The Legal and Constitutional Foundations For the District of Columbia Judicial Branch

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I. Introduction

As all residents of the District of Columbia are (or should be) well aware, the Nation's Constitution reserves to Congress the power "to exercise exclusive Legislation in all cases whatsoever over such District . . . as may . . . become the Seat of the Government of the United States." Article I, § 8, clause 17. The constitutional grant sanctions congressional establishment of all of the trappings of municipal authority in Washington, including the creation and oversight of all three branches of the District's government. The Constitution does not, however, mandate any particular solution to the problem of assigning to a national legislature the task of governing a city. Congress has responded by experimenting with a number of models, of which by general consensus it can be said that none has been ideal.

Congressional efforts to ordain the Third Branch of the District's government have proved especially vexed. In part, the difficulty is posed by the need to accommodate constitutional rules establishing the federal judiciary. The Constitution calls for a Supreme Court, and for "such inferior Courts as the Congress may from time to time" determine to be in the national interest. Article III, § 1; Article I, § 8, clause 9. The judges of all courts created under that authority are nominated by the President, but may take office only on confirmation by the Senate. Article II, § 2. They hold their offices with lifetime tenure, and are protected against reduction of their salaries. Article

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III, § 1. They may be removed from office only pursuant to the impeachment procedures applicable to all "civil Officers of the United States." Article II, § 4. United States Attorneys – federal prosecutors in each of the judicial districts – likewise are appointed by the President and confirmed by the Senate, although as officers of the Department of Justice reporting to the Attorney General they typically submit their resignations upon any change of presidential administration.[2]

The question considered here is a specific one: what requirements are imposed by the Constitution on the appointment of judges and prosecutors of the courts of the Nation's Capital? In particular, does the Constitution mandate the current procedures, by which the judges of the District's courts – the Superior Court and the District of Columbia Court of Appeals – as well as individuals charged with prosecuting offenders against District laws, are nominated by the President and are subject to confirmation by the United States Senate? Does it require that prosecution of accused criminals in the District be handled by the U.S. Attorney, rather than by a local official, selected otherwise than by the method used for the nomination of federal officers?

With respect to judges, the issue is neatly presented by the constitutional text itself: when the Congress designs a judicial system for the District of Columbia, is it operating under its authority to create "inferior Courts" under Article III, or is it "exercis[ing] exclusive Legislation [over] the Seat of the Government," under Article I? If the courts of the District are federal courts, then there can be no doubt that Article III

[2] U.S. Attorneys serve for four years. *See* 28 U.S.C. § 541 *et seq*. It is not uncommon, however, for their resignations to be requested if there is a change of administration – and especially a change of party – in the interim. They are expected to pursue the President's prosecutorial agenda, but to do so in a matter not avowedly political. Like all executive branch officials, they serve at the pleasure of the President, and may be removed by him. The extent to which U.S. Attorneys are subject to replacement for flagrantly partisan reasons during a presidential term seems to be a matter in some controversy at the moment of this writing.

permits no alternative to presidential appointment and senatorial confirmation, as well as life tenure. But if the courts are "Article I courts,"[3] then it follows with comparable clarity that Congress may delegate any of its authority as it sees fit, and that it need not retain any role in the appointment of the judges who will be members of those courts. Nor does the President have any constitutionally-directed role in the exercise of its Article I powers.[4]

Prior to the most recent top-to-bottom overhaul of the District's Third Branch in 1970,[5] the courts charged with adjudicating local criminal prosecutions and resolving local civil disputes were a hybrid creature. It could be said of them both that they were part of the congressional mandate to oversee the District of Columbia, and also that they were fully-fledged stars in the federal judicial galaxy. They had what one federal court described as a "dual character."[6] On occasion, Congress assigned to those courts non-judicial tasks that could be assumed only by virtue of their status under Article I, such as

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[3] "Article I courts" are courts set up to adjudicate matters falling within exclusive congressional competence. They include, for example, the bankruptcy courts, created pursuant to the power granted to Congress "to establish . . . uniform laws on the subject of Bankruptcies throughout the United States." Article I, § 8, clause 4. Military courts are established under congressional authority "[t]o provide for organizing, arming, and disciplining the Militia," Article I, § 8, clause 16, and are therefore also "Article I courts." And the courts of federal territories and "other Property belonging to the United States" are subject to plenary congressional control under Article IV, § 3, clause 2. Yet the Supreme Court has found it very difficult to articulate with precision the outer bounds of Article I courts: "no standard for pronouncing a court legislative rather than constitutional has obtained the adherence of a majority of the Court." J.H. Killian, *et al.*, The Constitution of the United States of America: Analysis and Interpretation: Analysis of Cases Decided by the Supreme Court to June 28, 2002 (GPO 2004), at 641, citing *inter alia* the fractured opinions of the Court in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962).

[4] Obviously, the President has the authority to sign or to withhold signature from legislative enactments. But that is the extent of his participation in implementing congressional powers under Article I. Just as the President does not appoint the Librarian of Congress, the Architect of the Capitol, or the Comptroller General, he has no obligatory role in carrying out such functions as the selection of the judiciary for the Nation's capital, as to which the Constitution grants plenary power to the legislative branch.

[5] The District of Columbia Court Reform and Criminal Procedure Act of 1970, 84 Stat. 473 ("the Court Reorganization Act").

[6] *Hobson v. Hansen*, 265 F. Supp. 902 (D.D.C. 1967).

the assignment to oversee compilation of a list of voters.[7] Yet Congress left no doubt that the adjudicatory acts of those courts, including those most parochial in scope, were judicial in character, therefore appealable to the Court of Appeals for the District of Columbia, a federal Article III court,[8] and thence reviewable by certiorari in the United States Supreme Court.

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

The ambivalent character of the District's local courts was eliminated in 1970. Driven in large measure by the realization that Washington had become a major city, with major urban problems that required a smoothly functioning judiciary,[9] Congress adopted and President Nixon signed legislation that essentially patterned the District's judicial branch on the structure most commonly adopted by the several States. The statute pronounced an absolute divorce of the local functions of the judiciary, thenceforth

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[7] This happened, for instance, in 1865, when the District of Columbia Supreme Court, as it was then called, was directed to appoint a Commission, the purpose of which was to ensure that the Democratic mayor of the City was denied power to control those lists. The scheme worked: an all-Republican Commission, reporting to the Chief Justice, was appointed. *See* J. Morris, Calmly to Poise the Scales of Justice (2001), 38 (hereinafter "Morris"). This charming volume's title comes from the description of the judicial function by William Cranch, noted reporter of Supreme Court jurisprudence and Chief Judge of the Circuit Court, dissenting, in *U.S. v. Bollman and Swartwout*, 1 D.C. (1 Cranch) 373 (Cranch, C.J., dissenting). Morris cites other examples of the assignment of non-judicial functions to the District's local courts that are more recent, if less egregious.

[8] This was the situation at least until the judicial restructuring of 1942, when a Municipal Court of Appeals was created, from which the federal appellate court had discretion to hear further appeals. From 1942 until the Court Reorganization Act, review in Article III courts was through writs, not appeals as of right. In all cases, however, while the courts had a variety of different names, the notion that decisions of local tribunals were appealable to or reviewable in Article III courts was consistently honored. Indeed, in many instances, local and federal courts had concurrent jurisdiction even at trial level. *See*, generally, Morris, surveying the history of the local courts, and of the federal Circuit Court and its progeny. *See also* the tables attached hereto at Appendix I. [**Note to editors**: the Appendix is two tables prepared by CCE staff.]

[9] The perceived proliferation of crime in the District, as well as its volatility during the 1968 riots after the murder of Rev. Martin Luther King, Jr., were major motivators of this awareness. There appears to have been considerable concern about the growing backlog of small-scale criminal prosecutions pending disposition in the federal courts. According to then-D.C. Mayor-Commissioner Walter Washington, over 1,000 people were incarcerated while awaiting trial or sentencing in the District as of July, 1969. *Court Reorganization, Criminal Law Procedures, Bail, and the Public Defender Service: Hearing on H.R. 13689 and H.R. 12854 Before the Subcomm. No. 1 of the House Committee on the District of Columbia,* 91st Cong. 214 (1969).

to be the exclusive province of the new (Article I) Superior Court and District of Columbia Court of Appeals, both formally inaugurated on January 1, 1971,[10] from those of the (Article III) U.S. District Court for the District of Columbia and the U.S. Court of Appeals for the District of Columbia Circuit.

The Court Reorganization Act provided that judges of both local courts would be appointed for terms of 15 years, subject, at the time, to mandatory retirement at age 70.[11] As before, they were to be nominated by the President, but would take office only upon confirmation by the Senate.[12] The Act also created a Commission on Judicial Disabilities and Tenure, charged with monitoring the performance of judges with a view to their reappointment and continuation in office. Congress expressly noted in the statute that it was exercising its powers under Article I, § 8, clause 17 in amending the D.C. Code to incorporate this latest overhaul of the Third Branch.[13]

The bill that became the Court Reorganization Act was not without controversy. In the face of significant support for greater local control, Congress hemmed in the federal prerogative to administer the Third Branch, not only by establishment of the Disabilities and Tenure Commission, but also by creating a Joint Committee on Judicial Administration. The Committee was made up exclusively of local judges: the Chief Judges of the Court of Appeals and the Superior Court, with associate judges of both

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[10] Hence the date "MCMLXXI" incorporated into the Seal of the Superior Court.

[11] D.C. Code § 11-1502 (1972).

[12] The President's role in this process is nothing more than the exercise of power delegated to him by Congress. Article II of the Constitution, which outlines the scope of the Executive Branch, contains not one word conferring power on the President with respect to the governance of the Nation's Capital. If the District of Columbia courts are truly Article I courts, established by congressional prerogative, then Congress has the right to organize them in any way it sees fit, including retaining to itself the judicial selection authority, or empowering the President or anyone else to perform that function.

[13] D.C. Code § 11-101(2) (1972).

courts to be elected annually by their colleagues. It was tasked with overseeing general personnel policies, including recruitment, removal, compensation, and training; accounts and auditing; procurement and disbursement; submission of the annual budget requests of both courts to the Commissioner of the District of Columbia as the integrated budget of the local court system; approval of the bonds of fiduciary employees within the local courts; formulation and enforcement of standards for outside activities of judges; development and coordination of statistical and management information systems and reports supporting the annual report of the D.C. courts; liaison between the District of Columbia courts and the courts of other jurisdictions, including the Judicial Conference of the United States, the Judicial Conference of the District of Columbia Circuit, and the Federal Judicial Center; and the design of "other policies and practices of the District of Columbia court system and resolution of other matters which may be of joint and mutual concern."[14]

The Court Reorganization Act also amended various sections of the U.S. Code specifically to assimilate the District of Columbia Court of Appeals to the highest Court of a State, and the Superior Court to State trial courts. But there was no question that the Court Reorganization Act was not promoted by its sponsors as a home rule measure, nor was it perceived by the District of Columbia Bar Association to be a substantial step toward local autonomy. The roles of the President and of the Senate in selecting judges in the new supposedly local courts were codified. There was to be no local participation in the appointment of judges or in the assignment of their functions. Nor was the analogy between D.C. and State courts perfect. Congress was aware of the tripartite identity of

[14] D.C. Code § 11-1701.

the District: it was at once a federal enclave, an entity very like a State, and a busy and troubled municipality that, in 1970, numbered well over 600,000 souls.

III. The District of Columbia Self-Government and Governmental Reorganization Act of 1973

Three years later, the District achieved (partial) home rule, through the District of Columbia Self-Government and Governmental Reorganization Act,[15] which gave the elected Mayor and District of Columbia Council considerable autonomy in adopting, amending, and repealing provisions of the D.C. Code. Although congressional oversight was retained even over specific legislative initiatives,[16] the Council's functions were patterned after those of State legislatures around the country.

The Home Rule Act did not substantially alter the new division of responsibilities between local and federal courts. But it did make a significant change in the way in which judges were selected. The original draft of the bill that became the Home Rule Act called for local judges to be appointed by the Mayor with the advice and consent of the District of Columbia Council. That provision was removed before enactment. Instead, the power to name judges was left with the President (with Senatorial advice and consent), albeit with the critical proviso that he select their names from a slate of three candidates for each vacancy proposed by a new Judicial Nominating Commission. Like the Commission on Disabilities and Tenure, it includes presidentially-appointed as well as local members, and at least two of them are not to be lawyers.

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[15] Pub. L. 93-198, 87 Stat. 774 (approved December 24, 1973) ("the Home Rule Act").

[16] Any specific "legislation" adopted by the elected Council, even after signature by the elected Mayor, may to this day be undone by resolution of Congress. Every proposed act is subject to congressional review, in that for a period of 60 days, beginning on the day it is transmitted to the Speaker of the House and the President of the Senate, Congress may adopt a joint resolution disapproving it, effectively overriding the Council's enactment. D.C. Code § 1-206.02(c)(2).

The Judicial Nominating Commission comprises seven members. The member appointed by the President serves a five-year term; the others six serve staggered terms of six years. Two members are appointed by the Board of Governors of the District of Columbia Bar; two (one of whom may not be a lawyer) are appointed by the Mayor; one (non-lawyer) member is appointed by the D.C. Council; and one (an active or retired federal judge having served in the District) is appointed by the chief judge of the United States District Court for the District of Columbia. The lawyer members of the Commission (under the Home Rule Act, like the members of the Judicial Disabilities and Tenure Commission) must be qualified to sit as judges in the District.[17] No member of Judicial Nominating Commission may serve simultaneously on the Tenure and Disabilities Commission.[18]

The composition of the Nominating Commission illustrates the congressional desire to entrust some role in the appointment of judges to persons familiar with the characteristics of the Nation's Capital, and the needs of its judicial department. However, while the proposal to make the local courts truly local in constitution, as well as in function, was mooted during consideration of the Home Rule Act, it did not survive into the final version. The parallel between the District government and those of the 50 States was regularly challenged with respect to the appointment process, and did not withstand scrutiny. Members of Congress, including supporters of the bill, insisted that the District was not a State but a city, whose municipal executive should not have the power to nominate members of the judiciary.

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[17] Home Rule Act, § 434(b)(4)(A-E).

[18] *Id.*, § 431(d)(3)(E).

Thus, for example, Congressman Ancher Nelsen (R-MN) likened the District to his home State's capital, St. Paul, whose residents would not expect their mayor to have appointment power over local courts.[19] Moreover, Gerald Reilly, Chief Judge of the D.C. Court of Appeals, worried that giving nominating power to the Mayor was sensible only if the District were granted statehood, which he believed would require a constitutional amendment.[20] Even Rep. Edith Green (D-OR), an unabashed liberal and a supporter of home rule, said on the House floor:

> I know of no city in the United States where the mayor is allowed to appoint such judges. . . . At the present time, the President appoints judges in the District of Columbia. The judges that the elected mayor [would be] given authority to appoint compare with circuit court and the State Supreme Court judges in my State of Oregon. I think we ought to make a change here and we ought to retain the Presidential appointment we have now.[21]

The Mayor was thus treated as the chief executive of a municipality, not as the Governor of a State, even against the background of the Court Reorganization Act which had repeatedly assimilated the courts of the District to those of a State. The simple answer to Ms. Green, after all, was that the apparent mismatch in executive functions would disappear if in her floor statement for "city" she had substituted "State," and for "mayor," "governor."[22] Yet this broken and inconsistent analogy was used to justify the

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[19] 119 Cong. Rec., H8715 (October 9, 1973).

[20] 119 Cong. Rec., H8722 (October 9, 1973).

[21] 119 Cong. Rec., H8798 (October 10, 1973).

[22] The Congresswoman could not truthfully have said that " I know of no [State] in the United States where the [governor] is allowed to appoint such judges." In many States (Maryland is a proximate example), Governors appoint members of the Supreme Court. In a State that comprises numerous cities, it would seem logical that city mayors do not appoint State judges, but that is hardly relevant to the issue. The District of Columbia includes just a single municipality, which performs a dual (indeed a treble) function as State and city (and federal enclave). It would seem that the State analogy was invited, indeed compelled, by the Court Reorganization Act adopted only three years earlier. After all, the highest courts of the nation's cities do not have their decisions reviewed on writs of certiorari by the U.S. Supreme Court. Yet

continuation of a system that retained presidential and congressional control over the membership of the local judiciary in Washington.

IV. The View of the Federal Judiciary

This regime remains in place today. It is clear beyond doubt that, in creating the District of Columbia Superior Court and Court of Appeals, Congress acted under its authority granted by Article I, not pursuant to Article III, of the Constitution. Yet they are also courts of general jurisdiction, with the power to deprive citizens of liberty or property under duly enacted legislation. The Supreme Court has held that it is consistent with the Constitution for a court to be empowered by Congress to exercise plenary judicial functions without requiring that its judges have Article III protections against removal from office or reduction of compensation.

The issue was squarely presented for United States Supreme Court resolution in 1973.[23] Roosevelt Palmore had been found guilty in D.C. Superior Court of carrying an unregistered firearm after conviction of a felony, in violation of the D.C. Code, and was sentenced to prison. He appealed to the Court of Appeals, challenging the constitutionality of his trial before what he claimed was a federal court whose presiding judge was neither appointed under nor subject to the tenure and compensation protections of Article III. The Court of Appeals affirmed, and Palmore purported to appeal to the Supreme Court, pursuant to laws then in effect providing for appellate, rather than discretionary (*i.e.*, certiorari), jurisdiction of the High Court in cases in which the

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the illogical and imprecise parallel to municipalities carried the day, and legislative provisions that would have given the District's executive the right to appoint its judiciary were withdrawn in favor of continuation of the procedural status quo with no substantive change.

[23] *Palmore v. United States*, 411 U.S. 389 (1973).

constitutionality of State law was in question.[24] The Supreme Court, *per* White, J., dismissed the appeal.

The Court canvassed the history of the District's Third Branch, finding that in the Court Reorganization Act, Congress had expressly assimilated the District of Columbia Court of Appeals to "**the highest court of a State**" for purposes of the High Court's appellate jurisdiction. That jurisdiction lay, however, only in cases in which **a statute of a State** was subject to constitutional challenge. Neither the Court Reorganization Act nor any other legislation specifically desccribed the District of Columbia Code (pre- or post-Home Rule) as State law, and, indeed, it was self-evident that no State had a hand in its enactment. Palmore's case could be heard, therefore, only pursuant to a writ of certiorari, which the Court then issued, and affirmed the decision below.[25]

The petitioner had, in effect, been convicted in a State court, created by Congress under Article I, for a violation of a statute that had been adopted by the federal government before home rule. The question was whether such an outcome denied him due process of law under the Fifth Amendment. Justice White for an 8-1 Court (Douglas, J., dissenting) held that it did not. According to the Court, Palmore's

> position ultimately rests on the proposition that an Article III judge must preside over every proceeding in which a charge, claim, or defense is based on an Act of Congress or a law made under its authority. At the very least, it asserts

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[24] 28 U.S.C. § 1257(2). This provision was eliminated in 1988, when (in Pub. L. 100-352) Congress removed nearly all appellate jurisdiction of the Supreme Court.

[25] This question came before the Court again in *Key v. Doyle*, 434 U.S. 59 (1977), *reh. den.*, 434 U.S. 1025 (1978). In *Key*, the Court reinforced the District-State analogy of the Court Reorganization Act, and held that "no right of appeal should lie to this Court when a local court of the District invalidates a law of exclusively local application." 434 U.S. 59, 68. D.C. Code provisions are not, for these purposes, "statutes of the United States," but constitute "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.*, 434 U.S. 59, 68 n.13. The entirety of the District's statutory *corpus juris*, therefore, governing hundreds of thousands of residents, and millions of visitors, is neither State nor federal in character.

> that criminal offenses under the laws passed by Congress may not be prosecuted except in courts established pursuant to Article III. In our view, however, there is no support for this view in either constitutional text or in constitutional history and practice.[26]

The Court cited numerous instances in which State courts had concurrent (and indeed, before 1875, exclusive) jurisdiction to adjudicate many of what we today call federal questions. It looked to the authorities of territorial courts, as well as courts-martial, concluding that the requirements of Article III "must in proper circumstances give way to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment."[27] The local courts of the District of Columbia were created pursuant to the congressional authority "to exercise the 'powers of . . . a State government in all cases where legislation is possible.'"[28]

Since States do not generally provide for lifetime tenure of judges, neither need Congress do so in carrying out its role as the local government of the District of Columbia. At the end of the day, the Court held, "Palmore was no more disadvantaged and no more entitled to an Article III judge than any other citizen of any of the 50 States who is tried for a strictly local crime."[29]

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[26] *Palmore*, 411 U.S. 389, 401.

[27] *Id.*, 411 U.S. 389, 408.

[28] *Id.*, 411 U.S. 389, 407, citing *Stoutenburgh v. Hennick*, 129 U.S. 141, 147 (1889).

[29] *Id.*, 411 U.S. 389, 410. This conclusion, although it appears well enshrined in the subsequent caselaw and is probably not a candidate for revisiting in the near future, is not entirely analytically satisfactory. The fact is that the District is not a State. The States' sovereignty is, of course, reserved in areas not "delegated to the United States by the Constitution," according to the Tenth Amendment. But there is no residual State sovereignty in the area as to which exclusive governing authority is conferred on Congress, which derives its only powers from the Constitution itself. If the Capital, therefore, is subject to the plenary sovereignty of the United States and not of any State, then it is not obvious that Congress may exercise that sovereignty to establish a judiciary not conforming to the few rules laid down by the Constitution to organize the federal judicial branch. *See*, for example, *O'Donoghue v. United States*, 289 U.S. 516 (1933)

The unambiguous characterization of the Court Reorganization Act courts as Article I courts has been reaffirmed in a number of subsequent decisions of the Supreme Court and other federal courts. In *Pernell v. Southall Realty*,[30] for example, the Supreme Court held that District of Columbia local court procedures must conform to the Bill of Rights as a limitation on congressional power (in that case, determining that there was a right to trial by jury in an action to recover possession of real property, under the Seventh Amendment), but otherwise expressing deference to the local courts' disposition of purely local matters.

In *Jenkins v. United States*,[31] the D.C. Circuit had to consider the question whether the District of Columbia courts had exclusive jurisdiction to hear challenges to the assessment of local D.C. taxes. The Court acknowledged the congressional assignment of responsibility, and concluded that review of taxation was one of the functions that Congress delegated to the local courts pursuant to its constitutional mandate for oversight of the Capital:

> Acting pursuant to Article I, § 8, clause 17, of the United States Constitution, Congress established a State-type court system for the District of Columbia, and transferred jurisdiction over matters arising under District of Columbia

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(in which the Court concluded that the only power Congress has to establish a permanent judiciary of general jurisdiction – as opposed to the temporary structures to be in place in the territories while their statehood is pending – is under Article III). The State courts may exercise plenary jurisdiction within their own borders precisely because, under the Constitution, the governments of the States never ceded that power to the federal authorities. The question still unresolved after *Palmore* and its progeny is not, in other words, whether it is consistent with the Constitution for State courts to adjudicate federal claims; it is whether, where there are no State courts to perform that function, the federal government may create its own courts to do so without regard to the rules granting (and therefore limiting) the court-creating authority given to Congress in Article III. The *O'Donoghue* Court went out of its way to avoid addressing the matter before it as one of constitutional interpretation, and the decision in that case was, in effect, legislatively overridden. But whether that outcome is consistent with the Constitution, in the opinion of this author at least, has not been definitively determined.

[30] 416 U.S. 363 (1974). This result flowed directly from the conclusion that the Bill of Rights limits what Congress can do in carrying out any of the powers granted to it by the Constitution.

[31] 236 F.3d 6 (D.C. Cir. 2001).

> law from the federal courts to the District of Columbia courts.[32]

The vesting of general jurisdiction (including, in the case at Bar, exclusive jurisdiction over federal constitutional or statutory challenges to local laws) in Article I courts in this manner was, the Circuit Court concluded, not "constitutionally problematic."[33]

V. Federal and Local Prosecutors

With respect to the prosecutorial function, the Court Reorganization Act is silent, thereby continuing the previous arrangement by which the United States Attorney for the District of Columbia bore and still bears principal responsibility for prosecuting all local crimes except the most minor. Prosecutions are brought in the name of the United States, on the basis of the legal fiction that crimes under the District of Columbia Code are crimes against the nation. The United States Court of Appeals for the D.C. Circuit held in 1979 that violations of the D.C. Code and the U.S. Code offended against a single sovereign, the United States. *See Goode v. Markley*, 603 F.2d 973 (D.C. Cir. 1979), *cert. denied*, 444 U.S. 1083 (1980). Yet most of the caselaw discussing this point assumes that conclusion, rather than deriving it, holding that D.C. Code offenses are crimes against the United States precisely because they are prosecuted by the U.S. Attorney.[34]

Nor are the reported cases consistent in any event. In a 1979 decision, *Davis v. United States*, the District of Columbia Court of Appeals held that the Federal Probation Act was not applicable to D.C. Code offenders because such persons do not commit

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[32] *Id.*, 236 F.3d 6, 12 (citing, *inter alia*, *Palmore*).

[33] *Id.*

[34] *United States v. Kember*, 648 F.2d 1354, 1358-59 (D.C. Cir. 1980); *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. den.*, 449 U.S. 923 (1980); *Dobbs v. Neverson*, 393 A.2d 147, 149 (D.C. 1978); *Hackney v. United States*, 389 A.2d 1336, 1339 (D.C. 1978)." *See*, generally, *Federal and Local Jurisdiction in the District of Columbia*, 92 Yale L.J. 292 n.79 (1982).

offenses against the United States.[35] The better view is the one expressed by one commentator: 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 powers in non-Article III courts.[36]

Nevertheless, the Home Rule Act specifically prohibited the Council from altering the powers of the U.S. Attorney (and the U.S. Marshal) with respect to local prosecutions, even for violations of the District's Code over which it was now the sole legislative master.[37] Although it has been argued that the Council could give local prosecutors concurrent authority to prosecute local offenses – since the focus of such legislation would be to expand the authority of the local Attorney General, rather than to affect that of the federal U.S. Attorney[38] – it seems implausible that such an enactment would survive congressional veto.

V. Conclusion

The inescapable conclusion from the adoption of the Court Reorganization Act and the Home Rule Act is that Congress has demonstrated both the constitutional authority and the political will to delegate its Article I, § 8, clause 17 authority to "exercise exclusive Legislation in all cases whatsoever over [the] District," with respect to all three branches of the City's government. The executive is an elected Mayor, and the legislature an elected Council. Both are ultimately dependent for their tenures in office upon the citizens of the Nation's Capital.

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[35] 397 A.2d 951, 955 (D.C. 1979). *See also Sanker v. United States*, 374 A.2d 304, 306-09 (D.C. 1977).

[36] *Id.*, 92 Yale L.J. 292, 309.

[37] *See* D.C. Code § 1-206.02(a)(8) (2001) (formerly § 1-233 (1981)).

[38] Schrag, The *Future of District of Columbia Home Rule*, 39 Cath. U. L. Rev. 311, n.162 (1990).

Congress has reserved to itself by legislation the power to organize and to oversee the Third Branch of the government of the District of Columbia. So too may Congress remove itself, and the President, from the process of selection of its judges and prosecutors. As a matter of logic and law, there would seem no substantial basis for the contention that Congress could not similarly by statute provide for selection of the members of the District's Article I courts, as well as of counsel who represent the public when they appear before those courts, by the Mayor, by the Council, by the Mayor with the advice and consent of the Council, by the courts, or even by the citizenry through popular election.

Both the Court Reorganization Act and the Home Rule Act are federal law, and they can therefore be changed by federal law. There is no constitutional impediment to the creation of a system whereby the selection of the judges of the Superior Court of the District of Columbia, and of the District of Columbia Court of Appeals, does not require their nomination by the President, or their confirmation by the United States Senate. Nor does the Constitution mandate that prosecution of local offenses be in the name of the United States, or through the office of the United States Attorney, rather than being placed in the hands of a local official.[39] All of this lies within congressional discretion, and all of these changes could be made without fear of constitutional challenge.

Whether such changes would be advisable and desirable is the subject that the other contributions to this discussion now address.

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[39] The U.S. Supreme Court upheld the power of an elected local prosecutor to prosecute offenses against territorial laws – *i.e.*, laws established by Congress in exercising plenary Article I powers similar to those under which it established the District's judicial branch – over 130 years ago. *See Snow v. United States*, 85 U.S. 317, 321 (1873).