Separation of Powers in the District of Columbia under Home Rule

James C. McKay Jr.
SEPARATION OF POWERS IN THE DISTRICT OF COLUMBIA UNDER HOME RULE

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I. INTRODUCTION

Three years ago Congress restored a measure of home rule to the citizens of the District of Columbia by its enactment of the District of Columbia Self-Government and Governmental Reorganization Act. In the distribution of governmental powers, the Act closely follows the federal tripartite model, vesting the legislative power in the Council, the executive power in the Mayor, and the judicial power in the District of Columbia courts. The importance of the principle of separation of powers to the newly formed District of Columbia government has been amply demonstrated by the number of conflicts between the three branches during this short period. Each branch has, at times, charged the

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2. Self-Government Act § 404(a), D.C. Code § 1-144(a).

3. Id. § 422, D.C. Code § 1-162.

4. Id. § 431(a), D.C. Code, tit. 11, app., at 438. The term “District of Columbia courts” embraces the Superior Court of the District of Columbia and the District of Columbia Court of Appeals. Id. § 103(13), D.C. Code § 1-122(13).
other two with serious encroachments. Although the Act reserved considerable authority to the federal government over District affairs,\(^5\) the federal government, for the most part, has played a passive role, allowing these conflicts to run their course.\(^6\)

The separation of governmental powers is a structural principle fundamental to any democratic system of government.\(^7\) Accepted as such by the drafters of the Constitution, it is a theme that appears throughout their writings, notably in *The Federalist*,\(^8\) Jefferson's *Notes on the State*

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5. Congress retains its ultimate authority over the District of Columbia. U.S. Const. art. 1, § 8, cl. 17; see Self-Government Act § 601, D.C. Code § 1-126. The Act expressly limits the legislative power of the Council in nine specific areas, id. § 602(a), D.C. Code § 1-147(a), including a two-year prohibition on the enactment of criminal laws, id. § 602(a)(9), D.C. Code § 1-147(a)(9), and a permanent prohibition on actions affecting the District of Columbia courts, id. § 602(a)(4), D.C. Code § 1-147(a)(4). Moreover, the Act reserves for the federal government a significant role in the local legislative process. No act of the Council, except for a temporary emergency act, see id. § 412(a), D.C. Code § 1-146(a), may take effect until it has lain before Congress for 30 working days when both Houses are in session, during which Congress may disapprove the act by concurrent resolution. Id. § 602(c), D.C. Code § 1-147(c). An act vetoed by the Mayor and overridden by the Council must be submitted to the President for 30 calendar days, during which he may sustain the Mayor's veto, before submission to Congress. Id. § 404(e), D.C. Code § 1-144(e). Furthermore, the judges of the District of Columbia courts are appointed by the President, with the advice and consent of the Senate, from a list of candidates supplied by the District of Columbia Judicial Nomination Commission. Id. § 433, D.C. Code, tit. 11, app., at 440. Finally, the District lacks fiscal autonomy, as the President and Congress retain the same authority over the District's budget as they possessed prior to home rule. Id. § 603(a), D.C. Code § 47-228(a).


Separation of Powers

of Virginia, and Washington's *Farewell Address.* As Madison stated in The Federalist, paraphrasing Montesquieu, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The principle was premised on a healthy skepticism of the motives of men in positions of power. As Madison explained:

This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.

The application of the principle, of course, does not require the complete separation of governmental powers or the hermetic sealing off of each branch from the others. Indeed, the integrity of each branch can only be ensured by granting each select powers over the others sufficient to check them without controlling them. Thus, under the Constitution, the President shares the legislative power by his ability to veto acts of Congress, and he exerts an influence on the judiciary by his authority to nominate all federal judges. Congress, in turn, shares the President's power of executive appointment by its ability to confirm executive officers, and it exerts an influence on the judicial branch by its authority to confirm judges appointed by the President; moreover, it keeps check on both branches by its power of the purse. The judiciary, as the ultimate interpreter of the law of the land, possesses considerable power over both branches. Of course, the power of one branch to check another, being an exception to the general distribution of governmental powers, must be expressly granted by the organic law establishing the

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9. T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (Univ. of N.C. ed. 1955), quoted in THE FEDERALIST, supra note 8, No. 48 (J. Madison), at 310-11.
10. 1 MESSAGES AND PAPERS OF THE PRESIDENTS 219 (1895).
11. THE FEDERALIST, supra note 8, No. 47 (J. Madison), at 301.
12. Id. No. 51 (J. Madison), at 322.
13. See Buckley v. Valeo, 424 U.S. 1, 121 (1976); Springer v. Philippine Islands, 277 U.S. 189 (1928). In the latter case, the Court noted that "[t]he existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the general inviolate character of this basic rule." Id. at 202.
governmental entity and may not be inferred from the basic powers of the branch exerting the check. Thus, the President could hardly infer the authority to veto acts of Congress from his executive authority alone. The core of the principle of separation of powers is that, subject to such well defined exceptions, one branch may not, directly or indirectly, compel or control the actions of another.

In granting home rule to the District of Columbia, Congress did not divide governmental powers strictly according to the federal model. It is well settled that Congress is under no constitutional compulsion to do so as its authority over the District under article I, section 8, clause 17, is plenary. The most essential difference is that the legislative power of the District, instead of being divided between two rival Houses and thus weakened, is concentrated in a unicameral, thirteen-member Council. Moreover, the checks given to certain branches against the others differ in some respects from the federal model. Hence, while the Mayor, as the President, may submit legislation and veto acts of the legislature, he lacks the authority to nominate members of the judiciary. While the Council, as the Congress, holds the power of the purse over the executive branch, it may not revise the budget of the judiciary; nor is it vested with the authority (with certain express exceptions) to participate in the process of executive appointment. The judicial branch of the District government, in contrast, has fewer checks against it from coequal branches than does the federal judiciary. These differences,

16. See *Palmore v. United States*, 411 U.S. 389 (1973) (Congress not required to assure criminal defendant in District of Columbia accused of crime against United States of a trial by an article III judge with life tenure, but may create article I courts to hear such cases); *Keller v. PEPCO*, 261 U.S. 428, 443 (1921); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 225 (1908).
19. *Id.* § 404(e), D.C. Code §1-144(e).
22. *Id.* § 445, D.C. Code tit. 11, app., at 443.
23. See Part II-A infra.
24. See Part III infra.
however, do not diminish the importance of the principle of separation of powers in the District government. Though the balance is somewhat different, owing to the fundamental differences between national and local government, the theory remains the same.

A strengthening of the executive and judiciary branches was, in part, required by the consolidation of legislative power of the District government in a single body. It is significant that while advocating the principle of separation of powers the chief fear of the drafters of the Constitution was the fear of legislative despotism. As Madison warned:

The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.

... its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.25

And as Hamilton added:

The tendency of the legislative authority to absorb every other has been fully displayed and illustrated by examples in some preceding numbers. In governments purely republican, this tendency is almost irresistible. The representatives of the people, in a popular assembly, seem sometimes to fancy that they are the people themselves, and betray strong symptoms of impatience and disgust at the least sign of opposition from any other quarter; as if the exercise of its rights, by either the executive or the judiciary, were a breach of their privilege and an outrage to their dignity. They often appear disposed to exert an imperious control over the other departments; and as they commonly have the people on their side, they always act with such momentum as to make it very difficult for the other members of the government to maintain the balance of the Constitution.26

Recent commentators have asserted that the founders' fear of legislative despotism is groundless in view of the enhancement of the powers of the Presidency through its receipt of broad powers delegated from the Congress.27 But whatever the validity of such observations in the federal context, the fear of legislative encroachment by the legislative branch of the District government, where the unicameral Council has refused to

26. *Id.* No. 71 (A. Hamilton), at 433.
delegate any significant amount of its power to the Mayor, is very much warranted.

II. THE LEGISLATURE v. THE EXECUTIVE

True to the fears of Madison and Hamilton, most of the conflicts that have occurred thus far in the District under home rule have involved encroachments by the legislature upon the powers of the other two branches, especially the executive. The Council has, at various times, attempted to interfere with the Mayor’s power to appoint executive officers, veto legislation, and control executive agencies. Conversely, the Council has charged the executive with infringing upon its supposed authority over the qualifications of its members. The unfortunate result of such conflicts, many of which are unresolved, has been a continual tension between the executive and the legislature.

A. Confirmation Requirements and the Executive Power of Appointment

One of the most essential elements of the executive power is the power of appointment. Most of the Mayor’s authority, especially with regard to day-to-day governmental operations, is exercised in his behalf by the heads of agencies of the District government. Typical executive functions, such as the assessment of real property for tax purposes, the removal of snow and ice from public highways, and the implementation of the Federal Energy Administration’s weatherization assistance program for low income persons, are carried out by such officers. It is therefore not surprising that the scope of the Mayor’s power to appoint executive officers has been the subject of controversy. Considerable

   The Mayor may delegate any of his functions (other than the function of approving or disapproving acts passed by the Council or the function of approving contracts between the District and the Federal Government under section 731 (D.C. Code § 1-826)) to any officer, employee, or agency of the executive office of the Mayor, or to any director of an executive department who may, with the approval of the Mayor, make a further delegation of all or a part of such functions to subordinates under his jurisdiction.


32. Cf. Myers v. United States, 272 U.S. 52, 117 (1926): “The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates . . . .” Quoted in Buckley v. Valeo, 424 U.S. 1, 135 (1976).
conflict between the legislative and executive branches has been generated by the Council's continual attempts to grant itself the power of confirmation. Two measures, the Confirmation Act of 1976 and the Organization of Offices, Agencies, Departments and Instrumentalities Act of 1976 both introduced January 13, 1976, would have required the Mayor's appointments of the heads of his principal executive agencies to be submitted to and confirmed by the Council. It is clear, however, from the text and legislative history of the Self-Government Act, that the Mayor's power of executive appointment under the Charter is exclusive and may not be diluted by the Council through its use of the legislative power.

The Mayor inherited much of this power from the appointed Commissioner of the District of Columbia, the chief executive officer of the District government prior to home rule under Reorganization Plan No. 3 of 1967. The vast majority of the District agencies currently in existence were created pursuant to this Reorganization Plan, and the Commissioner was vested with the sole authority to appoint executive officers. The Self-Government Act continued these agencies in existence and transferred all of the functions of the Commissioner to the Mayor, including the exclusive power to appoint the heads of these agencies.

Moreover, the authority to appoint the officers of either existing or new agencies which may be established by the Mayor or the Council is clearly implicit in the language of section 422 of the Charter, which vests the executive power of the District in the Mayor and makes him the chief executive of the District government. The legislative history of the Act supports this interpretation; as the Senate Report notes:

The executive power of the District shall be vested in the Mayor who shall be the chief executive officer of the District

38. Id. § 422, D.C. Code § 1-162: "In addition, except as otherwise provided in this Act, all functions granted to or vested in the Commissioner of the District of Columbia, as established under Reorganization Plan Numbered 3 of 1967, shall be carried out by the Mayor in accordance with this Act."
40. Id. § 404(b), D.C. Code § 1-144(b).
41. D.C. Code § 1-162.
government. He shall be responsible for the proper administration of the affairs of the District coming under his jurisdiction and control. The bill confers on him the usual administrative powers and duties, including the power to appoint personnel in the executive branch of the city government and to remove such personnel in accordance with applicable laws and regulations. (Emphasis added).\(^1\)

It is particularly significant that the Self-Government Act contains nothing similar to the appointments clause of the Constitution\(^4\) conditioning the President’s appointment of executive officers on the “advice and consent of the Senate.” Such a diminution of this inherently executive function must be expressly granted to the legislature by the organic law\(^4\) and may not be assumed by that branch through its legislative powers.\(^4\) That Congress did not intend a general dilution of this power of the Mayor is clear from its inclusion in the Self-Government Act of express provisions subjecting the Mayor’s appointment of the officers of certain independent agencies to “the advice and consent of the Council.”\(^4\)

Other than such express limitations on the executive power of appointment in this or other acts of Congress, however, nothing qualifies the authority of the Mayor to appoint executive officers. His power is exclusive.

For these reasons, the Corporation Counsel, in his review of these bills, concluded that they would constitute a “serious encroachment upon the executive power of the Mayor” in violation of the principle of

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43. U.S. CONST. art. II, § 2, cl. 2.
45. It is significant that earlier drafts of the United States Constitution vested the President with the exclusive authority, subject to certain express exceptions, to appoint all officers of the United States. See Buckley v. Valeo, 424 U.S. 1, 129-31, 271-74 (1976).
46. Namely, the Board of Elections, Self-Government Act § 491, D.C. Code § 1-1103; the Zoning Commission, id. § 492, D.C. Code § 5-412; the Public Service Commission, id. § 493, D.C. Code § 43-201a; and the Armory Board, id. § 494, D.C. Code § 2-1702. In addition, certain acts prior to home rule expressly vested the former District of Columbia Council with the authority to confirm certain officers appointed by the Commissioner—namely, the People’s Counsel, D.C. Code § 43-205(b); the members of the Board of Equalization and Review, D.C. Code § 47-646(a); the members of the Housing Rent Commission, D.C. Code § 45-1623(a) (Supp. II 1975); and the members of the Redevelopment Land Agency, D.C. Code § 5-703(a). As the Mayor inherited the power of the Commissioner to appoint these officers, Self-Government Act § 422, D.C. Code § 1-162, the present Council of the District of Columbia inherited the power of the old District of Columbia Council to confirm these officers. Id. § 404(a), D.C. Code § 1-144(a).
separation of powers embodied in the Self-Government Act, and he recommended that they be disapproved.\textsuperscript{47} Both bills subsequently died in committee.\textsuperscript{48} The controversy, however, is far from being resolved. Bill No. 2-11,\textsuperscript{49} introduced January 3, 1977, would subject the Mayor’s appointment of all executive agency heads under the proposed District Government Independent Merit Personnel Act\textsuperscript{50} to Council confirmation. The Corporation Counsel has reaffirmed his opposition to such an enactment.\textsuperscript{51}

Further conflict over the scope of the Mayor’s appointment power has been generated by the Council’s establishment of so-called “independent” agencies as a means of circumventing the Mayor’s appointment authority. However, whether a governmental entity is an executive agency, rather than a quasi-legislative or quasi-judicial agency, depends upon the statutory functions of the agency. If the functions are primarily investigative or informational, it is a legislative agency,\textsuperscript{52} but if it is given authority to administer or enforce the laws of the District of Columbia, then it is an executive agency and, hence, by virtue of section 422 of the Self-Government Act, is under the appointive authority of the Mayor.\textsuperscript{53}

The Council has enacted legislation establishing several such “independent” agencies headed by officers appointed by the Mayor “with the advice and consent of the Council”—namely, the Office of Aging,\textsuperscript{54} the Commission on the Arts and Humanities,\textsuperscript{55} the District of Columbia


\textsuperscript{49} 23 D.C. Reg. 4603 (1977), introduced by Council member Dixon.

\textsuperscript{50} Bill No. 2-10, 23 D.C. Reg. 4488 (1977), introduced by Council member Dixon. Section 422(3) of the Self-Government Act, D.C. Code § 1-162(3), requires the Council to provide for a merit system for District government employees, who are currently in the federal civil service, no later than Jan. 3, 1980.

\textsuperscript{51} Opinion of the Corp. Counsel re Bill No. 2-11, Confirmation Amendments Act, 1 Op. C.C.D.C. 459 (1977). Moreover, the Legislative Research Center of Georgetown Univ. Law Center (D.C. Project), at the request of Council member Dixon, researched the issue of Council confirmation of executive appointments and ironically, in an unpublished analysis dated June 15, 1976, came to the same conclusion as the Corporation Counsel. A similar conclusion was reached by Leon Ullman, Deputy Assistant Attorney General, Office of Legal Counsel, in an unpublished memorandum to Kenneth Lazarus, Associate Counsel to the President, dated Apr. 7, 1976, concerning the D.C. Budget Act.

\textsuperscript{52} Self-Government Act § 413, D.C. Code § 1-148, provides that: “[t]he Council, or any committee or person authorized by it, shall have power to investigate any matter relating to the affairs of the District . . . .”


\textsuperscript{54} D.C. Law No. 1-24, § 302, D.C. Code § 6-1712.

\textsuperscript{55} D.C. Law No. 1-22, § 4, D.C. Code § 31-1903.
General Hospital Commission,\textsuperscript{56} and the Commission on Licensure to Practice the Healing Arts.\textsuperscript{57} The first measure, the Act on Aging, was signed by the Mayor without mention of this objectionable provision. However, the Mayor, on the advice of the Corporation Counsel that such provision contravened the Charter,\textsuperscript{58} did not refer his appointment of the head of that agency to the Council for confirmation,\textsuperscript{59} and the Council has not challenged this action. The second measure, the Commission on the Arts and Humanities Act, was vetoed by the City Administrator as Acting Mayor,\textsuperscript{60} and, as the Council failed to override the veto within 30 days as required by the Charter,\textsuperscript{61} the Commission has, at most, a de facto status.\textsuperscript{62} The Mayor vetoed the final two measures, but was overridden by the Council and has permitted the Council to “confirm” his appointments. Unfortunately, the Mayor’s apparent acquiescence with respect to the appointment of the officers of the agencies created by these bills runs the danger of encouraging further attempted encroachments, thereby perpetuating the controversy over the scope of the Mayor’s power of appointment.

\textbf{B. Legislation by Resolution: Circumventing The Veto Power of the Mayor}

Other conflicts between the legislative and executive branches have been engendered by the Council’s use of resolutions.\textsuperscript{63} Under the Charter, the Council is empowered to take two kinds of formal action: it may

\begin{itemize}
  \item \textsuperscript{56} D.C. Law No. 1-134, §§ 202(a), 205, D.C. Code §§ 32-1312(a), 32-1315.
  \item \textsuperscript{57} D.C. Law No. 1-106, § 2(a)(1), D.C. Code § 2-103(a)(1).
  \item \textsuperscript{58} Opinion of the Corp. Counsel re App’t of the Exec. Dir. of the Office on Aging, 1 Op. C.C.D.C. 526 (1977).
  \item \textsuperscript{59} The Act on Aging also created an advisory Commission on Aging with 15 lay members appointed by the Mayor with the advice and consent of the Council. \textit{Id.} § 402, D.C. Code § 6-1721. The Mayor has permitted the Council to confirm these members as the Commission has no executive authority.
  \item \textsuperscript{60} Self-Government Act § 422(1), D.C. Code § 1-162(1), authorizes the Mayor to “designate the officer or officers of the executive department of the District who may, during periods of disability or absence from the District of the Mayor execute and perform the powers and duties of the Mayor.” The power to designate such a temporary Acting Mayor is distinct from the power to delegate executive functions to subordinates to carry out the day-to-day functions of the executive under § 422(6) of the Act, D.C. Code § 1-162(6). \textit{See} Unpublished Opinion of the Corp. Counsel re Whether the City Adm’r May Veto an Act of the Council (July 11, 1975).
  \item \textsuperscript{61} Self-Government Act § 404(e), D.C. Code § 1-144(e).
  \item \textsuperscript{62} The Mayor has appointed and the Council has “confirmed” members of the Commission.
  \item \textsuperscript{63} \textit{See generally} Opinion of the Corp. Counsel re The Legal Force & Effect of a Resolution Adopted by the Council. 1 Op. C.C.D.C. 261 (1976).
\end{itemize}
Separation of Powers

pass acts and adopt resolutions. The distinction between them is defined in section 412(a): "The Council shall use acts for all legislative purposes. . . . Resolutions shall be used to express simple determinations, decisions, or directions of the Council of a special or temporary character."64 An act of the Council is subject to a number of prerequisites before taking effect. A proposed act must be read twice in substantially the same form at an interval of at least thirteen days;65 it must be presented to the Mayor for approval;66 and, if approved (or not disapproved within ten working days), it must lie before Congress for thirty legislative days when both Houses are in session before taking effect.67 If vetoed by the Mayor and overridden by the Council, it must first be submitted to the President.68 The Council may dispense with the requirement of a second reading or of congressional review only under emergency circumstances, in which case two-thirds of the members present and voting may enact a temporary act, effective for a maximum period of ninety days.69 A resolution, by contrast, takes effect immediately upon adoption.70 It is effective without any review by the Mayor, the Congress, or the President.

The vast majority of resolutions adopted by the Council are proper uses of this device. They fall into two broad categories: resolutions which are purely symbolic and without any legal effect, and resolutions by which the Council exercises administrative or ministerial functions vested solely in that body by law. The first category includes resolutions honoring persons or groups, commemorating certain days, weeks, months, or years; expressing the opinion of the Council on public issues; and requesting or urging—but not compelling—certain actions by the Mayor, the courts, or the federal government. The second category includes resolutions making rules with respect to the internal organization or procedure of the Council; appointing or directing personnel

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64. D.C. Code § 1-146(a).
66. Id. § 404(e), D.C. Code § 1-144(e).
67. Id. § 602(c), D.C. Code § 1-147(c).
68. Id. § 404(e), D.C. Code § 1-144(e).
70. Under Council practice, resolutions may be adopted after a single reading at the biweekly legislative session. See Rules of Organization and Procedure of the Council, Res. No. 2-1, Rule 6, 23 D.C. Reg. 7984, 8014 (1977). Proposed resolutions (and bills) are subject to a 15 day notice requirement; however, this may be dispensed with by a simple declaration by the Council that an emergency exists. Rule 6G, id. at 8017. Moreover, a resolution may be considered at a special session called for that purpose. Rule 6B, id. at 8014. Resolutions may be referred to a committee, but in practice are generally retained by the Council. Rule 6D, id. at 8016.
employed by the Council;\textsuperscript{71} investigating the affairs of the District;\textsuperscript{72} confirming nominees to District offices by the Mayor or Chairman of the Council pursuant to statutes expressly authorizing Council confirmation;\textsuperscript{73} appointing members of District boards, commissions, or other bodies pursuant to statutes expressly authorizing such appointments;\textsuperscript{74} disapproving executive reorganization plans;\textsuperscript{75} and approving applications for grants to the District under federal law.

Some confusion, however, resulted from the transfer of certain functions of the former, appointive District of Columbia Council, established under Reorganization Plan No. 3 of 1967, to the present Council. The former Council had been given over 430 specific "quasi-legislative"\textsuperscript{76} functions formerly exercised by the Board of Commissioners of the District of Columbia, the three member, appointive body that governed the District from 1874 to 1967. Section 404(a) of the Charter\textsuperscript{77} transferred these functions to the new Council, as section 422 transferred the functions of the Commissioner to the Mayor.\textsuperscript{78} The former Council's exercise of many of these "quasi-legislative" functions was made subject to the approval of the Commissioner—namely, those "in respect of rules and regulations . . . or . . . penalties or taxes."\textsuperscript{79} Some important functions, however, were not made subject to his approval. The Council's exercise of one of these functions, the closing of public streets and alleys,\textsuperscript{80} gave

\textsuperscript{71} Self-Government Act § 401(c), D.C. Code § 1-141(c).
\textsuperscript{72} Id. § 413(a), D.C. Code § 1-148(a). See note 52 supra.
\textsuperscript{73} See, \textit{e.g.}, Self-Government Act § 455(a), D.C. Code § 47-120(a) (District of Columbia Auditor).
\textsuperscript{74} See, \textit{e.g.}, id. § 431(e)(3)(D), D.C. Code, tit. 11, app., at 439 (one member of the District of Columbia Commission on Judicial Disabilities and Tenure); id. § 434(b)(4)(D), D.C. Code, tit. 11, app., at 442 (one member of the District of Columbia Judicial Nomination Commission).
\textsuperscript{75} Id. § 422(12), D.C. Code § 1-162(12). Congress was careful to expressly provide the Council with this power in the Charter in view of the controversy over the power of Congress to subject the President's reorganization authority to congressional veto, \textit{see} 5 U.S.C. § 901 (1970), without express authority to do so in the Constitution. The Supreme Court, unfortunately, has declined to resolve this important issue. \textit{Atkins v. United States}, 556 F.2d 1028 (Ct. Cl. 1977) (4-3 decision), \textit{cert. denied}, 98 S. Ct. 718 (1978). \textit{See generally Watson, Congress Steps Out: A Look at Congressional Control of the Executive,} 63 CALIF. L. REV. 983 (1975).
\textsuperscript{76} \textit{See} Special Message to Congress Transmitting Reorganization Plan No. 3 of 1967 (June 1, 1967), 1 PUB. PAPERS OF PRES. JOHNSON 585, 586 (1968), \textit{reprinted in} D.C. Code, tit. 1, app., at 163 (1973).
\textsuperscript{77} D.C. Code § 1-144(a).
\textsuperscript{78} D.C. Code § 1-162. See note 38 supra.
rise to considerable controversy over the Council's use of its authority to adopt resolutions.

The closing of streets and alleys under the Street Readjustment Act of the District of Columbia is essentially a legislative action. As the District of Columbia Court of Appeals stated, in construing that Act, "the Council in determining whether to close a street is exercising legislative discretion based upon primarily legislative facts." The former Council chose to exercise this function by resolution. As the action did not concern rules, regulations, penalties, or taxes, it was not submitted to the executive. However, the ability of the former Council to take this legislative action by resolution did not authorize the present Council to do the same. The present Council is required to carry out the functions it inherited from the former Council "in accordance with the provisions of [the Self-Government] Act," and section 412 of that Act requires the Council to "use acts for all legislative purposes . . . ." Perhaps misled by the practice of the former Council, the present Council adopted dozens of resolutions purporting to close various streets and alleys. This practice continued until the end of 1976, despite several critical opinions issued by the Corporation Counsel. In an effort to resolve this conflict, the Mayor proposed, and the Council passed, an emergency act validating all of the closings purported to be effected by

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82. Chevy Chase Citizens Ass'n v. District of Columbia Council, 327 A.2d 310, 316 (D.C. 1974). The court continued:

Thus the Council, in deciding whether to close a street, considers and devises broad policy—that goes beyond the circumstances of specific parties—relating instead to the public generally. Policy decisions must be made with respect to such matters as traffic flow, transportation facilities, population density, and proper mixture of housing, commercial facilities, schools and parks. In making these policy decisions, the Council tends to consult broad relevant surveys, studies and published reports. Expertise from other government departments is sought. Since at a public hearing any interested person may offer his opinion regarding the proposed closing, the Council considers the opinion not only of the abutting property owners but also of the public generally. In short, the Council in deciding whether to close a street conducts a quasi-legislative hearing, sitting in a legislative capacity, making policy decisions directed toward the general public. (Citation omitted).

Id. at 316-17.

83. Self-Government Act § 404(a), D.C. Code § 1-144(a).
resolution prior to the effective date of the act.\textsuperscript{86} The act also delegated the function of closing streets and alleys to the Mayor, subject to Council approval, since using an executive order of the Mayor rather than an act of the Council would obviate the often extensive Congressional layover period required for all permanent acts of the Council. However, this emergency act expired March 29, 1977, and the Council has failed to enact similar permanent legislation proposed by the Mayor.\textsuperscript{87} And although, since December 1976, the Council has used acts instead of resolutions to close streets or alleys,\textsuperscript{88} the controversy still persists as the Council has continually asserted that it may legally close streets and alleys by resolution.\textsuperscript{89}

\textbf{C. Resolutions Compelling Executive Officers}

An entirely distinct use of the resolution by the Council, which has also raised separation of powers problems, is the use of this device to direct the activities of principal executive officers and the Mayor himself. Such a use of the resolution presumes a power over the executive which the Council simply does not possess. For example, Resolution No. 1-74 "directs the Metropolitan Police Department to adopt manpower distribution policies which would significantly increase foot patrols in the District of Columbia."\textsuperscript{90} Resolution No. 1-241 "instructs the Office of the Corporation Counsel to represent the Council of the District of Columbia in opposition to Columbia Federal [Savings and Loan Association]'s application before any legal proceedings held by the Federal Home Loan Bank Board or any of its regional offices."\textsuperscript{91} And Resolution No. 1-392 would require certain standards and procedures to be followed by the District of Columbia Accounting Office, the District of Columbia Treasurer, and other District agencies in the processing of vouchers and issuance of checks.\textsuperscript{92} Clearly, the authority of the Police

\textsuperscript{87} In Bill No. 2-56, 23 D.C. Reg. 5422 (1977), introduced Jan. 19, 1977, the Council excised the provisions delegating authority to the Mayor and substituted language revalidating closings validated by Act 1-184, the Emergency Street & Alley Closing Act of 1976.
\textsuperscript{88} See, e.g., D.C. Laws Nos. 2-2, 2-3, 2-4, 2-5, 2-6, 23 D.C. Reg. 8193, 8197, 8200, 8203, 8206 (1977).
\textsuperscript{89} See Act No. 2-34, 23 D.C. Reg. 9236 (1977); Act No. 2-74, 24 D.C. Reg. 1784 (1977); Act No. 2-114, 24 D.C. Reg. 4834 (1977).
\textsuperscript{90} 1 D.C. Stat. 235 (1975).
\textsuperscript{91} 22 D.C. Reg. 5995, 5997 (1976).
\textsuperscript{92} 23 D.C. Reg. 3778 (1976). \textit{Contra}, 1 Op. C.C.D.C. 105 (1976); see § 449(a) of the Charter, D.C. Code § 47-227(a), which provides that "the Mayor shall . . . prescribe the forms of receipts, vouchers, bills and claims to be used by all the agencies, offices, and instrumentalities of the District government . . . ."
Chief over the distribution of his forces, the authority of the Corporation Counsel over the invitation of litigation, and the authority of the District of Columbia Treasurer over the processing of vouchers and the issuance of checks are at the very heart of the responsibilities of those officers. The Council may not direct their activities; only the Mayor possesses such authority.

Other resolutions purport to direct the actions of the Mayor himself. For example, Resolution No. 1-244 "directs the Mayor to construct within six months . . . a ramp designed for use by the physically handicapped . . . and install an automatic door which operates with a treadle at the 13 and 1/2 Street entrance of the District Building."93 Another resolution, No. 1-326,94 requires the Mayor to submit to the Council a budget that would involve no increase in the overall tax burden to District taxpayers. The Self-Government Act requires the Mayor to submit an annual budget to the Council,95 but does not authorize the Council to impose conditions on the Mayor's preparation of the budget or to require him to submit an additional "no-tax-increase" budget according to Council specifications. These resolutions represent attempts by the Council to assume direct control over matters committed to the discretion of the Mayor and his subordinate officers and clearly violate section 422 of the Charter, which vests the executive authority of the District in the Mayor. Thus, they were considered to have no legal effect.96

Several other resolutions, while not interfering quite as severely with the functions of the executive, would have imposed considerable burdens on certain executive agencies by requiring the collection of extensive statistical data, the undertaking of studies, the preparation of reports, or the publication and dissemination of information. A prime example is Resolution No. 1-99, which "directs the Office of Community Services of the Municipal Planning Office and the Office of Public Affairs to collect data by ward and census tract and to organize and make available to Council members, to government officials, and to interested members of the public data so collected."97 Moreover, it requires these agencies "to establish a mechanism for disseminating, on a regular basis, all information, reports and studies collected or prepared by the District

93. 22 D.C. Reg. 6392, 6393 (1976). The Mayor agreed to this project, and it was completed by the District of Columbia Department of General Services and private contractors at a cost of over $30,000.
96. See Opinion of the Corp. Counsel re The Legal Force & Effect of a Resolution Adopted by the Council, supra note 63, at 280-81.
government and its agencies to all members of the Council, the public libraries of the District . . ." and directs them "to compile and make available . . . a catalog that will index and provide a bibliography for all publications, studies, and reports, prepared by, or under the auspices of, the Government of the District of Columbia."98 Such a monumental undertaking would have required substantial expenditures, involving diversion of funds appropriated by Congress to the District for other programs. Another example is Resolution No. 1-97, which directs the Mayor to "conduct an examination into the feasibility of implementing a residency requirement for . . . District employees, in connection with the development and administration of a personnel system . . .."99 Section 422(3) of the Charter100 directs the Council to enact a District government merit system, but does not authorize it to order the Mayor to conduct such an examination. A final example is Resolution No. 1-160, which requires "[e]very District government agency [to] develop and submit to the Mayor and Council an affirmative action plan."101 The Council, however, has no authority by resolution to require executive agencies to develop and submit such reports, and it apparently conceded as much, for it subsequently enacted legislation along similar lines.102 The reports, compilations, and plans sought by these resolutions are quite distinct from the evidence which the Council may require of any person pursuant to a valid investigation of District affairs under section 413(a) of the Charter.103 This provision authorizes the Council to require executive personnel to testify or produce books, papers, or other existing evidence, but does not authorize it to require such officers by resolution to collect evidence, make compilations, render judgments, or develop policy.

The Council has attempted to compel executive officers not only by the direct use of resolutions, but also by the enactment of legislation authorizing the Council to take such actions at a later date by the use of resolutions. Such legislation, however, does not legitimize a use of the resolution which is contrary to the Charter. A prime example is the Council's enactment of D.C. Law No. 1-111, the District of Columbia Fire Department Operations Act of 1976.104 The Act was essentially an

98. Id.
100. D.C. Code § 1-162(3).
103. See note 52 supra.
emotional response to a fatal fire occurring September 8, 1976, in which
the station nearest the blaze was temporarily closed pursuant to a rota-
tion system necessitated by lack of sufficient funds to keep all stations in
the City open on a full time basis.\footnote{105} As a result, fire equipment arrived
perhaps a few minutes later than it would have if the nearest station had been
open.\footnote{106} In an attempt to prevent further such occurrences, the
Council passed an emergency act which would have transferred authori-
ity over day-to-day operations of the Fire Department from the Mayor
and Fire Chief to the Council.\footnote{107} The Act provided that "the District shall
be divided into such fire companies, and subunits, thereof as the Council
of the District of Columbia may from time to time direct," and that "[n]o
decreases in the number of companies, changes in the type of
companies, or changes in the location of stationhouses shall be made
unless previously approved by resolution of the Council."\footnote{108} The Mayor
vetoed the measure on the ground that it would deprive the Fire Chief of
the flexibility he needed to meet rapidly changing conditions which could
occur in major fires or natural disasters. He noted that "in emergency
situations there will usually not be time to wait for a member of the
Council to introduce a resolution permitting an action, for the Council to
gather a quorum to consider the action, and (assuming consideration as
an emergency resolution) for two-thirds of the Council to approve the
resolution" without endangering the public safety by the delay.\footnote{109}

Though the Council was unable to override the Mayor's veto of the
emergency measure, it enacted permanent legislation which was only
slightly less objectionable. It provided, as did the emergency measure,
that "[t]he District shall be divided into such fire companies, and other
units as the Council of the District of Columbia may from time to time
direct," but modified the subsequent provision slightly by providing that
"[m]ajor changes in the manner the Department provides fire protection

\footnote{105} See Wash. Star, Sept. 8, 1976, § A, at 1, col.1. (final ed.); Wash. Post, Sept. 9,
1976, § D, at 1, col. 1.
\footnote{106} The incident also engendered a $5 million suit against the District. Chandler v.
District of Columbia, CA No. 8623-77 (D.C. Super. Ct., filed Sept. 2, 1977). However, the
suit was dismissed on the ground that the damage resulted from a discretionary action on
the part of the District. Order of Revercomb, J. (Mar. 8, 1978).
\footnote{107} Emergency District of Columbia Fire Department Operations Act of 1976,
\footnote{108} Id. § 2. The current law at that time, D.C. Code § 4-401 (1973), provided:
"The fire department of the District of Columbia shall embrace the whole of the said
District, and its personal and movable property shall be assigned and located as the
[Mayor] of said District may direct within the appropriations made by Congress."
\footnote{109} Unpublished veto message of the Mayor, Nov. 18, 1976. See also Opinions of the
and fire prevention shall be approved by resolution of the Council."

However, the substitution of this ambiguous phrase for the more precise phrase "decreases in the number of companies, changes in the type of companies, or changes in the location of stationhouses" resulted in little improvement, as any of these specific changes could be considered by the Council to constitute "[m]ajor changes in the manner the Department provides fire protection and fire prevention." Either measure represents an attempt by the Council to assume direct and continuing control over an executive function of the utmost importance to the public safety. The Mayor neither approved nor vetoed the act, and it purportedly became law without his approval. Fortunately, the Council has not yet adopted a resolution pursuant to this act.

The importance of the preservation of these three primary powers of the Mayor—the appointment power, the veto power, and the power to control executive officers—in the face of sustained efforts by the Council to draw such power into its "impetuous vortex," cannot be underestimated. The District Charter contemplated, and the exigencies of local government require, a strong Mayor to counterbalance the concentration of legislative power vested in the Council.

D. Quo Warranto and the Council’s Authority Over the Qualifications of its Members

The executive has not been alone in evoking the principle of separation of powers. The Council has reciprocated by charging encroachments by the executive in the case of District of Columbia v. Tucker. On June 6, 1977, the Corporation Counsel initiated an action in quo warranto in the

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111. The act is subject to an invalidating procedural infirmity. It was not presented to the Mayor until December 21, 1976. Section 404(e) of the Self-Government Act, D.C. Code § 1-144(e), requires that the Mayor be given 10 working days from his formal receipt of the bill to decide whether to approve or veto an act. However, the belated transmittal of the Act did not give the Mayor the required 10 days before the expiration of the first Council period on January 2, 1977 in accordance with § 401(b)(1), D.C. Code § 1-141(b)(1). The need for this time was acutely demonstrated by the large number of acts transmitted to the Mayor at the end of the year. The Council, of course, is not a continuous body, as six or seven of its membership of thirteen must be filled each biennium. Id. § 401(b)(4), D.C. Code § 1-141(b)(4). Acts of the Council which do not "become law" pursuant to § 404(e) before the end of the Council period in which they were enacted are nullities. See Opinion of the Corp. Counsel re Status of Acts of the Council of the District of Columbia Pending as of the End of the 94th Congress and the First Council Period (Dec. 30, 1976) reprinted in H.R. REP. NO. 95-1104, 95TH CONG., 2D SESS. 9 (1978). A recently reported congressional Bill, H.R. 12116, supra note 6, would clarify the pocket veto authority of the Mayor implicit in the Charter.
Superior Court of the District of Columbia against the Chairman of the Council on the ground that he lacked de jure title to his office by his failure to maintain the qualifications required by the Charter for holding office. Specifically, it was alleged that the Chairman engaged in outside employment for profit in violation of section 403(c) of the Charter,\textsuperscript{113} and thereby forfeited his office pursuant to section 402.\textsuperscript{114} The Corporation Counsel took the action in the name of the District of Columbia pursuant to D.C. Code sections 16-3521 to 3545 (1973), which authorizes the issuance of a writ of quo warranto against any person who "unlawfully holds or exercises . . . a public office of the District of Columbia, civil or military . . . ." and upon such a finding requires a judgment of ouster and exclusion from office.\textsuperscript{115}

The Council, which was given leave to file a memorandum as amicus curiae, argued that this action by the Corporation Counsel violated the principle of separation of powers implicit in the Charter on the theory that this principle required that the qualifications of Council members be controlled, or at least be subject to initiation, by the Council, rather than the executive or judicial branches of government. Noting that the Self-Government Act did not contain a provision authorizing the Council to determine the qualifications of its members,\textsuperscript{116} the court rejected this argument and held that an action by the highest legal officer in the government was the proper and traditional method to judge the qualifications of elected legislative officers.\textsuperscript{117} The court concluded that a quo warranto action by the Corporation Counsel against the Council Chairman was not contrary to the principle of separation of powers and, indeed, was the only method available in the District to test a Council member's title to office.\textsuperscript{118} The court ruled that the Chairman had in fact violated the prohibition of the Charter against engaging in outside employment, but refused to enter a judgment of ouster.\textsuperscript{119}

Not surprisingly, soon after the institution of the action, legislation was introduced in the Council which would divest the Corporation Counsel of the authority to act in this manner.

\textsuperscript{113} D.C. Code § 1-143(c).
\textsuperscript{114} D.C. Code § 1-142.
\textsuperscript{115} D.C. Code § 16-3545 (1973).
\textsuperscript{116} In contrast, the Houses of Congress have such power. U.S. Const. art. I, § 5, cl. 1.
\textsuperscript{117} 106 Daily Wash. L. Rep. at 44-45. The court further noted that even if such a provision existed, this still would not preclude an action in quo warranto by the chief legal officer to test the qualifications of a legislator. Id. at 44, n.20 (citing Buckman v. State ex rel. Spencer, 34 Fla. 48, 15 So. 697 (1894); Snowball v. People ex rel. Grupe, 147 Ill. 260, 35 N.E. 538 (1893); State ex rel. Love v. Cosgrave, 85 Neb. 187, 194, 122 N.W. 885, 888 (1909)).
\textsuperscript{118} 106 Daily Wash. L. Rep. at 45.
\textsuperscript{119} Id. at 51.
Counsel of his authority to institute quo warranto actions against members of the Council, thereby divesting the Superior Court of authority to adjudicate such actions.\textsuperscript{120} However, the bill is legally defective as it would diminish the civil jurisdiction of the Superior Court in violation of the Charter.\textsuperscript{121} This use of its legislative power as a sword to destroy the executive's authority to initiate quo warranto actions renders the Council's use of the principle of separation of powers as a shield against such actions very questionable.\textsuperscript{122}

III. THE LEGISLATURE V. THE JUDICIARY

Actions of the Council raising serious separation of power problems have been directed at the judicial branch as well as the executive, although not to the same extent. Fortunately, however, Congress took great pains to assure the independence of the District judiciary. The Charter provides for the appointment of judges by the President and their confirmation by the Senate\textsuperscript{123} from a list of candidates provided by the District of Columbia Judicial Nomination Commission, a body constituted by federal, District, and private appointees.\textsuperscript{124} A judge deemed "well-qualified" or better by the District of Columbia Commission on Judicial Disabilities and Tenure, a similarly constituted body, is

\textsuperscript{120} Bill No. 2-196, 24 D.C. Reg. 1145 (1977), introduced by Council member Clarke on July 26, 1977.

\textsuperscript{121} The measure, if enacted, would be invalid as it would contravene the Charter and other provisions of the Self-Government Act. Section 431(a) of the Charter, D.C. Code, tit. 11, app., at 438, vests the Superior Court with jurisdiction over all civil actions. D.C. Code § 11-921(a)(3)(A)(vi) (1973), enacted by the Court Reorganization Act, vests that court, as part of its civil jurisdiction, with authority over quo warranto actions. The Council is explicitly prohibited from enacting any legislation with respect to this section or any other section of title 11 of the D.C. Code under § 602(a)(4) of the Act, D.C. Code § 1-147(a)(4). Moreover, § 718(a) of the Act, D.C. Code tit. 11, app., at 443, continues the District of Columbia courts as established under the Court Reorganization Act. Only Congress can so alter the jurisdiction of the Superior Court.

\textsuperscript{122} Recently, however, congressional legislation was introduced which would amend the Charter to grant the Council the exclusive authority over the qualifications of its members. H.R. 10671, 95th Cong. 2d Sess. (1978), introduced February 1, 1978, by Representative Charles C. Diggs, Jr., would, \textit{inter alia}, amend the forfeiture provision in § 402 of the Charter, D.C. Code § 1-142, to give the Council the authority, with the concurrence of two-thirds of its total membership, to expel any member who fails to maintain the qualifications of office provided by that section, and, in the case of the Chairman, by § 403(c), D.C. Code § 1-143(c). The bill would also amend the latter section to permit the Chairman of the Council to engage in occasional teaching, writing, or lecturing, as defined by the Council by regulation. However, both the Mayor and the Chairman of the Council opposed these parts of the bill in the hearings held March 16, 1978.

\textsuperscript{123} Self-Government Act § 433(a), D.C. Code tit. 11, app., at 440.

\textsuperscript{124} \textit{Id.} § 434, D.C. Code, tit. 11, app., at 441-42.
automatically reappointed for an additional fifteen year term.\textsuperscript{125} It is significant that the whole of part C of the Charter, which contains the provisions concerning the judicial branch, unlike parts A and B, which concern the legislative and executive branches, respectively, is not subject to amendment by the people pursuant to the Charter amendment procedure,\textsuperscript{126} but may only be changed by act of Congress. Moreover, the Council is expressly prohibited from enacting any legislation "with respect to any provision of title 11 of the District of Columbia Code (relating to the organization and jurisdiction of the District of Columbia courts)."\textsuperscript{127} To allay any doubt as to the status of the courts, the Self-Government Act further provides that they "shall continue as provided under the District of Columbia Court Reorganization Act of 1970 \ldots ".\textsuperscript{128} Congress, having recently enacted a comprehensive reform of the local court system, did not desire to subject it to further change by the Council.\textsuperscript{129} Finally, to assure the fiscal independence of the courts, the Charter provides that the budget of the judiciary is not subject to revision by the Council or the Mayor.\textsuperscript{130}

The most serious attempt by the Council to encroach upon the province of the District of Columbia courts was its enactment of the District of Columbia Shop-Book Rule Act in early 1976.\textsuperscript{131} The Act was designed to fill a void in the rules governing the admissibility of evidence in the Superior Court caused by the repeal of the federal "Shop-Book Rule" Act,\textsuperscript{132} which applied to the Superior Court, as well as other article I courts, and the federal judiciary. That statute provided an exception to the hearsay rule for records kept in the ordinary course of business. The federal Act was repealed in conjunction with the enactment of the Federal Rules of Evidence,\textsuperscript{133} which included a provision—Rule 803(6)—superseding the federal "Shop-Book Rule" Act. However, the Federal Rules of Evidence, unlike the repealed federal Act, did not apply, by their own terms, to the Superior Court.\textsuperscript{134}

\begin{itemize}
\item \textsuperscript{125} \textit{Id.} § 433(c), D.C. Code, tit. 11, app., at 441. \textit{See} Part IV-B \textit{infra}.
\item \textsuperscript{126} \textit{Id.} § 303(a), D.C. Code § 1-125(a).
\item \textsuperscript{127} \textit{Id.} § 602(a)(4), D.C. Code § 1-147(a)(4).
\item \textsuperscript{128} \textit{Id.} § 718, D.C. Code, tit. 11, app., at 443.
\item \textsuperscript{130} Self-Government Act § 445, D.C. Code, tit. 11, app. at 443.
\item \textsuperscript{131} Act No. 1-88, 22 D.C. Reg. 4551 (1976).
\item \textsuperscript{132} 28 U.S.C. § 1732(a) (1970).
\item \textsuperscript{134} \textit{FED. R. EVID.} 1101(a).
\end{itemize}
There was little disagreement about the desirability of retaining a "shop-book rule" for the Superior Court. The controversy arose over the means by which the void would be filled, or more precisely, whether it should be filled by the courts or the Council. In anticipation of the repeal of the federal "Shop-Book Rule" Act, which would coincide with the effective date of the Federal Rules of Evidence, July 1, 1975, the Superior Court, with the approval of the District of Columbia Court of Appeals, promulgated Superior Court Civil Rule 43-I and analogous rules in other divisions of the court, which, in effect, reinstated the federal "Shop-Book Rule" Act in that court. The courts took this action pursuant to their power under D.C. Code section 11-946 (1973) to modify federal procedural rules, which were initially made applicable to the Superior Court, and to promulgate other rules governing the business of the court. Such rules, of course, have the force and effect of law.

The Council intended the proposed District of Columbia Shop-Book Rule Act to accomplish exactly the same thing. This legislative solution, however, was opposed by both the executive and judicial branches of the District government as an infringement of the rulemaking authority of the courts in violation of the principle of separation of powers. The Corporation Counsel argued that the power of the courts of the District of Columbia to promulgate rules of evidence had long been considered an essential element of the judicial power of such courts. By vesting the judicial power of the District in the Superior Court and District of Columbia Court of Appeals and by continuing them as established under the Court Reorganization Act, Congress had intended to assure the inviolability of this element of the courts' authority. The


136. This section, as the remainder of title 11 of the D.C. Code, was enacted by the District of Columbia Court Reorganization Act of 1970, Pub. L. No. 91-358, tit. I, 84 Stat. 475 (1970) [hereinafter referred to as the Court Reorganization Act].


140. *Id.* (citing *Griffen v. United States*, 336 U.S. 704, 716-17 (1949); *Fisher v. United States*, 328 U.S. 463, 476-77 (1946); and *Cropley v. Volger*, 2 App. D.C. 34 (D.C. Cir. 1893)).


Corporation Counsel also noted that the Council was expressly prohibited from enacting legislation with respect to D.C. Code section 11-946 (1973), the source of the courts' rulemaking authority. He concluded that the power of the Council with respect to the District of Columbia courts under the Self-Government Act was miniscule in comparison with the authority of Congress over the federal judiciary under the Constitution, and that the proposed act exceeded the Council's authority.

Although passed by the Council on December 16, 1975, the bill was vetoed by the Mayor on January 7, 1976 on the grounds that it exceeded the Council's authority and that it would be superfluous in light of the action of the courts. The Council, however, overrode the Mayor's veto, and, pursuant to the Charter, the Act was transmitted to the President for a decision whether the veto would stand. Noting that the promulgation of this procedural rule was clearly within the express power of the local courts, and, as such beyond the power of the Council, President Ford sustained the Mayor's veto. This was the first and, thus far, the only time that a President has exercised his authority to sustain the Mayor's overridden veto.

The President's action temporarily ended the controversy over the respective roles of the legislative and judicial branches of the District government in the promulgation of rules of evidence and other procedural rules. A number of popular bills which contained provisions imposing rules of evidence on the Superior Court died. The controversy, however, has not ended as members of the Council continue to introduce legislation imposing rules of evidence upon the District of Columbia courts. For example, the proposed Medical Records Act of 1977 would

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143. Id. § 602(a)(4), D.C. Code § 1-147(a)(4).
144. The Council's authority over rules of court is more akin to the authority of the New Jersey legislature defined in Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406, cert. denied, 340 U.S. 877 (1950), where the court held that the state constitution provision that "[t]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts" ousted the power of the state legislature over rules of court. Id. at 414. Accord, Burton v. Mayer, 274 Ky. 263, 118 S.W.2d 547 (1938); Lee v. Baird, 146 N.C. 361, 59 S.E. 876 (1907).
146. See Self-Government Act § 404(e), D.C. Code § 1-144(e).
147. The President's Message to the Chairman of the Council on His Disapproval of the D.C. Shop-Book Rule Act, 12 WEEKLY COMP. OF PRES. DOC. 301 (Feb. 27, 1976).
render any "secondary medical record" inadmissible as evidence in any proceeding by the courts of the District of Columbia.

The line between the rulemaking power of the courts and the legislative power of the Council was clarified somewhat by the decision of the District of Columbia Court of Appeals in In re C.A.P., rendered soon after the President's disapproval of the District of Columbia Shop-Book Rule Act. The court held that Superior Court Neglect Rule 18(c), which authorized, in certain circumstances, the termination of parental rights in a child neglect case, was without statutory basis and beyond the inherent authority of the Superior Court. The court of appeals reasoned that the termination of parental rights abridged the substantive right to conceive and raise one's children, and, thus, could not be effected under the Superior Court's general authority to promulgate rules of procedure. Partially in response to this decision, the Council enacted the Prevention of Child Abuse and Neglect Act of 1977, which supplied the legislative basis for the authority of the Family Division of the Superior Court to terminate parental rights pursuant to Superior Court Neglect Rule 18(c).

In sum, it appears that the District of Columbia courts possess the exclusive power to promulgate rules of procedure governing the business of the courts, while only the Council possesses the authority to enact rules that affect substantive rights. The line between substantive rights and procedural rules, however, is still unclear. Further judicial decisions will be required to define the parameters of each sphere of authority.

IV. THE JUDICIARY v. THE EXECUTIVE

In contrast to the frequent tension between the legislative and executive branches of the District government, relations between the executive and the judiciary have been extremely placid. Nevertheless, two matters have brought these branches briefly into conflict. The first

150. The term "secondary medical record" as distinguished from "primary medical record" is defined in the bill to include records "used to study morbidity and mortality" by certain governmental agencies or medical entities and records "used for professional training, supervision or discipline" of practitioners.


152. The statutory provisions relating to proceedings before the Family Division of the Superior Court are found in D.C. Code §§ 16-2301 to 2337 (1973).

153. Local rules with federal analogues that differ from the federal rules must be approved by the D.C. Court of Appeals, but ones governing areas where the federal rules are silent may be promulgated by the Superior Court alone. See D.C. Code § 11-946 (1973).


156. Id. § 407(c), 24 D.C. Reg. at 774 (1977) (amending D.C. Code § 16-2320(a) (1973)).
involved the authority of a Superior Court judge over the Corporation Counsel, and the second involved the authority of the District of Columbia Commission on Judicial Disabilities and Tenure over a Superior Court judge.

A. Judicial Authority to Require Executive Representation of Private Litigants

The dispute which resulted in charges of judicial encroachment on the province of the executive arose over the authority of a Superior Court judge to order the Corporation Counsel to represent a private parental petitioner in a proceeding for the involuntary commitment of a mentally ill adult in the case of District of Columbia v. Pryor. The applicable statute requires a parent desiring the involuntary commitment of an adult child to petition the Commission on Mental Health, which acts as a special master for the Superior Court. After accepting the case, the Commission holds a hearing and makes findings, recommendations, and conclusions of law, which it reports to the Superior Court. A person whose commitment is sought has a right to counsel in any proceeding before the Commission or the Superior Court. There is no provision in current law, however, for the representation of the petitioner himself. Prior law provided for such representation by the Corporation Counsel, but this provision was repealed and is not in the present statute.

Nevertheless, a Superior Court judge ordered the Corporation Counsel to represent the parental petitioners in two cases before the Superior Court in which the Commission on Mental Health had recommended civil commitment. After the court denied the District’s motion to vacate the appointments, the District petitioned the District of Columbia Court of Appeals for a writ of prohibition, or in the alternative, for a writ of mandamus against the trial judge on the ground that the Superior Court was without authority to make the appointments. The court of appeals agreed and held that a Superior Court judge had no inherent discretionary authority to appoint the Corporation Counsel to represent private parties in such cases. Citing the statutory basis of the Corporation Counsel’s responsibilities, the court made the following observations:

Subservience to the chief executive officer of the District government is the major thesis of this provision. To accept or create
an additional obligation to obey a court order to undertake representation of private citizens in mental health cases would not only be antithetical to the statute, but also would be contrary to the separation of powers concept so solidly ingrained in our governmental system. That one in public office is also a member of the Bar can be of no significance, for the two roles cannot be deemed separate and the order of appointment cannot be based on professional association as paramount to official responsibility and authority.\textsuperscript{161}

Thus, this conflict between the judicial and executive branches was amicably resolved.

\section*{B. Interference with Judicial Independence: The Powers of the Tenure Commission}

The issue of executive interference with judicial independence arose in an unusual context in the case of \textit{Halleck v. Berliner}.\textsuperscript{162} The alleged encroachment was not by the executive branch of the District government, but by the independent District of Columbia Commission on Judicial Disabilities and Tenure and the executive branch of the federal government. The District executive, however, was involved in the case as legal representative of the Commission.

The Tenure Commission, established by the Court Reorganization Act\textsuperscript{163} and continued by the Self-Government Act,\textsuperscript{164} consists of seven members; two appointed by the Mayor and two by the local Bar, and one each by the President, the Council, and the Chief Judge of the United States District Court for the District of Columbia.\textsuperscript{165} It possesses two distinct powers—the power to remove, suspend, or retire a judge of the District of Columbia courts for disability, malfeasance, or other conduct prejudicial to the administration of justice,\textsuperscript{166} and the power, added by the Self-Government Act, to determine whether a sitting judge seeking another term shall be reappointed.\textsuperscript{167} Pursuant to its reappointment power, the Commission routinely evaluates each sitting judge shortly before his term expires, based on information received in confidence from the Bar and the public, and rates the judge as exceptionally well qualified, well qualified, qualified, or unqualified. Either of the first

\textsuperscript{161} 366 A.2d at 143 (citation omitted).
\textsuperscript{163} D.C. Code § 11-1521 (1973).
\textsuperscript{164} Self-Government Act § 718(a), D.C. Code, tit. 11, app., at 443.
\textsuperscript{165} Id. § 431(e)(3), D.C. Code, tit. 11, app., at 439.
\textsuperscript{166} Id. § 432, D.C. Code, tit. 11, app., at 439-40.
\textsuperscript{167} Id. § 433(c), D.C. Code, tit. 11, app., at 441.
two ratings results in his automatic reappointment. A rating of "qualified" does not assure reappointment, but gives the President the option, with the advice and consent of the Senate, to reappoint the judge—the same procedure that was followed prior to home rule. A rating of "unqualified" precludes reappointment.

The first judge to be evaluated by the Tenure Commission under its new authority was Charles W. Halleck of the Superior Court, who had been appointed by President Johnson for a ten-year term expiring October 20, 1975. He received a rating of "qualified," leaving his reappointment to the President's discretion. President Ford nominated him for another term, and the Senate District of Columbia Committee reported the nomination to the full Senate. However, the Senate took no action prior to its adjournment sine die on October 1, 1976, necessitating the return of the nomination to the President. Though his term had expired, Judge Halleck continued serving as a hold-over judge. While Judge Halleck's nomination was pending in the Senate, the Tenure Commission, pursuant to its removal power, initiated an investigation to determine whether grounds existed for disciplinary action and served him with a Notice of Formal Proceeding based on allegations of "conduct prejudicial to the administration of justice" as defined by the Code of Judicial Conduct of the American Bar Association. On the eve of the date set for the hearing on these charges, Judge Halleck filed suit in the United States District Court for the District of Columbia to enjoin the Commission from holding the hearing and for a declaratory judgment that the removal and reappointment powers of the Commission were unconstitutional encroachments on the independence of the judiciary. In addition, he contended that the Commission was unduly influenced by an "institutionalized effort" by the United States Attorney's Office for the District of Columbia to prevent his reappointment, and that this constituted an impermissible encroachment by the federal executive on the District judiciary.

The Tenure Commission, represented by the Corporation Counsel, responded that Congress, given its plenary power over the District under article I, section 8, clause 17, of the Constitution, was not compelled to grant to an article I judge of the District of Columbia courts tenure equal to that given by the Constitution to an article III judge. It noted that the

drafters of the Court Reorganization and Self-Government Acts considered the Commission's possession of these powers to enhance, rather than diminish, judicial independence. The power of removal assured a high standard of conduct in the District judiciary, raising it beyond reproach, and the power of reappointment assured that the tenure of a well qualified judge would be removed from the political process.

The court rejected Judge Halleck's arguments and held that the principle of separation of powers was not offended by a statutory scheme which allocated to an independent agency functions that had previously been exercised not by the judiciary, but by the President and Senate. Furthermore, the court rejected the charge of undue influence by the United States Attorney's Office as not supported by the evidence. 

Halleck v. Berliner settled the authority of the Tenure Commission over the judicial branch of the District government. The instant controversy was laid to rest when President Carter decided not to reappoint Judge Halleck.

V. CONCLUSION

The experiences of the District of Columbia government during the first three years of home rule demonstrate the need for, and continued vitality of, the principle of separation of powers. During this period, each of the three branches was involved in at least one serious dispute over the proper boundaries of its powers with each of the other branches. True to the fears of the drafters of the Constitution, the legislative branch has adopted the most expansive definition of its powers. Its frequent attempts to extend its sphere of activity and absorb the powers of the other branches have been directed principally at the executive branch and unfortunately, many of the conflicts precipitated by these encroachments on the executive, in contrast to other disputes between the branches, remain unresolved. However despite the tension and uncertainty engendered by these experiences, they have reaffirmed the key role of the separation of governmental powers and its corollary system of checks and balances in assuring the stability and vitality of the District of Columbia government.

174. Judge Roszel C. Thomsen, Senior District Judge of the District of Maryland, sitting by designation. The judges of the District Court of the District of Columbia had all recused themselves, probably because one of their associates, Judge Gerhard Gesell, was a member of the Tenure Commission.
175. 427 F. Supp. at 1234.
176. Id. at 1234-35.