

1969

The Home Rule Dilemma in the District of Columbia

Catholic University Law Review

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

Recommended Citation

Catholic University Law Review, *The Home Rule Dilemma in the District of Columbia*, 19 Cath. U. L. Rev. 245 (1970).
Available at: <http://scholarship.law.edu/lawreview/vol19/iss2/7>

This Notes 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 administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

proceeding or the state attorney's indictment,⁹⁸ or to enact specific statutory provisions providing that all witnesses summoned to appear and testify at the inquest shall be entitled to have counsel present throughout to represent them, to confront and cross-examine other witnesses, to object to proffered evidence, to present evidence and to compel the attendance of witnesses.

The Home Rule Dilemma in the District of Columbia

Almost two hundred years have passed since the Declaration of Independence was written and issued to King George III of England. One of the principles set forth in that document declares that a government derives its "just powers from the consent of the governed."¹ Eleven years later a Constitutional Convention convened and began the difficult task of drafting a document which sought, among other things, to "establish Justice" and to "promote the general Welfare" of the citizens of the United States.² Despite the basic ideals portrayed by these two instruments, there exists within the United States a government whose justness and concern for promoting the general welfare of its citizens has been seriously questioned, since it is a government which derives its powers through means other than the consent of the governed. The government adverted to is that of the District of Columbia. During the past twenty years home rule advocates for the District have increased their efforts in an attempt to gain what they consider to be one of the basic rights of all citizens—the right to choose those officials who are to exercise governmental authority over them. Thus far the opponents of home rule have successfully repelled the arguments which have been presented in behalf of self-government for the Nation's Capital.³

That Congress has the power to "exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia is established in the Constitution

98. This alternative appears preferable in that it would not only alleviate constitutional infirmities resulting from application of the *Jenkins* rationale to inquest situations, but would also minimize possibilities of infringement on the right to trial by jury resulting from prejudicial pretrial publicity in conjunction with the inquest. That jurors be impartial and indifferent and that they reach a verdict based only on evidence adduced during the trial are fundamental principles inherent in the concept of trial by jury. *Turner v. Louisiana*, 379 U.S. 466, 471-72 (1965); *Irvin v. Dowd*, 366 U.S. 717, 722 (1961); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

1. DECLARATION OF INDEPENDENCE.

2. U.S. CONST. preamble.

3. Basically, there are three major arguments submitted by home rule proponents:

of the United States.⁴ Very little was said at the Constitutional Convention about the section providing for the future seat of the national government, therefore it is necessary to explore other sources to gather the intent of the drafters when they formulated this provision. James Madison in *The Federalist Papers* explains, to some degree, what the drafters had in mind when they included the provision for the seat of the government.⁵ They envisioned a stationary residence for the general government which would be independent of the control of any single state, thus protecting members of the national government against any prejudices.⁶ Noting that the District was to be formed by the cession of territory from two states (Maryland and Virginia), Madison wrote:

as the inhabitants will find sufficient inducements of interest, to become willing parties to the cession; as they will have had their voice in the election of the government, which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them . . . every imaginable objection seems to be obviated.⁷

Advocates of home rule argue that this strengthens their position as to the intentions of the Founding Fathers concerning the District of Columbia. Whether Madison was speaking for the drafters of the Constitution is not certain since records of the Convention pertaining to the seat of government provision are sketchy.⁸ However, there is no reason to discredit his observations.

(1) District residents should have a right to choose their own government; (2) the burden of legislating for the District is both time-consuming and bothersome to Congress; and (3) the government would be better, since popularly elected officials would be more responsive to District residents. Arguments against home rule for the District include: (1) bills proposed are deceptive and do not really provide for home rule, since they still leave the federal government with much control; (2) delegation of extensive power to a local government would violate article I, section 8 of the Constitution; (3) none of the proposed home rule bills gives promise of improving the local government; (4) history indicates that home rule would be unwise; (5) the city would find it difficult to get a substantial federal payment, since Congress would lose its sense of responsibility for District affairs; (6) local and federal government would have conflicting interests; (7) the legitimate interest of the federal government in the capital city would be undermined. M. DERTHICK, *CITY POLITICS IN WASHINGTON, D.C.* 170-74 (1962) [hereinafter cited as DERTHICK]. See also Byrd, *District of Columbia "Home Rule,"* 16 AM. U.L. REV. 254 (1967); Tydings, *Home Rule for the District of Columbia: The Case for Political Justice,* 16 AM. U.L. REV. 271 (1967).

4. U.S. CONST. art. I, § 8.

5. THE FEDERALIST No. 43, at 339 (Hamilton ed. 1909) (Madison).

6. *Id.*

7. *Id.*

8. The delegates to the Convention were more concerned about where the seat of government would be rather than what it would be. See 2 M. FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION* 127 (1937).

History of Government in the District

The government of the District has undergone much reorganization since congressional acceptance of the ceded territory in 1790.⁹ Initially there were five units of local government in the District—the county of Washington; the city of Washington; the city of Georgetown ceded by the State of Maryland; and the county and city of Alexandria ceded by the State of Virginia.¹⁰ The city of Georgetown on the Maryland side and Alexandria on the Virginia side each had a separate, popularly elected government.¹¹ Prior to incorporation of the city of Washington in 1802, the District was governed by three commissioners appointed by the President.¹² The act of incorporation of the District provided for a mayor-council form of municipal government.¹³ While the mayor was to be appointed annually by the President, the people were given the power to elect the twelve-member city council.¹⁴ The District municipal government was reorganized in 1812¹⁵ at which time Congress replaced the mayor-council system with a combination of an eight-member Board of Aldermen and a twelve-member Common Council, both of which were to be popularly elected.¹⁶

In 1820, Congress again set out to reorganize the local government. This time they retained the bicameral legislature, and in addition provided for a popularly elected mayor, who was to serve a two-year term.¹⁷ This form of home rule continued until the 1870's, when racial and political factors and a critical financial situation prompted Congress to gradually eliminate the home rule form of government.¹⁸ In 1871 Congress merged Georgetown and the city of Washington into one municipal corporation under a territorial form of government consisting of a presidentially-appointed governor and a bicameral legislature made up of a presidentially-appointed eleven-member Council and a twenty-two-member House of Delegates elected popularly.¹⁹ In addition, the District was permitted to have a nonvoting delegate to the House of Representatives.²⁰ This form of government was short-lived, lasting only three

9. Act of July 16, 1790, ch. 28, § 1, 1 Stat. 130.

10. DERTHICK 37.

11. COMMISSIONERS OF THE DISTRICT OF COLUMBIA, *THE GOVERNMENT OF THE DISTRICT OF COLUMBIA* 116-17 (1964).

12. Pursuant to Act of July 16, 1790, ch. 28, §§ 2, 3, 1 Stat. 130.

13. Act of May 3, 1802, ch. 53, §§ 2, 3, 5, 2 Stat. 195.

14. *Id.* §§ 2, 5.

15. Act of May 4, 1812, ch. 75, § 1, 2 Stat. 721.

16. *Id.* § 3.

17. Act of May 15, 1820, ch. 104, § 3, 3 Stat. 583, 584.

18. See DERTHICK 38; J. KEELEY, *DEMOCRACY OR DESPOTISM IN THE AMERICAN CAPITAL* (1939); J. WHYTE, *THE UNCIVIL WAR* (1958).

19. Act of Feb. 21, 1871, ch. 62, §§ 2, 5, 16 Stat. 419, 420-21.

20. *Id.* § 34. This is the only congressional representation that the District has ever had. Norton P. Chipman was the first and only delegate to be elected by District

years before Congress established a government run by a three-member commission appointed by the President.²¹ Congress confirmed this system four years later in the Organic Act of the District of Columbia,²² and this system prevailed until 1967. The present system was established under a presidential reorganization plan which became effective in August 1967.²³ It provides for a mayor-council form of government, the members of which are presidentially-appointed;²⁴ with the appointed mayor assuming much of the power previously given to the three commissioners.

At first glance it would appear that the denial of popular election of city officials and the lack of congressional representation violates article IV, section 4 of the Constitution, which guarantees a republican form of government. Federal courts, however, have refused to handle questions involving this provision, based on the Supreme Court's dictum in *Luther v. Borden*²⁵ stating that questions arising under this provision of the Constitution are of a political rather than judicial character.²⁶

The Political Question Dilemma

In *Hobson v. Tobriner*,²⁷ where citizens of the District attempted to enjoin the President from appointing three commissioners of the District, one of the

citizens. One of the major duties of the delegate was to sit on the Committee on the District of Columbia. His effectiveness, however, was hampered by his disqualification from voting. See J. WHYTE, *THE UNCIVIL WAR* 107-09 (1958).

21. Act of June 20, 1874, ch. 337, § 2, 18 Stat. 116.

22. Act of June 11, 1878, ch. 180, § 2, 20 Stat. 102, 103.

23. Reorganization Plan No. 3 of 1967, 81 Stat. 948 (1967) [hereinafter cited as Reorganization Plan]. The Reorganization Act of 1949 granted the President the power to reorganize governmental agencies, including the District of Columbia government, in order to provide for the effective functioning of the federal government. 5 U.S.C. §§ 901-13 (1964).

24. Reorganization Plan, §§ 201, 301.

25. 48 U.S. (7 How.) 1 (1848).

26. *Id.* at 40-43. The case arose out of Dorr's Rebellion of 1841. Several citizens became discontented with the 1663 Charter of Rhode Island and Providence Plantations, which provided for extremely limited suffrage and no way for amending this provision. In an attempt to rectify the situation many of these citizens took it upon themselves to elect a constitutional convention by universal manhood suffrage. The result of the convention was the formation of a new government which was subsequently adopted by a majority of the male qualified voters. The new government had to be abandoned after it failed to uphold its authority through the force of arms. It was during one of the skirmishes that the case developed. The plaintiff, Martin Luther, brought an action of trespass against Luther Borden and others. The defendants maintained that they had a right to break into Luther's house and arrest him, since they alleged that he was involved in the rebellion. Luther contended that his actions were justified since the Charter Government's authority had been annulled by the citizens of Rhode Island. Therefore, he contended his actions were in support of the lawful authority of the state, while Borden was in arms against it. *Id.* at 34-35.

27. 255 F. Supp. 295 (D.D.C.), *order denying petition*, *Hobson v. Gasch*, No. 20,388 (D.C. Cir., Sept. 29, 1966), *cert. denied*, 386 U.S. 914 (1967).

principal arguments was that such appointments violated the right of the residents of the District to have a republican form of government. The district court dismissed the plaintiff's application for a three-judge federal district court, one of the grounds being that questions arising under article IV, section 4 were of a "political" nature and therefore not within the jurisdiction of the court.²⁸ The court refused to even discuss the merits of the question presented, the sole basis for this refusal being the dictum of *Luther v. Borden*.

Because of the impact of the decision in *Luther v. Borden* on questions arising under the Guaranty Clause, it is necessary to examine closely the holding of that case. The only question presented to the Court in *Luther* was which of the two governments existing in Rhode Island in 1841 was legitimate and lawful.²⁹ The Court refused to decide the issue on the ground that the question was "political" and therefore "beyond its appropriate sphere of action."³⁰ The actual holding was that Congress or the President had the sole power to determine which of two contending state governments was legitimate.³¹ The basis for the holding was that the latter clauses of article IV, section 4, and a statute enacted in 1795,³² conferred on the President the power to call forth the militia to stop insurrection upon application by the proper governmental authority of the state. As a result, the President had an implied obligation to determine which of the two governments was legitimate. The Court found that, while the President never really summoned the militia, he did recognize the old governor as the executive authority in Rhode Island, and furthermore, that he had made arrangements to send the militia to the governor's aid if necessary.³³

A literal reading of the Court's opinion would lead one to believe that only the President and Congress have a duty to fulfill the guarantee. Section 4, however, provides that "The United States shall guarantee to every State in this Union a Republican Form of Government" It is arguable, then, that the judicial branch of the United States Government has an equal duty, along with the executive and legislative branches, to handle cases arising under the first clause of article IV, section 4. In *Hobson v. Tobriner*, the district court was not being called upon to determine which of two governments was

28. *Id.* In addition to their argument under article IV, section 4, the plaintiffs alleged that appointment of the three commissioners violated the fifth, ninth, tenth, fifteenth and nineteenth amendments. All of the claims were dismissed as not presenting substantial constitutional questions.

29. 48 U.S. (7 How.) at 38-39, 46.

30. *Id.* at 46-47.

31. See *Taylor v. Beckham*, 178 U.S. 548, 578-79 (1900).

32. Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424.

33. 48 U.S. (7 How.) 1, 44 (1848).

legitimate, rather the court was asked to determine whether the existing government in the District of Columbia was violative of the guarantee of a republican form of government. Unfortunately, the dictum, not the actual holding of *Luther v. Borden*, was the basis for the decision in *Hobson v. Tobriner*, as it has been the grounds for most questions brought under the Guaranty Clause. The net result of the strict adherence by the courts to the dictum can be described as no less than a paralyzation of the first clause of article IV, section 4. It does not seem logical that this was the intention of the drafters of the Constitution, especially since they wanted a flexible and workable document. Such automatic and indiscriminate classification by courts of all questions arising under article IV, section 4 is hardly flexible. In light of *Baker v. Carr*³⁴ and more recently *Powell v. McCormack*,³⁵ the precedent of *Luther v. Borden* requires closer scrutiny to reassess the validity of the Court's dictum that all questions arising under article IV, section 4 are "political" and therefore nonjusticiable.

Powell v. McCormack indicates that federal courts should apply the test of jurisdiction over the subject matter as announced in *Bell v. Hood*,³⁶ and if there is proper jurisdiction, the courts should apply the test of a political question discussed at length in *Baker v. Carr*.³⁷ In *Hobson v. Tobriner*, the court did not apply any tests when it refused the application for a three-judge district court. Simply stated, the test for jurisdiction is whether the claims involved will be sustained if the Constitution is given one construction and will be defeated if it is given another.³⁸ Upon applying this test to the District situation, the result is: If the District of Columbia is considered a "state" for the purposes of article IV, section 4, then whether or not there is a republican form of government can be examined. If article IV, section 4 is construed not to include the District of Columbia, then whether or not there is a republican form of government cannot be examined. Assuming that a court might follow this analysis and find jurisdiction, then the court must

34. 369 U.S. 186 (1962). See notes 37 and 39 *infra* and accompanying text.

35. 395 U.S. 486 (1969).

36. 327 U.S. 678 (1946). The case arose from a suit in the federal district court to recover damages for alleged violations of the fourth and fifth amendments. The district judge dismissed the suit on the ground that the action was not one arising under the Constitution or the laws of the United States. The Supreme Court reversed and held that there was federal jurisdiction. *Id.* at 680-82.

37. This case arose when several citizens of Tennessee instituted an action to gain a declaration that the Tennessee Apportionment Act of 1901 was unconstitutional. The district court dismissed the action on the ground that it lacked jurisdiction over the subject matter, and that the complaint failed to state a claim upon which relief could be granted. The Supreme Court reversed the judgment below, holding that the district court possessed jurisdiction of the subject matter, and that the petitioners were entitled to appropriate relief.

38. *Bell v. Hood*, 327 U.S. 678, 685 (1946).

decide whether a political question is presented. *Baker v. Carr* listed some of the attributes of political questions:

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³⁹

While the question of whether the District government is a republican one might be considered political under the above definition, the courts should at least determine whether or not the District is to be considered a "state" under article IV, section 4. It is only logical that a court should decide if the provision is applicable, before turning to the issue of whether the government is republican.

The Status of the District for Purposes of Article IV, Section 4

Once it is shown that there is justification for asserting that the court could find jurisdiction over the subject matter, the two main questions for the courts to consider are: (1) Is the District of Columbia a "state" within the meaning of article IV, section 4? (2) If so, is its government, created by act of Congress in 1967, republican in form?

To date there has not been a judicial determination of whether the District is a "state" for the purposes of article IV, section 4. In *Hepburn v. Ellzey*,⁴⁰ Chief Justice Marshall, speaking for the Court, determined that the District was not a state within the meaning of article III, and therefore a District citizen could not maintain an action against a citizen of another state in the circuit court for that state's district.⁴¹ *Hepburn* remained the law until 1940 when Congress expanded the diversity jurisdiction of federal courts to include controversies between citizens of "the Territories, the District of Columbia, and the Commonwealth of Puerto Rico."⁴² The power of Congress to enact this grant of federal jurisdiction was challenged in *National Mutual Insurance Co. v. Tidewater Transfer Co.*⁴³ While upholding the constitutionality of the

39. 369 U.S. at 217.

40. 6 U.S. (2 Cranch) 445 (1804).

41. *Id.* at 452-53.

42. Act of April 20, 1940, ch. 117, § 41, 59 Stat. 143, as amended, 28 U.S.C. § 1332(d) (1964).

43. 337 U.S. 582 (1949).

statute as a proper exercise of the power of Congress under article I of the Constitution, two members of the Court joined in the opinion of Mr. Justice Jackson which refused to overrule *Hepburn* for the purposes of article III.⁴⁴ Justice Rutledge's concurring opinion, which was joined in by Justice Murphy, indicated, however, that the *Hepburn* decision might have been wrongly decided:

Despite its great age and subsequent acceptance, I think the *Hepburn* decision was ill-considered and wrongly decided. Nothing hangs on it now except the continuance or removal of a gross and wholly anomalous inequality applied against a substantial group of American citizens, not in relation to their substantive rights, but in respect to the forums available for their determination.⁴⁵

In addition Justice Rutledge stated:

Marshall's sole premise of decision in the *Hepburn* case has failed, under the stress of time and later decision, as a test of constitutional construction. Key words like "state," "citizen," and "person" do not always and invariably mean the same thing.⁴⁶

*Texas v. White*⁴⁷ supports Justice Rutledge's assertion that certain words mean one thing in one section of the Constitution, but take on a different construction elsewhere. In that case the Supreme Court considered what the term "state" means for the purpose of article IV, section 4. Chief Justice Chase, writing for the Court, defined "state" in this context as a "political community, as distinguished from a government."⁴⁸ Based on this rather broad definition it is not difficult to see how the District of Columbia might qualify as a "state," thus entitling it to a republican form of government. Even if the District is considered to be a "state" in a very qualified sense, as was stated by the Court in *Metropolitan R.R. v. District of Columbia*,⁴⁹ there is no reason to presume that the qualifications for being a "state" in the context of the Constitutional provision under consideration have not been met. The federal courts have the ability to determine whether the District should qualify in this instance, but thus far they have preferred to avoid the problem by declaring such questions to be "political" and therefore nonjusticiable.

Is the District Government "Republican?"

Having determined that there is substantial legal justification for considering

44. *Id.* at 587-88.

45. *Id.* at 625.

46. *Id.* at 623.

47. 74 U.S. (7 Wall.) 700 (1869).

48. *Id.* at 721.

49. 132 U.S. 1, 9 (1889).

the District to be a "state" within the framework of article IV, section 4, the next step is to discuss whether or not the present government conforms to the traditional notions of a republican form of government. Once again Madison's observations in *The Federalist Papers* provide a valuable source for the purposes of definition. He defines a republic as

a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a government, that it be derived from the great body of the society⁵⁰

During the Constitutional Convention, Madison noted that the right of suffrage was "one of the fundamental articles of republican Government."⁵¹ In *re Duncan*⁵² provides a definition formulated by the Supreme Court on this subject: "By the Constitution, a republican form of government is guaranteed to every State in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration"⁵³ The distinguishing feature of that form does not exist in the present governmental structure of the District, nor has that feature been a part of the local government since 1874. Many state courts have held that the principle of having a republican government does not apply to local government.⁵⁴ Federal courts have consistently refused to consider the issue under the rationale of the political question doctrine. However, it would appear that the state courts have incorrectly narrowed the definition of "state" established by the Supreme Court in *Texas v. White*.⁵⁵ The most expedient way to solve the dilemma would be for the federal courts to exer-

50. THE FEDERALIST NO. 39, at 302 (Hamilton ed. 1909) (Madison).

51. 2 M. FARRAND, THE RECORDS OF THE FEDERAL CONVENTION 203 (1937). This position is supported by a modern writer on the Constitution, who commented: "'Republican Government,' beyond the possibility of argument, is representative government; and since the representative character of any government necessarily depends upon the popular right to vote, it inevitably results that the popular right of voting in the government of our states, and of voting therein in an effective way, is the thing to which this national guaranty most essentially appertains." 1 W. CROSSKEY, POLITICS AND THE CONSTITUTION 523 (1953).

52. 139 U.S. 449 (1891).

53. *Id.* at 461. See also *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175-76 (1874).

54. See *In re Pfahler*, 150 Cal. 71, 88 P. 270 (1906); *Sarlls v. State ex rel. Trimble*, 201 Ind. 88, 166 N.E. 270 (1929); *State ex rel. Porterie v. Smith*, 184 La. 263, 166 So. 72 (1935); *Hopkins v. Duluth*, 81 Minn. 189, 83 N.W. 536 (1900); *Walker v. Spokane*, 62 Wash. 312, 113 P. 775 (1911).

55. See Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 525 n.51 (1962).

cise their proper jurisdiction and determine the status of the District in regard to article IV, section 4.

Recent Home Rule Legislation

Currently two bills have passed the Senate which could be important steps in an attempt to give the District a more representative government.⁵⁶ The first is a bill providing for a nonvoting delegate to the House of Representatives.⁵⁷ This delegate would be popularly elected by citizens of the District. The second bill proposes the establishment of a fifteen-member commission on government for the District of Columbia.⁵⁸ The purpose behind this bill is an examination of the feasibility and desirability of various methods by which

- (1) the structure of the District government may be improved,
- (2) the District of Columbia may be granted a greater measure of self-government than presently exists, and
- (3) the District of Columbia government can promote economy, efficiency, and improved service in the transaction of the public business in the departments, agencies, and independent instrumentalities of the District government.⁵⁹

The proposed commission would consist of two senators, two members of the House of Representatives, five presidential appointees, four popularly elected members, the District Commissioner and the Chairman of the District of Columbia Council.⁶⁰ Perhaps the combined efforts of a delegate to the House of Representatives and a commission on District government will help bring an end to the present, highly questionable, form of local government.

The Supreme Court has already indicated that home rule for the District is constitutional.⁶¹ It has not, however, established whether or not denial of such a government to the District is unconstitutional under article IV, section 4. In *Downes v. Bidwell*⁶² the Court, in important dicta, discussed the Constitution's applicability to the District of Columbia and stated: "The Constitution had attached to it irrevocably. . . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the States, but it did not take it out of the United States or from under the aegis of the Constitution."⁶³ It should follow that the provision for a republican form

56. President Nixon's message to the Congress outlined the substance of the two bills. 115 CONG. REC. 4191 (daily ed. April 29, 1969).

57. S. 2163, 91st Cong., 1st Sess. (1969). This bill was passed by the Senate on October 1, 1969. 115 CONG. REC. 11708 (daily ed. Oct. 1, 1969).

58. S. 2164, 91st Cong., 1st Sess. (1969). This bill was passed by the Senate at the same time as S. 2163, and both have been sent to the House of Representatives for further action. 115 CONG. REC. 11712 (daily ed. Oct. 1, 1969).

59. 115 CONG. REC. 11713 (daily ed. Oct. 1, 1969).

60. *Id.* at 11712.

61. *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 108-10 (1953).

62. 182 U.S. 244 (1901).

63. *Id.* at 261.

of government is just as applicable to the District after the cession as it had been applicable to the states of Maryland and Virginia before the cession, and therefore the citizens of the ceded territory did not relinquish their right to said form of government.

In conclusion, it appears that the federal courts have a duty under the Constitution to re-evaluate the status of the District of Columbia in regard to article IV, section 4. In light of the decisions in *Baker v. Carr* and more recently *Powell v. McCormack*, the courts, if given the opportunity, should reconsider the rationale of cases such as *Hobson v. Tobriner*. Chief Justice Marshall's opinion in *Marbury v. Madison* states: "If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."⁶⁴ The government of the District of Columbia was created by an ordinary act of Congress; it is within the capacity of the courts to test that act for its constitutionality under article IV, section 4. Both Congress and the President have failed to provide the District with a representative government, and any change in the near future is not apparent. The unconstitutionality of the District government speaks for itself, since it is neither representative nor is it popularly elected. There does not seem to be any persuasive reason why the courts cannot handle such an issue, except the fear of overruling the precedent set in *Luther v. Borden*. Unless the courts act on the problem posed by the form of government in the Nation's Capital, some citizens will never realize true democracy.

The Federal Communications Commission and Cigarette Advertising

In 1934 Congress established the Federal Communications Commission (FCC) and directed it to observe the "public interest" in its regulation of the broadcasting industry.¹ Aiming to fulfill this broad congressional directive, the FCC in recent years has taken two controversial steps in an effort to regulate the advertising of cigarettes on radio and television. One was the so-called "cigarette decision" in which the FCC held that the presentation of cigarette commercials constituted an exposition of one side of a controversial issue of public importance and thus imposed an affirmative duty on a broad-

64. 5 U.S. (1 Cranch) 137, 178 (1803).

1. See 47 U.S.C. §§ 151, 307, 309(a), 403, 407, 409 (1964).