

1984

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Recommended Citation

Bruce C. French, *Can Home Rule in the District of Columbia Survive the Chadha Decision?*, 33 Cath. U. L. Rev. 811 (1984).

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CAN HOME RULE IN THE DISTRICT OF COLUMBIA SURVIVE THE *CHADHA* DECISION?

*Bruce Comly French**

More than a decade has passed since the enactment of the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act).¹ In this Act, the Congress delegated much of its constitutional authority affecting the District of Columbia² to an elected

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1. Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified in scattered sections of the D.C. CODE) [hereinafter cited as Home Rule Act].

2. U.S. CONST., art I, § 8, cl. 17, provides, inter alia:

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States

.....
D.C. CODE ANN. § 1-227 (1981 & Supp. 1984) provides, in pertinent part:

(a) Subject to the limitations specified in §§ 1-206, 1-207, 1-233, and 47-313, the legislative power granted to the District by this Act is vested in and shall be exercised by the Council in accordance with this Act. In addition, except as otherwise provided in this Act, all functions granted to or imposed upon, or vested in or transferred to the District of Columbia Council, as established by Reorganization Plan No. 3 of 1967, shall be carried out by the Council in accordance with the provisions of this Act.

.....
(e) An act passed by the Council shall be presented by the Chairman of the Council to the Mayor, who shall, within 10 calendar days (excluding Saturdays, Sundays, and holidays) after the act is presented to him, either approve or disapprove such act. If the Mayor shall approve such act, he shall indicate the same by affixing his signature thereto, and such act shall become law subject to the provisions of § 1-233(c). If the Mayor shall disapprove such act, he shall, within 10 calendar days (excluding Saturdays, Sundays, and holidays) after it is presented to him, return such act to the Council setting forth in writing his reasons for such disapproval. If any act so passed shall not be returned to the Council by the Mayor

Mayor³ and Council.⁴ Under the Home Rule Act, Congress exercises its retained constitutional authority⁵ by adopting simple⁶ or concurrent⁷ reso-

within 10 calendar days after it shall have been presented to him, the Mayor shall be deemed to have approved it, and such act shall become law subject to the provisions of § 1-233(c) unless the Council by a recess of 10 days or more prevents its return, in which case it shall not become law. If, within 30 calendar days after an act has been timely returned by the Mayor to the Council with his disapproval, two-thirds of the members of the Council present and voting vote to reenact such act, the act so reenacted shall become law subject to the provisions of § 1-233(c).

See also D.C. CODE ANN. § 1-204 (1981 & Supp. 1984).

3. D.C. CODE ANN. § 1-241 (1981 & Supp. 1984).

4. D.C. CODE ANN. § 1-221 (1981 & Supp. 1984).

5. D.C. CODE ANN. § 1-206 (1981 & Supp. 1984) provides, *inter alia*:

Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.

6. D.C. CODE ANN. § 1-233(c)(2) (1981 & Supp. 1984), provides, *inter alia*:

(c)(2) In the case of any such act transmitted by the Chairman with respect to any act codified in Title 22, 23, or 24, such act shall take effect at the end of the 30-day period beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate only if during such 30-day period 1 House of Congress does not adopt a resolution disapproving such act. The provisions of § 1-207, relating to an expedited procedure for consideration of resolutions, shall apply to a simple resolution disapproving such act as specified in this paragraph.

See also D.C. CODE ANN. § 4-102 (1981 & Supp. 1984) concerning the use of simple or concurrent resolutions to direct the President's control of the Metropolitan Police Department.

7. D.C. CODE ANN. § 1-207 (1981 & Supp. 1984) and D.C. CODE ANN. § 1-233(c)(1) (Supp. 1984). D.C. CODE ANN. § 1-233(c)(1) (Supp. 1984) provides, *inter alia*:

(c)(1) Except acts of the Council which are submitted to the President in accordance with Chapter 11 of Title 31, United States Code, any act which the Council determines, according to § 1-229(a), should take effect immediately because of emergency circumstances, and acts proposing amendments to title IV of this Act and except as provided in § 47-322(c) and § 47-328(d)(1) the Chairman of the Council shall transmit to the Speaker of the House of Representatives, and the President of the Senate, a copy of each act passed by the Council and signed by the Mayor, or vetoed by the Mayor and repassed by two-thirds of the Council present and voting, each act passed by the Council and allowed to become effective by the Mayor without his signature, and each initiated act and act subject to referendum which has been ratified by a majority of the registered qualified electors voting on the initiative or referendum. Except as provided in paragraph (2) of this subsection, no such act shall take effect until the end of the 30-day period (excluding Saturdays, Sundays, and holidays, and any day on which neither House is in session because of an adjournment *sine die*, a recess of more than 3 days, or an adjournment of more than 3 days) beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate and then only if during such 30-day period both Houses of Congress do not

lutions of disapproval⁸ to reject Council "acts"⁹ it disfavors. At the same time, Congress continues to enact public laws that affect the District of Columbia, usually in subject matter areas in which the Council lacks legislative authority.¹⁰

With several salient exceptions, the District of Columbia courts have broadly construed the provisions of the Home Rule Act to uphold the Council's exercise of authority.¹¹ Litigation has focused upon compliance with the procedural terms of the Home Rule Act and an interpretation of the Act's proscriptions upon local authority.¹² These decisions have never questioned the fundamental design of the Home Rule Act.

On June 23, 1983, the Supreme Court decided *Immigration and Naturalization Service v. Chadha*,¹³ holding unconstitutional Congress' use of legislative veto resolutions in the exercise of its lawmaking functions.¹⁴ Because the District of Columbia Home Rule Act contains a legislative veto provision, *Chadha* requires that the courts review the constitutional relationship between the District of Columbia and the Federal Establishment.

This article will first address the nature of the legislative authority Congress delegated to the District of Columbia government.¹⁵ The Supreme Court¹⁶ has upheld delegation of this legislative authority with certain ex-

adopt a concurrent resolution disapproving such act. The provisions of § 1-207, except subsections (d), (e), and (f) of such section, shall apply with respect to any concurrent resolution disapproving any act pursuant to this paragraph.

In its original formulation, the President exercised a role if the Mayor vetoed the bill and it was overridden by the Council. D.C. CODE ANN. § 1-147(c)(1) (1973 & Supp. V 1978).

8. See *supra* notes 6-7. In addition, a concurrent resolution of "approval" is used to effect congressional concurrence with the voters' adoption of an amendment to title IV of the Home Rule Act. D.C. CODE ANN. § 1-205(b) (1981).

9. In the exercise of its legislative authority the Council enacts acts. The Council's rules concerning the legislative process are reprinted at D.C. CODE ANN. § 1-227 (1981) (notes §§ 401-429 (Supp. 1984)); see also French, *Council of the District of Columbia Legislative Drafting Manual—Revised Edition*, 25 HOWARD L.J. 731, 773 (1982) [hereinafter cited as French Drafting Manual].

10. See, e.g., D.C. CODE ANN. §§ 1-701 to 1-748, 5-1201 to 5-1212, 11-903, 11-1561 to 11-1571, 11-1732 (1981 & Supp. 1984). As an example of pending measures, see H.R. 3920, 98th Cong., 1st Sess. (1983) (amending the Home Rule Act to authorize the Council to enact measures relating to the landlord-tenant branch of the superior court) and S. 1912, 98th Cong., 1st Sess. (1983) (amending D.C. CODE ANN. § 21-502(a) (1981) to change the membership requirements for the District of Columbia Commission on Mental Health).

11. See *infra* notes 30-153 and accompanying text.

12. *Id.*

13. 103 S. Ct. 2764 (1983).

14. *Id.* at 2788.

15. See *supra* note 2 and *infra* notes 30-37 and accompanying text.

16. See *infra* notes 19-49 and accompanying text.

ceptions, but these decisions precede *Chadha*.¹⁷ The article will then present an overview of the *Chadha* case and set the framework for the new constitutional analysis of the Home Rule Act. The application of the *Chadha* holding to the unique circumstances of the District of Columbia also will be considered, including a discussion of the constitutional defects in the Home Rule Act discovered since *Chadha*.¹⁸ The article will conclude with recommendations for legislative solutions to correct the infirmities of the Home Rule Act.

I. THE EXERCISE OF AUTHORITY BY THE LOCAL GOVERNMENT IN THE DISTRICT OF COLUMBIA.

A. *The Historical Setting*

The District of Columbia has constituted the national seat of government since the administration of John Adams. Under the United States Constitution the legislative control of the District is vested in the Congress.¹⁹ Throughout the District's history Congress has experimented with vesting various forms of legislative power in the Mayor and District of Columbia Council (Council).²⁰ Although this delegation of authority has removed the Congress from much of the day-to-day management of the city, the Congress has always retained the authority to override local initiatives.²¹

The early legislative bodies exercised delegated authority consistent with the organic acts of Congress.²² These limited experiments with home rule

17. See *supra* note 13 and accompanying text.

18. See *infra* notes 218-94 and accompanying text.

19. See *supra* notes 2, 5.

20. The Act of July 16, 1790, ch. 28, 1 Stat. 139, accepted the transfer of jurisdiction from Maryland and Virginia to establish the District of Columbia. The Act of May 3, 1802, ch. 53, 2 Stat. 195, established a mayor-council form of government as the first home rule in the District of Columbia. The 12 members of the District of Columbia Council were locally elected and served in a two-chamber legislature. The legislative authority was severely restricted. Act of May 3, 1802, ch. 53, § 7, 2 Stat. 197. The delegation cases, surveyed *infra* text accompanying notes 21-153, were all decided prior to *Chadha*. The chronicling of local legislative experience may be found in Newman & DePuy, *Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act*, 24 AM. U.L. REV. 537, 544-45 (1975); D.C. CODE ENCYCL. § 1-102 (West 1978).

The Legislative Assembly established by the Act of February 21, 1871, ch. 62, § 5, 16 Stat. 419 had many of the same ingredients as the current Home Rule Council. Local ordinances were adopted that were subject to modification or repeal by the Congress.

21. See, e.g., D.C. CODE ANN. § 1-206 (1981 & Supp. 1984) and D.C. CODE ANN. § 1-233(c) (Supp. 1984).

22. Even before the advent of Home Rule to the District of Columbia, discussed *infra* notes 50-153, the following have been upheld as permissible exercises of the congressional power to delegate its lawmaking authority to "rightful subjects of legislation" to the Govern-

came to an end with the abolition of the elected Legislative Assembly in 1874.²³ At this time legislative and executive functions were merged into a commission form²⁴ of government which endured until the mid-1960's.²⁵ Nevertheless, Congress still retained true legislative authority for the District of Columbia during this period. The District of Columbia board of commissioners implemented the laws for the District of Columbia that Congress enacted.²⁶ Local regulatory measures were usually designated Acts of the Legislative Assembly²⁷ or Commissioners' Orders.²⁸ But in each of these instances the locally-adopted measures were regulatory and

ment of the District of Columbia: *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109 (1953) (Supreme Court sustained a delegation to adopt ordinances and regulations "subject of course to constitutional limitations to which all lawmaking is subservient."); *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889) (D.C. constituted a body corporate with all the powers of a municipal corporation, not inconsistent with laws of the United States; act conferred upon D.C. only municipal powers and did not authorize it to impose license upon persons soliciting sales of goods on behalf of persons doing business outside D.C. which would be a regulation of commerce in violation of Constitution. The fact that Congress repealed and modified various parts of the acts of the Legislative Assembly containing the clause imposing such license, cannot be held to amount to a ratification of that clause by Congress, the parts repealed and modified being separately operative, and such as were within scope of municipal action); *Metropolitan R.R. Co. v. District of Columbia*, 132 U.S. 1 (1889) (D.C. is a municipal corporation, having a right to sue and be sued, and subject to the ordinary rules that govern the law of procedure between private persons.); *Fireman's Ins. Co. v. Washington*, 483 F.2d 1323 (D.C. Cir. 1973) (Insurance regulations of the District of Columbia were within police power of the City Council. While it possesses no inherent legislative authority, the City Council does have broad delegation of police power from Congress.); *Maryland and District of Columbia Rifle & Pistol Ass'n v. Washington*, 442 F.2d 123 (D.C. Cir. 1971) (When the legislative branch of the District is working within the scope of its permitted powers, and Congress has likewise legislated on the subject matter, the two may coexist in identical areas although the District may have exacted additional requirements or imposed additional penalties so long as the two are not inconsistent.); *United States ex rel. The Brightwood Ry. v. O'Neal*, 10 App. D.C. 205 (1897) (Congress' establishment of the court of the justice of the peace was within the usual scope of the general power of legislation over the District of Columbia.); *see also* on question of delegation and, the breadth thereof, *Newman & DePuy*, *supra* note 20, at 569-73, 631-43.

23. First temporarily, and then permanently, locally elected municipal home rule ended in 1874. Act of June 20, 1874, ch. 337, 18 Stat. 116, and Act of June 11, 1878, ch. 180, 20 Stat. 103. Three presidentially-appointed commissioners governed the District of Columbia for the next 93 years.

24. *See, e.g.*, 2 E. MCQUILLEN, MUNICIPAL CORPORATIONS § 9.20 (3d ed. 1979).

25. The Home Rule Act became effective as to the governance of the District of Columbia on Jan. 2, 1975.

26. Federal agencies issue rules to implement their authority under 5 U.S.C. §§ 501 to 576 (1982). For specific examples of similar District of Columbia pronouncements, *see infra* notes 27, 28, 40.

27. D.C. CODE ANN. §§ 1-261, 1-263 (1981 & Supp. 1984). *See Newman & DePuy*, *supra* note 20, at 724-44; *French Drafting Manual*, *supra* note 9, at 773.

28. *See French Drafting Manual*, *supra* note 9, at 774.

carried out the enactments of Congress.²⁹

The seminal Supreme Court case that considered the delegation of authority from Congress to the District of Columbia government is *District of Columbia v. John R. Thompson Co.*³⁰ The Thompson company violated a District of Columbia ordinance that prohibited the operators of a restaurant to refuse to serve persons solely on account of their race or color.³¹ *Thompson* presented the Supreme Court with two questions: whether the Legislative Assembly had authority to enact the open public accommodations ordinance, and if so, whether that ordinance was still in effect after the demise of the Legislative Assembly in 1874. Several of the acts of the Legislative Assembly had been reenacted by Congress or codified in the 1901 Code of Laws for the District of Columbia which gave rise to an argument that the public accommodations ordinance was impliedly repealed because it was not included in the compilation or reenacted.³² The Court held that Congress has authority to “delegat[e] . . . full legislative power [to the District of Columbia], subject of course to constitutional limitations to which all law making is subservient and subject also to the power of Congress at any time to revise, alter, or revoke the authority granted.”³³ Two thorny problems of “municipal” vis-a-vis “general” authority that had been the subject of an earlier case³⁴ and the nature of Congress’ “exclusive” legislative authority under the Constitution³⁵ were resolved by the Court. The Court concluded that Congress could not delegate its “national” power to the District of Columbia legislature and that Congress’ “exclusive” authority was exclusive because the neighboring states from which the District had been ceded did not have any of this legislative power.³⁶ In addition, the Supreme Court held that the Acts of the Legislative Assembly had not been impliedly repealed by the latter codification of District laws by the Congress, and therefore, remained effective.³⁷

29. Newman & DePuy, *supra* note 20, at 727 & n.17. Note that the Legislative Assembly, by Act 180, June 25, 1873, amended the Act of Feb. 12, 1873, ch. 133, 17 Stat. 436. The analysis appears flawed in that an additional set of funds were provided for related projects. In any event this isolated, implied amendment lends no support to override basic *Chadha* problems presented *infra* in text accompanying notes 218-84.

30. 346 U.S. 100 (1953).

31. *Id.* at 103 n.1.

32. *Id.* at 110-13.

33. *Id.* at 109.

34. *Id.* at 107 (citing *Metropolitan R.R. v. District of Columbia*, 132 U.S. 1 (1889) and *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889)).

35. *Thompson*, 346 U.S. at 109.

36. *Id.*

37. *Id.* at 110.

In 1967, President Lyndon B. Johnson transmitted to the Congress the Reorganization Plan No. 3 of 1967.³⁸ Under the Reorganization Plan, an appointed District of Columbia Council and Commissioner (Mayor) of the District of Columbia were established.³⁹ Although no new powers were conferred, the structure of the local government once again differentiated between executive and legislative functions.

The appointed city council exercised its delegated legislative authority through the use of regulations.⁴⁰ Regulations were adopted by the city council, subject to the approval or veto of the commissioner.⁴¹ If approved, or adopted following executive rejection, the regulations became immediately effective, or effective at a later time as the city council directed.⁴² In all instances where the city council operated, a specific basis of authority within section 402 of the Reorganization Plan had to be found.⁴³ Congress did not retain a direct legislative veto over these measures, or allow the city council to directly amend congressional acts affecting the District of Columbia.

The city council's grant of authority provided control over myriad municipal functions,⁴⁴ and Congress continued to enact and amend its acts that affected the District of Columbia.⁴⁵ Municipal police regulations

38. 32 Fed. Reg. 11,669 (1967), *reprinted in* 5 U.S.C. app. 1109 (1982).

39. 32 Fed. Reg. 11,669 (1967), *reprinted in* 5 U.S.C. app. §§ 201, 301, at 1109-10 (1982).

40. *See* French Drafting Manual, *supra* note 9, at 774-75. For illustrative examples see: Regulation to Prohibit the Employment of Professional Strikebreakers in the District of Columbia, 16 D.C. Reg. 294, Reg. 70-1; Regulation to Modify Existing Policies for the Provision of Day Care Services, 17 D.C. Reg. 479; Reg. 71-1; Retail Consumer Credit Regulation, 17 D.C. Reg. 815, Reg. 71-18; Regulations Governing the Provision of Contraceptive Information and Devices to Minors, 18 D.C. Reg. 154, Reg. 71-27; Regulation Governing Human Rights, 20 D.C. Reg. 347 Reg. 73-22.

41. Reorganization Plan No. 3 of 1967, *reprinted in* 5 U.S.C. app. § 406, at 1121 (1982).

42. *Id.*

43. *Id.* § 402.

44. The Reorganization Plan transferred unspecified and residual functions to the Commissioner (§ 401), while the Council received specific grants of authority over myriad subjects, all linked to specific statutory provisions in the D.C. Code: general provisions; regulation of professions, occupations, etc.; public welfare; police and fire; building restrictions and regulations; health and safety; highways, streets, and bridges; parks; public buildings and grounds; weights, measures, and markets; feeble-minded persons; discrete and limited criminal offenses; execution fees; discrete and limited matters affecting prisoners and institutions; alcoholic beverages; charters of incorporation and money lending; tissue banks and crematorium; standard time; corporations; limited matters affecting public education; institutions, agencies and services; food and drugs; insurance; labor; motor vehicles; public utilities; passenger motor vehicles for hire; real property; social security; taxation and fiscal affairs; and miscellaneous provisions. Other "certain agencies" are specifically granted retained powers in § 501.

45. D.C. CODE ANN. §§ 4-406 to 4-420, 11-101 to 11-2105, 35-1801 to 35-1811, 35-1901 to 35-1917, 47-3402 (1981 & Supp. 1984).

were published in the *District of Columbia Register*⁴⁶ and occasionally codified in the District of Columbia Rules and Regulations.⁴⁷ Acts of Congress continued to be published in the Statutes at Large⁴⁸ and usually codified in the District of Columbia Code.⁴⁹

B. Home Rule

The District of Columbia Self-Government and Governmental Reorganization Act was approved by President Richard M. Nixon on December 24, 1973.⁵⁰ The elected Council of the District of Columbia that assumed authority on January 2, 1975, was empowered to exercise the delegated "legislative power granted to the District by the [Home Rule Act]."⁵¹

In stark contrast to the limited enumerated authorities of the appointed city council,⁵² the power of the Home Rule Council is broad and plenary.⁵³ In addition to the grant of general powers, the Council exercises specifically-delegated authority in a number of areas. These include authority to reorganize and establish offices and departments,⁵⁴ develop local personnel legislation,⁵⁵ approve a comprehensive plan for the National Capital,⁵⁶ adopt an annual budget act,⁵⁷ issue revenue and general obligation bonds,⁵⁸ and adopt acts to establish the advisory neighborhood com-

46. D.C. CODE ANN. § 1-1533 (1981 & Supp. 1984).

47. District of Columbia Administrative Procedure Act, Pub. L. No. 90-614, § 8, 82 Stat. 1207 (1968). See generally Mize, *Guidelines for Deciphering the Laws of a Unique City—State Legislature—The Council of the District of Columbia*, 2 POTOMAC L. REV. 27 nn.156, 161 (1978).

48. 1 U.S.C. § 112 (1982).

49. See, e.g., Act of Aug. 14, 1976, Pub. L. No. 94-386, 90 Stat. 1170 and Act of July 30, 1947, ch. 388, § 202, 61 Stat. 637. See History of the District of Columbia Code, 1 D.C. CODE ANN. at 1-16 (1981 & Supp. 1984).

50. See *supra* note 1.

51. D.C. CODE ANN. § 1-227 (1981 & Supp. 1984).

52. See *supra* note 46.

53. See *supra* notes 2, 22.

54. D.C. CODE ANN. § 1-227(b) (1981 & Supp. 1984), implemented by D.C. CODE ANN. §§ 1-299.1 to 1-299.6 (Supp. 1984).

55. D.C. CODE ANN. § 1-242(3) (1981 & Supp. 1984), implemented by D.C. CODE ANN. §§ 1-601.1 to 1-637.2 (1981 & Supp. 1984).

56. D.C. CODE ANN. § 1-244 (1981 & Supp. 1984), implemented by the District of Columbia Comprehensive Plan Act of 1984, 31 D.C. Reg. 1049-1180 (1984).

57. D.C. CODE ANN. § 47-304 (Supp. 1984), implemented annually. See, e.g., Council action: Fiscal Year 1980 Budget Request Act, Act 2-311, 25 D.C. Reg. 6094 (1978), and Congressional action acting upon the recommendation of the Council: District of Columbia Appropriation Act, 1980, Pub. L. No. 96-93, 93 Stat. 713 (1980).

58. D.C. CODE ANN. §§ 47-322, 47-334 (1981 & Supp. 1984).

missions.⁵⁹ Specific obligations were imposed on the Council in separate acts of Congress concerning campaign finance and election matters⁶⁰ and the city's retirement system.⁶¹

Of the specific obligations imposed upon the Council, only one requiring the development of a local personnel system has been subject to judicial challenge. In *American Federation of Government Employees v. Barry*,⁶² labor unions representing District of Columbia government employees appealed from a judgment of the superior court that invalidated an order of the Public Employee Relations Board directing Mayor Marion S. Barry to bargain collectively with the unions concerning compensation. The labor board had determined that the mayor's failure to bargain violated provisions of the District of Columbia Government Comprehensive Merit Personnel Act of 1978⁶³ which mandated collective bargaining.⁶⁴ Immediately prior to the labor board's bargaining order, the Council had enacted emergency legislation that permitted a fixed pay raise by law for city employees without regard to collective bargaining rights, and tempo-

59. D.C. CODE ANN. § 1-251 (Supp. 1984), *implemented by* D.C. CODE ANN. §§ 1-252 to 1-270 (1981 & Supp. 1984).

60. The Council was directed to study the conduct of the 1974 primary elections in the District of Columbia with an eye towards their improvement. Act of August 14, 1974, Pub. L. No. 93-376, § 704(a), 88 Stat. 458. The Council issued the Report of the Committee on Government Operations of the Council of the District of Columbia Regarding the Management of the Election Held in 1974 (Sep. 1975), and subsequently enacted amendatory legislation, District of Columbia Election Act Amendments of 1976, Sep. 2, 1976, 23 D.C. Reg. 2050, D.C. Law 1-79. Section 401(b)(6) of the same Act required the Council to determine if labor unions as such might continue to make contributions to political campaigns in the District of Columbia. The Council answered in the affirmative. Corporations and Labor Unions Campaign Finance Act of 1975, Sep. 23, 1975, 22 D.C. Reg. 1987, D.C. Law 1-16.

61. The Council was directed to adopt regulations concerning potential conflicts of interest under the city's retirement act. D.C. CODE ANN. § 1-731 (1981 & Supp. 1984). The Council's implementing regulations were adopted by the District of Columbia Retirement Board First Regulations Adoption Act of 1983, 30 D.C. Reg. 2300 (1983).

62. 459 A.2d 1045 (D.C. 1983); *see also* D.C. CODE ANN. §§ 1-601.1 to 1-637.2 (1981), *as amended by* D.C. CODE ANN. §§ 1-601.1 to 1-637.2 (Supp. 1984). With specific regard to collective bargaining, labor relations, and compensation matters, *see id.* §§ 1-605.1 to 1-605.4, 1-612.1 to 1-612.15, 1-618.1 to 1-618.17 (1981 & Supp. 1984). For an analysis of the Council's intentions in enacting this measure, *see* Council of the District of Columbia, Report of the Committee on Government Operations, Bill No. 2-10, District of Columbia Government Comprehensive Merit Personnel Act of 1978, July 5, 1978, *reprinted in* House of Representatives, Committee on the District of Columbia, District of Columbia Government Comprehensive Merit Personnel Act of 1978, 96th Cong., 1st Sess. (1979); French, *Public Sector Labor Relations in the District of Columbia*, 28 CATH. U.L. REV. 753 (1979).

63. *American Federation*, 459 A.2d at 1047.

64. *Id.* *See* District of Columbia Government Comprehensive Merit Personnel Act Pay Provisions Emergency Declaration Resolution of 1980, Sep. 16, 1980, 27 D.C. Reg. 4284, Res. 3-544, and District of Columbia Government Comprehensive Merit Personnel Act Pay Provisions Emergency Amendments of 1980, Sep. 26, 1980, 27 D.C. Reg. 4273, Act 3-249.

rarily amended the provisions of the personnel act requiring collective bargaining. In the trial court, the unions argued that in the absence of bargaining, they were entitled to a pay raise comparable to federal employees, rather than the lower District of Columbia-approved sum.⁶⁵

In the District of Columbia Court of Appeals, the unions contended that the federal pay raise was required for two reasons: the Council had improperly invoked its emergency authority⁶⁶ and the Home Rule Act's specific statutory authority to develop a local personnel law⁶⁷ had been misinterpreted. The emergency authority was challenged as not responsive to an "unforeseen circumstance"⁶⁸ in that compensation matters were annually adjusted on September 30th for the new fiscal year. The personnel system developmental authority was challenged as violating the provision of the Home Rule Act guaranteeing benefits "at least equal to" those enjoyed under the federal system before Home Rule.⁶⁹

The appellate court determined that the emergency authority was justified and had been carefully documented in the accompanying resolution declaring the emergency circumstances.⁷⁰ The court also concluded that the Council's prior adoption of the personnel act⁷¹ had removed the specific linkage to the federal system⁷² and that the flexibility with which the Council addressed compensation matters was consistent with the "mandate of the Self-Government Act which was to turn over the administration of such local functions [as pay raises] to the District government."⁷³

Under title VI of the Home Rule Act, the Council's authority is limited by specific subject matter proscriptions. These include restrictions upon taxing the property of the United States or of any state,⁷⁴ lending public credit for the support of private undertakings,⁷⁵ enacting or repealing any act "which concerns the functions or property of the United States or which is not restricted in its application exclusively in or to the District,"⁷⁶

65. *American Federation*, 459 A.2d at 1047-48.

66. *Id.* at 1050.

67. *Id.* at 1051.

68. *Id.* at 1050 n.9.

69. *Id.* at 1051.

70. *Id.* at 1050-51. See *supra* note 64.

71. *American Federation*, 459 A.2d at 1051-53.

72. *Id.* at 1051.

73. *Id.*

74. D.C. CODE ANN. § 1-233(a) (1981 & Supp. 1984) provides, inter alia: "(a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to: (1) Impose any tax on property of the United States or any of the several states . . ."

75. D.C. CODE ANN. § 1-233(a)(2) (1981 & Supp. 1984).

76. D.C. CODE ANN. § 1-233(a)(3) (1981 & Supp. 1984).

enacting any measure with regard to the jurisdiction of the District of Columbia courts,⁷⁷ imposing tax upon the income of any individual not a resident of the District of Columbia,⁷⁸ enacting any measures affecting the height limitations upon building structures in the District of Columbia,⁷⁹ enacting any measures affecting the Commission on Mental Health,⁸⁰ enacting any measure affecting the United States courts, the U.S. Attorney, or the U.S. Marshal,⁸¹ or, temporarily, amending any provision of certain criminal laws.⁸² Similar limitations upon authority were expressly imposed upon actions affecting the National Zoological Park, the National Guard of the District of Columbia, the Washington Aqueduct, and the National Capital Planning Commission.⁸³ Another restriction prohibits the Council from removing the Hatch Act's⁸⁴ application to the political

77. D.C. CODE ANN. § 1-233(a)(4) (1981 & Supp. 1984) provides, *inter alia*, that the Council will have no authority to "[e]nact any act, resolution, or rule with respect to any provision in Title 11 (relating to organization and jurisdiction of the District of Columbia courts)."

78. D.C. CODE ANN. § 1-233(a)(5) (1981 & Supp. 1984) provides, *inter alia*, that the Council will have no authority to "[i]mpose any tax on the whole or any portion of the personal income, either directly or at the source thereof, of any individual not a resident of the District (the terms 'individual' and 'resident' to be understood for the purposes of this paragraph as they are defined in § 47-1801.4)."

79. D.C. CODE ANN. § 1-233(a)(6) (1981 & Supp. 1984).

80. D.C. CODE ANN. § 1-233(a)(7) (1981 & Supp. 1984).

81. D.C. CODE ANN. § 1-233(a)(8) (1981 & Supp. 1984), provides, *inter alia*, that the Council will have no authority to

[e]nact any act or regulation relating to the United States District Court for the District of Columbia or any other court of the United States in the District other than the District courts, or relating to the duties or powers of the United States Attorney or the United States Marshal for the District of Columbia.

82. D.C. CODE ANN. § 1-233(a)(9) (1981 & Supp. 1984) provides, *inter alia*, that the Council will have no authority to

[e]nact any act, resolution, or rule with respect to any provision of Title 23 (relating to criminal procedure), or with respect to any provision of any law codified in Title 22 or 24 (relating to crimes and treatment of prisoners), or with respect to any criminal offense pertaining to articles subject to regulation under Chapter 32 of Title 22 during the 48 full calendar months immediately following the day on which the members of the Council first elected pursuant to this Act take office.

83. D.C. CODE ANN. § 1-233(b) (1981 & Supp. 1984) provides:

(b) Nothing in this Act shall be construed as vesting in the District government any greater authority over the National Zoological Park, the National Guard of the District of Columbia, the Washington Aqueduct, the National Capital Planning Commission, or, except as otherwise specifically provided in this Act, over any federal agency, than was vested in the Commissioner prior to January 2, 1975.

For illustrative examples of state constitutional provisions imposing limitations upon the legislature, see COLO. CONST. art. V, § 25a; IDAHO CONST. art. 3, § 19; TENN. CONST. art. 2, §§ 28, 31.

84. D.C. CODE ANN. § 1-626.1 (1981 & Supp. 1984). The saga of Council attempts to amend prospectively the Hatch Act restrictions in the Home Rule Act is an interesting story.

activities of District employees. This limitation is a specific limitation upon the express grant of general authority to develop the city's personnel system. The Council is also circumscribed in its ability to fundamentally restructure certain "independent agencies."⁸⁵ Amendments to the statutes establishing the District of Columbia Board of Elections and Ethics,⁸⁶ the Board of Education,⁸⁷ the Public Service Commission,⁸⁸ the Zoning Commission and Board of Zoning Adjustment,⁸⁹ the National Capital Planning Commission,⁹⁰ and the Armory Board⁹¹ are limited, but the Council may

In §§ 2501 to 2511 of the District of Columbia Government Comprehensive Merit Personnel Act of 1978, *supra* note 62, at 95-102, the Council provided a "Little Hatch Act." This was to become effective at the time that Congress removed the restrictions upon Council authority in D.C. CODE ANN. § 1-208(b) (1981 & Supp. 1984). See §§ 3202(h), 3205, 3602(f)-3602(h) of the Merit Personnel Act. During congressional review of this measure, it was determined that a veto of the entire personnel act might occur if the offensive provision was not removed. Thus by emergency, and subsequently, permanent legislation, the current language of D.C. CODE ANN. § 1-626.1 (1981 & Supp. 1984) was adopted. District of Columbia Comprehensive Merit Personnel Act Amendments of 1979, Aug. 1, 1979, D.C. Law 3-14, 25 D.C. Reg. 10,565. The application of subchapter III, ch. 73, tit. 5, U.S.C. ("Hatch Act") to District of Columbia employees has been sustained in *French v. Devine*, 547 F. Supp. 443 (D.D.C. 1982); *Jordan v. Merit Systems Protection Board*, C.A. No. 80-0465 (D.D.C. Jan. 6, 1981). Legislation is pending before the Congress to allow local initiatives in this area. H.R. 4235, 98th Cong., 1st Sess. (1982) (amending 5 U.S.C. § 7324(d)(4) (1982)).

85. See *supra* note 1, tit. IV, pt. F, *amending and reenacting* D.C. CODE ANN. §§ 1-1303, 2-302, 5-412, 31-101, 43-401 (1981 & Supp. 1984).

86. D.C. CODE ANN. § 1-1303 (Supp. 1984). *But see generally* D.C. CODE ANN. §§ 1-1320, 1-1401 to 1-1473 (Supp. 1984).

87. D.C. CODE ANN. § 31-101 (1981 & Supp. 1984). The Council's relationship with the elected Board of Education has varied. When political relationships have been good, the two elected bodies have acted in harmony with one another. Early efforts of the elected Council were designed to effect the employment contract of the superintendent. Generally, however, the friction has been occasioned during the annual budget process, where the Board of Education attempts to "end-run" the Mayor. See D.C. CODE ANN. §§ 31-103 to 31-104 (1981 & Supp. 1984). It is clear, though, that the Council may exercise its plenary authority to amend any provision in the Education Code, D.C. CODE ANN. §§ 31-101 to 31-303 (1981 & Supp. 1984), and may enact general laws which have an incidental application to the public school system. See D.C. CODE ANN. §§ 1-609.1 to 1-615.5 (1981), *as amended by* D.C. CODE ANN. §§ 1-609.5 to 1-615.5 (Supp. 1984), linking the educational employees into the city-wide merit personnel act. As an example of a general repealing bill to remove archaic provisions in the Education Code, see *University of the District of Columbia and Board of Education Salary and Pay Schedules Adjustment Act of 1981*, D.C. CODE ANN. §§ 31-1028, 31-1221, 31-1226 (1981 & Supp. 1984).

88. D.C. CODE ANN. § 43-401 (1981). See *generally* D.C. CODE ANN. §§ 43-407, 43-541 to 43-547 (1981 & Supp. 1984); D.C. CODE ANN. § 43-405 (Supp. 1984).

89. D.C. CODE ANN. §§ 5-412, 5-424 (1981 & Supp. 1984). While direct action is not possible indirect action is. See, e.g., D.C. CODE ANN. §§ 5-901 to 5-907 (1981 & Supp. 1984); D.C. CODE ANN. §§ 5-1001 to 5-1015 (1981), *as amended by* D.C. CODE ANN. §§ 5-1001 to 5-1015 (Supp. 1984).

90. D.C. CODE ANN. §§ 1-2001 to 1-2011 (1981 & Supp. 1984).

91. D.C. CODE ANN. § 2-302 (1981 & Supp. 1984). See *generally* D.C. CODE ANN. §§ 2-325, 2-341 to 2-344 (1981 & Supp. 1984).

enact laws which affect these agencies.

The Council's subject matter authority is also limited by the people of the District of Columbia, through their use of the initiative and referendum powers.⁹² In *Convention Center Referendum Committee v. District of Columbia Board of Elections and Ethics*,⁹³ the Convention Center Referendum Committee sought to bar by initiative construction and operation of the convention center. While the initiative power allows the electorate to propose laws, this power is not without bounds. It is recognized that the electorate's power to act by initiative is coextensive with the legislature's power, and as such is limited to the proposal of legislative measures. Furthermore, the statutory authorization granting the electorate the right to propose laws through the initiative process expressly excludes the right to propose "laws appropriating funds."⁹⁴

The court held that the "appropriating funds" exception should not be read as prohibiting wholly prospective fiscal matters and that initiatives that (1) established substantive authorization for a new project, (2) repealed existing substantive authorization for a program (without rescinding its current funding), or (3) prohibited future budget requests were within the realm of permissible initiative subject matter, and thus, not prohibited by the "laws appropriating funds" exception.⁹⁵ The court held that the restriction on the electorate's power of initiative serves only to prohibit initiatives that would contravene existing budget request acts. It does *not* prohibit or restrict the electorate's power of initiative in purely prospective legislation of a fiscal nature.

There have been several other cases interpreting the subject matter limitations of the Home Rule Act. In *District of Columbia v. Greater Washington Central Labor Council*,⁹⁶ the District of Columbia Court of Appeals considered whether the Council could repeal a specific provision of the federal Longshoremen's and Harbor Workers' Compensation Act that provided coverage for private sector employees in the District of Columbia

92. D.C. CODE ANN. §§ 1-281 to 1-295 (1981 & Supp. 1984), *implemented by* D.C. CODE ANN. §§ 1-1320 to 1-1325 (1981), *as amended by* D.C. CODE ANN. §§ 1-1320 to 1-1325 (Supp. 1984).

93. 441 A.2d 889 (D.C. 1981) (en banc).

94. D.C. CODE ANN. § 1-281(a) (1981 & Supp. 1984); D.C. CODE ANN. § 1-1320(k)(1) (Supp. 1984).

95. D.C. CODE ANN. § 1-281(a) (1981 & Supp. 1984); D.C. CODE ANN. § 1-1320(k)(1) (Supp. 1984).

96. 442 A.2d 110, *reh'g denied*, 445 A.2d 960 (D.C. 1982), *cert. denied*, 103 S. Ct. 1261 (1983).

under the federal system.⁹⁷ The court held that the proscription on Council authority that prohibited the Council from amending or repealing acts of Congress that affected a function of the United States⁹⁸ only applied when the Council attempted to amend an act of Congress of national application, rather than one that merely affected local District matters.⁹⁹ The court viewed the act of Congress extending the provisions of the federal law to the District of Columbia¹⁰⁰ as a totally separate local act within the legislative authority of the Council.

In *Labor Council* the court also considered the restrictions upon the Council that prohibited legislation on the local¹⁰¹ and federal¹⁰² court systems. The court studied the enforcement of orders in the superior court as an equitable matter, holding that such authority was already available in the trial court.¹⁰³ In reviewing the appellate authority of the District of Columbia Court of Appeals, the court again concluded that its authority was carefully delineated in accordance with the District of Columbia Administrative Procedure Act.¹⁰⁴ Thus, the Council was acting within its assigned authority.¹⁰⁵ In studying any impact upon the federal court system, the court of appeals concluded that the Council had legislated upon "a 'local matter'"¹⁰⁶ by "merely repeal[ing] the congressional incorporation of a national law into local statutes."¹⁰⁷ While the local enactment was of the type which Congress may well have intended the Council to consider, the change in the workers' compensation system did affect functions of officers of the United States.¹⁰⁸ Only by reviewing this legislation from the perspective of a local law can the obvious federal impact be justified as de minimus and thus, not within the conduct proscribed by the Home Rule Act.¹⁰⁹

97. D.C. CODE ANN. § 36-501 (1973) (current version at D.C. CODE ANN. § 36-501 (1981 & Supp. 1984)).

98. D.C. CODE ANN. § 1-233(a)(3) (1981 & Supp. 1984).

99. *Labor Council*, 442 A.2d at 116-17.

100. *Id.* at 117.

101. *Id.* at 115-18. See also *supra* note 76.

102. See *supra* note 81.

103. *Labor Council*, 442 A.2d at 117.

104. D.C. CODE ANN. §§ 1-1502 to 1-1510 (1981), as amended by D.C. CODE ANN. §§ 1-1502 to 1-1510 (Supp. 1984).

105. *Labor Council*, 442 A.2d at 118.

106. *Id.*

107. *Id.*

108. *Id.* at 118-19.

109. *Id.* at 119. The federal government exercised significant control over the management of the workers' compensation system. See 33 U.S.C. § 939; see also Memorandum to the Hon. Marion S. Barry, Jr., from Judith W. Rogers, Corporation Counsel (April 21, 1980).

The Council's authority to legislate on the jurisdiction of the District of Columbia courts was considered again in *Capitol Hill Restoration Society v. Moore*.¹¹⁰ In *Moore* two issues were presented: whether the court of appeals could exercise direct review over an agency action that did not involve a "contested case" under the District of Columbia Administrative Procedure Act,¹¹¹ and, whether the Council could statutorily confer the jurisdiction of the court.¹¹²

The court held that because the Council and not the Congress had authorized the review of the agency decision, direct review was precluded.¹¹³ At issue specifically in *Moore* was a provision within the Demolition Ordinance affecting historic landmarks that provided for appellate review of the executive decision under the ordinance in the court of appeals.

The ordinance did not involve a "contested case" — as was conceded by all parties—and thus the District of Columbia Administrative Procedure Act review route was unavailable. Thus, the only authority for immediate review by the court of appeals was within an organic act. This second approach was attractive in that the court of appeals had earlier sustained such a review when authorized by the Congress in matters affecting minimum wages.¹¹⁴ The court of appeals concluded, however, that the Council was without authority to exercise this previously-approved congressional route because of the proscription in the Home Rule Act limiting the Council's authority to affect the courts' jurisdiction.¹¹⁵ Nevertheless, the court of appeals may still exercise appellate jurisdiction in these cases, as long as the superior court has dealt with the agency decision in the first instance.¹¹⁶

In *District of Columbia v. Sullivan*,¹¹⁷ the court approved the Council's enactment of the Traffic Adjudication Act of 1978.¹¹⁸ This Act removed certain traffic offenses from the realm of "criminal" offenses. As a result of this legislation, traffic offenses that formerly were presented in the superior court were handled administratively by the Bureau of Traffic Adjudica-

110. 410 A.2d 184 (D.C. 1979).

111. D.C. CODE ANN. § 1-1509 (1981 & Supp. 1984).

112. See restrictions imposed by D.C. CODE ANN. § 1-233(a)(4) (1981 & Supp. 1984). But see French, *Broadened Concepts of Standing in the Local District of Columbia Courts*, 23 HOWARD L.J. 256 (1980) (an expansive analysis of this jurisdictional matter).

113. *Moore*, 410 A.2d at 187.

114. *Id.* (citing *Hotel Assoc. of Wash., D.C. v. Minimum Wage and Indust. Safety Bd.*, 318 A.2d 294 (D.C. 1974) (en banc)).

115. D.C. CODE ANN. § 1-233(a)(6) (1981 & Supp. 1984).

116. D.C. CODE ANN. § 11-721 (1981 & Supp. 1984).

117. 436 A.2d 364 (D.C. 1981).

118. D.C. CODE ANN. §§ 40-601 to 40-602 (1981 & Supp. 1984).

tion.¹¹⁹ The District of Columbia Court of Appeals concluded that the Traffic Act neither changed the criminal jurisdiction of the superior court nor affected the appellate jurisdiction of the court of appeals. The sole change was that certain traffic violations that had previously constituted *criminal* offenses were no longer categorized as criminal.¹²⁰

In addition, the *Sullivan* court considered the issue of whether adjudication under the Traffic Act resulted in a "contested case," which under *Moore* is directly reviewable by the court of appeals. The court agreed that such a proceeding was adjudicative and therefore consistent with the definition of "contested case." Nevertheless, the court held that it was within the Council's authority to create explicit or implicit exceptions to this definition.¹²¹

In contrast to the expansion of the Council's authority over the judiciary, the Council's authority to tax has been limited. In enacting section 605 of the Revenue Act of 1975,¹²² the Council found a basis to levy a tax upon nonresident professionals who operated an unincorporated business in the District. Under the plain meaning of the Home Rule Act proscription relating to the "imposit[ion of] any tax on . . . the personal income . . . of any individual not a resident of the District," such a tax was permitted.¹²³

In deciding a suit, however, to enjoin collection of the tax as beyond the authority of the Council, the District of Columbia Court of Appeals in *Bishop v. District of Columbia*¹²⁴ primarily relied on Congress' intent in prohibiting a commuter tax.¹²⁵ In accord with congressional intent, the court in *Bishop* held that the tax, imposed on nonresident unincorporated professionals and personal service businesses, was an unauthorized extension of the Council's authority. Although the enactment of the tax carefully tracked the limit of the Council's authority, the characterization of the tax as a franchise or gross receipts tax was inappropriate. The court concluded that the will of Congress should control over a technical reading of the statute. Accordingly, the tax upon unincorporated businesses was

119. *Sullivan*, 436 A.2d at 365-66.

120. *Id.*

121. *Id.* at 367.

122. D.C. Law 1-23, effective Oct. 21, 1975, [1975] D.C. Stat. 47.

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

124. 411 A.2d 997 (D.C. 1980) (en banc), *cert. denied*, 446 U.S. 966 (1980), *on remand*, 109 Daily Wash. L. Rep. 101 (D.C. Super. Ct., Dec. 3, 1980), *noted Comment*, *Bishop v. District of Columbia: Taxation of Unincorporated Professionals' Net Income Violates Home Rule*, 29 CATH. U.L. REV. 1033 (1980).

125. *Bishop*, 411 A.2d at 998-99.

invalidated.¹²⁶

In *McIntosh v. Washington*,¹²⁷ the court again looked to congressional intent to interpret a Home Rule Act provision. In *McIntosh*, the court reviewed whether the Council's enactment of a criminal provision that strengthened the District's gun control laws violated a Home Rule Act provision, which expressly denied the Council the authority to enact criminal laws that already had been addressed in titles 22 and 23 of the Code.¹²⁸ The Council's authority to enact regulations strengthening gun control had been upheld earlier in *Maryland & District of Columbia Rifle & Pistol Ass'n v. Washington*¹²⁹ and the Council relied upon its pre-Home Rule authority to avoid the strictures of the Home Rule Act.¹³⁰

The court examined the legislative history behind the alleged prohibition against enactment of legislation such as the Gun Control Regulation and determined that Congress' intent was merely to place a time constraint on the Council's activity in this area until the District's criminal code could be evaluated and reviewed by the respective congressional committees.¹³¹ The history of local gun control legislation in the pre-Home Rule era was traced. In earlier litigation the city council's gun control laws¹³² did not conflict with provisions of the District's criminal code¹³³ and federal gun control laws.¹³⁴ The court determined that these local initiatives to strengthen control of handguns did not interfere or conflict with Congress' national gun laws¹³⁵ or the provisions of the District of Columbia Code adopted by the Congress on the same subject.¹³⁶ Thus, the court held that the Council's enactment to strengthen local gun control laws was within the Council's delegated authority.

Although the Council's authority is expansive in most areas of legislation, the Council's authority is restricted by procedural limitations. The specific procedural limitations on the Council include the appropriate use of acts or resolutions to carry out public policies;¹³⁷ the requirement of

126. *Id.* at 999.

127. 395 A.2d 744 (D.C. 1978).

128. D.C. CODE ANN. § 1-233(a)(9) (1981 & Supp. 1984).

129. 442 F.2d 123 (D.C. Cir. 1971).

130. D.C. CODE ANN. § 1-321 (1981 & Supp. 1984).

131. *McIntosh*, 395 A.2d at 751; *cf. Sullivan*, 436 A.2d at 366.

132. *McIntosh*, 395 A.2d at 752 (citing D.C. Pol. Reg. Arts. 50-55).

133. *Id.* at 752-53.

134. *Id.* at 753.

135. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 18 U.S.C. §§ 921-928 (1982).

136. D.C. CODE ANN. §§ 22-3201 to 22-3217 (1981 & Supp. 1984).

137. D.C. CODE ANN. § 1-229 (1981 & Supp. 1984). The use of resolutions by the Council has been a constant source of conflict between the executive and legislative branches of

prior notice of intended actions and of publication and codification of adopted measures;¹³⁸ the requirement of two readings in substantially the same form for all permanent enactments;¹³⁹ and the proper use of emergency acts.¹⁴⁰

The Council may adopt a temporary emergency act to respond to exigent circumstances.¹⁴¹ Two-thirds of the members of the Council determine that an emergency exists¹⁴² by adopting a resolution declaring an emergency. Thereafter, by simple majority vote, an act is adopted to respond to the emergency.¹⁴³ Emergency acts are adopted after a single reading.¹⁴⁴ There is no congressional review of these enactments.¹⁴⁵

In a case involving the use of the Council's emergency powers, the District of Columbia Court of Appeals, in *District of Columbia v. Washington Home Ownership Council, Inc.*,¹⁴⁶ severely curtailed the Council's authority. In *Home Ownership Council*, a nonprofit corporation, engaged in the

government. See Memorandum to Judith W. Rogers, Special Assistant for Legislation, from John R. Risher, Jr., Corporation Counsel, D.C. (Aug. 31, 1976); Memorandum to Chairman Sterling Tucker from Edward B. Webb, Jr., General Counsel (Oct. 19, 1976) (assessing the conflicting views).

A thoughtful analysis by McKay, *Separation of Powers in the District of Columbia Under Home Rule*, 27 CATH. U.L. REV. 515 (1978), exhaustively recounts the history of the relationship. Following the *Chadha* case, discussed *infra* text accompanying notes 154-217, a consensus of opinion has emerged reflective that federal constitutional separation of powers analysis has no direct analogy to the District's governmental system.

Illustrative examples authorizing the use of legislative vetoes, condemned in *Chadha*, include: D.C. CODE ANN. §§ 1-242(12), 1-612.1(g), 1-618.17(j) (1981 & Supp. 1984). Pending congressional legislation is designed to allow the use of resolutions if authorized by an act of the Council. H.R. 4071, 98th Cong., 1st Sess. (1983).

138. D.C. CODE ANN. § 1-227(c) (1981 & Supp. 1984).

139. D.C. CODE ANN. § 1-229(a) (1981 & Supp. 1984).

140. See *infra* notes 146-53 and accompanying text.

141. D.C. CODE ANN. § 1-229(a) (1981 & Supp. 1984).

142. *Id.* In fact, the style of the District's current emergency power is a curious holdover from the days of an administrative agency model of local government. D.C. CODE ANN. § 1-1506(c) (1981) provides for a 120 day period for emergency rules of District administrative agencies. Most state constitutions provide for emergency acts, but these are permanent acts that become effective more quickly than regular enactments of the legislature.

143. D.C. CODE ANN. § 1-227, notes § 412 (Supp. 1984). This method provides the interesting circumstance of allowing the constitutional-majority of the Council to determine that an emergency circumstance is present warranting a particular solution. Once having established an emergency, then the simple majority of the Council may craft a different solution to the emergency circumstance than originally presented. An alternative model better designed to link the declaration of the emergency with the statutory outcome would be to adopt but one legislative document: the act with internal findings of an emergency, all by a single two-thirds vote.

144. D.C. CODE ANN. § 1-229(a) (1981 & Supp. 1984).

145. D.C. CODE ANN. § 1-233(c)(1) (1981 & Supp. 1984).

146. 415 A.2d 1349 (D.C. 1980) (en banc).

District's rental housing market, brought suit to enjoin a series of emergency acts of the Council that imposed a moratorium upon the conversion of rental property to condominiums. The Council determined that the scarcity and cost of rental housing mandated restrictions upon the conversion of rental units to condominiums or cooperatives that were beyond the financial reach of most District residents. The finding of an emergency was not disputed by the plaintiffs.¹⁴⁷ The court of appeals looked to "the intent of Congress"¹⁴⁸ to determine the limits on the Council's exercise of delegated authority. Rather than enacting permanent legislation subject to congressional review, the Council had adopted a continuing series of identical emergency acts responsive to the same unchanging scarcity of rental units.¹⁴⁹ The Council, by enacting these emergency measures, inappropriately avoided congressional review.¹⁵⁰ Thus, the emergency measures were defective.

Once the Council determines that an emergency does in fact exist, however, the courts give considerable deference to its determination. In *American Federation of Government Employees v. Barry*, the Council's authority to enact emergency legislation regarding the merit personnel act was challenged.¹⁵¹ The court balanced "deference to the legislative authority of the Council, with [its] . . . own duty to oversee Council action which might exceed congressionally delegated authority."¹⁵² The court held that once the Council finds an emergency, the court need only check that the act was facially valid and consistent with the Council's legislative authority in conjunction with Congress.¹⁵³

C. Summary and Conclusions—Congressionally-Delegated Authority

Litigation under the Home Rule Act has involved both the substantive limitations upon the Council's authority and the Council's compliance with the procedural requirements imposed by the Home Rule Act. In each of the decisions studied, however, no consideration has been given to the new constitutional relationship between the District of Columbia and the Congress and President as a result of the seminal *Chadha* decision. Delegation of national authority to a local government under Home Rule is assured, but the manner in which it is exercised must be examined.

147. *Id.* at 1353.

148. *Id.* at 1351.

149. *Id.* at 1353-54 & n.16.

150. *Id.* at 1357-58.

151. 459 A.2d 1045, 1050 (D.C. 1983).

152. *Id.* at 1050.

153. *Id.* at 1051.

II. THE CHADHA DECISION: A NEW CONSTITUTIONAL ERA-- RETHINKING THE RELATIONSHIP BETWEEN CONGRESS AND THE EXECUTIVE

A. *The Case*

In *Immigration and Naturalization Service v. Chadha*, Jagdish Rai Chadha, an alien who had been admitted to the United States on a nonimmigrant student visa, remained in the country after his visa expired. Upon being ordered by the Immigration and Naturalization Service to show cause why he should not be deported, Chadha applied for suspension of the deportation. The immigration judge, acting pursuant to section 244(a)(1) of the Immigration and Nationality Act,¹⁵⁴ which authorized the Attorney General to suspend deportation once it is shown that the applicant meets certain requirements, ordered the suspension of Chadha's deportation and reported the suspension to Congress as required by section 244(c)(1) of the Immigration Act.¹⁵⁵

Subsequently, pursuant to section 244(c)(2) of the Immigration Act, the House of Representatives adopted a simple resolution vetoing the suspension.¹⁵⁶ The immigration judge then reopened deportation proceedings. As a result, Chadha moved to terminate the proceedings on the ground that the legislative veto provision exercised by the House of Representatives was unconstitutional. Both the immigration judge and the Board of Immigration Appeals declined to rule on the constitutionality of the provision and ordered Chadha deported. Chadha then filed a petition for review of the order with the Court of Appeals for the Ninth Circuit. The court held that the veto provision violated the separation of powers doctrine and ordered the Attorney General to cease deportation proceedings.

The Supreme Court granted certiorari to consider the constitutionality of permitting one House of Congress to invalidate a decision of an immigration judge, an employee of the Executive Branch acting under authority delegated to the Attorney General.¹⁵⁷ The Supreme Court, in an opinion authored by the Chief Justice and joined by six other Justices, studied the specific provisions of the Constitution governing Congress' lawmaking functions. The Court concluded that the "requirement that all legislation be presented to the President before becoming law was uniformly accepted by the Framers [at the Constitutional Convention]." Thus, because an or-

154. 8 U.S.C. § 1254(a)(1) (1982) [hereinafter cited as the Act].

155. 8 U.S.C. 1254(c)(1) (1982).

156. H.R. Res. 926, 94th Cong., 1st Sess., 121 CONG. REC. 40,800 (1975) (adopted pursuant to 8 U.S.C. § 1254(c)(2) (1982)).

157. *Chadha*, 103 S. Ct. at 2769-70.

der of the single House is "essentially legislative in purpose and effect,"¹⁵⁸ the full range of constitutional procedural provisions is mandated.

To arrive at this conclusion, the Court first looked to the purposes underlying the presentment clause and the bicameralism requirement of article I.¹⁵⁹ According to the Court, the underlying purpose in providing the President with the limited and qualified power to nullify proposed legislation was to protect against arbitrary action by Congress.¹⁶⁰ Likewise, bicameralism requires that laws should not take effect unless and until they have been fully and carefully considered. Under the Framers' view, therefore, the President's participation in the legislative process was to protect people from improvident laws. The division of Congress into two bodies also assured the result that legislative power would be exercised only after full study and debate.¹⁶¹

The Court noted that the Constitution provided for a division of delegated powers of the government into three categories in order to assure that each branch would confine itself to its responsibilities. Although the Court determined that when a branch acts, it presumptively acts within its assigned sphere,¹⁶² it held that, because the action of the House of Representatives in exercising the legislative veto was a use of legislative power, the procedural requirements of presentment and bicameralism applied.¹⁶³ The veto mechanism in section 244(c)(2) of the Immigration Act allowed

158. *Id.* There is no reason to quibble about the rationale of *Chadha* or its precise breadth, because it is certain that the actions of the Council of the District of Columbia are legislative in character, as that notion is used in *Chadha*. While great breadth has been attributed to the opinion of the Supreme Court in *Chadha*, Karl Llewellyn cautions in his book, *The Bramble Bush*, that a court may only decide the particular dispute before it under a general rule applicable to a whole class of like disputes, and that anything written in the Court's opinion, must be read with primary reference to the particular dispute. K. LLEWELLYN, *THE BRAMBLE BUSH* 42, 54-55 (1973). Thus, the essential holding of *Chadha* would run in this vein: When the Attorney General advises the Congress of an action he has taken to suspend the deportation of a particular person who was found to be deportable following an administrative hearing and a single house of Congress with little debate adopts a simple resolution to reject the Attorney General's decision and reinstates the deportation order of the individual, then such action by the House of Representatives is unconstitutional.

159. *Chadha*, 103 S. Ct. at 2781.

160. *Id.* at 2782-83.

161. *Id.* at 2784.

162. *Id.*

163. To recognize an act of legislative power as such, the Court noted that one should look to whether it contains matter that is properly to be regarded as legislative in its purpose and effect. Indications of whether an action is legislative in its purpose and effect include: (1) whether the act alters the legal status of persons outside the legislative branch; (2) whether the character of the legislative action which the act under consideration supplants is legislative; and (3) whether the nature of the decision implemented by the action is legislative. 103 S. Ct. at 2784-88.

one House of Congress to overturn a delegation of authority to the Attorney General without complying with the requirement of two House consideration and presentment to the President. The Court noted that "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked" and that the decision "can be implemented only in accordance with the procedures set out in Article I."¹⁶⁴

The Court also held that the veto provision was severable from the remainder of section 244.¹⁶⁵ Congressional amici argued that the subsection providing the congressional veto was not severable from the remainder of the section; therefore, all of section 244 had to fall and the Attorney General would have no authority to suspend the deportation of an individual in the first place.¹⁶⁶ The Court disagreed, stating that invalid portions of the statute are severable "unless it is clear that legislature would not have enacted those provisions which are [properly] within its power, independently of that [provision] which is not."¹⁶⁷ Moreover, said the Court, a presumption of severability arose because the Immigration Act contains a severability clause and severability was supported by the Act's legislative history.¹⁶⁸ The Court held that the tainted provision was severable and unconstitutional, thus affirming the judgment of the court of appeals.¹⁶⁹

Justice Powell concurred in the judgment of the Court in a separate opinion. The Justice would have resolved the *Chadha* controversy upon a different separation of powers rationale by holding that Congress had improperly assumed a judicial function in effectively resolving Mr. Chadha's specific legal rights and ordering him deported from the country. He noted that the case fell squarely within the rule that "the doctrine [of separation of powers] may be violated when one branch assumes a function that more properly is entrusted to another."¹⁷⁰ Further, the House adopted a resolution specifically directed at a potentially small number of persons without including any of the procedural safeguards the Framers sought to provide when adjudicating individual rights. The Justice declined to reach the broader constitutional question of legislative vetoes by resolution.

Justice White dissented in an extensive opinion outlining the practical

164. *Id.* at 2788 (footnote omitted).

165. *Id.* at 2788.

166. *Id.* at 2774.

167. *Id.*

168. *Id.*

169. *Id.* at 2788.

170. *Id.* at 2790.

effect of the majority's expansive holding.¹⁷¹ The Justice traced the historical importance of legislative vetoes as a balance against accretion of excessive Executive Branch control over the affairs of the Nation. While the frequent use of such provisions is a recent development, the Congress has used legislative vetoes since its regulation of the Northwest and Mississippi territories. The Justice assessed the ability of each actor mentioned in the majority opinion—the President and the other House—to preserve and effectuate their constitutional authority in the face of single House action. He concluded that each had the ability to protect itself against the unwarranted consolidation of power feared by the Framers. Thus, he concluded that the legislative veto provisions of section 244(c)(2) of the Immigration Act represent a permissible accommodation in the distribution of governmental powers between the executive and legislative branches.¹⁷²

A fair reading of the majority opinion in *Chadha* compels the conclusion that single House resolutions may not be used to exercise Congress' law-making authority. Further, the Congress may not authorize such a ruse to revise on an ad hoc basis delegations of authority to the Executive Branch contained in properly enacted laws. But the impact of such a holding is dramatic, as Justice White noted in dissent:

Today the Court not only invalidates § 244(c)(2) of the Immigration and Nationality Act, but also sounds the death knell for nearly 200 other statutory provisions in which Congress has reserved a "legislative veto." For this reason, the Court's decision is of surpassing importance.

. . . .

Today's decision strikes down in one fell swoop provisions in more laws enacted by Congress than the Court has cumulatively invalidated in its history.¹⁷³

The focus of legislative efforts in solving the constitutional and operational problems posed by *Chadha* has been in addressing the use of the legislative veto process itself. How might Congress recapture, on an ad hoc basis, the power that it generally delegates to others, be they the federal executive agencies, the President, or a subordinate legislature such as the Council of the District of Columbia? Congress has two choices in curing these constitutional problems. First, the Congress may enact laws with specific provisions that are not amenable to an improper interpretation by the agencies implementing the act. Thus, from the perspective of the

171. *Id.* at 2792, 2796 (White, J., dissenting).

172. *Id.* at 2795 & n.10 (White, J., dissenting).

173. *Id.* at 2792, 2810 (White, J., dissenting).

Framers, the political battle surrounding the enactment of legislation protects all segments of society from improvident or poorly drafted laws.

Alternatively, the Congress could enact laws which contain reporting requirements or delayed effectiveness of agency rules or orders. This approach would allow the Congress to express its displeasure with a particular agency initiative by the enactment of a joint resolution or bill to limit the agency's discretion. This method allows continued delegation of authority to executive agencies, but provides a proper process by which Congress may retain its ability to check unwarranted agency action. The joint resolution or bill would be considered by both Houses and, if adopted, presented to the President. Should the President veto the measure Congress would still have the constitutional authority to reconsider the matter. This is the legislative reform route most favored by persons testifying before congressional committees in the wake of the *Chadha* decision.¹⁷⁴

174. In addition to the hearings before the House of Representatives Committee on Rules, hearings before the Committee on Foreign Affairs, legislative and executive summaries, and scholarly works may be reviewed. See generally *The U.S. Supreme Court Decision Concerning the Legislative Veto: Hearings before the House Comm. on Foreign Affairs*, 98th Cong., 1st Sess. 116-29 (prepared statement of Eugene Grossman); *id.* at 159-226 (memorandum for the Attorney General, July 15, 1983); *id.* at 231-270 (Summary and Preliminary Analysis of the Ramifications of *INS v. Chadha*, the Legislative Veto case, by Morton Rosenberg, Specialist in American Public Law, American Law Division, Congressional Research Service, Library of Congress); *id.* at 231-70; Breyer, *The Legislative Veto After Chadha*, 72 GEO. L.J. 785 (1984); DeConcini, *The Legislative Veto: A Constitutional Amendment*, 21 HARV. J. ON LEGIS. 29 (1984); Hutchins, *Legislative Vetoes and the Administrative Process: A Constitutional and Operational Analysis*, 15 TEX. TECH L. REV. 307 (1984); Levitas & Brand, *Congressional Review of Executive and Agency Actions After Chadha: "The Son of Legislative Veto Lives On"*, 72 GEO. L.J. 801 (1984); Lungren & Krotoski, *The War Powers Resolution after the Chadha Decision*, 17 LOY. L.A.L. REV. 767 (1984); Smolla, *Bring Back the Legislative Veto: A Proposal for a Constitutional Amendment*, 37 ARK. L. REV. 509 (1984); Spann, *Spinning the Legislative Veto*, 72 GEO. L.J. 813 (1984); Spann, *Deconstructing the Legislative Veto*, 68 MINN. L. REV. 473 (1984); Strauss, *Was There a Baby in the Bathwater? A Comment on the Supreme Court's Legislative Veto Decision*, 1983 DUKE L.J. 789; Tribe, *The Legislative Veto Decision: A Law by Any Other Name?*, 21 HARV. J. ON LEGIS. 1 (1984); Comment, *Immigration and Naturalization Service v. Chadha: The Death Knell for the Legislative Veto?*, 69 IOWA L. REV. 497 (1984); Comment, *A Legislative "House of Cards" Tumbles*, 8 NOVA L.J. 451 (1984); Comment, *Congressional Control of Presidential War-Making Under the War Powers Act: The Status of a Legislative Veto After Chadha*, 132 U. PA. L. REV. 1217 (1984); Comment, *Immigration and Naturalization Service v. Chadha: The Legislative Veto Declared Unconstitutional*, 86 W. VA. L. REV. 461 (1983-84); *Constitutional Law—The Demise of the Legislative Veto: The Struggle for Political Accountability*, 17 CREIGHTON L. REV. 915 (1984); Casenote, *Immigration and Naturalization v. Chadha: The Legislative Veto Vanishes*, 17 J. MAR. L. REV. 523 (1984); Note, *Severability of Legislative Veto Provisions: A Policy Analysis*, 97 HARV. L. REV. 1182 (1984). These sources also provide commentary upon the severability and retroactivity topics considered below. Compare *General Assembly v. Byrne*, 90 N.J. 376, 448 A.2d 438 (1982) with *Enourato v. New Jersey Auth.*, 90 N.J. 396, 448 A.2d 449 (1982) (two state supreme court decisions interpreting state constitutional provisions similar to those confronted in *Chadha*).

Left unresolved, however, is the other side of *Chadha*: that any amendment or repeal of an act of Congress must be accomplished with the same formality as its original enactment. The Supreme Court's view of this issue is unequivocal:

Presentment to the President and the Presidential veto were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented.

. . . .

We see therefore that the Framers were acutely conscious that the bicameral requirement and the Presentment Clauses would serve essential constitutional functions. The President's participation in the legislative process was to protect the Executive Branch from Congress and to protect the whole people from improvident laws.

. . . .

Amendment and repeal of statutes, no less than enactment, must conform with Art. I.

. . . .

There is no provision allowing Congress to repeal or amend laws by other than legislative means pursuant to Art. I.¹⁷⁵

It is clear that this dicta requires Congress to honor the constitutional requirements of bicameralism and presentment in the amendment of laws first enacted by the Congress. The process to ensure compliance with these rules is simple: use joint resolutions or bills to enact, amend, or repeal the public laws of the United States. Such a rule is consistent with the constitutional scheme for lawmaking.

B. Supreme Court Holdings After *Chadha*

Any limitation in a broad holding of *Chadha* was quickly dispelled in two cases that followed *Chadha*. In *Consumer Energy Council of America v. Federal Energy Regulatory Commission*,¹⁷⁶ consumer groups participating in an administrative proceeding before the Federal Energy Regulatory Commission challenged the exercise of a legislative veto retained by Congress in the Natural Gas Policy Act of 1978.¹⁷⁷ The agency declined to resolve the constitutional issue of whether the one House veto was effective and revoked the congressionally-rejected rule. Under title II of the Natural Gas Act, the Commission was to implement an incremental pricing

175. *Chadha*, 103 S. Ct. at 2782-85 & n.18.

176. 673 F.2d 425 (D.C. Cir. 1981), *aff'd sub nom.* Process Gas Consumers Group v. Consumers Energy Council of Am., 103 S. Ct. 3556 (1983).

177. 15 U.S.C. §§ 3301-3342 (1982) [hereinafter cited as the Natural Gas Act].

program to shift part of the price increase resulting from deregulation of natural gas to industrial users in order to protect individual consumers.¹⁷⁸ Phase II of the program required the Commission to issue a rule that would be effective unless either House of Congress adopted a resolution disapproving the rule.¹⁷⁹ The House of Representatives exercised its veto power to disapprove the rule. The court of appeals held that the veto provision contained in the Natural Gas Act was unconstitutional because it prevented the President from exercising the veto power, that it contravened the bicameralism requirements of article I, and that it violated the constitutional doctrine of separation of powers.¹⁸⁰ The court then determined that, despite the fact that section 202 of the Natural Gas Act contained no severability clause, the veto provision contained in that section was severable from the remainder of the section.¹⁸¹ The crucial question was "whether Congress would have enacted other portions of the statute in the absence of the invalidated provision."¹⁸² Looking at the legislative history, the court determined that Congress would have enacted other portions of the statute and that the provision was not essential to the statutory policy. Thus the provision was severable. The Supreme Court summarily affirmed.

In *Consumers Union of the United States v. Federal Trade Commission*,¹⁸³ the FTC announced a final rule covering representations of warranty coverage and disclosures of accurate information in connection with the sale of used cars. The rule was submitted to each house pursuant to section 21(a) of the Federal Trade Commission Improvements Act,¹⁸⁴ which provided for submission of the rule and further provided that the rule would become effective only if Congress failed to adopt a concurrent resolution disapproving the rule. Congress adopted such a resolution and a consumer organization sued, alleging that the veto provision was unconstitutional. The Supreme Court, relying upon *Consumer Energy*, held in a per curiam opinion that review by concurrent resolution is constitutionally infirm because it violates principles of separation of powers between the branches of government, does not follow article I procedures for lawmaking, and vitiates the delegation doctrine by allowing standardless exercise

178. *Energy Council*, 673 F.2d at 433.

179. 15 U.S.C. § 3342(c) (1982).

180. *Energy Council*, 673 F.2d at 448.

181. *Id.* at 440-45.

182. *Id.* at 442.

183. 691 F.2d 575 (D.C. Cir. 1982) (en banc), *aff'd sub nom.* Process Gas Consumers Group v. Consumers Energy Council of Am., 103 S. Ct. 3556 (1983).

184. 15 U.S.C. § 57a-1 (1982) [hereinafter cited as FTCIA].

of congressional power.¹⁸⁵ The Supreme Court again summarily affirmed.

Justice Powell did not participate in either decision and Justice Rehnquist would have set the cases for plenary consideration. Justice White dissented. While emphasizing his principled disagreement with the majority in *Chadha*, Justice White noted the special nature of independent regulatory agencies that would support an outcome different than that for persons within the Executive Branch under the control of the President as in *Chadha*. He opined:

These regulations of [the Federal Trade Commission and the Federal Energy Regulatory Commission] have the force of law without the President's concurrence; nor can he veto them if he disagrees with the law that they make. . . . To invalidate the [legislative veto] device, . . . merely guarantees that the independent agencies, once created, for all practical purposes are a fourth branch of government not subject to the direct control of either Congress or the executive branch. I cannot believe that the Constitution commands such a result.¹⁸⁶

The adoption of the challenged Senate concurrent resolution was voided and the matter was remanded to the Federal Trade Commission without specific consideration of the severability matter.

Chadha, *Energy Council*, and *Consumers Union* have dramatically adjusted the procedural aspects of lawmaking by Congress. By a wide margin the Supreme Court has determined that Congress, when exercising its constitutional legislating function, must specifically comply with the terms of the Constitution that demand consideration and adoption of bills or joint resolutions by both Houses, followed by review of the President for the exercise of his or her Constitutional role to veto or to approve acts of Congress. The limited reach of *Chadha* was quickly expanded to include activities of independent regulatory agencies over which the President exercises no day-to-day authority.

The challenged use of the simple resolution of one House in *Chadha* and *Energy Council* as violative of both bicameralism and presentment requirements, was expanded to reach the use of concurrent resolutions in *Consumer Union*. The concurrent resolution satisfies the bicameralism imperative, but leaves untouched the requirement of presentment to the President.

The Supreme Court gives a strict construction to the constitution in matters of lawmaking process. Actions of the Congress to legislate must be

185. *Consumers Union*, 691 F.2d at 577-78.

186. *Chadha*, 103 S. Ct. at 3558 (White, J., dissenting).

accomplished by joint resolution or bill. Similarly, when any laws of the United States are amended or repealed, the Congress must honor the constitutional processes in achieving this objective. The authority to amend acts of Congress may not be delegated to other departments or agencies of government.

In all three cases the Court invalidated the challenged provision and sanctioned the exercise of administrative authority without congressional intervention. In *Chadha* and *Energy Council* the question of severability was specifically addressed. In no case did the Supreme Court invalidate the entire statutory scheme as a result of the legislative veto provision.

C. Federal Court Decisions on Severability After *Chadha*

Most post-*Chadha* decisions have held "legislative veto" provisions of organic acts severable as long as the veto provision had not been used.¹⁸⁷ In *City of Alexandria v. United States*,¹⁸⁸ the city sought the difference between the price it paid for a parcel of surplus government real property and a lesser price allegedly agreed upon under a prior contract of sale for the same parcel. The government argued that because the congressional review process, prescribed by the Federal Property and Administrative Services Act,¹⁸⁹ had not been undertaken, consummation of a contract had never been authorized. The city argued that the review procedure was unlawful under *Chadha* and that, therefore, the obstacle to contract formation had disappeared—because the Government Services Administration had manifested its assent, there was a contract implied in fact. The court held that under *Chadha*, it was unconstitutional for a committee of the House of Representatives to intervene and arrest a negotiated sale of surplus property.¹⁹⁰ The congressional action by the single Committee was held to constitute lawmaking and was thus defective. This system, of course, is more questionable on constitutional grounds than the systems of legislative vetoes found defective in *Chadha* because a single committee within one House could legislate for the Nation.

In *EEOC v. City of Memphis*,¹⁹¹ the district court was presented with the issue of whether the EEOC could lawfully enforce the provisions of the Age Discrimination in Employment Act. Enforcement authority had been transferred from the Department of Labor to the EEOC by a presidentially-initiated reorganization plan. The authority for such a plan was con-

187. See *infra* notes 188, 197, 208.

188. 3 Cl. Ct. 667 (1983).

189. 40 U.S.C. § 484(e)(6) (1982).

190. 3 Cl. Ct. at 678.

191. 33 Fair Empl. Prac. Cas. (BNA) 1089 (W.D. Tenn. 1983).

tained in the Reorganization Act of 1977, which provides for congressional disapproval of the proposed executive reorganization by a legislative veto.¹⁹² The proposed transfer was not rejected by the Congress and the court determined the legislative veto provision severable.¹⁹³

In making its determination with respect to severability, the court reviewed the legislative history of the Department of Labor-EEOC transfer and concluded that the Congress had ratified the transfer through explicit reference in the Civil Service Reform Act of 1978 and in the continued funding of the EEOC enforcement activities under the antidiscrimination act. Although validated in this circumstance, the principles of *Chadha* would not permit the use of a single House resolution to affect the exercise of the President's executive reorganization authority. Should Congress wish to reject a proposed reorganization, a joint resolution or bill would have to be employed.

The question of the validity of the transfer of enforcement functions under the antidiscrimination act was again presented in *Muller Optical Company v. EEOC*.¹⁹⁴ The court adopted the same analysis as the *City of Memphis* court, relying upon the congressional failure to use the legislative veto and Congress' subsequent ratification of the transferred authority.¹⁹⁵

In *EEOC v. Hernando Bank*,¹⁹⁶ the EEOC brought suit against a bank under the Equal Pay Act alleging that the bank had discriminated against female employees on the basis of sex. The bank claimed that the EEOC had no power to enforce the Equal Pay Act since the transfer of authority from the Department of Labor to the EEOC had been effected under the same reorganization plan challenged in *City of Memphis* and *Muller Optical Company*. The Court of Appeals for the Fifth Circuit found that the veto provision was severable. Because the reorganization plan conformed to the substantive provisions of the Act and the veto had not been employed, the plan transferring enforcement authority was valid without the veto provision. Thus, the EEOC was able to exercise its enforcement authority.¹⁹⁷

192. 5 U.S.C. §§ 901-912 (1982).

193. 33 Empl. Prac. Dec. (CCH) ¶ 34,083, at 32,101-02 (W.D. Tenn. Dec. 29, 1983).

194. 574 F. Supp. 946 (W.D. Tenn. 1983), *aff'd*, 53 U.S.L.W. 2123 (6th Cir. 1984). *But see* EEOC v. CBS, Inc., — F.2d — (Docket No. 84-6063) (2d Cir. 1984) reaching a contrary result.

195. *Id.* at 953-54.

196. 33 Empl. Prac. Dec. (CCH) ¶ 34,154, at 32,434 (5th Cir. Feb. 13, 1984).

197. *Id.* at 32,437. The legislative veto provision is severable in that it was ratified by Congress. *See* EEOC v. State of New York, 34 Fair Empl. Prac. Cas. (BNA) 379 (N.D.N.Y. 1984); EEOC v. Old Dominion Freight Lines, 34 Fair Empl. Prac. Cas. (BNA) 377 (M.D.N.C. 1984); EEOC v. Radio Montgomery, Inc., 34 Fair Empl. Prac. Cas. (BNA) 378

By contrast, in *EEOC v. Allstate Insurance Company*,¹⁹⁸ the court, relying on *Chadha*, ruled that the transfer of Equal Pay Act authority was invalid due to the presence of the legislative veto provision in the reorganization act, despite the fact that neither House of Congress ever invoked the veto provision. According to the court, any use of a legislative veto scheme which has the effect of enacting laws without complying with the Constitutional prescription for legislation is unconstitutional. The court held, therefore, that the Reorganization Act of 1977 and Reorganization Plan No. 1 of 1978 were both unconstitutional and deprived the EEOC of its authority to enforce the Equal Pay Act.

The *Allstate Insurance* court rejected the reasoning of the other courts that upheld the transfer of enforcement authority to the EEOC. The court held that the entire reorganization act was tainted by the inclusion of the constitutionally-infirm legislative veto provision. In considering whether the veto provision was severable, the court determined that "Congress intended the one-house veto provision to be an integral and indispensable part of the entire [Reorganization] Act."¹⁹⁹ Thus, the invalid provision invalidated the entire Act and the purported transfer of enforcement authority.

While the Supreme Court and the larger number of lower federal courts following *Chadha* have severed the defective legislative veto provisions and sustained the remainder of the acts, the split in judgments suggests that the United States should seek clarification from the High Court as to the appropriate method of implementing the principles of *Chadha*. One

n.3 (W.D. Va. 1984) (court's conclusion was "buttressed by the court's belief that the 1977 Act in no way altered or affected the substantive rights of the citizenry, which was not the situation in *Chadha*. The Act and Plan simply transferred enforcement authority from one part of the executive branch to another."); *EEOC v. International Mill Serv.*, 34 Fair Empl. Prac. Cas. (BNA) 392 (E.D. Pa. 1984); *EEOC v. Jackson City, Miss.*, 33 Fair Empl. Prac. Cas. (BNA) 963 (W.D. Miss. 1983); *EEOC v. El Paso Nat. Gas Co.*, 33 Fair Empl. Prac. Cas. (BNA) 1837 (W.D. Tex. 1984) (court noted that *Chadha* was not controlling because the veto was not exercised here, but still held that the provision was severable); *EEOC v. Chudahy Foods Co.*, 33 Fair Empl. Prac. Cas. (BNA) 1836 (W.D. Wash. 1983). Additional pending cases involving *Chadha* principles include: *AFGE, AFL-CIO v. Reagan*, Civ. No. 83-1914 (D.D.C. filed July 1, 1983); *United States v. Exxon Corp.*, Civ. No. 78-1035 (D.D.C. —); *EEOC v. Merrill Lynch*, No. 82-C-2922 (N.D. Ill. —); *EEOC v. Dettering School District*, No. C-3-82-043 (S.D. Ohio —).

198. 570 F. Supp. 1224 (S.D. Miss. 1983), *appeal dismissed*, 52 U.S.L.W. 3889 (U.S. June 11, 1984); *see also* *EEOC v. Westinghouse Elec. Corp.*, 577 F. Supp. 1029 (D.N.J. 1982), *rev'd on other grounds*, 725 F.2d 211 (3d Cir. 1984) (where District Judge Bloch reached the same result relying upon the *Allstate* decision). *But see* *Exxon Corp. v. DOE*, No. 5-103 (TECA, 1984) (holding legislative veto provision not retroactively defective or, in the alternative, if retroactive, then severable).

199. *Allstate Insurance*, 570 F. Supp. at 1232.

district court, in its effort to make sense of the conflicting opinions and in light of the absence of guidance from the Supreme Court, recommended that the EEOC seek authorization from the Secretary of Labor to litigate in his behalf under the Age Discrimination in Employment Act until the effect of the Department of Labor-EEOC reorganization is definitely resolved.²⁰⁰

D. *The Rules Concerning Retroactive Application*

Under a purist's view, a constitutional analysis of *Chadha* may be interpreted to hold all acts containing a legislative veto provision void ab initio. This is unlikely, however, because such a result would create chaos. Leading Supreme Court decisions hold that future and prospective application of major constitutional decisions is appropriate. On a case by case basis, consideration is given to three factors:

(1) Whether the decision of the Supreme Court establishes a new principle of law or decides an issue of first impression whose resolution was not clearly foreshadowed;

(2) Whether the prior history of the legal issue suggests that retroactive application of a decision would retard the public policies served by the new rule; and

(3) Whether a retroactive decision would impose a financial hardship or an inequitable result.²⁰¹

In *Buckley v. Valeo*,²⁰² an action was initiated against the Federal Election Commission challenging the constitutionality of certain provisions of the Federal Election Campaign Act of 1971²⁰³ and the provisions of Subtitle H of the Internal Revenue Code of 1954.²⁰⁴ The statutes were attacked as a violation of first amendment speech and free association provisions and fifth amendment equal protection. In addition, the plaintiffs contended that the method of appointment of the members of the Commission under the FECA was unconstitutional as violative of the doctrine of the separation of powers under the Appointments Clause.²⁰⁵ The method of appointment of the members of the Commission provided that

200. *EEOC v. Pan Am. World Airways*, 33 *Empl. Prac. Dec.* (CCH) ¶ 34,106, at 32,193 (S.D.N.Y. Jan. 4, 1984).

201. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971).

202. 424 U.S. 1 (1976) (per curiam).

203. 2 U.S.C. §§ 431-455 (1982); 18 U.S.C. §§ 591-608, 610-617 (1982) (§ 591 repealed by § 201(a)(1), 93 Stat. 1367; §§ 608, 610-617 repealed by § 201(a), 90 Stat. 496) [hereinafter cited as FECA].

204. 26 U.S.C. §§ 6096, 9001-9012, 9031-9042 (1982).

205. Art. II, § 2, cl. 2 requires that the President, with the advice and consent of the Senate, shall appoint all officers of the United States whose appointments are not otherwise

the President appoint two of the six voting members. It also provided that the President *pro tempore* of the Senate and the Speaker of the House appoint the remaining four members. The Court held that the Commission could not properly exercise its powers under the FECA, for the reason that the appointment process was unconstitutional because the legislative branch has no constitutional authority to appoint officers of the United States.²⁰⁶ Nevertheless, the Court accorded *de facto* validity to the Commission's past acts. The Court analogized this decision to its sustaining the activities of legislators serving under an unconstitutional apportionment plan.²⁰⁷ Accordingly, the Court stayed its judgment for a period of thirty days in order to give Congress an opportunity to take appropriate action, allowing the Commission to function *de facto* in the interim under the substantive provisions of the Act.

In *Arizona Governing Committee v. Norris*,²⁰⁸ plaintiffs, in a class action, challenged the constitutionality of Arizona's voluntary pension plan. Under this plan, the state offered its employees the option of receiving retirement benefits from one of several companies, all of which paid women lower monthly retirement benefits than men. A suit was brought under title VII of the Civil Rights Act of 1964²⁰⁹ alleging that the defendant had violated section 703(a) of the Civil Rights Act by administering an annuity plan that discriminated on the basis of sex.²¹⁰ The Supreme Court agreed with the plaintiffs' contentions,²¹¹ but held that retroactive relief was not appropriate as the employer assumed that its pension plan was lawful and that, more importantly, a retroactive remedy would have a disruptive impact on the operation of the employer's pension plan.²¹²

In *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*,²¹³ a debtor in a proceeding for reorganization filed suit in the bankruptcy court seeking damages for breach of contract and warranty, misrepresentation, coercion, and duress. The defendant sought dismissal of the suit on the grounds that the Bankruptcy Reform Act of 1978 unconstitutionally con-

provided for in the Constitution, unless Congress vests the appointments of such officers in the President alone, in the courts, or in the heads of departments.

206. *Buckley v. Valeo*, 424 U.S. at 143. The Court found that "most of the powers conferred by the Act . . . can be exercised only by 'Officers of the United States,' appointed in conformity with Art. II, § 2, cl. 2 . . ." Since the method of appointment of the members of the FEC did not conform to the constitutional prescription, it was invalid. *Id.*

207. *Id.* at 142.

208. 103 S. Ct. 3492 (1983).

209. 42 U.S.C. § 2000e to 2000e-17 (1982).

210. 42 U.S.C. § 2000e-2(a) (1982).

211. *Norris*, 103 S. Ct. at 3493.

212. *Id.* at 3509-10.

213. 458 U.S. 50 (1982).

ferred article III judicial power on judges who lack life tenure and protection against salary diminution. In a plurality opinion, the Supreme Court held that the grant of jurisdiction to bankruptcy courts could not be sustained as an exercise of Congress' power to create adjuncts to article III courts. The Court asserted that Congress did not have the power to create adjuncts to adjudicate constitutional rights and state-created rights.²¹⁴ The Court, however, held that its judgment would have prospective effect only and that its holding would be stayed for several months.²¹⁵ Relying upon *Chevron Oil*,²¹⁶ Justice Brennan noted that retroactive application would have vast and far-reaching effects because it would "visit injustice and hardship upon those litigants who had relied upon the [Bankruptcy] Act's vesting of jurisdiction in the bankruptcy courts."²¹⁷

Prospective application of the *Chadha* decision fits well within the rationale of the Supreme Court in like circumstances. Significant constitutional adjudications that determine new principles of law and create hardships and inequities through retroactive application are undesirable. The pervasive effect of the legislative veto tool in acts of Congress cautions against retroactive application: too many laws would be invalidated and former judgments of the judiciary questioned. The new constitutional rule of *Chadha* is a rule for the future.

III. CHADHA AND THE UNIQUE CIRCUMSTANCES OF THE DISTRICT OF COLUMBIA

The preceding discussion demonstrates that while the congressional delegation of authority to the local District government has been broadly interpreted under the Home Rule Act, no appellate case has decided whether the legislative veto and concurrent resolution approval mechanism included in the Home Rule Act is constitutional. Nor has any court held that the Council has the fundamental authority to rewrite the organic acts of Congress without a specific role for the Congress and the President.

Thus, the following five provisions of the Home Rule Act are suspect. One provision is defective because it provides no limitation upon the Council's rewriting of acts of Congress, while the other four provisions fail because of impermissible use of resolutions.

The general grant of lawmaking authority to the Council provides:

[The] legislative power of the [Council of the] District [of Co-

214. *Id.* at 80-87.

215. *Id.* at 88.

216. *See supra* note 201 and accompanying text.

217. *Northern Pipeline*, 458 U.S. at 88.

lumbia] shall extend to all rightful subjects of legislation within the District consistent with the Constitution of the United States and the provisions of this [Home Rule] Act subject to all restrictions and limitations imposed upon the states by the 10th section of the 1st article of the Constitution of the United States.²¹⁸

This grant of authority runs afoul of *Chadha's* requirement that amendment or repeal of acts of the Congress must be accomplished in the same fashion as their original enactment: consideration and adoption by both Houses of Congress and Presentment and approval by the President.²¹⁹

The process by which the Council and the voters of the District of Columbia may recommend to Congress amendments to title IV of the Home Rule Act provides for the use of a concurrent resolution to effect the will of Congress. The Act provides:

(b) An amendment to the charter [title IV of the Home Rule Act] ratified by the registered qualified electors shall take effect only if within 35 calendar days (excluding Saturdays, Sundays, holidays, and days on which either House of Congress is not in session) of the date such amendment was submitted to the Congress *both Houses of Congress adopt a concurrent resolution, according to the procedures specified in § 1-207, approving such amendment.*²²⁰

A concurrent resolution to add new provisions to the Home Rule Act was used to authorize the political tools of referendum, initiative, and recall in the District of Columbia.²²¹ Thus, the act of Congress granting home rule was amended by concurrent resolution without any role for the President. This use of concurrent resolutions was specifically condemned by the Supreme Court in *Consumers Union*.²²²

All permanent Council acts are submitted to the Congress following local approval for a period of congressional review. Two provisions of the Home Rule Act affect their disposition by the Congress: one governs the review of general laws, while one specifically governs review of matters affecting the criminal substantive and procedural laws. These provisions include:

Except [budget, emergency, and Charter Amendment] acts of the Council . . . [and] as provided in paragraph (2) of this subsection, *no . . . [Council] act shall take effect until the end of the*

218. D.C. CODE ANN. § 1-204 (1981 & Supp. 1984).

219. See *supra* text accompanying notes 154-217.

220. D.C. CODE ANN. § 1-205(a), (b) (1981 & Supp. 1984) (emphasis added).

221. See *supra* notes 92-95 and accompanying text.

222. D.C. CODE ANN. § 1-233(c)(1), (2) (1981 & Supp. 1984). See *supra* notes 183-186 and accompanying text.

30-day period . . . beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate and then *only if during such 30-day period both Houses of Congress do not adopt a concurrent resolution disapproving such act.*

. . . .
 In the case of any such act transmitted by the Chairman with respect to any act codified in Title 22, 23, or 24 [of the District of Columbia Code], *such act shall take effect at the end of the 30-day period . . . only if during such 30-day period 1 House of Congress does not adopt a resolution disapproving such act.*²²³

These two provisions are always used by Congress to review permanent enactments of the Council. Occasional efforts have been undertaken to reject Council measures, but only two such congressional initiatives resulted in the rejection of the Council act. One concurrent resolution of disapproval rejected an effort by the Council to restrict the location of foreign chanceries.²²⁴ Ultimately, the Congress enacted comprehensive legislation to govern the location of diplomatic missions in the Capital.²²⁵ The other congressional rejection was effected by simple resolution: reform of the sexual assault law was rejected although the Council was clearly acting within its assigned sphere of delegated authority.²²⁶ These two rejections are of the precise nature condemned by the Supreme Court in *Chadha*, *Consumers Energy Council of America*, and *Consumers Union*.

Finally, the use of resolutions is authorized to control the operation of the local police department by the President:

[W]henver the President of the United States determines that special conditions of an emergency nature exist which require the use of the Metropolitan Police force for Federal purposes, he may direct the Mayor to provide him, and the Mayor shall provide, such services of the Metropolitan Police force as the President may deem necessary and appropriate.

. . . .
 [S]uch *services* made available . . . *shall terminate upon the end of such emergency*, the expiration of a period of thirty days following the date on which such services are first made available, *or the adoption of a resolution by either the Senate or the House of*

223. D.C. CODE ANN. § 1-233(c)(1), (2) (1981 & Supp. 1984) (emphasis added).

224. S. Con. Res. 63 (Dec. 19, 1979); H.R. Con. Res. 228 (Dec. 20, 1979), *reprinted in* 27 D.C. Reg. 246 (1980).

225. D.C. CODE ANN. §§ 5-1201 to 5-1212 (Supp. 1984).

226. See D.C. CODE ANN. §§ 1-233(a)(9) (1981 & Supp. 1984). The time period restricting the Council's activity expired on Jan. 1, 1979.

Representatives providing for such termination, whichever first occurs.

. . . .

Except to the extent provided . . . [elsewhere], *no such services shall extend for any period in excess of thirty days, unless the Senate and the House of Representatives approve a concurrent resolution authorizing such an extension.*²²⁷

The provisions affecting the local District police allow the Congress to control authority delegated to the President and the Mayor of the District of Columbia by resolution. When the Congress exercises its lawmaking authority, it may not do so in this manner.

A. Is the District of Columbia so Unique that the Congress May Dispense with Constitutional Provisions When Exercising its Authority?

Any argument that the principles of *Chadha* do not apply when Congress acts under its constitutional authority with respect to the District of Columbia must be premised upon a special constitutional role the Congress exercises over the national seat of government. This special role, if any, must be found in the constitutional provision affecting the District of Columbia.²²⁸ This enumerated power merely provides that the Congress, rather than Maryland or Virginia, exercises sovereignty over the District of Columbia. The Supreme Court noted in *District of Columbia v. John R. Thompson Co.*, in commenting upon this congressional obligation to manage the affairs of the District that:

There is no reason why a state, if it so chooses, may not fashion its basic law so as to grant home rule or self-government to its municipal corporations.

. . . .

[T]here is no constitutional barrier to the delegation by Congress to the District of Columbia of full legislative authority, subject of course to constitutional limitations to which all lawmaking is subservient²²⁹

Under this power Congress may delegate its authority to local officials. But the delegation of authority must comport with the constitutional limitations imposed by *Chadha*.²³⁰ The constitutional interpretation of bicameralism and presentment under *Chadha* may be limited in applying only to

227. D.C. CODE ANN. § 4-102 (1981 & Supp. 1984) (emphasis added).

228. *Thompson*, 346 U.S. at 109-10.

229. *Id.*

230. *See supra* text accompanying notes 154-217.

matters of national legislation, not to matters such as the District of Columbia. The superior court, in *United States v. McIntosh*²³¹ and *United States v. Langley*,²³² adopted this narrow view. This view, used to preserve several criminal convictions,²³³ does a disservice to the national character of the District of Columbia. In *United States v. Cole*,²³⁴ however, the superior court ruled "that the holding of *Chadha* applies in the present case."²³⁵ The court then concluded that the one-House congressional review mechanism affecting criminal enactments of the Council was unconstitutional.²³⁶ Thus, the purported congressional rejection of the District's sexual assault reform law was ineffective. The court then considered whether the Congress would have granted local authority over criminal matters without the safety valve of rejection. The court concluded that Congress intended the entire criminal law amendatory authority only to be locally vested if an opportunity of rejection existed. Thus, all Council authority to amend the criminal laws was invalid as those provisions were inextricably intertwined and had to be invalidated in one fell swoop.²³⁷ The defendant had been properly convicted under the preexisting criminal law and the motion to arrest judgment was denied. Congress' plenary power over the District of Columbia is equal to other specifically enumerated constitutional powers.²³⁸ The Supreme Court in *Chadha* specifically outlined the exceptions to its holding, by turning to the Constitution to find those provisions allowing the Congress or the President to act outside of the bicameralism and presentment requirements.²³⁹ Creating an additional exception from the constitutionally-compelled lawmaking procedures for the District of

231. Daily Wash. L. Rep., April 20, 1984, at 789, col. 1 (D.C. Sup. Ct. Mar. 27, 1984).

232. Daily Wash. L. Rep., April 23, 1984, at 801, col. 3 (D.C. Sup. Ct. Mar. 30, 1984), appeal granted en banc, No. 84-467, 84-564 (D.C. June 27, 1984).

233. In *McIntosh* and *Langley*, the defendants alleged that the congressional one-House veto of an act of the Council amending the District's criminal code was invalid under *Chadha*. Thus, the argument went, any indictment under the preexisting law was invalid in that the amendatory law was in effect. While the author concludes that the purported rejection by Congress would be prospectively invalid, the author's fundamental premise is that the Council was without constitutional authority to amend the act and thus the amendatory act itself was defective. See *infra* note 237 and accompanying text; see also Wash. Post, Apr. 4, 1984, at C1, col. 2; Wash. Post, Mar. 29, 1984, at A1, col. 1.

234. Daily Wash. L. Rep., June 6, 1984, at 1117, col. 1 (D.C. Sup. Ct. May 9, 1984), appeal granted en banc, No. 84-703 (D.C. June 27, 1984). The analysis in this article has not considered the serious constitutional problems of retroactive notice and ex post facto protection that arise in the criminal context. Under constitutional due process protections any statutory infirmities must be resolved in favor of the criminal defendant.

235. *Id.* at 1121, col. 2.

236. *Id.* at 1122, col. 1.

237. *Id.* at 1124, col. 1-2.

238. See U.S. CONST. art. I, § 8.

239. *Chadha*, 103 S. Ct. at 2786.

Columbia was not sanctioned by the Court. Thus, the exhaustive listing of acts of Congress made suspect by the *Chadha* analysis properly includes the Home Rule Act.²⁴⁰

While the Supreme Court has upheld delegated authority as it existed in the early 1950's, it has not decided a case involving the Home Rule Act.²⁴¹ In its most recent opinion addressing the governmental structure of the District of Columbia, *Palmore v. United States*,²⁴² the Court noted the District's special "state" court system and stated that "[the] Congress may also exercise regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes"²⁴³ No one would contend that the Congress might adopt a simple or concurrent resolution to effect its "police and regulatory powers."

The decisions involving the Home Rule Act have all been decisions of local courts. No appellate court decision upholds the procedural aspects of the Home Rule Act that allow congressional rejection of Council acts by resolution or the basic presentment clause problem of local lawmaking without involvement by the President.²⁴⁴

B. The Procedural Defects: Change the Use of Simple and Concurrent Resolutions

The procedural aspects of the Home Rule Act that permit congressional "approval" or "disapproval" of Council-initiated legislation²⁴⁵ may be resolved simply.

Despite the District of Columbia's corporation counsel's litigation posture in the Superior Court²⁴⁶ and the United States District Court for the District of Columbia,²⁴⁷ the Department of Justice,²⁴⁸ and the House of

240. *Id.* at 2792 (White, J., dissenting).

241. Supreme Court review has been sought and denied in three instances: *District of Columbia v. Greater Wash. Central Labor Council*, 442 A.2d 110 (D.C.), *reh'g denied*, 445 A.2d 960 (1982), *cert. denied*, 103 S. Ct. 1261 (1983); *Bishop v. District of Columbia*, 411 A.2d 997 (D.C.) (en banc), *cert. denied*, 446 U.S. 966 (1980); *Hechinger v. Martin*, 411 F. Supp. 650 (D.D.C. 1976), *appeal dismissed*, 429 U.S. 1030 (1977).

242. 411 U.S. 389 (1973).

243. *Id.* at 397-98.

244. *See infra* notes 252-75 and accompanying text.

245. *See* Home Rule Act, *supra* notes 1, 6-8.

246. *See* Motion of the District of Columbia to Intervene, *United States v. Cole*, Crim. No. F-5111-82 (D.C. Super. Ct. decided May 9, 1984).

247. *Dimond v. District of Columbia*, No. 83-1938 (D.D.C. filed 1983). This civil action is presently before the court on Plaintiffs' Motion for Summary Judgment and the Defendants' Motion to Dismiss the Second Amended Complaint or in the Alternative, for Summary Judgment. *See* Memorandum of Points and Authorities in Support of Motion of Defendants District of Columbia, Marion S. Barry, Jr., Margurite C. Stokes, John Touchstone, and Maurice Turner to Dismiss Plaintiffs' Second Amended Complaint or in the Alternative for

Representatives have endorsed curative amendments to the Home Rule Act.²⁴⁹ These amendments, if promptly adopted by the full Congress, would provide a sound constitutional basis for the Congress to exercise its retained authority over the District of Columbia.²⁵⁰

The amendments change the use of simple and concurrent resolutions in the Home Rule Act to a joint resolution that requires action by both Houses, satisfying the bicameralism clause, and consideration by the President, satisfying the presentment clause. The bill also provides a similar curative amendment to the city's retirement law which may not be subject to amendment by the Council.²⁵¹

The curative bill also notes that "any . . . [law] which was passed by the Council of the District of Columbia prior to the date of enactment of this [amendatory] Act, . . . [is] hereby deemed valid"²⁵²

The ratification of actions of the Council in this fashion, although not novel, is a prudent step to ensure that prior actions of the Council, taken in good faith and in reliance upon authority presumed to exist, are not invalidated. Congress employed the same method when the Legislative Assembly was first temporarily, and then, permanently abolished.²⁵³ This measure will solve the legislative review—the congressional disapproval scheme—problem highlighted by *Chadha*. Nevertheless, H.R. 3392 in its present form solves only one-half of the *Chadha* problem.

The Committee on Government Operations favorably reported a com-

Summary Judgment at 57-76, *Dimond v. District of Columbia*, No. 83-1938 (D.D.C. filed 1983). The precise Presentment Clause problem has been presented to the District Court in *Dimond*, at Second Amended Complaint ¶ 44.

248. See Response to Interrogatories [by the United States], *United States v. Cole*, Crim. No. F-5111-82 (D.C. Sup. Ct. 1984).

249. H.R. 3932, A Bill To amend the District of Columbia Self-Government and Governmental Reorganization Act, and for other purposes, adopted by the House of Rep. on Oct. 4, 1983. 129 CONG. REC. H 7903-07 (daily ed. Oct. 4, 1983). H.R. REP. NO. 393, 98th Cong., 1st Sess. 3 (1983) states: "It is the considered opinion of the Committee in consultation with the District Government, that corrective legislation is the best way to excise the District of Columbia Home Rule Act from the taint of *Chadha*." See Statements of the Hon. Ronald V. Dellums, Stewart B. McKinney, and Marion S. Barry before the House Comm. on Rules, Feb. 23, 1984.

250. See Home Rule Act, *supra* note 5 outlining Congress' retained authority over the District.

251. D.C. CODE ANN. § 1-746(a)(3) (1981), as amended by H.R. 3932, § 3, *supra* note 249. See analysis of Bill 4-420, District of Columbia Retirement Reform Act Amendatory Act of 1982, which purported to amend some provisions beyond Council authority. Memorandum to William R. Spaulding from Lawrence H. Mirel, General Counsel (December 8, 1982).

252. See Home Rule Act, *supra* note 211, at § 1(i).

253. Act of June 20, 1874, ch. 337, § 10, 18 Stat. 116 (1874); Act of June 11, 1878, ch. 180, § 1, 20 Stat. 102 (1878).

panion bill in the House²⁵⁴ that has not yet been adopted by the Senate. An eleventh-hour initiative by the Department of Justice sought to remove criminal code amendments from the Council's general authority, thus jettisoning the bill's speedy enactment.²⁵⁵

C. Amendment of Acts of Congress by Subordinate Legislative Bodies is Unconstitutional

The District of Columbia and the present and former territories pose unique problems under the principles of *Chadha*. These jurisdictions have been given "congressional" authority to amend enactments of the Congress of local or territorial application.²⁵⁶ This authority was conferred as early as in the First Congress in the grant of authority to manage the Northwest Territory.²⁵⁷ In the modern era, similar authorities have been vested within the legislatures of Guam,²⁵⁸ the Virgin Islands,²⁵⁹ Puerto Rico,²⁶⁰ and the District of Columbia.²⁶¹

But the manner in which subordinate legislative bodies operate must be carefully scrutinized. These bodies operate under authority delegated by

254. S. 1858, 98th Cong., 1st Sess. (1983).

255. See Letter from Ass't Attorney General Robert A. McConnell to the Hon. William V. Roth, Jr. 2-5 (Nov. 15, 1983). This saga of the interaction between the federal government and the District of Columbia is recounted in correspondence to the Hon. Ronald Reagan from the Hon. Marion S. Barry, Jr. (Nov. 15, 1983); see Wash. Post, Mar. 14, 1984, at A1, col. 1; Wash. Post, Mar. 15, 1984, at C1, col. 5; Wash. Post, Mar. 16, 1984, at C3, col. 1.

256. See *supra* note 2 and accompanying text; *infra* notes 257-62 and accompanying text.

257. *Chadha*, 103 S. Ct. at 2800-01 n.18 (White, J., dissenting).

258. The local legislature of Guam is authorized to "modify] or repeal" acts of Congress. 48 U.S.C. § 1421(c) (1982). 48 U.S.C. § 1423(i) (1982) "reserves [to Congress] the power and authority to annul the [laws]." The Guam Government Code does not contain any provisions of law enacted by the Congress that solely affect Guam. These provisions are within chapter 8A of title 48 of the United States Code. See generally Leibowitz, *The Applicability of Federal Law to Guam*, 16 VA. J. INT'L L. 21-63 (1975); Soloman, *The Guam Constitutional Convention of 1977*, 19 VA. J. INT'L L. 725-806 (1979).

259. The legislative authority of the Virgin Islands was found in 48 U.S.C. § 1574 (1982). The Virgin Islands Code is enacted pursuant to the general grant of legislative authority. While the authority of the local legislature is ambiguous with regard to amendment of acts of Congress, see *id.* § 1574(c), it does not appear that this authority has been codified in the Virgin Islands Code. An annual report of the laws enacted by the legislature shall be reported to the Congress. 48 U.S.C. § 1575(g) (1982).

260. The legislative authority vested in a local legislature in Puerto Rico was originally codified in 48 U.S.C.A. §§ 811-845 (West 1952). By virtue of ratification of the constitution of the Commonwealth of Puerto Rico by the Congress on July 3, 1952, §§ 811-820, 822-844 previously cited were repealed (West Supp. 1983). See generally Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 11 GA. J. INT'L & COMP. L. 211 (1981); Note, *Puerto Rico; Colony or Commonwealth*, 6 N.Y.U. J. INT'L L. & POL. 115 (1973).

261. See *supra* note 2.

the Congress. The enumerated constitutional power of Congress to manage the affairs of these jurisdictions is now suspect under *Chadha*.

Although specific language differs for each jurisdiction, each of these delegated authorities allows the Congress to reject or annul an act of the local legislature within some time period. For example, under Guam's statutory authority, the Congress must annul an enactment of the Guam Legislature within one year of its date of receipt by the Congress. In some instances in the past, a role for the President has been provided.²⁶²

Acts of the Council of the District of Columbia become effective at the end of the 30-legislative day disapproval period unless rejected by the Congress. These rejection provisions are, of course, constitutional. After *Chadha*, however, such authority must be exercised by bill or joint resolution, rather than by any other previous mechanism.

The more fundamental problem is whether the congressionally delegated authority to rewrite or amend acts of Congress that affect the local area—be it the District of Columbia or one of the territories—has become defective under *Chadha*. The Council's rewriting of acts of Congress causes a unique problem in the District of Columbia and the territories that is not experienced by the federal administrative agencies. This is because the agencies and the President carry out congressional enactments by issuing rules or regulations, not by rewriting the organic laws of Congress. While it appears that the Council of the District of Columbia and the territorial legislatures have authority concurrent with the Congress to rewrite acts of Congress of limited application, the author has not been able to verify any such exercise of authority by territorial bodies.²⁶³ The Council of the District of Columbia has exercised this authority on myriad occasions. Out of the 723 acts adopted by the Home Rule Council since its inception, a significant number would seem to fall within the proscription of the *Chadha* ruling.

Quite candidly, the full logic of *Chadha* would make the ability of the Council to amend acts of the Congress suspect even from the legislative side. *Thompson* and *McIntosh* at least present some constitutional dicta

262. Compare 48 U.S.C.A. §§ 825-826, 1405o (West 1952) (repealed Supp. 1983), with 48 U.S.C.A. § 1423(i) (West 1952 & Supp. 1983) and D.C. CODE ANN. § 1-147(c)(1) (Supp. 1978), § 1-227 (1981 & Supp. 1984).

263. Study of the organic acts of the Congress for the governance of Guam, the Virgin Islands and Puerto Rico, and the respective local codes all reflect a similar conclusion: local laws of the home legislature are codified in the local Code while the acts of the Congress affecting the territory or commonwealth are codified separately in title 48 of the United States Code. See generally Laughlin, *The Application of the Constitution in the United States Territories: American Samoa, A Case Study*, 2 U. HAWAII L. REV. 337-88 (1980); Leibowitz, *United States Federalism: The States and Territories*, 28 AM. U.L. REV. 449-82 (1979).

that allow the Congress to delegate *its* authority to the District Council in accordance with the congressional interest in removing itself as the "city council" for the District of Columbia.²⁶⁴ But this would not surrender the President's power.²⁶⁵ Never litigated before under the principles of *Chadha* is the ability of Congress to allow a subordinate legislative body to rewrite the public laws of the United States.²⁶⁶

Two other aspects of locally-exercised authority are suspect. The use of the emergency powers authorized by the Home Rule Act has been considered to the extent that the court of appeals concluded that the Council abuses its delegated authority when that thwarts effective congressional review.²⁶⁷ It is clear that the emergency acts of the Council should conceptually follow the same rules outlined in *Chadha* concerning permanent acts: those which amend acts of Congress are defective. Similarly, while the use of emergency acts has been sustained by the court of appeals under both the Home Rule Act²⁶⁸ and the predecessor reorganization plan,²⁶⁹ the Supreme Court has not credited the Council's use to be consistent with *Thompson*,²⁷⁰ which requires congressional ability to reject actions of the Council deemed unwise. At present, the emergency acts do not permit such congressional action.

Under *Chadha*, the process by which the Congress authorized the two

264. *Thompson*, 346 U.S. at 108-09; see also 395 A.2d at 753.

265. Cf. *Chadha*, 103 S. Ct. at 2779 n.13 (President's approval of law does not immunize it from constitutional attack).

266. See *supra* Part I(C). Nevertheless, it is important to note the several illustrative enactments of the Council where the Council has the authority to act. The following enactments are valid because they do not amend Acts of Congress and create new law, or amend previous enactments of the Council not amending Act of Congress, or amend regulations adopted by the appointed city council: D.C. CODE ANN. §§ 40-1201 to 40-1208 (1981 & Supp. 1984) (Child Restraint Act of 1982); D.C. CODE ANN. § 45-1601 to 45-1642 (Supp. 1984) (amending D.C. CODE ANN. §§ 45-1601 to 45-1642 (1981) (Rental Housing Conversion and Sale Act of 1980 Amendment Act of 1982); Amendment to § 23 of Reg. 74-39, 21 D.C. Reg. 1285, 30 D.C. Reg. 55 (Vendors Regulation Amendment Act of 1982). The following enactments would be invalid if enacted in the future in that their amendatory and repealing provisions may not be logically severed from the organic provisions: D.C. CODE ANN. §§ 7-411 to 7-472 (Supp. 1984) (Street and Alley Closing and Acquisition Procedures Act of 1982) (Titles V and VII of this law amended myriad provisions of preexisting Acts of Congress, including, e.g., D.C. CODE ANN. §§ 7-106, 7-201, 7-309 to 7-312, 7-319, 7-330, 16-1311 (1981). The following act may be sustained in that its repealing provision can be severed and the remaining provisions of the act may be given effect: D.C. CODE ANN. §§ 22-3112.1 to 22-3112.4 (Supp. 1984) (Anti-Intimidation and Defacing of Public or Private Property Criminal Penalty Act of 1982).

267. See *supra* notes 140-53 and accompanying text.

268. See *supra* notes 151-53.

269. *Hobson v. District of Columbia*, 304 A.2d 637 (D.C. 1973).

270. See *supra* note 241. But emergency rulemaking by an agency under 5 U.S.C. § 553(d) (1982) might provide a slender reed upon which to sustain the Council's actions.

Amendments to the District Charter is invalid.²⁷¹ While logic provides that a general ratification of the Council's past action as de facto valid should be presumed,²⁷² the ongoing use of the initiative process causes concern. If the process of congressional approval is now defective, actions initiated after June 23, 1983, should not be permitted, until Congress affirmatively carries out the will of the people of the District of Columbia in authorizing these tools of grass roots democracy.²⁷³ Current actions of the electorate under a now defective provision of the Home Rule Act cannot be sustained. The invalid provision currently provides no authority to act.

It is interesting to note that the pre-Home Rule Council, acting under the authority of Reorganization Plan No. 3 of 1967, never purported to amend acts of the Congress. Before acting, a specific grant of express authority from the reorganization plan was required as a prerequisite to action.²⁷⁴ Once a basis of authority was found, a local "regulation" could be adopted. The fairest analogy to local self-government during this period was that of a federal administrative agency for the District of Columbia. Thus, under a harmonization of the *Thompson* and *Chadha* cases, the adoption of regulations by the appointed city council presented no constitutional infirmity. Before Home Rule, *Thompson* would authorize no more than that.

Assuming that this was the breadth of authority vested in the Council, the House-adopted amendatory bill²⁷⁵ would effectively cure any *Chadha* problems. But far greater authority is vested in a locally elected government in the Nation's Capital and properly so.

Thus, the Council seems to exercise unfettered authority (subject, of course, to ultimate congressional review and the Home Rule Act's internal proscriptions) to amend acts of Congress affecting the District. Both the congressional and Council statutory enactments are contained in the District of Columbia Code. Little mention is made of the local home rule in the United States Code, and in this respect, the District of Columbia situation differs from that of the territorial legislatures outlined above.

D. *The Solution to the Problem*

The House of Representatives has already provided for use of joint reso-

271. D.C. CODE ANN. § 1-205(b) (1981 & Supp. 1984).

272. See *infra* notes 277-90 and accompanying text.

273. D.C. CODE ANN. §§ 1-281 to 1-295 (1981 & Supp. 1984).

274. See Reorganization Plan No. 3 of 1967, reprinted in 5 U.S.C. notes §§ 402(1)-402(432), 406, at 1109, 1110-20 (1982).

275. See *supra* note 249. H.R. 3932 also includes a provision to correct deficiencies in the District of Columbia Retirement Reform Act, § 3.

lutions for all Congressional "approval" or "disapproval" action and has affirmatively ratified the enactments of the Council of the District of Columbia since 1975.²⁷⁶ After *Chadha*, however, the District of Columbia Council's authority under the Home Rule Act must be revised. The organic authority of the Council could be codified in the Public Laws of the United States in much the same manner that it is for Guam and the other territories.²⁷⁷ Congress may simply authorize the Council of the District to adopt the District of Columbia Code, District of Columbia Statutes at Large, and the District of Columbia Municipal Regulations as the Local Public Laws of the District of Columbia. Assuming presidential approval, subsequent action by the District of Columbia government would merely amend local laws and not laws enacted by Congress. Thus, the President's nonwaivable constitutional presentment authority would not be required. Whatever limited reservations of authority Congress wished to maintain may be codified in the original grant of authorized legislation, or achieved by joint resolution.²⁷⁸ Specific repeals of acts of Congress affecting the District of Columbia previously enacted by Congress may be included within this measure because this would fall within the grant of Council authority.²⁷⁹ Under this scheme, Congress would retain authority by dis-

276. *Id.* But cf. *supra* note 266 concerning special caveats. The most prudent course would be to expressly disapprove the two vetoed acts of the Council and to ratify all initiatives properly adopted. See *supra* notes 271-73 and accompanying text.

277. In litigation interpreting the Organic Act of Guam, 48 U.S.C. §§ 1421-1424(b) (1952), the federal district court considered that the Organic Act of Congress "serves as a Constitution for Guam." *Agana Bay Dev. Co. (Hong Kong) v. Supreme Court of Guam*, 422 F. Supp. 593, 608 (D. Guam 1974), *rev'd on other grounds*, 529 F.2d 952 (9th Cir. 1976). Congress, of course, under the provisions of 48 U.S.C. § 1423(i) (1982) retains the authority to amend or repeal an act of the Guam legislature in much the same fashion as under the joint resolution legislative veto. *Bordallo v. Comacho*, 416 F. Supp. 83, 85 (D. Guam 1973), *aff'd*, 520 F.2d 763 (9th Cir. 1975).

278. An alternative approach, which was effectively used in the case of Puerto Rico, would be to have the Congress enact the Constitution of the State of New Columbia as the "constitution for the District of Columbia," coupling with that, joint resolution legislative veto authority. This would not in any manner inhibit the development of full statehood for the citizens of the District of Columbia. In fact, such an enactment might be enhanced. See 1 D.C. CODE ANN. at 41-83 (1981 & Supp. 1984). But, for a dissenting view as to the utility of this model, see Oulahan, *The Proposed New Columbia Constitution: Creating a "Manacled State"*, 32 AM. U.L. REV. 635 (1983). Ideally, too, Congress would repeal its acts affecting the District of Columbia ultimately to be enacted by the local government and placed in the "Local Public Laws," as recommended in § 5 of the draft bill in the Appendix to solve the *Chadha* problem.

279. An example of such an approach was used by the Council in its enactment of personnel legislation. Conflicting federal provisions were deemed superceded. D.C. CODE ANN. § 1-633.2 (1981 & Supp. 1984). A number of Acts of Congress would require special treatment because of mixed appropriations and statutory provisions in a single act. See appropriations Act.

approving specific actions of the Council or by amendment of the basic grant of authority.²⁸⁰

E. Defective Provisions of the Home Rule Act are Severable

Drawing upon the principles of severability outlined above one must consider how to treat constitutionally infirm provisions of the Home Rule Act.²⁸¹ The fairest view of the Home Rule Act's congressional veto provisions is that they are not severable. The absence of a routine severability clause and scattered remnants of legislative history suggest that the Senate would not have agreed to enactment of the Home Rule Act without the legislative veto provision. Although the weight of legislative history may take the view that the Act is not severable, a careful review of the record supports the conclusion that the will of the entire Congress is uncertain.²⁸² There is no legislative history concerning the role of the President in the governance of the District of Columbia because the President enjoyed a role in certain lawmaking,²⁸³ managed the police department in certain instances,²⁸⁴ and retained control of the fiscal affairs of the District.²⁸⁵ Similarly, the legislative veto issue did not manifest itself as a significant issue because of its frequent use in diverse laws enacted by the Congress.²⁸⁶

Case law suggests that in most circumstances legislative veto clauses are severable from legislative enactments.²⁸⁷ Generally this has also been the approach in cases following *Chadha*.²⁸⁸ For the reasons discussed below, it is the appropriate course for the Home Rule Act.

Without a definite congressional intent to the contrary, a court faced with a challenge to an enactment of the Council under the Home Rule Act should sever the invalid provisions, while retaining the general grant of delegated legislative authority to the Council. At a minimum, therefore, all actions of the Council where no veto was exercised would be sustained.

280. D.C. CODE ANN. § 1-207 (1981 & Supp. 1984); D.C. CODE ANN. § 1-233(c) (1981 & Supp. 1984).

281. See *supra* notes 218-27 and accompanying text.

282. For a recounting of the sketchy legislative history bearing upon the question of congressional intention, see *Committee on the District of Columbia, Home Rule for the District of Columbia 1973-1974, Background and Legislative History of H.R. 9056, H.R. 9682, and Related Bills*, Serial No. S-4, Dec. 1974, at 3031 (Dec. 7, 1973 Conference Report); *id.* at 3050, 3052 (Dec. 12, 1973) (Congressional Record Remarks of Sen. Mathias).

283. See D.C. CODE ANN. § 1-147(c)(1) (1973).

284. D.C. CODE ANN. § 4-102 (1981 & Supp. 1984).

285. See *supra* note 57.

286. See *supra* note 174.

287. See *supra* notes 188-217 and accompanying text.

288. *Id.*

Nevertheless, there are two circumstances in which the veto was used: the rejection of the Council's chancery law and the local reform of the sexual assault laws. In the instance of the chancery matter, the effect of the veto was only of academic interest, in that the Congress subsequently adopted comprehensive legislation occupying the entire subject matter field.²⁸⁹

The House's second veto was used to reject the Council's sexual assault reform laws. This veto has been challenged in a number of suits where the defendant was charged under the preexisting law and not the purportedly amended law presumed valid because of the defective veto.²⁹⁰ One judge of the superior court, finding *Chadha* applicable to the District of Columbia, has opined that all Council authority with respect to amendment of the criminal laws is invalid. This decision, while narrow in its specific terms, is amenable to an expansive construction which would invalidate all enactments of the Council that have amended titles 22 and 23 of the District of Columbia Code. The continued enforcement of the criminal law may be upheld by giving *Chadha* a prospective application,²⁹¹ or by concluding that any amendment of the underlying criminal code was defective in the first instance.

The more difficult question is whether actions of the Council since January 1, 1975, which have amended myriad Acts of Congress, may be sustained despite the exercise of questionable authority. In this instance, a rule of severability will not be serviceable because it infers a limitation upon the Council's authority to amend Acts of Congress not found in the Home Rule Act grant of authority. Discerning the intent of Congress by silence represents an unwarranted usurpation of legislative authority. These acts of the Council, amending acts of Congress, should be given de facto effect with a direction to the Congress to amend the Home Rule Act as suggested in the appended draft bill.²⁹² This time restraint is consistent with decisions of the Supreme Court and the District of Columbia Court of Appeals analyzed above involving new interpretations of constitutional provisions (or of the Home Rule Act's emergency authority provisions), where a retroactive application would cause considerable hardship.

F. Decisions Applying Chadha to the Home Rule Act should be Given Prospective Application.

The analysis of principles concerning retroactivity²⁹³ concludes that new

289. D.C. CODE ANN. §§ 5-1201 to 15-1212 (Supp. 1984).

290. See *supra* notes 231-33 and accompanying text.

291. See text accompanying *supra* notes 201-17 and *infra* notes 293-94.

292. See *infra* part III G.

293. The true extent of a decision such as *Allstate Insurance* can be shown by considering

constitutional interpretations following *Chadha* should be prospectively applied. Thus, whether by curative act of Congress or by judicial order, the far-reaching and devastating effect of *Chadha's* application to the Home Rule Act may be avoided. Actions of the Council undertaken in good faith and in reliance upon presumed constitutional authority should be honored. Similarly, declarations of validity should be afforded to emergency acts of the Council not previously invalidated in judicial proceedings and to initiatives properly in effect.

Actions of the Council taken after the effect of *Chadha* on June 23, 1983, should also be afforded de facto validity. But as time passes, changes will have to be undertaken in the manner of operation of the Council's legislating. Here the Council's own rule of severability should allow a court to sustain an action of the Council which contains incidental amendments to Acts of Congress. Minor technical amendments can be severed from an otherwise valid action of the Council.

The process of initiative and referendum is more troublesome. The process by which the Congress authorized the use of such devices is invalid, and thus continued resort to that defective authority must end. Thus, initiatives currently pending should be declared invalid pending congressional amendment of the Home Rule Act to authorize the use of the initiative and referendum tool. In this amendatory bill, Congress might ratify and exempt from certain procedural requirements pending measures.²⁹⁴

G. *The Options Available to Congress*

The entire analysis of this article has consistently endorsed delegated authority to a local District of Columbia government. Minimal restrictions upon the exercise of such authority are both consistent with the spirit of the Home Rule Act and the proper day-to-day management of the District of Columbia. Congressional adoption of a further series of amend-

a retroactive application to the invalidity of federal authority transferred by reorganization plans. See *supra* note 198 and accompanying text. Since 1950 most redistributions of local governmental powers in the District of Columbia have been effected by federal reorganization plans. See Reorganization Plan No. 5 of 1952, 17 Fed. Reg. 5849; Reorganization Plan No. 4 of 1966, 31 Fed. Reg. 11,137; Reorganization Plan No. 5 of 1966, 31 Fed. Reg. 11,857; Reorganization Plan No. 3 of 1967, 32 Fed. Reg. 11,669; Reorganization Plan No. 3 of 1968, 33 Fed. Reg. 7747; Reorganization Plan No. 4 of 1968, 33 Fed. Reg. 7749. Invalidation of these plans would return the District of Columbia to its stage of government before many independent boards and commissions were consolidated under the authority of the Board of Commissioners.

294. Cf. D.C. CODE ANN. § 1-1325 (1981 & Supp. 1984) (ratifying certain initiatives filed before an implementing act was adopted by the Council).

ments to the pending House bill would create the proper constitutional framework for home rule in the District of Columbia and would comply with the mandates of the principles of *Chadha*. Thus, joint resolutions or bills are required for all lawmaking and the Council is prohibited from amending Acts of Congress.

Enactment of less than that proposed in the draft bill reprinted in the Appendix would result in continued litigation concerning the status of the District of Columbia. Ultimately such litigation would require resolution by the Supreme Court. The early action by Congress is both desirable to obviate the need for continued litigation, but preferred as a matter of legislative supremacy in setting forth the proper dimensions of home rule in the national capital. Authorization to adopt the Local Public Laws of the District of Columbia, coupled with a delayed repeal of Acts of Congress affecting the District of Columbia placed within the jurisdiction of the Council, would complete the necessary revisions to the Home Rule Act.

IV. CONCLUSION

Serious consideration must be given promptly to amendment of the Home Rule Act to avoid a constitutional crisis in the District of Columbia. This Article has explored the range of problems that emerged with the mechanisms of Home Rule following the *Chadha* decision. The solution posed in this Article will correct the constitutional infirmities in the Home Rule Act and provide a basis for the continuing development of self-government in the national capital.

POSTSCRIPT

During the printing of this Article, the Congress enacted H.J. Res. 648. Section 131 of this appropriations measure adopted a number of amendments to the Home Rule Act in an effort to cure the defects noted herein.

Subsection (a) effected an amendment to section 466(b) of the Home Rule Act with regard to the issuance of District of Columbia government bonds. Subsection (b) effected the amendment proposed in section 2(a) of the preceding draft bill. Subsection (c) amended section 412 of the Home Rule Act to authorize the use of legislative vetoes by the Council. Subsections (d), (e), (f), and (g) effectively accomplished proposed amendments in sections 2(c), (d), and (e), with slightly differing time provisions insofar as criminal code amendments are concerned. Subsection (h), (i), and (j) are the same as sections 2(g), (h), and (i) of the preceding draft bill. Subsection (k) attempts to achieve the same adjustment as section 2(j) of the preceding draft bill, but without the clarity surrounding measures over which Congress exercised its legislative veto. Subsection (l) provides a severability clause to the Home Rule Act, while subsection (m) amends the Retirement Reform Act. Subsection (n) provides that these amendments to the Home Rule Act will continue in force despite the adoption of permanent appropriations.

The Congress did not adopt the fundamental amendments recommended by sections 2(b), 3 and 4 of the preceding draft bill. Thus, the premise of this Article requires continued legislative correction or judicial intervention. Recommended amendments affecting initiatives, see section 2(k) and (l) of the preceding amendatory bill, should also be enacted.

This measure was presented to the President who approved it on October 12, 1984.

APPENDIX

The following proposed draft bill implements the author's proposals to provide a constitutional framework of government in the District of Columbia.

98th Congress
2nd Session
H.R. _____

To amend the District of Columbia Self-Government and Governmental Reorganization Act; to authorize the Council of the District of Columbia to adopt the Local Public Laws of the District of Columbia; to repeal inconsistent acts; and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

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

A BILL

To amend the District of Columbia Self-Government and Governmental Reorganization Act; to authorize the Council of the District of Columbia to adopt the Local Public Laws of the District of Columbia; to repeal inconsistent acts; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that this Act may be cited as the "District of Columbia Self-Government Reform Act of 1984."

Section 2. The District of Columbia Self-Government and Governmental Reorganization Act is amended as follows:

(a) Section 303(b) of such Act is amended to read as follows:

(b) An amendment to the charter ratified by the registered qualified electors shall take effect upon the expiration of the thirty-five-calendar-day period (excluding Saturdays, Sundays, holidays, and days on which either House of Congress is not in session) following the date such amendment was submitted to the Congress, or upon the date prescribed by such amendment, whichever is later, unless, during such thirty-five-day period, there has been enacted into law a joint resolution, in accordance with the procedures specified in section 604 of this Act, disapproving such amendment. In any case in which any such joint resolution disapproving such an amendment has, within such thirty-five-day period, passed both Houses of Congress and has been transmitted to the President, such resolution, upon becoming law subsequent to the expiration of such thirty-five-day period, shall be deemed to have repealed such amendment, as of the date such resolution becomes law.

(b) Section 401(a) of such Act is amended by adding a sentence at the end thereof to read as follows:

In the exercise of its legislative authority under this Act, the Council may not amend any Act of the Congress.

(c) The second sentence of section 602(c)(1) of such act is amended to read as follows:

Except as provided in paragraph (2), such act shall take effect upon the expiration of the 30-calendar-day period (excluding Saturdays, Sundays, and holidays, and any day on which neither

House is in session because of an adjournment sine die, a recess of more than 3 days, or an adjournment of more than 3 days) beginning on the day such act is transmitted by the Chairman to the Speaker of the House of Representatives and the President of the Senate, or upon the date prescribed by such act, whichever is later, unless, during such 30-day period, there has been enacted into law a joint resolution disapproving such act. In any case in which any such joint resolution disapproving such an act has, within such 30-day period, passed both Houses of Congress and has been transmitted to the President, such resolution, upon becoming law subsequent to the expiration of such 30-day period, shall be deemed to have repealed such act, as of the date such resolution becomes law.

(d) The third sentence of section 602(c)(1) of such Act is amended by deleting "concurrent" and inserting in lieu thereof "joint".

(e) The first sentence of section 602(c)(2) of such Act is amended by deleting "only if during such 30-day period one House of Congress does not adopt a resolution disapproving such act" and inserting in lieu thereof "unless, during such 30-day period, there has been enacted into law a joint resolution disapproving such act. In any case in which any such joint resolution disapproving such an act has, within such 30-day period, passed both Houses of Congress and has been transmitted to the President, such resolution, upon becoming law subsequent to the expiration of such 30-day period, shall be deemed to have repealed such act, as of the date such resolution becomes law."

(f) The second sentence of section 602(c)(2) of such Act is amended to read as follows:

The provisions of section 604, relating to an expedited procedure for consideration of joint resolutions, shall apply to a joint resolution disapproving such act as specified in this paragraph.

(g) Section 604(b) of such Act is amended by deleting "concurrent" and inserting in lieu thereof "joint".

(h) Subsections (b) and (c) of section 740 of such Act are amended by deleting in each subsection the words "resolution by either the Senate or the House of Representatives" and inserting in lieu thereof "joint resolution by the Congress".

(i) Section 740(d) of such Act is amended by deleting "concurrent" and inserting in lieu thereof "joint".

(j) The amendments made by this section shall not be applicable with respect to any law, which was passed by the Council of the District of Columbia (including initiatives adopted pursuant to law, but not including

acts of the Council of the District of Columbia specifically rejected by the Congress), emergency acts of the Council of the District of Columbia not judicially invalidated, prior to the date of the enactment of this Act, and such laws are deemed valid, in accordance with the provisions thereof, notwithstanding such amendments.

(k) The amendments to title IV concerning initiatives, referendum, and recall are specifically approved by the Congress.

(l) To the extent that any initiatives are pending on the date that this amendment becomes effective they shall be deemed to have been properly filed in accordance with law.

Section 3(a). Except as provided in subsection (b), within one year of the effective date of this Act, the Council of the District of Columbia may adopt the Local Public Laws of the District of Columbia which shall include all laws of general and permanent application to the District of Columbia within the authority of the Council of the District of Columbia presently codified in the District of Columbia Code or the District of Columbia Municipal Regulations.

(b) The Council of the District of Columbia shall have no authority to enact laws presently codified as title 11 of the District of Columbia Code nor any matter beyond the competence of the Council of the District of Columbia under the District of Columbia Self-Government and Governmental Reorganization Act.

Section 4. Upon the adoption of the Local Public Laws of the District of Columbia authorized by section 4 of this Act, the following Acts are repealed:

[The drafter should include here a listing of all Acts of Congress which will now come under the authority of the Council of the District of Columbia]