL, D.C.

BEFORE THE SUBCOMMITTEE ON JUDICIARY AND EDUCATION

OF THE HOUSE COMMITTEE ON THE DISTRICT OF COLUMBIA

ON THE DISTRICT OF COLUMBIA PROSECUTORIAL AND JUDICIAL

EFFICIENCY ACT OF 1985

OCTOBER 1, 1985

MR. CHAIRMAN AND MEMBERS OF THE SUBCOMMITTEE:

I AM PLEASED TO APPEAR BEFORE YOU TODAY ON BEHALF OF THE MAYOR OF THE DISTRICT OF COLUMBIA, TO TESTIFY ON A DRAFT BILL ENTITLED THE "DISTRICT OF COLUMBIA PROSECUTORIAL AND JUDICIAL EFFICIENCY ACT OF 1985." THE BILL DEALS WITH MANY DIFFERENT ISSUES, SEVERAL OF WHICH WOULD IMPACT ON THE QUALITY OF THE DISTRICT'S SELF-GOVERNMENT. IT IS TO THESE ISSUES ALONE THAT I WILL ADDRESS MY REMARKS.

THE MOST SIGNIFICANT PROVISION OF THIS BILL FROM A HOME RULE PERSPECTIVE IS SECTION 2, WHICH WOULD PROVIDE THAT PROSECUTIONS OF CRIMINAL LAWS OF THE DISTRICT OF COLUMBIA AND CRIMINAL LAWS OF THE UNITED STATES WHICH ARE APPLICABLE SOLELY TO THE DISTRICT OF COLUMBIA BE CARRIED OUT IN THE NAME OF THE DISTRICT OF COLUMBIA RATHER THAN IN THE NAME OF THE UNITED STATES. HOWEVER, PROSECUTIONS UNDER THESE LAWS WOULD STILL BE CONDUCTED BY THE UNITED STATES ATTORNEY FOR THE

DISTRICT OF COLUMBIA. SECTION 2 WOULD FURTHER PROVIDE FOR THE TEMPORARY APPOINTMENT ON A ROTATIONAL BASIS OF TEN ASSISTANT CORPORATION COUNSELS TO THE U.S. ATTORNEY'S OFFICE, OSTENSIBLY FOR THE PURPOSE OF PROSECUTING THESE OFFENSES.

AS THIS OFFICE TESTIFIED BEFORE THIS SUBCOMMITTEE TWO YEARS AGO, THE TRANSFER OF PROSECUTORIAL, AND OTHER AUTHORITY RELATED TO THE ADMINISTRATION OF JUSTICE, FROM THE FEDERAL TO THE DISTRICT OF COLUMBIA GOVERNMENT SHOULD NOT BE PIECEMEAL. THAT IS, IF THE DISTRICT IS TO BE GIVEN AUTHORITY OVER CRIMINAL PROSECUTIONS, OVER PRISONERS, AND OVER THE SELECTION OF JUDGES, SUCH AUTHORITY SHOULD BE CONVEYED AT THE SAME TIME, IN THE SAME BILL. OF THESE THREE AREAS THIS BILL DEALS SOLELY WITH THE TRANSFER OF PROSECUTORIAL AUTHORITY, BUT DOES LITTLE TO FACILITATE THAT TRANSFER. THE BILL WOULD MAKE A PURELY SYMBOLIC CHANGE IN THE NAME OF THE PARTY PROSECUTING THE OFFENSE; THE UNITED STATES ATTORNEY WOULD NONETHELESS RETAIN FULL AUTHORITY OVER THE CONDUCT OF THE PROSECUTIONS. AT THE SAME TIME, THE OFFICE OF THE CORPORATION COUNSEL WOULD BE EXPECTED TO AUGMENT THE U.S. ATTORNEY'S STAFF. WHILE WE HAVE LONG ENCOURAGED MEASURES WHICH WILL LEAD TO THE TRANSFER OF FULL AUTHORITY OVER CRIMINAL PROSECUTIONS, THIS MEASURE IS NOT, IN OUR VIEW, A POSITIVE STEP TOWARD PROSECUTORIAL AUTONOMY FOR THE DISTRICT OF COLUMBIA. THOUGH OPPONENTS OF THE TRANSFER OF PROSECUTORIAL AUTHORITY HAVE ARGUED THAT THE CORPORATION COUNSEL'S OFFICE LACKS THE EXPERIENCE NECESSARY TO

HANDLE THESE PROSECUTIONS, WE BELIEVE THOSE OBJECTIONS ARE UNFOUNDED AND THAT THE "TRAINING" WHICH IS THE APPARENT OBJECT OF THIS BILL IS UNNECESSARY. AS THIS OFFICE HAS WRITTEN IN THE PAST TO THE CHAIRMAN OF THIS SUBCOMMITTEE, THE OFFICE OF THE CORPORATION COUNSEL HAS EXISTED CONTINUOUSLY, UNDER A VARIETY OF TITLES FOR OVER 160 YEARS, DURING WHICH TIME IT HAS HANDLED A BROAD VARIETY OF LEGAL MATTERS -- CRIMINAL, CIVIL AND ADMINISTRATIVE. BECAUSE OF THE UNIQUE NATURE OF THE DISTRICT OF COLUMBIA THE OFFICE HAS FUNCTIONED AS A STATE ATTORNEY GENERAL'S OFFICE, AS WELL AS A MUNICIPAL LEGAL OFFICE. WE HAVE A HIGHLY QUALIFIED AND EXPERIENCED STAFF, WITH ATTORNEYS FROM SOME OF THE BEST LAW SCHOOLS IN THE COUNTRY AND WITH PREVIOUS EXPERIENCE AT FEDERAL AND STATE GOVERNMENT LEVELS AND IN THE PRIVATE SECTOR. MOREOVER, A MEANINGFUL TRANSFER OF PROSECUTORIAL AUTHORITY OVER SERIOUS CRIMINAL OFFENSES WILL REQUIRE THE OFFICE TO INCREASE DRAMATICALLY IN SIZE. AMONG THE NEW HIRES NECESSITATED BY THE TRANSFER IT IS EXPECTED THAT THERE WOULD BE A SUBSTANTIAL NUMBER OF EXPERIENCED CRIMINAL LAWYERS.

IN SUM, THE EXECUTIVE BRANCH OF THE DISTRICT OF COLUMBIA GOVERNMENT IS ANXIOUS TO CONTINUE EXPLORING THE BEST MEANS OF TRANSFERRING PROSECUTORIAL AUTHORITY TO THE DISTRICT. HOWEVER, SECTION 2 THIS DRAFT BILL FALLS SHORT OF THAT GOAL.

SEVERAL OTHER PROVISIONS OF THE DRAFT BILL MERIT RECOGNITION AS BEING CONSISTENT WITH THE GOAL OF COMPLETE HOME RULE FOR THE DISTRICT OF COLUMBIA. SECTION 4 OF THE BILL WOULD PLACE WITHIN THE AUTHORITY OF THE DISTRICT OF COLUMBIA COURTS THE SELECTION AND APPOINTMENT OF

THE EXECUTIVE OFFICER OF THE COURTS. AT PRESENT THE EXECUTIVE OFFICER MUST BE SELECTED FROM AMONG INDIVIDUALS NOMINATED BY THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, A FEDERAL AGENCY. SIMILARLY, SECTION 7, REGARDING APPOINTMENTS TO THE BOARD OF TRUSTEES OF THE PUBLIC DEFENDER SERVICE, WOULD REMOVE FROM THE APPOINTING PANEL THE CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND WOULD ADD THE CHIEF JUDGE OF THE DISTRICT OF COLUMBIA COURT OF APPEALS.

FINALLY, WE SUPPORT SECTION 10 OF THE PROPOSED BILL. THIS PROVISION WOULD ESTABLISH A MECHANISM BY WHICH THE SUPREME COURT, ANY UNITED STATES COURT OF APPEALS, OR THE HIGHEST COURT OF ANY STATE MIGHT CERTIFY TO THE DISTRICT OF COLUMBIA COURT OF APPEALS CONTROLLING QUESTIONS OF DISTRICT OF COLUMBIA LAW. THIS PROVISION RECOGNIZES THE HIGHEST COURT OF THE DISTRICT OF COLUMBIA AS THE PRIMARY AUTHORITY ON QUESTIONS OF DISTRICT OF COLUMBIA LAW.

IN CONCLUSION, THE EXECUTIVE BRANCH OF THE DISTRICT OF COLUMBIA GOVERNMENT HAS SUPPORTED AND WILL CONTINUE TO SUPPORT LEGISLATIVE PROPOSALS WHICH FURTHER THE GOAL OF SELF-DETERMINATION FOR THE DISTRICT AND ITS CITIZENS. WE CANNOT, HOWEVER, SUPPORT SECTION 2 OF THIS DRAFT BILL, WHICH PURPORTS TO MOVE IN THE DIRECTION OF FULL HOME RULE, BUT IN REALITY DOES NOT FURTHER THE CAUSE OF LOCAL AUTONOMY. WE SUPPORT SECTIONS 4,7, AND 10 FOR THE REASONS I HAVE OUTLINED. WE TAKE NO POSITION ON THE REMAINING PROVISIONS OF THE BILL, WHICH DEAL WITH INTERNAL ADMINISTRATION OF THE COURTS AND THE JUDICIAL APPOINTMENT PROCESS, EXCEPT TO NOTE THAT SECTION 6 HAS ALREADY BEEN ENACTED AS A PROVISION OF PUBLIC LAW 98-235.

AGAIN, THANK YOU FOR THIS OPPORTUNITY TO SPEAK.

Mr. DYMALLY. Mr. Suda?

Mr. SUDA. Yes?

Mr. DYMALLY. In other words, what if we took out section 2, would that make you happy?

Mr. SUDA. No, Your Honor, section 2 does not make me happy for several——

Mr. DYMALLY. What if we eliminated it?

Mr. SUDA. If you eliminated section 2, you would have a bill that in my judgment cleans up several problems currently in regard to the administration of the local court system and I would support the bill.

Mr. DYMALLY. You don't like the idea of the corporation counsel going over to the U.S. attorney's office?

Mr. SUDA. No, Your Honor, I do not. I do not.

Mr. DYMALLY. All right. Let us take that under advisement because we certainly want a bill that would make the city happy. We don't want something that you are going to be fussing about.

Mr. SUDA. Thank you.

Mr. DYMALLY. Minority counsel?

Mr. HAMM. Thank you, Mr. Chairman.

My name is Ron Hamm, minority staff assistant.

Mr. Suda, I found your testimony very enlightening. I would have a couple of questions for you, though.

Does the corporation counsel currently have the authority to work with the U.S. attorney and delegate its attorneys to them on need?

Mr. SUDA. No. I would like to explain what the corporation counsel's office does do now basically because I think you will see that our jurisdictions meet at one point, and where they meet there is a lot of cooperation between the two offices. They meet principally actually in two areas.

They meet in the criminal area because we handle the prosecution of all juveniles except those that are designated for adult trial. We also handle the prosecution of misdemeanors, minor misdemeanors, in the District of Columbia. And very frequently there is a charge that is our charge and simultaneously a charge that is the U.S. attorney's charge, at the same time. In those cases there is no question but that there is a great deal of cooperation between the United States and the District of Columbia.

In the civil area there is another point at which my office and the office of the U.S. attorney very frequently collaborate, and that is in regard to issues, mostly law enforcement issues, that arise in civil lawsuits. The jurisdiction of the office of the corporation counsel in regard to civil lawsuits is complete. It is quite like an attorney general's office; and we are sued as frequently as any State is sued, and we are certainly sued as frequently as any city is sued.

Well, very frequently, in light of the law enforcement situation in the District of Columbia, the United States is simultaneously sued in the same lawsuit. In those cases there is very close touch between my office and the U.S. attorney's office.

I have been in the corporation counsel's office for 20 years. Most of my time has been spent heading up the civil division, and that is why I feel it is necessary to emphasize that the ties between my

office and the U.S. attorney's office in the civil area are very strong and have been for as long as I have been in the office.

Mr. DYMALLY. Mr. Suda and counsel, may we just proceed with Mr. Ridley, and probably we could take the questions together. I may have erred in not proceeding directly.

Mr. Ridley?

STATEMENT OF WALTER RIDLEY

Mr. RIDLEY. Good morning, Mr. Chairman, and other committee members. I am pleased to appear before you today in support of bill H.R. 2050. This bill conforms with the District's goal of achieving full autonomy and will significantly improve our ability to manage the criminal justice system. While we will ask for some modification of the bill and have not decided upon the most feasible operating procedure, we look forward to working with this committee, the Federal Bureau of Prisons and U.S. Parole Commission to assure efficient and equitable treatment of District prisoners housed in Federal institutions from transition through full implementation of these changes in parole procedures.

The criminal justice system in the District is complex. The parole function is no exception to the fact. The District currently has approximately 1,800 prisoners located in 33 different Federal prisons in 23 different States across the country. We expect a continual increase in the number of D.C. offenders given Federal designations over the next year or so while the District expands its institutional capacity. Furthermore, some of the Federal prison locations, where District of Columbia Code violators are housed, are as distant as California and Texas, thus requiring tremendous transportation expenditures in order to either bring the prisoners to the D.C. Board of Parole or transport parole board members and staff to various Federal prisons.

In assessing the most feasible way of implementing this legislation the District has identified four options:

First, to transport prisoners to the District of Columbia 6 to 9 months prior to their parole eligibility date for a hearing before the board;

Second, to transport D.C. Parole Board members and staff to each of the Federal institutions housing D.C. prisoners on a predetermined schedule for the purpose of conducting hearings;

Third, combine (1) and (2) above by establishing regions based on the geographic distribution of prisoners where hearings will be conducted on a predetermined schedule by transporting both prisoners and parole board personnel to those locations; and

Fourth, by requesting the U.S. Parole Commission to conduct courtesy hearings of D.C. Code violators using D.C. parole guidelines for making release decisions and forwarding relevant information to the District's Parole Board for the actual rendering of the release decision.

Currently, we are assessing the scope of responsibility and cost of implementing each of these options. Many factors must be considered and successful transition and operation of this transfer of authority will require the continued cooperation and support of the Federal Bureau of Prisons and U.S. Parole Commission.

Although cost projections have not been finalized, we estimate a need for at least $1 million in additional funding to the District for the first year if Option 2—transporting parole board personnel to each Federal prison—is adopted. Option 3 would be slightly less costly, depending upon the regional configuration used, but would create additional work for the U.S. Marshal Service and Federal Bureau of Prisons in transporting and housing prisoners at designated regions. In summary, this transfer is going to require additional funding, and we ask that the bill be amended to allow for an incremental assumption of cost by the District.

Also, since implementation of this legislation will require extensive planning with local and Federal agencies, we need a transition period of 2 years, rather than 1, as currently contemplated by this committee. This will enable us to establish an automated information system interfaced with the Federal prisons and other affected agencies to ensure a safe and orderly process for making parole release decisions for D.C. prisoners housed in Federal institutions.

In conclusion, Mr. Chairman, and committee members, we applaud your action of furthering the objectives of home rule by this legislative initiative. We look forward to receiving responsibility for making parole release decisions for all D.C. Code violators and will immediately proceed to develop a viable parole transfer plan after this legislation has been adopted.

I will be happy to entertain questions. Thank you.

Mr. DYMALLY. Thank you, Mr. Ridley.

First, I want to congratulate you on your recent appointment and welcome you to the committee.

Mr. Suda wants to do some mathematics here. He wants a minus and you want a plus. Both of them I find very intriguing and not at all totally objectionable. So you want a million dollars and Mr. Suda wants section 2 out. The subcommittee will take that under advisement.

But let me switch just a moment here and talk to you about the whole question of parole and housing of inmates. Does the District of Columbia send any of its inmates up to Petersburg?

Mr. RIDLEY. Yes, we do, sir.

Mr. DYMALLY. I had occasion, Mr. Ridley, to go to Petersburg recently. It took me a whole day to go there. I drove; stopped and got some orange juice on my way up, stopped and got some lunch. It consumed 1 entire day. I asked my staff who traveled with me what happens to poor families who have to visit inmates there? But more significantly, what about the right of the inmate to counsel? I mean, it seems to me a major hardship not only in getting to Alderson. And Alderson, I have been threatening to go to Alderson for 5 years; and every time I put on my calendar, "visit to Alderson"—and the next one is proposed for October 13 and 14—my staff tells me it is a 2-day visit. Because I can't get a morning plane here and come back in the evening the same day. That is really an outrage. Something really ought to be done about it.

I have been very quiet; I haven't gone and held press conferences and done something about it. But the fact that I had to sacrifice an entire day—it wasn't a sacrifice, really; it was an experience. It seems to me that we really ought to be doing something about this situation.

And now I see District of Columbia is uncertain about this whole question of facilities. I am referring not only to District of Columbia; I am referring to the Federal system, although we don't have any Federal representatives here.

People who are just seeking bail are sent all the way to Alderson, have to be transported back here for 8 hours, wait for a public defender, and are sent back up to Alderson again. That is really inefficient. I am just beginning to get involved with the system. I have been sort of an observer, kind of a 3-day resident of the District. I go back home every weekend. But I know of some personal instances where the Federal Government has people in Alderson and Petersburg without bail. They don't have a right to effective counsel that way. A lawyer has to give up an entire day. A public defender is not going to do that sort of thing, anyhow. I am just venting my frustration.

What are we doing about this situation, Mr. Ridley? You want a million dollars; give me some good answers.

Mr. RIDLEY. I would like to turn that response over to Mr. Suda, Chairman Dymally, since he is more familiar than I.

Mr. DYMALLY. All right, both of you. Both of you are on the firing line.

Mr. Suda, if you want section 2 out, give me some good answers.

Mr. SUDA. No, no. Mr. Chairman, first of all, in regard to the pretrial detainees that were going to Petersburg, that through an arrangement that we have worked out with the U.S. attorney's office has ceased. From about August 22 to last week, all persons who appeared in front of the U.S. District Court for the District of Columbia were held at Petersburg. We have stopped that. They are now being held in the D.C. jail. So the only persons who should be in Petersburg as of this time are those persons who have been convicted already on a charge and have been sentenced. All pretrial detainees are now back up in the District of Columbia.

The situation obviously is a very complicated one caused by our overcrowded prison institutions here in the District of Columbia. Each one of our institutions is now over capacity. The D.C. jail is still over capacity in spite of the Judge Bryant decree. The central facility—all of the Lorton facilities are over capacity. And our halfway houses are over capacity. Because of this overcrowding the Federal Government has continued to take convicted and sentenced persons to Federal institutions to help ease the overcrowding situation, and also to help the District of Columbia meet the lines drawn by the Judge Bryant order in terms of getting the numbers of persons at the D.C. jail down to 1,694 by November 22, 1985, which is now just roughly a month and a half away. That complicates it.

So there is more here than just the ability to try to reach an agreement to bring people back to the District of Columbia. However, I am pleased to say that in regard to pretrial detainees that situation has been worked out and they are now being housed at the District of Columbia jail.

Mr. DYMALLY. Mr. Suda, I am an unreconstructed home ruler. I mean, I believe in home rule 1,000 percent. But on this particular issue, and I have basically supported everything, I just got to tell you, you may anticipate some legislation from me next year if the

District of Columbia does not expedite the whole problem of housing of women inmates who are not sentenced someplace that is convenient for counsel.

Yes, after they are sentenced society believes, and I don't share that necessarily, that criminals in prisons have no rights. But defendants have rights, and they ought not to be subject to this sort of inconvenience.

I have been your friend for the last years. I am just going to tell you something: If I have to spend 2 days to go up to Alderson, you can expect some—unless you get some special charter for me to come back the same day, you can expect some legislation next year. I am warning you. OK?

Mr. SUDA. I think the situation at Alderson is a very bad one. I agree with you on that.

Mr. DYMALLY. It is just an outrage.

To what do you attribute the high incarceration and recidivism rates for the District of Columbia? Both of you, Mr. Ridley and Mr. Suda.

Mr. RIDLEY. I will try first, Mr. Chairman. The District of Columbia right now has a very serious drug abuse problem. In addition to that, the District of Columbia has probably one of the better law enforcement components in the United States, using modern technology and, of course, increased numbers. Therefore, the arrest rate is much higher than it is in most urban areas.

The high recidivism rate is a little complex for me because there are so many different ways that you can measure recidivism. One of the things we look at is the drug problem, and a large percentage, as I understand from the statistics I have read, are those who have been involved in the possession and sale or distribution of substances. Therefore, I think that contributes to our large recidivism.

Mr. DYMALLY. Do you think the unique system, or should I say the unusual system of dual parole that you have here, with the Feds and the District, may cause some of that problem?

Mr. RIDLEY. In the compilation of the statistics it very well could, Mr. Chairman.

Mr. DYMALLY. Could you give us a brief review of your new revised guidelines and how they operate?

Mr. RIDLEY. Yes, sir.

Mr. DYMALLY. And if it is lengthy, then could you submit a copy for the record?

Mr. RIDLEY. I will, sir.

In the last 12 months the District of Columbia Board of Parole enacted several significant rule changes. The first set of rule changes concerned the establishment of specific criteria for the issuance of parole violator warrants and for rendering parole revocation decisions. These rules changes greatly reduce the degree of discretion in decisionmaking by parole board members and brought District policies in this area in line with other jurisdictions.

The second significant rule change concerns the establishment of empirically based parole decisionmaking guidelines. These guidelines were designed to ensure uniformity in parole decisionmaking and to ensure that public safety considerations are systematically included in all aspects of parole decisionmaking.

The D.C. parole guidelines consist of several measures which examine: One, likelihood that parolee will commit other crimes; two, history of commiting violent crimes; three, history of violations of drug laws; four, institutional adjustment; and five, program participation.

The measure used to specifically assess risk is the salient factor scale, which is the risk assessment component of guidelines used by the U.S. Parole Commission since 1974, and has a strong empirical foundation. The salient factor scale has been validated and revalidated as a reasonably accurate predictor of risk in several studies using samples of Federal prison releasees. The salient factor scale has been used by the D.C. Board of Parole since April 1985, and some of the areas covered by this measure include: criminal history, institutional history, age, and history of drug use. Over time it is expected that use of this measure and the remaining components of the District's guidelines system should facilitate parole decisionmaking greatly reducing the risk to the public at large.

Mr. DYMALLY. The U.S. attorney disagrees with you, and claims that the high recidivism rate in the District of Columbia is due to lax parole guidelines.

Mr. RIDLEY. Mr. Chairman, in April 1985, we implemented the new guidelines. Therefore, I am sure the U.S. attorney has not had an opportunity to assess the validity of the new guidelines, sir.

Mr. DYMALLY. If this legislation were passed here in the House and signed by the President, how much time do you think you would need to put it into effect?

Mr. RIDLEY. I would request 2 years, sir.

Mr. DYMALLY. Two years?

Mr. RIDLEY. Yes, sir.

Mr. DYMALLY. Mr. Suda, I don't want to influence the decision of the Advisory Commission on Site Selection, but I certainly would like to express my concern about this question of inconvenience of families of poor inmates who are not yet sentenced. So at some appropriate time, if it could be arranged, I would like to talk with the Chair of the committee about this problem, so that they will understand there is a need to make some decision about this site selection speed.

Mr. SUDA. Yes; I would be very happy to do that.

Mr. DYMALLY. Thank you. Do you agree with the legal basis for the proposal to require criminal cases to be brought in the name of the District of Columbia?

Mr. SUDA. Yes; I do.

Mr. DYMALLY. You heard my comment to Mrs. Rolark. I share your view that you should get the whole ball of wax, and this administration in my judgment has been very hypocritical about this question of local home rule by wanting to give Medicare and Social Security and everything to the private sector or State or local government, but not the criminal justice system to the District of Columbia. But in the meantime, this is the best we can do.

We have some questions which we plan to mail to both of you for a further response, so we can enter it into the record with the hope that it will convince the Senate to pass this piece of legislation this year.

Thank you very much.

Mr. SUDA. Thank you, Mr. Chairman.

[The questions and answers submitted follow:]

Responses of Mr. Walter B. Ridley, Chairman
District of Columbia Board of Parole to
Questions posed on October 1, 1985 by the
Subcommittee on Judiciary and Education

Question:
1. For the record, Mr. Ridley, can you just give a mild description of the parole review process under both the District of Columbia and how it is similar or distinct from the federal parole system?

Answer:
1. The District of Columbia Board of Parole has adopted a set of structured formal parole guidelines. The use of formal parole decision-making guidelines at parole initial hearings and rehearings is a step toward a more coherent parole decision-making process that will lead both to increased consistency in parole release decisions and enhanced accountability of the Board. These guidelines reduce the degree of subjectivity prevalent in past parole decisions, and make explicit those factors to be considered in each individual case. The guideline model used is dynamic, requiring an ongoing data collection, and feedback mechanism to provide the content and/or structure of the guidelines over time.

The major objectives of using formal parole guidelines are:

1) Promoting consistent parole decision-making;

2) Making the paroling policies more explicit;

3) Incorporating a concern for fairness;

4) Achieving the sentencing purposes of incapacitation, specific deterrence, and rehabilitation;

5) Penalizing institutional misconduct, and

6) Developing an evolutionary model of management control.

There are three principles underlying the parole guidelines. The first principle is that the parole decision-making process should be based on offender characteristics that have a statistically determined bearing on the offender's risk of future involvement in criminal behavior. The second principle is that the court addresses the purposes of retribution and general deterrence, through the sentence it imposes, and the Board of Parole will not usurp these functions of the sentencing judge. A third principle is that in determining the factors

Answer to Question #1 Continued

used as components of the guidelines, consideration should be given to their fairness and to their statistical reliability.

The overriding principle of the guidelines is that they should allow for release of a parolee only when information indicates that there is a reasonable probability that an individual will live and remain at liberty without violating the laws and that such release is not incompatible with the welfare of society.

The guidelines are comprised of four factors:

1) Degree of risk as determined by calculation of the Salient Factor Score, an actuarial risk assessment device;

2) Type of risk that distinguishes between violent crimes, weapons, or drug trafficking and other less serious crimes;

3) Institutional adjustment as determined by disciplinary infractions/or lack of while incarcerated; and

4) Program participation as measured by the degree of participation in prison programs by the inmate.

The guidelines were modeled, in part, after those used by the U.S. Parole Commission and the state of Pennsylvania. The guidelines are empirically based with a numerical score determined by first calculating a Salient Factor Score (risk assessment). This score places the offender into one of four risk categories. A baseline number of points is assigned to each risk category. For each of the other factors for which an affirmative finding is made, points are added or subtracted from the baseline score. The resulting point total determines whether or not parole is granted, and if so, the level of supervision to be imposed. The Board members may override a guideline recommendation if there are mitigating or aggravating circumstances. Decisions that override guideline recommendations must be clearly documented.

Question:
2. Could you provide a brief review of the Parole Board's revised guidelines?

Answer:
2. The guidelines encompass state of the art techniques for decision-making and set basic standards for parole supervision levels. These guidelines draw from the experiences of two model systems: the U.S. Parole Commission and the state of Pennsylvania. They incorporate results of fourteen years of research at the federal level and include the collective thinking of District officials and local, state and federal experts in the field. We chose the state of Pennsylvania because its guidelines contain both pre- and post-incarceration factors such as ours.

The District of Columbia Parole Board is statutorily mandated to consider parole eligibility within the context of the prisoner's conduct within the institution, the probability a new crime will not be committed; and the general welfare of society.

Specific factors considered by the Board of Parole include: offense severity; prior criminal record; personal and social history; physical and emotional health; institutional adjustment, including success at combating problems; and availability of community resources for transition from prison.

The Parole Board has been guided in its decisions by these factors. However, up to now, there was no systematic way to combine these factors in a manner to ensure reliable decision-making that also specifically took the predicted risk of future criminal involvement into account.

Even though our past parole decision-making criteria have included many of the same factors enumerated in the new guidelines, we will now attach specific numerical values to each factor. Also the risk assessment factors we will use have been statistically validated.

In developing these guidelines, our major thrust was protection of the public, especially from persons who commit crimes of violence, with weapons, and whose crimes involve drugs, including PCP. Our guidelines specifically include each of these serious acts as negative parole indicants and include a numerical score to predict risk to the community.

Answer to Question #2 Continued

Under the new guideline system four factors are considered with numerical values attached to each of the factors. These factors are: degree of risk that is posed by an offender if released; type of risk that distinguishes between violent crimes, drug trafficking and other less serious crimes; institutional adjustment, and program participation, as measured by degree of participation in prison programs. A composite score is derived, based on how each offender is calculated on each of the four factors, and a guidelines recommendation is then determined. In any instance where the Parole Board choses to override the guideline recommendation, the reason must be clearly documented.

We have included participation in educational and vocational training programs as enhancing factors in the guidelines. In other words, while high risk, serious offenders will serve long sentences, sustained achievement will be recognized as a positive factor in calculating the guidelines score.

In summary, the result of these changes in parole release decision-making is that higher quality decisions will be made. The goal is to incarcerate high risk offenders who may pose a danger to the community. The goal for low risk offenders who work hard while incarcerated to improve themselves is to be paroled at their initial hearing.

I have included a copy of Amendment No. 1 to the District of Columbia Municipal Regulations Title 28 Corrections, Courts and Criminal Justice which includes Procedures for Granting Parole for your information.

Question:
3. In your opinion, how will the abolishment of federal parole effect the interests and rights of D.C. Code offenders in federal prisons?

Answer:
3. It would deny the D.C. offender the same parole rights afforded D.C. offenders housed under the jurisdiction of the District of Columbia. In addition the impact of the abolishment would in my opinion severely impede the habilitative opportunities afforded the same offenders.

Question:
4. Recidivism is quite high in the District of Columbia; what do you attribute this to and how does it compare with other major urban jurisdictions?

Answer:
4 Recidivism is not only quite high in the District of Columbia but also nationally. According to the Bureau of Justice Statistics, approximately 61 percent of those admitted to state prisons in 1979 were recidivists (prior admission to prison). Of those entering prison without a history of incarceration (an estimated 39 percent of all admissions), 60 percent had prior convictions that resulted in probation and an estimated 27 percent were on probation at the time of their prison admission.

Definitive data on recidivism in the District is not available. However, it is estimated that the proportion of District sentenced offenders with prior incarcerations approximates national figures.

The reasons for high recidivism both locally and nationally are probably numerous. The lack of effective prison rehabilitation programs, inadequate post-release supervision, drug abuse, and chronic high unemployment among segments of the population are some of the often cited reasons for persons returning to prison.

Question:
5. The United States Attorney's Office attributes high recidivism rate in the District to laxed parole standards; what is your response to this contention?

Answer:
5. A uniform operational definition of recidivism does not exist. In a generic sense, it refers to an established pattern of individuals violating laws. Based upon current methods for compiling and analyzing criminal justice data, the District's general indicator of recidivism is the number of persons rearrested while in some type of pre or post trial release program.

Answer to Question #5 Continued

Since January of 1983, the percentage of arrestees for serious crimes, who are processed through the court cellblock, has ranged from 20 to 27 percent. Of those numbers, which average 15,700, approximately 27 percent were in post trial release programs including probation and parole. A noteworthy fact about all rearrests is that a majority, ranging from 55 to 64 percent, were for drug law violations.

It is also important to note that probation is the most widely used program for which post trial rearrest statistics are compiled.

Nationally, parole is the second major form of community supervision for adjudicated offenders. Although some prisoners are released to the community unconditionally, approximately 75 percent are released to parole supervision. Parolees account for approximately 11 percent of all adults in the United States under some form of correctional supervision. The percentage of persons rearrested in the District who were on parole ranged from four to eighteen percent, on a quarterly basis since 1983.

Reported crime in the District has declined for the past three years. We attribute much of this to improved technology and enhanced law enforcement techniques which incorporate technological advancements.

Corresponding improvements have been made in parole decision-making. Recognizing the need to curtail some of the subjectivity in parole decision-making, the District recently adopted empirically based guidelines. Some type of decision-making guidelines for parole exist in all jurisdictions, with the degree of explicitness and the range of flexibility varying to a large extent. Factors for consideration in parole decision-making are simply listed in some jurisdiction. In others, they are listed and prioritized in terms of importance, while in other jurisdictions, detailed guidelines are linked to rating scales and computational formula are utilized to make decisions.

The District's parole release standards are among the most stringent in the country. They emphasize aggravating factors such as criminal histories of offenders and severity of the instant offense, and place less emphasis on traditionally mitigating factors such as participation in institutional programs. Additionally, we have very stringent procedures for revoking parole and immediately intervene when parolees test positive for drug use or fail to comply with other conditions of release such as maintaining employment.

Question:
6. Administratively speaking, if this legislation passed, how would your office conduct parole hearings over the numerous offenders in the federal system and to what extent would you have to increase the number of parole officers?

Answer:
6. I have addressed part of this question in my earlier testimony.

In assessing the most feasible way of implementing this legislation, the District has identified four options:

(1) To transport prisoners to the District of Columbia six to nine months prior to their parole eligibility date for a hearing before the Parole Board;

(2) To transport D.C. Parole Board members and staff to each of the federal institutions housing D.C. prisoners on a predetermined schedule for the purpose of conducting hearings;

(3) Combine 1 and 2 above by establishing regions (based on the geographic distribution of prisoners) where hearings will be conducted on a predetermined schedule by transporting both prisoners and Parole Board personnel to those locations; and

(4) By requesting the U.S. Parole Commission to conduct courtesy hearings of D.C. Code violators, using D.C. parole guidelines for making decisions, and forwarding relevant information to the District's Parole Board for the actual rendering of the release decision.

Currently, we are assessing the scope of responsibility and cost of implementing each of these options. Many factors must be considered and successful transition and operation of this transfer of authority will require the continued cooperation and support of the Federal Bureau of Prisons and U.S. Parole Commission

Although cost projections have not been finalized, we estimate a need for at least one million dollars in additional funding to the District for the first year if Option 2 (transporting Parole Board personnel to each federal prison) is adopted.

Answer to Question #6 Continued

Option 3 would be slightly less costly, depending upon the regional configuration used, but would create additional work for the U.S. Marshal Service and Federal Bureau of Prisons in transporting and housing prisoners at designated regions. In summary, this transfer is going to require additional funding and we ask that the Bill be amended to allow for an incremental assumption of cost by the District.

Question:
7. What is your parole officers present caseload and how would it be changed by this legislation?

Answer:
7. The present parole officers case ratio is 1 to 65 for youth cases and 1 to 88 for adults. This caseload includes active, inactive and warrant issue cases.

Parole supervision is currently a function of the Department of Corrections.

The Board of Parole has recently established a staff team to study the feasibility of a proposed reorganization which would transfer responsibility for parole supervision to the Board of Parole.

There will be an increase in the number of cases but it will not be a major impact because all D.C. Code offenders housed in federal prisons will not have the same parole eligibility dates nor will they be heard by the Board at the same time. The problem could be addressed by the addition of a few parole officers.

Question:
8. If the Congress passed this legislation, how much time would you require before taking over their functions?

Answer:
8. Since implementation of this legislation will require extensive planning with local and federal agencies, we need a transition period of two years.

Question:
9. Has your office conducted a statistical analysis of the paroles granted over the last few years, based on the character and nature of the offense, and the respective sentence imposed?

Answer:
9. The D.C. Office of Criminal Justice Plans and Analysis in conjunction with the D.C. Board of Parole, engaged in a research project, funded by the Bureau of Justice Statistics, to test the applicability of the Iowa Risk Assessment Scale with the District's parole population.

This device was selected for analysis because it contains a "risk of violence" classification in addition to general risk classification scheme. Research involved a statistical analysis based on follow-up of a retrospective sample of 581 District of Columbia parolees released during CY 1980. Variables in this analysis included criminal history, parole performance history, drug use history, and other socio-demographic items.

Findings from this analysis indicated that the Iowa Risk Assessment Scale failed to satisfactorily predict parole performance. It is determined that this device is inapplicable to D.C. parolees.

Using the same CY 1980 parolee population sample, the Salient Factor Score was tested for its applicability to the District's parolee population.

The Salient Factor Score is a risk assessment tool developed and used by the U.S. Parole Commission. This risk assessment measure was developed and validated on samples (i.e., those incarcerated in federal facilities). This scale has also been subjected to two separated reliability studies which resulted in the refinement of its items and the instructions of scoring as reliability enhancements.

To determine whether the Salient Factor Score differentiated adequately for D.C. parolees, salient factors scores were calculated from data for 402 of the parolees released in the District of Columbia in CY 1980. The scores were then examined in relation to parole outcomes as defined by revocations, new convictions, technical violations, and parole without incident. Findings from this analyses suggested that the Salient Factor Scale could indeed differentiate, with some

Answer to Question #9 Continued

accuracy, those parolees likely to have parole revoked from other parolees. However, it should be noted that due to limitations in the data base and in sampling procedures, these findings were viewed as strictly preliminary with further validation studies required overtime.

In addition to these two studies which were conducted in conjunction with the development process for parole guidelines, the District's Department of Corrections issues annual reports on parolee performance, and includes data on parole socio-demographic characteristics.

Once the planned automated parole management information system is established, then more refined research may be done which could more clearly delineate those variables linked to parole success and consequently improve risk assessment devices.

Mr. DYMALLY. Mr. Polansky? Mr. Polansky, it is good to have you back again.

STATEMENT OF LARRY P. POLANSKY, EXECUTIVE OFFICER, D.C. COURTS

Mr. POLANSKY. It is my pleasure, sir. It is my pleasure to be here on behalf of Judge Moultrie, who was invited to testify, but I will testify on behalf of the D.C. courts, sir.

I would like to speak to those sections of the proposed bill which affect the courts directly, and I will suggest some amendments which the courts believe are extremely important.

Mr. DYMALLY. Mr. Polansky, I take it you have those amendments in writing?

Mr. POLANSKY. Yes; we have provided a copy to staff of the proposed amendments to section 3.

Mr. DYMALLY. Thank you.

Mr. POLANSKY. In fact, we thank you for section 3 which would make our hearing commissioners a permanent feature of the superior court operation. We have had them in operation for 3 years, and they have been a very important part of our operation. We would ask, however, for some amendment to section 3 that would expand the authority of the hearing commissioners sufficiently to eliminate bottlenecks that have developed in those 3 years.

There is a requirement in the current act for the consent of the parties in order to permit the hearing commissioner to determine conditions of release or to hear a probable cause hearing. Well, this at times will create a delay in that a judge must be brought from an active courtroom to respond to the nonconsent of the parties. This also places a restriction on a hearing commissioner which is not placed on a U.S. magistrate, which is surprising since our statute is modeled upon that Magistrate Act.

On the other hand, it is our belief that in the actual trial of cases the consent of the parties should be required; however, the requirement that the findings of the commissioner would result only in a recommendation to a judge again creates delay in the operation of the court. It is our opinion that once the parties have consented to be heard by the hearing commissioner it would be appropriate to permit the rendering of a final judgment, subject, however, to

review by a judge of the trial court upon proper motion made by a party. In our opinion, the simple amendments suggested would result in significant benefit to the operation of the court.

Section 4 of the act that you propose is part of our legislative package that we have previously submitted, and we certainly support that.

We respectfully suggest that section 5, which would repeal totally the automatic disbarment provisions of the District of Columbia Code, be reviewed for amendments which would specifically address any problem that the committee sees. We strongly believe that conviction for an offense involving moral turpitude does reflect upon a lawyer's right to be an officer of the court, and would ask that you carefully review section 11–2503 of the District of Columbia Code before acting with a broad brush to repeal the entire section.

Section 6 is a technical change regarding retirement age that in fact was passed in a previous year. But I must admit that we missed the fact that there was a section of the act that was not corrected, and this is a required technical amendment.

I have no comment on section 7 regarding the board of trustees of the public defender's service.

We would also respectfully submit that the proposed section 8 amendment is not totally necessary. One part asks that the authority of the auditor-master to audit and state a specific fiduciary account be removed and that authority be provided for the register of wills. I would bring to your attention that de facto that has occurred; and the second part, to provide the authority for the register of wills formally, is appropriate. Removing that authority from the auditor-master might, in fact, hurt in that any judge of the court can delegate to the auditor-master any case, and this might preclude the delegation of a probate matter for the auditor-master.

Section 9 of the act is part of our court package, and it takes care of the duplicate reporting requirement placed on D.C. judges. I would commend this section highly, and would indicate to you that Judge Tamm—recently deceased Judge Tamm—publicly announced that he did not understand why the D.C. judges were required to report to the Federal Commission.

Section 10, although not commented on by the District of Columbia courts in their legislative package, regarding the certification of State questions of law, we believe is a commendable addition to this bill.

Sections 11 to 14, regarding the D.C. Nominating and Tenure Commission, we decline to comment on.

Section 15, however, which would eliminate the category of exceptionally well qualified, is a warranted and I think very desirable change to the act. The distinction between well qualified and exceptionally well qualified does not help in any fashion and does create some tension among judges who are qualified in one or the other of those categories.

We are pleased that you have included in this omnibus court package several of the proposals that were in the court's legislative package which we forwarded to the members of the committee earlier this year. We would, however, ask that you consider additional amendments recommended by the Joint Committee on Judicial Ad-

ministration and by the judges of both courts that would provide for sabbatical leave for judges, would correct a gross mistake made in the statutory language which controls the calculation of survivors' annuities, and change the methodology for the provision of compensation of senior judges without changing the maximum annual salary they might earn.

Last but not least, we would ask that you review the statute regarding the limitation of D.C. judges' salaries to 90 percent of Federal judges' salaries. We believe there is proper justification for that to be changed to an equivalent salary to that of Federal judges.

We have attached to the prepared testimony which we will submit a copy of that previously submitted legislative package, and would, at this time, stand ready to answer any questions you might have.

[The prepared statement and attachment of Mr. Polansky follow:]

Testimony of Larry P. Polansky
Executive Officer - District of Columbia Courts
before the
Judiciary and Education Subcommittee
of the
House of Representatives
Committee on the District of Columbia

Chairman Dymally and members of the Judiciary and Education Subcommittee of the Committee on the District of Columbia, it is my pleasure to be here today to testify on behalf of the District of Columbia Courts regarding the proposed District of Columbia Prosecutorial and Judicial Efficiency Act of 1985.

I will speak on those sections of the proposed bill which affect the District of Columbia Courts directly and will suggest some additional amendments which the Courts believe are extremely important to their effective operation.

We thank you for Section 3 which will make our hearing commissioners a permanent feature of the Superior Court operation. We would ask, however, that you amend Section 3 to expand the authority of the hearing commissioners sufficiently to eliminate bottlenecks that have developed in our use of hearing commissioners over the past three years.

The requirement for the consent of the parties in order to permit the hearing commissioner to determine conditions of release in pretrial detention or for a preliminary examination for probable cause has created delay in that a judge must be brought from an operating trial courtroom in order to accommodate the defendant who does not consent. This requirement places a restriction on the hearing commissioner which is not placed on a U.S. Magistrate by

the statute upon which our authorization was modeled and tends to disrupt our trial operation.

On the other hand, it is our belief that in the actual trial of cases, the consent of the parties should be required, however, the requirement that the findings of the commissioner result only in a recommendation to a judge again delays the action which must be taken by the Court. It is our opinion that once the parties have consented to be heard by the hearing commissioner, it would be appropriate to permit the rendering of a "final" judgment, subject, however, to review by a judge of the trial court upon motion made by a party. In our opinion, the simple amendments suggested would result in significant benefit to the operation the Court.

We respectfully suggest that Section 5, which would repeal totally the automatic disbarment provisions of the District of Columbia Code, be reviewed for amendments which would specifically address any problem that the Committee sees. We strongly believe that conviction for an offense involving moral turpitude does reflect upon the lawyer's right to be an "officer of the Court" and would ask that you carefully review Section 11-2503 of the Code of Professional Responsibility before acting with a broad brush to repeal that section.

We would also respectfully submit that the proposed Section 8 amendment to Section 1724 of Title 11 of the District of Columbia Code is not necessary or needed. The Auditor-Master can still be asked by a judge to audit and state a specific fudiciary account, but more importantly, the audit staff that at one time (many years ago) reported to the Auditor-Master, was transferred to the Probate Division of the Superior Court five years ago and now performs that function under the supervision of the Register of Wills.

This, however, does suggest that Part B of your Section 8 change, which adds that responsibility to the Register of Wills, is quite appropriate and we, therefore, fully support Part B of Section 8.

We're pleased that you have included in this omnibus Court package several of the proposals in the Court's legislative package forwarded to the members of this Committee earlier this year. We would, however, ask that you consider additional amendments recommended by the Joint Committee on Judicial Administration and by the Judges of both Courts that would: provide for sabbatical leave for judges; correct a gross mistake made in the statutory language which controls the calculation of a survivor's annuity; and change the methodology for the provision of compensation to senior judges without changing the maximum annual salary they might earn. Last but not least, we would ask that you review the statute regarding the limitation of D.C. judges' salaries to 90 percent of Federal judges' salaries.

We have attached to the prepared testimony a copy of the previously submitted Court legislative package and would, at this time, stand ready to answer any questions the Committee might have.

Thank you.

Attachment

LEGISLATIVE PACKAGE

DISTRICT OF COLUMBIA COURTS

The attached legislation is hereby formally proposed by the Joint Committee on Judicial Administration. A summary of the individual Bills is provided as follows:

1. SUPERIOR COURT HEARING COMMISSIONERS ACT

Create permanent legislation to continue the use of hearing commissioners in the Superior Court of the District of Columbia. This legislative proposal would accomplish this and would also provide certain amendments to the existing concept which would permit flexibility in carrying out the responsibilities of the hearing commissioners and expedite the judicial process and procedures. The main change is to permit the commissioners to make findings and enter judgment, with the consent of the parties and without the sign-off of a judge. The Bill provides a review and appeal procedure of this decision. The U.S. Court of Appeals for the Federal Circuit provides clear authority for such a procedure in the case of The D.C. Auld Company v. Chroma Graphics Corp., U.S.C.A. Fed. Cir., App. No. 84-1381, January 28, 1985.

2. ELIMINATE DUPLICATE FILING OF JUDICIARY FINANCIAL DISCLOSURE STATEMENTS

Section 1530 of Title 11 of the District of Columbia Code requires each judge of the District of Columbia Courts to file an annual financial disclosure statement with the District of Columbia Commission on Judicial Disabilities and Tenure and Courts' policy provides for certain staff to file financial disclosure statements with the Chief Judge of the District of Columbia Court of Appeals. In addition, Public Law 95-521 (Ethics in Government Act of 1978, 28 U.S.C.A. App. I, Section 301 et seq.) has been determined by the Judicial Ethics Committee of the Judicial Conference of the United States to include judges and specified staff of the District of Columbia Courts. It is suggested that Title 28 be amended to exclude the District of Columbia Courts, thereby eliminating this duplication in reporting.

3. APPOINTMENT OF THE EXECUTIVE OFFICER OF THE DISTRICT OF COLUMBIA COURTS ACT

Title 11, Section 1703(b) of the District of Columbia Code currently provides that the Executive Officer of the District of Columbia Courts be appointed from a list of persons submitted by the Director of the Administrative Office of the United States Courts. Since the Executive Officer is responsible for the administration of the District of Columbia Courts, the selection of this person should be by the two Chief Judges with the concurrence of the Joint Committee on Judicial Administration as a totally internal process. There is no logical reason for the

certification of candidates by the Administrative Office of the United States Courts, since there is no official interaction between that office and the District of Columbia Courts.

4. THE DISTRICT OF COLUMBIA JUDICIAL COMPENSATION ACT

This proposed legislation would amend Section 11-703(b) and Section 11-904(b) of the District of Columbia Code to provide that the judges of the District of Columbia Court of Appeals and the Superior Court of the District of Columbia are to be compensated at not less than the rate of pay of United States appellate and district judges. The only logical reason for keying a salary as a percentage of another position is if there is a hierarchy to be maintained. In the District of Columbia, the local and federal courts are separate and distinct systems with separate jurisdiction and structure and there is no need to maintain a hierarchical structure of pay and status. In terms of work load, there is no question that the heavier case load demands are in the District of Columbia Courts.

5. DISTRICT OF COLUMBIA COURTS SABBATICAL LEAVE ACT

Recognizing that the tedious duties and responsibilities of trial and appellate judges often preclude the judge from staying abreast of recent developments in the law and also recognizing the needs of the Courts to develop expertise in certain legal specialties, it is proposed that there be special provisions for sabbatical leave for District of Columbia judges. In light of the dangers of judicial burnout, these sabbatical leave provisions should be for extended periods of time and provide for

professional enrichment in settings separate from the normal workplace. It is suggested that the period of leave should be up to twelve (12) months within an eight-year period. Criteria for selection of judges to participate and for the purposes of the leave should be established by the Joint Committee on Judicial Administration.

6. DISTRICT OF COLUMBIA JUDICIAL RETIREMENT SURVIVOR'S ANNUITY ACT

The existing surviving spouse and dependent portions of the judicial retirement system results in a significantly reduced annuity despite the almost doubling of judicial contributions to participate. It is proposed that the percentage of annuity be increased and that the annuity be computed on the current salary or retirement entitlement rather than on the salary that the judge was receiving prior to retirement.

Section 11-1568 (C)(2)(B) of the District of Columbia Code currently provides that if there is a surviving spouse, a dependent child's annuity would be $2,700.00 per year divided by the number of surviving children or $900.00 per year per child, which ever is less. Proposed amendments would raise this annuity to a more realistic figure of the lesser of $6,000.00 per year divided by the number of children or $2,000.00 per child per year.

Moreover, if there is no surviving spouse, existing Section 11-1568(c)(3) currently computes the surviving child's annuity at the lesser of $3,420.00 per year divided by the number of children or $1,080.00 per year per child. It is recommended that this annuity be amended to provide the lesser of $9,000.00 per year divided by the number of children or $3,000.00 per child per year.

As to the computation of the surviving spouse's annuity, it is proposed that the annuity equal 60% of the judge's actual retirement salary at the time of his or her death or 60% of the amount of entitlement had the judge been eligible to retire.

It is our belief that these changes would begin to make the surviving spouse and dependent children annuities of the judicial retirement system more comparable with the Civil Service retirement program.

7. DISTRICT OF COLUMBIA SENIOR JUDGE COMPENSATION ACT

Many retired judges request senior judge status and are appointed to assist the Court of Appeals and the Superior Court in the performance of judicial functions. These judges do not receive or accumulate paid annual or sick leave benefits and many receive little compensation for actual time served. There is lack of uniformity in the rate of pay senior judges receive for service since they are currently paid at a rate calculated on the difference between their annual retirement salary and the annual salary of an active associate judge. This amounts to a large variance between rates of pay received by some senior judges in comparison with other senior judges and in some cases little or no remuneration for hours of service performed.

We agree that a senior judge should not be entitled to receive, on an annual basis, a combination of salary and retirement benefits in excess of the current associate judge salary. However, we feel that a senior judge should receive the daily rate of pay of an active judge's salary for work performed, for to do otherwise would devalue the services of those senior judges. This proposed bill would provide for the same daily rate of pay for a senior judge as that of an associate judge on the court in which he or she performs duties. However, aggregate retirement benefits and cumulative daily earnings of a senior judge would not be permitted to exceed the current annual salary of an active judge.

Mr. DYMALLY. Mr. Polansky, you touched on two very technical themes and, as a layperson, I want you to explain the language which you read, and I quote: "Commission's . . . 'exceptionally well qualified' category." What do you mean by that?

Mr. POLANSKY. In the evaluation of a sitting D.C. judge for recertification for an additional 15-year term, the tenure commission has several categories which it can classify. One—it could say that the judge is "not qualified," at which point the judge may not be reappointed. The tenure commission may say that the judge is "qualified," which then would lead to the ability of the President to rename that judge, but there is no automatic renaming. The third category is "well qualified," which would call for the automatic renaming of that judge for another 15-year term. In addition, there is a fourth category called "exceptionally well qualified," which results in the same decision as "well qualified," and the only result that it has is to give you a weighting of how well qualified one judge is as compared to the other. I would say that it performs in many senses a disservice in publicly making a distinction that really makes no difference.

Mr. DYMALLY. You also made reference to "tensions"—tensions among judges?

Mr. POLANSKY. Yes; it has a feeling of one judge sitting next to another judge who certainly feel that they both are doing a proper and fine and appropriate job, and one being "exceptionally well qualified" and carrying a certain halo that the next door neighbor does not carry. I would submit that it really has no meaning, and it can only cause hard feelings among the members of the bench.

Mr. DYMALLY. Now could you elaborate on your comment regarding section 5? Can present court of appeals standards protect the bar and the community adequately?

Mr. POLANSKY. Well, I think it does. However, there was a rationale when the Court Reorganization Act was implemented to provide for the automatic disbarment for the conviction of a crime of moral turpitude. Now perhaps that is overreaching. However, the total repeal of that may or may not have an effect on the limits of the ability of the court to act. I would personally submit, not on behalf of the court, that I feel that there is a value, although there may be parts of that particular section of the D.C. Code which overreach. And I would recommend highly a looking at that section to see if there are parts of it that need revision, rather than the total abolishment of that section.

Mr. DYMALLY. Mr. Polansky, as usual, we have some written questions which we shall forward to you for a response.

Mr. POLANSKY. I would be glad to respond, sir. Thank you.

Mr. DYMALLY. Without objection, the following statements will be entered into the record:

Councilman David Clarke.

[The prepared statement of Mr. Clarke follows:]

COUNCIL OF THE DISTRICT OF COLUMBIA

WASHINGTON, D. C. 20004

STATEMENT OF DAVID A. CLARKE, CHAIRMAN

COUNCIL OF THE DISTRICT OF COLUMBIA

BEFORE THE SUBCOMMITTEE ON JUDICIARY AND EDUCATION

OF THE HOUSE COMMITTEE ON THE DISTRICT OF COLUMBIA

OCTOBER 1, 1985

Chairman Dymally and members of the Subcommittee, thank you for the opportunity to offer testimony on H.R. 2050, which addresses parole authority over District of Columbia prisoners and on H.R. 3370, the "District of Columbia Prosecutorial and Judicial Efficiency Act of 1985".

H.R. 2050

H.R. 2050 would give the District of Columbia Board of Parole exclusive authority over all parole matters concerning prisoners convicted of D.C. Code offenses or of any laws of the United States applicable exclusively to the District of Columbia. The effect of the legislation would be to transfer parole authority over D.C prisoners housed in federal correctional facilities from the United States Parole Commission to the District of Columbia Board of Parole. This bill would expand the authority of the District of Columbia government and is consistent with our goals of attaining true Home Rule. However, I am concerned that H.R. 2050 not be viewed

as a substitute for the much broader plan of granting judicial and prosecutorial autonomy to the District.

H.R. 2050 addresses only one segment of the District's criminal justice system -- the parole function. In the past this Committee has considered legislation which would have transferred authority over almost all facets of the District's criminal justice system to the District of Columbia government. While I recognize that the Reagan Administration has opposed the plan for judicial and prosecutorial autonomy, I continue to hope that Congress will not lose sight of the need for a comprehensive transfer.

In order to successfully accomplish the transfer of authority contemplated by H.R. 2050, it will be necessary for the District of Columbia Government to develop a comprehensive plan for implementation. There a several options available for implementing the transfer. I am pleased to see that the bill provides the District with the necessary flexibility to determine which procedure to adopt. It is also helpful that the current bill contains a delayed effective date provision. The inclusion of this provision will permit time for the District to adjust its budgetary planning in order to take into account the additional costs which will be occasioned by the enactment of H.R. 2050.

While the new effective date provisions are helpful, Section 4 of the bill relating to the applicability of the legislation is troublesome. Paragraph (b) of Section 4 clarifies that the U.S. Parole Commission is to retain parole authority over prisoners who, prior to the effective date of this legislation, received unified

sentences for violations of both District of Columbia law and United States law. Paragraph (a) provides that after the effective date of the legislation, persons convicted of both District and federal code offenses are to receive separate and distinct sentences for such convictions. It is unclear under this provision, however, which parole board would have authority over a prisoner in this situation. If the intent of this provision is to have the prisoner subject to both the District of Columbia Board of Parole and the United States Parole Commission for the separate convictions (perhaps for offenses arising out of a single incident), this would seem to be unduly difficult. It would be helpful if this section was revised to clarify that these prisoners are to be subject to only one parole board.

To conclude, while I view H.R. 2050 as promoting equity and fairness within the D.C. criminal justice system by providing that all D.C. prisoners will be subject to the same parole authority and will be judged according to the same standards, I would prefer that this transfer of authority be made in the context of a much broader grant of prosecutorial and judicial autonomy.

H.R. 3370

H.R. 3370, the "District of Columbia Prosecutorial and Judicial Efficiency Act of 1985", contains a variety of provisions which would impact upon the administration of justice in the District of Columbia. Many of the legislative changes proposed in the bill are necessary in order to implement some of the recommendations made in

the District of Columbia Bar's study of the District of Columbia court system, commonly referred to as the Horsky Committee Study. For the most part, these proposals can only be accomplished by amendments to either the Home Rule Charter or Title 11 of the District of Columbia Code, both of which the Council is prohibited from amending.

I note, however, that this bill does point to a reoccurring problem. Even the simplest matters relating to the administration of justice in the District of Columbia must be brought before the Congress of the United States if a change to Title 11 is required because the local legislature lacks the authority to address them. I hope that in the near future Congress will consider lifting the limitation which prohibits the Council from enacting legislation with respect to Title 11.

Several of the bill's provisions are troublesome. Section 2(a) of the bill provides that criminal offenses are to be prosecuted in the name of the District of Columbia by the United States Attorney. I strongly oppose this provision of the bill. This section does not enhance or strengthen Home Rule. It represents a change in name only. If true Home Rule is to be accomplished a change in prosecutorial authority is needed, not just a change in name. In addition to the Home Rule implications, I find it objectionable to have an official acting in the name of and on behalf of the District of Columbia who is neither elected by the citizens of the District of Columbia nor selected by those entrusted by the public with that responsibility. I strongly urge the Subcommittee to delete this provision from the bill.

Paragraghs (b) and (c) of Section 2 are also troublesome. Paragraph (b) limits the joinder of D.C. Code and U.S. Code offenses in a single indictment and appears to remove the authority of the U.S. District Court for the District of Columbia to act on any D.C. Code offense which may be joined with a U.S. Code offense. Paragraph (c) is a conforming amendment which provides that prosecutions affected by this section will not abate. These provisions do little in terms of achieving greater Home Rule for the District. It would appear, however, the provisions may work a tremendous hardship in terms of the efficient administration of justice. Consequently, I request that you not enact this provision.

Paragraph (d) of Section 2 would require that the United States Attorney provide annual reports to the Mayor and the Council. Usually, a reporting requirement such as that contained in paragraph (d), is written into the law in order to assist the Council fulfill its oversight responsibilities with respect to the reporting agency. In this case, provisions of the Home Rule Act specifically preclude the Council from acting on the information. Thus, while this information would be extremely useful and we would greatly appreciate receiving it, what the District really needs is prosecutorial autonomy.

Paragraph (e) of Section 2 would require that the Corporation Counsel detail assistants to the United States Attorney's Office and that the United States Attorney accept their services. The benefits of a such a training program are many and I offer my support for this type of program. I am concerned, however, that the mandatory nature of this provision weighs heavily on the Office of the Corporation

Counsel. The Office of Corporation Counsel is an agency of the District of Columbia Government and it should be the responsibility of the local government, not the Congress, to determine how the agency should operate and how its resources should be used. If it is determined that legislation is necessary to establish or maintain the exchange program, it might be more in line with the spirit of Home Rule for Congress to exercise its authority to regulate the Office of the United States Attorney by simply requiring that the Office make the program available to assistants of the Corporation Counsel's Office. I am also concerned that care be taken in the drafting and implementation of this section so as to ensure that assistants of the Corporation Counsel's Office are not placed in conflict-of-interest situations since the Corporation Counsel and the United States Attorney represent different entities.

Section 11 of the bill amends provisions of the Home Rule Act which relate to the Judicial Nominations Commission. The amendment would limit access to materials furnished to or developed by the Commission. The limitation sought in this provision of the bill could be accomplished by an amendment to the District's Freedom of Information Act. Amendment of this Act is a responsibility of the Council as was its enactment, and, if the Judicial Nominations Commission presents this issue to the Council, I am sure it would receive a fair review.

One proposal that was recommended as part of the legislative amendments needed to implement the Horsky Committee Study was a proposal to give authority to the Council to periodically adjust the small claims ceiling. This proposal was not included in the bill and I recommend its inclusion. As you are aware, Congress recently raised the small claims jurisdiction for Superior Court from $750 to $2,000. This was the first increase in a 14 year period. It might be advantageous to delegate the authority to make such adjustments to the Council so that we might be able to review of the sufficiency of the ceiling as the need arises.

Thank you for the opportunity to share these comments with you.

Mr. DYMALLY. U.S. Acting Assistant Attorney General Phillip Brady.

[The prepared statement of Mr. Brady follows:]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

SEP 27 1985

Honorable Ronald Dellums
Chairman
Committee on the District of Columbia
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H.R. 2050, a bill "to give to the Board of Parole of the District of Columbia exclusive power and authority to make parole determinations concerning prisoners convicted of violating any law of the District of Columbia, or any law of the United States applicable exclusively to the District." As set forth in more detail below, the Department of Justice believes that the change sought by this bill would not improve the law enforcement and corrections programs in the District of Columbia and we therefore oppose this bill. Furthermore, we believe that Congress should not undertake piecemeal revisions of the D.C. corrections programs until completion of a thorough and comprehensive review of all sentencing and correctional practices.

At present under the D.C. Code, the determination of parole jurisdiction is controlled by the place of incarceration rather than the jurisdiction of conviction. The result is that the D.C. Board of Parole makes parole decisions for D.C. Code offenders when they are housed in D.C. institutions and the United States Parole Commission makes parole decisions for D.C. Code offenders when they are housed in federal institutions. At the present time over 1,400 D.C. Code offenders are held in Federal Bureau of Prisons facilities. This represents the designed capacity of three modern correctional institutions. Although some of these are in federal custody because of their extremely violent criminal histories or to separate them from other District of Columbia inmates, the bulk of them are in federal custody primarily because of shortages of space to house inmates in the District of Columbia system. Thus, two factors not addressed in H.R. 2050 are the real burden to the Federal Bureau of Prisons of confining this large group of local offenders and the serious problems involved in adding these geographically dispersed inmates to the D.C. Parole Board's caseload.

In the 1930's when the D.C. Board of Parole was established, this divided jurisdictional scheme may have met correctional needs. The Comprehensive Crime Control Act of 1983 abolishes the United States Parole Commission in 1991, however, and legislative attention must clearly be given to the questions of future parole responsibility for D.C. Code offenders designated to Federal institutions. At the same time every effort must be made to insure that the District of Columbia will provide adequate prison space to house its sentenced criminals.

A larger question is what role should parole serve as a correctional tool in the District of Columbia? The legislative history of the Comprehensive Crime Control Act of 1984, P.L. 98-473, clearly reflects the Congressional determination that the "rehabilitation model" upon which the Federal sentencing and parole system was based is no longer valid. S. Rep. No. 225, 98th Congress 1st Sess. 38 (1983). Based upon a study spanning a decade conducted by the National Commission on Reform of Federal Criminal Law, it was concluded that the Federal sentencing and parole system resulted in significant disparities in criminal sentences. As stated in the Senate Report:

> The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward.
>
> The [Comprehensive Crime Control Act of 1984 (CCCA)] meets the critical challenges of sentencing reform. The [CCCA's] sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain. The current effort constitutes an important attempt to reform the manner in which we sentence convicted offenders. The Committee believes that the [CCCA] represents a major breakthrough in this area. Id. at 65.

The current D.C. sentencing and parole system does not reflect this new understanding of the limitations of the "rehabilitation model" as described above.

In addition, the District of Columbia parole system has other demonstrated problems. When we reviewed similar legislation two years ago [H.R. 3369], this matter was discussed in detail in our letter dated July 25, 1983 from Assistant Attorney General Robert A. McConnell to you. The Department noted at that time that the D.C. Board of Parole, according to its 1982 annual report, granted parole at initial hearings to 61% of the adult offenders and that 73% of the remainder were granted parole upon a rehearing. The Board also reported however, that based upon a study of a selected sample of 322 parolees released on parole between 1977 and 1979, 52% were re-arrested during the first two years of parole supervision. Of the parolees who were re-arrested, 77% were convicted for crimes committed while on parole. Given the very high percentage of parolees released at the time of initial parole consideration and the very high rate of recidivist criminal activity among those released, the policies and procedures of the D.C. Board of Parole were called into serious question.

We also pointed out that despite the large number of D.C. parolees who commit crimes following parole release, parole apparently was revoked in a relatively small percentage of the cases. In that regard, the D.C. Board of Parole reported that of those parolees in its 1977-1979 sample who were convicted of crimes while on parole, parole was revoked because of the new offense in less than one half of the cases. Although the reason for this statistic was not explained, it appears that it may be attributed to the D.C. Parole Board policy of not issuing parole violator warrants for certain offenses. In this regard, the Board listed in its 1982 Annual Report the types of offenses it terms "Eligible Offenses" for purposes of issuance of parole violator warrants. It appears that as a matter of policy, the Board will not issue parole violator warrants for burglary of commercial establishments, possession of firearms (unless the defendant is arrested with the weapon in his hand or on his person), grand larceny, embezzlement, fraud, forgery and uttering and for a host of other violations of the District of Columbia Code or the United States Code.

This apparent policy which allows substantial numbers of parolees to continue on parole even after arrest and conviction of serious crimes was of significant concern to us in the past. If these matters have not yet been completely remedied, and it may be too early to conclude that they have, then similar concern is presently warranted. Under H.R. 2050, the jurisdiction of the D.C. Board of Parole would be substantially expanded to include those D.C. Code offenders presently under the jurisdiction of the U.S. Parole Commission. These offenders, however, include some of

the most dangerous and violent criminals convicted in the District of Columbia. Premature release of such individuals pursuant to existing parole policies would pose a real and direct threat to law enforcement interests in the District of Columbia.

We believe it is time for a thorough legislative review of District of Columbia sentencing and correctional practices. A major expansion of the capacity of D.C. correctional facilities is essential. The Federal Bureau of Prisons is seriously overcrowded and can no longer accept the overload of the District of Columbia system. This is especially true in light of the increased D.C. prison population that would result, at least temporarily, from a more responsibly run parole system. Replacement of the parole system in the District of Columbia by a sentencing guideline system similar to that adopted by Congress in the Comprehensive Crime Control Act of 1984 should be considered. While expansion of the D.C. inmate capacity must begin at once, other changes can be more thoroughly considered than is done in H.R. 2050.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General

Mr. DYMALLY. Mr. Wiley Branton, chairman of the D.C. Judicial Nomination Commission.

[The prepared statement of Mr. Branton follows:]

Draft of Remarks Prepared for Delivery by Wiley A. Branton on H.R. 3370 Before the Subcommittee on Judiciary and Education of the Committee on the District of Columbia, October 1, 1985. (The Honorable Mervyn M. Dymally, M.C.)

Mr. Chairman and members of the Committee. My name is Wiley A. Branton, a resident of 1611 Tamarack Street, N.W., Washington, D.C. 20012. I am currently a partner in the law firm of Sidley & Austin with offices at 1722 Eye Street, N.W., in the District of Columbia. I have been a member of the bar for more than 33 years and have resided in the District of Columbia for the past 20 years. I currently serve as a member and Chairman of the District of Columbia Judicial Nomination Commission. I was appointed to the Commission by The Honorable Marion S. Barry, Jr., as one of the Mayor's two appointees to the seven-member Commission. I wish to address my remarks to certain provisions of H.R. 3370 and the views expressed here are my personal views and no official position has been taken on the matters, except where otherwise noted, by the Judicial Nomination Commission.

Sec. 6. MANDATORY RETIREMENT AGE OF JUDGES

I fully support the raising of the mandatory retirement age for judges in the District of Columbia courts from age 70 to age 74. This change has already been enacted into law, but it is my understanding that

Section 6 is being offered so as to conform the D.C. Code with the District of Columbia Self-Government and Governmental Reorganization Act.

Sec. 11. PUBLIC ACCESS TO MATERIALS OF JUDICIAL NOMINATION COMMISSION

The very nature of judicial appointments requires the utmost confidentiality and persons who submit information to the Judicial Nomination Commission should have the confidence of knowing that the information can be retained by the Commission as privileged and confidential information and that it will not be subject to release under any provision of the Freedom of Information Act, or by any other procedure. Lawyers, judges and the general public would be very hesitant about making comments that might reflect adversely on the character or fitness of persons under consideration for judicial appointment unless they are assured that their remarks or comments will be protected as is intended by the proposed language in Section 11.

Sec. 12. MEETINGS OF THE JUDICIAL NOMINATION COMMISSION

As a general rule, meetings of the Commission should be closed to the public because of the sensitive issues of character and fitness of potential judicial nominees that generally form the subject matter of most meetings. The same protection that is afforded by the preceding section is equally as important to the meetings of the Commission.

Sec. 13. PUBLIC ANNOUNCEMENT OF JUDICIAL RECOMMENDATIONS

Not only do I personally favor the enactment of Section 13, but this subject matter has the approval of the members of the Judicial Nomination Commission who have had occasion to discuss the desirability of releasing to the public the names of individuals recommended by the Commission to the President of the United States for his consideration in selecting nominees for appointment to the District of Columbia courts. Invariably, the names leak out and on occasion some erroneous information concerning certain names has been published. Such errors could be avoided by the official release by the Commission of the names of individuals being recommended to the President, but only after the names have been submitted to the White House. In my opinion, the public release of the names alerts the public to the identification of potential judicial nominees and will provide an opportunity for information to be made available to the White House by persons who were unaware that certain individuals were being considered for judicial appointment. There is every reason to believe that most of the remarks and information coming to the White House as a result of the public disclosure of the names of the persons being recommended for possible juducial appointment would be of a complimentary

nature. It is also quite possible that individuals will come forward with information reflecting undesirable character traits of such a magnitude as to not only alert the White House that the President should not select a particular person who has been recommended, but which would have caused the Commission to not recommend the person in the first instance if it had been privy to the information.

Sec. 14. DISCLOSURE OF CERTAIN INFORMATION TO THE JUDICIAL NOMINATION COMMISSION

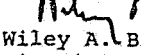
Once a person has been appointed and confirmed as a judge in the District of Columbia court system, the Commission on Judicial Nominations has no further responsibility as to the actual performance of those judges during the terms of their respective appointments. A different agency, the District of Columbia Commission on Judicial Disabilities and Tenure, is the agency that has the responsibility for monitoring the conduct of judges. The latter Commission has the power to suspend, retire or remove a judge of a District of Columbia court, and is also the agency charged with the responsibility for recommending, for or against, the reappointment of judges whose terms are expiring.

There are occasions when information in the possession of the Commission on Judicial Disabilities and Tenture may be needed by the Judicial Nomination Commission,

and such information could be very vital in certain decisions that must be made by the Judicial Nomination Commission in two situations. One such situation has to do with the fact that the Judicial Nomination Commission has the responsibility for the actual appointment of the Chief Judge for both the Superior Court as well as the District of Columbia Court of Appeals. It would be ludicrous if the Judicial Nominations Commission should appoint any judge to the position of Chief Judge at a time when the Commission on Judicial Disabilities and Tenure had information which would dictate that the person probably should not be appointed Chief Judge if said information was known to the Judicial Nomination Commission. Information would only be sought by the Judicial Nomination Commission from the Commission on Judicial Disabilities and Tenure regarding those judges who are actually under consideration for possible appointment as Chief Judge, and the information would remain confidential with the Judicial Nomination Commission.

The other instance where information held by the Commission on Judicial Disabilities and Tenure could be of value to the Judicial Nomination Commission would be in those instances where a judge on the Superior Court is being considered by the Judicial Nomination Commission for possible recommendation to the President to fill a vacancy on the District of Columbia Court of Appeals.

Respectfully submitted,



Wiley A. Branton, Chairman
District of Columbia Judicial
Nomination Commission

Mr. DYMALLY. Mr. James McKay, chairman, Legislation Committee, D.C. Bar.

[The prepared statement of Mr. McKay follows:]

STATEMENT OF
JAMES C. MCKAY, JR.
CHAIRMAN, LEGISLATION COMMITTEE
DIVISION VI (DISTRICT OF COLUMBIA AFFAIRS) OF THE
DISTRICT OF COLUMBIA BAR*
BEFORE THE
SUBCOMMITTEE ON JUDICIARY AND EDUCATION
DISTRICT OF COLUMBIA COMMITTEE
UNITED STATES HOUSE OF REPRESENTATIVES
ON
H.R. 3370
DISTRICT OF COLUMBIA
PROSECUTORIAL AND JUDICIAL EFFICIENCY ACT OF 1985

October 1, 1985

Mr. Chairman and members of the Committee:

Thank you for the opportunity to submit a statement on H.R. 3370, the District of Columbia Prosecutorial and Judicial Efficiency Act of 1985. This statement is made on behalf of Division VI of the District of Columbia Bar, the Division responsible for monitoring legislative and judicial developments that affect the District of Columbia. The views expressed herein are only those of the Division and not those of the District of Columbia Bar or its Board of Governors.

We support a number of provisions in the bill which are a logical outgrowth of the Court Reorganization and Self-Government Acts and which further home rule by enhancing the independence of the District of Columbia Government from the Federal Government.

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* STANDARD DISCLAIMER

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.

We fully support the provisions in section 2 providing that all local offenses be conducted in the name of the District of Columbia and eliminating the joinder of federal and local offenses in indictments and informations. We also believe that the requirement for annual reports on prosecutions and convictions by the United States Attorney for the District of Columbia to the Mayor and Council would be of great benefit to the District Government in fulfilling its administrative and legislative responsibilities over the District's criminal justice system.

We further believe that the requirement in section 2 for the detail of a limited number of Assistant Corporation Counsel to the office of the United States Attorney would be of great benefit to both offices. We premise this support on the understanding that its object would be to give the Office of the Corporation Counsel the benefit of greater experience in handling prosecution of serious offenses, to give the United States Attorney's Office the benefit of additional attorneys experienced in prosecuting local offenses, and to promote cooperation between the two prosecutorial offices responsible for public safety in the District. We would have serious reservations, however, if the primary goal were simply to achieve budget savings in the Office of the United States Attorney.

In addition, we fully support provisions of the bill eliminating the federal role in the administration of the

District's criminal justice system. We therefore favor section 4, which deletes the requirement that the Executive Officer of the Court be selected from a list provided by the Administrative Office of the United States Courts, and section 7, which eliminates the Chief Judges of the Federal Circuit and District courts from the panel that appoints the Board of Trustees for the Office of the Public Defender for the District of Columbia.

Similarly, we support section 9, which eliminates the requirement that District of Columbia Judges file financial disclosure reports with the Federal Judicial Ethics Committee, in view of the existing requirement in D.C. Code § 11-1530 that these judges file similar reports with the District of Columbia Commission on Judicial Disabilities and Tenure. We believe that it is consistent with court reform and home rule that the District of Columbia judiciary report to an agency of the District of Columbia Government rather than the Federal Government.

Likewise, we support section 10, which would authorize the D.C. Court of Appeals to answer questions certified to it by federal and state appellate courts, because it is consistent with the theory embodied in the Court Reform Act that the District of Columbia Court of Appeals should be treated like the highest court of a state. Many states have similar referral mechanisms, and we believe that giving this authority to the District of Columbia Court of Appeals would be in the interests of judicial economy.

We have reservations about section 3, which would remove the sunset provision from the statutory authorization for hearing commissioners. While we recognize the need to extend this authority on a temporary basis to avoid its abrupt cessation, we believe that a decision to make it permanent at this time may have the negative effect of discouraging evaluation of the hearing commissioner program, including the important questions of the method of and standards for appointment. Therefore, we suggest the Committee extend the authority for a limited period to permit further evaluation.

We have grave reservations about section 5, which would repeal D.C. Code § 11-2503, which provides for the disbarment of attorneys convicted of crimes involving moral turpitude. Although there may be some justification for reconsidering the policy embodied in this law, we believe that its potential impact on the quality of the Bar and the public's perception of the Bar is too great for us to support it without the benefit of further debate and discussion among citizens of the District and the members of the Bar.

We have a varied reaction to the provisions concerning the Judicial Nomination Commission. We fully support section 15, which would give the Commission additional time to evaluate judges who have made themselves available for another term. We also support the concept of section 13, which would make the list of judicial nominees public.

However, we would suggest that the legislation make it clear whether the Commission or the President has the responsibility of making the list public and specify guidelines as to the timing of the disclosure of the list.

While we have no opposition to the policies embodied in those provisions of sections 11 and 12 that exempt the Commission from the D.C. Freedom of Information Act and Open Meetings provision, respectively, we believe that the Council of the District of Columbia has the legislative power to makes these exemptions and should be given the opportunity to do so. Our analysis leads us to conclude the the Commission, as an agency of the District Government, is specifically excluded from the federal Freedom of Information Act by 5 U.S.C. §551(1)(D), but that it does fall within the scope of the D.C. Freedom of Information Act. Therefore, the Council, not Congress, should enact any legislation making exemptions from this local act.

Likewise, we believe that the Council should be permitted to exempt the Commission from the Open Meetings provision, D.C. Code § 1-1504. This provision, although originally enacted by Congress by Title VII of the Self-Government Act, is a purely local law which the drafters of that Act contemplated would be within the legislative authority of the Council. No one has questioned the Council's authority to amend other provisions of local law enacted by Title VII, such as the amendments to the D.C.

Election Act, added by § 751 of the Self-Government Act. Therefore, the Council should be permitted to amend the local Open Meetings provision to provide an exemption for the Commission.

We have reservations about two provisions in section 14 of the bill, which permit disclosure of certain confidential information submitted to the Commission--namely, the provision authorizing a judge to disclose confidential medical information, which may have the practical effect of forcing its disclosure, and the provision permitting disclosure of documents at a hearing before the Commission for the purposes of prosecution for perjury before the Commission, which may raise fifth amendment concerns. We believe that these provisions should be more fully discussed before enactment.

Finally, we oppose section 16 of the bill, which would eliminate the option of the Tenure Commission to rate a judge "exceptionally well-qualified." The requirement can and should be made to serve the purpose of recognizing those judges whose service is truly exceptional. It also serves as an inducement to judges to maintain a high quality of justice. In our view, any efforts expended concerning this requirement should be devoted to making the rating meaningful by, for example, encouraging the Commission to give reasons for an "exceptionally well-qualified" rating. Therefore, we believe that this section should be deleted from the bill.

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In conclusion, we support the many provisions of H.R. 3370 that further the independence of the District's judicial and criminal justice system and thereby enhance home rule. We have reservations about certain provisions that are unrelated to this purpose, and hope that the Committee will reconsider the ones that we have mentioned. With these exceptions, we support this legislation and hope that the Committee will take favorable action.

Thank you for the opportunity to submit this statement.

Mr. DYMALLY. Legal memo to staff from the American Law Division of CRS.

[The memorandum follows:]

Congressional Research Service
The Library of Congress

Washington, D.C. 20540

July 18, 1985

TO: House District of Columbia Committee
Attention: Donald Temple

FROM: American Law Division

SUBJECT: Effect of Abolition of Federal Parole Commission by 1984 Comprehensive Crime Control Act upon D.C. Code Offenders

This is in response to your request for an examination of the effect of the abolition of the Federal Parole Board by P.L. 98-473, the Comprehensive Crime Control Act of 1984, upon D.C. Code offenders housed in federal and District of Columbia institutions. Our examination is, of necessity, limited by your time constraints. Further, the implementation of the Comprehensive Crime Control Act of 1984 is far from complete, and elucidation of its standards in practice may shed light upon the questions you have raised. Nevertheless, to the extent that our current information and time constraints permit us, we shall endeavor to respond to your questions as fully as possible.

Parole authority over D.C. Code offenders confined in District of Columbia penal institutions appears to be vested in the District's own Board of Parole under D.C. Code § 24-201a et seq. The Comprehensive Crime Control Act of 1984 does not appear to address this authority, and therefore the authority of the District Board of Parole would seem to be undisturbed by the new legislation.

The Act's effect upon federally housed D.C. offenders appears to present a more difficult question. D.C. Code § 24-209 vests authority over prisoners convicted in the District of Columbia

of offenses against the United States or now or hereafter confined in any federal penitentiary or prison in the Federal Parole Board created by 18 U.S.C. § 723a. Under Section 24-209 of the D.C. Code, the Federal Parole Board's authority over such federally housed prisoners is parallel to that of the District Board of Parole over prisoners confined in the District's own institutions. In 1976, the Federal Parole Board was replaced by the U.S. Parole Commission. Act of March 15, 1976, P.L. 94-233, 90 Stat. 219. Section 12 of P.L. 94-233 provided that:

> Whenever in any of the laws of the United States or the District of Columbia the term 'United States Parole Board', or any other term referring thereto, is used, such term or terms, on or after the effective date of this Act, shall be deemed to refer to the United States Parole Commission as established by the amendments made by this Act.

Thus, the U.S. Parole Commission appears to have assumed the jurisdiction over the D.C. offenders committed to federal custody previously held by the Parole Board under Section 24-209 of the D.C. Code. Under the 1984 Comprehensive Crime Control Act, Sec. 218(a)(5), Chapter 311 of title 18 of the U.S. Code (which includes the current federal parole provisions and those which deal with the U.S. Parole Commission) is repealed. The effective date of this repealer is addressed in Sec. 235(b)(1)(A) of P.L. 98-473, which states that Chapter 311 (among others)

> shall remain in effect for five years after the effective date [of this Act] as to an individual convicted of an offense or adjudicated to be a juvenile delinquent before the effective date and as to a term of imprisonment during the period described in subsection (a)(1)(B) . . . .

The Comprehensive Crime Control Act of 1984 also extends the term of office of a U.S. Parole Commissioner in office on the effective date of the Act for the five year period. Further, the Act requires that:

> (3) The United States Parole Commission shall set a release date for an individual who will be in its jurisdiction the day

> before the expiration of five years after the effective date of this Act, that is within the range that applies to the prisoner under the applicable parole guideline. A release date set pursuant to this paragraph shall be set early enough to permit consideration of an appeal of the release date, in accordance with Parole Commission procedures, before the expiration of five years following the effective date of this Act.

The Act does not appear to address directly the question of the effect of P.L. 98-473 upon the power given to the federal parole authority under D.C. law with respect to D.C. offenders committed to federal custody. However, by virtue of the fact that, at the expiration of the five-year period following the Act's effective date, the U.S. Parole Commission would cease to exist (unless the Congress, upon review of required studies, should determine that the parole system should be reinstated and the life of the Parole Commission extended under Sec. 236(b)(3) of the Act), a question would seem to arise with respect to what authority would then wield the power over such offenders theretofore wielded by the U.S. Parole Commission. The Act itself is silent on this question.

We hope that this will be of assistance.

Elizabeth B. Bazan
Legislative Attorney

Mr. DYMALLY. Criminal Practice Institute summary of present Federal-District corrections practices.

[The CPI summary follows:]

Young Lawyers Section
Bar Association of
the District of Columbia

Public Defender Service
for the
District of Columbia

Criminal Practice Institute

Trial Manual

Chairpersons
Barbara Bergman
John M. Facciola
Scott Howe
Darryl W. Jackson

Produced By Staff Attorneys for:
Public Defender Service
United States Attorney's Office
for the District of Columbia

The Superior Court, the D.C. Department of Corrections and the Bureau of Prisons have signed a Memorandum of Understanding that is designed to facilitate the consideration of recommendations for federal designations. Excerpts from this memorandum are reproduced below:

Transfers to the Federal Bureau of Prisons
(excerpts from interagency agreement)

The U.S. Department of Justice (Bureau of Prisons, U.S. Marshals Service, U.S. Parole Commission), the District of Columbia Superior Court (Criminal Court, Department of Social Services), and the District of Columbia Department of Corrections agree to the procedures outlined below to expedite the designation of certain offenders sentenced by Judges in D.C. Superior Court and their transfer to BOP institutions.

The following groups of offenders are covered by this agreement:

1. Females committed for Youth Corrections Act Study, or NARA study.

2. Females sentenced under the Youth Corrections Act, or NARA.

3. Females sentenced under the D.C. Code to a term of more than one year.

4. Males committed for study or sentence under the NARA statute.

5. Males committed for study or sentence under the Youth Corrections Act in whose cases the committing Judge requests a federal designation for completion of the study or service of the sentence.

6. Males sentenced to an adult term under the D.C. Code in whose cases the sentencing Judge recommends a federal designation for service of the sentence.

NOTE: . . . Ordinarily, offenders who have not reached their eighteenth birthday at the time of sentencing, regardless of their type or length of sentence, will not be considered for designation to a federal facility.

* * * * *

D.C. Superior Court, Criminal Division, Committing Judge:

When ordering an offender for a study to be conducted in a federal institution, the committing Judge will send two copies of the presentence report (or post-sentence report) with a referral letter to

the Bureau of Prisons. The completed YCA study will consist of a psychological evaluation and a staff summary unless the Judge submits specific "referral questions." The NARA study will contain a summary of the offender's narcotic history and a comment regarding the offender's eligibility to be sentenced under NARA.

When the committing Judge recommends a federal designation for male offenders sentenced to an adult or YCA term under the D.C. Code, the Judge will send two copies of the PSI to the Bureau of Prisons. The packet from the Judge also will contain a referral letter describing the Court's objectives in requesting federal placement. Specific information regarding the court's assessment of the offenders' specific program needs is always helpful.

When the committing Judge sentences female offenders under YCA or NARA, or to a D.C. Code term of more than one year, the Judge will send two copies of the PSI to the Bureau of Prisons. A referral letter is not required, but is desirable and is always appreciated.

D.C. Superior Court, Criminal Division, Clerk's Office:

The Criminal Clerk's Office will prepare and transmit three copies of the Judgment and Commitment (J&C) order to the U.S. Marshals Service, District of Columbia, (Prisoner's Movement Section), one copy of the J&C to the Bureau of Prisons, and one copy to the Legal Assistance Branch, D.C. Superior Court. These copies are in addition to the number normally prepared for Court and the D.C. Department of Corrections records.

U.S. Marshal Service, District of Columbia, Prisoner Movement Section:

As soon as the U.S. Marshals Service receives the Judgment & Commitment Order, they will contact the Bureau of Prisons for a designation. The TWX requesting designation will include the Court's docket number, the offense, and the length of sentence for each conviction listed on on the J&C.

Bureau of Prisons, Correctional Programs Section:

The Bureau of Prisons may decide to designate a federal institution as soon as the Correctional Programs Section receives both the referral packet from the committing Judge and the request for designation from the U.S. Marshal. Designations will be made without delay and study cases will be given priority.

U.S. Marshal Service, District of Columbia:

The U.S. Marshal, D.C., will move the offender to the designated institution as promptly as transportation allows.

District of Columbia, Department of Corrections:

The D.C. Department of Corrections will maintain a computerized record of all offenders awaiting federal designation. They will provide D.C. Superior Court Legal Assistance Branch with a list of offenders needing designation and the date the J&C Order was issued.

D.C. Superior Court, Legal Assistance Branch:

The Legal Assistance Branch will work closely with all of the involved agencies to ensure that the above procedures are followed and to resolve any difficulties or problems which would delay the process.

If an offender has been recommended for federal designation but has not been moved within 15 days, the Legal Assistance Branch will contact the Bureau of Prisons and the U.S. Marshal, D.C. to determine whether the delay is in the designation process or in transportation.

Bureau of Prisons Designation Procedures

The Committing Judge will mail a referral letter and two (2) copies of the presentence or post sentence investigation (PSI) to the Bureau of Prisons. In cases where the PSI is more than one year old, the Bureau of Prisons will require a current PSI (pre or post) before designating an individual to a federal institution. Where applicable, PSI's should also contain detailed information about any active or concurrent sentences and/or pending charges.

In the case of offenders who are committed for study and observation under the provisions of the Youth Corrections Act, the completed study will consist of a psychological evaluation and a staff summary. Any specific referral questions which go beyond the scope of the ordinary study procedures should be included in the referral letter from the sentencing Judge. The NARA study will consist of a narrative account of the offender's narcotic history and a comment regarding the offender's eligibility to be sentenced under NARA.

In case of male offenders sentenced under the Youth Corrections Act or to an adult term, the committing Judge should explain in the referral letter why the offender should be designated to a federal facility rather than confined in a D.C. Department of Corrections facility.

In the case of female offenders, a referral letter from the committing Judge is not required, but is highly recommended.

The Judge's referral letter and two copies of the PSI should be sent to:

Superior Court Designator
Correctional Programs Section, Room 525
Bureau of Prisons
320 First Street, N.W.
Washington, D.C. 20534

Delays in Designation

The Bureau of Prisons cannot designate an offender until it receives both the appropriate materials from the Court and a request for designation from the U.S. Marshal, District of Columbia.

If the Bureau of Prisons receives the referral packet from the Court but does not receive the U.S. Marshal's request for designation, the appropriate BOP official will telephone the Legal Assistance Office of the Superior Court to determine if, in fact, the Court desires an immediate federal designation and if so, if a copy of the Judgment and Commitment has been sent to the U.S. Marshal, D.C. If the sentencing Judge still desires a federal designation but the Judgment and Commitment has not been sent to the U.S. Marshal, the Legal Assistance Office will follow through on the Court's wishes. If, however, the Legal Assistance Office indicates that the U.S. Marshal has been notified of the Court's wishes, the Bureau of Prisons will call the U.S. Marshal's Office (Deputy U.S. Marshal - 633-1778) to expedite the designation process. The Bureau of Prisons will not designate an offender until the U.S. Marshal, D.C. requests designation.

If the Bureau of Prisons receives the U.S. Marshal's request for designation but does not receive the referral packet from the Court, the appropriate BOP official will contact the Legal Assistance Office of the Superior Court. The BOP will telephone the Legal Assistance Office (727-5038) on a weekly basis to request the necessary material. Phone calls will be followed up with a letter detailing the name and docket number of the offender, the name of the sentencing Judge, and the date of the U.S. Marshal's request.

Probation Violators

In the case of D.C. Superior Court probation violators, the responsibility remains with the committing Judge to send a referral letter and two copies of the PSI to the Bureau of Prisons. If the case is a result of a technical violation, the Department of Social Services prepares a probation violation report. If the violation is a result of criminal conduct resulting in a new conviction, the Judge may require an updated PSI detailing the circumstances of the new offence. In either case, the new information should be forwarded to the BOP in addition to the PSI's and the Judge's referral letter. Of particular interest to the BOP is the official version of the offense and any changes in the social history of the offender, including changes in mental health status or drug and/or alcohol abuse. As in the case of

direct commitments, the BOP will not designate from a PSI that was prepared more than one year before the date of sentencing in the instant offense. If an updated PSI is not prepared, a copy of the PD 163 (the arresting officer's report), an official version as if for a PSI and/or the Affidavit in Support of the Arrest Warrant should be included in the packet sent to the BOP.

Probation Violators

Individuals convicted in D.C. Superior Court, designated to a federal institution and released on parole by the U.S. Parole Commission, who violate the terms of their parole, will be designated by the Designations Officer, Northeast Regional Office, Bureau of Prisons.

Violations as a result of a new criminal conviction: If the U.S. Probation Officer desires to revoke the parole of a Superior Court parolee, he or she will contact the U.S. Parole Commission to issue a warrant. The U.S. Parole Commission will contact the U.S. Marshal to execute the warrant.

Once the warrant is executed by the U.S. Marshal, the USM will request designation by TWX from the U.S. Parole Commission (NERO). The U.S. Parole Commission will, in turn, request designation from the Northeast Designations Officer, Bureau of Prisons.

Technical Violators: The U.S. Probation Officer will conduct a preliminary interview to determine if the revocation hearing should be conducted locally or in a federal institution. If the hearing is conducted locally, and the individual's parole is revoked, the Parole Commission will contact the Northeast Designations Officer, Bureau of Prisons, to request designation. If the hearing is to be conducted in a federal institution, the NERO Designations Officer, BOP will designate a federal institution.

Questions concerning the designation of parolees from D.C. Superior Court, should be directed to:

Designations Officer, NERO/BOP
Philadelphia, Pennsylvania
(212) 596-5652
(FTS) 596-5652

D. Female Prisoners

Women who receive sentences in the Superior Court that are greater than one year and who are not within nine months of a statutory parole eligibility, expiration or mandatory release date, are almost always automatically designated to a federal institution, because the D.C. Department of Corrections does not have a facility that is designed for long-term incarceration of women. This does not

mean that women will be treated for all purposes as federal designatees. A process has now been established by which female prisoners are reviewed by the District of Columbia Department of Corrections for halfway house placement. (See the Joint Agreement reproduced below.) Because of possible confusion or error, it may be wise for counsel to provide female clients who are placed in federal facilities with a copy of this agreement. Counsel with questions about female clients in the federal system can contact the Federal Bureau of Prisons, Correctional Programs Division, 320 First Street, N.W., Washington, D.C. (724-3257). With this current arrangement, there is no reason for counsel to request a federal designation for a female client; the woman will receive a federal designation anyway and counsel's request may cause her to lose the chance of an earlier parole by the D.C. Board of Parole, directly from the jail. Moreover, once a client arrives at the federal institution, it is usually advisable for her to ask to see the D.C. Parole Board. Even though she may need to wait a little longer before seeing the D.C. Board, if the client is seen first by the federal parole board she is likely to be set off for a substantial period of time.

JOINT AGREEMENT BETWEEN THE BUREAU OF PRISONS AND THE DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS REGARDING FEMALE OFFENDERS

The Bureau of Prisons and the District of Columbia Department of Corrections agree to the procedures outlined below to formalize the provisions for designating Bureau of Prisons' facilities for District of Columbia women and for transferring District of Columbia women to and from facilities of the Bureau of Prisons.

Under Section 24-201 of the D.C. Code, the District of Columbia Board of Parole has jurisdiction over prisoners confined in any District of Columbia facility, and may impose a release date or modify one already established by the United States Parole Commission. To mitigate the effects of the distance at which D.C. women are housed from their homes, and to give them an opportunity to have their cases heard by the District of Columbia Board of Parole, this Agreement formalizes the procedures for designating federal facilities for D.C. women. This Agreement also establishes a review process for determining a D.C. woman's appropriateness for placement in a D.C halfway house or for release on parole. That review process will be known as a "transfer status review" and will be conducted by the D.C. Department of Corrections and D.C. Board of Parole upon request from the federal institution housing the woman.

Because the District of Columbia has no facilities to house long-term D.C. women, the Bureau of Prisons has agreed to:

1. Designate federal institutions for most D.C. Code violators serving sentences of more than one year but who are not within nine months of a statutory parole eligibility, expiration, or mandatory release date.

2. Refer to the D.C. Department of Corrections and the D.C. Board of Parole for transfer consideration any D.C. woman in its custody who makes such a request and is within nine months of statutory parole eligibility, an expiration date, or a mandatory release date.

A parole eligibility date is the date on which a D.C. woman becomes eligible for parole consideration. An expiration date is the date on which a D.C. woman is to be released with 180 days or less of accumulated good time. A mandatory release date is the date on which a D.C. woman is to be released with more than 180 days of accumulated good time. Because a decision to seek a hearing with the U.S. Parole Commission is entirely voluntary, the absence of any U.S. Parole Commission action or the presence of a presumptive parole date established by the U.S. Parole Commission will not influence the time at which a referral is made, nor will any U.S. Parole Commission action be required for favorable transfer consideration by the D.C. Department of Corrections and D.C. Board of Parole.

Designations of Institutions for District of Columbia Female Offenders

The procedures described in Interagency Agreement, Department of Justice and District of Columbia Superior Court, signed June 15, 1981 [see Appendix B], describing each agency's designation responsibilites, delineates the procedures to be followed in designating institutions for D.C. women. In addition to those procedures, the Bureau of Prisons has the authority to review all requests for designation to ensure that a D.C. woman is not within nine months of a statutory parole eligibility, expiration or mandatory release date. If the D.C. woman is within nine months of a statutory parole eligibility, expiration or mandatory release date, the Assistant Director, Correctional Programs, Bureau of Prisons, will notify:

Director
Legal Assistance Branch
District of Columbia Superior Court
451 Indiana Avenue, N.W., Room 237
Washington, D.C. 20001

Once the Legal Assistance Branch has been notified, the Correctional Programs Branch will hold the designation request in abeyance until a determination has been made as to community placement or parole. The D.C. Department of Corrections and the D.C. Board of Parole will make those determinations within 60 days. If the offender is unsuitable for community placement at that time or is unlikely to be paroled in the near future, the Chief Classification and Parole Officer, D.C. Detention Facility, will make a written request to the Administrator, Correctional Programs Branch, that the designation proceed. Upon receipt of this written request, the Bureau of Prisons will designate an appropriate federal facility.

If the offender is found to be a suitable candidate for community placement or parole, the Chief Classification and Parole Officer, D.C. Department of Corrections Detention Facilities, will notify the Assistant Director, Correctional Programs, of the disposition. A courtesy copy will be sent to the Director, Legal Assistance Branch. The Federal Prison System will then notify the United States Marshals Service, Washington, D.C., that the federal designation is not required.

Transfer Referrals of D.C. Women to the D.C. Department of Corrections and the D.C. Board of Parole

To ensure that every D.C. woman in federal custody is aware of the referral process and her right to request referral, Bureau of Prisons staff will discuss with each, at her initial classification, this right and the procedures to be followed. Also at initial classification, each woman will be given a "Notice of Eligibility Form" . . . to sign. A D.C. woman may choose not to be referred. If a woman declines referral, a copy of the form reflecting this declination will be forwarded to the D.C. Department of Corrections and D.C. Board of Parole. Any woman who declines referral at the time of her initial orientation will be given a second opportunity when she is within nine months of parole eligibility or whenever she so requests. If she again declines, notice of this action will again be forwarded to the D.C. Department of Corrections and D.C. Board of Parole. Each woman who requests referral will be referred for transfer status review when she is within nine months of a parole eligibility, expiration or mandatory release date.

For each referral of a D.C. woman, Bureau of Prisons staff will provide the following information:

(a) A cover letter from Warden (the cover letter will not include a recommendation);

(b) Sentence Date (BP-5);

(c) Pre-Sentence Report, when available;

(d) Progress Report completed not more than 90 days prior to the referral;

(e) A psychiatric or psychological report completed not more than 90 days prior to the referral for any D.C. woman committed for a violent offense or with a prior record including a violent offense.

To expedite the referral process, all referral packages will be mailed directly to:

Assistant Director
Women's Programs and Community Services
District of Columbia Department of Corrections
614 H Street, N.W., #1001
Washington, D.C. 20001

and:

District of Columbia Board of Parole
614 H Street, N.W., #563
Washington, D.C. 20001

If the Department of Corrections or the Board of Parole require more information to make a decision, the institution will provide it upon request. To expedite such a request and the referral process, either of the D.C. agencies may contact the Correctional Programs Branch at 724-3081, which will relay the request to the appropriate institution.

Referral of D.C. Women on Writ to the District of Columbia. If a D.C. woman becomes eligible for referral while in the District of Columbia on writ, the Department of Corrections Case Management staff will, upon the woman's request, refer her for transfer. The D.C. staff will send for appropriate referral material from the institution and prepare an additional progress report covering any new information. The material will be forwarded by the Department of Corrections Case Management staff to the Assistant Director, Women's Programs, and the District of Columbia Board of Parole for the transfer status review. In any such case, the Legal Assistance Branch, D.C. Superior Court, will be contacted to assure that the prisoner is not returned on the writ prior to the review and to assist in quashing the writ if appropriate.

Transfer Denial. If the D.C. Department of Corrections and D.C. Board of Parole determine a D.C. woman is inappropriate for halfway house placement or parole, each will send a letter to the Warden of the federal institution, indicating the reasons for the denial.

The decision of a D.C. woman, in federal custody, to have a hearing before the United States Parole Commission is entirely voluntary; therefore, the absence of a United States Parole Commission decision cannot be the basis for denying a D.C. woman's request for transfer to the D.C. Department of Corrections.

Transfer Approval. If the Assistant Director, Women's Programs, D.C. Department of Corrections and/or the D.C. Board of Parole agree to accept a D.C. woman for transfer, notice will be given to the Warden of the federal institution. Each D.C. agency will advise the other of its decision by way of carbon copy of its notice to the Warden.

If transfer is approved for community placement, the Assistant Director of Women's Programs, D.C. Department of Corrections will provide

notice of the transfer date. If transfer is approved for parole consideration, but not through community placement, the Warden of the federal institution will coordinate the transfer date with the Assistant Director of Detention Services.

Grievances Relating to Designation and Transfer of D.C. Women. D.C. women wishing to express a formal complaint regarding any action under the procedures in this Agreement may:

(1) Use the Bureau of Prisons Administrative Remedy procedure for matters under Bureau of Prisons jurisdiction.

(2) Use the D.C. Department of Corrections grievance procedure for matters under D.C. Department of Corrections jurisdiction.

Both the Bureau of Prisons and the D.C. Department of Corrections will assist D.C. women in their custody in obtaining the appropriate grievance procedure forms in matters outside their reviewing authority.

E. The Effect of a Parole Violator's Warrant on the Sentence

Many defendants who await sentencing are also facing a possible revocation of parole. The status of any parole violator's warrant (whether it has been issued and not executed or issued and executed) is very important in order for the defendant to avoid serving consecutive sentences. The execution of the warrant is the controlling factor here, not whether the client's parole has been revoked formally at a revocation hearing.

If a parole violator's warrant has been issued and lodged against the client as a detainer -- but not executed -- at the time he is sentenced on a new offense, the sentencing court is powerless to make the new sentence consecutive to the old sentence. This is because the defendant is incarcerated solely on the new conviction and is not in custody on an executed parole violators warrant. Pre-conviction credit, under 18 U.S.C. §3568, reduces only the new sentence.

It is, therefore, usually in the interest of the client not to have the warrant executed, and counsel's submission to the D.C. Board of Parole or the U.S. Parole Commission of information and arguments against execution, if done early in a new case, is often effective to avoid execution of the warrant. 58/ Moreover, counsel should seek to

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58/ Counsel's ability at a "five-day hold hearing" to represent that the Board will not execute its warrant or initiate revocation proceedings may be extremely important in the bail determination. See infra Chapter 1.

Mr. DYMALLY. List of members of the Ad Hoc Legislative Group and submission on D.C. Judicial Improvements Act of 1985.

[The list and submission follow:]

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April 18, 1985

DISTRICT OF COLUMBIA JUDICIAL
IMPROVEMENTS ACT OF 1985

Attached are a series of legislative proposals which could form the District of Columbia Judicial Improvements Act of 1985. These proposals generally implement legislative recommendations of the Horsky Committee Study that require Congressional action. They have been developed with the help of an informal legislative group. While none of them are major, together they will help strengthen and improve the functioning of the District of Columbia court system.

A brief description follows of the Horsky Committee Study, of the informal legislative group, and of the proposals themselves.

Horsky Committee Study

In 1978 the District of Columbia Bar established the District of Columbia Court System Study Committee under the chairmanship of Charles A. Horsky. That Committee was charged

with assessing the effect of the District of Columbia Court Reform and Criminal Procedure Act of 1970 (84 Stat. 473), and with making "such recommendations as are warranted for further improvement in the court system of the District."

The Committee conducted a massive study and issued nine reports which are commonly referred to collectively as the Horsky Committee Study. One report, on court organization, dealt with problems common to both the District of Columbia Court of Appeals and the Superior Court. One report dealt with the Court of Appeals. The other seven reports addressed the various branches of the Superior Court.

The entire Study, consisting of the nine reports, was printed as a committee print in April 1983 by the Subcommittee on Governmental Efficiency and the District of Columbia of the Senate Committee on Governmental Affairs, S. Prt. 98-34.

The Horsky Committee Study makes numerous recommendations. They have been reviewed by the D.C. courts and by a committee of the D.C. Bar appointed for implementing those recommendations. Many of those recommendations can be, and have been, implemented by the courts themselves. Others require legislative action either by the Congress or by the Council of the District of Columbia.

The Informal Legislative Group

An informal legislative group was created at the invitation of the Council for Court Excellence and the Bar's Committee for the Implementation of the Horsky Committee Study. The purpose was to formulate a set of legislative proposals implementing recommendations of the Horsky Committee Study on which there seems to be general agreement and to get support for enactment.

The informal group has consisted of majority and minority staff representatives from the cognizant House and Senate committees, representatives of the Council of the District of Columbia and its Judiciary Committee, representatives of the Mayor's office and the Corporation Counsel, the United States Attorney, the Chief Judges of the D.C. courts and the Executive Officer of the D.C. courts, the Executive Director of the D.C. Bar and representatives of Divisions 2, 4 and 6 of the Bar and of the Bar's Implementation Committee, and representatives of the Council for Court Excellence.

The group has had six meetings and has considered various of the Horsky Committee Study legislative recommendations. No votes have been taken and none of the individuals or entities represented on the group are bound in any way. However, the attached proposals are what has emerged as more or

less of a consensus deserving of support. While they were being developed, recommendations dealing with retired judges and the jurisdictional limit for small claims were partially implemented by enactment of Public Law 98-598.

The Legislative Proposals

The legislative proposals follow, numbered as Items No. 1 through 12. The first ten items are from the Horsky Committee Study. In each of those ten items there is reference to the particular Horsky Committee Study recommendation involved, suggested legislative language, and an explanation of the purpose of the proposal.

The last two items -- Nos. 11 and 12 -- did not result from the Horsky Committee Study. They arose during the group's consideration and were believed to warrant inclusion in the package. Like the other items, these two proposals contain suggested legislative language and an explanation of the purpose of the proposal.

As will be apparent, none of the proposals is major. Similarly, none of them is believed to be controversial; in the course of the work of the group, several recommendations were eliminated as either controversial or unnecessary. Taken together the attached proposals should help improve and

strengthen the functioning of the court system of the District of Columbia. It is hoped that they can be combined and made the nucleus of a bill which could be the District of Columbia Judicial Improvements Act of 1985.

If further information is desired about these proposals contact either Sam Harahan of the Council for Court Excellence (783-7736) or John H. Pickering, Chairman of the Bar's Implementation Committee (872-6200).

Charles A. Horsky, Chairman
Council for Court Excellence

John H. Pickering, Chairman
D.C. Courts Study Implementation Committee, D.C. Bar

ITEM NO. 1

Recommendation No. 5 of the Court Organization Report*/

- Eliminating the requirement that the Executive Officer of the D.C. Courts be appointed from a list of persons submitted by the Director of the Administrative Office of the United States Courts.

Amendment

Section 1703(b) of title 11 of the District of Columbia Code is amended to read as follows:

(b) The Executive Officer shall be selected by, and subject to removal by, the Joint Committee on Judicial Administration with the concurrence of the respective chief judges. The Joint Committee shall consider experience and special training in administrative and executive positions, and familiarity with court procedures. The judges may consult with the Director of the Administrative Office and with the Commission on Qualifications of Federal Circuit Executives, for the purpose of obtaining the names of qualified candidates; however, the judges shall not be limited to choosing among the candidates suggested by the Director or the Commission.

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*/ This and similar references are to recommendations in the indicated reports of the District of Columbia Bar's D.C. Court System Study Committee published as a Senate Committee Print, S. Prt. 98-34, and commonly referred to as the Horsky Committee Study.

Purpose

This amendment implements Recommendation No. 5 of the Court Organization Report; it is supported by the D.C. Superior Court Board of Judges.

This amendment alters the present method of selecting an Executive Officer for the D.C. Courts. The Executive Officer is responsible for the administration of the District of Columbia Court System, subject to the supervision of the Joint Committee and the Chief Judges. Currently, the Executive Officer must be chosen from among a list of candidates put forward by the Director of the Administrative Office of the United States Courts. This amendment vests the choice in the hands of the Joint Committee on Judicial Administration, with the concurrence of both Chief Judges. The Judges' choice is no longer restricted to candidates suggested by the Director, although they are free to consult with him and with the Commission on the Qualifications of Federal Circuit Executives. The criteria listed in the statute are advisory; they are the same as the criteria set forward in the statute dealing with the qualifications of federal circuit executives. 28 U.S.C. 332(f).

The change is intended to alleviate problems which have become apparent in the present system by giving the local judiciary more discretion in their choice and a greater responsibility for that choice.

The D.C. Superior Court Board of Judges considers this scheme for selection more appropriate than the current system. The selection of a Court Executive is essentially a local matter. Now that the position of court administrator has become more prevalent across the country, it is no longer necessary to depend on the federal system for the selection of an executive for the D.C. Courts. The District of Columbia Court System, as an independent branch of government, is entitled to make its own judgments in filling this position.*/

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*/ For additional explanation see pp. 814-18 of the Horsky Committee Study, S. Prt. 98-34.

ITEM NO. 2

Recommendation No. 18 of the Court Organization Report

- Grants the D.C. Judicial Nomination Commission 60 days to nominate candidates for judicial vacancies.

Amendment

That section 434(d)(1) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 be amended by replacing the word "thirty" with the words "sixty calendar."

In its amended form the provision would read [amendment in brackets]:

> (d)(1) In the event of a vacancy in any position of judge of a District of Columbia Court, the Commission shall, within [sixty calendar] days following the occurrence of such vacancy, submit to the President, for possible nomination and appointment . . . .

Purpose

The purpose of the amendment is to allow the D.C. Judicial Nomination Commission more time to complete its nomination tasks. The amendment implements Recommendation No. 18 of the Court Organization Report of the Horsky Committee Study. The Committee expressed "concern about the adequacy of the screening and recommendation process

performed within the existing 30 day authorized period." Moreover, the Committee found this concern expressed repeatedly in interviews conducted while preparing its report. A 30-day period is especially troublesome when more than one vacancy occurs and all the nominations must be reported within 30 days. This difficulty was expressly recognized in the recent enactment creating seven new Superior Court judgeships, which included a provision allowing ninety days for the Judicial Nomination Commission to act. Pub. L. No. 98-235 (Mar. 19, 1984). Representative Dymally described the problem as follows:

> Because in 1981 there were three investigators and now with an increased workload, they only have two investigators. The last time they were faced with this problem they had a tremendous problem which called for a supplemental appropriation to expedite the process. It was felt that the 90 days will give them enough time to do a thorough investigation and submit to the President the best nominees there are. That is basically it. It is not to delay the process, but simply to give them enough time, with limited staff to submit to the President the best candidates that there are in the district.

130 Cong. Rec. H779 (daily ed. Feb. 22, 1984). The amendment also includes the term "calendar days" to avoid ambiguity with "business days."

The D.C. Superior Court Board of Judges agrees with the recommendation.*/

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*/ For additional explanation, see pp. 850-51 of the Horsky Committee Study, S. Prt. 98-34.

ITEM NO. 3

Recommendation No. 21 of the Court Organization Report

- Restrict access to materials of Judicial Nomination Commission.

Amendment

Substitute for the last sentence of section 434(c)(3) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 the following:

Materials furnished to or developed by the Commission during the selection process shall be treated as privileged and confidential, and hereby are exempt from the D.C. Freedom of Information Act of 1976 and the federal Freedom of Information Act.

ITEM NO. 4

Recommendation No. 22 of the Court Organization Report

- Clarify exemption of D.C. Judicial Nomination Commission from public meeting requirement.

Amendment

Amend section 434(c) of the District of Columbia Self-Government and Governmental

Reorganization Act of 1973 to add a new subparagraph (4) reading:

(4) Meetings of the Commission may be held in private; the Commission is exempt from public meeting requirements of the District government including Section 742 of this Act.

ITEM NO. 5

Recommendation No. 23 of the Court Organization Report

- Provide that judicial candidate recommendations be announced publicly when forwarded to the President.

Amendment

Amend the first sentence of section 434(d)(1) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 to read [amendment in brackets]:

In the event of a vacancy in any position of judge of a District of Columbia court, the Commission shall, within [sixty calendar days] following the occurrence of such vacancy, submit to the President, for possible nomination and appointment, a list of three persons for each vacancy. [At this time, the Commission

shall announce publicly the names of those persons recommended by the Commission so that the public may have an opportunity to submit comments on the recommendations to the President.]

Purpose

The amendments to the District of Columbia Self-Government and Governmental Reorganization Act of 1973 resulting from Recommendations Nos. 21, 22 and 23 of the Court Organization Report all address the selection process of the D.C. Judicial Nomination Commission. Currently, the judicial selection process in the District of Columbia lacks protections that would render the process more effective. In structuring the procedure for choosing D.C. judges, however, the values of full public access, and government in the "sunshine" must be balanced against the need for the Nomination Commission to receive essential information regarding prospective nominees in the strictest confidence. This balance will ensure fair and effective decisionmaking while providing public comment and scrutiny at the appropriate stages of the process. The Board of Judges of the Superior Court supports the first two recommendations and has no opinion on the third.

1. With respect to the first amendment, it

is important to appreciate that the Nomination Commission performs, in part, a merit review function. The Commission screens and identifies nominees for judicial office on the basis of merit prior to selecting for nomination among the qualified candidates. To ensure open and candid discussion of judicial candidates, it is necessary to restrict access to materials furnished to or developed by the Commission during the selection process. District government laws and regulations presently are unclear as to the applicability of the local and federal Freedom of Information Acts to the procedures of the Commission. This amendment clarifies existing law by providing a statutory exemption to the Federal and D.C. Freedom of Information Acts. With this amendment, information about potential judicial nominees will be submitted with greater confidence as to its confidentiality.

The drafters were not unsympathetic to the concern that the interested public have ample opportunity for input at the Nomination Commission level. However, we were concerned that many candidates well qualified for judicial office would refuse to be considered for nomination absent confidentiality. Further, there is also concern that some sources may be reluctant to speak candidly about judicial candidates to the Nomination Commission absent confidentiality.

The Judicial Nomination Commission has an

affirmative responsibility, which should be underlined, to seek information about prospective candidates from all quarters of the community. Lengthening the period for completing the nomination process will enable the Nomination Commission to do so and to consider more fully community views about prospective candidates. Members of the community with comments concerning prospective judicial nominees should feel less constrained in presenting their views under the proposed amendment. In short, this first amendment would enhance the quality of the process in the initial stages by removing the chilling effect of open access to information obtained and generated by the Commission.

2. Similarly, the second amendment (Recommendation No. 22, to clarify the exemption of the Judicial Nomination Commission from public meeting requirements) reflects the policy that secrecy of proceedings and deliberation at the Judicial Nomination Commission stage ensures more candid and open debate over the potential candidates. Those with views about the suitability of judicial candidates, as well as the candidates themselves, are better served by proceedings conducted outside the public eye. Again, with this amendment, exchange within the Commission will escape the inhibiting effects of close public scrutiny and should result in more productive dialogue.

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The ad hoc legislative group recognized that the effect of Item No. 3 regarding the District of Columbia Freedom of Information Act could be accomplished by the Council of the District of Columbia amending that act. Moreover, it is arguable (although not clear) that the Council also could accomplish Item No. 4. These amendments are nevertheless being recommended to the Congress since it alone can amend section 434 of the Self-Government Act and there is no doubt regarding Congress's ability to reform section 742 of that Act. Accordingly Items Nos. 3 and 4 have been fashioned to complement any initiative the Council may take to amend the District of Columbia Freedom of Information Act or section 742 of the Self-Government Act. The scope of the current group of legislative proposals is aimed at the Congress. When the ad hoc legislative group undertakes future recommendations for the Council's consideration, of course, any elements of Items Nos. 3 and 4 which remain pending and within the jurisdiction of the Council can be proposed fresh at that time.

3. The final amendment (public announcement of nominees) addresses the need to ensure a mechanism for public knowledge of the results of the judicial nominating process. The revision requires the Commission to announce publicly the names of those persons recommended by the Commission at the time it submits the names to the

President. This change will ensure that those persons with views about judicial nominees have the opportunity to present their views to the President in a timely manner. Presently, the public is dependent upon learning the names of judicial nominees from the media or other secondary sources. Since the President selects the judges from the list of nominees, this amendment seeks to encourage public input into the procedure.

For additional explanation of these three proposals see pp. 853-55 of the Horsky Committee Study, S. Prt. 98-34.

ITEM NO. 6

Recommendation No. 26 of the Court Organization Report

- Authorizing the D.C. Judicial Disability and Tenure Commission, in its discretion, to disclose to the D.C. Judicial Nomination Commission information which it may possess relating to any judge under consideration by the Commission for elevation to the Court of Appeals or to the office of chief judge.

Amendment

Section 1528 of title 11 of the District of Columbia Code is amended by:

(1) relabeling current paragraph (b) as paragraph (c);

(2) inserting a new paragraph (b), which reads:

> The Commission shall have the authority, in its discretion, to provide the District of Columbia Judicial Nomination Commission with any information which it may possess relating to any judge under consideration by the Nomination Commission for elevation to the Court of Appeals or to the office of Chief Judge.

Purpose

This amendment implements Recommendation No. 26 of the Court Organization Report, which is supported by

the Superior Court Board of Judges. The amendment alters Section 1528 to provide that the D.C. Judicial Disability and Tenure Commission may, in its discretion, provide the D.C. Judicial Nomination Commission with information which it may possess relating to any judge under consideration by the Nomination Commission for elevation to the Court of Appeals or to the office of chief judge. The amendment is not intended to alter the basic principle of the section that records of proceedings before the Disability Commission are privileged and confidential. However, when one investigatory commission of the D.C. judicial system possesses information relevant to an ongoing consideration by another investigatory commission, it is appropriate that records material to the fitness of the candidate be shared.*/

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*/ For additional explanation see p. 857 of the Horsky Committee Study, S. Prt. 98-34.

ITEM NO. 7

Recommendation No. 28 of the Court Organization Report

- To require judges seeking reappointment to state their intention for additional term 180 days before term expires.

Amendment

That Section 433(c) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 be amended by replacing the words "three months" with the words "six months" and the words "thirty days" with the words "sixty calendar days."

In its amended form the provision would read [amendment in brackets]:

(c) Not less than [six months] prior to the expiration of his term of office, any judge of the District of Columbia courts may file with the Tenure Commission a declaration of candidacy for reappointment. If a declaration is not so filed by any judge, a vacancy shall result from the expiration of his term of office and shall be filled by appointment as provided in subsections (a) and (b). If a declaration is so filed, the Tenure Commission shall, not less than [sixty calendar days] prior

to the expiration of the declaring candidate's term of office, ...

Purpose

The purpose of this amendment is to allow a longer period of consideration for judicial reappointments by both the Tenure Commission and the President. The amendment implements Recommendation No. 28 of the Court Organization Report of the Horsky Committee Study. That D.C. Bar Study found that "[b]y all accounts, including a review of the Commission's Annual Report, the 90-day notice period is insufficient to enable the Commission to conduct its investigations and formulate a Commission recommendation on a sitting judge. This situation is particularly exasperating when several judges come up for reappointment at the same time." In addition, the Bar Study found that currently the Tenure Commission requests that judges voluntarily declare their intention six months before their terms expire.*/

The D.C. Superior Court Board of Judges agrees with this recommendation.

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*/ For additional explanation see pp. 862-63 of the Horsky Committee Study, S. Prt. 98-34.

ITEM NO. 8

Recommendation No. 29 of the Court Organization Report

- To eliminate judicial reappointment evaluation category of "exceptionally well-qualified".

Amendment

That Section 433(c) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973 be amended by removing the words "exceptionally well-qualified or."

In its amended form, the provision would read [amendment in brackets]:

> If the Tenure Commission determines the declaring candidate to be [] well-qualified for reappointment to another term, then the term of such declaring candidate shall be automatically extended. . . .

Purpose

The purpose of the amendment is to remove an unnecessary and potentially divisive evaluation standard for reappointing judges. The amendment implements Recommendation No. 29 of the Court Organization Report of the Horsky Committee Study which found "little value in retaining the two automatic reappointment categories for

evaluating judges' performance." In fact, the designation has no effect on reappointment. Under the current version of the statute, it makes no difference whether a judge is rated as "exceptionally well-qualified" or simply "well-qualified."

The Horsky Committee Study also found that only a small number of Superior Court judges were designated as "exceptionally well-qualified" while "virtually every appellate judge" has been rated "exceptionally well-qualified." The Study concluded that the distinction was based on the relative lack of difficulty of assessing the productivity and qualification of appellate judges as opposed to trial judges.*/

The D.C. Superior Court Board of Judges agrees with the recommendation.

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*/ See pp. 863-64 of the Horsky Committee Study, S. Prt. 98-34.

ITEM NO. 9

Recommendation No. 30 of the Statutory Courts Report

- To give authority to periodically adjust small claims ceiling.

Amendment

Amend Section 1321 of title 11 of the District of Columbia Code to read [amendment in brackets]:

> The Small Claims and Conciliation Branch has exclusive jurisdiction of any action within the jurisdiction of the Superior Court which is only for the recovery of money, if the amount in controversy does not exceed $2,000, exclusive of interest, attorney fees, protest fees, and costs. [The Council of the District of Columbia is hereby authorized to review and to change the jurisdictional amount by legislation from time to time.]

Purpose

The recently enacted Public Law 98-598 raised the D.C. Superior Court's small claims jurisdiction from $750 to $2,000. That substantially carried out Recommendation No. 29 of the Statutory Courts Report of the Horsky Committee Study. It was the first increase in the Court's

statutory jurisdiction over small claims since 1970, a fourteen year period. (The neighboring jurisdictions presently have higher jurisdictional limits for their courts equivalent to the D.C. Small Claims Branch -- $5,000 in Fairfax County, Virginia, and $10,000 in Montgomery and Prince George's Counties, Maryland.) The new $2,000 ceiling for the D.C. Small Claims Branch has resulted in an immediate rise in the caseload of this Branch, and should enable many citizens and businesses with small civil cases to have their disputes adjudicated more quickly than before.

The amendment now proposed has as its basis Recommendation No. 30 of the Statutory Courts Report of the Horsky Committee Study. The Horsky Committee Study had recommended legislation allowing the Superior Court to change the jurisdictional ceiling periodically (see p. 700, S. Prt. 98-34), and the Superior Court Board of Judges agreed with that recommendation. It is arguable, however, that the legislative process of the Council of the District of Columbia may be better suited to resolving the various considerations involved in periodically revising the jurisdictional ceiling. Accordingly, the amendment would have the Congress delegate legislative authority to amend the D.C. small claims ceiling to the Council of the District of Columbia.

ITEM NO. 10

Recommendation No. 8 of the Probate Court Report

- To integrate, statutorily, the Auditor Master's office within the Probate Division of the D.C. Superior Court.

Amendment

This amendment would carry out the Horsky Committee Study recommendation for merging the audit staffs of the Auditor-Master and the Register of Wills in the Probate Division.

Section 1724 of title 11 of the District of Columbia Code is amended by omitting the phrase "(1) audit and state fiduciary accounts" and by renumbering the remaining clauses as (1) and (2).

As so amended Section 1724 would read in pertinent part:

> There shall be an Auditor Master of the Superior Court who shall (1) execute orders of reference referred by the Superior Court and perform duties in accordance with Rule 53 of the Federal Rules of Civil Procedure or other applicable rule, and (2) perform such other functions as may be assigned by the Superior Court. . . .

Section 2104 of title 11 of the District of Columbia Code is amended by deleting the word

"and" at the end of subsection (a)(2), by striking the period at the end of subsection (a)(3) and replacing the same with a semicolon and the word "and", and by adding the following new phrase at the end of subsection (a): "(4) audit and state fiduciary accounts."

Purpose

At the time of the D.C. Bar study of the Superior Court, the Auditor-Master was conducting audits and preparing audit reports for the Superior Court on all fiduciary accounts other than probate and guardianship accounts. He also audited those trust accounts remaining in U.S. District Court. The office of the Register of Wills, in the Probate Division, handles the accounts of decedents' estates and guardianship.

The Horsky Committee Study noted that the Auditor-Master's office had developed a substantial backlog of accounts, while, at the time of the Study, the Register of Wills office was up-to-date. The Study concluded that "it is inappropriate for the Auditor-Master of the D.C. Superior Court to continue to serve the U.S. District Court in matters of reference and account."

The amendment removes the requirement that the Auditor-Master audit and state fiduciary accounts and

authorizes the Register of Wills to perform that function. The Horsky Committee Study also recommended that the Superior Court should "merge the regular audit staffs of the Auditor-Master and the Register of Wills under a consolidated Probate Division." The amendment makes that merger possible with the efficiency the Study believed would result.*/ In fact the merger has taken place and the statutes should be changed to reflect the fact.

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*/ For a more detailed explanation see pp. 764-68 of the Horsky Committee Study, S. Prt. 98-34.

ITEM NO. 11

Proposal to eliminate unnecessary duplication of financial reporting */

Amendment

Amend Section 303 of the Ethics in Government Act of 1978, 28 U.S.C. app. section 301 (1982) by adding subsection (e):

> (e) With respect to the judicial officers and employees of the Superior Court of the District of Columbia and the District of Columbia Court of Appeals, the District of Columbia Judicial Disabilities and Tenure Commission shall perform the functions of and have the same authority as the Judicial Ethics Committee of the Judicial Conference of the United States under this title.

Purpose

Presently the judges of the Superior Court of the District of Columbia and the District of Columbia Court of Appeals are required to file financial disclosure reports with the Committee on Judicial Ethics of the U.S. Judicial Conference, as well as with the District of Columbia Judicial Disabilities and Tenure Commission. According to Judge Edward A. Tamm, Chairman of the Judicial Conference Committee, the

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*/ This item was not part of the Horsky Committee Study.

judges and employees of the District of Columbia Courts should not come under the jurisdiction of the Judicial Ethics Committee because that Committee was established to review financial disclosure reports of federal judges exclusively. The judges of the District of Columbia and their employees are already covered by the D.C. Judicial Disabilities and Tenure Commission and therefore should not be required to file financial disclosures with a judicial ethics committee set up for the federal judiciary.

ITEM NO. 12

Proposal for Certification of Local Law Questions*/

Amendment

Add the following new Chapter to Title 11 of the District of Columbia Code:

Chapter __. Certification of Questions of Law.

§1 Power to Answer

The District of Columbia Court of Appeals may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States or the highest appellate court of any other state, when requested by the certifying court if there are involved in any proceeding before the certifying court questions of law of the District of Columbia which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the District of Columbia Court of Appeals.

§2 Method of Invoking

This Act may be invoked by an order of any of the courts referred to in section 1 upon the court's own motion or upon the motion of any party to the cause.

§3 Contents of Certification Order

A certification order shall set forth (1) the question of law to be answered; and (2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

§4 Preparation of Certification Order

The certification order shall be prepared by the certifying court and forwarded to the District of

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*/ This proposal was not part of the Horsky Committee Study.

Columbia Court of Appeals by the clerk of that court. The District of Columbia Court of Appeals may require the original or copies of all or such portion of the record before the certifying court as it deems necessary to a determination of the questions certified to it.

§5 Cost of Certification

Fees and costs shall be the same as in appeals docketed before the District of Columbia Court of Appeals and shall be equally divided between the parties unless otherwise precluded by statute or by order of the certifying court.

§6 Briefs and Argument

The District of Columbia Court of Appeals may prescribe rules of procedure concerning the answering and certification of questions of law under this chapter.

§7 Opinion

The written opinion of the District of Columbia Court of Appeals stating the law governing the questions certified shall be sent by the Clerk to the certifying court and to the parties.

§8 Power to Certify

The District of Columbia Court of Appeals, on its own motion or the motion of any party, may order certification of questions of law to the highest court of any state under the conditions set forth in section 1.

§9 Procedure for Certifying

The procedures for certification from the District of Columbia to the receiving state shall be those provided in the laws of the receiving state.

Purpose

The proposed legislation is patterned after the Uniform Certification of Questions of Law Act, 12 U.L.A. 52 (1975),

which has been adopted by statute or rule in twenty-four states.

The proposal was suggested by the Legislative Committee of Division IV of the D.C. Bar as a result of inquiries received from the United States Court of Appeals for the District of Columbia Circuit. It would permit that Court and any other United States Court of Appeals, the Supreme Court of the United States, and the highest court of any state to certify questions of District of Columbia law to the District of Columbia Court of Appeals which would have discretion to act on the certification.

Information was obtained from the National Center for State Courts about experience under the Uniform Act. Also, the Corporation Counsel's office supplied information as to the possible case load that might result from adoption of the proposal. That information was considered by the District of Columbia Court of Appeals and the informal legislative group has been advised that that Court has no objection to the proposed legislation so long as it provides -- as the proposed language does -- that

1) The District of Columbia Court of Appeals has discretion to decide whether to act on the certification, and

2) Certification is limited to the Supreme Court of the United States, the United States Courts of Appeals, and the highest courts of the states.

Adoption of the proposal would provide a means for obtaining -- without unduly burdening the District of Columbia Court of Appeals -- authoritative resolution of undecided questions of District of Columbia law that may be determinative of proceedings pending in the certifying court.

Mr. DYMALLY. The Yale Law Journal, volume 92, page 292.
[The article follows:]

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*On leave of absence, 1982-83.
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Notes

Federal and Local Jurisdiction in the District of Columbia

The 1982 trial of John Hinckley for the attempted assassination of President Ronald Reagan brought to the public's attention a unique feature of the criminal justice system in the District of Columbia. Although federal and state charges never are joined together for trial, federal and D.C. Code charges may be joined in one indictment under section 11-502(3) of the D.C. Code,[1] and tried before the United States District Court for the District of Columbia.[2]

In the Hinckley case, the federal prosecutor used section 11-502(3) to join three federal and ten D.C. Code charges. This joinder required the district court to determine whether to use both federal and D.C. Code evidentiary standards during the trial, or only one standard. The court ruled that only federal standards would be used,[3] and therefore placed the

1. Under D.C. CODE ANN. § 11-502(3) (1981), the United States District Court has jurisdiction over "[a]ny offense under any law applicable exclusively to the District of Columbia which offense is joined in the same information or indictment with any Federal offense." A similar but more limited jurisdictional statute is found at D.C. CODE ANN. § 23-311(b) (1981):

> Two or more offenses may be charged in the same indictment or information as provided in subsection (a) [offenses charged are of similar character or based on same transaction] even though one or more is in violation of the laws of the United States and another is in violation of the laws applicable exclusively to the District of Columbia and may be prosecuted as provided in Section 11-502(3).

The requirements for the proper joinder of offenses under § 23-311(a) are the same as those found in FED. R. CRIM. P. 8. *See infra* note 99. Despite the broad language of § 11-502(3), which on its face permits joinder of even unrelated federal and local offenses in one indictment, the D.C. Circuit has read the "proper joinder" requirements of rule 8 (also described in D.C. CODE ANN. § 23-311) into § 11-502(3). United States v. Kember, 648 F.2d 1354, 1359 (D.C. Cir. 1980); United States v. Jackson, 562 F.2d 789, 793 (D.C. Cir. 1977).

2. The federal courts in the District are the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia Circuit. The local trial court is the Superior Court, and the local appellate court is the District of Columbia Court of Appeals.

3. The D.C. Circuit previously had ruled that the use of two evidentiary standards in the same trial is "patently not feasible." United States v. Belt, 514 F.2d 837, 844 (D.C. Cir. 1975); *see* United States v. Hairston, 495 F.2d 1046, 1054 n.13 (D.C. Cir. 1974) (applying federal evidentiary standard for impeachment by prior conviction); United States v. Brown, 483 F.2d 1314, 1317-18 (D.C. Cir. 1973) (federal bail rules apply to defendant charged with D.C. Code offenses in federal court). *But see* United States v. Garnett, 653 F.2d 558, 560-61 (D.C. Cir. 1981) (refusing to decide whether federal or District probation provisions apply to D.C. Code violator in federal court); United States v.

burden of disproving insanity upon the prosecution. In contrast, the D.C. Code places the burden of proof upon the defendant.[4] This ruling may well have been the deciding factor in Hinckley's acquittal by reason of insanity.

This Note examines three alternative bases for the jurisdiction of the District's Article III courts[5] over joined D.C. Code offenses. First, if the D.C. Code is defined as federal law,[6] and D.C. Code offenses are considered "crimes against the United States,"[7] D.C. Code offenses fall within federal court "arising under" jurisdiction.[8] Second, Article III jurisdiction

Greene, 489 F.2d 1145, 1153 (D.C. Cir. 1973) (D.C. Code insanity standard applicable to D.C. Code offenders in federal court), *cert. denied*, 419 U.S. 977 (1974); United States v. Brown, 483 F.2d 1314, 1320-23 (D.C. Cir. 1973) (MacKinnon, J., dissenting) (D.C. Code bail provisions should apply to D.C. Code violators in federal court).

4. D.C. CODE ANN. § 24-301(j) (1981); see Bethea v. United States, 365 A.2d 64, 93-95 (D.C. 1976) (upholding constitutionality of § 24-301(j)), *cert. denied*, 433 U.S. 911 (1977).

5. The District's federal courts are established under Article III of the U.S. Constitution, D.C. CODE ANN. § 11-101(1) (1981), and exercise the same judicial power of the United States as all other Article III courts, Palmore v. United States, 411 U.S. 389, 408-09 (1973); *see also* United States v. Jackson, 562 F.2d 789, 800 (D.C. Cir. 1977) ("A central purpose and policy of D.C. court reorganization was to assure that the prompt and effective discharge of [federal] responsibilities would not be impeded by the necessity of trying local criminal offenses, for which a forum was provided in an enlarged and strengthened local court system."); Andrade v. Jackson, 401 A.2d 990, 992 (D.C. 1979) (District's federal courts divested of local jurisdiction). Article III defines the boundaries of the judicial power that Article III courts may exercise. *See* National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 615, 645, 655 (1949) (concurring and dissenting opinions) (six Justices rejected proposition that Congress could freely expand Article III judicial power using its Article I powers); *see also* Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809) (Article III jurisdiction may not be extended beyond Article's express limits).

6. Whalen v. United States, 445 U.S. 684, 687 (1980) (acts of Congress affecting only the District equal to other federal laws); Pernell v. Southall Realty, 416 U.S. 363, 368 (1974) (same).

7. *E.g.*, Goode v. Markley, 603 F.2d 973, 976 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1083 (1980); Milhouse v. Levi, 548 F.2d 357, 360 n.6 (D.C. Cir. 1976); United States v. Greene, 489 F.2d 1145, 1150 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 977 (1974); United States v. Williams, 28 F. Cas. 647, 658 (C.C.D.C. 1833) (No. 16,712); United States v. Hammond, 26 F. Cas. 96, 96 (C.C.D.C. 1801) (No. 15,293).

8. Article III provides: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] [the Laws of the United States]. . . ." U.S. CONST. art. III, § 2, cl. 1. *See* Whalen v. United States, 445 U.S. 684, 687 (1980) (D.C. Code "certainly come[s]" within this Court's Art. III jurisdiction"); Pernell v. Southall Realty, 416 U.S. 363, 368 (1974) (similar); National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 650 (1949) (Frankfurter, J., dissenting) (whenever Congress creates "some right for the inhabitants of the District, it could choose to provide for the enforcement of that right in any court of the United States, because the case would be one arising under 'the Laws of the United States' "). Congress has not conferred jurisdiction on the District's Article III courts to hear D.C. Code offenses through an amendment to the Judiciary Act, 28 U.S.C., the normal route of conferring federal question jurisdiction. Instead, it amended the Judiciary Act to *exclude* D.C. Code causes of action from federal question jurisdiction. 28 U.S.C. § 1364 (Supp. V 1981) (formerly codified at 28 U.S.C. § 1363 (1976)).

In general, "[a] suit arises under the law that creates the cause of action," American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257, 260 (1916), and therefore D.C. Code offenses tried in federal court by virtue of the operation of § 11-502(3) arise under D.C. Code substantive criminal provisions, not under the jurisdictional statute. *See* The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 452 (1852) (Congress cannot circumvent limitations of Article III by enacting purely jurisdictional statute under its Article I powers, and base federal question jurisdiction solely on that statute); Note, *Subject Matter Jurisdiction and the Foreign Sovereign Immunities Act of 1976*, 68 VA. L. REV. 893, 903 (1982) (constitutional limitation on "arising under" jurisdiction is that "a case may

over D.C. Code prosecutions may be justified because the United States is named as party plaintiff in those prosecutions; D.C. Code offenses are prosecuted by the United States Attorney in the name of the United States.[8] Third, local offenses may be considered pendent claims when joined in one indictment with federal charges and tried in federal court.[10]

The Note argues that Congress' exercise of its power under the Constitution to create local law for the District[11] should not be considered an exercise of its national legislative capacity. Rather, Congress acts as a state-like sovereign when enacting local law.[12] D.C. Code matters,[13] therefore, do not "arise under" the "laws of the United States"[14] and

not arise under a law enacted pursuant to Congress' power to regulate the federal courts or its power to create federal jurisdiction").

In addition, federal jurisdiction "may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law . . . . The federal nature of the right to be established is decisive—not the source of the authority to establish it." Puerto Rico v. Russell & Co., 288 U.S. 476, 483 (1933); *see also* Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n, 588 F.2d 1216, 1226-27 (9th Cir. 1978) (nature rather than source of claim determines whether right can be litigated in federal court; Hawaiian law enacted pre-statehood by Congress not cognizable post-statehood in federal court), *cert. denied*, 444 U.S. 826 (1979). Uncertainty should be resolved against extending federal jurisdiction, Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1959), particularly when local courts can give effective relief.

9. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend . . . to Controversies to which the United States shall be a Party . . . .").

10. The federal courts in the District have interpreted § 11-502(3) by analogy to civil pendent jurisdiction. United States v. Shepard, 515 F.2d 1324, 1331 (D.C. Cir. 1975); United States v. Kember, 487 F. Supp. 1340, 1342 (D.D.C.), *aff'd*, 648 F.2d 1354 (D.C. Cir. 1980); *see* Financial Gen. Bankshares, Inc. v. Metzger, 680 F.2d 768, 773-74 n.9 (D.C. Cir. 1982).

11. U.S. CONST. art. I, § 8, cl. 17 ("Congress shall have power . . . to exercise exclusive legislation in all cases whatsoever over [the] District . . . ."); *see* State of Md., Act of Dec. 19, 1791, ch. 45, § 2 (codified at 2 LAWS OF MARYLAND 327 (W. Kilty ed. 1800)) (ceding present District territory to United States).

12. The D.C. Code was enacted under Congress' power to act as the state legislature for the District. Palmore v. United States, 411 U.S. 389, 397-98 (1973); District of Columbia v. John R. Thompson Co., 346 U.S. 100, 108 (1953); *see* Capital Traction Co. v. Hof, 174 U.S. 1, 5 (1899) (Congress "may exercise within the District all legislative powers that the legislature of a State might within the State"); Hodgkin, *The Constitutional Status of the District of Columbia*, 25 POL. SCI. Q. 257, 260 (1910); Comment, Palmore v. United States: *The Interrelationship of Article I and Article III of the Constitution*, 23 AM. U.L. REV. 119, 140-44 (1973). The D.C. Code is equivalent to a state code. Key v. Doyle, 434 U.S. 59, 68 n.13 (1977). Congress may exercise local legislative authority despite the lack of congressional representation for the District. *See* Heald v. District of Columbia, 259 U.S. 114, 124 (1922) (upholding taxation without representation). District residents do vote in presidential elections, however, U.S. CONST. amend. XXIII, and elect a nonvoting delegate to the House of Representatives, D.C. CODE ANN. § 1-401 (1981).

13. Congress indicates its intent to create laws of exclusively local application by enacting such legislation as part of the D.C. Code. In Key v. Doyle, 434 U.S. 59 (1977), the Supreme Court stated:

> It is more the nature of the D.C. Code than its limited geographical impact that distinguishes it from other federal statutes. Unlike most congressional enactments, the Code is a comprehensive set of laws equivalent to those enacted by state and local governments having plenary power to legislate for the general welfare of their citizens.

Id. at 68 n.18; *see* United States v. McDonald, 481 F.2d 513, 522 n.24 (D.C. Cir. 1973).

14. Palmore v. United States, 290 A.2d 573, 578-80 (D.C. 1972) (D.C. Code laws not laws of United States requiring Article III judge), *aff'd*, 411 U.S. 389 (1973); *see* Katz, *Federal Legislative Courts*, 43 HARV. L. REV. 894, 902-03 (1930) ("much of the litigation in the territories and in the District falls outside of the categories of cases embraced within the federal 'judicial power' as defined in Article III"); Comment, *supra* note 12, at 144 (congressionally enacted D.C. Code provisions "not

D.C. Code offenses are crimes against the District of Columbia, not against the United States.[15] Since the real party in interest in local prosecutions is the District of Columbia, in prosecuting local crimes the District's United States Attorney acts not in his capacity as a federal officer, but in a local capacity.[16] As a result, the judicial power of Article III should not normally extend to causes of action under the D.C. Code.

Pendent jurisdiction, the third possible basis for federal court jurisdiction over D.C. Code offenses, is the only one justifiable under the Constitution. In addition, only the pendent jurisdiction justification for federal jurisdiction comports with congressional intent in separating federal and local spheres in the District.[17] The exercise of pendent jurisdiction in the

part of the laws of the United States requiring article III court adjudication"); *see also* American Sec. & Trust Co. v. Commissioners of the District of Columbia, 224 U.S. 491, 494-95 (1912) (D.C. Code statute not "law of the United States" for purposes of Supreme Court review), cited with approval in Key v. Doyle, 434 U.S. 59, 62 n.5 (1977); Spivey v. Barry, 665 F.2d 1222, 1227 n.14 (D.C. Cir. 1981) (no federal question jurisdiction under District laws); Thomas v. Barry, 543 F. Supp. 801, 804 (D.D.C. 1982) (same); Keyes v. Madsen, 179 F.2d 40, 43 (D.C. Cir. 1949) (D.C. Code provision not "Act of Congress" within meaning of 28 U.S.C. § 2403 (1976) (requiring certification to U.S. Attorney General of cases in which "the constitutionality of any Act of Congress affecting the public interest is drawn in question")), *cert. denied*, 339 U.S. 928 (1950); Herian v. United States, 363 F. Supp. 287, 290 (D.D.C. 1973) (District law not "Act of Congress" for district court jurisdiction under 28 U.S.C. § 1345 (1976)); 28 U.S.C. § 1364 (Supp. V 1981) (formerly codified at 28 U.S.C. § 1363 (1976)) (D.C. Code provisions not "Acts of Congress" or "laws of the United States" for district court jurisdiction). Cases arising under the laws of the territories are comparable to those arising under District laws. *See* District of Columbia v. John R. Thompson Co., 346 U.S. 100, 105 (1953) (similarity of Congress' constitutional powers over District and territories); Grant v. Cooke, 7 D.C. (2 Mackey) 165, 200-01 (1871) (structure of 1871 government created for the District (similar to today's Home Rule structure) parallels that of territories); Hodgkin, *supra* note 12, at 267 (similarity between District and territorial governments). For analogous reasons, therefore, there is no federal question jurisdiction over local territorial law. Territory of Guam v. Olsen, 431 U.S. 195, 199 n.7, 203 (1977) (Guam law); *see* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 675 (1974) (Puerto Rico statutes are "state statutes" for purposes of Three-Judge Court Act, 28 U.S.C. § 2281 (repealed 1976)). Like the District, the territories have no voting representation in Congress. *See* Leibowitz, *United States Federalism: The States and the Territories*, 28 AM. U.L. REV. 449, 451 (1979). In addition, Congress reserves power to annul territorial legislature legislation, *see* National Bank v. County of Yankton, 101 U.S. 129, 133 (1880); 48 U.S.C. §§ 1405a, 1574(c) (1976) (annulment power over Virgin Islands legislature's acts); *id.* § 1423i (annulment power over Guam legislature's acts); Leibowitz, *supra*, at 452, just as it may annul D.C. Council legislation, *see infra* note 17. In Harris v. Rosario, 446 U.S. 651, 651-52 (1980), the Court upheld a lower level of federal welfare benefits for Puerto Rico than for states, finding a rational basis for the difference in Puerto Ricans' freedom from federal income tax. District residents, however, are taxed by the federal government at the same rate as state residents.

15. Davis v. United States, 397 A.2d 951, 955 (D.C. 1979) (Federal Probation Act not applicable to D.C. Code offenders because they do not commit "offenses against the United States"); Sanker v. United States, 374 A.2d 304, 306-09 (D.C. 1977) (same).

16. McCall v. Swain, 510 F.2d 167, 180 & n.34 (D.C. Cir. 1975) (when U.S. Attorney General acts pursuant to order of local court, he probably acts in nonfederal capacity, just as state officials executing federal court orders are considered "federal officers"); Borders v. Reagan, 518 F. Supp. 250, 258 (D.D.C. 1981) (dictum) (federal employee not an "officer of the United States" when execution of his duties involves no nexus with federal law); *see also* 48 U.S.C. § 1617 (1976) (Virgin Islands U.S. Attorney acts in dual capacity, prosecuting both offenses against United States in name of United States, and offenses against Virgin Islands in name of Virgin Islands' local government).

17. Congress manifested this intent in two separate Acts. In the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970) [hereinafter cited

criminal context, however, promotes jury hostility and creates arbitrary differences in trial outcomes among similarly situated offenders. In civil pendent jurisdiction cases, the trial judge must supervise litigants to prevent abuse. Due to the special characteristics of criminal cases, however, the supervisory powers of the trial judge are severely curtailed. For this reason, pendent jurisdiction is not an appropriate concept to import to the criminal context. The Note concludes that the District's federal courts should be divested of the section 11-502(3) vestige of local jurisdiction.

I. Nonfederal Nature of the D.C. Code

Congress' power of local legislation over the District of Columbia is wholly different from its national legislative powers, and precludes the definition of the D.C. Code as "federal law." In addition, the description of laws of exclusively local application in the District as "federal," and therefore as within the "arising under" jurisdiction of Article III courts, undermines a desirable uniformity in the interpretation of District law. This description also is at odds with Congress' overriding intent in the

as "Court Reform Act"] (codified at D.C. CODE ANN. tit. 11 (1981)), Congress created two separate court systems in the District. *See* M.A.P. v. Ryan, 285 A.2d 310, 313 (D.C. 1971) (in distributing judicial power in the District, Court Reform Act allotted to each system its own sphere, making neither subservient to the other). In the 1973 District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) [hereinafter cited as "Home Rule Act"] (codified at scattered sections of the D.C. Code), Congress created a local state-like entity in the District, delegating its local legislative power to a Mayor, D.C. CODE ANN. §§ 1-241, 1-242 (1981), and to a 13-member Council, *id.* § 1-221. The Council's powers became "as broad as those of Congress." Firemen's Ins. Co. v. Washington, 483 F.2d 1323, 1328 (D.C. Cir. 1973). Included in this delegation was the power to classify certain acts as crimes. District of Columbia v. Sullivan, 436 A.2d 364, 366 (D.C. 1981). Congress did place several restrictions on the Council's legislative authority, *see* D.C. CODE ANN. § 1-233(a) (1981), but in general the Council's legislative powers are limited just as are those of the states, by Article I, § 10 of the U.S. Constitution, D.C. CODE ANN. § 1-204 (1981), *see* Grant v. Cooke, 7 D.C. (2 Mackey) 165, 196-97 (1871) (identical prohibition on acts of 1871 D.C. Legislative Assembly interpreted by Court as limitation "appropriate only to States, or governments similar to them"); *see also* Firemen's Ins. Co. v. Washington, 483 F.2d at 1328 (District "akin to a state").

Despite this broad delegation, Congress retained "ultimate legislative authority," D.C. CODE ANN. § 1-201(a) (1981), and a legislative veto power, D.C. CODE ANN. § 1-233(c) (1981 & Supp. 1982). (The constitutionality of this veto power has been called into question by the Supreme Court's recent opinion in Immigration & Naturalization Serv. v. Chadha, 103 S. Ct. 2764, 2787-88 (1983).). Congress also reserved the power to legislate affirmatively for the District. D.C. CODE ANN. § 1-206 (1981). Any act passed by the Council and approved by the Mayor must be submitted to Congress; a majority of both the House and the Senate may nullify the measure within thirty calendar days. D.C. CODE ANN. § 1-233(c)(1) (1981 & Supp. 1982); *see* D.C. CODE ANN. § 1-233(c)(2) (1981) (majority of either House sufficient to veto measure dealing with criminal law or procedure). In judging D.C. Council actions, the House District Committee determines whether the action violates the Constitution or a clear federal interest, or exceeds power granted the Council in the Home Rule Act. *See* 127 CONG. REC. H6741 (daily ed. Oct. 1, 1981) (statement of Rep. McKinney). For example, the House of Representatives exercised its supervisory power over Council legislation by vetoing a proposed Sexual Assault Reform Act, D.C. Act 4-69, H. R. Res. 208, 97th Cong., 2d Sess., 127 CONG. REC. H6762 (daily ed. Oct. 1, 1981). For the history of cession and of the various District governments, see Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia* (pt. 1), 46 GEO. L.J. 207, 208-210, 214-23 (1957-1958).

1970 Court Reform and 1973 Home Rule Acts[18] to create autonomous federal and local legal frameworks in the District and to fashion a new federal-local court relationship analogous to that existing in the states. Finally, this "federal" definition, and the consequent description of D.C. Code offenses as "crimes against the United States," cannot be reconciled with the actual jurisdiction conferred by Congress upon the District's courts in the Court Reform Act. Accordingly, local criminal offenses should be redefined as "crimes against the District of Columbia."

A. *Hybrid Congressional Power*

Under Article I, section 8, clause 17 of the Constitution, Congress is granted the power of "exclusive legislation in all cases" in the District.[19] The courts have interpreted this power both as wholly national and as "plenary" in character.[20] This interpretation has justified the extension to the District of legislation enacted under Congress' other Article I powers that exceeds Congress' powers as applied to states.[21] The supposed "plenary" nature of this power in addition has given some courts sufficient justification to apply laws codified in the D.C. Code to federal matters in the District,[22] even though legislation of this type and effect could not justifiably be enacted by a state legislature.

At the heart of these cases is a failure to recognize that clause 17 grants

18. *See supra* note 17 (discussing the two Acts).

19. U.S. CONST. art. 1, § 8, cl. 17.

20. Chief Justice Marshall, for example, maintained that the only "safe and clear rule" that may be articulated in determining the status of Congress' clause 17 power relative to its other enumerated Article I powers is that all such powers are equal. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 364, 424, 426 (1821) (all laws passed by Congress under its Article I powers, including clause 17, are "laws of the United States"); *see* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2888 n.8 (1982) (White, J., dissenting) (all Article I powers are equal); O'Donoghue v. United States, 289 U.S. 516, 539-40 (1933) (all Article I powers are for national purposes), *cited with approval in* National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 601 (1949); Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 619 (1838) (Congress has full plenary power); Neild v. District of Columbia, 110 F.2d 246, 250-51 (D.C. Cir. 1940) (Congress acts as legislature of national character when legislating for the District); United States v. Williams, 28 F. Cas. 647, 655-58 (C.C.D.C. 1833) (No. 16,712) (no distinction between federal and municipal powers in the District); O'Donoghue, *The Power of Congress to Tax in Respect to the District of Columbia*, 31 GEO. L.J. 146, 159 (1943) ("Congress is never a state legislature but always and necessarily the national legislature and it is only in this capacity that it can ever act.").

21. *See* Employers' Liability Cases, 207 U.S. 463, 500 (1908) (Congress' plenary power over District justifies its application to District of measures that would violate commerce clause if applied to states); Hyde v. Southern Ry., 31 App. D.C. 466, 472-73 (1908) (same); *see also* Neild v. District of Columbia, 110 F.2d 246, 251 (D.C. Cir. 1940) (commerce clause no limitation on Congress' local legislative powers, only bar to state legislation). Clause 17 also was used to justify interference with federal functions of the District's courts. In Federal Radio Comm'n v. General Elec. Co., 281 U.S. 464, 466, 468 (1930), and in Postum Cereal v. California Fig Nut Co., 272 U.S. 693, 699-700 (1927), the Court noted that Congress had empowered the District's courts to oversee factfinding of federal agencies, despite the fact that this function would violate the separation of powers principle if vested in Article III courts.

22. *See infra* p. 321.

three different types of power to Congress: first, the power to extend laws of nationwide application to the District;[23] second, the power to protect national interests there; and third, the power to enact state-like local laws governing District residents. Clause 17 grants hybrid powers to Congress, and thus is a unique source of congressional authority, distinct from Congress' other section 8 powers of purely national scope.[24] When Congress legislates under its other section 8 powers, it creates "laws of the United States" falling within the Article III "arising under" jurisdiction, which it may choose to enforce in Article III courts. Congress may also create "laws of the United States" under clause 17, and does so when it promulgates rules to protect the functioning of the national government.

A major component of Congress' clause 17 power, however, is the authority to enact local laws for the District. Two factors differentiate between the types of laws that may be enacted under clause 17. First, as to subject matter, the scope of local laws may be much greater than the "laws of the United States." As the Supreme Court has noted, the enactment of the D.C. Code "would exceed [Congress'] powers . . . in the context of national legislation enacted under other powers delegated to it under Art. I, § 8."[25] Second, local laws, unlike federal laws, must be confined in application to a limited geographical area. Congress itself has recognized the intuitive distinction between federal and local laws, by codifying the D.C. Code separately from the U.S. Code. Even as a matter of history, the two types of laws are distinct: The first local laws for the District were the laws of the ceding states, which Congress adopted in toto,[26] only gradually reshaping them over the years to meet the changing

23. Palmore v. United States, 411 U.S. 389, 397 (1973).

24. *See infra* note 29.

25. Palmore v. United States, 411 U.S. 389, 398 (1973); *see supra* notes 12, 13.

26. From 1790 to 1801, the District continued to be governed by the laws of the ceding states. Act of July 16, 1790, ch. 28, § 1, 1 Stat. 130; *see* 13 STATS. AT LARGE OF VIRGINIA ch. 32, at 44 (W. Hening ed. 1823); 2 LAWS OF MARYLAND ch. 45, § 2, at 327 (W. Kilty ed. 1800). In 1801, Congress reenacted those state laws previously applicable to the area ceded, Act of Feb. 27, 1801, ch. 56, § 1, 2 Stat. 103 (codified in REVISED STATUTES OF THE UNITED STATES RELATING TO THE DISTRICT OF COLUMBIA § 92 (1875)), and from 1801 to 1871 the District was "governed for the most part under the laws of Maryland and Virginia as they existed at the time of cession." Byrd, *District of Columbia "Home Rule,"* 16 AM. U.L. REV. 254, 258 (1967). Maryland statutes were freely quoted in all compilations of laws before the first D.C. Code, of 1901, was enacted, and the 1875 edition of D.C. statutes provided that all offenses not therein defined would continue to be "punished as provided by laws in force in the District." REVISED STATUTES OF THE UNITED STATES RELATING TO THE DISTRICT OF COLUMBIA § 1146 (1875). Congress also continued to distinguish between local and federal offenses. *See* Act of June 17, 1870, ch. 62, § 1, 16 Stat. 153 (vesting jurisdiction over both "offences against the United States" as well as "offences against any of the . . . laws of the levy court [local legislative court] of the County of Washington" in a Police Court); *see also* REVISED STATUTES OF THE UNITED STATES RELATING TO THE DISTRICT OF COLUMBIA § 1101 (1875) (distinguishing persons convicted under "laws of the United States" from those convicted under laws "of the District," providing that both types of offenders could be housed in the District's prison). This latter distinction continues today in the differentiation for fiscal purposes between D.C. Code offenders, sentenced in local or federal court, and U.S. Code offenders. The U.S. reimburses the District government for U.S.

needs of the District. In addition, Congress never required that these laws be interpreted by Article III courts. Upon cession, Congress created state-like courts of general jurisdiction[27] to enforce the local laws, investing these courts with the same civil and criminal common law powers enjoyed by the state courts prior to cession.[28] All of these factors point to one

offenders housed in the District's Lorton, Virginia, prison, D.C. CODE ANN. § 24-446 (1981), while the District government reimburses the U.S. for costs of housing D.C. Code offenders in federal institutions, D.C. CODE ANN. § 24-424 (1981).

27. The original courts of general jurisdiction for the District, the circuit court for the District of Columbia, created by the Act of Feb. 27, 1801, ch. 15, § 3, 2 Stat. 103, 105, and its successor, the supreme court, see Act of Mar. 3, 1863, ch. 91, § 1, 12 Stat. 762, 762-63, initially were not defined as established under Article III, United States v. Burroughs, 289 U.S. 159, 163 (1933). Since the major function of these courts was to exercise general, state court-like jurisdiction, it was believed that they could not be so established, even though they sat as "courts of the United States" exercising federal jurisdiction in special terms, and their judges were tenured. *See* Act of Apr. 29, 1802, ch. 31, § 24, 2 Stat. 156, 166 (circuit court to exercise power of U.S. district court in special term); Act of Mar. 3, 1863, ch. 91, § 3, 12 Stat. 762, 763 (same, for supreme court). By virtue of their special terms, however, these courts were permitted to exercise the same powers as Article III "courts of the United States." Claiborne-Annapolis Ferry Co. v. United States, 285 U.S. 382, 391 (1932) (District's court may set aside federal agency (ICC) orders sitting as court of the United States); Federal Trade Comm'n v. Klesner, 274 U.S. 145, 154, 156, 158 (1927) (because of complete parallelism between jurisdiction of the District's courts and of Article III courts, the District's court may set aside federal agency (FTC) order). These extended powers may have influenced the Supreme Court's decision in O'Donoghue v. United States, 289 U.S. 516, 538-40, 546 (1933), that Congress could not continue to deny District residents an Article III forum, and, accordingly, its courts must be considered Article III courts. *See* Act of June 7, 1934, ch. 426, 48 Stat. 926 (D.C. Court of Appeals changed to United States Court of Appeals for the District of Columbia); Act of June 25, 1936, ch. 804, 49 Stat. 1921 (D.C. Supreme Court became United States District Court for the District of Columbia); Act of Dec. 29, 1942, ch. 835, § 1(d), 56 Stat. 1094 (District's courts became a federal judicial circuit). The District's new Article III courts continued to hear nonfederal question matters arising under District law, and to exercise administrative and advisory functions—forbidden to other Article III courts for separation of powers reasons—previously vested in the District's courts by virtue of their non-Article III status. The *O'Donoghue* opinion therefore created an anomaly: For the first time, Article III courts would exercise non-Article III functions. The conceptual difficulty of justifying Article III court exercise of these other types of jurisdiction has contributed to the confusion found in a series of extremely divided Supreme Court decisions: the 3-2-2-2 opinions in National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), the 3-2-2 opinions in Glidden Co. v. Zdanok, 370 U.S. 530 (1962), and the 4-2-3 opinions in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982). Attempting to solve the problem, the Court has created an unclear division between "Article I" (or "legislative") and "Article III" courts. *See infra* note 82. In the Court Reform Act, Congress resolved the issue in the District by creating federal courts identical in jurisdiction to all other Article III courts, *see supra* note 5, and by restoring the local courts of the District to a position similar to the one they occupied prior to cession, as quasi-state courts of general jurisdiction, without any attributes of Article III courts. D.C. CODE ANN. § 11-921(a) (1981) (civil jurisdiction); *id.* § 11-923(b)(1) (criminal jurisdiction). *See* Palmore v. United States, 411 U.S. 389, 392 n.2 (1973) (Congress "invested the local courts with jurisdiction equivalent to that exercised by state courts"); H.R. REP. NO. 907, 91st Cong., 2d Sess. 35 (1970) (same). Local judges do not have tenure guarantees, D.C. CODE ANN. §§ 11-1523, 11-1526 (1981), and therefore local courts are not "courts of the United States" as defined in 28 U.S.C. § 451 (1976) (courts of United States are those whose judges are entitled to hold office during good behavior).

28. The local District courts possess the common law powers of the ceding states' courts. Kendall v. United States, 37 U.S. (12 Pet.) 524, 614, 620-21 (1838); Pang-Tsu Mow v. Republic of China, 201 F.2d 195, 198 (D.C. Cir. 1952), *cert. denied*, 345 U.S. 925 (1953). The present D.C. Code continues in force Maryland common law, D.C. CODE ANN. § 49-301 (1981), not only that law as it was construed in Maryland at the time of cession, but also the evolving common law, Linkins v. Protestant Episcopal Cathedral Found., 187 F.2d 357, 360-61 (D.C. Cir. 1950). In interpreting this common law, the District's courts use Maryland decisions. Watkins v. Rives, 125 F.2d 33, 35 (D.C.

conclusion: "laws of the United States" and the laws of the District of Columbia should not be equated,[29] and accordingly, the Article III judicial power does not normally encompass District local law.

The limitations upon Congress' exercise of local powers never have been delineated with precision. As a matter of symmetry, however, since Congress may enact local laws for the District that exceed its normal powers under other parts of section 8,[30] there is no structural reason why the limitations upon Congress' exercise of its local legislative function should be identical to those governing its exercise of national powers. In fact, District residents are best protected by requiring instead that Congress be bound in the exercise of its local legislative capacity by constitutional restrictions similar to those that govern a state's dealings with its citizens.[31]

Cir. 1941); Gerace v. Liberty Mut. Ins. Co., 264 F. Supp. 95, 97 (D.D.C. 1966). The District's courts may try offenders for common law crimes. United States v. Davis, 71 F. Supp. 749, 750 (D.D.C. 1947), *rev'd on other grounds*, 167 F.2d 228 (D.C. Cir.), *cert. denied*, 334 U.S. 849 (1948). By contrast, there are no common law offenses against the United States, only offenses defined by statute. United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812).

29. Several cases have recognized this distinction. In American Sec. & Trust Co. v. Rudolph, 38 App. D.C. 32, 45 (1912), the court described Congress' federal and local powers under clause 17 as "two distinct classes of legislative powers." Under one, Congress enacts "laws that govern throughout the United States." Under the second, Congress possesses "special legislative powers to the full extent possessed by" the ceding states. These powers, exercised in the D.C. Code, "are local in their nature and purpose, and expressly limited to the boundaries of the District. They are not laws of the United States . . . ." *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2874 (1982) ("powers granted under that clause are obviously different in kind from the other broad powers conferred on Congress").

30. *See supra* p. 298.

31. In Hamilton Nat'l Bank v. District of Columbia, 176 F.2d 624 (D.C. Cir.), *cert. denied*, 338 U.S. 891 (1949), the court concluded:

> [T]he due process of the Fifth Amendment should include or imply for the inhabitants of the District of Columbia equal protection of the laws enacted by Congress as the local legislature of the District. It is unthinkable that Congress, enacting statutes applicable only in this jurisdiction, does not violate the due process clause of the Fifth Amendment if it denies the people of this District equal protection of the laws, just as a state legislature violates the "equal protection" clause of the Fourteenth Amendment if it does the same thing.

Id. at 630. Instead of adopting this restricted definition of Fifth Amendment "equal protection," the Supreme Court in Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding invalid statute authorizing racial segregation in District schools), stated that the due process clause of the Fifth Amendment embodies equal protection principles applicable to *all* Congressionally enacted law. The result reached in *Bolling* did not require such a sweeping pronouncement, for the statute in question, like the statute at issue in *Hamilton National Bank*, applied only to District of Columbia residents.

A similar unwarranted expansion of congressional authority took place in the field of eminent domain. In its first opinion delineating the bounds of Congress' power to appropriate private property, the Supreme Court limited the permissible objectives of such appropriation to those that fall within the delegated enumerated powers of the federal government. Kohl v. United States, 91 U.S. 367, 372 (1876). A few years later, the Court held that in the District, Congress is not so limited in its takings power, but may appropriate property for any public use justifiable under traditional state police power. Shoemaker v. United States, 147 U.S. 282, 298 (1893) (upholding condemnation of private property in District for use as public park); *see* Berman v. Parker, 348 U.S. 26 (1954). This broad approach to Congress' eminent domain power is now applied not only in the District, where it is supported by Congress' state-like authority, but also in the states, where it has no such support. The Supreme Court now will not place any limitation upon the types of "public uses" for which Congress

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The national powers of Congress contained in clause 17 also are subject to constitutional restraints. When Congress extends national legislation to the District, its actions are limited by the constitutional rights of District residents, which predate congressional sovereignty over the area. These rights were extended while the District still was a part of two states of the Union, and were not abrogated by its cession to the United States.[32] The rights of District residents would be secured by requiring Congress to be bound, when extending national law to the District, by the standard of uniformity that governs its relationship with the states.[33] Congress, and

may appropriate property. *See* United States *ex rel.* Tennessee Valley Auth. v. Welch, 327 U.S. 546, 551 (1946) ("it is the function of Congress to decide what type of taking is for a public use," not the function of the Court). As in the case of equal protection, had the Court recognized the distinction between Congress' broad police power in the District, and its restricted enumerated powers elsewhere in the Union, the expansion of Congress' power of eminent domain may well never have occurred.

These results have been made possible by the combined application of two incompatible principles: first, that Congress may exercise the police power of a state in legislating for the District, *see supra* note 12, and thus has much broader powers there than in any other part of United States, *see* Gibbons v. District of Columbia, 116 U.S. 404, 408 (1886) (in legislating for the District, "Congress, like any state legislature [is] unrestricted by constitutional provisions"), and second, that all laws enacted for the District must be considered "laws of the United States," *see supra* notes 6, 7. The second principle bootstraps upon the first, and the outcome is the unwarranted expansion of congressional power in the fifty states.

32. In Downes v. Bidwell, 182 U.S. 244, 260-61 (1901), the Court stated that when the District was part of the ceding states, the Constitution "attached to it irrevocably." Cession did not take the District "out of the United States or from under the aegis of the Constitution" since neither party to the cession contract "had ever consented to that construction of the cession." Since a pre-cession unconstitutional act affecting its inhabitants would have been void, "Congress could not do indirectly by carving out the District what it could not do directly." *See* O'Donoghue v. United States, 289 U.S. 516, 540 (1933) (District "not taken out of the Union by cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution, among which was the right to have their cases arising under the Constitution heard and determined by federal courts created under . . . Art. III."); *see also* National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 620-21 n.14 (1949) (Rutledge, J., concurring) (list of applicable constitutional guarantees); Hodgkin, *supra* note 12, at 262 (civil rights guarantees of the Constitution apply to the District, including guarantee of republican government).

33. Chief Justice Marshall may have approved of the view that in extending national law to the District, Congress should be bound by constitutional restrictions that govern its dealings with states. In Hepburn & Dundas v. Ellzey, 6 U.S. (2 Cranch) 445, 453 (1805) (District not a state within original meaning of Constitution; therefore Article III diversity jurisdiction between citizens of different states may not be extended to District residents until Congress so legislates), he implied that clause 17 conveyed to Congress a power to redefine the word "state" as used in Article III to include the District. Justice Marshall thus seemed to sanction a limited use of Article I powers to expand, only for definitional purposes, the judicial power conveyed by Article III. (Congress did legislate as Justice Marshall suggested, *see* 28 U.S.C. § 1332(d), upheld as constitutional in National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 382 (1949)). In Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 325 (1820), Justice Marshall again suggested that Congress could use its power of redefinition to expand the meaning of "state" used in Article I, § 2, cl. 3, requiring Congress to apportion direct taxes among the states. In *Loughborough*, Justice Marshall stated his assumption that "the principle of uniformity, established in the constitution, secures the district from oppression." *Id.*

Congress always has considered itself empowered to extend constitutional guarantees referring to "states" to the District and to territories, exercising the power of redefinition recognized by Justice Marshall in *Hepburn* and *Loughborough*. For example, the interstate rendition clause, art. IV, § 2, cl. 2, refers to "states," but Congress extended its requirements to territories, Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302. The full faith and credit clause, art. IV, § 1, also refers only to "states," but Congress extended it to courts of territories, Act of Mar. 27, 1804, ch. 56, § 2, 2 Stat. 298, 299. The

the courts, should not be permitted to circumvent this standard simply by invoking the clause 17 "plenary" power.

Although the boundaries between the various powers conveyed by clause 17 may at times be blurred, the possibility of some ambiguity does not justify a refusal to acknowledge differences in congressional capacity when enacting federal and local law. The federal and local legal frameworks in the District plainly are separate and autonomous, and, accordingly, the description of Congress' power over the District as purely "federal" and of the D.C. Code as "laws of the United States" cannot be justified.

B. *Goal of Uniformity*

Local crimes in the District may be defined by three sources of authority: by Congress, by the locally elected District Council,[34] and by the District's local courts, exercising their criminal common law powers inherited from the courts of Maryland.[35] Local laws, no matter what their source, should be uniformly construed and applied. If the laws emanating only from the first source, Congress, are considered "federal" and therefore within Article III court "arising under" jurisdiction, arbitrary distinctions in the interpretation of District local law would result.

The needed consistency is possible only if local congressional enactments are treated as local law. It is implausible to interpret District law instead as a uniform body of *federal* law. The local Court of Appeals has stated that it is "quite unlikely" that the mere act of cession of the District from Maryland transformed Maryland local offenses into general federal offenses.[36] Further, enactments of Congress and of the Council cannot be

Supreme Court held that the full faith and credit clause imposes the same obligations upon the District's courts as it does upon state courts, Loughran v. Loughran, 292 U.S. 216, 227-28 (1934). Congress extended the full Constitution to the District in 1871, Act of Feb. 21, 1871, ch. 62, § 34, 16 Stat. 419, 426, but did not specify whether it intended just to extend rights of national citizenship to District residents, or to redefine its relationship with the District along the lines of the national-state relationship embodied in the Constitution. In that same Act, Congress also created a state-like territorial government for the District, with an elected Governor (exercising the powers of today's Mayor), and a Legislative Assembly (similar to today's D.C. Council), *id.* § 2, 16 Stat. 419 (Governor), *id.* § 5, 16 Stat. 420 (Assembly). This structure lends support to the interpretation that Congress intended to treat the local entity as a state. It is difficult to interpret the Act as merely granting rights of national citizenship, since District residents unquestionably enjoyed those rights prior to 1871. Congress has reinforced this interpretation by defining the District as a state in almost 200 provisions of the U.S. Code. *See* U.S.C. Index (District of Columbia) (1976 & Supp. V 1981).

34. *See supra* note 17 (discussing Council authority).

35. *See supra* note 28.

36. Palmore v. United States, 290 A.2d 573, 579 (D.C. 1972), *aff'd*, 411 U.S. 389 (1973). *See* Puerto Rico v. Russell & Co., 288 U.S. 476, 483 (1933) (act of Puerto Rico legislature presents no federal question, even though authority to maintain suit derives from an Act of Congress); Fraenkl v. Cerecedo Hermanos, 216 U.S. 295, 304 (1910) (order of Puerto Rico military governor not "law of the United States" and therefore not "arising under a law of the United States").

equated by characterizing the latter as a federal instrumentality, fashioning federal rules for the District. Unlike federal agencies, the Council is popularly elected,[37] and may amend its own "enabling statute," the District Charter.[38] The Council's power extends to all proper subjects of legislation, much like a state legislature, and its powers are limited just as are those of the states, by Article I, section 10 of the United States Constitution.[39]

Finally, the nondelegation doctrine no longer poses a roadblock to uniformity. At one time, courts refused to permit Congress to delegate its power to define local offenses to a local legislature, holding that Congress could not delegate "general" lawmaking power.[40] The nondelegation rule in turn was used to uphold the characterization of local offenses as crimes against the United States.[41] The Supreme Court later disapproved this line of cases and ruled that Congress could delegate its power to define local offenses to a local legislative authority.[42] In so doing, the Court distinguished between Congress' local and national powers, holding that only the former may be delegated and that delegated local power may be as broad as the police power of the states.[43] In the Home Rule Act, Congress did in fact delegate to the current District local government the power to define local offenses,[44] and there is little doubt that this delegation is constitutional.[45] The nondelegation justification for continuing to categorize local offenses as "crimes against the United States" therefore has been removed.

37. *See supra* note 17.

38. Amendments to the District Charter must be approved by Congress. D.C. CODE ANN. § 1-205(b) (1981).

39. *See supra* note 17.

40. Fletcher v. United States, 42 App. D.C. 53, 63 (1914); United States v. Cella, 37 App. D.C. 433, 435 (1911), *cert. denied*, 223 U.S. 728 (1912). In *Cella*, the court rejected plaintiff's argument that prosecutions under the D.C. Code should be brought in the name of the District of Columbia rather than the United States, basing its holding on the nondelegation doctrine. Since Congress may not delegate the authority to enact local criminal statutes, reasoned the court, the United States must continue to prosecute crimes under those statutes. Now that the nondelegation limitation has been overruled, *see infra* note 42, there is no longer any sound rationale for barring the prosecution of local offenses by the real party in interest in local District prosecutions, the District of Columbia.

41. *See, e.g.*, Metropolitan R.R. v. District of Columbia, 132 U.S. 1, 9 (1889) (crimes committed in the District are crimes against United States because Congress, not District government, is sovereign there); Franchino, *supra* note 17, at 231-39 (discussing line of cases); Hodgkin, *supra* note 12, at 265-67 (same).

42. District of Columbia v. John R. Thompson Co., 346 U.S. 100, 108-10 (1953); *see* Firemen's Ins. Co. v. Washington, 483 F.2d 1323, 1328 (D.C. Cir. 1973) ("When Congress delegates its police power to the local government, that entity's powers become as broad as those of Congress . . . .").

43. District of Columbia v. John R. Thompson Co., 346 U.S. 100, 105-09 (1953).

44. *See supra* note 17 (discussing Home Rule Act).

45. Borders v. Reagan, 518 F. Supp. 250, 266 n.23 (D.D.C. 1981).

C. *Congressional Intent and the Court Reform Act*

Congress implicitly ratified the view of the D.C. Code as a body of nonfederal, state-like law in its restructuring of the court system in the District. It did not make all areas of federal and District law consistent with this approach, however: A few provisions that bear upon the federal-state relationship have not been extended to govern the federal-District one, although they are equally applicable to it.

1. *Analogy to States*

Congress separated federal and local jurisdiction in the District by analogy to the federal-state court system model. It created two types of courts for the District: first, Article III courts equivalent in jurisdiction to federal courts in the fifty states to determine federal matters,[46] with no federal question jurisdiction over Acts of Congress applicable exclusively to the District of Columbia,[47] and second, local courts equivalent to state courts of general jurisdiction.[48] Congress structured the relationship between the federal and local courts to parallel that existing in the fifty states.[49] The federal courts have long considered District residents to be state citizens for purposes of federal court diversity jurisdiction;[50] now the District is defined as a state for federal civil rights jurisdiction[51] and for removal jurisdiction;[52] and District officials can act "under color of state law."[53] D.C. Code statutes are considered "statutes of the District of Columbia" for purposes of federal civil rights statutes;[54] the local Court of Appeals is defined as the "highest court of a state" for purposes of Supreme Court review;[55] and the local courts are considered state courts for purposes of removal jurisdiction.[56]

46. *See supra* note 5.

47. 28 U.S.C. § 1364 (Supp. V 1981) (formerly codified at 28 U.S.C. § 1353 (1976)).

48. *See supra* note 27

49. H.R. REP. NO. 907, 91st Cong., 2d Sess. 35 (1970) (jurisdiction of local courts of the District will be "comparable with State courts . . . result[ing] in a Federal-State court system . . . analogous to court systems in the several States"); 116 CONG. REC. 8098 (1970) (statement of Rep. Harsha) (District court system "on a par with systems in the 50 States"); *see* United States v. Thompson, 452 F.2d 1333, 1342 (D.C. Cir. 1971) ("overriding purpose" of Court Reform Act "to put the District's judicial system on a par with those of the states"), *cert. denied*, 405 U.S. 998 (1972).

50. 28 U.S.C. § 1332(d) (1976).

51. 28 U.S.C. § 1343(b)(1) (Supp. V 1981).

52. 28 U.S.C. § 1451(2) (1976).

53. 42 U.S.C. § 1983 (Supp. V 1981); *see* Hurd v. Hodge, 334 U.S. 24, 31 (1948) (District included within "State or Territory" of 42 U.S.C. § 1982).

54. 28 U.S.C. § 1343(b)(2) (Supp. V 1981).

55. 28 U.S.C. § 1257 (1976); *see* D.C. CODE ANN. § 11-102 (1981); SUP. CT. R. 54.

56. 28 U.S.C. § 1451(1) (1976); *see* District of Columbia *ex rel.* John Driggs Co. v. Ranger Constr. Co., 394 F. Supp. 801, 802 (D.D.C. 1974) (Congress intended that District defendants "have a right to removal concomitant with defendants sued in state courts"); *see also* Johnson v. Robinson, 509 F.2d 395, 398-99 (D.C. Cir. 1974) (local courts treated as state courts for purposes of exhaustion

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The federal and local courts in the District have implemented Congress' expressed intent by fashioning their relationship according to principles of federalism and comity. The local courts have held themselves not bound by decisions of the D.C. Circuit, notwithstanding a federal constitutional basis for those decisions.[57] The D.C. Circuit has interpreted the Court Reform Act to give local courts in the District "full responsibility for the development of the District's own law,"[58] and has held that the federal courts must accord the "greatest deference" to local court decisions.[59] The federal courts have adapted the major guidelines that shape their approach to state law and state courts—the *Younger*,[60] *Pullman*,[61] and *Erie*[62] doctrines—to their dealings with District of Columbia local law matters.

2. *Remaining Inconsistencies*

Many provisions in the U.S. Code bear on the federal-state relationship, however, and Congress failed to amend some of these to conform to its general scheme for the District of Columbia. Noting Congress' express

of state remedies prior to invocation of federal habeas corpus jurisdiction).

57. M.A.P. v. Ryan, 285 A.2d 310, 312-13 (D.C. 1971); see Bethea v. United States, 365 A.2d 64, 71 (D.C. 1976), cert. *denied*, 433 U.S. 911 (1977).

58. Steorts v. American Airlines, Inc., 647 F.2d 194, 196 (D.C. Cir. 1981).

59. McCall v. Swain, 510 F.2d 167, 173 (D.C. Cir. 1975).

60. Younger v. Harris, 401 U.S. 37 (1971) (federal court must dismiss injunction action challenging state law under which plaintiff concurrently prosecuted in state court); see Rieser v. District of Columbia, 580 F.2d 647, 657 (D.C. Cir. 1978) (*Younger* doctrine limit on federal jurisdiction designed to protect very type of court system created in the District with pervasive local responsibilities). *But see* Halleck v. Berliner, 427 F. Supp. 1225, 1239 (D.D.C. 1977) (since *Younger* doctrine based on principles of federalism, it does not "apply with the same force" in the District).

61. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941) (abstention doctrine); see Thomas v. Barry, 543 F. Supp. 801, 804 (D.D.C. 1982) (federal court should abstain from deciding matters of District law and public policy); Association of Court Reporters v. Superior Court, 424 F. Supp. 90, 96 (D.D.C. 1976) (same); *see also* Sullivan v. Murphy, 478 F.2d 938, 962 n.35 (D.C. Cir.) (if Congress intended to pattern federal-local court relationship on federal-state one, then doctrine does apply), cert. *denied*, 414 U.S. 880 (1973). *But see* Halleck v. Berliner, 427 F. Supp. 1225, 1239 (D.D.C. 1977) (since *Pullman* based on federalism principles, it does not apply with equal force in the District as in states).

62. Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (federal courts in diversity cases follow state common law). The District is accorded full equality with states for diversity jurisdiction purposes, see 28 U.S.C. § 1332(d) (1976), but 28 U.S.C. § 1652 (1976), requiring federal courts in diversity to use state law as rule of decision, does not define the District as a state. Even so, the policy bases for *Erie* are equally applicable to the District, Anchorage-Hynning & Co. v. Moringiello, 697 F.2d 356, 360-61 (D.C. Cir. 1983) (per curiam), and therefore federal court deference and comity principles should substitute for *Erie*. Lee v. Flintkote Co., 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979). For this reason the District's federal courts in diversity cases look to the local courts to provide choice of law principles and substantive rules of decision. Semler v. Psychiatric Inst., 575 F.2d 922, 926-31 (D.C. Cir. 1978); see *also* Fireman's Fund Ins. Co. v. Videfreeze Corp., 540 F.2d 1171, 1174-75 (3d Cir. 1976) (construing Rules of Decision Act to apply to all *nonfederal* matters; applies Virgin Islands burden of proof rule in diversity case), cert. *denied*, 429 U.S. 1053 (1977); Turnbull v. Bonkowski, 419 F.2d 104, 106 (9th Cir. 1969) (federal court must respect pre-state Alaska court's interpretation of Alaska law). *See generally* Note, *An Erie Doctrine for the District of Columbia*, 62 GEO. L.J. 963, 980, 983-92 (1974) (urging adoption of *Erie* doctrine by federal courts in District).

proviso that, for purposes of federal district court jurisdiction, D.C. Code laws are not "laws of the United States," the Supreme Court in *Key v. Doyle*[63] commented that this "hardly implies that Congress must have intended that references to 'laws of the United States' found in all other jurisdictional chapters and sections . . . *would* include provisions of the D.C. Code."[64] Yet in many instances the Supreme Court and the lower federal courts apply a presumption contrary to Congress' clear intent. Unless Congress specifically states to the contrary, these courts refuse to equate the District with states, and construe the D.C. Code not as state, but as federal, law.

In *District of Columbia v. Carter*,[65] for example, the Supreme Court held that Congress did not intend the District to be considered a "State or Territory" for purposes of 42 U.S.C. § 1983, which provides a federal forum for deprivations of constitutional rights under color of state (or territorial) law. Congress soon disavowed the Supreme Court's construction, amending the section to equate explicitly the District with the states and territories.[66]

In other cases, Supreme Court literalism has remained uncorrected. In *Palmore v. United States*,[67] the Court held that D.C. Code statutes are not equivalent to state statutes for purposes of appeal as of right to the Supreme Court.[68] In *Key v. Doyle*,[69] however, the Court held that D.C. Code statutes also are not "statutes of the United States" for purposes of Supreme Court appeal.[70] The result, as the *Key* dissent noted, is that

63. 434 U.S. 59 (1977).

64. *Id.* at 67 n.12; see Note, *supra* note 62, at 981 (imputing any significance to Congress' failure to amend U.S. Code provision to conform to new scheme "is excessively literal, considering . . . the task Congress would have faced had it decided to amend every applicable section of the judicial code in order to bring the District of Columbia courts into exact conformity with the state systems").

65. 409 U.S. 418, 432 (1973), *see id.* at 430 ("assumption that the Federal Government could keep its own officers under control" is equally applicable to District officers).

66. 42 U.S.C. § 1983 (Supp. V 1981); *see* H.R. REP. NO. 548, 96th Cong., 1st Sess. 1-3 (1979), *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 2609, 2609-11 (after amendment, federal courts have jurisdiction over § 1983 actions against District officials acting under authority of local laws, even if those laws were passed by Congress). *Carter* is an anomaly, since Congress has "established an independent court system with exclusive jurisdiction over local matters." *Id.* at 2, 1979 U.S. CODE CONG. & AD. NEWS at 2610. The District has the same "government structures that operate in every other locale," *id.*, and the amendment therefore "is necessary in order to give citizens of the District of Columbia rights equal to those of citizens in the states and territories of the United States." *Id.* at 1, 1979 U.S. CODE CONG. & AD. NEWS at 2609.

67. 411 U.S. 389 (1973).

68. *Id.* at 395 ("We are entitled to assume that in amending § 1257, Congress legislated with care, and that had Congress intended to equate the District Code and state statutes for the purposes of § 1257, it would have said so expressly . . . .").

69. 434 U.S. 59 (1977).

70. The Court reasoned that mandatory appellate jurisdiction over state court judgments is reserved for cases threatening the supremacy and uniformity of federal law; no such threat exists when state courts invalidate state statutes on federal grounds, and no automatic right of appeal is provided to the Supreme Court. "From the analogy of the local D.C. courts to state courts drawn by Congress in the 1970 Act, it follows that no right of appeal should lie to this Court when a local court of the

D.C. Code enactments are treated as "mongrel statutes," reviewable only by writ of certiorari.[71] The *Key* decision invited Congress to legislate the necessary clarification, but Congress has not yet done so.

In addition, Congress has not extended the prohibition upon the issuance of federal injunctions staying state court proceedings[72] to local District proceedings,[73] nor has it eliminated the United States Attorney General's constructive custody over defendants sentenced by the local courts.[74]

District invalidates a law of exclusively local application." *Id.* at 68. The Court explained that underlying its decision in *Palmore* was "the long-established principle that counsels a narrow construction of jurisdictional provisions authorizing appeals as of right to this Court." *Id.* at 65. Although the *Key* majority did not expressly overrule *Palmore*, it did so indirectly by finding that pre-1970 methods of Supreme Court review of local law should remain applicable. *Id.* at 64, 66. Separate provision for Supreme Court appeal from the local court system was last provided in the Act of Mar. 3, 1911, ch. 231, § 250, 36 Stat. 1087, 1159. Section 250(6), similar to 28 U.S.C. § 1257(1) (1976) (construed by the Court in *Key*), provided for appeals in "cases in which the construction of any law of the United States is drawn in question by the defendant." Just as in *Key*, the Court in American Sec. & Trust Co. v. Commissioners of the Dist. of Columbia, 224 U.S. 491, 494-95 (1912), concluded that the phrase "law of the United States" in this section did not include congressional acts applicable solely to the District. Appeals could also be taken under § 250(3) of the 1911 Act, similar to § 1257(2) (construed by the Court in *Palmore*) which provided for appeals in cases involving the "constitutionality of any law of the United States." Although the same words, "law of the United States," were used in both sections of the Act, the Court concluded in Heald v. District of Columbia, 254 U.S. 20, 22-23 (1920), that appeals involving the constitutionality of local statutes should be permitted under § 250(3). *Heald* found that § 250(3) simply reenacted statutes that had been interpreted to permit Supreme Court review in cases "concerning the constitutional power of Congress to enact local statutes" and that the prior construction to permit appeals in these cases should continue, 254 U.S. at 22-23, even though this forced the Court to interpret identical words in the same jurisdictional statute in different ways. The result in *Palmore* cuts off one of these routes to Supreme Court review under the 1911 Act.

71. 434 U.S. at 74 (White, J., dissenting). The *Key* dissent noted that *Key* and *Palmore* together may remove any basis even for certiorari review of local court constructions of local statutes. *Id.* at 74-75 & n.6. Congress should resolve this problem by providing that for purposes of § 1257, D.C. Code provisions are state statutes. *Cf.* 28 U.S.C. § 1258(2) (1976) (providing for Supreme Court appeal when a Puerto Rico statute is upheld against a challenge under the Constitution, just as state statutes may be appealed under 28 U.S.C. § 1257(2) (1976)).

72. 28 U.S.C. § 2283 (1976).

73. *See* Shapiro v. Thompson, 394 U.S. 618, 625 n.4 (1969); Police Officers' Guild v. Washington, 369 F. Supp. 543, 549 (D.D.C. 1973).

74. D.C. CODE ANN. § 24-425 (1981). When the U.S. Attorney General takes custody of persons and designates their place of confinement pursuant to a Superior Court order he should be considered as acting in a nonfederal capacity. McCall v. Swain, 510 F.2d 167, 180 n.34 (D.C. Cir. 1975); *see* Borders v. Reagan, 518 F. Supp. 250, 258 (D.D.C. 1981) (dictum) (federal employee not an "officer of the United States" when execution of his duties does not involve interpreting and enforcing federal law). The U.S. Code does not give the Attorney General jurisdiction over local prisoners in his custody: 18 U.S.C. § 4082(a) (1976) gives him custody only of "person[s] convicted of an offense against the United States," a category that should not include D.C. Code offenders. *See* Milhouse v. Levi, 548 F.2d 357, 362 n.13 (D.C. Cir. 1976). The D.C. Department of Corrections has actual custody of local inmates and under D.C. CODE ANN. § 24-442 (1981 & Supp. 1982) must provide "proper treatment, care, rehabilitation and reformation" for those inmates when they are incarcerated in the District's prison facilities.

The D.C. Circuit has interpreted these provisions inconsistently. In Cannon v. United States, 645 F.2d 1128 (D.C. Cir. 1981), the court held that since the District's Mayor and Council have charge of Lorton prison, *id.* at 1136-37, the legal fiction of "custody of the Attorney General" does not suffice as a basis for a Lorton inmate suit against prison officials under the Federal Tort Claims Act, *id.* at 1141-42. In Milhouse v. Levi, 548 F.2d 357, 363 (D.C. Cir. 1976), however, the court held that Congress' failure to amend the provision under which the Attorney General nominally regulates Lor-

Congress also has failed to exclude the local courts from the category of "courts established by Act of Congress" that may issue writs under the All Writs Act,[75] and despite the existence of a separate writ statute in the D.C. Code,[76] the D.C. Circuit has ruled that the local courts may issue writs under either the U.S. or the D.C. Code provision.[77]

The most problematic anomaly still remaining is the continued prosecution of defendants in the local courts by the United States Attorney for the District of Columbia. Attempts to create a local prosecutor's office have failed.[78] Because local cases are prosecuted by the United States Attorney, they continue to be brought in the name of the United States. This proce-

tion furlough programs was significant evidence that Congress intended federal control to continue. *See* Dobbs v. Neverson, 393 A.2d 147, 149 & n.6 (D.C. 1978) (Attorney General custody justifies application of federal, rather than District, good time rule to offenders sentenced by local court and transferred from Lorton to mental hospital); Rivers v. United States, 334 A.2d 179, 182 (D.C. 1975) (because of Attorney General's custody, Lorton inmates may be tried in federal court under federal escape statute); *see also* United States v. Perez, 488 F.2d 1057, 1059 (4th Cir. 1974) (federal court jurisdiction upheld over prisoner assault on guard at Lorton).

Lorton should explicitly be recognized as a local facility. Though established by an Act of Congress, Act of Mar. 3, 1909, ch. 250, 35 Stat. 688, 717, Lorton is "an integral part of the District of Columbia correctional system." McCall v. Swain, 510 F.2d 167, 170 (D.C. Cir. 1975). The D.C government exercises actual powers of government over the area. D.C. CODE ANN. § 24-442 (1981 & Supp. 1982); *see* Board of Supervisors v. United States, 408 F. Supp. 556, 564 n.10 (E.D. Va. 1976) (U.S. is merely legal titleholder of Lorton land; actual powers of government over area are exercised by the District, and Lorton is governed by District law), *dismissed mem. sub nom.* Board of Supervisors v. District of Columbia, 551 F.2d 305 (4th Cir. 1977); *see also* 119 CONG. REC. 22,955 (1973) (statement of Sen. Eagleton) (District government should maintain own penal institutions as exercise of self-government); *see also* D.C. CODE ANN. § 24-422 (1981) (District must bear cost of maintaining D.C. Jail facility); *id.* § 24-423 (District must reimburse U.S. for federal funds expended on maintenance of District inmates).

75. 28 U.S.C. § 1651 (1976).

76. D.C. CODE ANN. § 16-1901 (1981).

77. United States v. Cogdell, 585 F.2d 1130, 1133-34 (D.C. Cir. 1978) (superior court may issue writ under 28 U.S.C. § 1651, and when it does so, writ is "issued under the laws of the United States"), *rev'd on other grounds sub nom.* United States v. Bailey, 444 U.S. 394 (1980). Other anomalies are found in the D.C. Rules of Criminal Procedure: *e.g.*, rule 5-I (if arrest outside the District pursuant to superior court warrant, defendant may be removed to the District under the Federal Rules of Criminal Procedure rather than through extradition proceeding); rule 6 (grand jury summoned by superior court may return indictments in superior or district court); rule 9 (superior court warrant for D.C. Code offense may be delivered either to U.S. Marshal or to D.C. Chief of Police), *see* United States v. Boettcher, 588 F.2d 89, 90 (4th Cir. 1978) (because delivered to U.S. Marshal, superior court arrest warrant for D.C. Code offense was issued under "law of the United States"); rule 20 (D.C. Code violators outside the District may waive local trial and consent to disposition in U.S. district court where located), *see* United States v. Ford, 627 F.2d 807, 812 n.5 (7th Cir.) (upholding application of rule 20 to D.C. Code violators who plead guilty in federal district court outside the District), *cert. denied*, 449 U.S. 923 (1980); rule 40 (superior court may release or detain U.S. Code offenders in certain circumstances), *see* D.C. CODE ANN. § 11-923(c)(2) (1981).

78. The District's delegate to Congress introduced a bill in the House in 1981 to establish a local Attorney General's office, and to transfer prosecutorial authority for local offenses and custodial responsibility for local prisoners to the D.C. government, H.R. 1253, 97th Cong., 1st Sess. (1981), but the bill failed to reach the House floor. A local prosecutor would be consistent with the scheme adopted in other jurisdictions. *See* 48 U.S.C. § 1694(e) (Supp. V 1981) (providing for both U.S. Attorney and local Attorney General for Northern Mariana Islands); 48 U.S.C. § 778 (repealed 1950) (providing local Attorney General for Puerto Rico); *see also* Snow v. United States, 85 U.S. (18 Wall.) 317, 321 (1873) (upholding power of elected local prosecutor to prosecute offenses against territorial laws).

dure in turn is used to justify the retention of Article III jurisdiction over D.C. Code offenses and to support the characterization of D.C. Code violations as offenses against the United States.[79]

D. *"Federal" Offenses and Non-Article III Courts*

The logic by which D.C. Code offenses are considered crimes against the United States is consistent neither with the jurisdiction conferred by Congress upon the District's two court systems, nor with the constitutional power of Congress to vest certain matters in non-Article III courts.

Under the Judiciary Act, the district courts of the United States have exclusive jurisdiction over prosecutions for crimes against the United States.[80] Congress has not amended that provision to carve out an exception for prosecutions under the D.C. Code. It has merely vested jurisdiction over all laws applicable only to the District of Columbia in a non-Article III court system of general jurisdiction. This division of jurisdiction suggests that Congress does not intend to equate D.C. Code and U.S. Code offenses.

Had Congress instead defined D.C. Code violations as "offenses against the United States" but excepted them from the exclusive jurisdiction of Article III courts, that exception could not withstand scrutiny. Since jurisdiction over offenses against the United States is part of the "protected core" of Article III power,[81] Congress cannot divest Article III courts of this jurisdiction and place it instead in non-Article III courts.[82] The Court

79. Dobbs v. Neverson, 393 A.2d 147, 149 (D.C. 1978); see United States v. Kember, 648 F.2d 1354, 1358-59 (D.C. Cir. 1980) (U.S. Attorney's power to prosecute D.C. Code offenses supports federal jurisdiction over local offenses despite dismissal of federal charges); United States v. Ford, 627 F.2d 807, 812 (7th Cir.) (U.S. Attorney's prosecution of local offenses in name of United States justifies retention of jurisdiction over District offenses by federal district courts outside the District), cert. *denied*, 449 U.S. 923 (1980); United States v. Jackson, 562 F.2d 789, 806 (D.C. Cir. 1977) (MacKinnon, J., dissenting in part) (U.S. Attorney's prosecution of both federal and local offenses supports their joinder in single trial in federal court); Hackney v. United States, 389 A.2d 1336, 1339 (D.C. 1978) (U.S. Attorney's power to prosecute D.C. Code offenses justifies return of indictments by grand jury called by local court in either local or federal court).

80. 18 U.S.C. § 3231 (1976).

81. Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2871 n.25 (1982).

82. The power of Congress to create non-Article III courts and the type of jurisdiction with which they can be invested has been much disputed. It may be argued that the Framers never intended to create any source of federal judicial power other than Article III. THE FEDERALIST Nos. 80, 81, 82 (A. Hamilton); 2 RECORDS OF THE FEDERAL CONVENTION 45-46, 423-25 (M. Farrand rev. ed. 1937); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 7-25 (2d ed. 1973). Attempting to ensure the separation of governmental powers, the Framers sought an unbiased and independent judiciary that would exercise only judicial power. THE FEDERALIST Nos. 78, 79 (A. Hamilton); 1 RECORDS OF THE FEDERAL CONVENTION, *supra*, at 97-98, 108-10; 2 *id.* at 428-29; see O'Donoghue v. United States, 289 U.S. 516, 530-31 (1933).

Article 1, § 8, cl. 9, conferring power upon Congress "to constitute Tribunals inferior to the supreme Court," thus may refer only to those courts that Article III permits Congress to constitute.

Reform Act's removal of D.C. Code criminal proceedings from Article III court jurisdiction can be justified only if those proceedings are not federal in nature.

The Supreme Court confronted this issue in *Palmore v. United States.*[83] In that case, the Court justified non-Article III court jurisdiction over D.C. Code offenses by analogy to state court enforcement of federal penal laws.[84] Congress, however, never has required state courts to enforce fed-

Katz, *supra* note 14, at 894 n.2; Note, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 COLUM. L. REV. 132, 137 n.28, 149-50 (1962). Although the "necessary and proper" clause, Article I, § 8, cl. 18, grants broad implied powers to Congress, it should not be interpreted to grant an additional court-creating power, since that power is enumerated in another section of the Constitution. Congress' implied power over section 8 subjects does allow it to create administrative bodies exercising quasi-judicial power; for this reason the Court held in *Ex parte* Bakelite Corp., 279 U.S. 438, 451 (1929), that Article I courts may be created to determine matters "arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." Non-Article III trial courts may be constituted to determine these "public rights" cases, and the principle of separation of powers is satisfied by review of these matters in an Article III court. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2894 (1982) (White, J., dissenting).

Congress' power to create local District courts, however, derives from its general sovereign powers over the District, a wholly different source than that of its power to create courts to adjudicate "public rights." The Supreme Court's recent opinion in *Northern Pipeline*, 102 S. Ct. at 2868-71, does not serve the cause of clarity by describing the two types of courts under a single rubric, as "legislative courts." As the four-member dissent in that case notes, there are fatal flaws in this unitary theory, and in characterizing Congress' power to create all non-Article III courts in the District simply as "geographical." *Id.* at 2888-89 & n.8 (White, J., dissenting); *see also In re* Cox Cotton Co., 24 B.R. 930, 952-54 (E.D. Ark. 1982) (distinguishing District of Columbia courts, which exercise judicial power, from other courts with narrow subject matter jurisdiction established under Article I, which do not exercise judicial power).

Although the United States is a party to criminal proceedings, those proceedings do not adjudicate "public rights." *Northern Pipeline*, 102 S. Ct. at 2871 n.24. Federal criminal proceedings remain at the "protected core" of Article III judicial power, *id.* at 2871 n.25, and must remain subject to Article III adjudication. *See infra* notes 85-88. If Congress' section 8 powers, including the power to define local criminal offenses under clause 17, are deemed to be coequal, and District offenses therefore are defined as "federal," the separation of powers principle must apply to the local courts created by Congress to try those offenses. (That Congress may vest some of the federal judicial power in state courts has no relevance to the integrity of this principle and its application to congressionally created non-Article III courts. *Northern Pipeline*, 102 S. Ct. at 2867 n.15.). The principle would require that those courts be invested with Article III tenure and salary guarantees, especially since the U.S. government prosecution of D.C. Code violations may undermine the impartiality of judges without those protections. *See* Brown, *The Rent in Our Judicial Armor*, 10 GEO. WASH. L. REV. 127, 129 (1941) (Article III protections doubly needed in cases in which U.S. government is party). These difficulties may be avoided, first, by defining D.C. Code offenses as "crimes against the District of Columbia," and second, by defining the District's local courts not as "federal courts with limited geographical reach" but instead as quasi-state courts, constituted under Congress' state-like power in the District, with jurisdiction over local law matters, including criminal offenses. These courts do exercise judicial power, not of the United States, but of the District of Columbia, and have nothing in common with quasi-administrative public rights adjudicatory bodies. This different theoretical framework for the two types of courts serves to explain the current status of the District's courts in a more satisfactory and consistent way.

83. 411 U.S. 389 (1973).

84. *Id.* at 402, 407. The Court in *Palmore* also analogized the jurisdiction of the District's local courts to that exercised by territorial courts, *id.* at 403, but the Court disregarded an important distinction between territorial courts and courts of the District. The federal question jurisdiction of territorial courts without Article III protections has been justified by the ephemeral nature of the territories and the temporary nature of their courts. McAllister v. United States, 141 U.S. 174, 187-88

uniform treatment of District residents by the various sources of authority in the District and would best comport with Congress' intent in restructuring the local and federal governmental and judicial frameworks in the District into separate and autonomous units. Defining the D.C. Code as nonfederal removes actions arising under that Code from the category of cases that may fall within the "arising under" jurisdiction of Article III courts. The Code instead would be interpreted and enforced uniformly by an independent court system. Under this framework, section 11-502(3) may not be interpreted as a mere allocation of "federal" jurisdiction among the courts of the District,[93] but instead as a statutory embodiment of the pendent jurisdiction concept applied to criminal cases.[94]

II. Examining "Criminal Pendent Jurisdiction"

The standards for the exercise of pendent jurisdiction have been delineated by the Supreme Court in *United Mine Workers v. Gibbs*,[95] and are applicable to pendent local District claims for the same reasons that they govern pendent state law claims.[96] Under *Gibbs*, the federal court has "power" to hear local causes of action normally outside its limited jurisdiction when the federal and local claims derive from a "common nucleus of operative fact."[97] The "power" requirement must also be met in criminal pendent actions under section 11-502(3); it is satisfied if the federal and local charges arise out of the "same transaction"[98] and may be joined for trial under Federal Rule of Criminal Procedure 8(a).[99] *Gibbs* also

C.F.R. §§ 2.12-2.20 (1982) (federal parole regulations) *with* D.C. CODE ANN. § 24-204 (1981) (District parole statute) *and* District of Columbia Parole Board, Guidelines for Initial Adult Parole Hearing (1982) (District parole regulations) (on file with *Yale Law Journal*).

93. *See supra* note 14.

94. *See supra* note 10.

95. 383 U.S. 715 (1966).

96. Financial Gen. Bankshares, Inc. v. Metzger, 680 F.2d 768, 772-74 (D.C. Cir. 1982); Thomas v. Barry, 543 F. Supp. 801, 804 & n.3 (D.D.C. 1982); Wachovia Bank & Trust Co. v. National Student Mktg. Corp., 461 F. Supp. 999, 1010 (D.D.C. 1978), *rev'd on other grounds*, 650 F.2d 342 (D.C. Cir. 1980), *cert. denied*, 452 U.S. 954 (1981); National Tire Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81, 88-89 (D.D.C. 1977), *aff'd mem.*, 595 F.2d 888 (D.C. Cir. 1979); Houlihan v. Anderson-Stokes, Inc., 434 F. Supp. 1324, 1329-30 (D.D.C. 1977); Marshall v. District of Columbia, 392 F. Supp. 1012, 1018 (D.D.C. 1975), *rev'd on other grounds*, 559 F.2d 726 (D.C. Cir. 1977).

97. *Gibbs*, 383 U.S. at 725.

98. United States v. Jackson, 562 F.2d 789, 797 (D.C. Cir. 1977) (rule 8 "same transaction" test gives court power over D.C. Code offenses, and "resolution of the joinder issue has *jurisdictional* significance"); *see also* Note, *UMW v. Gibbs and Pendent Jurisdiction*, 81 HARV. L. REV. 657, 661 (1968) (*Gibbs* test very similar to Federal Rule of Civil Procedure 13(a) "same transaction" test for compulsory counterclaims). *But see* United States v. Kember, 648 F.2d 1354, 1360 (D.C. Cir. 1980) (resolution of the joinder issue is solely "a matter of sound exercise of the court's discretion, not a question of its power"); United States v. Shepard, 515 F.2d 1324, 1330 (D.C. Cir. 1975) (urging broader criminal pendent jurisdiction).

99. Two or more offenses may be charged in the same indictment or information in a separate

vests certain supervisory responsibilities in the trial court, and identifies situations in which pendent civil claims should be dismissed without prejudice. Due to the different characteristics of criminal trials, however, the trial court in criminal pendent jurisdiction cases cannot fulfill its *Gibbs* responsibilities.

A. *The Gibbs Requirements in the Civil Context*

Under *Gibbs*, the federal court has no subject matter jurisdiction over any case in which the federal claims are insubstantial.[100] Even when the court has jurisdictional power, it should exercise its discretion to refuse to adjudicate certain local claims. For example, when all federal claims are dismissed before trial, the local District claims should be dismissed as well.[101] The action should also be dismissed when a District claim raises a novel and unsettled issue of law;[102] the federal court should allow local courts the opportunity to first decide the issue,[103] since the District of Columbia, like the states, is entitled to an internally consistent elaboration of its law by its own courts.[104] The coherence of local law is disrupted by

> count for each offense if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

FED. R. CRIM. P. 8(a); *see also* D.C. CODE ANN. § 23-311(b) (1981) (parallel D.C. Code provision).

100. United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966); Financial Gen. Bankshares, Inc. v. Metzger, 680 F.2d 768, 772 (D.C. Cir. 1982); Thomas v. Barry, 543 F. Supp. 801, 804 n.3 (D.D.C. 1982); Note, *supra* note 98, at 666. *But see* Rosado v. Wyman, 397 U.S. 397, 404 (1970) ("the view that an insubstantial federal question does not confer jurisdiction . . . [is] more ancient than analytically sound").

101. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Financial Gen. Bankshares, Inc. v. Metzger, 680 F.2d 768, 773 (D.C. Cir. 1982).

102. Moor v. County of Alameda, 411 U.S. 693, 716 (1973); Financial Gen. Bankshares, Inc. v. Metzger, 680 F.2d 768, 772, 775-76 (D.C. Cir. 1982); Houlihan v. Anderson-Stokes, Inc., 434 F. Supp. 1324, 1330 (D.D.C. 1977); Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code*, 13 LAW & CONTEMP. PROBS. 216, 233 (1948); Note, *supra* note 98, at 666.

103. Financial Gen. Bankshares, Inc. v. Metzger, 680 F.2d 768, 772-73, 778 (D.C. Cir. 1982) (comity interest leads to dismissal); National Tire Wholesale, Inc. v. Washington Post Co., 441 F. Supp. 81, 88-89 (D.D.C. 1977) (dismissal of pendent District claim promotes "policy of avoiding needless resolution of state claims in federal courts"), *aff'd mem.*, 595 F.2d 888 (D.C. Cir. 1979); Houlihan v. Anderson-Stokes, Inc., 434 F. Supp. 1324, 1329-30 (D.D.C. 1977) (once federal claims are dismissed on defendant's motion for summary judgment, comity and justice require that the court dismiss the District local law claims, citing *Gibbs*); Trivits v. Wilmington Inst., 417 F. Supp. 160, 169 (D. Del. 1976) (where federal claim dismissed after trial, state claim in interest of comity should be interpreted by state courts). *But see* Rosado v. Wyman, 397 U.S. 397, 405 (1970) (refusing to adopt "conceptual approach that would require jurisdiction over the primary claim at all stages as prerequisite to resolution of the pendent claim").

104. Lee v. Flintkote Co., 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) ("[W]ere we not to yield a measure of deference to the District of Columbia Court of Appeals, two courts—neither of which could review the other's decisions—would engage independently in the process of formulating the local law of the District. That would subvert the dual aims of . . . discouraging forum shopping and promoting uniformity within any given jurisdiction on matters of local substantive law."); Bethea v. United States, 365 A.2d 64, 71 (D.C. 1976) ("In our system of jurisprudence, which so greatly values the doctrine of *stare decisis*, the ability to shape and control the precedential foundations of the law is essential to the independence of a particular judicial structure." The D.C. Court of Appeals has an

federal court interpretations, since local courts may be reluctant to create a conflict with a federal construction, and therefore may be constrained in their later consideration of the same issues.[105] The chilling effect is especially disturbing in the District, where courts of general jurisdiction, created a mere thirteen years ago, have not yet had an opportunity to develop a substantial body of law.[106] The federal court also should exercise its discretion to dismiss pendent claims if the joinder of federal and local claims may confuse the jury.[107]

B. *Applying* Gibbs *in the Criminal Context*

The federal court can fulfill its *Gibbs* responsibilities only if it is able to refuse jurisdiction, since the distinctive characteristic of the *Gibbs* test is the supervisory responsibility it places upon the federal trial court[108] to preserve comity between federal and local courts, to prevent "forum-shopping" by dismissing cases with insubstantial federal claims, and to promote fairness by dismissing claims likely to confuse a jury. But in the criminal context, the court's discretion to refuse to adjudicate a pendent claim is restricted, if not entirely eliminated. In criminal prosecutions, unlike civil suits, jeopardy attaches[109] to all charges as soon as a jury is empaneled[110] or the judge begins to hear evidence.[111] Following that attachment, charges dismissed in the federal court cannot be brought in the local court;[112] there is no possibility of "dismissal without prejudice."

Perhaps due to this consequence of dismissing pendent local criminal charges, the District's federal courts have been reluctant to order dismissal, even in cases in which they should have no jurisdictional power to

"obligation to fulfill the mandate of the Court Reorganization Act by preserving the autonomous authority of our judicial structure."), *cert. denied*, 433 U.S. 911 (1977); 74 HARV. L. REV. 1660, 1662 (1961) (state normally entitled to elaboration of its law by its own courts).

105. Wechsler, *supra* note 102, at 232 (federal courts are not authorized state law expositors; no mechanism by which state courts can correct federal court errors), *cited with approval in* United Mine Workers v. Gibbs, 383 U.S. 715, 726 n.15 (1966); Note, *supra* note 98, at 666 (state consideration limited following federal court's holding on novel issue of state law; because of possible reliance, state court hesitant to create conflict with federal determination).

106. *See* Financial Gen. Bankshares, Inc. v. Metzger, 680 F.2d 768, 771 (D.C. Cir. 1982) (district court improperly retained jurisdiction over local claim because District's local courts had not yet had opportunity to define applicable standards).

107. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Houlihan v. Anderson-Stokes, Inc., 434 F. Supp. 1324, 1330 (D.D.C 1977).

108. Note, *supra* note 98, at 666.

109. U.S. CONST. amend. V ("No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . .").

110. Serfass v. United States, 420 U.S. 377, 388 (1975).

111. Lee v. United States, 432 U.S. 23, 27 n.3 (1977); Serfass v. United States, 420 U.S. 377, 388 (1975).

112. A defendant can be brought to trial again only in very limited circumstances. *See* Westen & Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81.

hear the local claims.[113] This practice promotes jury prejudice, and allows prosecutors to "forum shop" for federal evidentiary rules that may have a material effect on the outcome of the litigation, even though the federal count used to gain access to that forum is insubstantial and ultimately is dropped.[114] Further, these restrictions on the federal court's supervisory power hamper its ability to prevent the harsher treatment produced by the joinder statute for defendants convicted of U.S. Code offenses within the District compared to U.S. Code violators in the fifty states.

1. *Multiplicity and Jury Prejudice*

Courts and commentators have noted that the practice of charging multiple counts under a single code for one criminal act increases the possibility of jury prejudice and hostility, and the danger of a compromise verdict.[115] Multiplicitous indictments are tolerated, and defendants may not move to strike counts on grounds of multiplicity, because courts presume that Congress legislates with care and intends that the offenses it defines in separate sections of the U.S. Code (or of the D.C. Code) will be separately charged.[116] The presumption that Congress does not intend dupli-

113. Disposition of the federal charge prior to trial, or severance of the federal and local charges, should dictate dismissal of the local charges for lack of jurisdictional power. *See* United States v. Jackson, 562 F.2d 789, 797, 800 (D.C. Cir. 1977) (district court loses jurisdiction when local charge severed prior to trial; court must dismiss local action and U.S. Attorney must reindict in Superior Court). The D.C. Circuit has also held, however, that "[o]nce the federal court has acquired jurisdiction, it may determine all questions arising, irrespective of the disposition of the federal claim." United States v. Shepard, 515 F.2d 1324, 1330 (D.C. Cir. 1975) (district court may retain jurisdiction to conclude trial of D.C. Code offenses even though Government dismissed federal charges prior to submission of case to jury); *see* United States v. Kember, 648 F.2d 1354, 1359 (D.C. Cir. 1980) (§ 11-502(3) "does not suggest that any disposition of the federal offense, subsequent to proper joinder in an indictment, withdraws power over the local offense"); *id.* at 1359 n.9 (although court agrees with holding in *Jackson*, it would not have based dismissal on jurisdictional grounds, but instead on trial court's discretionary powers).

114. *See* United States v. Jackson, 562 F.2d 789, 793 (D.C. Cir. 1977) ("[p]lainly" it would be "an unacceptable situation" in light of Congress' determination that District offenses should generally be tried in the District's courts to so strain rule 8 joinder by the "simple expedient of adding at least one federal count to any indictment").

115. Crisafi v. United States, 383 A.2d 1, 3 n.2 (D.C.), *cert. denied*, 439 U.S. 931 (1978); Bridges v. United States, 381 A.2d 1073, 1075 (D.C. 1977), *cert. denied*, 439 U.S. 842 (1978); *see* United States v. Alston, 609 F.2d 531, 534 (D.C. Cir. 1979) (because of § 11-502(3) joinder, "[p]yramiding charges is particularly troublesome in" the District), *cert. denied*, 445 U.S. 918 (1980); United States v. Ketchum, 320 F.2d 3, 8 (2d Cir.) (risk of prolix pleading's having psychological effect upon jury), *cert. denied*, 375 U.S. 905 (1963); *Note, Double Jeopardy and the Multiple-Count Indictment*, 57 YALE L.J. 132, 133 (1947) (multiple count indictments "greatly enhance the potential penalty for any given criminal transaction").

116. The U.S. Attorney may charge the same offense several times in an indictment in different counts. Although the defendant may move before trial under Federal Rule of Criminal Procedure 12 to dismiss the indictment as multiplicitous, the defendant cannot move to strike counts on the ground of multiplicity, 8 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 8.07[1], and the jury can convict on the multiplicitous counts, subject only to the limitation that consecutive sentences may not be imposed, North Carolina v. Pearce, 395 U.S. 711, 717-18 (1969) (double jeopardy prohibition on multiple punishment for same offense); *see* Iannelli v. United States, 420 U.S. 770, 786 n.18 (1975) (greater

cation does not hold once two separate codes are available to the prosecutor for charging.[117] The two codes often are aimed at deterring and punishing the same criminal conduct, and aside from federal jurisdictional elements, they describe the "same offenses" in many parallel provisions.[118] Recognizing this, the District's federal courts refuse to permit double convictions for similar U.S. and D.C. Code charges.[119]

By increasing the number of available charging provisions, section 11-502(3) joinder expands the prosecutor's already broad discretion to include multiple charges in a single indictment, and creates a corresponding increase in jury prejudice. The effects of the availability of two self-contained codes for charging must nullify the presumption that multiplicity is tolerable.[120] The absence of any checks on the prosecutor's section 11-

and lesser offenses may not be separately punished).

117. The D.C. Circuit has held, however, that "it is for the U.S. Attorney to determine whether to prosecute under both [federal and local] statutes or only one." United States v. Shepard, 515 F.2d 1324, 1336 (D.C. Cir. 1975).

118. The test used to determine whether two statutory provisions describe two offenses or only one is "whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). Only the "essential elements" of two offenses need be the same under *Blockburger*, United States v. Sampol, 636 F.2d 621, 653-54 (D.C. Cir. 1980), and the only difference between many D.C. and U.S. Code offenses is the element of federal jurisdiction—not an "essential element" for *Blockburger* purposes. United States v. Blassingame, 427 F.2d 329, 330 (2d Cir. 1970) (federal jurisdiction element "is logically no part of the crime itself" and therefore prosecution need not prove defendant's knowledge of that element), *cert. denied*, 402 U.S. 945 (1971); *see* United States v. Hooper, 432 F.2d 604, 605 (D.C. Cir. 1970) (questioning cumulative federal-District sentences for offenses "factually the same crime, except for the addition of a federal element of which defendant had no knowledge"); *see also* U.S. NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, Final Report § 103 comment (1971) (jurisdiction not element of offense because not relevant to criminality, but only goes to power of government to prosecute); Annot., 67 A.L.R.3d 988, 1000 (1975 & Supp. 1982) (listing cases in which jurisdictional element not required to be proved beyond reasonable doubt). *But see* United States v. Girst, 636 F.2d 316, 322-23 (D.C. Cir.) (separate punishments for offenses that differ only by jurisdictional element consistent with congressional intent), *vacated*, 645 F.2d 1014 (D.C. Cir. 1979); United States v. Butler, 462 F.2d 1195, 1198-99 (D.C. Cir. 1972) (existence of separate offenses depends on Congress', not on defendant's, intent).

At the very least, when a U.S. Code offense requires proof of only one fact in addition to those required for the D.C. Code offense to which it is joined, the D.C. Code offense should be considered a lesser included offense, and for double jeopardy purposes, greater and lesser included offenses define the "same offense." Brown v. Ohio, 432 U.S. 161, 168 (1977). The U.S. Attorney, however, does not charge D.C. Code offenses as lesser included offenses. United States v. Jones, 527 F.2d 817, 829 nn.14-15 (D.C. Cir. 1975); United States v. Hill, 470 F.2d 361, 368 (D.C. Cir. 1972).

119. United States v. Leek, 665 F.2d 383, 387 (D.C. Cir. 1981); United States v. Dorsey, 591 F.2d 922, 938-39 (D.C. Cir. 1978); United States v. Jones, 527 F.2d 817, 821 (D.C. Cir. 1975); United States v. Diggs, 522 F.2d 1310, 1323-24 (D.C. Cir. 1975), *cert. denied*, 429 U.S. 852 (1976); United States v. Shepard, 515 F.2d 1324, 1335 n.25, 1336 (D.C. Cir. 1975); United States v. Knight, 509 F.2d 354, 361, 363 (D.C. Cir. 1974); United States v. Canty, 469 F.2d 114, 128-29 (D.C. Cir. 1972); United States v. Spears, 449 F.2d 946, 949, 954 (D.C. Cir. 1971); United States v. Hooper, 432 F.2d 604, 606 (D.C. Cir. 1970). *But see* United States v. Girst, 636 F.2d 316, 322-23 (D.C. Cir.) (U.S. Code weapons offense designed to augment similar D.C. Code offense, and therefore separate punishments are consistent with congressional intent), *vacated*, 645 F.2d 1014 (D.C. Cir. 1979).

120. The Supreme Court has held that the federal prosecutor's charging discretion is broad, and that "when an act violates more than one [U.S. Code] criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." United States v. Batchelder, 442 U.S. 114, 123-24 (1979); *see* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Oyler v. Boles, 368 U.S. 448, 456 (1962); United States v. Jones, 527 F.2d 817, 820 (D.C. Cir.

502(3) charging power may well result in harsher treatment for District defendants charged under both federal and local Codes than for defendants charged under only one Code.[121]

2. *Disparity of Outcome Among D.C. Code Violators*

Many defendants charged under both the U.S. and D.C. Codes and tried in federal court ultimately are sentenced only for D.C. Code offenses.[122] The D.C. Circuit has ruled that this fact notwithstanding, it is "patently not feasible for the District Court to try a defendant, charged with both local and federal offenses, under differing evidentiary rules" and that therefore federal rules must apply.[123] At the same time, the D.C. Circuit has permitted the use of D.C. Code evidentiary standards if all federal charges are disposed of prior to the start of evidence.[124] Thus, the district court may determine which standards to apply by reference to a purely arbitrary factor: the stage of the proceeding at which all federal charges have been dismissed. Based solely on this factor, trial outcomes of federal court defendants ultimately sentenced for identical D.C. Code of-

1975); United States v. Greene, 489 F.2d 1145, 1151 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 977 (1974).

121. In requiring the District's federal courts to read the D.C. and U.S. Codes together to determine if they define the "same offense," § 11-502(3) creates additional confusion. To read the codes together, the D.C. Circuit must infer that Congress enacted them with the intent that they "mesh," although the Supreme Court has held that the two codes are completely separate, with different purposes and different spheres of operation. Johnson v. United States, 225 U.S. 405, 417-19 (1912). The idea that the codes "mesh," applied outside of the context of the "same offense" determination, leads to strange results. *See* United States v. Greene, 489 F.2d 1145, 1150-51 (D.C. Cir. 1973) (because codes mesh, U.S. Attorney may use D.C. Code felony murder statute to prosecute U.S. Code defendant in federal court, and statute encompasses U.S. Code offenses), *cert. denied*, 419 U.S. 977 (1974); *see also* Bland v. Rodgers, 332 F. Supp. 989, 990 (D.D.C. 1971) (D.C. Code charging provision applied to defendant charged with federal offense), *rev'd on other grounds sub nom.* United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973). *But see* United States v. Greene, 489 F.2d 1145, 1162 (D.C. Cir. 1973) (statement by Bazelon, J., as to why he would grant rehearing en banc) (codes not intended to mesh), *cert. denied*, 419 U.S. 977 (1974).

122. U.S. Code charges may be dismissed before or during trial. In addition, if a defendant is convicted of both U.S. and D.C. Code offenses that are the "same offense" for double jeopardy purposes under the rule of *Blockburger*, *see supra* note 118, the court must vacate one of the sentences. The defendant in this way may be left with only a D.C. Code conviction, *see supra* note 119 (cases vacating one conviction, D.C. or U.S., or remanding to the trial court with instructions to do so).

123. United States v. Bell, 514 F.2d 837, 844, 850 (D.C. Cir. 1975) (federal evidentiary standard for impeachment by prior conviction should apply to local offenders in federal court); United States v. Hairston, 495 F.2d 1046, 1054 n.13 (D.C. Cir. 1974) (same); *see* United States v. Brown, 483 F.2d 1314, 1318 (D.C. Cir. 1973) (federal bail rules applicable to defendant charged with D.C. Code offenses in federal court). *But see* United States v. Garnett, 653 F.2d 558, 561 (D.C. Cir. 1981) (unclear whether federal or District probation provision applies to D.C. Code violator in federal court).

124. United States v. Greene, 489 F.2d 1145, 1152-56 (D.C. Cir. 1973) (D.C. Code insanity standard applicable to D.C. Code violator in federal court), *cert. denied*, 419 U.S. 977 (1974); United States v. Brown, 483 F.2d 1314, 1320-23 (D.C. Cir. 1973) (MacKinnon, J., dissenting) (D.C. Code provisions should apply in federal court to D.C. Code defendants). *But see* United States v. Brown, 483 F.2d 1314, 1318 (D.C. Cir. 1973) (federal bail rules applicable to federal court defendant charged with D.C. Code offenses).

fenses may differ materially.

The practice of using federal evidentiary standards in the federal court trial of D.C. Code offenses results in an additional disparity between federal and local court treatment of D.C. Code offenders. The different evidentiary standards applied by the two court systems—local or federal[125] burdens of proof, presumptions, and tests for witness competency, for example—are substantive, and may have substantial effects upon trial outcomes.[126] The difference in outcomes that may result between offenders tried for identical D.C. Code violations because of the happenstance of the court in which they are tried contradicts the fairness and uniformity principles underlying the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*.[127] *Erie* sacrificed uniformity among federal court decisions to achieve uniformity among federal and local courts sitting in the same jurisdiction in adjudications of local law matters.[128] *Erie* embodies two principles equally applicable to criminal cases. The first is an equal protection principle: Litigants with similar claims should be treated similarly, regardless of the court in which those claims are adjudicated. The second is a fairness principle: Litigants with a choice between state and federal forums should not be permitted unilaterally to choose the rules and thereby affect the outcome of the litigation.[129]

The policies of *Erie* are implemented in the Federal Rules of Evidence,[130] which require that federal courts, when adjudicating state

125. The federal and local courts in the District use different rules of evidence. The Federal Rules of Evidence apply to federal criminal proceedings. FED. R. EVID. 1101(b). The District's local courts are not in any way bound by federal evidentiary law or the Federal Rules of Evidence. Jackson v. United States, 424 A.2d 40, 42 (D.C. 1980), *cert. denied*, 454 U.S. 1127 (1981), only by principles of the common law, as developed by the District's courts. D.C. R. CRIM. P. 26. Even though the D.C. Court of Appeals uses the Federal Rules of Appellate Procedure, see D.C. CODE ANN. § 11-743 (1981), and the D.C. Superior Court uses the Federal Rules of Civil and of Criminal Procedure, see D.C. CODE ANN. § 11-946 (1981), the local courts may modify even those rules to suit local needs; federal interpretations, though they may be persuasive, are not binding. Tupling v. Britton, 411 A.2d 349, 351 (D.C. 1980).

126. Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208, 212 (1939) (state burden of proof applied); see Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 714 (1974) (state rules concerning burden of proof, presumptions, and sufficiency of evidence must be followed where they differ from federal court practice).

127. 304 U.S. 64 (1938). It is unclear whether the Rules of Decision Act, 28 U.S.C. § 1652 (1976), interpreted by the Supreme Court in *Erie*, encompasses District law when requiring federal courts to enforce "state law" as the Rule of Decision when determining state claims. *See* Ely, *supra* note 126, at 701-02 (rejecting "state enclave" theory as basis for *Erie* doctrine, opening way for *Erie*'s application to District law as to state law); Note, *supra* note 62, at 980, 983 (autonomy and stature of local courts require federal court use of *Erie* principles); *see supra* note 62 (discussing *Erie* doctrine).

128. Comment, *Pendent Jurisdiction—Applicability of the* Erie *Doctrine*, 24 U. CHI. L. REV. 543, 548 (1957).

129. 304 U.S. at 75; *see* Hanna v. Plumer, 380 U.S. 460, 467 (1965); *see also* Lee v. Flintkote Co., 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) (unfair for litigation result materially to differ because suit is brought in federal rather than local court); Comment, *supra* note 128, at 548; Note, *supra* note 62, at 983-92.

130. *See* C. WRIGHT, FEDERAL COURTS § 93, at 622 (4th ed. 1983) (under Federal Rules of

claims,[131] apply state substantive rules regarding presumptions as to facts that are elements of a claim or defense (including burdens of proof),[132] and competency of witnesses.[133] The *Erie* rationale also requires that federal courts trying D.C. Code offenses apply the substantive evidentiary standards found in that Code or developed by the local District courts. It is true that the Rules of Decision Act,[134] interpreted by the Supreme Court in *Erie*, by its terms applies only to civil trials.[135] Because federal courts in general may not enforce state criminal laws,[136] however, there never has been a need for an *Erie*-type rule in criminal cases. When the Supreme Court did have the opportunity to confront a unique situation in which a federal officer, indicted by a state, removed his trial to federal court, the Court had no difficulty ruling that "the Circuit courts of the United States . . . adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law."[137] Similarly, in the federal trial of D.C. Code charges, the federal court should "adopt and apply the laws" of the District of Columbia.[138] This procedure would promote the *Erie* goals of treating litigants with similar claims uniformly, regardless of the court in which they find themselves situated, and of discouraging prosecutor "forum-shopping" for evidentiary rules.

Evidence, federal courts will continue to apply state-defined evidentiary "rules that in form only regulate evidence but in fact are closely associated with substantive rights").

131. Although the state claim in *Erie* was heard by a federal court under its diversity jurisdiction, the *Erie* doctrine is equally applicable to pendent state claims. Rental Car v. Westinghouse Elec. Corp., 496 F. Supp. 373, 380 (D. Mass. 1980); C. WRIGHT, *supra* note 130, § 19, at 109.

132. FED. R. EVID. 302.

133. FED. R. EVID. 601.

134. 28 U.S.C. § 1652 (1976).

135. *See* United States v. Shaffer, 520 F.2d 1369, 1372 (3d Cir. 1975) (in criminal cases federal courts do not look to state law as rule of decision), *cert. denied*, 423 U.S. 1051 (1976); Sherman, *Analysis of Federal Decisions Dealing with Evidence Published During 1967*, 69 COLUM. L. REV. 377, 377 (1969) (in empirical study of evidence rules applied in federal court, almost no use found of state evidentiary law in federal criminal law decisions).

136. Article III courts normally have no jurisdiction over state offenses. Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 289-90 (1888).

137. Tennessee v. Davis, 100 U.S. 257, 271 (1880).

138. Even prior to the Court Reform Act, the Supreme Court refused to substitute its judgment on evidentiary matters for that of the local courts, creating, in effect, a quasi-*Erie* doctrine for those courts. Griffin v. United States, 336 U.S. 704, 712-18 (1949); Fisher v. United States, 328 U.S. 463, 476 (1946). The Court approached local rules in the territories with the same degree of deference. De Castro v. Board of Comm'rs, 322 U.S. 451, 459 (1944) (policy reason for *Erie* equally applicable to territorial courts). The Supreme Court recently has departed from this long-standing policy of deferring to local court interpretation in Whalen v. United States, 445 U.S. 684, 687-88 (1980) (construing D.C. Code statute not yet considered by D.C. Court of Appeals rather than remanding, justifying action on grounds that deference to local courts is "a matter of judicial policy, not a matter of judicial power"); *cf.* Pernell v. Southall Realty, 416 U.S. 363, 369 (1973) (new court structure of the District "lends additional support to our longstanding practice of not overruling the courts of the District on local law matters 'save in exceptional situations where egregious error has been committed.' [citations omitted]. This principle . . . [is] now supported by the clear intent of Congress in enacting the 1970 Court Reform Act, [and] must serve as our guide in the present case.").

While, as a matter of fairness to defendants, *Erie* requires the application of different substantive evidentiary standards to federal and to pendent local claims, the use of two standards may cause jury confusion. In these circumstances, the rule of *United Mine Workers v. Gibbs* requires the trial court to exercise its discretion to dismiss the pendent claims.[139] The jeopardy element in criminal procedure, however, hampers the trial court's exercise of that discretion.[140] The likelihood of jury confusion in such cases mandates not that local evidentiary standards be abandoned, but that the use of section 11-502(3) joinder be curtailed.

3. *Disparity of Outcome Among U.S. Code Violators*

Using section 11-502(3), the federal prosecutor is able to circumvent a U.S. Code hierarchy of greater and lesser-included charges and penalties. The prosecutor may charge a District defendant with a greater federal offense in one count, and with a lesser D.C. Code offense, instead of the parallel U.S. Code provision, in a second count, mindful of the fact that the local provision carries a greater maximum penalty than its federal counterpart. In this way, the prosecutor ensures that if the defendant is convicted of both charges, he may receive a total sentence longer than the maximum authorized under the federal scheme.[141] Alternatively, if the greater offense cannot be proved at trial, or if the defendant pleads guilty to the lesser charge as part of a plea bargain, the defendant will receive a harsher punishment than similar defendants in other federal courts who can be charged only under the U.S. Code. The district court compounds the problem of disparate treatment for District defendants by on occasion applying D.C. Code provisions to the trial of joined D.C. and U.S. Code offenses, or even of U.S. Code offenses alone.[142] Although the D.C. Cir-

139. United Mine Workers v. Gibbs, 383 U.S. 715, 727 (1966); Houlihan v. Anderson-Stoker, Inc., 434 F. Supp. 1324, 1330 (D.D.C. 1977); see C. WRIGHT, *supra* note 130, § 93, at 627 ("possibility of jury confusion is a recognized reason for refusing to exercise jurisdiction over a pendent state claim, and this is the course the court should follow when contradictory rules" apply).

140. *See supra* p. 315.

141. *See, e.g.*, United States v. Leek, 665 F.2d 383, 386 (D.C. Cir. 1981) (U.S. Attorney reached outside Federal Bank Robbery Act to "circumvent the scheme's carefully crafted hierarchy of penalties"); United States v. Canty, 469 F.2d 114, 128 (D.C. Cir. 1972) ("by reaching out to a catchall assault provision in the District of Columbia Code . . . venturing outside the federal scheme, the prosecution was able to circumvent the scheme's carefully crafted hierarchy of penalties . . . [and] to obtain a sentence longer than the maximum authorized under the highest tier of the bank robbery scheme"); *see also* United States v. Jones, 527 F.2d 817, 832 (D.C. Cir. 1975) (Wright, J., dissenting) ("It is obvious . . . that being put at risk of receiving a prison term five times as great, and actually receiving a sentence two and a half times as great, as a defendant in any other federal District Court might receive is an 'adverse consequence.' ").

142. *See* Bland v. Rodgers, 332 F. Supp. 989, 990 (D.D.C. 1971) (D.C. Code charging provision applied to defendant charged with both federal and local offenses), *rev'd on other grounds sub nom.* United States v. Bland, 472 F.2d 1329 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 909 (1973); *see also* United States v. Hinckley, 672 F.2d 115, 132 n.115 (D.C. Cir. 1982) (refusing to decide whether

cuit in most cases reverses this use of the D.C. Code,[143] it has not definitely ruled that D.C. Code provisions never should be applicable to U.S. Code trials in the District.

C. *Joinder and Equal Protection*

In several cases, the D.C. Circuit has acknowledged that section 11-502(3) can lead to disparities in treatment among U.S. Code offenders and among D.C. Code offenders. The court has reached conflicting conclusions, however, about the legitimacy of these results.

In *United States v. Jones*,[144] the court held that the increase in risk exposure in federal court is a classification "based on location" that "clearly" has a "rational basis."[145] In a dissent, Judge Wright objected that the use of section 11-502(3) "create[s] an invidious discrimination based solely on the fact that the trial occurred within the District of Columbia."[146] Later cases seem to follow this dissenting view. In *United States v. Leek*,[147] the court noted that the district court's dual criminal jurisdiction under section 11-502(3) engenders a "potential equal protection issue";[148] in *United States v. Garnett*,[149] it criticized the statute's "potential for differing treatment of similarly situated defendants solely by virtue of the forum in which they are prosecuted."[150] The *Garnett* court described section 11-502(3) as "a troublesome anomaly among federal jurisdictional statutes,"[151] disagreeing with the Supreme Court's characterization of this provision as a "minor exception" to the local court's exclusive jurisdiction over local criminal cases.[152]

U.S. or D.C. Code insanity standard applies to U.S. Code defendants); United States v. Caldwell, 543 F.2d 1333, 1366 (D.C. Cir. 1974) (same), *cert. denied*, 423 U.S. 1087 (1976); United States v. Gooding, 477 F.2d 428, 431 (D.C. Cir. 1973) (deciding that federal, rather than District, nighttime search provision applies to federal court trial of federal offenses by principle that the "more specific and more recent" statute, *i.e.*, the federal statute, should govern), *aff'd*, 416 U.S. 430 (1974).

143. In United States v. Hairston, 495 F.2d 1046 (D.C. Cir. 1974) the court noted that to apply D.C. Code evidentiary provisions to U.S. Code defendants

> would place criminal defendants prosecuted in the federal courts of the District of Columbia on a different footing from those tried in any other federal circuit, although both classes of defendants may be charged under the same U.S. Code provisions. This treatment of similarly situated persons in a different fashion is fraught with equal protection overtones . . . .

Id. at 1051-52 (quoting United States v. Henson, 486 F.2d 1292, 1309 n.20 (D.C. Cir. 1973)); United States v. Thompson, 452 F.2d 1333, 1341 (D.C. Cir. 1971) (D.C. Code bail provision may not be applied to U.S. Code defendant), cert. denied, 405 U.S. 998 (1972).

144. 527 F.2d 817 (D.C. Cir. 1975).
145. *Id.* at 821-22 & n.6.
146. *Id.* at 832 (Wright, J., dissenting).
147. 665 F.2d 383 (D.C. Cir. 1981).
148. *Id.* at 388 n.43.
149. 653 F.2d 558 (D.C. Cir. 1981).
150. *Id.* at 561.
151. *Id.*
152. Palmore v. United States, 411 U.S. 389, 392 n.2 (1973).

D.C. Jurisdiction

Despite its awareness of the problems raised by section 11-502(3), the D.C. Circuit has not taken any steps to limit the use of the statute.[153] The court did limit another Court Reform Act jurisdictional statute, however, reading it narrowly in light of Congress' overriding intent of separating federal and local court jurisdiction.[154]

D. *Congressional Intent and Efficiency Considerations*

The D.C. Circuit has also reached conflicting conclusions about Congress' purpose in enacting section 11-502(3). The only legislative history existing for the section is the following short paragraph:

> Some overlapping of jurisdiction will inevitably remain, that being only a minor percentage of cases primarily arising when the same person is accused of infractions which are both Federal and purely local violations (and in those cases the United States Attorney will handle all charges with minimal procedural difficulties).[155]

In *United States v. Jackson*,[156] the court pointed out that the confusion engendered by section 11-502(3) joinder "belies the optimism of the House Committee's parenthetical remark." Congress, said the *Jackson* court, "simply did not consciously confront the sort of problem" that the statute creates.[157]

The court in *United States v. Shepard*[158] interpreted the section differently, finding that its mere existence demonstrates that Congress had determined that "the District court was to be the preferred forum whenever federal and local offenses were joinable in the same indictment and that a single trial was to be preferred over two separate trials."[159] Writing in

153. The D.C. Circuit and Congress are the only authorities that may place limits on the use of § 11-502(3), since the Home Rule Act expressly forbids the District Council from regulating federal court jurisdiction. D.C. CODE ANN. § 1-233(a)(8) (1981). In United States v. Jackson, 562 F.2d 789, 793 (D.C. Cir. 1977), the court did mention that the U.S. Attorney should not be able to confer jurisdiction on the federal court by the "simple expedient of adding at least one federal count to any indictment. Plainly, this would be an unacceptable situation" in light of Congress' clear Court Reform Act intent to vest jurisdiction over local offenses in the local courts.

154. Thompson v. United States, 348 F.2d 1031, 1036-37 (D.C. Cir. 1976) (limiting reach of D.C. CODE ANN. § 11-301 (1981)). The court in *Thompson* held that an expansive reading of the statute, which on its face seems to grant broad power to the D.C. Circuit to review local decisions, would "defy the overarching congressional intent that the courts in the District of Columbia be reconstituted into separate and independent systems." *Id.* at 1036. By contrast, a narrow reading, allowing review only for a limited period of time, "is at once more in accord with Congress' 'federalization' scheme [for the District] and more nearly symmetrical with others of the provisions . . . in the Court Reform Act." *Id.* at 1037.

155. H.R. REP. NO. 907, 91st Cong., 2d Sess. 33 (1970).

156. 562 F.2d 789 (D.C. Cir. 1977).

157. *Id.* at 799.

158. 515 F.2d 1324 (D.C. Cir. 1975).

159. *Id.* at 1330.

dissent in *United States v. Jackson*, Judge MacKinnon described section 11-502(3) as "serv[ing] the convenience of defendants, the Government, the witnesses, lawyers, and grand and petit juries. . . . Congress intended to insure that *both* types of offenses were prosecuted with the least complications possible."[160]

It is a truism that in criminal cases, fairness to defendants must be accorded great weight, and that efficiency and resource conservation goals should play a more limited role than in the civil context.[161] Because of the restrictions upon the trial court's supervisory power over joined local claims in criminal trials, however, the effect of section 11-502(3) joinder is to accord less fairness to criminal defendants in the District than to civil litigants.

In evaluating the joinder provision, the public interest requires a balancing of the unfairness to defendants resulting from its use against its potential for increasing efficiency or conserving judicial resources, with less weight given to efficiency than in the civil context. There are two different types of joinder that occur under section 11-502(3): joinder of charges that define the "same offense," and joinder of charges that define different offenses, but arise out of the same criminal transaction. "Same offense" joinder and "same transaction" joinder have different efficiency and fairness properties, and must be evaluated individually.

Charges that define the "same offense" cannot be separately prosecuted without violating double jeopardy.[162] When these charges are prosecuted together, if convictions on both U.S. and D.C. Code "same offense" counts are returned by the jury, one conviction must be vacated.[163] Joinder in these circumstances does not promote efficiency; instead it may hamper it by forcing the D.C. Circuit to police trial court convictions to ensure that

160 562 F.2d 789, 806 (D.C. Cir. 1977) (MacKinnon, J., dissenting in part).

161. The Federal Rules of Civil Procedure embody a principle of judicial economy, encouraging resolution of all aspects of a dispute in one suit; pendent jurisdiction is another tool to achieve this goal. Note, *supra* note 98, at 661. The principles underlying the Federal Rules of Criminal Procedure are very different. Boddie v. Connecticut, 401 U.S. 371, 390-91 (1971) (Black, J., dissenting) (contrasting constitutional "strict and rigid due process rules" that protect criminal defendants, with rules that govern civil trials. The Constitution "does not place such private disputes on the same high level as it places criminal trials and punishment."). (Justice Black's position in *Boddie*, that strict due process rules applicable to criminal trials normally are unnecessary in civil trials, was adopted in United States v. Kras, 409 U.S. 434, 444-46 (1973).) *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (constitutional emphasis on procedural and substantive safeguards for criminal defendants); *see also* United States v. Jackson, 562 F.2d 789, 799 (D.C. Cir. 1977) ("as a general matter, wholesale importation of civil law concepts into the criminal sphere is a practice fraught with danger. . . . Efficiency—'the conservation of judicial energy and the avoidance of multiplicity of litigation'—[which] may be pursued with single-minded devotion in the rules and doctrines of civil procedure," in criminal procedure "must sometimes give way to the need to protect the rights of defendants"); 8 J. MOORE, *supra* note 116, ¶ 8.02[1] ("The civil model . . . is often inappropriate in criminal procedure, and no subject illustrates this fact better than joinder.").

162 *See supra* note 118.

163 *See supra* p. 317.

no dual jury convictions for the "same offense" are permitted to stand.[164]

In contrast, there undoubtedly are efficiency gains from joining charges arising from a single criminal transaction that otherwise would have to be prosecuted in separate federal and local court trials.[165] "Same transaction" joinder, however, itself promotes further discrimination against District residents, by singling them out for routine dual prosecutions under both federal and local Codes. State defendants are treated differently; only in extraordinary circumstances will they be prosecuted by the United States following a state court prosecution for the same criminal act.[166]

"Same offense" joinder should not be permitted, first, because the possibility of dual convictions is much greater when violations of two Codes have been charged than in ordinary trials, and second, because there is no efficiency justification for "same offense" joinder to balance the prejudice it creates. But it is impossible for the prosecutor to determine in advance which charges will result in convictions, and, accordingly, whether two offenses of conviction will define the same or different offenses. Thus, im-

164. *See supra* note 119 (D.C. Circuit may vacate either D.C. or U.S. sentence, or may remand to trial court with instructions to do so).

165. The D.C. Circuit has justified § 11-502(3) joinder of all offenses arising out of the same transaction on the grounds that joinder places District defendants and defendants in the fifty states on an equal footing: The latter may be prosecuted by both their federal and state sovereigns for a single criminal act, but District defendants may be prosecuted only by the federal sovereign. The court reasons that the double jeopardy clause requires a single proceeding for prosecution of District defendants for U.S. and D.C. Code offenses. *See* United States v. Alston, 609 F.2d 531, 537 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 918 (1980); United States v. Jones, 527 F.2d 817, 821 (D.C. Cir. 1975); United States v. Shepard, 515 F.2d 1324, 1331 (D.C. Cir. 1975); United States v. Canty, 469 F.2d 114, 128-29 n.20 (D.C. Cir. 1972). The double jeopardy clause, however, does not prevent the U.S. Attorney from prosecuting a District defendant in separate proceedings for different D.C. and U.S. Code offenses arising out of the same act or transaction. The Supreme Court has not adopted the "same transaction" test, first used to define a "criminal unit" for double jeopardy purposes by Justice Brennan in a concurring opinion in Ashe v. Swenson, 397 U.S. 436, 449, 453-54 (1970). Instead, the test of Blockburger v. United States, 284 U.S. 299, 304 (1932), remains the accepted guide for determining when two separately defined crimes constitute the "same offense" for double jeopardy purposes. Simpson v. United States, 435 U.S. 6, 11 (1978).

166. The premise behind the idea that § 11-502(3) will equalize defendants, *i.e.*, that defendants in the fifty states, unlike District defendants, may be prosecuted twice for the same act by both state and federal sovereigns, by and large is a myth. By a policy of 25-years' standing, the Justice Department will not prosecute a defendant for an act for which he already has been brought to trial in a state court, other than "in instances of peculiar enormity, or where the public safety demand[s] extraordinary rigor." Rinaldi v. United States, 434 U.S. 22, 28 (1977) (per curiam) (citing Fox v. Ohio, 46 U.S. (5 How.) 410, 435 (1847)); *see* Note, *The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution*, 31 STAN. L. REV. 477, 486-96 (1979). In addition, over half the states bar state proceedings following federal proceedings in certain circumstances. *See* Vestal & Gilbert, *Preclusion of Duplicative Prosecutions: A Developing Mosaic*, 47 MO. L. REV. 1, 32-36 (1982); *see also* United States v. Knight, 509 F.2d 354, 361 (D.C. Cir. 1974) (per curiam) ("[T]he problem . . . is not insignificant when persons in the District of Columbia are branded for both federal and District of Columbia Code felonies for what is essentially a single transaction. The problem is accentuated, and with constitutional considerations, if persons in every state of the Union committing the same act are not put under a multiple federal-state brand—whether because of constitutional barriers or because of the realistic consideration . . . that except in unusual or emergency cases there is no sound warrant for multiple federal and state convictions even assuming constitutional authority.").

permissible joinder cannot be separated at the outset from efficient joinder. As a consequence, both types of joinder under section 11-502(3) should be curtailed, for whatever efficiency gains are realized by the statute cannot justify its effects.

The hierarchies of D.C. Code criminal offenses and penalties are flexible, as are the U.S. Code hierarchies. In most instances the public interest and the interests of defendants are best served by a trial of D.C. Code offenses in the local court, or instead by a trial in the federal court of U.S. Code offenses only.

Conclusion

The interests of residents of the District can best be protected if their legal relationship to Congress in its dual role as the District's federal and local sovereign is both consistent and well-defined. Because of the current ambiguous status of District local law, prosecutors and judges may construe that law at whim as either federal or local. Criminal defendants in the District are particularly prejudiced by this easy definitional manipulation, since the use of either federal or local standards at any stage of the criminal justice process, from bail to parole, may easily be justified. The safest way to prevent these ill effects is to establish three presumptions. First, when Congress enacts laws of nationwide applicability, it should not be permitted to single out District residents for different treatment, using the justification that its powers over the District are "plenary" in nature. Second, when Congress exercises its authority as a state legislature for the District, it should choose to be bound by constitutional principles that define and delimit the relationship between states and their citizens. Third, the principles that govern the interactions between federal and state courts also should govern the dual court system in the District.

These presumptions would bring to light and hold up for scrutiny legislation like section 11-502(3), which is inconsistent with the presumptions of uniformity and of a federal-state court relationship, and which in addition creates classifications that discriminate against District residents. In view of the longstanding restrictions upon the exercise by District residents of political rights, as well as their inability to effect a repeal of section 11-502(3) or to prevent its use by the United States Attorney,[167] these classifications must be judged with particular scrutiny.[168] The D.C. Circuit has held that "[i]t is not enough for such classifications to be merely rational or even plausible; the justification offered must actually be *convincing*."[169] Section 11-502(3) joinder does not meet this requirement.

167. D.C. CODE ANN. § 1-233(a)(8) (1981).

168. Nationally disenfranchised District residents "occupy a profoundly anomalous position in the federal system," United States v. Thompson, 452 F.2d 1333, 1340 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 998 (1972), and may be classified as "a paradigmatically powerless class politically." *See* J. ELY, DEMOCRACY AND DISTRUST 83 (1980).

169. *Thompson*, 452 F.2d at 1341; *see* United States v. Brown, 483 F.2d 1314, 1317 n.14 (D.C. Cir. 1973). *Thompson* noted that "we normally depend upon the vote as 'preservative of other basic civil and political rights,'" 452 F.2d at 1341 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)), but "it is senseless to remit District residents to the political process, since for them there *is* no political process." In the District "the normal arguments for judicial restraint become no more than hollow shibboleths grotesquely detached from the logic which once supported them. There is no reason to pay deference to the views of a representative body which does not in fact represent those against whom it is discriminating." *Thompson*, 452 F.2d at 1341.

Mr. DYMALLY. Mr. Richard Netter, Division IV, D.C. Bar.
[The prepared statement of Mr. Netter follows:]

STATEMENT OF THE LEGISLATION COMMITTEE OF DIVISION IV OF THE D.C. BAR REGARDING THE BILL TO ENACT THE "DISTRICT OF COLUMBIA PROSECUTORIAL AND JUDICIAL EFFICIENCY ACT OF 1985"

Ellen Bass, Co-Chair
David J. Hayes, Co-Chair
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Gerald P. Greiman
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Arthur B. Spitzer
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Richard B. Nettler, Chair*
Joel P. Bennett
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Maurice S. Meyer
Lutz Alexander Prager
Florence Lewis Smith
Donald Ubben
Joseph F. Giordano
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Members of Legislation Committee Rules Who Participated in Drafting Some of the Comments

Steering Committee, Division IV (Courts, Lawyers and the Administration of Justice), D.C. Bar

Dated: September 27, 1985

*Principal Author

STANDARD DISCLAIMER

"The views expressed herein represent only those of Division IV: Courts, Lawyers, and the Administration of Justice of the D.C. Bar and not those of the D.C. Bar or of its Board of Governors."

The Legislation Committee of Division IV of the District of Columbia Bar, which is concerned with courts, lawyers and the administration of justice, has studied the District of Columbia Prosecutorial and Judicial Efficiency Act of 1985 which would (1) require criminal prosecutions in the Superior Court of the District of Columbia to be brought in the name of the District of Columbia (§ 2(d)); (2) provide for the assignment of assistant Corporation Counsels as special assistant United States attorneys (§ 2(e)); (3) make permanent the authority of hearing commissioners (§ 3); (4) amend provisions of the D.C. Code regarding the appointment, tenure and responsibilities of judicial personnel (§§ 4,6-9,11-16); (5) repeal the "super" disbarment provision of the D.C. Code (§ 5); and (6) provide for the certification of questions of local law from appellate courts to the District of Columbia Court of Appeals (§ 10).

The Legislation Committee strongly supports, for reasons more fully stated below, sections four and five and sections eight through sixteen of the proposed bill. It takes no position on the other provisions because (1) it has not had sufficient opportunity to consider them and (2) it may be more appropriate for other Divisions of the D.C. Bar to comment on them. Moreover, because the sections of the bill discussed below are non-controversial, the Legislation Committee recommends that they be considered separately from those provisions dealing with criminal prosecutions. Finally, the Legislation Committee notes

that section six, which raises the retirement age for judges, was already the subject of a bill which became law last year and, therefore, should be deleted from this bill.

1. Sections 4 and 8-16. Judicial Efficiency Provisions.

These provisions seek to implement recommendations of the District of Columbia Court System Study Committee, under the chairmanship of Charles A. Horsky, and an informal legislative group created at the invitation of the Council for Court Excellence and the D.C. Bar's Committee for the Implementation of the Horsky Committee Study. Section 10, which concerns certifications of questions of law to the District of Columbia Court of Appeals and was drafted by the Legislation Committee as an additional recommendation, was not one of the original recommendations of the Horsky Committee. We submit the following comments on some of these sections:

Section 4 would amend D.C. Code § 11-1703(b) and provide the District of Columbia Court System with the authority to select an Executive Officer for the Courts from any group of qualified individuals rather than being limited to a list of candidates chosen by the Director of the Administrative Office of the United States Courts. We support this amendment which gives the local courts more discretion and greater responsibility for managing what is a local function.

Section 10 incorporates legislation recommended by the Legislation Committee for improvement in the administration of justice in the District of Columbia by enabling questions of

local law to be certified to the District of Columbia Court of Appeals from other appellate courts. The section is patterned after the Uniform Certification of Questions of Law Act, 12 U.L.A. Civil Proc. and Rem. Laws at 52. As of January 1983, the provisions of the Uniform Act had been adopted by rule or statute in twenty-two states. From a study of all reported decisions by the United States Court of Appeals for the District of Columbia Circuit since 1980, it appears that, of the 78 decisions applying local law, fourteen of the Court's recent decisions would have been candidates for certification. These decisions required interpretation and application of local law in the absence of controlling precedent by the local courts. The Legislation Committee believes that consistent interpretation of local law is best served by providing the D.C. Court of Appeals with a mechanism whereby it can resolve the local law issues itself when they are determinative of litigation in other appellate courts. Section 10 provides such a mechanism.

Sections 11 and 12 are concerned with the selection process of the D.C. Judicial Nominations Commission. Section 11 provides that the records of the Judicial Nominations Commission are priviledged and exempt from freedom of information act requests, and section 12 provides that meetings of the Commission may be closed to the public. These amendments to the current process, we believe, will ensure fair and effective decisionmaking. The Legislation Committee recommends adoption of these provisions.

2. Section 5. Repeal of Automatic Disbarment Provisions.

The Legislation Committee supports repeal of D.C. Code § 11-2503 (1981). That section has been construed by the District of Columbia Court of Appeals to require the automatic and permanent disbarment of any attorney convicted of a crime of moral turpitude. See In re Colson, 412 A.2d 1160 (D.C. 1979)(en banc); In re Kerr, 424 A.2d 94 (D.C. 1980)(en banc). The Committee believes that because § 11-2503 permits no exceptions it is not necessarily consistent with the administration of justice in the District. We know of no other jurisdiction which mandates permanent disbarment, and the section's application to only attorneys "convicted" of crimes of moral turpitude creates inconsistencies in the discipline of attorneys admitted to practice in the District of Columbia. Instead, in accordance with the provisions of section 15 of Rule XI of the Rules Governing the Bar of the Court of Appeals for the District of Columbia and DR 1-102(A)(4) of the Code of Professional Responsibility, the imposition of sanctions should be made on a case-by-case basis. Moreover, it is the Committee's opinion that, even if ad hoc consideration is not considered appropriate, the question of whether or not an attorney should be automatically and permanently disbarred after being convicted of a crime of moral turpitude is a judgment that should be left open to the District of Columbia Court of Appeals. Repeal of § 11-2503 provides the Court with this responsibility.

The inconsistency in discipline referred to above concerns the fact that § 11-2503 only applies to members of the D.C. Bar convicted of a crime of moral turpitude. An attorney who has committed such an offense but has not been convicted need not be automatically or permanently disbarred. Similarly, someone who was convicted of a crime of moral turpitude before becoming a member of the D.C. Bar is not precluded from applying for admission to the Bar. See In re Manville, 494 A.2d 1289 (D.C. 1985. The drastic effects of § 11-2503 also seem to result in efforts by the Board of Professional Responsibility to find, wherever possible, that a particular conviction was not for a crime of moral turpitude.

In sum, the Legislation Committee strongly supports repeal of D.C. Code § 11-2503 because whatever measures are belived most appropriate for the discipline of members of the D.C. Bar should be left for the District of Columbia Court of Appeals to determine.

Mr. DYMALLY. Mr. Horsky and Mr. Pickering.

Will the witnesses identify themselves, please, for the record?

Mr. HORSKY. I am Charles Horsky, chairman of the Council for Court Excellence in the District of Columbia.

Mr. PICKERING. I am John Pickering, the former president of the District of Columbia Bar; currently Chair of the bar's committee to implement the recommendations of the Courts Study Committee, commonly known as the Horsky committee.

Mr. DYMALLY. Will the witnesses proceed, please?

STATEMENTS OF CHARLES A. HORSKY, PRESIDENT, COUNCIL FOR COURT EXCELLENCE, DISTRICT OF COLUMBIA; AND JOHN H. PICKERING, CHAIRMAN, D.C. BAR COURTS STUDY IMPLEMENTATION COMMITTEE

STATEMENT OF CHARLES A. HORSKY

Mr. HORSKY. Mr. Chairman, perhaps I might begin by identifying the Council for Court Excellence of which I am the president. It is a local civic organization composed of concerned citizens from the legal, business, civic and judicial communities. One of our organizational purposes include fostering better public understanding of the judicial system in the District, and promoting reform and improvements in the administration of justice in the local courts.

I would like to begin by expressing our appreciation to this subcommittee and to its fine staff for your ongoing commitment to developing legislative means to improve the quality of justice and the effectiveness of the District of Columbia courts. The bills before the committee this morning are evidence of the breadth of need and concern of your committee and the Congress in this area.

The council appears before you today in support of the general thrust and direction of H.R. 3370. Under the leadership of a special committee convened by John Pickering, members of our board of directors have worked closely over the past year with the office of the Mayor, officials of the local and Federal courts, appropriate congressional committee staff, and others in furtherance of a number of items in H.R. 3370.

Additionally, the genesis for a number of the items in this bill was an earlier major study by the D.C. Bar, the District of Columbia Court Study Committee. We studied the effects of the District of Columbia Court Reform and Criminal Procedure Act of 1970 and issued a series of nine reports, subsequently published by the U.S. Senate Committee on Governmental Affairs. Twelve of the legislative proposals before you today emanate from that bar effort, as subsequently reviewed and considered by the committee Mr. Pickering chaired. I would like to comment briefly on each of those items.

Section 3, dealing with hearing commissioners is the first one. While we understand and support the underlying need for a permanent authorization for hearing commissioners in the superior court, we believe the legislative proposals now before the committee should be amended in three specific areas: appointment procedure, position security, and disciplinary procedures.

In general, Mr. Chairman, we favor an appointment and position security procedure for the hearing commissioners in superior court similar to that adopted earlier by the U.S. Congress for U.S. magistrates. As was just recently stated, the hearing commissioners are patterned on the U.S. magistrate system, and we think they should be parallel.

Specifically, we favor an 8-year-fixed-term appointment, and the related magistrate appointment and reappointment provisions which require a concurrence of a majority of the active judges in the District following use of an independent merit selection panel composed of residents of the judicial district to assist the court in identifying and recommending the best qualified candidates.

Finally, we recommend that this bill provide that hearing commissioners, as judicial officers who hear a variety of matters specified within the D.C. Code and elsewhere, come within the judicial discipline and conduct regulations and oversight of the canons of judicial ethics and of the D.C. Judicial Disabilities and Tenure Commission, just as the Congress earlier provided for all other judicial officers in the superior court.

The rationale for our proposed amendments concerning hearing commissioners are several. First, regarding the method of appointment, the proposed bill provides that the chief judge appoint and remove these individuals. The procedures adopted by the Congress regarding the appointment and screening of candidates for posi-

tions as U.S. magistrates, as outlined above, we believe to be a much better system.

We also understand that the hearing commissioners currently serving in the court lack civil service safeguards such as are provided as a matter of course to other D.C. Superior Court staff. A fixed appointment term of sufficient duration, such as 8 years, would assure that this important segment of the court family is not inadvertently penalized from a personnel or job security standpoint.

Finally, with regard to the inclusion of the hearing commissioners under the existing D.C. Judicial Disabilities and Tenure Commission authority, we suggest that as quasi-judicial officers it is most appropriate that these court officers' conduct be covered in this manner. This would be particularly true if the amendments suggested by Mr. Polansky are adopted. I might also note that we learned that the practice in this area in other States is that full-time court employees who exercise judicial functions on a full-time basis come within the jurisdiction of the independent judicial conduct agency.

Section 4, dealing with the appointment of the executive officer, we support. Section 4 is consistent with the recommendations of the Court Organization Report of the D.C. Bar's committee referred to earlier, and the D.C. Superior Court Board of Judges favor this notion of local judicial discretion and responsibility for selection of the D.C. courts' administrator.

With respect to section 8, the court supports the provisions, which I might note in large degree have been effectively accomplished earlier through action of Superior Court Chief Judge Moultrie. The provision is necessary, really, to bring the practice and the underlying legislative authorization in line with each other. These issues have been focused on and agreed to by both D.C. Bar committees and the D.C. Superior Court Board of Judges.

The requirement relating to judicial financing reporting, though modest in language, has important workload implications for both a Federal judicial review committee and for our D.C. court judges. We strongly support this section, which would eliminate the present duplicate financial reporting filing requirement to which judges of the superior court and the D.C. Court of Appeals are now subjected. D.C. court judges would continue to be subject to the reporting requirements of the D.C. Judicial Disabilities and Tenure Commission.

With regard to sections 11, 12, and 13, the council supports the several proposed changes in the Judicial Nomination Commission's processes. We believe the values of public access provided for by the D.C. Freedom of Information Act must be balanced with the need for the D.C. Judicial Nomination Commission to receive and consider confidential information for decisionmaking purposes at each stage of the judicial nomination process.

The reforms will ensure the necessary protections to render the selection process more effective, and allow for public input at the appropriate stage of judicial nominations in the District. Both the D.C. Court System Study Committee and the D.C. Courts Implementation Committee reports concur on these three issues. The Board of Judges of the D.C. Superior Court supports the first two

proposals, and has voiced no opinion on the proposal to announce judicial nominations publicly at the time they are sent to the President.

Sections 14, 15, and 16 we support, to give the Tenure Commission and the Judicial Nomination Commission greater facility to share information regarding judges between the two groups. In addition, we support the change in the notice period of from 3 months to 6 months for judges to notify the Tenure Commission regarding their intent as to an additional term.

Finally, section 16 provides a much needed refinement in the existing statutory judicial reappointment evaluation categories. The proposal now before the committee in this regard is, we believe, an appropriate remedy to an unnecessary and potentially divisive evaluation standard for reappointing judges.

Each of the proposals in 14, 15, and 16 were considered by the Court Organization Report of the D.C. Bar's Court System Study Committee, and supported by both the D.C. Courts Study Implementation Committee and the D.C. Superior Court Board of Judges.

While the Council for Court Excellence supports the main thrust of this bill and many of its components, may I ask you, Mr. Chairman, to consider the amendments we have suggested to the provisions concerning hearing commissioners. A copy of our proposed amendments is attached to the statement which I have submitted to the committee. Thank you.

[The prepared statement of Mr. Horsky follows:]

STATEMENT OF CHARLES A. HORSKY,
PRESIDENT OF THE COUNCIL FOR COURT EXCELLENCE,
BEFORE THE
SUBCOMMITTEE ON JUDICIARY AND EDUCATION OF THE
COMMITTEE ON THE DISTRICT OF COLUMBIA
OF THE
UNITED STATES HOUSE OF REPRESENTATIVES

October 1, 1985

Mr. Chairman, Members of the Committee, thank you for inviting the Council for Court Excellence to appear before you today. My name is Charles A. Horsky, and I serve as President of the Council. The Council is a local civic organization in the District of Columbia, composed of concerned citizens from the legal, business, civic and judicial communities. Our organizational purposes include fostering better public understanding of the judicial system in the District of Columbia, and promoting reform and improvements in the administration of justice in the local and federal courts in the District of Columbia.

I would like to begin my brief remarks by expressing our appreciation to this Subcommittee and its fine staff for your ongoing commitment to developing legislative means to improve the quality of justice and the effectiveness of the District of Columbia courts. The bills before the committee this morning are evidence of the breadth of need and concern of your committee and the Congress in this area.

The Council for Court Excellence appears before you today in support of the general thrust and direction of H.R. 3370. Under the leadership of a special committee

convened by John H. Pickering of the D. C. Bar, members of our Board of Directors have worked closely over the past year with the office of the Mayor, officials of the local and federal courts, appropriate Congressional committee staff, and others in furtherance of a number of the legislative items contained in H.R. 3370. Additionally, the genesis for a number of the items in this bill was an earlier major study by the D. C. Bar, the District of Columbia Court System Study Committee. Over a four-year period, we studied the effects of the District of Columbia Court Reform and Criminal Procedure Act of 1970 and issued a series of nine reports, subsequently published by the U. S. Senate Committee on Governmental Affairs, Subcommittee on Governmental Efficiency and the District of Columbia, in April 1983. Twelve of the legislative proposals before you today emanate from that Bar effort, as subsequently reviewed and considered by the Committee Mr. Pickering chaired. I would like to comment briefly on each of them.

Section 3. Hearing Commissioners

While we understand and support the underlying need for a permanent authorization for hearing commissioners in the Superior Court of the District of Columbia, we believe the legislative proposals now before the Committee should be amended in three specific areas: appointment procedure, position security, and disciplinary procedures.

In general, Mr. Chairman, we favor an appointment and position security procedure for the hearing commissioners in Superior Court similar to that adopted earlier by the U. S. Congress for U. S. Magistrates; see 28 U.S.C. §§ 631-639. More specifically, we favor an eight-year fixed term appointment, and the related magistrate appointment and reappointment provision which requires a concurrence of a majority of the active judges in the District following use of an independent merit selection panel, composed of residents of the judicial district, to assist the court in identifying and recommending the best qualified candidates. Finally, Mr. Chairman, we recommend that this bill provide that hearing commissioners, as judicial officers who hear a variety of matters as specified within D. C. Code 11-1732, and elsewhere, come within the judicial discipline and conduct regulations and oversight of the Canons of Judicial Ethics and of the D. C. Judicial Disabilities and Tenure Commission, just as the Congress earlier provided for all other judicial officers in the Superior Court.

The rationale for our proposed amendments concerning hearing commissioners, as outlined briefly above, are several. First, regarding the method of appointment of hearing commissioners, the proposed bill provides that the chief judge of the Superior Court appoint and remove these individuals. The procedures adopted by the U. S. Congress

regarding the appointment and screening of candidates for positions as U. S. Magistrates, as outlined above, we believe to be a better system. We also understand that hearing commissioners currently serving in the Superior Court lack civil service safeguards, such as are provided as a matter of course to other D. C. Superior Court staff. A fixed appointment term of sufficient duration, such as eight years, would assure that this important segment of the court family is not inadvertently penalized from a personnel or job security standpoint. Finally, with regard to the inclusion of the hearing commissioners under the existing D. C. Judicial Disabilities and Tenure Commission authority, we suggest that as quasi-judicial officers it is most appropriate that these court officers' conduct be covered in this manner. I might also note that we learned that the practice in this area in the other states is that full-time court employees who exercise judicial functions on a full-time basis come within the jurisdiction of the independent judicial conduct agency.

Section 4. Appointment of Executive Officer of the District of Columbia Courts

The Council for Court Excellence supports the proposed changes in District of Columbia Code 11-1703 in this area. Section 4 of this bill is consistent with recommendations in the Court Organization Report of the D. C. Bar's

D. C. Court System Study Committee, referred to earlier. I should also note that the D. C. Superior Court Board of Judges favors this notion of local judicial discretion and responsibility for selection of the D. C. Courts' administrator.

Section 8. Reorganization of Audit Responsibility

The Council for Court Excellence supports the provisions of Section 8, which I might note in large degree have effectively been accomplished earlier through action of Superior Court Chief Judge Moultrie. The provision is necessary to bring the practice and the underlying legislative authorization in line with each other. Also, these issues have been focused on and agreed to by both D. C. Bar committees and the D. C. Superior Court Board of Judges.

Section 9. Judicial Financial Reporting Requirements

This proposed section, though modest in language, has important workload implications for both a federal judicial review committee and for our D. C. Courts judges. We strongly support the intent of this section, which would eliminate the present duplicate financial reporting filing requirement to which judges of the Superior Court and of the D. C. Court of Appeals are now subjected. D. C. Courts judges would continue to be subject to the reporting

requirements of the D. C. Judicial Disabilities and Tenure Commission.

Sections 11, 12 and 13. D. C. Judicial Nomination Commission

With regard to Sections 11, 12 and 13 of H.R. 3370, the Council for Court Excellence supports the several proposed changes in the Judicial Nomination Commission's processes. We believe the values of public access provided for by the D. C. Freedom of Information Act must be balanced with the need for the D. C. Judicial Nomination Commission to receive and consider confidential information for decision-making purposes at each stage of the judicial nomination process. The reforms will ensure the necessary protections to render the selection process more effective, and allow for public input at the appropriate stages of judicial nominations in the District of Columbia. Both the D. C. Court System Study Committee and the D. C. Courts Implementation Committee Reports concur on these three issues. The Board of Judges of the D. C. Superior Court supports the first two proposals, and has voiced no opinion on the proposal to announce judicial nominations publicly at the time they are sent to the President.

Sections 14, 15 and 16. D. C. Judicial Disabilities and Tenure Commission

The Council for Court Excellence supports amendment of the D. C. Code as proposed in Section 14 to give the Tenure

Commission and the D. C. Judicial Nomination Commission greater facility to share information regarding judges between the two groups. In addition, we support the change in the notice period of from three months to six months for judges to notify the tenure commission regarding their intent as to an additional term. Finally, Section 16 of the bill provides a much needed refinement in the existing statutory judicial reappointment evaluation categories. The proposal now before the committee in this regard is, we believe, an appropriate remedy to an unnecessary and potentially divisive evaluation standard for reappointing judges.

Each of the proposals contained in Sections 14, 15 and 16 of H.R. 3370 was considered in the Court Organization Report of the D. C. Bar's Court System Study Committee, mentioned above, and supported by both the D. C. Courts Study Implementation Committee and the D. C. Superior Court Board of Judges.

While the Council for Court Excellence supports the main thrust of this bill and many of its components, may I again ask you, Mr. Chairman and Members of the Committee, to consider the amendments we have suggested to the provisions concerning Hearing Commissioners.

Thank you again for permitting me to speak to you today. I would be happy to answer any questions at this time.

The Council for Court Excellence

PROPOSED AMENDMENTS

11-1732. Hearing Commissioners

(a) The judges of the D. C. Superior Court shall appoint hearing commissioners who shall serve in the Superior Court and shall perform the duties enumerated in subsection (d) of this section and such other duties as are consistent with the Constitution and laws of the United States and of the District of Columbia and are assigned by rule of the Superior Court. The appointment shall be by the concurrence of a majority of all judges in active service on the Superior Court. Absent concurrence of all judges in active service, appointment shall be by the Chief Judge of the Superior Court.

(b) Hearing commissioners shall be selected pursuant to standards and procedures approved by the Superior Court Board of Judges which shall contain provision for public notice of all vacancies in hearing commissioner positions and for the establishment of a merit selection panel, composed of lawyer and non-lawyer residents of the District of Columbia who are not employees of the Court, to assist the Court in identifying and recommending persons who are best qualified to fill such positions.

(c) No individual may be appointed or serve as a hearing commissioner under this section unless he or she has been a member of the Bar of the District of Columbia for at least three years.

(d) A hearing commissioner may perform the following functions:

same as subsections under original paragraph (c)

(e) The appointment of any individual as a hearing commissioner shall be for a term of eight years.

(f) Removal of a hearing commissioner during the term for which he or she is appointed shall be only for incompetency, misconduct, neglect of duty, or physical or mental disability.

(g) Hearing commissioners shall be subject to the provisions of 11 D. C. Code 1521-1530 (1981 ed. as amended) governing the authority of the D. C. Commission on Judicial Disabilities and Tenure to suspend, remove or retire a judge and shall abide by the Canons of Judicial Ethics.

Mr. DYMALLY. Mr. Horsky, we note with interest your recommended amendments and the committee will take that under advisement.

Mr. HORSKY. Thank you.

Mr. DYMALLY. Now we will turn to Mr. Pickering. Then we will come back and ask some questions.

STATEMENT OF JOHN H. PICKERING

Mr. PICKERING. Thank you, Mr. Chairman.

I am pleased to appear before the committee this morning in general support of H.R. 3370. My formal testimony is on behalf of the D.C. Bar's D.C. Courts Study Implementation Committee which I chair. I should emphasize that I am speaking for that committee, not for the bar or for its board of governors, consistent with our policy.

H.R. 3370 contains a number of provisions which will help strengthen and improve the functioning of the District of Columbia court system. While I will address myself more directly to several sections of the bill, I believe it is important for the record to reflect that many of the proposals in H.R. 3370 emanate from the major 4-year evaluation study of the D.C. courts, chaired by an ad hoc committee of the D.C. Bar which Mr. Horsky chaired. The final report of that study was printed by the U.S. Senate Committee on Governmental Affairs in April 1983, as Senate Print 98-34.

The Horsky committee study of the D.C. courts made numerous recommendations for improvement in the courts. Each of the studies was reviewed by the judges of the D.C. courts, and by the bar committee which I chair. I am pleased to report many of the recommendations have been implemented administratively by the D.C. courts themselves, and we are particularly appreciative of the time and attention given by Chief Judge H. Carl Moultrie, first, and Judge George Goodrich, who chaired the superior court's committee to review the many recommendations of the Horsky study.

Finally in the way of opening remarks, I should also note that over the past 15 months the bar committee which I chair has been participating with the Council for Court Excellence and with representatives of the Federal and local judiciary and court administration, the executive branch of the D.C. government, U.S. attorney for the District, committee staff from affected congressional committees, and others to study and determine the necessity of legislative action on a number of the improvement recommendations of the Horsky committee that are before this committee now in H.R. 3370.

A list of the persons invited to participate in this informal group, most of whom did so, has been submitted with my statement, and I ask that it be inserted in the record. The work of this group resulted in a general consensus on 12 legislative proposals which are explained in a memorandum dated April 18, 1985. Copies of that memorandum also have been furnished with my statement, and I request that it also be made part of the record of this hearing.

We are pleased that H.R. 3370 incorporates 10 of our 12 legislative proposals. This is done in sections 4, 8, 9, 10, 11, 12, 13, 14, 15, and 16 of the bill. Our bar implementation committee supports and

endorses these sections and urges their enactment. I shall not discuss them in detail since the background and the need for each is fully explained in the memorandum I have submitted. Indeed, I want to note my agreement with what Mr. Horsky has said about the bill, and to comment briefly on the following sections:

First, section 10. This provides for certification of questions of law. It is patterned after the Uniform Certification of Law Act, which has been adopted by statute or court rule in 24 States. The need for it was suggested by the Legislative Committee of Division IV of the bar as a result of inquiries from the U.S. Court of Appeals for the D.C. Circuit. I would permit that court of appeals, any other U.S. Court of Appeals, the U.S. Supreme Court, and the highest court of any State to certify questions of District of Columbia law to the D.C. Court of Appeals which would have discretion to act on the certification. Adoption of this proposal by the Congress would provide a means for obtaining authoritative resolution of undecided questions of D.C. law that may be determinative of proceedings pending in the certifying court. Our group got information, and that information was supplied by the National Center for State Courts and the Corporation Counsel's Office, and that information indicates that this provision would not be used often and would not burden the District of Columbia Court of Appeals. That court has studied the matter; it agrees and has no objection to the proposal.

Finally, on sections 11, 12, and 13, these represent, as Mr. Horsky has indicated, a consensus on the proper balance between the public right to participate in the judicial selection process and the need for confidentiality so the Judicial Nomination Commission can get the best and most adequate information to do its job. We realize that some parts of these three proposals might be adopted by the Council for the District of Columbia. We will, of course, support that. However, as explained in the memorandum I have submitted for the record, there is doubt that the council could do all that is required, so congressional action is proposed since there have to be other areas in which this bill rests.

While we are pleased that 10 of our 12 proposals are included in H.R. 3370, we are disappointed that two of them are not. We urge the committee to include them also. They are items 2 and 9 of the memorandum I have submitted.

Item 2 would give the Judicial Nomination Commission 60, instead of 30, days to process nominations. This committee recognized the need for this additional time when it allowed 60 days for nominating the seven additional judges in the last year or so. This should be made permanent as recommended by the Horsky study. It is supported by the nomination commission, the courts, and our bar committee. It would also parallel the 60 days allowed the tenure commission by section 15 of the bill.

Item 9 would give the Council of the District of Columbia authority periodically to adjust the jurisdictional ceiling for small claims. This would give desirable flexibility, would relieve Congress of the need to legislate on an essentially local matter, and is in line with how the matter is handled in neighboring jurisdictions. We appreciate the fact that this committee a year ago did raise the jurisdictional ceiling to $2,000 after a 14-year period when the level of the

ceiling was unrealistically low. And we think in line with home rule that this would be a desirable authority to give to the District of Columbia Council.

Mr. Chairman, this completes my formal statement. I will be glad to answer any questions you or the committee may have.

[The prepared statement of Mr. Pickering follows:]

TESTIMONY OF JOHN H. PICKERING, CHAIRMAN
D.C. BAR COURTS STUDY IMPLEMENTATION COMMITTEE
BEFORE THE JUDICIARY AND EDUCATION SUBCOMMITTEE
OF THE COMMITTEE ON THE DISTRICT OF COLUMBIA,
U.S. HOUSE OF REPRESENTATIVES
THE HONORABLE MERVYN M. DYMALLY, CHAIRMAN
OCTOBER 1, 1985

Mr. Chairman, Members of the Committee, I am pleased to appear before you this morning in general support of H.R. 3370. My formal testimony is on behalf of the D.C. Bar's D.C. Courts Study Implementation Committee which I chair.

H.R. 3370 contains a number of provisions which will help strengthen and improve the functioning of the District of Columbia Court System. While I will address myself more directly to several sections of the bill, I believe it is important for the record to reflect that many of the proposals in H.R. 3370 emanate from the major four year evaluation study of the D.C. Courts by an ad hoc committee of the D.C. Bar, which Charles A. Horsky chaired. The final report of that study was printed by the U.S. Senate Committee on Governmental Affairs in April, 1983, as Senate Print 98-34. The Horsky Committee study of the D.C. Courts made numerous recommendations for improvement in the Courts. Each of the studies was reviewed by the judges of the D.C. Courts, and by the committee of the D.C. Bar which I chair which is concerned with facilitating their implementation. I am pleased to report that

many of the recommendations have been implemented administratively by the D.C. Courts themselves, and that we are particularly appreciative of the time and attention given by Chief Judge H. Carl Moultrie I and Judge George Goodrich, who chaired the Superior Court's Committee to review the many recommendations of the Horsky Study.

Finally in the way of opening remarks, I should also note that over the past fifteen months the Bar Committee which I chair has been participating with the Council for Court Excellence and with representatives of the federal and local judiciary and court administration, the Executive Branch of the D.C. Government, the U.S. Attorney for the District, committee staff from affected Congressional committees, and others to study and determine the necessity of legislative action on a number of the court improvement recommendations of the Horsky Study that are before this Committee in H.R. 3370.

A list of the persons invited to participate in this informal group, most of whom did so, has been submitted with my statement, and I ask that it be inserted in the record. The work of this group resulted in a general consensus on 12 legislative proposals which are explained in a memorandum dated April 18, 1985. Copies of that memorandum have been furnished to the Committee and I request that it also be made part of the record of this hearing.

We are pleased that H.R. 3370 incorporates 10 of our 12 legislative proposals. This is done in Sections 4, 8, 9, 10, 11, 12, 13, 14, 15, 16 of the bill. Our Bar Implementation Committee supports and endorses these sections and urges their enactment. I shall not discuss these sections in detail since the background and need for each is fully explained in the memorandum I have submitted. Instead I want to note my agreement with what Mr. Horsky has said about the bill, and to comment briefly on the following sections:

Section 10

Section 10 of the bill provides for certification of questions of law. It is patterned after the Uniform Certification of Law Act, 12 U.L.A. 52 (1975), which has been adopted by statute or court rule in twenty-four states. The need for it was suggested by the Legislative Committee of Division IV of the D.C. Bar as the result of inquiries from the U.S. Court of Appeals for the D.C. Circuit. It would permit the U.S. Court of Appeals, any other U.S. Court of Appeals, the U.S. Supreme Court, and the highest court of any state to certify questions of District of Columbia law to the D.C. Court of Appeals which would have discretion to act on the certification. Adoption of this proposal by the Congress would provide a means for obtaining authoritative resolution of undecided questions of

D.C. law that may be determinative of proceedings pending in the certifying court. Information supplied by the National Center for State Courts and the Corporation Counsel's office indicates that this provision would not be used often and would not burden the District of Columbia Court of Appeals. That Court agrees and has no objection to the proposal.

Sections 11, 12 and 13

These three sections represent a consensus on the proper balance between the public right to participate in the judicial selection process and the need for confidentiality so the Judicial Nomination Commission can get the best and most adequate information to do its job. We realize that some parts of these proposals might be adopted by the Council for the District of Columbia. However, as explained in the memorandum I have submitted, there is doubt that the Council could do all that is needed, so Congressional action is proposed.

While we are pleased that 10 of our 12 proposals are included in H.R. 3370, we are disappointed that two are not. We urge the Committee to include them also. They are Items 2 and 9 of the memorandum I have submitted.

Item 2 would give the Judicial Nomination Commission 60, instead of 30, days to process nominations. This Committee

recognized the need for this additional time when it allowed 60 days for nominating the seven additional judges. This should be made permanent as recommended by the Horsky Study. It is supported by the Nomination Commission, the Courts, and our Bar Committee. It would also parallel the 60 days allowed the Tenure Commission by Section 15 of the bill.

Item 9 would give the Council of the District of Columbia authority periodically to adjust the jurisdictional ceiling for small claims. This would give desirable flexibility, would relieve Congress of the need to legislate on an essentially local matter, and is in line with how the matter is handled in neighboring jurisdictions.

Mr. Chairman, this completes my formal statement. I will be glad to answer any questions the Committee may have.

Mr. DYMALLY. Thank you. Both you, Mr. Pickering and Mr. Horsky, I have a couple questions. You did not comment on sections 2, 5, and 7 of the bill. Is there any reason for that?

Mr. HORSKY. Mr. Chairman, the reason I did not is that I appear here as a representative of the Council for Court Excellence, which has a rather elaborate procedure for coming to conclusions on legislative matters. We have not considered the matters in the items covered by those sections, so I am not in a position to comment on them.

Mr. DYMALLY. Do you have any personal view?

Mr. HORSKY. I have not studied them in detail, Mr. Chairman. Section 2 it seems to me is an appropriate thing to do. It seems to me realistic to say that if you commit an offense against the District of Columbia law you ought to be prosecuted in the name of the District of Columbia.

The other one you mentioned was 5——

Mr. DYMALLY. And 7.

Mr. HORSKY. Seven? I don't have any position on that personally at all.

Mr. DYMALLY. Mr. Pickering?

Mr. PICKERING. If I may, Mr. Chairman, like Mr. Horsky, the District of Columbia Bar has strict policies as to how positions can be developed and, consequently, I am limited by what we have studied in our particular committee. We have not studied, nor did the informal group which developed a lot of these, did they focus on those three matters.

Speaking personally, I have no problem at all with I think the intent and the general provisions of section 2. I think it is realistic, and I think that some interchange between the corporation counsel's office and the U.S. attorney's office beyond the interchange that already exists is probably a good thing. So from my own standpoint, I see no problem with that. I can understand why it is just a question of part or not of all, but I think it may be a good beginning.

Section 5 of the bill, it is my understanding—and this again is something we have not studied, so I can't take any official position on it. But I understand the suggestion emanated with the board of professional responsibility to give them some flexibility involving crimes of moral turpitude, and I think that it may be something that requires more study. I think that there was not perhaps the intention to repeal all of the section, but maybe only the first section. But I think that needs to be looked at again. I don't know enough about it to really comment all that intelligently.

Section 7, again I have not studied and I can only say that I can understand the desire because so much of the Public Defender's work is in the local courts; yet, it does seem to me that there is still, as I understand it, some work in the court of appeals. And perhaps the chairmanship might be changed, but I am not so sure that the Federal judiciary should be shut completely out of it. That is just a personal, off-the-cuff sort of reaction.

Mr. DYMALLY. Do you have any personal reaction to H.R. 2050?

Mr. PICKERING. That is wholly beyond any experience that I have in the way in which the parole system operates. I have been, I guess, involved in a parole matter or two, years ago, and I just really have no thoughts one way or another. I am not familiar enough with the system. I listened to the testimony this morning and certainly I think there are some real problems that need to be worked out. But the way in which District of Columbia prisoners basically are dispersed all over the country, personally, that is not a happy situation.

Mr. DYMALLY. But as a lawyer, you see some obvious difficulties with people who are awaiting indictment, getting counsel close to them in this dispersement that takes them all over the country?

Mr. PICKERING. I am sorry I didn't hear, Mr. Chairman.

Mr. DYMALLY. As a lawyer, you obviously have some difficulty with——

Mr. HORSKY. I understand, however, that is being changed.

Mr. DYMALLY. Yes.

Mr. HORSKY. Before conviction they now are housed in the District of Columbia, which will take care of that problem.

Mr. PICKERING. Yes, I know. I certainly made enough trips as an appointed counsel to both the D.C. jail and to Lorton to know the problems that are involved if you had to do much more. I remember years ago when I was on the committee chaired first by now Judge Gesell and then by the late Newell Ellison, the Committee on the Administration of Justice, we found one of the real bottlenecks in the whole criminal justice system was the absence of sufficient buses to bring the prisoners up even from Lorton. It is a real problem.

Mr. DYMALLY. This thing is compounded by the fact that under court order they must move some of the inmates to Petersburg, and now Alderson, before trial.

One final question for both of you. Do you care to comment on the high rate of incarceration and recidivism in the District of Columbia? What are your personal views on this?

Mr. PICKERING. I am really speaking for myself. I don't know what the answer is. I heard Mr. Ridley and I have no basis for disagreeing with that. I do think we have both a very efficient police force here beyond what occurs in many other jurisdictions. It still could be improved, the quality of representation, and on the defense side, the Public Defender Service, being able to handle only roughly I think 15 percent of the prosecutions in the District.

But whether it is something peculiar to the District or simply the effectiveness of the law enforcement, I really can't say. I would be inclined to believe the effectiveness of law enforcement has a great deal to do with it.

Mr. HORSKY. One of the items, Mr. Chairman, that we noticed in the study made by the D.C. Bar was the very high rate of incarceration of juveniles, and I think this is a matter for attention by the D.C. Council. But I think one of the things that we may deal with in the future in our Council for Court Excellence is some suggested modifications of the way juveniles are treated.

As to the recidivism rate, I really have nothing to add to what Mr. Pickering has said. I don't think that the District is peculiar in any sense except that it does have I think a very good police department.

Mr. DYMALLY. We would be interested in your study on juveniles. I think that might be an appropriate subject for a committee hearing, so we would like to hear from you as soon as you are finished.

Mr. HORSKY. You might look at the section in the report printed in the Senate document, which will give you some idea of what we are talking about.

Mr. PICKERING. This is one of the things, Mr. Chairman, this group that we informally brought together from time to time, we concentrated first on looking at what we thought would be a consensus on congressional legislation that would be something that could be a first step in helping improve the judicial process. We have hopes that we can follow the same kind of practice of getting together occasionally and exchanging ideas about things which the District of Columbia Council can deal with, particularly in the juvenile area. It is one of the things that we want to think about moving on.

There are many, many recommendations in the Horsky study on that, some of which can be controversial and some of which probably command a broad consensus. But they all need to be looked at to see if there is something that could be done about them.

Mr. DYMALLY. I think this whole question of juvenile justice would be an appropriate subject for oversight hearings at some subsequent date.

Mr. HORSKY. We would be glad to participate.

Mr. DYMALLY. Thank you very much.

The record will be held open for approximately 5 days in the event any witness wishes to place any testimony or statement into the record.

Without any more business, the meeting is adjourned.

[Whereupon, at 10:35 a.m., the subcommittee was adjourned, to reconvene subject to the call of the Chair.]

[The following correspondence was received by the subcommittee:]

COUNCIL OF THE DISTRICT OF COLUMBIA

WASHINGTON, D. C. 20004

September 30, 1985

The Honorable Mervyn M. Dymally
Chairman, Subcommittee on Judiciary
and Education
Committee on the District of Columbia
U.S. House of Representatives
Room 1310, Longworth House Office Building
Washington, D.C. 20515

Dear Chairman Dymally:

Thank you for the invitation to appear before the Subcommittee on Judiciary and Education to present testimony on H.R. 2050 and H.R. 3370. Unfortunately, I will be unable to attend the hearing. The Council's Committee of the Whole meeting, which I chair, is scheduled at approximately the same time as the hearing. As you may be aware, the Council meets every Tuesday morning. Consequently, it is difficult for any member of the Council to attend Congressional hearings that are scheduled on Tuesdays. Fully recognizing Congress' need to set its schedule in accordance with its needs, I would like to respectfully renew my request that when there is an option as to scheduling that the Council's inability to attend functions scheduled on Tuesdays be taken into consideration. Any accommodation that can be made in this regard would be greatly appreciated.

While I will not be able to present testimony at the hearing, I am enclosing a statement for the record. I would greatly appreciate it if the statement was included in the official hearing record.

Thank you for your consideration of the matters raised in the enclosed statement. I look forward to working with the Subcommittee as it considers other issues effecting the District of Columbia.

Sincerely,

David A. Clarke
Chairman

Enclosure
DAC:jcs

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

SEP 27 1985

Honorable Ronald Dellums
Chairman
Committee on the District of Columbia
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H.R. 2050, a bill "to give to the Board of Parole of the District of Columbia exclusive power and authority to make parole determinations concerning prisoners convicted of violating any law of the District of Columbia, or any law of the United States applicable exclusively to the District." As set forth in more detail below, the Department of Justice believes that the change sought by this bill would not improve the law enforcement and corrections programs in the District of Columbia and we therefore oppose this bill. Furthermore, we believe that Congress should not undertake piecemeal revisions of the D.C. corrections programs until completion of a thorough and comprehensive review of all sentencing and correctional practices.

At present under the D.C. Code, the determination of parole jurisdiction is controlled by the place of incarceration rather than the jurisdiction of conviction. The result is that the D.C. Board of Parole makes parole decisions for D.C. Code offenders when they are housed in D.C. institutions and the United States Parole Commission makes parole decisions for D.C. Code offenders when they are housed in federal institutions. At the present time over 1,400 D.C. Code offenders are held in Federal Bureau of Prisons facilities. This represents the designed capacity of three modern correctional institutions. Although some of these are in federal custody because of their extremely violent criminal histories or to separate them from other District of Columbia inmates, the bulk of them are in federal custody primarily because of shortages of space to house inmates in the District of Columbia system. Thus, two factors not addressed in H.R. 2050 are the real burden to the Federal Bureau of Prisons of confining this large group of local offenders and the serious problems involved in adding these geographically dispersed inmates to the D.C. Parole Board's caseload.

In the 1930's when the D.C. Board of Parole was established, this divided jurisdictional scheme may have met correctional needs. The Comprehensive Crime Control Act of 1983 abolishes the United States Parole Commission in 1991, however, and legislative attention must clearly be given to the questions of future parole responsibility for D.C. Code offenders designated to Federal institutions. At the same time every effort must be made to insure that the District of Columbia will provide adequate prison space to house its sentenced criminals.

A larger question is what role should parole serve as a correctional tool in the District of Columbia? The legislative history of the Comprehensive Crime Control Act of 1984, P.L. 98-473, clearly reflects the Congressional determination that the "rehabilitation model" upon which the Federal sentencing and parole system was based is no longer valid. S. Rep. No. 225, 98th Congress 1st Sess. 38 (1983). Based upon a study spanning a decade conducted by the National Commission on Reform of Federal Criminal Law, it was concluded that the Federal sentencing and parole system resulted in significant disparities in criminal sentences. As stated in the Senate Report:

> The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward.
>
> The [Comprehensive Crime Control Act of 1984 (CCCA)] meets the critical challenges of sentencing reform. The [CCCA's] sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain. The current effort constitutes an important attempt to reform the manner in which we sentence convicted offenders. The Committee believes that the [CCCA] represents a major breakthrough in this area. Id. at 65.

The current D.C. sentencing and parole system does not reflect this new understanding of the limitations of the "rehabilitation model" as described above.

In addition, the District of Columbia parole system has other demonstrated problems. When we reviewed similar legislation two years ago [H.R. 3369], this matter was discussed in detail in our letter dated July 25, 1983 from Assistant Attorney General Robert A. McConnell to you. The Department noted at that time that the D.C. Board of Parole, according to its 1982 annual report, granted parole at initial hearings to 61% of the adult offenders and that 73% of the remainder were granted parole upon a rehearing. The Board also reported however, that based upon a study of a selected sample of 322 parolees released on parole between 1977 and 1979, 52% were re-arrested during the first two years of parole supervision. Of the parolees who were re-arrested, 77% were convicted for crimes committed while on parole. Given the very high percentage of parolees released at the time of initial parole consideration and the very high rate of recidivist criminal activity among those released, the policies and procedures of the D.C. Board of Parole were called into serious question.

We also pointed out that despite the large number of D.C. parolees who commit crimes following parole release, parole apparently was revoked in a relatively small percentage of the cases. In that regard, the D.C. Board of Parole reported that of those parolees in its 1977-1979 sample who were convicted of crimes while on parole, parole was revoked because of the new offense in less than one half of the cases. Although the reason for this statistic was not explained, it appears that it may be attributed to the D.C. Parole Board policy of not issuing parole violator warrants for certain offenses. In this regard, the Board listed in its 1982 Annual Report the types of offenses it terms "Eligible Offenses" for purposes of issuance of parole violator warrants. It appears that as a matter of policy, the Board will not issue parole violator warrants for burglary of commercial establishments, possession of firearms (unless the defendant is arrested with the weapon in his hand or on his person), grand larceny, embezzlement, fraud, forgery and uttering and for a host of other violations of the District of Columbia Code or the United States Code.

This apparent policy which allows substantial numbers of parolees to continue on parole even after arrest and conviction of serious crimes was of significant concern to us in the past. If these matters have not yet been completely remedied, and it may be too early to conclude that they have, then similar concern is presently warranted. Under H.R. 2050, the jurisdiction of the D.C. Board of Parole would be substantially expanded to include those D.C. Code offenders presently under the jurisdiction of the U.S. Parole Commission. These offenders, however, include some of

the most dangerous and violent criminals convicted in the District of Columbia. Premature release of such individuals pursuant to existing parole policies would pose a real and direct threat to law enforcement interests in the District of Columbia.

We believe it is time for a thorough legislative review of District of Columbia sentencing and correctional practices. A major expansion of the capacity of D.C. correctional facilities is essential. The Federal Bureau of Prisons is seriously overcrowded and can no longer accept the overload of the District of Columbia system. This is especially true in light of the increased D.C. prison population that would result, at least temporarily, from a more responsibly run parole system. Replacement of the parole system in the District of Columbia by a sentencing guideline system similar to that adopted by Congress in the Comprehensive Crime Control Act of 1984 should be considered. While expansion of the D.C. inmate capacity must begin at once, other changes can be more thoroughly considered than is done in H.R. 2050.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Phillip D. Brady
Acting Assistant Attorney General

H.R. 2050 AND H.R. 3370

THURSDAY, OCTOBER 10, 1985

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON JUDICIARY AND EDUCATION,
COMMITTEE ON THE DISTRICT OF COLUMBIA,
Washington, DC.

The subcommittee met, pursuant to call, at 9:27 a.m., in room 1310, Longworth House Office Building, Hon. Mervyn M. Dymally (chairman of the subcommittee) presiding.

Present: Representatives Dymally and Combest.

Also present: Donald M. Temple, senior staff counsel; Donn G. Davis, senior legislative associate; Sandra Fiske, staff assistant; and Ronald P. Hamm, minority staff assistant.

Mr. DYMALLY. The Subcommittee on Judiciary and Education is called to order to consider two bills, H.R. 2050 and H.R. 3370.

Thus far this session the subcommittee has favorably reported to the full committee H.R. 2717, a bill to establish a separate and independent jury system for the District of Columbia. Similar to H.R. 2717, the bills before us this morning address both home rule concerns and the improvement and efficiency of the local judicial system.

H.R. 2050 is a reintroduction of H.R. 3369, a bill introduced and passed by the House of Representatives in the 98th Congress. It would transfer parole over District of Columbia Code offenders in Federal prisons from the U.S. Parole Commission to the District of Columbia Parole Board.

There are over 1,700 District of Columbia Code offenders housed in the Federal Bureau of Prison facilities. Male District of Columbia Code offenders are placed in Federal facilities for selective custody and various other reasons. Female District of Columbia offenders sentenced to greater than 1-year terms are placed in Federal facilities due to the absence of a facility specifically for female offenders in the District of Columbia. Most of these female offenders are confined at Alderson, WV, over 300 miles from the District of Columbia.

Under present law, at section 24–209 of the District of Columbia Code, the place of an offender's confinement determines parole authority. This law is contrary to the current Federal-State parole practices.

According to the U.S. Parole Commission, the District of Columbia is the only government housing inmates in Federal correction institutions which does not retain parole authority. Several Federal lawsuits by both male and female District of Columbia Code offenders in Federal prisons have been filed as a result of these practices.

As we consider this bill, several points are worth noting. Since the House passed this bill in the last Congress, the District of Columbia has revised its parole guidelines consistent with certain recommendations made by Senator Specter and the U.S. attorney for the District of Columbia. Also, the prison overcrowding problem in the District of Columbia has resulted in an increased number of District of Columbia inmates being transferred to Federal prisons. Further, Congress recently passed the Comprehensive Crime Control Act of 1983 which would abolish Federal parole and the U.S. Parole Commission in 1991.

Most important, section 24-209 became law almost 50 years ago and 40 years prior to the Home Rule Act. It's language remains ambiguous. For example, neither this provision, nor its legislative history, answers whether the U.S. Parole Commission should apply District of Columbia parole standards in its parole consideration of District of Columbia Code offenders. Given this history, appropriate amendment would seem long overdue.

Lawsuits filed in response to this provision remain unsolved and continue to consume time and expense. This legislation provides a practical and legally sound remedy to this longstanding problem.

H.R. 3370, the Prosecutorial and Judicial Efficiency Act of 1985, is a bill which evolves in large part from recommendations of the District of Columbia Court Study Committee under the chairmanship of Mr. Charles Horsky, the District of Columbia courts, and private counsel. This bill seeks to clarify that District of Columbia Code matters do not arise under the laws of the United States, and District of Columbia Code offenders are crimes against the District of Columbia and not against the United States.

Before we adjourn, I want to welcome a new member, Mr. Combest, to the committee. Welcome, Mr. Combest.

Mr. COMBEST. Thank you, sir.

Mr. DYMALLY. Now, what we propose to do is to recess until the first rollcall. During the 15-minute break in the rollcall, we will assemble in the Rayburn Room just behind the House Chambers and proceed to conduct the business of the subcommittee. So the subcommittee is now in recess.

[Whereupon, at 9:34 a.m., the subcommittee was recessed.]

[Report 98-909 follows:]

98TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
2d Session } { 98-909

D.C. JUDICIAL APPOINTMENT AUTHORITY ACT

JULY 25, 1984.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. DELLUMS, from the Committee on the District of Columbia, submitted the following

REPORT

[To accompany H.R. 5951]

[Including cost estimate of the Congressional Budget Office]

The Committee on the District of Columbia, to whom was referred the bill (H.R. 5951) to change the appointment process for judges of District of Columbia courts, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment strikes out all after the enacting clause of the bill and inserts a new text which appears in italic type in the reported bill.

PURPOSE OF THE BILL

The purpose of H.R. 5951 is to transfer judicial appointment authority over judges of the Superior Court and Court of Appeals of the District of Columbia from the President to the District of Columbia Mayor and confirmation authority from the United States Senate to the District of Columbia City Council and to increase the jurisdictional limit of the Small Claims Court of the District of Columbia.

BACKGROUND OF THE LEGISLATION

Prior to 1970, the United States District Court was the court of general unlimited jurisdiction for the District of Columbia. It functioned as both a federal and state court, exercising jurisdiction over matters of a purely local nature. Additionally, the District of Columbia had three trial courts of limited or special jurisdiction: The Court of General Sessions, a Juvenile Court and a Tax Court.

In 1970 Congress passed Public Law 91-358, the District of Columbia Court Reform and Criminal Procedure Act, which became effective in February, 1971. The act reorganized the District's courts, expanded their jurisdiction, authorized additional judgeships, established the

joint Committee on Judicial Administration and created the Commission on Judicial Disabilities and Tenure.

Most important, this Act created a District of Columbia Court of Appeals, the highest court in the District, equivalent to the court of last resort in any state. Likewise, final judgments of this court became reviewable by the United States Supreme Court. This Act also abolished the Court of General Sessions, the Juvenile Court and the Tax Court and created the District of Columbia Superior Court with the following divisions: Civil, Criminal, Family, Probate, and Tax. The Landlord and Tenant and the Small Claims and Conciliation Courts function as branches of the civil division. Congress expressly established the District of Columbia judicial system analagous to state judicial systems.

In December, 1973 Congress passed the District of Columbia Self Government and Governmental Reorganization Act of 1973, Public Law 93–198 (hereafter the Home Rule Act).

The House version, H.R. 16196, proposed the same language provided in H.R. 5951 regarding Mayoral nomination of judges and City Council confirmation (See Report 91–907).

The Senate version, S. 2601, also provided for Mayoral nomination of judges. However, it retained confirmation authority in the Senate (See Senate Report 91–405). A House floor amendment retained presidential appointment authority. At conference presidential appointment of judges and Senate confirmation authority were both retained. (See Conference Report 91–1303)

The 1973 Self Government and Governmental Reorganization Act created a Judicial Nomination Commission authorized to recommend nominations to the President for appointment of judges to District of Columbia courts. It established residency and other requirements for judicial nominations and appointments.

The Judicial Nomination Commission and the Judicial Disabilities and Tenure Commission (hereafter, Tenure Commission) each consists of seven members similarly appointed. One member is appointed by the President; two members by the unified District of Columbia Bar Board of Governors; two members by the Mayor, one of whom shall not be a lawyer; one non lawyer member by the Council and one member appointed by the Chief Judge of the United States District Court for the District of Columbia, who is required to be an active or retired Federal judge serving in the District.

The Judicial Nomination Commission submits names of three candidates to the President thirty days before a judicial vacancy occurs. If more than one vacancy occurs, the Commission must submit separate lists of candidates for each vacancy. Once the President declares his nomination the Senate must confirm it. If the President fails to nominate a candidate within sixty days after receiving a list of names, the Commission may appoint a candidate from the list with the advice and consent of the Senate.

A person must be a United States citizen and a District of Columbia resident to receive a judicial appointment in a District of Columbia court. Additionally, he or she must have been an active member of the District of Columbia Bar and engaged in the active practice of

law in the District for five years preceding the nomination, or for five years must have served on the faculty of a law school in the District or have been employed as an attorney by the United States or District of Columbia government.

Judges of District of Columbia Courts are appointed for fifteen year terms. Upon completion of their terms, judges continue to serve until reappointed or a successor is appointed. A judge's term is automatically extended for another full term if the Tenure Commission determines the candidate to be "exceptionally well qualified" or "well qualified" for reappointment. If the Tenure Commission determines the candidate to be simply "qualified" for reappointment, the President may nominate such candidate and refer the nomination for Senate confirmation. If the Tenure Commission determines the candidate to be "unqualified" for reappointment, a judge becomes ineligible for reappointment.

In the District of Columbia Superior Court there is presently authorized one chief judge and fifty associate judges. In the District of Columbia Court of Appeals there is one chief and eight associate judges. The Judicial Nomination Commission designates a chief judge for both courts.

The jurisdiction of these respective courts is purely local in nature. The Court of Appeals has jurisdiction over appeals from all final orders, judgements and interlocutory orders of the District of Columbia Superior Court and all orders and decisions of the Mayor, the City Council or any agency of the District of Columbia. The Superior Court has jurisdiction over any civil action or other matter brought in the District of Columbia unless exclusive jurisdiction is vested in a Federal court in the District of Columbia. It also has jurisdiction over any violation of criminal laws applicable exclusively to the District of Columbia.

On January 2, 1979 pursuant to section 602(a)(9) of the District of Columbia Self-Government and Reorganization Act, Congress transferred to the local government the authority to amend and repeal provisions of the District of Columbia Criminal Code. Thus, the District not only maintains its own civil and criminal laws, it is also vested with authority to amend those laws. Pursuant to section 602(c)(1) and (2) of the Home Rule Act, the council chairman is required to transmit such District of Columbia government acts to the Congress for a thirty day review period before such acts can become law. During this period, any single member of Congress may introduce a disapproval resolution which, if passed by both Houses of Congress, results in a legislative veto of the locally passed legislation.

In August, 1980 Representative Dellums, Chairman of the House Committee on the District of Columbia, introduced H.R. 7988 the Criminal Justice Reform bill. This bill sought to establish a District of Columbia Attorney General, transfer prosecutorial authority to the local Attorney General for local offenses and provide for local appointment of judges. The bill was referred to the Subcommittee on Judiciary, Education and Manpower, then chaired by Representative Mazzoli.

On September 23, 1980, the Subcommittee held a hearing on this proposal and received extensive testimony. The Subcommittee took no action.

In May, 1984 Representatives Bliley, Fauntroy, Dymally and McKinney introduced H.R. 5636, a bill to change the appointment process for judges of the District of Columbia and to increase the jurisdictional limit of the Small Claims Court from $750 to $2,000.

On June 14, 1984 the Committee on the District of Columbia, Subcommittee on Judiciary and Education held hearings on H.R. 5636 and received statements from the following witnesses: Joseph diGenova, United States Attorney for the District of Columbia; Pauline Schneider, on behalf of Mayor Marion Barry; David Clarke, District of Columbia City Council Chairman; Chief Judge Theodore R. Newman, Jr., Chairman, Joint Committee on Judicial Administration; Samuel Harahan, Executive Director, Council for Court Excellence; Ellen Bass, Co-chair of District IV, District of Columbia Bar; and Iverson Mitchell, III, President of the Washington Bar Association.

All witnesses indicated support for increasing the jurisdictional limit of the Small Claims Court of the District of Columbia from $750 to $2,000.

The Mayor, City Council Chairman and the President of the Washington Bar Association supported the complete bill.

The United States Attorney for the District of Columbia opposed transfer of judicial nomination and confirmation authority to the Mayor and the City Council. The Council for Court Excellence and Division IV of the District of Columbia Bar took no position. Following the hearing, the subcommittee passed the bill by voice vote and referred it to the full committee. The full committee passed H.R. 5636 by a unanimous voice vote with seven members present and four proxies in support of the bill.

Need for Legislation on Judicial Appointment Authority

Since 1970 Congress has passed legislation on a careful but consistent basis to transfer full self-government over local affairs from the federal government to the District of Columbia government.

This bill is a step in the same direction. H.R. 5951 seeks to grant the District of Columbia the same autonomy over selection of judges in its court system that states have over selection of judges in state court systems. The proposal to transfer judicial appointment authority to the local government is a timely and logical proposal, consistent with the nation's deep rooted democratic tradition.

In this connection, Mr. Dymally, Chairman of the Subcommittee on Judiciary and Education, stated:

> The District has a local democratic government which includes the Executive, Legislative and Judicial branches and its structure mirrors federal and most state and local political enterprises. . . . Most important, it has citizens who unlike other Americans have not realized full citizenship rights. Thus, I see no federal interest here. I see no threat to the independence or quality of the Judiciary.

Mr. Bliley, the ranking minority member on the Subcommittee stated:

> . . . we have had 12 years of Home Rule and I think it is reasonable for the citizens who pay taxes and who elect the Mayor to have some imput into the appointment of judges.
>
> * * * * *
>
> . . . I think that if we really truly believe in Home Rule, that having the Mayor do the appointment is only fair.

In September, 1980 Chief Judge Theodore Newman of the District of Columbia Court of Appeals testified on the transfer of judicial appointment authority. His statement summarized this bill quite adequately:

> Judges will be doing the same work they are doing now. They will have the same term of office they have now. They will have the same jurisdiction. They will have the same power. The only difference is their commission of office will be signed by the Mayor, rather than by the President of the United States.
>
> This bill seeks to recognize the rights of District of Columbia citizens and to make the selection of local judges consistent with the selection of federal and state court judges.

SMALL CLAIMS JURISDICTIONAL LIMIT

In the 1970 District of Columbia Court Reform and Criminal Procedure Act, the small claims jurisdictional limit was increased from $150 to $750. There has been no increase in this jurisdictional limit in fourteen years.

Presently, there is a backlog in the number of cases pending in the civil division of the District of Columbia Superior Court. On this issue, District of Columbia Court Study Committee of the District of Columbia Bar concluded that small claims cases are actually clogging the civil division with a significant impact on the motions calendar. Statistics prepared for the clerk of the civil division of the District of Columbia Superior Court in 1983 show that, based on a sample of 990 civil division cases, 51 percent involved claims up to $2,500.

It is clear that a shift of smaller claims to the small claims branch would greatly aid the Superior Court in calendaring and disposing of pending civil cases. Further, an increased jurisdictional limit would provide parties a less expensive and speedier forum for resolution of their complaints.

Only one judge has handled small claims cases from 1970 to date. Hence, the Committee recognizes that the increased jurisdictional limit will likely result in an increased small claims calendar and workload. The Committee is concerned that the Court adequately prepare for the transition of cases to the small claims court in order to continue its efficient and timely disposition of cases.

Additionally, the Committee is concerned that the court provide maximum access with minimum inconvenience to parties in the small claims court, particularly consumers who are subject to risk of job or pay loss. Thus, the court may consider it practical to expand its

evening sessions and to adopt a half day scheduling system. Evening sessions tend to minimize both business and consumer risk of loss. Moreover, the near certainty of schedule is beneficial to both the court and the parties.

Finally, the Committee is concerned that the small claims court insure the changes in its jurisdictional limit and schedule are publicized throughout the District of Columbia.

Summary

These bills address both Home Rule concerns and the quality of efficiency of the local judicial process. These bills neither create any new authority, nor require any additional spending.

Committee Vote

On June 28, 1984 the Full Committee, with a quorum present, took up the measure and passed it by a unanimous voice vote.

Statements Required by Rule XII(l)(3) of House Rules
Oversight Findings and Recommendations

The Committee's oversight findings with respect to the matters with which the legislation is concerned remain as a part of its continuing congressional oversight required by the Constitution and specifically provided for in the Home Rule Act (sections 601, 602, 604, and 731 of Public Law 93–198).

Committee on Government Operations Summary

No oversight findings and recommendations have been received which relate to this measure from the Committee on Government Operations under clause 2(b)(2) of Rule X.

Inflationary Impact

The bill, if enacted into law, will have no forseeable inflationary impact on prices or costs in the operation of the national economy.

Budget Authority

This legislation for the District of Columbia creates no new budget authority or tax expenditures by the Federal Government. Therefore, a statement required by section 308(a) of the Congressional Budget and Impoundment Control Act of 1974 is not necessary.

Congressional Budget Office—Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, D.C., July 6, 1984.

Hon. Ronald V. Dellums,
Chairman, Committee on the District of Columbia. U.S. House of Representatives, Longworth House Office Building, Washington, D.C.

Dear Mr. Chairman: The Congressional Budget Office has reviewed H.R. 5951, the District of Columbia Judicial Appointment Authority

Act of 1984, as ordered reported by the House Committee on the District of Columbia, June 28, 1984. We estimate no significant budget impact to federal, state or local governments would result from enactment of this bill.

H.R. 5951 amends the District of Columbia Self-Government and Governmental Reorganization Act to allow the Mayor of the District of Columbia (D.C.), with the advice and consent of the D.C. Council, to nominate and appoint judges of the D.C. Courts. Under current law, the appointments are made by the President, with the advice and consent of the Senate. The bill also changes the D.C. Judicial Nomination Commission and the D.C. Commission on Judicial Disabilities and Tenure from seven-member commissions with some members serving terms of different lengths, to five-member commissions with all members serving six-year terms.

H.R. 5951 also expands the jurisdiction of the Small Claims and Conciliation Branch of the Superior Court to include any action for the recovery of sums of money not exceeding $2,000. Based on information from the Executive Office of the D.C. Courts, we expect that enactment of this provision would increase the calendar of the small claims court, but decrease by a corresponding amount the calendar of the civil court. This shift in jurisdiction is not expected to have any signifcant budget impacts to the D.C. government.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

RUDOLPH G. PENNER.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of Rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

THE DISTRICT OF COLUMBIA SELF-GOVERNMENT AND GOVERNMENTAL REORGANIZATION ACT

* * * * * * *

TITLE IV—THE DISTRICT CHARTER

* * * * * * *

PART C—THE JUDICIARY

JUDICIAL POWERS

SEC. 431. (a) * * *

* * * * * * *

(e)(1) No person may be appointed to the Tenure Commission unless he—

(A) is a citizen of the United States;

(B) is a bona fide resident of the District and has maintained an equal place of abode in the District for at least ninety days immediately prior to his appointment; and

(C) is not an officer or employee of the legislative branch or of an executive or military department or agency of the United States (listed in sections 101 and 102 of title 5 of the United States Code); and (except with respect to the person appointed or designated according to paragraph (3)(E) is not an officer or employee of the judicial branch of the United States, or an officer or employee of the District government (including its judicial branch).

(2) Any vacancy on the Tenure Commission shall be filled in the same manner in which the original appointment was made. Any person so appointed to fill a vacancy occurring other than upon the expiration of a prior term shall serve only for the remainder of the unexpired term of his predecessor.

(3) In addition to all other qualifications listed in this section, lawyer members of the Tenure Commission shall have the qualifications prescribed for persons appointed as judges of the District of Columbia courts. Members of the Tenure Commission shall be appointed as follows:

[(A) One member shall be appointed by the President of the United States.]

[(B)] (*A*) Two members shall be appointed by the Board of Governors of the unified District of Columbia Bar, both of whom shall have been engaged in the practice of law in the District for at least five successive years preceding their appointment.

[(C) Two members shall be appointed by the Mayor, one of whom shall not be a lawyer.]

(*B*) *One member shall be appointed by the Mayor, and shall be a lawyer.*

[(D)] (*C*) One member shall be appointed by the Council, and shall not be a lawyer.

[(E)] (*D*) One member shall be appointed by the [chief judge of the United States District Court] *District of Columbia Joint Committee on Judicial Administration* for the District of Columbia, and such member shall be an active or retired [Federal] *District of Columbia Court* judge serving in the District.

No person may serve at the same time on both the District of Columbia Judicial Nomination Commission and on the District of Columbia Commission on Judicial Disabilities and Tenure.

* * * * * * *

NOMINATION AND APPOINTMENT OF JUDGES

SEC. 433. (a) Except as provided in section 434(d)(1), the [President] *Mayor* shall nominate, from the list of persons recommended to him by the District of Columbia Judicial Nomination Commission established under section 434, and, by and with the advice and consent of the [Senate], *Council* appoint all judges of the District of Columbia courts.

(b) No person may be nominated or appointed a judge of a District of Columbia court unless he—

(1) is a citizen of the United States:

(2) is an active member of the unified District of Columbia Bar and has been engaged in the active practice of law in the District for the five years immediately preceding his nomination or for such five years has been on the faculty of a law school in the District, or has been employed as a lawyer by the United States or the District of Columbia government;

(3) is a bona fide resident of the District of Columbia and has maintained an actual place of abode in the District for at least ninety days immediately prior to his nomination, and shall retain such residency as long as he serves as such judge, except judges appointed prior to the effective date of this part who retain residency as required by section 1501(a) of title 11 of the District of Columbia Code shall not be required to be residents of the District to be eligible for reappointment or to serve any term to which reappointed;

(4) is recommended to the [President], *Mayor*, for such nomination and appointment, by the District of Columbia Judicial Nomination Commission; and

(5) has not served, within a period of two years prior to his nomination, as a member of the Tenure Commission or of the District of Columbia Judicial Nomination Commission.

(c) Not less than three months prior to the expiration of his term of office, any judge of the District of Columbia courts may file with the Tenure Commission a declaration of candidacy for reappointment. If a declaration is not so filed by any judge, a vacancy shall result from the expiration of his term of office and shall be filled by appointment as provided in subsections (a) and (b). If a declaration is so filed, the Tenure Commission shall, not less than thirty days prior to the expiration of the declaring candidate's term of office, prepare and submit to the [President] *Mayor* a written evaluation of the declaring candidate's performance during his present term of office and his fitness for reappointement to another term. If the Tenure Commission determines the declaring candidate to be exceptionally well qualified or well qualified for reappointment to another term, then the term of such declaring candidate shall be automatically extended for another full term, subject to mandatory retirement, suspension, or removal. If the Tenure Commission determines the declaring candidate to be qualified for reappointment to another term, then the [President] *Mayor* may nominate such candidate, in which case the [President] *Mayor* shall submit to the [Senate] *Council* for advice and consent the renomination of the declaring candidate as judge. If the [President] *Mayor* determines not to so nominate such declaring candidate, he shall nominate another candidate for such position only in accordance with the provisions of subsections (a) and (b). If the Tenure Commission determines the declaring candidate to be unqualified for reappointment to another term, then the [President] *Mayor* shall not submit to the [Senate] *Council* for advice and consent the renomination of the declaring candidate as judge and such judge shall not be eligible for reappointment or appointment as a judge of a District of Columbia court.

DISTRICT OF COLUMBIA JUDICIAL NOMINATION COMMISSION

SEC. 434. (a) There is established for the District of Columbia the District of Columbia Judicial Nomination Commission (hereafter in this section referred to as the "Commission"). The Commission shall consist of [seven] *five* members selected in accordance with the provisions of subsection (b). Such members shall serve for terms of six years [, except that the member selected in accordance with subsection (b)(4)(A) shall serve for five years; of the members first selected in accordance with subsection (b)(4)(B), one member shall serve for three years and one member shall serve for six years; of the members first selected in accordance with subsection (b)(4)(C), one member shall serve for a term of three years and one member shall serve for five years; the member first selected in accordance with subsection (b)(4)(D) shall serve for six years; and the member first appointed in accordance with subsection (b)(4)(E) shall serve for six years.]. In making the respective first appointments according to subsections (b)(4)(B) and (b)(4)(C), the Mayor and the Board of Governors of the unified District of Columbia Bar shall designate, at the time of such appointments, which member shall serve for the shorter term and which member shall serve for the longer term.

(b)(1) * * *

* * * * * * *

(4) In addition to all other qualifications listed in this section, lawyer members of the Commission shall have the qualifications prescribed for persons appointed as judges for the District of Columbia courts. Members of the Commission shall be appointed as follows:

[(A) One member shall be appointed by the President of the United States.]

[(B)] (*A*) Two members shall be appointed by the Board of Governors of the unified District of Columbia Bar, both of whom shall have been engaged in the practice of law in the District for at least five successive years preceding their appointment.

[(C) Two members shall be appointed by the Mayor, one of whom shall not be a lawyer.]

(*B*) *One member shall be appointed by the Mayor, and shall be a lawyer.*

[(D)] (*C*) One member shall be appointed by the Council, and shall not be a lawyer.

[(E)] (*D*) One member shall be appointed by the [chief judge of the United States District Court for the District of Columbia,] *District of Columbia Courts Joint Committee on Judicial Administration*, and such member shall be an active or retired [Federal] *District of Columbia Court* judge serving in the District.

* * * * * * *

(d)(1) In the event of a vacancy in any position of the judge of a District of Columbia court, the Commission shall, within thirty days following the occurrence of such vacancy, submit to the [President,] *Mayor*, for possible nomination and appointment, a list of three persons for each vacancy. If more than one vacancy exists at one given time, the Commission must submit lists in which no person is named

more than once and the [President] *Mayor* may select more than one nominee from one list. Whenever a vacancy will occur by reason of the expiration of such a judge's term of office, the Commission's list of nominees shall be submitted to the [President] *Mayor* not less than thirty days prior to the occurrence of such vacancy. In the event the [President] *Mayor* fails to nominate, for [Senate] *Council* confirmation, one of the persons on the list submitted to him under this section within sixty days after receiving such list, the Commission shall nominate, and with the advice and consent of the [Senate,] *Council*, appoint one of those persons to fill the vacancy for which such list was originally submitted to the [President.] *Mayor*.

(2) In the event any person recommended by the Commission to the [President] *Mayor* requests that his recommendation be withdrawn, dies, or in any other way becomes disqualified to serve as a judge of the District of Columbia courts, the Commission shall promptly recommend to the [President] *Mayor* one person to replace the person originally recommended.

(3) In no instance shall the Commission recommend any person, who in the event of timely nomination following a recommendation by the Commission, does not meet, upon such nomination, the qualifications specified in section 433.

* * * * * * *

SECTION 1321 OF TITLE 11, DISTRICT OF COLUMBIA CODE

§ 11–1321. Exclusive jurisdiction of small claims.

The Small Claims and Conciliation Branch has exclusive jurisdiction of any action within the jurisdiction of the Superior Court which is only for the recovery of money, if the amount in controversy does not exceed [$750,] *$2,000*, exclusive of interest, attorney fees, protest fees, and costs. An action which affects an interest in real property may not be brought in the Branch. If a counterclaim, cross claim, or any other claim or any defense, affecting an interest in real property, is made in an action brought in the Branch, the action shall be certified to the Civil Division.

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MARKUP ON H.R. 2050 AND H.R. 3370

THURSDAY, OCTOBER 17, 1985

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON JUDICIARY AND EDUCATION,
COMMITTEE ON THE DISTRICT OF COLUMBIA,
Washington, DC.

The subcommittee met, pursuant to call, at 10:05 a.m., in room 1310, Longworth House Office Building, Hon. Mervyn M. Dymally (chairman of the subcommittee) presiding.

Present: Representative Dymally.

Also present: Edward C. Sylvester, Jr., staff director; Donald M. Temple, senior staff counsel; and Donn G. David, senior legislative associate.

[The clean bill, H.R. 3560, follows:]

I

99TH CONGRESS
1ST SESSION

H. R. 3560

To require criminal prosecutions concerning violations of the laws of the District of Columbia to be conducted in the name of the District, to provide permanent authority for hearing commissioners in the District of Columbia courts, to modify certain procedures of the District of Columbia Judicial Nomination Commission and the District of Columbia Commission on Judicial Disabilities and Tenure, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 11, 1985

Mr. DYMALLY introduced the following bill; which was referred to the Committee on the District of Columbia

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A BILL

To require criminal prosecutions concerning violations of the laws of the District of Columbia to be conducted in the name of the District, to provide permanent authority for hearing commissioners in the District of Columbia courts, to modify certain procedures of the District of Columbia Judicial Nomination Commission and the District of Columbia Commission on Judicial Disabilities and Tenure, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia Prosecutorial and Judicial Efficiency Act of 1985".

SEC. 2. CONDUCT OF PROSECUTIONS IN THE DISTRICT.

(a) CONDUCT OF PROSECUTIONS.—Section 23-101 of title 23 of the District of Columbia Code is amended by striking out subsections (c), (d), (e), and (f) and inserting in lieu thereof the following:

"(c) Except as otherwise provided by law, all other criminal prosecutions for offenses under the laws of the District of Columbia and the laws of the United States applicable exclusively to the District of Columbia shall be conducted in the name of the District of Columbia by the United States Attorney for the District of Columbia or his or her assistants.

"(d) Notwithstanding any other provision of law, prosecutions for offenses under the laws of the District of Columbia and the laws of the United States applicable exclusively to the District of Columbia shall be conducted in the name of the District of Columbia.".

(b) EFFECT OF CHANGES IN CONDUCT OF PROSECUTIONS IN THE DISTRICT.—No prosecution, administrative action, or other proceeding lawfully commenced under any law of the United States, any law of the United States applicable exclusively to the District of Columbia, or any law of the District of Columbia shall abate solely by reason of the taking effect of any provision of subsection (a), but such

action or proceeding shall be continued with such substitutions as to parties as may be appropriate.

(c) ANNUAL REPORT ON PROSECUTIONS.—Not later than March 1 of each year, the United States attorney for the District of Columbia shall compile and make available an annual report concerning prosecutions, under the laws of the District of Columbia and the laws of the United States applicable exclusively to the District of Columbia, conducted by the Office of the United States attorney for the District of Columbia in the previous calendar year. Such report shall include the number of prosecutions and convictions by category and nature of offense, and shall include any recommendations concerning the criminal justice system in the District of Columbia.

SEC. 3. HEARING COMMISSIONERS.

Section 11-1732 of title 11 of the District of Columbia Code is amended to read as follows:

"§11-1732. Hearing commissioners.

"(a) The chief judge of the Superior Court may appoint and remove hearing commissioners who shall serve in the Superior Court and perform the duties enumerated in subsection (c) of this section and such other duties as are consistent with the Constitution and laws of the United States and of the District of Columbia and are assigned by rule of the Superior Court.

"(b) No individual may be appointed or serve as a hearing commissioner under this section unless such individual has been a member of the bar of the District of Columbia for at least three years.

"(c) A hearing commissioner, when specifically designated by the chief judge of the Superior Court, may perform the following functions:

"(1) Administer oaths and affirmations and take acknowledgments.

"(2) Determine conditions of release and pretrial detention pursuant to the provisions of title 23 of the District of Columbia Code (relating to criminal procedures).

"(3) Conduct preliminary examinations in all criminal cases to determine if there is probable cause to believe that an offense has been committed and that the accused committed it.

"(4) Subject to the provisions of subsection (d), with the consent of the parties involved, make findings in uncontested proceedings, and in contested hearings in the civil, criminal, and family divisions of the Superior Court.

"(d)(1) With respect to proceedings and hearings under subsection (c)(4), a rehearing of the case, or a review of the hearing commissioner's findings, may be made by a judge of

the appropriate division sua sponte and shall be made upon a motion of one of the parties, which motion shall be filed within ten days after the judgment. An appeal to the District of Columbia Court of Appeals may be made only after a review hearing is held in the Superior Court.

"(2)(A) In any case brought under sections 11-1101(1), (3), (10), or (11) involving the establishment or enforcement of child support, or in any case seeking to modify an existing child support order, where a hearing commissioner in the Family Division of the Superior Court finds that there is an existing duty of support, the hearing commissioner shall conduct a hearing on support, make findings, and enter judgment.

"(B) If in a case under subparagraph (A), the hearing commissioner finds that a duty of support exists and makes a finding that the case involves complex issues requiring judicial resolution, the hearing commissioner shall establish a temporary support obligation and refer unresolved issues to a judge.

"(C) In cases under subparagraphs (A) and (B) in which the hearing commissioner finds that there is a duty of support and the individual owing that duty has been served or given notice of the proceedings under any applicable statute or court rule, if that individual fails to appear or otherwise respond, the hearing commissioner shall enter a default order.

"(D) A rehearing or review of the hearing commissioner's findings in a case under subparagraphs (A) and (B) may be made by a judge of the Family Division sua sponte. The findings of the hearing commissioner shall constitute a final order of the Superior Court.".

SEC. 4. APPOINTMENT OF EXECUTIVE OFFICER OF THE DISTRICT OF COLUMBIA COURTS.

Section 11-1703 of title 11 of the District of Columbia Code is amended—

(1) by striking out subsection (b);

(2) by redesignating subsection (c) as subsection (d); and

(3) by inserting after subsection (a) the following new subsections:

"(b) The Executive Officer shall be appointed, and subject to removal, by the Joint Committee on Judicial Administration with the approval of the chief judges of the District of Columbia courts. In making such appointment the Joint Committee shall consider experience and special training in administrative and executive positions and familiarity with court procedures.

"(c) The Executive Officer shall be a bona fide resident of the District of Columbia or become a resident not more than 180 days after the date of appointment.".

SEC. 5. MANDATORY RETIREMENT AGE OF JUDGES.

Section 431(c) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by striking out "seventy" and inserting in lieu thereof "seventy-four".

SEC. 6. APPOINTMENT PANEL FOR THE BOARD OF TRUSTEES OF THE PUBLIC DEFENDER SERVICE.

(a) COMPOSITION OF APPOINTMENT PANEL.—Section 303 of the District of Columbia Court Reform and Criminal Procedure Act of 1970 (D.C. Code, 1-2703) is amended in subsection (b)(1)—

(1) by striking out subparagraph (A); and

(2) by redesignating subparagraphs (B), (C), (D), and (E) as subparagraphs (A), (B), (C), and (D), respectively.

(b) PRESIDING OFFICER.—Section 303 of such Act (D.C. Code, 1-2703) is further amended in subsection (b)(2) by striking out "Chief Judge of the United States Court of Appeals for the District of Columbia Circuit" and inserting in lieu thereof "Chief Judge of the District of Columbia Court of Appeals".

SEC. 7. REORGANIZATION OF AUDIT RESPONSIBILITY.

(a) AUDITOR-MASTER.—Section 11-1724 of title 11 of the District of Columbia Code is amended—

(1) by striking out "(1) audit and state fiduciary accounts,"; and

(2) by respectively redesignating clauses (2) and (3) as clauses "(1)" and "(2)".

(b) REGISTER OF WILLS.—Section 11-2104(a) of title 11 of the District of Columbia Code is amended—

(1) in paragraph (2) by striking out "and" after the semicolon;

(2) in paragraph (3) by striking out the period and inserting in lieu thereof "; and"; and

(3) by inserting at the end thereof the following new paragraph:

"(4) audit and state fiduciary accounts.".

SEC. 8. ELIMINATION OF DUPLICATE JUDICIAL FINANCIAL REPORTING REQUIREMENT.

(a) TERMINATION OF FEDERAL DISCLOSURE REQUIREMENTS.—Section 303 of the Ethics in Government Act of 1978 (28 U.S.C. App. 301) is amended by inserting at the end thereof the following new subsection:

"(h) The provisions of this Act shall not apply to any judicial officer or employee of the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—Section 308(9) of such Act (28 U.S.C. App. 308(9)) is amended by striking out "courts of the District of Columbia".

SEC. 9. CERTIFICATION OF QUESTIONS OF LAW.

Subchapter II of Chapter 7, title 11, District of Columbia Code, is amended by inserting after section 11-722 the following new section:

"§ Sec. 11-723. Certification of Questions of Law.

"(a) The District of Columbia Court of Appeals may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or the highest appellate court of any State, if there are involved in any proceeding before any such certifying court questions of law of the District of Columbia which may be determinative of the cause pending in such certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the District of Columbia Court of Appeals.

"(b) This section may be invoked by an order of any of the courts referred to in subsection (a) upon the court's motion or upon motion of any party to the cause.

"(c) A certification order shall set forth (1) the question of law to be answered; and (2) a statement of all facts relevant to the questions certified and the nature of the controversy in which the questions arose.

"(d) A certification order shall be prepared by the certifying court and forwarded to the District of Columbia Court of Appeals. The District of Columbia Court of Appeals may require the original or copies of all or such portion of the

record before the certifying court as are considered necessary to a determination of the questions certified to it.

"(e) Fees and costs shall be the same as in appeals docketed before the District of Columbia Court of Appeals and shall be equally divided between the parties unless precluded by statute or by order of the certifying court.

"(f) The District of Columbia Court of Appeals may prescribe the rules of procedure concerning the answering and certification of questions of law under this section.

"(g) The written opinion of the District of Columbia Court of Appeals stating the law governing any questions certified under subsection (a) shall be sent by the clerk to the certifying court and to the parties.

"(h)(1) The District of Columbia Court of Appeals, on its own motion or the motion of any party, may order certification of questions of law to the highest court of any State under the conditions described in subsection (a).

"(2) The procedures for certification from the District of Columbia to a State shall be those provided in the laws of that State.".

SEC. 10. PUBLIC ACCESS TO MATERIALS OF JUDICIAL NOMINATION COMMISSION.

Section 434(c)(3) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by striking out the last sentence and inserting in lieu thereof:

"Information, records, and other materials furnished to or developed by the Commission in the performance of its duties under this section shall be privileged and confidential. The District of Columbia Freedom of Information Act and section 552 of title 5, United States Code, (known as the Freedom of Information Act) shall not apply to any such materials.".

SEC. 11. MEETINGS OF THE JUDICIAL NOMINATION COMMISSION.

Section 434(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by inserting at the end thereof "Meetings of the Commission may be closed to the public. Section 742 of this Act shall not apply to meetings of the Commission.".

SEC. 12. PUBLIC ANNOUNCEMENT OF JUDICIAL RECOMMENDATIONS.

Section 434(d) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by inserting at the end thereof the following new paragraph:

"(4) Upon submission to the President, the name of any individual recommended under this subsection shall be made public by the Judicial Nomination Commission.".

SEC. 13. DISCLOSURE OF CERTAIN INFORMATION TO THE JUDICIAL NOMINATION COMMISSION.

Section 11–1528 of title 11, District of Columbia Code, is amended by striking out all of subsection (a) and inserting in lieu thereof the following:

"(a)(1) Subject to paragraph (2), the filing of papers with, and the giving of testimony before, the Commission shall be privileged. Subject to paragraph (2), hearings before the Commission, the record thereof, and materials and papers filed in connection with such hearings shall be confidential.

"(2)(A) The judge whose conduct or health is the subject of any proceedings under this subchapter may disclose or authorize the disclosure of any information under paragraph (1).

"(B) With respect to a prosecution of a witness for perjury or on review of a decision of the Commission, the record of hearings before the Commission and all papers filed in connection with such hearing shall be disclosed to the extent required for such prosecution or review.

"(C) Upon request, the Commission shall disclose, on a privileged and confidential basis, to the District of Columbia Judicial Nomination Commission any information under paragraph (1) concerning any judge being considered by such nomination commission for elevation to the District of Columbia Court of Appeals or for chief judge of a District of Columbia court.".

SEC. 14. REAPPOINTMENT TO JUDICIAL OFFICE.

Section 433(c) of the District of Columbia Self-Government and Governmental Reorganization Act is amended—

(1) in the first sentence by striking out "three months" and inserting in lieu thereof "six months"; and

(2) in the second sentence, by striking out "thirty" and inserting in lieu thereof "sixty".

SEC. 15. MODIFICATION OF JUDICIAL REAPPOINTMENT EVALUATION CATEGORIES.

Section 433(c) of the District of Columbia Self-Government and Governmental Reorganization Act is amended in the third sentence by striking out "exceptionally well-qualified or".

SEC. 16. SERVICES OF RETIRED JUDGES.

Section 11-1504(a) of title 11, District of Columbia Code, is amended by striking out paragraphs (2) and (3) and inserting after paragraph (1) the following new paragraph:

"(2) At any time prior to or after retirement, a judge may request recommendation from the District of Columbia Commission on Judicial Disabilities and Tenure (hereinafter in this section referred to as the "Commission") to be appointed as a senior judge in accordance with this section.".

SEC. 17. EXTENSION OF PERIOD FOR SUBMITTING JUDICIAL NOMINATIONS.

Section 434(d)(1) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by striking out "thirty days" each place it appears and inserting in lieu thereof "sixty days".

SEC. 18. EFFECTIVE DATE.

This Act shall take effect on the date of the enactment of this Act.

O

Mr. DYMALLY. The Subcommittee on Judiciary and Education will come to order.

I would like to submit for the record my statement on H.R. 2050 and H.R. 3370.

[The prepared statement of Mr. Dymally follows:]

OPENING STATEMENT

OF

MERVYN M. DYMALLY

COMMITTEE ON THE DISTRICT OF COLUMBIA

CHAIRMAN, SUBCOMMITTEE ON JUDICIARY AND EDUCATION

ON

H.R. 2050 AND H.R. 3370

SUBCOMMITTEE MARK-UPS

THURSDAY, OCTOBER 17, 1985

9:00 A.M.

GOOD MORNING!

THE SUBCOMMITTEE ON JUDICIARY AND EDUCATION IS CALLED TO ORDER TO CONSIDER TWO BILLS: H.R. 2050 AND H.R. 3370.

EARLIER THIS SESSION THE SUBCOMMITTEE FAVORABLY REPORTED TO THE FULL COMMITTEE, H.R. 2946, A BILL TO ESTABLISH A SEPARATE AND INDEPENDENT JURY SYSTEM FOR THE DISTRICT OF COLUMBIA. THIS BILL WOULD AMEND TITLE 11 OF THE DISTRICT OF COLUMBIA CODE TO TRANSFER CONTROL OVER LOCAL JURIES FROM THE U.S. DISTRICT COURT TO THE DISTRICT OF COLUMBIA SUPERIOR COURT AND TO FACILITATE THE IMPLEMENTATION OF A "ONE DAY ONE TRIAL" JURY SYSTEM LOCALLY.

SIMILAR TO H.R. 2946, THE BILLS BEFORE US THIS MORNING ADDRESS BOTH HOME RULE CONCERNS AND THE IMPROVEMENT AND EFFICIENCY OF THE LOCAL JUDICIAL SYSTEM.

H.R. 2050 IS A REINTRODUCTION OF H.R. 3369, A BILL INTRODUCED AND PASSED BY THE HOUSE OF REPRESENTATIVES IN THE 98TH CONGRESS. IT WOULD TRANSFER PAROLE OVER DISTRICT OF COLUMBIA CODE OFFENDERS IN FEDERAL PRISONS FROM THE U.S. PAROLE COMMISSION TO THE DISTRICT OF COLUMBIA

PAROLE BOARD. MOST IMPORTANT, IT SEEKS TO RESOLVE A LONGSTANDING LEGAL PROBLEM IN THE PAROLE AREA.

THERE ARE OVER 1,700 DISTRICT OF COLUMBIA CODE OFFENDERS HOUSED IN FEDERAL BUREAU OF PRISON FACILITIES. MALE DISTRICT OF COLUMBIA CODE OFFENDERS ARE PLACED IN FEDERAL FACILITIES FOR SELECTIVE CUSTODY AND VARIOUS OTHER REASONS. FEMALE DISTRICT OF COLUMBIA OFFENDERS SENTENCED TO GREATER THAN ONE YEAR TERMS ARE PLACED IN FEDERAL FACILITIES. THIS IS DUE TO THE ABSENCE OF A LOCAL PENAL FACILITY FOR FEMALE OFFENDERS. MOST OF THESE FEMALE OFFENDERS ARE CONFINED AT ALDERSON, WEST VIRGINIA OVER 300 MILES FROM THE DISTRICT OF COLUMBIA. OTHERS ARE CONFINED AS FAR AWAY AS TEXAS.

UNDER PRESENT LAW, AT SECTION 24-209 OF THE DISTRICT OF COLUMBIA CODE, THE PLACE OF AN OFFENDER'S CONFINEMENT DETERMINES PAROLE AUTHORITY. THIS LAW IS CONTRARY TO CURRENT FEDERAL-STATE PAROLE PRACTICES. ACCORDING TO THE UNITED STATES PAROLE COMMISSION, THE DISTRICT OF COLUMBIA IS THE ONLY GOVERNMENT HOUSING INMATES IN FEDERAL CORRECTION INSTITUTIONS WHICH DOES NOT RETAIN PAROLE AUTHORITY. AS A RESULT OF THIS PRACTICE SEVERAL FEDERAL LAWSUITS BY BOTH MALE AND FEMALE DISTRICT OF COLUMBIA CODE OFFENDERS IN FEDERAL PRISONS HAVE BEEN FILED.

AS WE CONSIDER THIS BILL SEVERAL POINTS ARE WORTH NOTING. FIRST, SINCE THE HOUSE PASSED THIS BILL IN THE LAST CONGRESS THE DISTRICT OF COLUMBIA HAS REVISED ITS PAROLE GUIDELINES, CONSISTENT WITH CERTAIN RECOMMENDATIONS MADE BY SENATOR ARLEN SPECTOR AND UNITED STATES ATTORNEY FOR THE DISTRICT OF COLUMBIA, JOSEPH DIGENOVA. SECOND, THE PRISON OVERCROWDING PROBLEM IN THE DISTRICT HAS RESULTED IN AN INCREASED NUMBER OF DISTRICT OF COLUMBIA INMATES BEING TRANSFERRED TO

FEDERAL PRISONS. THIRD. CONGRESS RECENTLY PASSED THE COMPREHENSIVE CRIME CONTROL ACT OF 1983, WHICH WOULD ABOLISH FEDERAL PAROLE AND THE UNITED STATES PAROLE COMMISSION IN 1991.

FINALLY, SECTION 24-209 BECAME LAW ALMOST 50 YEARS AGO AND 40 YEARS PRIOR TO THE HOME RULE ACT. MOREOVER, ITS LANGUAGE REMAINS AMBIGUOUS. FOR EXAMPLE, NEITHER SECTION 24-209 NOR ITS LEGISLATIVE HISTORY ANSWERS WHETHER THE UNITED STATES PAROLE COMMISSION SHOULD APPLY DISTRICT OF COLUMBIA PAROLE STANDARDS WHEN IT CONSIDERS PAROLE FOR DISTRICT OF COLUMBIA CODE OFFENDERS. GIVEN THIS HISTORY, APPROPRIATE AMENDMENT IS OVERDUE.

LAW SUITS FILED IN RESPONSE TO THIS PROVISION REMAIN UNSOLVED AND CONTINUE TO CONSUME TIME AND EXPENSE. THIS LEGISLATION PROVIDES A PRACTICAL AND LEGALLY SOUND REMEDY TO THIS LONGSTANDING PROBLEM.

H.R. 3370, THE PROSECUTORIAL AND JUDICIAL EFFICIENCY ACT OF 1985, IS A BILL WHICH EVOLVES IN LARGE PART FROM RECOMMENDATIONS OF THE DISTRICT OF COLUMBIA COURT STUDY COMMITTEE (UNDER THE CHAIRMANSHIP OF MR. CHARLES HORSKY) AND THE DISTRICT OF COLUMBIA COURTS.

THIS BILL SEEKS TO CLARIFY THAT DISTRICT OF COLUMBIA CODE MATTERS DO NOT "ARISE UNDER" THE LAWS OF THE UNITED STATES AND DISTRICT OF COLUMBIA CODE OFFENDERS ARE CRIMES AGAINST THE DISTRICT OF COLUMBIA, NOT AGAINST THE UNITED STATES.

ALSO, IT WOULD AUTHORIZE HEARING COMMISSIONERS FOR THE COURT ON A PERMANENT BASIS, IMPROVE JUDICIAL NOMINATION AND TENURE COMMISSION PROCEDURES AND OTHER MATTERS.

THESE BILLS COME BEFORE THE SUBCOMMITTEE THROUGH BIPARTISAN COOPERATION. THEY HAVE BEEN GIVEN SERIOUS SCRUTINY AND CERTAIN RECOMMENDATIONS HAVE BEEN MADE WHICH WILL IMPROVE THEM. THUS, I WILL BE INTRODUCING AN AMENDMENT IN THE NATURE OF A SUBSTITUTE SO REFLECTING THESE CHANGES.

Chairman DYMALLY. The subcommittee is considering H.R. 2050 on the powers of the D.C. Parole Board and H.R. 3370 on court procedures, and other matters.

I have an amendment in the nature of a substitute, reflecting bipartisan concerns which modify H.R. 3370. Without objection, that amendment will be approved and incorporated in a clean bill. The clean bill is numbered H.R. 3560.

In the absence of a quorum and without objection, as chairman of the subcommittee, I will refer H.R. 2050 and H.R. 3370 and H.R. 3560 to the full committee for such action as they may deem appropriate.

The subcommittee has already voted to report to the full committee H.R. 2717, the independent jury system bill, for which a clean bill, H.R. 2946, incorporates amendments proposed by Mr. Bliley and adopted by the subcommittee.

Without objection, H.R. 2946 will also be referred to the full committee. I take this action in my capacity as chairman, with the hope that the full committee will take the necessary action to send these bills out of committee.

The meeting is adjourned.

[Whereupon, at 10:07 a.m., the subcommittee was adjourned, subject to the call of the Chair.]

COMMITTEE MARKUP OF THE FOLLOWING BILLS EN BLOC: H.R. 2050, H.R. 2946, AND H.R. 3578

TUESDAY, OCTOBER 22, 1985

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE DISTRICT OF COLUMBIA,
Washington, DC.

The committee met, pursuant to call, at 9:15 a.m. in room 1310, Longworth House Office Building, Hon. Ronald V. Dellums (chairman of the committee) presiding.

Present: Representatives Dellums, Fauntroy, Mazzoli, Stark, Barnes, Dymally, Wheat, McKinney, and Combest.

Staff present: Edward C. Sylvester, Jr., staff director; Robert B. Brauer, senior staff assistant; Donald M. Temple, senior staff counsel; Sandra Fiske and Julius Hobson, Jr., staff assistants; Donn G. Davis, senior legislative associate; John Gnorski, minority staff director; and Ronald P. Hamm, minority staff assistant.

[The bill, H.R. 3578, follows along with a section-by-section analysis:]

[This markup may also be found in serial No. 99-6 hearing. H.R. 2946 is the clean bill of H.R. 2717.]

I

99TH CONGRESS
1ST SESSION

H. R. 3578

To provide permanent authority for hearing commissioners in the District of Columbia courts, to modify certain procedures of the District of Columbia Judicial Nomination Commission and the District of Columbia Commission on Judicial Disabilities and Tenure, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

OCTOBER 17, 1985

Mr. DYMALLY introduced the following bill; which was referred to the Committee on the District of Columbia

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A BILL

To provide permanent authority for hearing commissioners in the District of Columbia courts, to modify certain procedures of the District of Columbia Judicial Nomination Commission and the District of Columbia Commission on Judicial Disabilities and Tenure, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia Prosecutorial and Judicial Efficiency Act of 1985".

SEC. 2. ANNUAL REPORT ON PROSECUTIONS.

Not later than March 1 of each year, the United States attorney for the District of Columbia shall compile and make available an annual report concerning prosecutions, under the laws of the District of Columbia and the laws of the United States applicable exclusively to the District of Columbia, conducted by the Office of the United States attorney for the District of Columbia in the previous calendar year. Such report shall include the number of prosecutions and convictions by category and nature of offense, and shall include any recommendations concerning the criminal justice system in the District of Columbia.

SEC. 3. HEARING COMMISSIONERS.

Section 11–1732 of title 11 of the District of Columbia Code is amended to read as follows:

"**§ 11–1732. Hearing commissioners.**

"(a) The chief judge of the Superior Court may appoint and remove hearing commissioners who shall serve in the Superior Court and perform the duties enumerated in subsection (c) of this section and such other duties as are consistent with the Constitution and laws of the United States and of the District of Columbia and are assigned by rule of the Superior Court.

"(b) No individual may be appointed or serve as a hearing commissioner under this section unless such individual

has been a member of the bar of the District of Columbia for at least three years.

"(c) A hearing commissioner, when specifically designated by the chief judge of the Superior Court, may perform the following functions:

"(1) Administer oaths and affirmations and take acknowledgments.

"(2) Determine conditions of release and pretrial detention pursuant to the provisions of title 23 of the District of Columbia Code (relating to criminal procedures).

"(3) Conduct preliminary examinations in all criminal cases to determine if there is probable cause to believe that an offense has been committed and that the accused committed it.

"(4) Subject to the provisions of subsection (d), with the consent of the parties involved, make findings in uncontested proceedings, and in contested hearings in the civil, criminal, and family divisions of the Superior Court.

"(d)(1) With respect to proceedings and hearings under subsection (c)(4), a rehearing of the case, or a review of the hearing commissioner's findings, may be made by a judge of the appropriate division sua sponte and shall be made upon a motion of one of the parties, which motion shall be filed

within ten days after the judgment. An appeal to the District of Columbia Court of Appeals may be made only after a review hearing is held in the Superior Court.

"(2)(A) In any case brought under sections 11–1101 (1), (3), (10), or (11) involving the establishment or enforcement of child support, or in any case seeking to modify an existing child support order, where a hearing commissioner in the Family Division of the Superior Court finds that there is an existing duty of support, the hearing commissioner shall conduct a hearing on support, make findings, and enter judgment.

"(B) If in a case under subparagraph (A), the hearing commissioner finds that a duty of support exists and makes a finding that the case involves complex issues requiring judicial resolution, the hearing commissioner shall establish a temporary support obligation and refer unresolved issues to a judge.

"(C) In cases under subparagraphs (A) and (B) in which the hearing commissioner finds that there is a duty of support and the individual owing that duty has been served or given notice of the proceedings under any applicable statute or court rule, if that individual fails to appear or otherwise respond, the hearing commissioner shall enter a default order.

"(D) A rehearing or review of the hearing commissioner's findings in a case under subparagraphs (A) and (B) may

be made by a judge of the Family Division sua sponte. The findings of the hearing commissioner shall constitute a final order of the Superior Court.".

SEC. 4. APPOINTMENT OF EXECUTIVE OFFICER OF THE DISTRICT OF COLUMBIA COURTS.

Section 11–1703 of title 11 of the District of Columbia Code is amended—

(1) by striking out subsection (b);

(2) by redesignating subsection (c) as subsection (d); and

(3) by inserting after subsection (a) the following new subsections:

"(b) The Executive Officer shall be appointed, and subject to removal, by the Joint Committee on Judicial Administration with the approval of the chief judges of the District of Columbia courts. In making such appointment the Joint Committee shall consider experience and special training in administrative and executive positions and familiarity with court procedures.

"(c) The Executive Officer shall be a bona fide resident of the District of Columbia or become a resident not more than 180 days after the date of appointment.".

SEC. 5. MANDATORY RETIREMENT AGE OF JUDGES.

Section 431(c) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by

striking out "seventy" and inserting in lieu thereof "seventy-four".

SEC. 6. APPOINTMENT PANEL FOR THE BOARD OF TRUSTEES OF THE PUBLIC DEFENDER SERVICE.

(a) COMPOSITION OF APPOINTMENT PANEL.—Section 303 of the District of Columbia Court Reform and Criminal Procedure Act of 1970 (D.C. Code, 1–2703) is amended in subsection (b)(1)—

(1) by striking out subparagraph (A); and

(2) by redesignating subparagraphs (B), (C), (D), and (E) as subparagraphs (A), (B), (C), and (D), respectively.

(b) PRESIDING OFFICER.—Section 303 of such Act (D.C. Code, 1–2703) is further amended in subsection (b)(2) by striking out "Chief Judge of the United States Court of Appeals for the District of Columbia Circuit" and inserting in lieu thereof "Chief Judge of the District of Columbia Court of Appeals".

SEC. 7. REORGANIZATION OF AUDIT RESPONSIBILITY.

(a) AUDITOR-MASTER.—Section 11–1724 of title 11 of the District of Columbia Code is amended—

(1) by striking out "(1) audit and state fiduciary accounts,"; and

(2) by respectively designating clauses (2) and (3) as clauses "(1)" and "(2)".

(b) REGISTER OF WILLS.—Section 11–2104(a) of title 11 of the District of Columbia Code is amended—

(1) in paragraph (2) by striking out "and" after the semicolon;

(2) in paragraph (3) by striking out the period and inserting in lieu thereof "; and"; and

(3) by inserting at the end thereof the following new paragraph:

"(4) audit and state fiduciary accounts.".

SEC. 8. ELIMINATION OF DUPLICATE JUDICIAL FINANCIAL REPORTING REQUIREMENT.

(a) TERMINATION OF FEDERAL DISCLOSURE REQUIREMENTS.—Section 303 of the Ethics in Government Act of 1978 (28 U.S.C. App. 301) is amended by inserting at the end thereof the following new subsection:

"(h) The provisions of this Act shall not apply to any judicial officer or employee of the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—Section 308(9) of such Act (28 U.S.C. App. 308(9)) is amended by striking out "courts of the District of Columbia".

SEC. 9. CERTIFICATION OF QUESTIONS OF LAW.

Subchapter II of Chapter 7, title 11, District of Columbia Code, is amended by inserting after section 11–722 the following new section:

"§ Sec. 11–723. Certification of Questions of Law.

"(a) The District of Columbia Court of Appeals may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or the highest appellate court of any State, if there are involved in any proceeding before any such certifying court questions of law of the District of Columbia which may be determinative of the cause pending in such certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the District of Columbia Court of Appeals.

"(b) This section may be invoked by an order of any of the courts referred to in subsection (a) upon the court's motion or upon motion of any party to the cause.

"(c) A certification order shall set forth (1) the question of law to be answered; and (2) a statement of all facts relevant to the questions certified and the nature of the controversy in which the questions arose.

"(d) A certification order shall be prepared by the certifying court and forwarded to the District of Columbia Court of Appeals. The District of Columbia Court of Appeals may require the original or copies of all or such portion of the

record before the certifying court as are considered necessary to a determination of the questions certified to it.

"(e) Fees and costs shall be the same as in appeals docketed before the District of Columbia Court of Appeals and shall be equally divided between the parties unless precluded by statute or by order of the certifying court.

"(f) The District of Columbia Court of Appeals may prescribe the rules of procedure concerning the answering and certification of questions of law under this section.

"(g) The written opinion of the District of Columbia Court of Appeals stating the law governing any questions certified under subsection (a) shall be sent by the clerk to the certifying court and to the parties.

"(h)(1) The District of Columbia Court of Appeals, on its own motion or the motion of any party, may order certification of questions of law to the highest court of any State under the conditions described in subsection (a).

"(2) The procedures for certification from the District of Columbia to a State shall be those provided in the laws of that State.".

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SEC. 13. DISCLOSURE OF CERTAIN INFORMATION TO THE JUDICIAL NOMINATION COMMISSION.

Section 11–1528 of title 11, District of Columbia Code, is amended by striking out all of subsection (a) and inserting in lieu thereof the following:

"(a)(1) Subject to paragraph (2), the filing of papers with, and the giving of testimony before, the Commission shall be privileged. Subject to paragraph (2), hearings before the Commission, the record thereof, and materials and papers filed in connection with such hearings shall be confidential.

"(2)(A) The judge whose conduct or health is the subject of any proceedings under this subchapter may disclose or authorize the disclosure of any information under paragraph (1).

"(B) With respect to a prosecution of a witness for perjury or on review of a decision of the Commission, the record of hearings before the Commission and all papers filed in connection with such hearing shall be disclosed to the extent required for such prosecution or review.

"(C) Upon request, the Commission shall disclose, on a privileged and confidential basis, to the District of Columbia Judicial Nomination Commission any information under paragraph (1) concerning any judge being considered by such nomination commission for elevation to the District of Columbia Court of Appeals or for chief judge of a District of Columbia court.".

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(1) in the first sentence by striking out "three months" and inserting in lieu thereof "six months"; and

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SEC. 15. MODIFICATION OF JUDICIAL REAPPOINTMENT EVALUATION CATEGORIES.

Section 433(c) of the District of Columbia Self-Government and Governmental Reorganization Act is amended in the third sentence by striking out "exceptionally well-qualified or".

SEC. 16. SERVICES OF RETIRED JUDGES.

Section 11–1504(a) of title 11, District of Columbia Code, is amended by striking out paragraphs (2) and (3) and inserting after paragraph (1) the following new paragraph:

"(2) At any time prior to or after retirement, a judge may request recommendation from the District of Columbia Commission on Judicial Disabilities and Tenure (hereinafter in this section referred to as the "Commission") to be appointed as a senior judge in accordance with this section.".

SEC. 17. EXTENSION OF PERIOD FOR SUBMITTING JUDICIAL NOMINATIONS.

Section 434(d)(1) of the District of Columbia Self-Government and Governmental Reorganization Act is amended

by striking out "thirty days" each place it appears and inserting in lieu thereof "sixty days".

SEC. 18. EFFECTIVE DATE.

This Act shall take effect on the date of the enactment of this Act.

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SECTION BY SECTION ANALYSIS

OF

H.R. 3578

Section 1 — SHORT TITLE
Provides Short Title of Bill: "District of Columbia Prosecutorial and Judicial Efficiency Act of 1985."

Section 2 — PROSECUTIONS IN THE DISTRICT OF COLUMBIA
Requires the United States Attorney for the District of Columbia to publish an annual report concerning its District of Columbia Criminal Justice Activity in prosecutions, convictions, and nature of offenses by category.

Section 3 — HEARING OFFICERS
Provides permanent authority and guidelines for appointment and authority of hearing officers in the District of Columbia Superior Court and provides certain guidelines consistent with federal statutory requirements.

Section 4 — APPOINTMENT OF EXECUTIVE OFFICER OF THE DISTRICT OF COLUMBIA COURTS
Amends Section 1703(b), title 11 of the District of Columbia Code, to eliminate the requirement that the Executive Officer of the District of Columbia Courts be appointed from a list of candidates submitted by the Director of the Administrative Office of the United States courts.

Section 5 — MANDATORY RETIREMENT AGE OF JUDGES
Amends Section 431(c) of the District of Columbia Self Government and Governmental Reorganization Act (hereafter "the Act") to comply with P.L. 93-198 which amended Section 1502 of title 11, District of Columbia Code. This Act changed the mandatory retirement age for District of Columbia Court Judges from 70 to 74.

Section 6 — APPOINTMENT PANEL FOR THE BOARD OF TRUSTEES OF THE PUBLIC DEFENDER SERVICE
Amends Section 2703 of Title I, District of Columbia Code, to remove the Chief Judge of the United States Court of Appeals for the District of Columbia from the appointment panel for the Board of Trustees of the Public Defender Service and to require the Chief Judge of the District of Columbia Court of Appeals to preside over the panel.

Section 7 — REORGANIZATION OF AUDIT RESPONSIBILITY
Amends Sections 1724 and 2104 of title 11 of the District of Columbia Code to integrate the Auditor Master's office

within the Probate Division of the District of Columbia Superior Court.

Section 8 — ELIMINATION OF DUPLICATE JUDICIAL FINANCIAL REPORTING REQUIREMENT
Amends Section 303 of the Ethics in Government Act of 1978, (28 U.S.C. App. 301). This would result in judges of District of Columbia Courts being required to file financial disclosure reports exclusively with the District of Columbia Judicial Disabilities and Tenure Commission.

Section 9 — CERTIFICATION OF QUESTIONS OF LAW
Amends subchapter 11 of Chapter 7, title 11 District of Columbia Code, to provide the District of Columbia Court of Appeals authority to answer certain undecided questions of District of Columbia law that may be determinative of proceedings pending in the certifying court.

Section 10 — PUBLIC ACCESS TO MATERIALS OF JUDICIAL NOMINATION COMMISSION
Amends Section 434(c) (3) of the Home Rule Act, as amended, to exempt materials relevant to the judicial nomination consideration process from the Federal Freedom of Information Acts.

Section 11 — MEETINGS OF THE JUDICIAL NOMINATION COMMISSION
Amends Section 434(c) of the Act to allow the Judicial Nomination Commission to hold closed meetings in its consideration process. It also exempts the Commission from Section 742 of the Home Rule Act, as amended.

Section 12 — PUBLIC ANNOUNCEMENT OF JUDICIAL RECOMMENDATIONS
Amends 434(d) of the Home Rule Act, as amended, to require the Commission to make a public announcement of its Judicial Recommendations when it submits the recommendation to the President.

Section 13 — DISCLOSURE OF CERTAIN INFORMATION TO THE JUDICIAL NOMINATION COMMISSION
Amends Section 11-1528 of the District of Columbia Code to authorize the District of Columbia Judicial Disability and Tenure Commission to disclose to the District of Columbia Judicial Nomination Commission information relating to the nomination of any candidate for chief judgeship of appellate or Superior Court.

Section 14 — REAPPOINTMENT TO JUDICIAL OFFICE
Amends Section 433(c) of the Home Rule Act, as amended, to require judges seeking reappointment to state their intention for an additional term of six months or 180 days prior to the expiration of their current term of office.

Would also require the Tenure Commission to prepare and submit to the President a written evaluation of the declaring candidate's performance during his or her present term of office not less than sixty (60) days prior to the expiration of the candidate's term of office.

Section 15 — MODIFICATION OF JUDICIAL REAPPOINTMENT EVALUATION CATEGORIES
Amends Section 433(c) of the Home Rule Act, as amended, to eliminate judicial reappointment evaluation category of "exceptionally well qualified."

Section 16 — EFFECTIVE DATES
The provisions of the bill would become effective immediately.

The CHAIRMAN. The Committee on the District of Columbia will come to order.

Before we proceed with the business of today's meeting, I am pleased to advise the committee members that Congressman Larry Combest from the 19th District of Texas has joined the committee, and we look forward to his participation, and the Chair would yield briefly to my distinguished colleague from Connecticut for any remarks he may have with respect to our new colleague.

Mr. MCKINNEY. Well, thank you, Mr. Chairman. There is a certain amount of heroism in anybody that wants to join us here in our happy family, and we have been understaff on the minority side, and I am delighted to be finally staffed again, so to speak.

The CHAIRMAN. I thank my colleague for his remarks.

The gentleman from California.

Mr. DYMALLY. Mr. Chairman, the gentleman from Texas I believe attended his first meeting last week, and we would extend to him a very warm welcome and look forward to working with him.

The CHAIRMAN. I thank the gentleman for his remarks.

The purpose of today's full committee meeting is to mark up three pieces of legislation which affect the city's authority over the parole of D.C. codefenders and matters related to the judicial system.

We are marking up bill H.R. 2050 on the parole board; H.R. 3578, a clean bill for the bill H.R. 3370 on court procedures. These bills were considered thoroughly at subcommittee hearings on October 1 and under our committee rule 0.3, on the recommendation of the subcommittee chairperson the majority members have agreed to consider these bills in full committee.

In addition, we have before us bill H.R. 2946, a clean bill for H.R. 2717, the jury system bill reported out by our Subcommittee on Judiciary and Education last June.

These bills have as their chief concern areas where the Federal interest is either nonexistent or virtually nonexistent.

In no other jurisdiction does the Federal Government play any direct role in these matters, and it is only logical and appropriate that the District of Columbia should also be preeminent in these strictly local matters.

The three bills before us would achieve this end.

I call on the subcommittee chairman, Hon. Mervyn Dymally, for a motion to report to the House H.R. 2050, H.R. 3578, and H.R. 2946, with such explanation as he may give so we can vote on these matters en bloc.

Mr. MCKINNEY. If the chairman would yield.

The CHAIRMAN. I would yield momentarily to the gentleman from Connecticut.

Mr. MCKINNEY. I have a letter to the chairman from the Honorable Thomas J. Bliley, Jr., saying:

> I am unavoidably absent both from any markup on Tuesday, October 26, 1985 and wish to formally state my intention to file additional views on any or all measures approved by the committee on Tuesday, October 22, including H.R. 2050, H.R. 2946 and H.R. 3578, and shall be as prompt in submitting these views as possible. Thanking you in advance.

The CHAIRMAN. The gentleman's communication to the full committee is duly noted, and the committee would take appropriate action.

The gentleman from California is recognized.

Mr. DYMALLY. Thank you, Mr. Chairman, for calling this meeting of the full committee to consider the bills before us.

I would like, Mr. Chairman, to explain each bill before moving for their approval.

First, H.R. 2050 is the same bill introduced and passed by the House of Representatives in the 98th Congress. It would transfer parole over District of Columbia Code offenders in Federal prisons from the U.S. Parole Commission to the D.C. Parole Board.

Mr. Chairman, I might add parenthetically, it is my intention to take staff up to Alderson, WV this weekend for an oversight visit, with the committee's permission.

The CHAIRMAN. Without objection.

Mr. DYMALLY. There are over 1,700 District of Columbia Code offenders housed in Federal Bureau of Prison facilities. Many District of Columbia Code offenders are placed in Federal facilities for selective custody and various other reasons.

Female D.C. offenders sentenced to greater than 1-year terms are routinely placed in Federal prisons as a matter of course. This is due to the absence of a local penal facility for female offenders. Most of these female offenders are confined to Alderson, WV, or 300 miles from the District of Columbia. Others are confined as far away as Texas.

Under present law at section 24-209 of the District of Columbia Code, the place of an offender's confinement determines parole authority. This law is contrary to current Federal/State parole practices.

According to the U.S. Parole Commission, the District of Columbia is the only local jurisdiction housing inmates in a Federal correction institution which does not retain its own parole authority. As a result of this practice, several Federal lawsuits by both male and female District of Columbia Code offenders in Federal prisons have been filed.

Several points are worth noting.

First, since the House passed this bill in the last Congress the District of Columbia has revised its parole guidelines consistent with seven recommendations made by Senator Arlen Specter and the U.S. attorney for the District of Columbia.

Second, the prison overcrowding problem in the District has resulted in an increased number of District of Columbia inmates being transferred to Federal prisons.

Third, Congress recently passed a Comprehensive Crime Control Act of 1983 which would abolish Federal parole and the U.S. Parole Commission in 1991.

Fourth, section 24-29 became law almost 50 years ago and 40 years prior to the Home Rule Act. Lawsuits filed in response to this provision remain unresolved and continue to consume time and expense.

This legislation provides a practical and logically sound remedy to this longstanding problem.

H.R. 3578, the Prosecutorial and Judicial Efficiency Act of 1985, is a clean bill version of H.R. 3370, which evolved in large part from recommendations of the District of Columbia Court Study Committee under the chairmanship of Mr. Charles Horsky and the District of Columbia courts.

The subcommittee held a hearing on both H.R. 2050 and H.R. 3370 on October 3, 1985, and received substantial testimony in support of these bills, along with constructive comments.

As a result, the majority and minority staff worked closely under the subcommittee chairman and ranking minority member's direction to work out any differences in H.R. 3370.

H.R. 3578 represents this bipartisan work product. But there are several minor technical amendments which have been brought to our attention by legislative counsel's office.

H.R. 2946, a clean bill for H.R. 2717, is a bill to establish an independent jury system for the Superior Court of the District of Columbia.

The subcommittee held hearings on H.R. 2717 on June 26, 1985, and reported a clean bill to the full committee.

Presently, the local judicial system's jury plan is determined by Federal judicial officers. The local court system, like that of other jurisdictions, is capable of administering its own jury system and determining its own jury needs and selection processes.

These bills have received broad-based support from the Mayor, the city council, the local board of parole, the superior court, the U.S. District Court on the jury bill, certain local bar association subdivisions, the Horsky committee, and the Council on Court Excellence.

Department of Justice opposition has been expressed to H.R. 2050 and H.R. 2946.

Mr. Chairman, I would like to move that the committee vote on the technical amendments to H.R. 3578 en bloc and thereafter, move that the committee favorably report H.R. 2050, H.R. 2946 and H.R. 3578 to the House of Representatives for its consideration and passage.

The CHAIRMAN. All right. Is there any discussion? The gentleman from the District of Columbia.

Mr. FAUNTROY. Mr. Chairman, I am pleased to offer my full support for the three bills brought forth by the Subcommittee on Judiciary and Education.

H.R. 2050, as the chairman has indicated, transfers parole authority over the District of Columbia offenders housed in Federal prisons from the U.S. Parole Commission to the District of Columbia Parole Board.

H.R. 2946 establishes an independent jury system for the Superior Court of the District of Columbia. This legislation, requested by the D C. Superior Court and concerned groups, will provide for an efficient jury system for the District Superior Court. This change will make jury duty for District of Columbia citizens a more worthwhile civic duty.

H.R. 3578 will require criminal prosecutions concerning violations of the laws of the District of Columbia to be conducted in the name of the District. The bill further provides permanent authority for hearing commissioners in the District and modifies certain

procedures of the D.C. Judicial Nomination Commission and the D.C. Commission on Judicial Disabilities and Tenure.

Mr. Chairman, all of this legislation continues the committee's efforts to extend and enhance the concept of self-government for the District of Columbia.

I wish to commend the Subcommittee on Judiciary and Education under the chairmanship of Mr. Dymally and the ranking minority member, Mr. Bliley, for this significant legislation.

The CHAIRMAN. I thank the gentleman for his remarks.

Is there any further discussion?

Mr. DYMALLY. Mr. Chairman, I ask unanimous consent that all the technical amendments to these bills be approved.

The CHAIRMAN. Without objection, it is so ordered.

The Chair would indicate that we are waiting for one of our distinguished colleagues to arrive, and at that point it is the intention of the Chair that the clerk will call the role on the motion offered by the gentleman from California, the chairman of the subcommittee, that we pass these three bills en bloc.

Mr. DYMALLY. Mr. Chairman.

The CHAIRMAN. The gentleman from California.

Mr. DYMALLY. Because the H.R. 3578 has so many technical amendments, I want to make specific mention of H.R. 3578, a number of technical amendments.

The CHAIRMAN. The gentleman is clarifying his unanimous consent request?

Mr. DYMALLY. Yes.

The CHAIRMAN. With that clarification and without objection, the motion is agreed to and the amendments will be placed at the appropriate point in the record.

Mr. STARK. Mr. Chairman.

The CHAIRMAN. The gentleman from California, Mr. Stark.

Mr. STARK. A parliamentary inquiry, Mr. Chairman. What is the number of members necessary for a quorum?

The CHAIRMAN. One additional, seven.

Mr. STARK. I thank the Chair.

The CHAIRMAN. Then the clerk will call the roll on the motion offered by the gentleman from California, Mr. Dymally, that the three bills be passed en bloc.

The CLERK. Mr. Fauntroy?

Mr. FAUNTROY. Aye.

The CLERK. Mr. Mazzoli?

[No response.]

The CLERK. Mr. Stark?

Mr. STARK. Aye.

The CLERK. Mr. Gray?

The CHAIRMAN. Aye by proxy.

The CLERK. Mr. Barnes?

Mr. BARNES. Aye.

The CLERK. Mr. Dymally?

Mr. DYMALLY. Aye.

The CLERK. Mr. Wheat?

Mr. WHEAT. Aye.

The CLERK. Mr. McKinney?

Mr. MCKINNEY. Aye.

The CLERK. Mr. Parris?
[No response.]
The CLERK. Mr. Bliley?
[No response.]
The CLERK. Mr. Combest?
The CHAIRMAN. The gentleman is expected momentarily, so we will keep the roll open to allow the gentleman to vote, unless there are any objections.
The CLERK. Mr. Dellums?
The CHAIRMAN. Aye.
The CLERK. Mr. Chairman, eight votes aye, no votes nay.
The CHAIRMAN. It is the intention of the Chair that we would keep the roll open until such time as the gentleman from Texas arrives in order to cast his vote. He is on his way.
I thank my colleagues for providing us the necessary quorum to vote out the three bills.
While we are waiting, the Chair would like to thank the gentleman from California and the subcommittee for their diligent work and we appreciate their efforts on behalf of enhancing the quality of life for the residents of the District of Columbia. The gentleman has been very hard working and extraordinarily diligent in these matters and the Chair just wants that to be duly noted.
Mr. DYMALLY. Thank you very much, Mr. Chairman. I want a copy of your remarks to be transmitted to the District newspapers in Los Angeles.
Mr. Chairman, while we have some time, I want to again give notice that I intend to visit Alderson, WV this weekend and will take staff with me for a long overdue oversight visit.
The CHAIRMAN. We thank the gentleman for his efforts.
The gentleman from the District of Columbia.
Mr. FAUNTROY. May I commend the gentleman, as well, for his leadership and commitment to his responsibilities to the District of Columbia Committee and thus to the people of the District of Columbia.
I wish I could accompany you to Alderson. I have been there on at least one occasion. I shared with them the instructions from the black leadership family plan and I am looking forward to their reporting to the chairman how well they are doing in implementing their mission.
Mr. DYMALLY. Mr. Chairman.
The CHAIRMAN. The gentleman from California.
Mr. DYMALLY. I do want to bring to the committee and the chairman the work that the minority staff contributed to these three pieces of legislation. They were most helpful and the members of the minority side were also most cooperative in trying to bring these pieces of legislation before the full committee.
The CHAIRMAN. I thank the gentleman for his observation.
The Chair would like to note that our distinguished colleague, the gentleman from Texas, Mr. Combest, has arrived from another committee hearing and would like to repeat our remarks that we welcome the gentleman and we appreciate his interest in the Committee on the District of Columbia. We know in many ways it is a labor of love and, you know, one doesn't always get the kind of credit for this work back in the home district, but it is a necessary

job and we appreciate the gentleman for volunteering to serve on this important full committee.

Mr. COMBEST. Thank you.

Mr. MCKINNEY. Despite the fact, Mr. Chairman, that some of us questioned his sanity in doing so, before you arrived I am sure your ears were burning because we welcomed you with glowing platitudes and all other kinds of welcome. And there is my leader over there.

The CHAIRMAN. The gentleman from Kentucky.

Mr. MAZZOLI. I apologize for being late.

The CHAIRMAN. The Chair would like to indicate that we kept the roll open for both of you gentlemen, and the clerk will read—the Chair voted aye.

The CLERK. Mr. Mazzoli?

Mr. MAZZOLI. Aye.

The CLERK. Mr. Combest?

Mr. COMBEST. Aye.

I would like to say thank you, Mr. Chairman, and ranking member of the committee for welcoming me.

The CHAIRMAN. Thank you.

The CLERK. The vote now totals, Mr. Chairman, 10 votes yea, no votes nay.

The CHAIRMAN. All right. With a vote of 10 to zero, the motion offered by the gentleman from California, Mr. Dymally, has been approved and the three bills are approved en bloc and favorably reported to the House.

Is there any other business to come before the full committee?

[No response.]

The CHAIRMAN. If not the committee stands in adjournment.

[Whereupon, at 10:10 a.m., the committee was adjourned.]

[The floor actions on H.R. 2050, H.R. 2946, and H.R. 3578 follow:]

[From the Congressional Record—House, Oct. 28, 1985]

DISTRICT OF COLUMBIA BUSINESS

The SPEAKER. The Chair recognizes the gentleman from California [Mr. Dellums], chairman of the Committee on the District of Columbia.

TRANSFER OF PAROLE AUTHORITY TO THE DISTRICT OF COLUMBIA PAROLE BOARD

Mr. DELLUMS. Mr. Speaker, by direction of the Committee on the District of Columbia, I call up the bill (H.R. 2050) to give to the Board of Parole for the District of Columbia exclusive power and authority to make parole determinations concerning prisoners convicted of violating any law of the District of Columbia, or any law of the United States applicable exclusively to the District, and ask unanimous consent that the bill be considered in the House as in the Committee of the Whole.

The Clerk read the title of the bill.

The SPEAKER pro tempore (Mr. Gray of Illinois). Is there objection to the request of the gentleman from California?

There was no objection.

The Clerk read the bill, as follows:

H.R. 2050

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. The first sentence of the first section of the Act entitled "An Act to reorganize the system of parole of prisoners convicted in the District of Columbia",

approved July 17, 1947 (D.C. Code, sec. 24-201a; 61 Stat. 378), is amended by striking out "for the penal and correctional institutions of the District of Columbia" and inserting in lieu thereof "for prisoners convicted of violating any law of the District of Columbia or any law of the United States applicable exclusively to the District of Columbia".

SEC. 2. The Act entitled "An Act to establish a Board of Indeterminate Sentence and Parole for the District of Columbia and to determine its functions, and for other purposes", approved July 15, 1932 (D.C. Code, sec. 24-203 through sec. 24-209; 47 Stat. 696-699), is amended—

(1) in section 6 (D.C. Code, sec. 24-206)—

(A) by striking out "(a)" in subsection (a); and

(B) by striking out subsection (b); and

(2) by striking out section 10 (D.C. Code, sec. 24-209) and inserting in lieu thereof the following new section:

"SEC. 10. The Board of Parole for prisoners convicted of violating any law of the District of Columbia or any law of the United States applicable exclusively to the District of Columbia (created pursuant to the first section of the Act entitled 'An Act to reorganize the system of parole of prisoners convicted in the District of Columbia', approved July 17, 1947 (D.C. Code, sec. 24-201a; 61 Stat. 378) has exclusive power and authority, subject to the provisions of this Act, to release on parole, to terminate the parole of, and to modify the terms and conditions of the parole of, any prisoner convicted of violating a law of the District of Columbia, or a law of the United States applicable exclusively to the District of Columbia, regardless of the institution in which the prisoner is confined.".

SEC. 3. Section 304(a) of the District of Columbia Law Enforcement Act of 1953 (D.C. Code, sec. 4-134(a); 67 Stat. 100) is amended by striking out ", or the United States Board of Parole has authorized the release of a prisoner under section 6 of that Act, as amended (D.C. Code, sec. 24-206),".

SEC. 4. (a) After the date of enactment of this Act, individual convicted of violating both a law of the District of Columbia (including any law of the United States applicable exclusively to the District) and a law of the United States shall be given separate and distinct sentences for such convictions.

(b) The United States Parole Commission shall retain parole authority over individuals who, prior to the date of enactment of this Act, received unified sentences for violations of both a law of the District of Columbia (including any law of the United States applicable exclusively to the District of Columbia) and a law of the United States.

SEC. 5. Within one year after the date of the enactment of this Act, the Board of Parole for the District of Columbia, under applicable guidelines, shall make parole eligibility determinations and shall set a date certain for full parole hearings for all individuals brought within the parole authority of such Board under this Act. Each such individual shall be notified in writing of any determinations made under this section.

SEC. 6. (a) Except as provided in subsection (b), the provisions of this Act shall take effect on the date of the enactment of this Act.

(b) The amendments made by sections 1, 2, and 3 of this Act shall take effect one year after the date of the enactment of this Act.

Mr. DELLUMS. Mr. Speaker, I move to strike the last word.

Mr. Speaker, this is the third Congress in which this question has been before the body. Two years ago, the House on a voice vote adopted the change in the law, but no action was taken by the other body. Under present law in effect for 50 years or more, the vast majority of offenders convicted of violating either a local District of Columbia law or Federal law that applies only in the District served their sentences in facilities operated by the District of Columbia, and if they are granted parole, it is by the local D.C. Parole Board. One thousand seven-hundred offenders, however, serve in Federal facilities and are reviewed by the U.S. Board of Parole.

H.R. 2050, Mr. Speaker, merely establishes that since they are local offenders, parole jurisdiction will be with the local parole board. That is the arrangement, as you very well know, Mr. Speaker, in the 50 States and should apply here in the District of Columbia.

The chairman of our Subcommittee on Judiciary and Education that conducted the hearings on H.R. 2050 is the gentleman from California [Mr. Dymally], who will give a further explanation when he has the floor.

Mr. Speaker, I yield back the balance of my time.

Mr. DYMALLY. Mr. Speaker, I move to strike the last word.

Mr. Speaker, H.R. 2050, is the same bill introduced and passed by the House of Representatives in the 98th Congress. It would transfer parole over District of Co-

lumbia Code offenders in Federal prisons from the U.S. Parole Commission to the District of Columbia Parole Board.

There are over 1,700 District of Columbia Code offenders housed in Federal Bureau of Prison facilities. Male District of Columbia Code offenders are placed in Federal facilities for selective custody and various other reasons Female District of Columbia offenders sentenced to greater than 1 year terms are routinely placed in Federal facilities as a matter of course. This is due to the absence of a local penal facility for female offenders. Most of these female offenders are confined at Alderson, WV, over 300 miles from the District of Columbia. Others are confined as far away as Texas.

Under present law, at section 24-209 of the District of Columbia Code, the place of an offender's confinement determines parole authority. This law is contrary to current Federal-State parole practices. According to the U.S. Parole Commission, the District of Columbia is the only local jurisdiction housing inmates in Federal correction institutions which does not retain its own parole authority. As a result of this practice, several Federal lawsuits by both male and female District of Columbia Code offenders in Federal prisons have been filed.

Several points are worth noting. First, since the House passed this bill in the last Congress, the District of Columbia has revised its parole guidelines, consistent with certain recommendations made by Senator Arlen Specter and U.S. attorney for the District of Columbia, Joseph diGenova. Most important, these revised guidelines are modeled closely after current Federal guidelines. Second, the overcrowding problem in the District has resulted in an increased number of District of Columbia inmates being transferred to Federal prisons. Third, Congress recently passed the Comprehensive Crime Control Act of 1983, which would abolish Federal parole and the U.S. Parole Commission in 1991. Fourth, section 24-209 became law almost 50 years ago and 40 years prior to the Home Rule Act.

Lawsuits filed in response to this provision remain unsolved and continue to consume unnecessary time and expense. This legislation provides a practical and logically sound remedy to this longstanding problem and I believe that now is the time for this body to pass this legislation and to save the local government and the local and Federal courts further time and money.

Mr. Speaker, I would add that this bill is indeed a step toward home rule. But also, it is a cost efficient step. If passed, this legislation is estimated to save the Federal Government over $1.3 million on the average for the first 5 years after its passage. Thereafter, the District government will underwrite any expenses attached to the execution of its parole authority.

Thus, for the reasons which I've outlined, I strongly urge my colleagues to adopt this measure.

Mr. FAUNTROY. Mr. Speaker, I move to strike the last word.

Mr. Speaker, I rise in support of all three bills that have been reported by the Committee on the District of Columbia. I want to focus now, first of all, of course, upon H.R. 2050 which transfers parole authority over the District of Columbia offenders housed in Federal prisons from the U.S. Parole Commission to the District of Columbia Parole Board.

Mr. Speaker, currently there are over 1,400 D.C. Code offenders housed in Federal Bureau of Prisons facilities. Male D.C. Code offenders are placed in Federal facilities for selective custody, and various other reasons. Female D.C. Code offenders sentenced to greater than 1-year terms are placed in Federal facilities due to the absence of a facility specifically for female offenders here in Washington. Most of these female offenders are confined at Alderson, WV, whence the chairman of the subcommittee, Mr. Dymally, has just come. As he has pointed out to you, it is over 300 miles away from the District of Columbia.

Mr. DYMALLY. Mr. Speaker, will the gentleman yield?

Mr. FAUNTROY. I yield to the gentleman.

Mr. DYMALLY. I thank the gentleman for yielding.

Mr. Speaker, I am pleased to inform the gentleman that some of the inmates were most appreciative of your interest in this inconvenience which their families suffer, and have asked me to convey to you the hope that you would continue this fight to have a facility constructed in the District of Columbia.

Mr. FAUNTROY. I thank the gentleman for his leadership in moving H.R. 2050 through the committee process and now to the floor. I am sure that their hopes will be realized as a result of the vote of the House today.

Mr. Speaker, at present, under the District Code, the determination of parole jurisdiction is controlled by the place of incarceration rather than the jurisdiction of conviction. The result is that the District Board of Parole makes parole decisions for District offenders when they are housed in District institutions, and the U.S. Parole

Commission makes parole decisions for District Code offenders when they are housed in Federal institutions.

Mr. Speaker, H.R. 2050 expands the authority of the District of Columbia government by providing it with the right to determine paroles for District Code offenders whether held in District or Federal facilities.

Mr. Speaker, H.R. 2946 establishes an independent jury system for the District of Columbia, our local court. This legislation requested by the Superior Court of the District of Columbia and concerned groups will provide for an efficient jury system for the superior court. This change will help make jury duty for the District of Columbia citizens a more worthwhile civic duty.

The third measure, H.R. 3578, as amended, Mr. Speaker, will require criminal prosecutions concerning violations of the laws of the District of Columbia to be conducted in the name of the District. The bill further provides permanent authority for Hearing Commissioners in the District and modifies certain procedures of the District of Columbia Judicial Nomination Commission, and the District Commission on Judicial Disabilities and Tenure. Mr. Speaker, all three bills further the independence of the District of Columbia judicial and criminal justice system and thereby enhance self-government.

I wish to commend the chairman of the District Committee, Congressman Ronald Dellums, and the ranking minority member, Mr. McKinney. I would also like to thank Mr. Dymally, chairman of the Subcommittee on Judiciary and Education, and Mr. Bliley, the ranking minority member.

Mr. Speaker, as you know, I represent more people, taxpayers, than any single voting Member of the House. Indeed, I represent more people who pay taxes in this country than elect seven Senators, because there are, as you know, more citizens in the District of Columbia than reside in seven States in the Union. So I would prefer to have been here not simply to expand the parole authority of the District government with respect to those convicted of code violations in this city, but to turn the entire system over to the local citizenry inasmuch as we, alone among Americans, are continued denial of the right to representation in the U.S. House and Senate.

I would prefer to have passed a measure that would turn the entire court system over to the superior court and therefore allow us to fashion our own jury system procedures. Of course, I would certainly have preferred to have passed H.R. 3578, as amended, as a function of a locally elected mayor and city council, thus providing us the kind of permanent authority that we request here in terms of control of our criminal prosecutions.

Mr. Speaker, I yield back the balance of that time that those two Senators who would have been speaking, rather those Representatives who would have been speaking, had they been freed from the tyranny of taxation without representation here in the District of Columbia, as I am not.

Mr. BLILEY. Mr. Speaker, as the ranking minority member of the Judiciary and Education Subcommittee of the Committee on the District of Columbia, I rise in support of H.R. 2050.

As explained by the distinguished chairman of the subcommittee, Mr. Dymally, this bill is a question of equity. The fact is that some convicted District of Columbia criminals are sent to the District's prison at Lorton and some are sent to various Federal institutions around the country. For those people at Lorton, the District Parole Board has jurisdiction, for those men and women in Federal prisons, the Federal Parole Board and its rules and regulations apply.

Since the two parole authorities with responsibility for District prisoners have different criteria and regulations as well as the fact that different conditions may lead to different attitudes and therefore different behavior patterns affecting parole possibilities, I believe that it is a simple question of equity that the District of Columbia have sole parole authority over its own citizens.

I speak for the minority members of the committee when I say that this legislation is fair and equitable for the people and the government of the District of Columbia and we endorse its passage.

Mr. DELLUMS. Mr. Speaker, I move the previous question on the bill.

The previous question was ordered.

The bill was ordered to be engrossed and read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. DELLUMS. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the bill just passed.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from California?

There was no objection.

[From the Congressional Record—House, October 28, 1985]

DISTRICT OF COLUMBIA JURY SYSTEM ACT

Mr. DELLUMS. Mr. Speaker, by direction of the Committee on the District of Columbia, I call up the bill (H.R. 2946) to establish an independent jury system for the Superior Court of the District of Columbia, and ask unanimous consent that the bill be considered in the House as in the Committee of the Whole.

The Clerk read the title of the bill.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from California?

There was no objection.

The Clerk read the bill, as follows:

H.R. 2946

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia Jury System Act".

SEC. 2. ESTABLISHMENT OF DISTRICT OF COLUMBIA JURY SYSTEM.

Chapter 19 of title 11 of the District of Columbia Code is amended to read as follows:

"CHAPTER 19. JURIES AND JURORS

"Sec.
"11-1901. Declaration of policy.
"11-1902. Definitions.
"11-1903. Prohibition of discrimination.
"11-1904. Jury system plan.
"11-1905. Master juror list.
"11-1906. Qualification of jurors.
"11-1907. Summoning of prospective jurors.
"11-1908. Exclusion from jury service.
"11-1909. Deferral from jury service.
"11-1910. Challenging compliance with selection procedures.
"11-1911. Length of service.
"11-1912. Juror fees.
"11-1913. Protection of employment of jurors.
"11-1914. Preservation of records.
"11-1915. Fraud in the selection process.
"11-1916. Grand jury; additional grand jury.
"11-1917. Coordination and cooperation of courts.
"11-1918. Effect of invalidity.

"CHAPTER 19. JURIES AND JURORS

"§ 11-1901. Declaration of policy.

"A jury selection system is hereby established for the Superior Court of the District of Columbia. All litigants entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross section of the residents of the District of Columbia. In accordance with the provisions of this chapter, all qualified individuals shall have the opportunity to be considered for service on grand and petit juries in the District of Columbia and shall be obligated to serve as jurors when summoned for that purpose.

"§ 11-1902. Definitions.

"For purposes of this chapter, the following terms have the following meanings:

"(1) The term 'Board of Judges' means the chief judge and the associate judges of the Superior Court of the District of Columbia.

"(2) The term 'chief judge' means the chief judge of the Superior Court of the District of Columbia.

"(3) The term 'clerk' means the clerk of the Superior Court of the District of Columbia or any deputy clerk.

"(4) The term 'Court' means the Superior Court of the District of Columbia and may include any judge of the Court acting in an official capacity.

"(5) The term 'juror' means (A) any individual summoned to Superior Court for the purpose of serving on a jury; (B) any individual who is on call and available to report to Court to serve on a jury upon request; and (C) any individual whose service on a jury is temporarily deferred.

"(6) The term 'jury' includes a grand or petit jury.

"(7) The term 'jury system plan' means the plan adopted by the Board of Judges of the Court, consistent with the provisions of this chapter, to govern the administration of the jury system.

"(8) The term 'master juror list' means the consolidated list or lists compiled and maintained by the Board of Judges of the District of Columbia Courts which contains the names of prospective jurors for service in the Superior Court of the District of Columbia.

"(9) The term 'random selection' means the selection of names of prospective jurors in a manner immune from the purposeful or inadvertent introduction of subjective bias, so that no recognizable class of the individuals on the list or lists from which the names are being selected can be purposefully or inadvertently included or excluded.

"(10) The term 'resident of the District of Columbia' means an individual who has resided or has been domiciled in the District of Columbia for not less than six months.

"§ 11-1903. Prohibition of discrimination.

"A citizen of the District of Columbia may not be excluded or disqualified from jury service as a grand or petit juror in the District of Columbia on account of race, color, religion, sex, national origin, ancestry, economic status, marital status, age, or (except as provided in this chapter) physical handicap.

"§ 11-1904. Jury System Plan.

"(a) The Board of Judges shall adopt, implement, and as necessary modify, a written jury system plan for the random selection and service of grand and petit jurors in the Superior Court consistent with the provisions of this chapter. The adopted plan and any modifications shall be subject to a 30-day period of review by Congress in the manner provided for an act of the Council under section 602(c)(1) of the District of Columbia Self-Government and Government Reorganization Act. The plan shall include—

"(1) detailed procedures to be followed by the clerk of the Court in the random selection of names from the master juror list;

"(2) provisions for a master jury wheel (or other device of like purpose and function) which shall be emptied and refilled at specified intervals, not to exceed 24 months;

"(3) provisions for the disclosure to the parties and the public of the names of individuals selected for jury service, except in cases in which the chief judge determines that confidentiality is required in the interest of justice; and

"(4) procedure to be followed by the clerk of the Court in assigning individuals to grand and petit juries.

"(b) The jury system plan shall be administered by the clerk of the Court under the supervision of the Board of Judges.

"§ 11-1905. Master juror list.

"(a) The jury system plan shall provide for the compilation and maintenance by the Board of Judges of a master juror list from which names of prospective jurors shall be drawn. Such master juror list shall consist of the list of District of Columbia voters, individuals who submit their names to the Court for inclusion on the master juror list, and names from such other appropriate sources and lists as may be provided in the jury system plan.

"(b) Notwithstanding any other provision of law, upon request of the Board of Judges any person having custody, possession, or control of any list required under subsection (a) shall provide such list to the Court, at cost, at all reasonable times.

Each list shall contain the names and addresses of individuals on the list. Any list obtained by the Court under the provisions of this chapter may be used by the Court only for the selection of jurors pursuant to this chapter.

"(c) Not less than once each year, the Board of Judges shall give public notice to the citizens of the District of Columbia that individuals may be included on the master juror list by submission of their names and addresses to the clerk of the Court. Such public notice shall be given through such means as will reasonably assure as broad a dissemination as possible.

"§ 11-1906. Qualification of Jurors.

"(a) The jury system plan shall provide for procedures for the random selection and qualification of grand and petit jurors from the master juror list. Such plan may provide for separate or joint qualification and summoning processes.

"(b)(1) An individual shall be qualified to serve as a juror if that individual—

"(A) is a resident of the District of Columbia;

"(B) is a citizen of the United States;

"(C) has attained the age of 18 years; and

"(D) is able to read, speak, and understand the English language.

"(2) An individual shall not be qualified to serve as a juror—

"(A) if determined to be incapable by reason of physical or mental infirmity of rendering satisfactory jury service; or

"(B) if that individual has been convicted of a felony or has a pending felony or misdemeanor charge, except that an individual disqualifed for jury service by reason of a felony conviction may qualify for jury service not less than one year after the completion of the term of incarceration, probation, or parole following appropriate certification under procedures set out in the jury system plan.

"(3) Any determination regarding qualification for jury service shall be made on the basis of information provided in the juror qualification form and any other competent evidence.

"(c)(1) The jury system plan shall provide that a juror qualification form be mailed to each prospective juror. The form and content of such juror qualification form shall be determined under the plan. Notarization of the juror qualification form shall not be required.

"(2) An individual who fails to return a completed juror qualification form as instructed may be ordered by the Court to appear before the clerk to fill out such form, to appear before the Court and show cause why he or she should not be held in contempt for failure to submit the qualification form, or both. An individual who fails to show good cause for such failure, or who without good cause fails to appear pursuant to a Court order, may be punished by a fine of not more than $300, by imprisonment for not more than seven days, or both.

"(d) An individual who intentionally misrepresents a material fact on a juror qualification form for the purpose of avoiding or securing service as a juror may be punished by a fine of not more than $300, by imprisonment for not more than 90 days, or both.

"§ 11-1907. Summoning of Prospective Jurors.

"(a) At such times as are determined under the jury system plan, the Court shall summon or cause to be summoned from among qualified individuals under section 11-1906 sufficient prospective jurors to fulfill requirements for petit and grand jurors for the Court. A summons shall require a prospective juror to report for possible jury service at a specified time and place unless advised otherwise by the Court. Service of prospective jurors may be made personally or by first-class, registered, or certified mail as determined under the plan.

"(b) A prospective juror who fails to appear for jury duty may be ordered by the Court to appear and show cause why he or she should not be held in contempt for such failure to appear. A prospective juror who fails to show good cause for such failure, or who without good cause fails to appear pursuant to a Court order, may be punished by a fine of not more than $300, by imprisonment for not more than seven days, or both.

"§ 11-1908. Exclusion from jury service.

"(a) Subject to the provisions of this section and of sections 11-1903, 11-1906, and 11-1909, no individual or class of individuals may be disqualified, excluded, excused, or exempt from service as a juror.

"(b) An individual summoned for jury service may be: (1) excluded by the Court on the ground that that individual may be unable to render impartial jury service or that his or her service as a juror would be likely to disrupt the proceedings; (2) excluded upon preemptory challenge as provided by law; (3) excluded pursuant to the

procedure specified by law upon a challenge by any party for good cause shown; or (4) excluded upon determination by the Court that his or her service as a juror would be likely to threaten the secrecy of the proceedings, or otherwise adversely affect the integrity of jury deliberations. No person shall be excluded under clause (4) of this subsection unless the judge, in open Court, determines that such exclusion is warranted and that exclusion of that individual will not be inconsistent with sections 11-1901 and 11-1903 of this chapter.

"(c) An individual excluded from a jury shall be eligible to sit on another jury if the basis for the initial exclusion would not be relevant to his or her ability to serve on such other jury. The procedures for challenges to and review of exclusions from jury service shall be set forth in the jury system plan.

"§ 11-1909. Deferral from jury service.

"A qualified prospective juror may be deferred from jury service only upon a showing of undue hardship, extreme inconvenience, public necessity, or temporary physical or mental disability which would affect service as a juror. The procedure for requesting a deferral from jury service and the procedure and basis for granting a deferral shall be set forth in the master plan.

"§ 11-1910. Challenging compliance with selection procedures.

"(a) A party may challenge the composition of a jury by a motion for appropriate relief. A challenge shall be brought and decided before any individual juror is examined, unless the Court orders otherwise. The motion shall be in writing, supported by affidavit, and shall specify the facts constituting the grounds for the challenge. If the Court so determines, the motion may be decided on the basis of the affidavits filed with the challenge. If the Court orders trial of the challenge, witnesses may be examined on oath by the Court and may be so examined by either party.

"(b) If the Court determines that in selecting a grand or petit jury there has been a substantial failure to comply with this chapter, the Court shall stay the proceedings pending the selection of a jury in conformity with this chapter, quash the indictment, or grant other appropriate relief.

"(c) The procedures prescribed by this section are the exclusive means by which a person accused of a crime, the District of Columbia, the United States, or a party in a civil case may challenge a jury on the ground that the jury was not selected in conformity with this chapter. Nothing in this section shall preclude any person from pursuing any other remedy, civil or criminal, which may be available for the vindication or enforcement of any law prohibiting discrimination on account of race, color, religion, sex, national origin, economic status, marital status, age, or physical handicap in the selection of individuals for service on grand or petit juries.

"§ 11-1911. Length of service.

"The length of service for grand and petit jurors shall be determined by the master jury plan. In any twenty-four month period an individual shall not be required to serve more than once as a grand or petit juror except as may be necessary by reason of the insufficiency of the master juror list or as ordered by the Court.

"§ 11-1912. Juror fees.

"(a) Notwithstanding section 602(a) of the District of Columbia Self-Government and Governmental Reorganization Act, grand and petit jurors serving in the Superior Court shall receive fees and expenses at rates established by the Council of the District of Columbia, except that such fees and expenses may not exceed the respective rates paid to such jurors in the federal system.

"(b) A petit or grand juror receiving benefits under the laws of employment security of the District of Columbia shall not lose such benefits on account of performance of juror service.

"(c) Employees of the United States or of any State or local government who serve as grand or petit jurors and who continue to receive regular compensation during the period of jury service shall not be compensated for jury service. Amounts representing reimbursement of expenses incurred in connection with jury service may be paid to such employees to the extent provided in the jury system plan.

"§ 11-1913. Protection of employment of jurors.

"(a) An employer shall not deprive an employee of employment, threaten, or otherwise coerce an employee with respect to employment because the employee receives a summons, responds to a summons, serves as a juror, or attends Court for prospective jury service.

"(b) An employer who violates subsection (a) is guilty of criminal contempt. Upon a finding of criminal contempt an employer may be fined not more than $300, im-

prisoned for not more than 30 days, or both, for a first offense, and may be fined not more than $5,000, imprisoned for not more than 180 days, or both, for any subsequent offense.

"(c) If an employer discharges an employee in violation of subsection (a), the employee within 9 months of such discharge may bring a civil action for recovery of wages lost as a result of the violation, for an order of reinstatement of employment, and for damages. If an employee prevails in an action under this subsection, that employee shall be entitled to reasonable attorney fees fixed by the court.

"§ 11-1914. Preservation of records.

"(a) All records and lists compiled and maintained in connection with the selection and service of jurors shall be preserved for the length of time specified in the jury system plan.

"(b) The contents of any records or lists used in connection with the selection process shall not be disclosed, except in connection with the preparation or presentation of a motion under § 11-1910, or until all individuals selected to serve as grand or petit jurors from such lists have been discharged.

"§ 11-1915. Fraud in the selection process.

"An individual who commits fraud in the processing or selection of jurors or prospective jurors, either by causing any name to be inserted into any list maliciously or by causing any name to be deleted from any list maliciously (including malicious data entry or the altering of any data processing machine or any set of instructions or programs which control data processing equipment for such malicious purpose), is guilty of the crime of jury tampering, and, upon conviction, may be punished by a fine of not more than $10,000, imprisonment for not more than two years, or both. This section shall not limit any other provisions of law concerning the crime of jury tampering.

"§ 11-1916. Grand jury; additional grand jury.

"(a) A grand jury serving in the District of Columbia may take cognizance of all matters brought before it regardless of whether an indictment is returnable in the Federal or District of Columbia courts.

"(b) If the United States Attorney for the District of Columbia certifies in writing to the chief judge that an additional grand jury is required, the judge may in his or her discretion order an additional grand jury summoned which shall be drawn at such time as he or she designates. Unless discharged by order of the judge, the additional grand jury shall serve until the end of the term for which it is drawn.

"§ 11-1917. Coordination and Cooperation of Courts.

"To the extent feasible, the Superior Court and the United States District Court shall consider the respective needs of each court in the qualification, selection, and service of jurors. Nothing in this chapter shall be construed to prevent such courts from entering into any agreement for sharing resources and facilities (including automated data processing hardware and software, forms, postage, and other resources).

"§ 11-1018. Effect of Invalidity.

"If any provision of this Act or the application of that provision is held invalid, such invalidity shall not affect any other provision or application of this Act which can be given effect without the invalid provision or application.".

SEC. 3. TECHNICAL AND CONFORMING AMENDMENTS.

Section 1869(f) of title 28, United States Code, is amended by striking out "except that for purposes of sections 1861, 1862, 1866(c), 1866(d), and 1867 of this chapter such terms shall include the Superior Court of the District of Columbia".

SEC. 4. EFFECTIVE DATE.

(a) Except as provided in subsection (b), the provisions of this Act shall take effect 180 days after the date of enactment of this Act.

(b) Upon enactment of this Act, the Board of Judges shall have authority to promulgate and adopt a jury system plan in accordance with this Act and the Court and the clerk of the Court shall have authority to take all necessary actions preliminary to the assumption of the administration of an independent jury system under this Act.

Mr. DELLUMS. Mr. Speaker, I move to strike the last word. Mr. Speaker, this bill relieves the U.S. courts of the task of calling jurors to serve at trials in local District of Columbia courts. The present practice is a holdover from 1970, when the U.S. court handled felony trials and appeals for local offenses. In 1970, the Congress cre-

ated a trial court and appeals court especially to handle such local cases. If H.R. 2946 becomes law, the local court will handle just the local cases, and the U.S. district court would just call jurors for Federal cases.

A full explanation of the bill will be given by my distinguished colleague, the gentleman from California [Mr. Dymally], who chairs the Subcommittee on Judiciary and Education, when he is recognized.

Mr. Speaker, with that brief explanation, I yield back the balance of my time.

Mr. DYMALLY. Mr. Speaker, I move to strike the last word.

Mr. Speaker, this bill is quite simple. H.R. 2946 is a bill to establish an independent jury system for the Superior Court of the District of Columbia.

In 1970, this body and Congress passed the District of Columbia Court Reform Act, which became effective in 1971. We established a D.C. court system expressly analogous to State court systems. After nearly 15 years of self-management and competitive efficiency, the court is prepared to administer its own jury system, independent of the U.S. District Court for the District of Columbia.

Most important, it is quite capable of doing so and at the same time continuing to work closely and cooperate with the U.S. District Court for the District of Columbia. Hence, the local district court is "strongly supportive" of this transition. As do State courts, the local courts here have local needs which, like State courts, they should have the authority to address.

Against this backdrop, I urge my fellow Members of this august body to adopt H.R. 2946.

Mr. BLILEY. Mr. Speaker, I move to strike the last word.

Mr. Speaker, I rise as a cosponsor and as the ranking member of the Subcommittee on Judiciary and Education in strong support of H.R. 2946.

This legislation is needed for the District of Columbia court system to effectively and efficiently deal with the large caseload of court proceedings that it is faced with. Last year this body authorized seven new superior court judges for the District of Columbia. The addition of these positions has overstrained the limited capacity of the present jury selection system employed by the District courts.

The courts have also instituted the "one day, one trial" method of jury duty which places larger demands on the panels of jury selection than the traditional method of jury service. I support one day, one trial and I am proud of the work that the chairman of the subcommittee and I did in achieving this carefully written bipartisan bill. The gentleman from California and myself worked hard on this legislation and I feel confident that I speak for the minority on the committee when I say that we enthusiastically support this bill.

Mr. DYMALLY. Mr. Speaker, will the gentleman yield?

Mr. BLILEY. I am happy to yield to the gentleman from California.

Mr. DYMALLY. Mr. Speaker, I want to take this opportunity to express my deep gratitude to the gentleman from Virginia [Mr. Bliley] for his support of this legislation and other legislation affecting the judiciary in the District of Columbia. The gentleman from Virginia has been most cooperative in the committee's deliberations, and I wish to express my thanks to him.

Mr. BLILEY. Mr. Speaker, I thank the gentleman from California [Mr. Dymally], and I yield back the balance of my time.

Mr. DELLUMS. Mr. Speaker, I move to strike the last word.

Mr. Speaker, I rise simply to compliment the gentleman from California [Mr. Dymally] and the gentleman from Virginia [Mr. Bliley] for their diligent activity and their conscientious efforts as the chairperson of the Subcommittee on Judiciary and Education and the ranking minority member of that subcommittee. Both of these gentlemen are very delightful members to work with. They are conscientious, hard-working members who are very diligent about the business of trying to rectify many of the inadequacies that exist between the Federal Government and the residents of the District of Columbia.

My purpose in rising was only to make that statement, Mr. Speaker, and I yield back the balance of my time.

Mr. BLAZ. Mr. Speaker, I move to strike the last word.

(Mr. Blaz asked and was given permission to include extraneous matter.)

Mr. BLAZ. Mr. Speaker, I present for inclusion in the Record various items of correspondence from the Department of Justice objecting to the legislation presently being considered. Those items are as follows:

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, October 28, 1985.

Hon. ROBERT H. MICHEL,
Minority Leader, U.S. House of Representatives,
Washington, DC.

DEAR CONGRESSMAN MICHEL: The following bills are scheduled for floor action on Monday, October 28, 1985 on the District Calendar:

H.R. 2050.—a bill to transfer parole authority over District of Columbia offenders housed in federal prison from the United States Parole Commission to the District of Columbia Parole Board.

H.R. 2946.—a bill to establish an independent jury system for the Superior Court of the District of Columbia.

H.R. 3578.—(We are not sure which bill H.R. 3578 or H.R. 3592 will be scheduled for floor action. Originally, H.R. 3370 was introduced on September 19, 1985. A staff mark-up resulted in H.R. 3578 being introduced on October 17, which the Committee reported out. Subsequent to the Committee mark-up, H.R. 3592, which is a clean version of H.R. 3578 with additional amendments, was introduced.)—a bill to provide permanent authority for hearing commissioners in the District of Columbia courts, to modify certain procedures of the District of Columbia courts, to modify certain procedures of the District of Columbia Judicial Nomination Commission and the District of Columbia Commission on Judicial Disabilities and Tenure, and for other purposes.

The Department of Justice has sent letters of opposition on H.R. 2050 and H.R. 2946 to the Committee on the District of Columbia (copies attached).

H.R. 2050

The Department opposes H.R. 2050 for several reasons:

(1) Place of incarceration rather than jurisdiction of correction determines parole jurisdiction under the D.C. Code.

(2) The policies and procedures of the D.C. Board of Parole were called into serious question during a hearing on similar legislation (H.R. 3369) during the 98th Congress.

(3) New guidelines established by D.C. Board of Parole in the Spring of 1985 have not yet been analyzed for efficiency and effectiveness.

(4) The U.S. Sentencing Commission established under P.L. 98-473 (Comprehensive Crime Control Act of 1984) and recently confirmed by the Senate will have to address this issue as it determines how to phase out the U.S. Parole Commission (abolished under P.L. 98-473).

(5) A piecemeal approach to the D.C. sentencing and correctional practices is a real and direct threat to law enforcement interests in the District, especially since August of 1985 when the Federal Bureau of Prisons started to assume custody of all D.C. Code violators sentenced in D.C. Superior Court to assist the District government in responding to a court order to reduce overcrowding at its correctional facilities.

H.R. 2946

While H.R. 2946 contains significant improvements over the jury selection system now in effect in the federal courts, e.g. broadening the base of persons who can be summoned for jury duty, narrowing the number of automatic exclusions from jury service, and increasing the penalties for certain fraudulent conduct in the jury selection process, we do not believe that a bifurcated approach to the D.C. jury selection system—one for the local trial court and one for the federal trial court—is a prudent or efficient one. Such a bifurcated approach would entail administrative difficulties, duplication of effort and additional cost to the federal government. For these reasons, we oppose H.R. 2946 in its present form, but we would consider changes to the Jury Selection and Service Act to incorporate the improvements contained in H.R. 2946.

H.R. 3578

Although this Department has not been asked to comment on H.R. 3370, H.R. 3578 or H.R. 3592, we do have concerns about several provisions contained in these related bills. H.R. 3592 (introduced as a clean version of H.R. 3578 but with several technical amendments) appears to be the bill scheduled for floor action. We do object to Section 2 of this bill which requires the U.S. Attorney for District of Co-

lumbia to compile an annual report by category of offense and conviction of D.C. Code violators, and violators of U.S. law exclusive to the District of Columbia. The material is now available and a matter of public record. To have the local U.S. Attorney's office utilize the manpower and resources necessary to compile and publish this report would create serious budgetary problems for that office—an issue the Committee failed to address.

Sections 10–11 of H.R. 3592 would govern public access to materials of the Judicial Nomination Commission. It is our belief that confidentiality promotes candor in such proceedings but we recognize that there may be instances where total secrecy is unfair. Section 13 requires in part that the record and materials filed in connection with the Judicial Disability and Tenure Commission be kept confidential unless the judge whose conduct or health is at issue authorizes disclosure. It is not clear whether the judge can authorize disclosure of some of the information while suppressing the rest. If so, this could result in presenting a very one-sided picture to the public. We suggest that either of the following approaches would be preferable:

(1) requiring a judge who wants part of the record to be made public to consent to all of it being made public, or

(2) following the rule which applies in grand jury proceedings, i.e., the record is kept secret and the decision makers are sworn to secrecy, but witnesses may tell the public about their testimony and submissions if they wish.

We would appreciate any assistance you could give in making our views known on these issues.

The Office of Management and Budget has advised this Department and that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

PHILLIP D. BRADY,
Acting Assistant Attorney General.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, September 27, 1985.

Hon. RONALD DELLUMS,
Chairman, Committee on the District of Columbia,
Washington, DC.

DEAR MR. CHAIRMAN: This is in response to your request for the views of the Department of Justice on H.R. 2050, a bill "to give to the Board of Parole of the District of Columbia exclusive power and authority to make parole determination concerning prisoners convicted of violating any law of the District of Columbia, or any law of the United States applicable exclusively to the District." As set forth in more detail below, the Department of Justice believes that the change sought by this bill would not improve the law enforcement and corrections programs in the District of Columbia and we therefore oppose this bill. Furthermore, we believe that Congress should not undertake piecemeal revisions of the D.C. corrections programs until completion of a thorough and comprehensive review of all sentencing and correctional practices.

At present under the D.C. Code, the determination of parole jurisdiction is controlled by the place of incarceration rather than the jurisdiction of conviction. The result is that the D.C. Board of Parole makes parole decisions for D.C. Code offenders when they are housed in D.C. institutions and the United States Parole Commission makes parole decisions for D.C. Code offenders when they are housed in federal institutions. At the present time over 1,400 D.C. Code offenders are held in Federal Bureau of Prisons facilities. This represents the designed capacity of three modern correctional institutions. Although some of these are in federal custody because of their extremely violent criminal histories or to separate them from other District of Columbia inmates, the bulk of them are in federal custody primarily because of shortages of space to house inmates in the District of Columbia system. Thus, two factors not addressed in H.R. 2050 are the real burden to the Federal Bureau of Prisons of confining this large group of local offenders and the serious problems involved in adding these geographically dispersed inmates to the D.C. Parole Board's caseload.

In the 1930's when the D.C. Board of Parole was established, this divided jurisdictional scheme may have met correctional needs. The Comprehensive Crime Control Act of 1983 abolishes the United States Parole Commission in 1991, however, and legislative attention must clearly be given to the questions of future parole responsi-

bility for D.C. Code offenders designated to Federal institutions. At the same time every effort must be made to insure that the District of Columbia will provide adequate prison space to house its sentenced criminals.

A larger question is what role should parole serve as a correctional tool in the District of Columbia? The legislative history of the Comprehensive Crime Control Act of 1984, P.L. 98-473, clearly reflects the Congressional determination that the "rehabilitation model" upon which the Federal sentencing and parole system was based is no longer valid. S. Rep. No. 225, 98th Congress, 1st Sess. 38 (1983). Based upon a study spanning a decade conducted by the National Commission on Reform of Federal Criminal Law, it was concluded that the Federal sentencing and parole system resulted in significant disparities in criminal sentences. As stated in the Senate Report:

"The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward.

"The [Comprehensive Crime Control Act of 1984 (CCCA)] meets the critical challenges of sentencing reform. The [CCCA's] sweeping provisions are designed to structure judicial sentencing discretion, eliminate indeterminate sentencing, phase out parole release, and make criminal sentencing fairer and more certain. The current effort constitutes an important attempt to reform the manner in which we sentence convicted offenders. The Committee believes that the [CCCA] represents a major breakthrough in this area." *Id.* at 65.

The current D.C. sentencing and parole system does not reflect this new understanding of the limitations of the "rehabilitation model" as described above.

In addition, the District of Columbia parole system has other demonstrated problems. When we reviewed similar legislation two years ago [H.R. 3369], this matter was discussed in detail in our letter dated July 25, 1983 from Assistant Attorney General Robert A. McConnell to you. The Department noted at that time that the D.C. Board of Parole, according to its 1982 annual report, granted parole at initial hearings to 61 percent of the adult offenders and that 73 percent of the remainder were granted parole upon a rehearing. The Board also reported however, that based upon a study of a selected sample of 322 parolees released on parole between 1977 and 1979, 52 percent were re-arrested during the first two years of parole supervision. Of the parolees who were re-arrested, 77 percent were convicted for crimes committed while on parole. Given the very high percentage of parolees released at the time of initial parole consideration and the very high rate of recidivist criminal activity among those released, the policies and procedures of the D.C. Board of Parole were called into serious question.

We also pointed out that despite the large number of D.C. parolees who commit crimes following parole release, parole apparently was revoked in a relatively small percentage of the cases. In that regard, the D.C. Board of Parole reported that of those parolees in its 1977-1979 sample who were convicted of crimes while on parole, parole was revoked because of the new offense in less than one half of the cases. Although the reason for this statistic was not explained, it appears that it may be attributed to the D.C. Parole Board policy of not issuing parole violator warrants for certain offenses. In this regard, the Board listed in its 1982 Annual Report the types of offenses it terms "Eligible Offenses" for purposes of issuance of parole violator warrants. It appears that as a matter of policy, the Board will not issue parole violator warrants for burglary of commercial establishments, possession of firearms (unless the defendant is arrested with the weapon in his hand or on his person), grand larceny, embezzlement, fraud, forgery and uttering and for a host of other violations of the District of Columbia Code or the United States Code.

This apparent policy which allows substantial numbers of parolees to continue on parole even after arrest and conviction of serious crimes was of significant concern to us in the past. If these matters have not yet been completely remedied, and it may be too early to conclude that they have, then similar concern is presently warranted. Under H.R. 2050, the jurisdiction of the D.C. Board of Parole would be substantially expanded to include those D.C. Code offenders presently under the jurisdiction of the U.S. Parole Commission. These offenders, however, include some of the most dangerous and violent criminals convicted in the District of Columbia. Premature release of such individuals pursuant to existing parole policies would pose a real and direct threat to law enforcement interests in the District of Columbia.

We believe it is time for a thorough legislative review of District of Columbia sentencing and correctional practices. A major expansion of the capacity of D.C. correctional facilities is essential. The Federal Bureau of Prisons is seriously overcrowded

and can no longer accept the overload of the District of Columbia system. This is especially true in light of the increased D.C. prison population that would result, at least temporarily, from a more responsibly run parole system. Replacement of the parole system in the District of Columbia by a sentencing guideline system similar to that adopted by Congress in the Comprehensive Crime Control Act of 1984 should be considered. While expansion of the D.C. inmate capacity must begin at once, other changes can be more thoroughly considered than is done in H.R. 2050.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

PHILLIP D. BRADY,
Acting Assistant Attorney General.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, July 31, 1985.

Hon. RONALD V. DELLUMS,
Chairman, Committee on District of Columbia, U.S. House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: This is to proffer the views of the Department of Justice on H.R. 2946, a bill that would establish an independent jury selection system for the Superior Court of the District of Columbia. While we believe that some of the changes from current law contained in H.R. 2946 would constitute significant improvements over the jury selection system now in effect in the federal courts, we oppose the bill for the reasons set forth below.

Jury selection for both the Superior Court of the District of Columbia and the United States District Court for the District of Columbia is now governed by a single process established by the Jury Selection and Service Act (28 U.S.C. 1861, *et seq.*) and administered by the United States District Court for the District of Columbia. If H.R. 2946 were enacted, there would exist within the District of Columbia two separate jury selection systems—one for the local trial court and one for the federal trial court. Inevitably, such a bifurcated approach would entail administrative difficulties, duplication of effort, and additional cost to the federal government, notwithstanding the provision of the bill that encourages the federal and local courts to share resources and facilities to the extent feasible.

H.R. 2946 would improve the current jury selection system by broadening the base of persons who can be summoned for jury duty, by narrowing the number of automatic exclusions from jury service, and by increasing the penalties for certain fraudulent conduct in the jury selection process. However, we are not persuaded that the prospect of such advances warrants the establishment of another jury selection system in the District of Columbia, with all of the drawbacks that such a course would entail. Rather, we think the better course would be to consider amending the Jury Selection and Service Act to incorporate the improvements contained in H.R. 2946. Such an approach would improve the jury selection process not only in the Superior Court but in all federal courts. Equally important, it would preserve the unified selection system currently in effect in the District of Columbia, thereby avoiding the administrative and financial costs of a bifurcated system.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

PHILLIP D. BRADY,
Acting Assistant Attorney General.

Mr. DELLUMS. Mr. Speaker, I move the previous question on the bill.

The previous question was ordered.

The bill was ordered to be engrossed and read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. DELLUMS. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the bill just passed.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from California?

There was no objection.

[From the Congressional Record—House, Oct. 28, 1985]

DISTRICT OF COLUMBIA JUDICIAL EFFICIENCY AND IMPROVEMENT ACT OF 1985

Mr. DELLUMS. Mr. Speaker, by direction of the Committee on the District of Columbia, I call up the bill (H.R. 3578) to provide permanent authority for hearing commissioners in the District of Columbia courts, to modify certain procedures of the District of Columbia Judicial Nomination Commission and the District of Columbia Commission on Judicial Disabilities and Tenure, and for other purposes, and ask unanimous consent that the bill be considered in the House as in the Committee of the Whole.

The Clerk read the title of the bill.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from California?

There was no objection.

The Clerk read the bill, as follows:

H.R. 3578

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia Prosecutorial and Judicial Efficiency Act of 1985".

SEC. 2. ANNUAL REPORT ON PROSECUTIONS.

Not later than March 1 of each year, the United States attorney for the District of Columbia shall compile and make available an annual report concerning prosecutions, under the laws of the District of Columbia and the laws of the United States applicable exclusively to the District of Columbia, conducted by the Office of the United States attorney for the District of Columbia in the previous calendar year. Such report shall include the number of prosecutions and convictions by category and nature of offense, and shall include any recommendations concerning the criminal justice system in the District of Columbia.

SEC. 3. HEARING COMMISSIONERS.

Section 11-1732 of title 11 of the District of Columbia Code is amended to read as follows:

"§ 11-1732. Hearing commissioners.

"(a) The chief judge of the Superior Court may appoint and remove hearing commissioners who shall serve in the Superior Court and perform the duties enumerated in subsection (c) of this section and such other duties as are consistent with the Constitution and laws of the United States and of the District of Columbia and are assigned by rule of the Superior Court.

"(b) No individual may be appointed or serve as a hearing commissioner under this section unless such individual has been a member of the bar of the District of Columbia for at least three years.

"(c) A hearing commissioner, when specifically designated by the chief judge of the Superior Court, may perform the following functions:

"(1) Administer oaths and affirmations and take acknowledgments.

"(2) Determine conditions of release and pretrial detention pursuant to the provisions of title 23 of the District of Columbia Code (relating to criminal procedures).

"(3) Conduct preliminary examinations in all criminal cases to determine if there is probable cause to believe that an offense has been committed and that the accused committed it.

"(4) Subject to the provisions of subsection (d), with the consent of the parties involved, make findings in uncontested proceedings, and in contested hearings in the civil, criminal, and family divisions of the Superior Court.

"(d)(1) With respect to proceedings and hearings under subsection (c)(4), a rehearing of the case, or a review of the hearing commissioner's findings, may be made by a judge of the appropriate division sua sponte and shall be made upon a motion of one of the parties, which motion shall be filed within ten days after the judgment.

An appeal to the District of Columbia Court of Appeals may be made only after a review hearing is held in the Superior Court.

"(2)(A) In any case brought under sections 11–1101 (1), (3), (10), or (11) involving the establishment or enforcement of child support, or in any case seeking to modify an existing child support order, where a hearing commissioner in the Family Division of the Superior Court finds that there is an existing duty of support, the hearing commissioner shall conduct a hearing on support, make findings, and enter judgment.

"(B) If in a case under subparagraph (A), the hearing commissioner finds that a duty of support exists and makes a finding that the case involves complex issues requiring judicial resolution, the hearing commissioner shall establish a temporary support obligation and refer unresolved issues to a judge.

"(C) In the cases under subparagraphs (A) and (B) in which the hearing commissioner finds that there is a duty of support and the individual owing that duty has been served or given notice of the proceedings under any application statute or court rule, if that individual fails to appear or otherwise respond, the hearing commissioner shall enter a default order.

"(D) A rehearing or review of the hearing commissioner's findings in a case under subparagraphs (A) and (B) may be made by a judge of the Family Division sua sponte. The findings of the hearing commissioner shall constitute a final order of the Superior Court.".

SEC. 4. APPOINTMENT OF EXECUTIVE OFFICER OF THE DISTRICT OF COLUMBIA COURTS.

Section 11–1703 of title 11 of the District of Columbia Code is amended—

(1) by striking out subsection (b);

(2) by redesignating subsection (c) as subsection (d); and

(3) by inserting after subsection (a) the following new subsection:

"(b) The Executive Officer shall be appointed, and subject to removal, by the Joint Committee on Judicial Administration with the approval of the chief judges of the District of Columbia courts. In making such appointment the Joint Committee shall consider experience and special training in administrative and executive positions and familiarity with court procedures.

"(c) The Executive Officer shall be a bona fide resident of the District of Columbia or become a resident not more than 180 days after the date of appointment.".

SEC. 5. MANDATORY RETIREMENT AGE OF JUDGES.

Section 431(c) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by striking out "Seventy" and inserting in lieu thereof "seventy-four".

SEC. 6. APPOINTMENT PANEL FOR THE BOARD OF TRUSTEES OF THE PUBLIC DEFENDER SERVICE.

(a) COMPOSITION OF APPOINTMENT PANEL.—Section 303 of the District of Columbia Court Reform and Criminal Procedure Act of 1970 (D.C. Code, 1–2703) is amended in subsection (b)(1)—

(1) by striking out subparagraph (A); and

(2) by redesignating subparagraphs (B), (C), (D), and (E) as subparagraphs (A), (B), (C), and (D), respectively.

(b) PRESIDING OFFICER.—Section 303 of such Act (D.C. Code, 1–2703) is further amended in subsection (b)(2) by striking out "Chief Judge of the United States Court of Appeals for the District of Columbia Circuit" and inserting in lieu thereof "Chief Judge of the District of Columbia Court of Appeals".

SEC. 7. REORGANIZATION OF AUDIT RESPONSIBILITY.

(a) AUDITOR-MASTER.—Section 11–1724 of title 11 of the District of Columbia Code is amended—

(1) by striking out "(1) audit and state fiduciary accounts,"; and

(2) by respectively designating clauses (2) and (3) as clauses "(1)" and "(2)".

(b) REGISTER OF WILLS.—Section 11–2104(a) of title 11 of the District of Columbia Code is amended—

(1) in paragraph (2) by striking out "and" after the semicolon;

(2) in paragraph (3) by striking out the period and inserting in lieu thereof "; and"; and

(3) by inserting at the end thereof the following new paragraph:

"(4) audit and state fiduciary accounts.".

SEC. 8. ELIMINATION OF DUPLICATE JUDICIAL FINANCIAL REPORTING REQUIREMENT.

(a) TERMINATION OF FEDERAL DISCLOSURE REQUIREMENTS.—Section 303 of the Ethics in Government Act of 1978 (28 U.S.C. App. 301) is amended by inserting at the end thereof the following new subsection:

"(h) The provisions of this Act shall not apply to any judicial officer or employee of the Superior Court of the District of Columbia or the District of Columbia Court of Appeals.".

(b) TECHNICAL AND CONFORMING AMENDMENT.—Section 308(9) of such Act (28 U.S.C. App. 308(9)) is amended by striking out "courts of the District of Columbia".

SEC. 9. CERTIFICATION OF QUESTIONS OF LAW.

Subchapter II of Chapter 7, title 11, District of Columbia Code, is amended by inserting after section 11–722 the following new section:

"§ Sec. 11–723. Certification of Questions of Law.

"(a) The District of Columbia Court of Appeals may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or the highest appellate court of any State, if there are involved in any proceeding before any such certifying court questions of law of the District of Columbia which may be determinative of the cause pending in such certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the District of Columbia Court of Appeals.

"(b) This section may be invoked by an order of any of the courts referred to in subsection (a) upon the court's motion or upon motion of any party to the cause.

"(c) A certification order shall set forth (1) the question of law to be answered; and (2) a statement of all facts relevant to the questions certified and the nature of the controversy in which the questions arose.

"(d) A certification order shall be prepared by the certifying court and forwarded to the District of Columbia Court of Appeals. The District of Columbia Court of Appeals may require the original or copies of all or such portion of the record before the certifying court as are considered necessary to a determination of the questions certified to it.

"(e) Fees and costs shall be the same as in appeals docketed before the District of Columbia Court of Appeals and shall be equally divided between the parties unless precluded by statute or by order of the certifying court.

"(f) The District of Columbia Court of Appeals may prescribe the rules of procedure concerning the answering and certification of questions of law under this section.

"(g) The written opinion of the District of Columbia Court of Appeals stating the law governing any questions certified under subsection (a) shall be sent by the clerk to the certifying court and to the parties.

"(h)(1) The District of Columbia Court of Appeals, on its own motion or the motion of any party, may order certification of questions of law to the highest court of any State under the conditions described in subsection (a).

"(2) The procedures for certification from the District of Columbia to a State shall be those provided in the laws of that State.".

SEC. 10. PUBLIC ACCESS TO MATERIALS OF JUDICIAL NOMINATION COMMISSION.

Section 434(c)(3) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by striking out the last sentence and inserting in lieu thereof: "Information, records, and other materials furnished to or developed by the Commission in the performance of its duties under this section shall be privileged and confidential. Section 552 of title 5, United States Code, (known as the Freedom of Information Act) shall not apply to any such materials.".

SEC. 11. MEETINGS OF THE JUDICIAL NOMINATION COMMISSION.

Section 434(c)(1) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by inserting at the end thereof "Meetings of the Commission may be closed to the public. Section 742 of this Act shall not apply to meetings of the Commission.".

SEC. 12. PUBLIC ANNOUNCEMENT OF JUDICIAL RECOMMENDATIONS.

Section 434(d) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by inserting at the end thereof the following new paragraph:

"(4) Upon submission to the President, the name of any individual recommended under this subsection shall be made public by the Judicial Nomination Commission.".

SEC. 13. DISCLOSURE OF CERTAIN INFORMATION TO THE JUDICIAL NOMINATION COMMISSION.

Section 11-1528 of title 11, District of Columbia Code, is amended by striking out all of subsection (a) and inserting in lieu thereof the following:

"(a)(1) Subject to paragraph (2), the filing of papers with, and the giving of testimony before, the Commission shall be privileged. Subject to paragraph (2), hearings before the Commission, the record thereof, and materials and papers filed in connection with such hearings shall be confidential.

"(2)(A) The judge whose conduct or health is the subject of any proceedings under this subchapter may disclose or authorize the disclosure of any information under paragraph (1).

"(B) With respect to a prosecution of a witness for perjury or on review of a decision of the Commission, the record of hearings before the Commission and all papers filed in connection with such hearing shall be disclosed to the extent required for such prosecution or review.

"(C) Upon request, the Commission shall disclose, on a privileged and confidential basis, to the District of Columbia Judicial Nomination Commission any information under paragraph (1) concerning any judge being considered by such nomination commission for elevation to the District of Columbia Court of Appeals or for chief judge of a District of Columbia court.".

SEC. 14. REAPPOINTMENT TO JUDICIAL OFFICE.

Section 433(c) of the District of Columbia Self-Government and Governmental Reorganization Act is amended—

(1) in the first sentence by striking out "three months" and inserting in lieu thereof "six months"; and

(2) in the second sentence, by striking out "thirty" and inserting in lieu thereof "sixty".

SEC. 15. MODIFICATION OF JUDICIAL REAPPOINTMENT EVALUATION CATEGORIES.

Section 433(c) of the District of Columbia Self-Government and Governmental Reorganization Act is amended in the third sentence by striking out "exceptionally well-qualified or".

SEC. 16. SERVICES OF RETIRED JUDGES.

Section 11-1504(a) of title 11, District of Columbia Code, is amended by striking out paragraphs (2) and (3) and inserting after paragraph (1) the following new paragraph:

"(2) At any time prior to or after retirement, a judge may request recommendation from the District of Columbia Commission on Judicial Disabilities and Tenure (hereinafter in this section referred to as the "Commission") to be appointed as a senior judge in accordance with this section.".

SEC. 17. EXTENSION OF PERIOD FOR SUBMITTING JUDICIAL NOMINATIONS.

Section 434(d)(1) of the District of Columbia Self-Government and Governmental Reorganization Act is amended by striking out "thirty days" each place it appears and inserting in lieu thereof "sixty days".

SEC. 18. EFFECTIVE DATE.

This Act shall take effect on the date of the enactment of this Act.

COMMITTEE AMENDMENTS

The SPEAKER pro tempore. The Clerk will report the first committee amendment.

The Clerk read as follows:

Committee amendment: Page 2, strike out line 3 and insert in lieu thereof "Judicial Efficiency and Improvement Act of 1985'."

Mr. DELLUMS. Mr. Speaker, I ask unanimous consent that the committee amendments be considered en bloc, considered as read, and printed in the Record.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from California?

There was no objection.

The remaining committee amendments are as follows:

Committee amendments: Page 7, line 6, strike out "subsection (b)(2)" and insert in lieu thereof "subsection (b)(1)".

Page 7, line 7, strike out "Chief Judge" and insert in lieu thereof "chief judge".

Page 8, line 5, strike out "Section 303" and insert in lieu thereof "Section 301".

Page 8, line 16, insert "(a) IN GENERAL.—" before "Subchapter II".

Page 10, after line 11, insert the following new subsection:

(b) TECHNICAL AMENDMENT.—The table of sections for such subchapter is amended by adding at the end thereof the following new item:

"11-723. Certification of questions of law."

Page 12, line 22, strike out "second" and insert in lieu thereof "third".

Page 13, line 5, strike out "third" and insert in lieu thereof "fourth".

Page 13, line 14, strike out " "Commission" " and insert in lieu thereof " 'Commission' ".

Page 5, strike out line 4 and all that follows through line 8 on page 5 and insert in lieu thereof the following:

"(D)(1) Subject to paragraph (2), the findings of the hearing commissioner shall constitute a final order of the Superior Court.

"(2) A rehearing or review of the hearing commissioner's findings in a case under subparagraphs (A) and (B) may be made by a judge of the Family Division sua sponte and shall be made upon a motion of one of the parties, which motion shall be filed within ten days after the judgment. An appeal to the District of Columbia Court of Appeals may be made only after a hearing is held in the Superior Court."

Mr. DELLUMS. Mr. Speaker, I simply wish to explain briefly that the committee amendments presented to the body are perfecting amendments, and I ask that they be approved.

The SPEAKER pro tempore. The question is on the committee amendments.

The committee amendments were agreed to.

Mr. DELLUMS. Mr. Speaker, I move to strike the last word.

Mr. Speaker, this bill makes certain changes in the local courts in Washington, DC, suggested by local practitioners, officials, and the courts, and makes permanent authority for hearing commissioners, authority which Congress has granted from year to year in appropriation bills.

Hearings were held before our Subcommittee on the Judiciary and Education chaired by the gentleman from California [Mr. Dymally], with the ranking minority member being the distinguished gentleman from Virginia [Mr. Bliley], each of whom will give a further explanation of the bill at the appropriate time.

With the brief introductory set of remarks, Mr. Speaker, I yield back the balance of my time.

Mr. DYMALLY Mr. Speaker, I move to strike the last word.

Mr. Speaker, since the 98th Congress, the Subcommittee on Judiciary and Education has focused its attention on improving the administration of Justice in the District of Columbia, and at the same time transferring to the District authority over its agencies, consistent with the legislative intent underlying the District of Columbia Court Reform and Criminal Procedure Act of 1970 and the District of Columbia Self-Government Act and Government Reorganization Act of 1973, as amended.

This legislation emanates from these significant legislative developments. It reflects both self-government considerations and the improvement and efficiency of the local judicial system. The bill itself evolves from recommendations of the District of Columbia Court Study Committee and the District of Columbia courts.

A brief history of its development are in order. In 1978, the District of Columbia Bar Association formed the District of Columbia Court Study Committee. This committee (commonly known as the Horsky Committee) was charged with evaluating the District of Columbia Court Reform and Criminal Procedure Act of 1970 and making appropriate recommendations for improving the judicial system. Over a 4-year period, the court study committee conducted its mission. Certain provisions in this bill represent the committee's work product.

In sum, H.R. 3578 would create permanent authority for District of Columbia hearing commissioners, eliminate duplicate judicial financial reporting, provide authority for the District of Columbia Court of Appeals to answer certain undecided questions of District of Columbia law pending in other courts and amend a panoply of provisions involving judicial nomination, reappointment, and tenure processes.

It would also require the U.S. attorney to publish an annual report regarding its District of Columbia criminal justice activity. Further, it would modify the appointment panel for the Board of Trustees of the Public Defender Service.

These noncontroversial provisions would further improve local judicial nomination and tenure processes and at the same time move the local government one step further toward self-government. Most important, it is estimated that the bill would save the local government over $600,000 a year at no cost to the Federal Government.

Mr. BLILEY. Mr. Speaker, I move to strike the last word.

Mr. Speaker, I rise to support the passage of H.R. 3578. This bill makes a number of minor, but important and needed corrections in the procedures and efficiency of the District of Columbia courts.

Mr. Dymally, the chairman of the Judiciary and Education Subcommittee, was diligent in his efforts to craft a piece of valuable legislation that all parties could agree to. I am pleased to be able to lend my support to his efforts and to thank him for his bipartisan spirit.

Mr. Speaker, the minority members of the District of Columbia committee support passage of H.R. 3578.

Mr. DELLUMS. Mr. Speaker, I move the previous question on the bill.

The previous question was ordered.

The bill was ordered to be engrossed and read a third time, and was read the third time, and passed and a motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. DELLUMS. Mr. Speaker, I ask unanimous consent that all members may have 5 legislative days in which to revise and extend their remarks on the bill just passed.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from California?

There was no objection.

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