

1982

## Home Rule

Sean Connelly

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

---

### Recommended Citation

Sean Connelly, *Home Rule*, 31 Cath. U. L. Rev. 815 (1982).

Available at: <https://scholarship.law.edu/lawreview/vol31/iss4/14>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

## HOME RULE

### HOME RULE: *CONVENTION CENTER REFERENDUM COMMISSION V. DISTRICT OF COLUMBIA*

In 1973, Congress passed the District of Columbia Self-Government and Governmental Reorganization Act<sup>1</sup> in an attempt to bring the right of "home rule" to the District of Columbia.<sup>2</sup> Commentators have stated that the Home Rule Act is rampant with "inconsistencies and vagaries."<sup>3</sup> This past year, the District of Columbia Court of Appeals' en banc decision in *Convention Center Referendum Commission v. District of Columbia*<sup>4</sup> helped to clarify this murky area even though the court was badly divided and unable to set forth a majority opinion. The "narrow" issue in *Convention Center* involved the scope of the electorate's power to compel an initiative pursuant to Congress' 1977 amendments to the Home Rule Act<sup>5</sup>, and the validity of the District of Columbia Council's subsequent implementing legislation.<sup>6</sup> Perhaps even more important than the court's ultimate decision on this issue, however, was its detailed examination of the entire system of separated powers established by the Home Rule Act.

This landmark case resulted from an ad hoc group's efforts to place an initiative on the election ballot, pursuant to the Initiative, Referendum and Recall Charter Amendments Act of 1977,<sup>7</sup> that proposed blockage of further public funding of the Washington Convention Center. In approving the Charter Amendments Act, Congress had provided for the right of initiative and had instructed the District of Columbia Council to pass implementing legislation by September 6, 1978.<sup>8</sup> When that deadline passed without any legislation being enacted, the Convention Center Referendum

---

1. Pub. L. No. 93-198, 87 Stat. 774 (codified in scattered sections of D.C. CODE ANN. (1981) [hereinafter cited as the Home Rule Act].

2. See, e.g., 119 CONG. REC. H8708 (daily ed. Oct. 9, 1973) (remarks of Rep. Diggs).

3. Newman & DePuy, *Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act*, 24 AM. U.L. REV. 537, 540 (1975).

4. 441 A.2d 889 (D.C. 1981) (en banc) (Convention Center II).

5. Initiative, Referendum, and Recall Charter Amendments Act of 1977, D.C. CODE ANN. §§ 1-281 to 1-295 (1981) [hereinafter cited as Charter Amendments Act].

6. Initiative, Referendum, and Recall Procedures Act of 1979, D.C. CODE ANN. §§ 1-1320 to 1-1326 (1981) [hereinafter cited as Initiative Procedures Act].

7. Charter Amendments Act, *supra* note 5.

8. *Id.* § 1-287. The Charter Amendments Act required that implementing legislation be passed within 108 days of the March 10, 1978, effective date.

Committee (CCRC) sued to have the Charter Amendments Act declared self-executing in order to allow introduction of its initiative.<sup>9</sup> On February 28, 1979, the District of Columbia Court of Appeals ruled that the Act was not self-executing.<sup>10</sup> However, this decision became moot when the Council passed implementing legislation shortly thereafter.<sup>11</sup> Meanwhile, the public funding and construction of the convention center was continuing unabated.<sup>12</sup>

Upon passage of the implementing legislation, CCRC again submitted its proposed initiative to the Board of Elections and Ethics.<sup>13</sup> The Board again rejected the initiative, stating that it was an improper subject for the electorate.<sup>14</sup> The Board based its decision on the "Dixon Amendment" to the Initiative Procedures Act, which bars any initiative that would "negate or limit [a budget request act] of the Council."<sup>15</sup> CCRC sued in Superior Court, arguing that the Dixon Amendment was invalid because it abrogated rights granted to the electorate by the Charter Amendments Act.<sup>16</sup> CCRC argued that the Dixon Amendment was an ordinary legislative act that could not repeal or substantially amend a Charter (i.e., constitutional) provision.<sup>17</sup> The Superior Court rejected this argument and ruled that the Dixon Amendment merely made explicit what was already implicit in the Charter Amendments Act itself: the fact that an initiative could not be used to block the expenditure of funds that have previously been appropriated for a capital project.<sup>18</sup>

Although the District of Columbia Court of Appeals subsequently affirmed the Superior Court's ruling,<sup>19</sup> it relied on a different theory. The

---

9. See *Convention Center Referendum Comm'n v. Board of Elections and Ethics*, 441 A.2d 871, 872-73 (D.C. 1979) (*Convention Center I*).

10. *Convention Center I*, 441 A.2d at 873.

11. The Initiative Procedures Act went into effect on June 7, 1979. See, *Convention Center I*, 441 A.2d at 873.

12. See *Convention Center II*, 441 A.2d at 896.

13. *Id.* at 894.

14. *Id.*

15. *Id.* at 884 n.6. The Dixon Amendment is now codified in D.C. CODE ANN. § 1-1320(k)(1)(G) (1981).

16. *Convention Center I*, 441 A.2d at 873.

17. *Id.* The Charter Amendments are in the nature of constitutional provisions and cannot be amended by ordinary legislation. *Convention Center II*, 441 A.2d at 915. The District Charter may only be amended by passage of a Council Act that is ratified by a majority of registered qualified voters in the District and then approved by concurrent resolution of Congress. D.C. CODE ANN. § 1-205 (1981).

18. See *Convention Center I*, 441 A.2d at 873. The Charter Amendments Act excepts "laws appropriating funds" from the electorate's general power of initiative. D.C. CODE ANN. § 1-281(a) (1981).

19. *Convention Center I*, 441 A.2d at 872.

majority invoked the well-established principle that the right of initiative is only available with regard to legislative, rather than administrative or executive, matters.<sup>20</sup> It reasoned that the right of initiative could not be any broader than the Council's legislative power,<sup>21</sup> and held that, once funds had been appropriated for a project, the only remaining function was for the Mayor to exercise his exclusive executive function to spend those funds.<sup>22</sup> Any other conclusion, would impermissibly interfere with the District of Columbia's system of separated powers established by the Home Rule Act.<sup>23</sup> Because the Council was without power to block the expenditure of previously appropriated funds, the electorate was necessarily also without this power.<sup>24</sup> In dissent, Judge Gallagher agreed that the scope of the initiative power was limited to proposing legislative matters,<sup>25</sup> but strongly attacked the majority's conclusion that an attempt to reverse the appropriation of funds was non-legislative.<sup>26</sup> Judge Gallagher thought it "elementary that what a legislature can legislate it can repeal."<sup>27</sup>

The District of Columbia Court of Appeals reheard the case en banc in order to rule on these "questions of exceptional importance concerning both the legislative powers of the District of Columbia Council and the related right of the electorate to adopt legislation by initiative."<sup>28</sup> A divided court affirmed the earlier panel opinion, holding that the CCRC proposal was not a valid initiative,<sup>29</sup> but the plurality disagreed with the earlier opinion's reasoning. The plurality held that even though the initiative proposed a legislative act that would be within the Council's power to effectuate, it was nonetheless barred by the Charter Amendments Act exception that precludes initiatives for "laws appropriating funds."<sup>30</sup> This exception, according to the plurality, was merely made explicit by the later Dixon Amendment to the Initiative Procedures Act. Thus, the Dixon Amendment was valid because it did not repeal or substantially amend a Charter provision.<sup>31</sup> The en banc concurrence, consisting of the two mem-

---

20. *Id.* at 874. For cases supporting this principle, *see, e.g.*, *Seaton v. Lackey*, 298 Ky. 188, 192, 182 S.W.2d 336 (1944); *Whitehead v. H and C Development Corp.*, 204 Va. 144, 129 S.E.2d 691 (1963).

21. *Convention Center I*, 441 A.2d at 876.

22. *Id.* at 879.

23. *Id.* at 881.

24. *Id.*

25. *Id.* at 883 (Gallagher, J., dissenting).

26. *Id.*

27. *Id.* at 888.

28. *Convention Center II*, 441 A.2d at 892.

29. *Id.*

30. *Id.* See *supra* note 18.

31. *Id.* at 914-15.

bers of the original panel majority, adhered to the view that the initiative could not go forward because it proposed an administrative, not a legislative, act.<sup>32</sup> The four dissenters argued that District of Columbia citizens had been deprived of their right to vote because of the view, implicit in the plurality and concurrence, that initiatives should be restricted to the greatest extent possible in order to minimize interference with the executive and legislative branches of the District of Columbia government.<sup>33</sup> The dissent denounced this "undercurrent" in the two majority opinions by stating that initiatives are *designed* to interfere with elected officials on specific issues, and then heavily criticized the arguments put forward in both opinions.<sup>34</sup>

Interestingly, it is the plurality and dissent rather than plurality and concurrence, that finally set forth most of the operative law for the future. At issue first was whether the CCRC initiative proposed a legislative matter.<sup>35</sup> All nine judges agreed that the initiative power could not extend beyond the legislative power vested in the Council.<sup>36</sup> Nevertheless, only the two concurring judges felt that the proposal would be outside the Council's legislative power,<sup>37</sup> both the plurality and dissent agreed that the proposal was legislative in nature.<sup>38</sup>

Resolution of this issue required close analysis of the Council's legislative powers under the Home Rule Act.<sup>39</sup> When it passed the Home Rule Act, Congress vested broad legislative power in the District of Columbia Council in order to relieve itself of "the burden of legislating upon essentially local District matters."<sup>40</sup> However, in order to avoid possible constitutional problems,<sup>41</sup> Congress retained a role in the legislative process by

---

32. *Id.* at 921 (Newman, C.J., concurring).

33. *Id.* at 922 (Gallagher, J., dissenting).

34. *Id.* at 922-23.

35. *Id.* at 896.

36. *Id.* at 892 (plurality), 920 (Newman, C.J., concurring), 921 (Gallagher, J., dissenting).

37. *Id.* at 921 (Newman, C.J., concurring).

38. *Id.* at 892 (plurality), 921 (Gallagher, J., dissenting).

39. *Id.* at 903-11 (plurality).

40. D.C. CODE ANN. § 1-201 (1981). Thus, subject to certain enumerated exceptions, *see id.* § 1-233(a), the Council may legislate over "all rightful subjects of legislation within the District . . ." *Id.* § 1-204. The Mayor may then veto the act, but the Council may overrule this veto by two-thirds vote. *Id.* § 1-227(e).

41. The United States Constitution provides that Congress has the power to exercise "exclusive" legislation over the District. U.S. CONST. art. I, § 8. Although the Supreme Court has, on occasion, addressed this problem, its announcements have not always been consistent, and commentators still differ over the amount of legislative authority Congress may constitutionally delegate to the District of Columbia. *See Newman & Deputy, supra* note 3, at 569-73.

subjecting the Council's ordinary legislation to a thirty-day congressional layover, during which time the legislation can be disapproved by a concurrent resolution of the House and Senate.<sup>42</sup> District Budgetary Acts, however, received different treatment. After the Council passes a budget request act,<sup>43</sup> the Mayor submits the request to the President<sup>44</sup> who, after review by the Office of Management and Budget,<sup>45</sup> submits the final version to Congress.<sup>46</sup> For the Council's budget request to be enacted into law, Congress must approve it in the annual District of Columbia Appropriations Act.<sup>47</sup> Thus, while most legislation passed by the Council requires mere Congressional acquiescence, budget requests require Congress to act affirmatively.

With those principles established, the *Convention Center II* en banc plurality examined the initiative to determine whether the proposed matter would have been within the Council's power to enact.<sup>48</sup> The plurality read the initiative as an attempt to halt the convention center project by means of both a substantive and fiscal strategy.<sup>49</sup> The substantive strategy was to repeal the authorization for the construction<sup>50</sup> and operation<sup>51</sup> of the Convention Center.<sup>52</sup> The fiscal strategy was to revoke any present appropriations for the project and to prohibit the Council from making future

42. D.C. CODE ANN. § 1-233(c). Congress also reserved its power to legislate affirmatively for the District on any subject. *Id.* § 206.

43. The Council passes budget request acts pursuant to D.C. CODE ANN. § 47-304 (1981). As with ordinary legislation, *see supra* note 40, the Mayor has veto power over all or part of the budget request act, and the Council may override this veto by two-thirds vote. D.C. CODE ANN. § 1-227(f) (1981).

44. D.C. CODE ANN. §§ 1-227(f), 47-304 (1981).

45. 31 U.S.C. §§ 2, 16, 26 (1976).

46. *Id.* § 11(a).

47. *See* 31 U.S.C. §§ 1301-53 (1976); D.C. CODE ANN. § 47-304 (1981).

48. *Convention Center II*, 441 A.2d at 899-902. The only CCRC initiative examined by the plurality was the original one that attempted to halt the present and future funding of the convention center, even though CCRC argued that its later initiatives relating only to *future* funding of the convention center, should also be considered. *See id.* at 900. However, those later initiatives were submitted by CCRC without having obtained the approval of 5% of the registered electors in each of five or more of the city's wards, as required by D.C. CODE ANN. § 1-282(a) (1981). *See* 441 A.2d at 901. The plurality held that the proposer of an initiative may not alter the terms of an initiative after the required popular support has been governed. *Id.* at 900-02. Neither the concurrence nor the dissent took issue with this holding.

49. 441 A.2d at 899-900.

50. The general authorization for the construction of the convention center was said to be found in D.C. CODE ANN. § 9-219(a) (1981). *See* 441 A.2d at 899.

51. The authority for the convention center's operation emanated from D.C. CODE §§ 9-601 to 9-610 (1980 Supp.) (currently codified at same location). *See* 441 A.2d at 899.

52. *See* 441 A.2d at 899.

budget requests.<sup>53</sup>

The plurality first considered whether the substantive act of revoking the authorization for the construction and operation of the project would be within the Council's power to effectuate, and concluded that the Council could pass legislation to accomplish this end.<sup>54</sup> However, the plurality stated that the Council could only halt the expenditure of funds already appropriated by Congress, by going through the more elaborate budgetary process.<sup>55</sup> In other words, it would not be enough to merely deauthorize a project. Rather, the Council would have to submit the proposal to Congress and get its approval on this supplemental budget request act to rescind appropriations for the deauthorized program.<sup>56</sup> The court felt that it would circumvent the requirement of affirmative congressional approval for budgetary matters to allow the Council to deauthorize (by passing ordinary legislation) a program previously funded by Congress.<sup>57</sup> Thus, the court concluded that the thirty-day congressional layover period for ordinary legislation and the affirmative congressional approval required for budget request acts were not functionally equivalent.<sup>58</sup>

As to the fiscal strategy embodied in the initiative, the court found that the Council would have the authority to act in this area, as long as it passed a supplemental budget request act.<sup>59</sup> Furthermore, the plurality held that the power to enact a supplemental budget request act is a legislative one.<sup>60</sup> Stating that the passage of ordinary legislation is no less legislative because of the congressional layover requirement, the plurality reasoned that a rescission of funding is a legislative act that merely happens to involve two legislatures: the Council and Congress.<sup>61</sup> The dissent explicitly agreed with the plurality's reasoning and conclusion that the proposal encompassed in the initiative would be within the Council's power to effectuate.<sup>62</sup> Only the two concurring judges disagreed, concluding that the initiative proposed a nonlegislative act.<sup>63</sup> At this point in the court's analy-

---

53. *See id.*

54. *Id.* at 905-11.

55. *Id.* at 906.

56. *Id.* at 907.

57. *Id.*

58. *See id.*

59. *Id.* at 910. Note that under this reasoning, it does not matter whether or not the substantive authority for a previously funded project is repealed, because in either case, the Council must pass a supplementary budget request act and obtain affirmative congressional approval.

60. *Id.* at 910.

61. *Id.*

62. *Id.* at 922 (Gallagher, J., dissenting).

63. *Id.* at 921 (Newman, C.J., concurring).

sis, therefore, two judges had determined that the initiative was properly withheld from the electorate, while the seven remaining judges were required to make the additional determination of whether there was any express or implied limitation on the general rule that the right of initiative is coextensive with the legislature's authority.<sup>64</sup>

The plurality found two possible limitations on the electorate's right to act by initiative.<sup>65</sup> First, the Charter Amendments Act precludes all initiatives for "law appropriating funds."<sup>66</sup> Second, the Dixon Amendment to the Initiative Procedures Act bars initiatives that would "negate or limit" a budget request act.<sup>67</sup> The plurality and dissent were in full accord that the Dixon Amendment would, if given effect, block the proposed initiative because that initiative would plainly contravene an existing budget request act.<sup>68</sup> Furthermore, both the plurality and dissent agreed that the Dixon Amendment was valid legislation only insofar as it conformed to the Charter Amendments Act, which is in the nature of a constitutional provision that cannot be amended by ordinary legislation.<sup>69</sup> Thus, the decisive issue was whether the exception in the Charter Amendment Act precluding initiatives proposing "laws appropriating funds" barred an initiative proposing the "unappropriation" of funds.

In order to decide this issue, the plurality looked at the language of the "laws appropriating funds" exception and concluded that it was ambiguous.<sup>70</sup> This ambiguity stemmed from three factors. First, the Council does not pass "laws"; rather, it passes "acts" that become law only after congressional layover (in the case of ordinary legislation) or affirmative congressional approval (in the case of budgetary matters).<sup>71</sup> Second, the Council does not "appropriate" but instead, "requests" funds which Congress may then appropriate.<sup>72</sup> Finally, because there is no distinct "unappropriations" process (i.e., the Council would merely pass a supplemental

---

64. The principle that the power of the electorate to act by initiative is coextensive with the legislature's power, in the absence of express or implied legislation, has been established by cases such as *Simpson v. Hite*, 36 Cal. 2d 125, 129, 222 P.2d 225, 228 (1950) (en banc); *Paget v. Logan*, 78 Wash. 2d 349, 356, 474 P.2d 247, 251-52 (1970) (en banc). There appeared to be unanimous agreement among the *Convention Center II* judges on this point. See 441 A.2d at 897 (plurality), 920 (concurrence), 921 (dissent).

65. See 441 A.2d at 911.

66. See *supra* note 18.

67. See *supra* note 15 and accompanying text.

68. See 441 A.2d at 914-15 (plurality), 929 (dissent).

69. See *id.* at 914 (plurality), 924 (dissent). As to the exclusive procedure to amend the Charter, see *supra* note 17.

70. 441 A.2d at 911.

71. *Id.* See *supra* notes 40-47 and accompanying text.

72. 441 A.2d at 911. See *supra* notes 43-47 and accompanying text.

budget request act seeking rescission of funding), the word “appropriations” could refer to either a positive or negative act.<sup>73</sup> Because the language of the exception was facially ambiguous, the plurality looked beyond it to the purpose of the exception.<sup>74</sup> The plurality decided that neither the Council nor Congress had considered, at the time the Charter Amendments Act was passed, whether an attempt by the electorate to block the expenditure of previously appropriated funds would fit within the exception.<sup>75</sup> Nevertheless, the plurality felt that the Act should be interpreted to bar such an attempt because the legislative purpose was to “prevent the electorate from interfering with accomplished fiscal acts of the Council and/or Congress.”<sup>76</sup> Once the Charter Amendments Act had been interpreted to bar the initiative, the Dixon Amendment (which on its face clearly barred the initiative) must necessarily be mere surplusage;<sup>77</sup> had it any independent force, it would be an invalid attempt to amend the Charter by ordinary legislation.<sup>78</sup>

The dissent vehemently criticized the plurality’s interpretation of the “laws appropriating funds” exception.<sup>79</sup> It argued that this language should be translated to mean “budget request acts.”<sup>80</sup> Such an interpretation, according to the dissent, would have the effect of barring only those initiatives actually proposing a budget request act.<sup>81</sup> The dissent felt that this interpretation would allow an initiative that sought to rescind (rather than appropriate) funds to go to the electorate.<sup>82</sup> Because the initiative was not, therefore, barred by the Charter, the Dixon Amendment was necessarily invalid insofar as it attempted to abrogate a basic Charter right.<sup>83</sup>

Although the dissent’s attempt to construe the initiative right liberally is well-intended, its interpretation of the “laws appropriating funds” exception ultimately proves to be too broad. The dissent’s argument that interpreting “laws appropriating funds” to mean “budget request acts” would allow initiatives to halt, but not seek, funds might be persuasive had not the dissent previously admitted that a budget request act must be passed in

---

73. 441 A.2d at 911.

74. *Id.* at 911-13.

75. *Id.* at 912.

76. *Id.* at 913.

77. The plurality stated that the Dixon Amendment was “congruent” with the Charter. *Id.* at 915.

78. *See supra* note 17 and accompanying text.

79. *See* 441 A.2d at 924-27, 930 (Gallagher, J., dissenting).

80. *Id.* at 924 (Gallagher, J., dissenting).

81. *Id.*

82. *Id.* at 926-27 (Gallagher, J., dissenting).

83. *Id.* at 930 (Gallagher, J., dissenting).

both cases.<sup>84</sup> Thus, the plurality appears, on balance, to have the better view. There is, however, at least one problem with the plurality's opinion. If indeed the Dixon Amendment is mere surplusage to the Charter Amendments Act, why did the Council ever pass it? It would seem that the Council must have interpreted the Charter Amendments Act as allowing an initiative, such as that proposed by the CCRC, which would "unappropriate" funds.

Overall, the plurality opinion is the most well-reasoned of the three. Despite rejecting CCRC's particular initiative, the plurality actually construed the initiative right relatively broadly. More importantly, the plurality abandoned the restrictive view of the earlier panel majority as to what constitutes a "legislative act" within the power of the Council. Contrary to the dissent's criticisms, the plurality's opinion fully protects both Home Rule and the electorate's general right of initiative.

*Sean Connelly*

---

84. *See id.* at 922 (Gallagher, J., dissenting) (agreeing with plurality's interpretation of council's legislative powers).