COMMENTS

TOUGH LOVE IN THE DISTRICT: MANAGEMENT REFORM UNDER THE DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE ACT

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INTRODUCTION

On April 17, 1995, the President signed into law the District of Columbia Financial Responsibility and Management Assistance Act ("DCFRA").[1] The DCFRA created the District of Columbia Financial Responsibility and Management Assistance Authority ("Authority"), informally referred to as the "Control Board"[2] and modeled in part after similar entities established in other cities.[3]

The financial and management crises precipitating the Authority's creation are known even to the most casual observers of the District.[4]

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1. District of Columbia Financial Responsibility and Management Assistance Act, Pub. L. No. 104-8, 109 Stat. 97 (1995) [hereinafter DCFRA].

2. Although the Authority is almost universally referred to as the "Control Board" or "Financial Control Board," these terms do not appear in the Act or its amendments.

3. *See* H.R. REP. NO. 104-96, at 24-36 (1995) (contrasting Authority with control boards in Chicago, Cleveland, Yonkers (N.Y.), Philadelphia, and New York City).

4. Many Americans outside of the District of Columbia are aware of the problems facing the Nation's capital. *See id.* at 4 (citing national awareness of D.C.'s financial and management problems).

Indeed, some of the more recent city services failures have garnered national attention.[5] With the prospects of insolvency and a shutdown of government services looming, Congress exercised its plenary legislative authority over the District[6] and created the Authority, with the expectation that its unelected members would rein in District spending and implement significant management reforms.[7]

Since its creation, the Authority has faced stiff opposition from Home Rule activists and statehood proponents.[8] Public meetings of the Authority and its appointees are popular settings for protests, demonstrations and other forms of civil disobedience.[9] The Authority has even encountered opposition from members of Congress who participated in the drafting of the DCFRA.[10] For many District residents, the DCFRA and its subsequent amendments represent unacceptable erosions of their "Home Rule" rights under the District of Columbia Self-Government and Governmental Reorganization Act ("Home Rule Act").[11] Some suggest the DCFRA was enacted as part of an elaborate, racist plot by Congress to reverse the demographic composition of the District of Columbia.[12] District of Columbia

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5. *See* Glen Elsasser, *Capital City, Capital Crisis*, CHI. TRIB., June 21, 1996, at 1 (describing pothole-scarred streets, litter-strewn courthouses, and public schools without lights or functioning bathrooms); Tony Kornheiser, Editorial, *Watch out for that pothole, it's . . . car-nivorous!*, ROCKY MOUNTAIN NEWS, June 2, 1996, at 64A (lamenting number of potholes in District of Columbia, including one that a Washington resident filled with a mattress); Thomas W. Waldron, *District of Columbia Keeps Cutting As It Nears Running Out of Money*, BALT. SUN, June 16, 1995, at 13A (reporting early summer for 80,000 students of D.C. public schools when school system ran out of money).

6. *See* Palmore v. United States, 411 U.S. 389, 396-97 (1973) (determining Congress' power over District of Columbia as including that of state legislature or municipal government); *see also infra* notes 22-23 and accompanying text (discussing Congress' ability to legislate for District of Columbia).

7. *See infra* note 74 and accompanying text (discussing congressional intent for Authority).

8. *See* Hamil R. Harris, *Home Rule Activists Disrupt Control Board Meeting*, WASH. POST, Aug. 6, 1997, at A6 (detailing disruption of public meeting announcing implementation of D.C. Revitalization Act); Debbi Wilogoren & Sari Horwitz, *Parents Decry Class Inaction; Play, Protest Mark Day D.C. Schools Were to Open*, WASH. POST, Sept. 3, 1997, at B1 (describing protest outside school superintendent General Julius W. Becton's office on day public schools were scheduled to open but did not); Vernon Loeb, *Protesters Try to 'Teach' Control Board a Lesson; About 200 Turn Out for Rally Against Social Spending Cuts*, WASH. POST, May 16, 1997, at D3 (reporting "teach in" at Authority's offices aimed at "educating" Authority regarding importance of social programs).

9. *See id.* (describing protests and demonstrations endured by Authority and its agents).

10. *See* Debbi Wilgoren & David Vise, *School Board Vows to Fight on Trustees Plan*, WASH. POST, Feb. 13, 1998 at B4. (citing the District's non-voting delegate to the house of Representatives, Eleanor Holmes Norton, criticizing Authority's actions in D.C.'s public schools).

11. District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. CODE ANN. §§ 1-201 to 1-299.7 (1981)) [hereinafter Home Rule Act].

12. Some of the more radical Home Rule/D.C. statehood proponents and conspiracy theorists refer to "The Plan," an alleged long-term effort by white members of Congress to return Washington to a white-majority city. *See* Marc Fisher, *A Big White Lie? To Conspiracy Theo-*

Mayor Marion Barry refers to the 1997 Congressional expansion of the Authority's power[13] as "the rape of democracy,"[14] while others have referred to the five Authority board members as "Mussolinis."[15]

Despite the protestations and rhetoric from local activists and impuissant politicians, Congress continues to strengthen the Authority and expand its responsibilities, with the expectation that it take a proactive approach to management reform.[16] This Comment examines the various laws affecting the responsibilities and powers of the Authority with respect to its mandate to improve the management efficiency of the District. Specifically, this Comment analyzes the management reform and restructuring powers of the Authority under the original DCFRA,[17] under the so-called "Superpowers" amendment to the DCFRA,[18] and under the National Capital Revitalization and Self-Government Improvement Act of 1997 ("D.C. Revitalization Act").[19]

Part I provides a brief historical outline of the different governing bodies that have existed in the District of Columbia. Part II presents

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rists, a Takeover of Washington Is Part of "The Plan," WASH. POST, July 31, 1997, at B1 (detailing history of "The Plan" and quoting believers who point to DCFRA as evidence of its existence); Clarence Page, *Democracy on Probation in D.C.*, BALT. SUN, Aug. 21, 1997, at 21A (referring to "The Plan" and citing Mayor Marion Barry's references to members of Congress involved in drafting the DCFRA as "enemies of the people"). Racism may have played at least a part in the withdrawal of Home Rule from the District of Columbia in 1874. *See infra* note 30 (discussing controversy over the allegedly pretextual excuse for the 1874 withdrawal of Home Rule). "The Plan" has been cited as the underlying purpose of the DCFRA. *See id.*

13. *See infra* Part IV (discussing D.C. Revitalization Act).

14. *See* Vernon Loeb, *Brimmer Makes Clear Who's Boss; Mayor Loses Power But Gains an Issue*, WASH. POST, Sept. 15, 1997, at C1 (quoting Mayor Barry using phrase at weekly press briefing); Cynthia Tucker, *Bad Government; Black Voters Lose Tolerance for D.C. Mayor*, ATLANTA CONST., Sept. 14, 1997, at 7F (referring to Mayor Barry as "the poster boy for poor government" and citing his repeated use of phrase); *Washington's 'Mayor for Life' Has Little to Do; Congress' Overhaul Leaves Some Upset*, CHI. TRIB., Aug. 24, 1997, at 8 (citing Barry's use of phrase while describing Republican members of Congress); John Kolbe, *Civic Rule Hits Bottom in Capital, Congress Quietly Rides to the Rescue*, ARIZ. REPUB., Aug. 22, 1997, at B7 (also quoting Jesse Jackson's reference to Authority as "a military junta").

15. Steve Twomey, *The Price of D.C.'s Salvation*, WASH. POST, July 31, 1997, at D1; Susanna Spencer, Letter to the Editor, *Home Rule Trashed*, WASH. POST, Aug. 7, 1997, at A22 (agreeing with Twomey's "Mussolini analogy" when speaking of transfer of power from D.C.'s elected officials to Authority).

16. *See infra* note 74 and accompanying text (citing legislative history relating to intended scope of management reform in District).

17. *See infra* Part III (examining DCFRA).

18. DCFRA, Pub. L. No. 104-8, 109 Stat. 97 (1995), *as amended by* Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 5203(f), 1996 U.S.C.C.A.N. (110 Stat.) 3009, 3009-3503. The amendment was first referred to as the "super power" by the plaintiffs' attorney in *Shook v. District of Columbia Financial Responsibility and Management Assistance Authority*, 964 F. Supp. 416 (D.D.C. 1997), *aff'd in part and rev'd in part*, 132 F.3d 775 (D.C. Cir. 1998), at a TRO hearing. *See* Transcript of Temporary Restraining Order at 20-21, Shook v. District of Columbia Fin. Responsibility and Management Assistance Auth., 964 F. Supp. 416 (D.D.C. 1997) (No. 96-2601) (statement of Ms. Barbara S. Wahl).

19. National Capital Revitalization and Self Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 [hereinafter D.C. Revitalization Act]; *see also infra* Part IV (discussing D.C. Revitalization Act).

an overview of the more significant financial and management failures leading to the passage of the DCFRA. Part III examines the original DCFRA and the Authority's interpretation of its management reform responsibilities and powers as manifested by its recommendations issued to departments and agencies of the District government.

Part III also examines the "Superpowers" amendment to the DCFRA, and Authority interpretation of this amendment. Part IV analyzes the Authority's transformation from a "financial control board" to Washington's Chief Executive Officer under the D.C. Revitalization Act.

Finally, recommendations are made to the various entities that continue to influence and set policy for the District of Columbia: The Authority, Congress, and the President of the United States. Although much could be written concerning the denial of democratic privileges to the citizens of Washington, the recommendations offered in this Comment focus solely on guaranteeing the Authority's success at ending the crisis currently gripping the Nation's Capital. Once its goal is accomplished, District residents will be in a position to make a credible appeal to Congress for a renewal of Home Rule.

I. HISTORICAL BACKGROUND

The history of municipal government in the District of Columbia is long and colorful. Congress' experiments in local governance[20] have included attempts at six different municipal structures, expanding and contracting with each the degree of local autonomy.[21]

A. Express Language of the Constitution

Control over the District of Columbia is expressly granted to Congress by the Constitution, which states that Congress shall have the power "to exercise exclusive Legislation in all Cases whatsoever, over

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20. As early as 1874, Congress referred to the variety of municipal governments tried in the District of Columbia as "experiments." *See* H.R. REP. NO. 44-64, at 1 (1876); S. REP. NO. 43-479, at 1 (1874).

21. The six forms of government can be described generally as: (1) Mayor-City Council (1801-1812); (2) Board of Aldermen and Board of Common Council (1812-1871); (3) Territorial Governor (1871-1874); (4) Board of (Three) Commissioners (1874-1967); (5) Single Commissioner (1967-1973); and (6) Mayor—City Council (1973-current). *See* Jason I. Newman & Jacques B. DePuy, *Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act*, 24 AM. U. L. REV. 537, 541-47 (1975) (providing summary of various forms of municipal governments in District of Columbia). Newman and DePuy note a trend in Congress' experiments in that with each new form of government, the degree of self-government enjoyed by District residents generally increased until 1871, when Congress imposed a "territorial" government. *See id.* at 544-45.

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."[22] This exclusive legislative authority has been interpreted by the Supreme Court as giving Congress plenary power over the District, allowing it to legislate for the City in a way that would "exceed its powers . . . or be very unusual if applied to the nation as a whole."[23] As described below, Congress has utilized this plenary authority on a number of occasions to alter the governmental structure of the District of Columbia.

B. 1802-1874

The District of Columbia was incorporated under federal law by the Act of May 3, 1802.[24] A City Charter was established that allowed for a presidentially-appointed Mayor and popularly elected[25] City Council.[26] Over the next sixty-nine years, Congress modified the City Charter several times, in most cases expanding Washington voters' abilities to influence city policy and providing at least a limited form of "Home Rule."[27]

C. 1874-1967

The Act of June 20, 1874,[28] created a temporary, three-commissioner form of government. This structure was formalized

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22. U.S. CONST. art. I, § 8, cl. 17.

23. Palmore v. United States, 411 U.S. 389, 398 (1973) (citing Capital Traction v. Hof, 174 U.S. 1, 5 (1899)). Both federal Article III courts and the Article I courts of the District of Columbia have consistently reaffirmed this view of Congress' relationship to the District of Columbia. *See, e.g.*, Doe v. McMillan, 412 U.S. 306, 334-35 (1973) (holding that Congress' decision to compile and publish report on state of education in D.C. while acting as legislature for District falls under its plenary authority and is not subject to judicial review); District of Columbia v. Carter, 409 U.S. 418, 429 (1973) (confirming that Congress' legislative powers over the District of Columbia include all those possessed by a state legislature); Shook v. District of Columbia Fin. Responsibility and Management Assistance Auth., 964 F. Supp. 416, 421 (D.D.C. 1997) ("The Congress of the United States . . . has the entire control over the District of Columbia for every purpose of government—national or local." (quoting *Capital Traction*, 174 U.S. at 5)); Darby v. United States, 681 A.2d 1156, 1158 (D.C. 1996) (rejecting argument that Guarantee Clause of Constitution applies to, or in any way restricts power of Congress to legislate for District of Columbia).

24. Act of May 3, 1802, § 2, 2 Stat. 195, ch. 53, *reprinted in Acts Relating to the Establishment of the District of Columbia and Its Various Forms of Governmental Organization*, 1 D.C. CODE ANN. 17, 49 (1981) [hereinafter *Acts Relating to the District of Columbia*].

25. Eligible voters under the Act of May 3, 1802, were "free white male inhabitants of full age, who have resided twelve months in the city, and paid taxes therein the year preceding the election's being held." *Id.* at 50.

26. *See id.* (establishing twelve-member City Council consisting of two chambers: seven members in the first chamber, and five members in the second).

27. *See supra* note 21 (listing six forms of government attempted in District of Columbia).

28. Act of June 20, 1874, 18 Stat. 116, ch. 337, *reprinted in Acts Relating to the District of Columbia, supra* note 24, at 99.

four years later by the Act of June 11, 1878,[29] signaling the official end of Congress' first experiment with self-government in the District of Columbia.[30] The presidentially-appointed Board of Commissioners took over most city governance functions,[31] and the popularly-elected, non-voting delegate to the House of Representatives was withdrawn.[32] As the Supreme Court stated in *Metropolitan R.R. v. District of Columbia*,[33] "[l]egislative powers have now ceased, and the municipal government is confined to mere administration."[34]

D. 1967-1973

In 1967, President Johnson issued a Reorganization Order replacing the District's three-commissioner system with a single Commissioner-Council form of government.[35] This new system did not confer additional local autonomy on District residents; the Mayor-Commissioner and nine members of the City Council were ap-

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29. Act of June 11, 1878, 20 Stat. 103, ch. 180, *reprinted in Acts Relating to the District of Columbia*, *supra* note 24, at 105.

30. *See id.* The end of Home Rule and suffrage for D.C. residents did not go without a fight from the minority members of Congress:

> It is the conclusion of the minority that the people of the District of Columbia have a clear, incontrovertible right to a local government derived from their own suffrages; that no inhibition against the exercise of such a right is contained in the Constitution . . . ; but on the contrary, that Congress is itself inhibited by its constitutional restrictions and public obligations from denying or abridging that right . . . .
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> The minority, therefore, respectfully recommend that a simple municipal government, in the usual form common to American communities, be adopted for the District of Columbia.

S. REP. NO. 44-572, at 28 (1877), *quoted in* Newman & DePuy, *supra* note 21, at 546 n.60.

The official justification for the withdrawal of Home Rule is remarkably similar to the reasons for the contemporary withdrawal: municipal insolvency. *See* Newman & DePuy, *supra* note 21, at 546 n.59. At this time, large municipalities across the country were flirting with bankruptcy, some even being taken over by their state sponsors. *See* 119 CONG. REC. 22,948-49 (1973) (statement of Sen. Mathias) (describing widespread municipal insolvency and corruption throughout 1870s).

Others have advanced a well-supported argument claiming that conservatives in the District and in Congress, upset about the "curse of black suffrage," viewed a Congressional takeover of the District as the only means of preserving white rule. *See* Newman & DePuy, *supra* note 21, at 546 n.59 (providing official explanation of disenfranchisement as response to "overspending and corruption of Shepherd Administration" (quoting Henderson, *Why Home Rule Was Taken From D.C.*, WASH. STAR-NEWS, Nov. 11, 1973, at G2)).

31. *See* Act of June 11, 1878, 20 Stat. 103, ch. 180, *reprinted in Acts Relating to the District of Columbia*, *supra* note 24, at 105 (appointing three permanent commissioners with all the powers and responsibilities of previous government).

32. *See* Act of June 20, 1874, 18 Stat. 116, ch. 337, *reprinted in Acts Relating to the District of Columbia*, *supra* note 24, at 99 (repealing law providing for delegate in Congress, executive, secretary, legislative assembly, and board of public works for District of Columbia).

33. 132 U.S. 1 (1899).

34. *Id.* at 7.

35. *See* Reorganization Plan No. 3 of 1967, 32 Fed. Reg. 11,669 (1967), *reprinted in Acts Relating to the Establishment of the District of Columbia*, *supra* note 24, at 126.

pointed by the President.[36]

II. THE DISTRICT OF COLUMBIA HOME RULE ACT AND SUBSEQUENT FINANCIAL AND MANAGEMENT CRISES

The District of Columbia Self-Government and Governmental Reorganization Act ("Home Rule Act")[37] produced thousands of pages of legislative history as Congress debated the soundness of restoring some form of self-government to the District,[38] and what form such a municipal government should take.[39] Eventually, Congress settled on a Strong-Mayor[40] system with an elected City Council.[41] For the first time in nearly a century, residents of the District of Columbia possessed a degree of local autonomy.

Financial problems are not new to the District of Columbia. As mentioned above, they were at least a pretext for the original Congressional repeal of Home Rule in 1878.[42] Over the past twenty years, however, financial and managerial problems again reached crisis proportions, threatening the City's ability to provide basic city services. Discussed below are some of the more egregious examples of the problems which led to the Authority's creation.

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36. *See id.* § 201. The new Mayor-Commissioner received all of the power and authority of the former three commissioners, with the exception of some "quasi-legislative" functions which were reserved for the City Council. *See id.* § 401; *see also* Newman & DePuy, *supra* note 21, at 547 (describing "quasi-legislative" powers given to City Council).

37. Pub. L. No. 93-198, 87 Stat. 774 (1973) (codified as amended at D.C. CODE ANN. §§ 1-201 to 1-299.7 (1981)).

38. Some members of Congress opposed the delegation of congressional authority to a municipal government in Washington. *See* Newman & DePuy, *supra* note 21, at 569-73 (discussing constitutional concerns over Home Rule Act expressed by members of Congress).

39. *See Markup by Full Committee of H.R. 9056, Titles III and IV, (1973), reprinted in Background and Legislative History of H.R. 9056, H.R. 9682, and Related Bills*, 93D CONG., at 1049 (1974) (statement of Rep. Adams) (describing decision to provide for strong mayor rather than City Manager system). *See generally Report of the Commission on the Organization of the Government of the District of Columbia*, H.R. DOC. NO. 92-317, vol. 1, at 141 [hereinafter *Nelson Commission Report*] (calling for greater executive and legislative autonomy in District immediately prior to Home Rule Act); Reorganization Plan No. 3 of 1967, *supra* note 35, at 160-61 (citing problems inherent with divided executive authority and benefits of single executive system).

40. A "Strong-Mayor" system allows the Mayor veto power over legislation passed by the Council, the ability to reorganize any executive agency or department (which includes most D.C. government agencies), and the ability to appoint the heads of each of these agencies or departments, subject to Council approval. *See* Home Rule Act, § 422, 87 Stat. at 798-99. Excepted from Mayoral (and Council) control are "independent agencies," identified in sections 491-495 of the Home Rule Act. *See id.* §§ 491-495 (identifying Board of Elections and Ethics, Zoning Commission, Public Service Commission, Armory Board, and Board of Education as independent agencies). The nature of these independent agencies became a key topic in the lawsuit challenging the Authority's action regarding the Board of Education, discussed *infra* Part C.1.

41. *See* Home Rule Act § 401(a), (b)(1) (providing for thirteen-member, popularly elected "Council of the District of Columbia"); *see also supra* note 39 (discussing Congress' decision to establish Strong-Mayor system).

42. *See supra* note 30 (discussing municipal insolvency as reason for repeal of home rule).

A. District Agencies in Receivership

Recognizing the crises in individual departments and agencies of government, courts have carved out chunks of the District government and removed them from local control. In at least one case, a special master assumed control of specific agency functions,[43] and in another case, the entire agency was placed in receivership.[44] These actions were generally taken after repeated failures to comply with court-mandated reforms, or when it became clear that the department or agency was not capable or could no longer be trusted to implement the necessary reforms.[45]

For example, recognizing the abysmal condition of the Department of Public and Assisted Housing, D.C. Superior Court Judge Steffen W. Graae placed the Department in receivership and under the direction of the federal Department of Housing and Urban Development ("HUD") in May, 1995.[46] In the Department of Corrections, a federal judge appointed a special investigator to handle all sexual harassment claims within the agency and a receiver over medical care.[47] Finally, the Child Welfare Agency, part of the Department of Human Services, was placed in full receivership when the City failed to meet several judicially imposed deadlines and re-

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43. *See infra* note 47 and accompanying text (discussing appointment of Special Master in Department of Corrections).

44. *See infra* note 46 and accompanying text (identifying order of D.C. Superior Court judge that placed Department of Public and Assisted Housing in receivership).

45. *See infra* note 48 and accompanying text (describing placement of Child Welfare Service in receivership after repeated failures to comply with court orders); *see also* H.R. REP. NO. 104-96, at 8-9 (1995) (describing budgetary problems associated with District's failure to anticipate costs of abiding by consent decrees or court-ordered corrections).

46. *See* Vernon Loeb, *D.C. Cedes Control of Housing Agency; Takeover by Receiver to Last at Least 3 Years*, WASH. POST, May 5, 1995, at A1 (describing court-ordered takeover and appointment of housing receiver); *see also* Vernon Loeb, *A Miserable Place to Call Home; SE Complex Illustrates Daunting Task Facing D.C. Housing Receiver*, WASH. POST, Aug. 16, 1995, at A1 (describing dilapidated public housing projects).

47. The Department of Corrections is currently operating under seven major court orders and consent decrees, each the result of a lawsuit alleging unlawful conditions of confinement, sexual harassment, or poor medical care. *See Women Prisoners of D.C. Dep't of Corrections v. District of Columbia*, 877 F. Supp. 634 (D.D.C. 1994), *vacated in part, modified in part*, 93 F.3d 910 (D.C. Cir. 1996), *cert. denied*, 117 S. Ct. 1552 (1997) (providing exhaustive analysis of abuses in Department of Corrections); *see also* OFFICE OF THE MAYOR OF THE DISTRICT OF COLUMBIA, "A Review of Court Orders and Consent Decrees," *FY 1998 District of Columbia Budget and Financial Plan*, Mar. 18, 1997, at G-2 to G-7 (providing summary of all court orders and consent decrees entered against departments and agencies of District of Columbia and estimated cost of compliance for FY1998-FY2001); Katya Lezin, *Life at Lorton: An Examination of Prisoners' Rights at the District of Columbia Correctional Facilities*, 5 B.U. PUB. INT. L.J. 165, 190-95 (1996) (describing deplorable state of medical facilities at D.C. correctional facilities); Toni Locy, *City Settles Suit On Harassment For $8 Million; Deal Adds Inspector To Corrections Department*, WASH. POST, Aug. 29, 1997, at A1 (citing judge's praise of settlement agreement in sexual harassment case against Department of Corrections).

peatedly failed to abide by numerous court orders.[48]

Thus, prior to the enactment of the DCFRA in 1995, large chunks of the D.C. government were being surgically removed from local control. Home Rule was dying a slow death on its own and there was no evidence of significant reforms, coming either from the Mayor's office or the Council, that would stop the hemorrhage.[49]

B. Financial Mismanagement and Budget Deficits

In fiscal year 1994, the District recorded a $335 million deficit[50] and continued a trend of depending solely on the annual federal payment[51] to pay bills incurred from the previous year.[52] Thirty-nine percent of the federal payment for 1991, for example, was used to pay bills from 1990, even after receiving $331 million from a bond issue intended to remedy the operating deficit.[53] In addition, the District consistently over-estimated revenue income in the early 90s: income tax revenues in 1991 and 1992 were about $100 million under the original estimates,[54] and sales tax revenues annually averaged over $34 million below estimates for the years 1991, 1992, and 1993.[55]

The Mayor was also unsuccessful in curbing overspending by District agencies under his control.[56] Officials in government agencies reportedly failed to enter bills into the City's "financial management

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48. *See* LaShawn v. Barry, Civ. No. 89-1754, 1995 WL 520763 (D.D.C. Aug. 24, 1995) (General Receivership Order) (outlining details of receivership); *see also* LaShawn v. Dixon, 762 F. Supp. 959, 986 (D.D.C. 1991) (providing exhaustive recitation of abuses, incompetence, and neglect at Child and Family Services Division), *aff'd*, 990 F.2d 1319 (D.C. Cir. 1993).

49. *See* H.R. REP. NO. 104-96, at 10-15 (1995) (describing failure of District government to take steps necessary to improve conditions in many areas of D.C. government); *see also LaShawn*, 762 F. Supp. at 986-88 (D.D.C. 1991) (describing District's intransigence in response to court-ordered reforms of Child Welfare service).

50. *See* H.R. REP. NO. 104-96, at 7; *see also id.* at 10-15 (describing District's failure to address overspending, cut personnel, adopt a long-term financial plan, or provide requested information to Congress on Washington's financial status).

51. A federal payment was made annually to the District of Columbia as compensation for many of the services provided by the City that would normally be handled by a state government. The payment also compensated the District for services provided to the tax-exempt federal agencies located in the District. *See* Home Rule Act, Pub. L. No. 93-198, § 501(b), 87 Stat. 774, 812 (1973) (codified as amended at D.C. CODE ANN. §§ 1-201 to 1-299.7 (1981)). The D.C. Revitalization Act abolished the annual federal payment in exchange for assumption by the federal government of large District liabilities. *See infra* Part IV (discussing D.C. Revitalization Act).

52. *See* H.R. REP. NO. 104-96, at 7-8 (describing District's increasing reliance on federal payments).

53. *See id.* at 8. Even more disturbing, outstanding obligations for Fiscal Year 1995 were $126 million *more* than the entire federal payment. *See id.*

54. *See id.* (documenting District's failed attempts at forecasting revenues).

55. *See id.* Compounding the problem, the District underestimated expenditures for the Department of Human Services, the District's largest department of government, by $64 million in fiscal year 1992 and $84 million in fiscal year 1993. *See id.*

56. *See id.* (documenting local officials' failure to address specific causes of financial crisis).

system" in an effort to make their agencies' financial situation appear better.[57] The result was confusion over how much was actually owed to vendors and contractors, and uncertainty about the actual dollar amounts that would be required of the City to satisfy those debts.[58]

C. *Public Works*

The District's repeated failures in the area of public works have received the most national attention. During what has been called the "Blizzard of '96," a city-wide failure to plow snow from Washington's streets left many D.C. citizens stranded in their homes.[59] Reports of potholes filled with mattresses[60] and on-the-clock city employees doing work at a private residence in Virginia received nationwide attention,[61] placing additional pressure to intervene on Congresspersons from constituents who were concerned and/or embarrassed by the deteriorating conditions in the nation's capital.

D. *Public Safety*

The Metropolitan Police Department has been equally plagued with allegations of ineffectiveness and corruption.[62] With more than 400 murders annually, Washington, D.C. had the highest per capita homicide rate in the nation from the late 1980's to 1994.[63] In addition, crime has decreased nationally since 1991, by eleven percent per person, while during the same period in the District, crime increased sixteen percent per person.[64]

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57. *See* Howard Schneider & David A. Vise, *D.C. Failing to Rein in Spending, Report Says*, WASH. POST, Apr. 21, 1995, at A1 (portraying lack of leadership and accountability in District departments and agencies).

58. *See id.* (describing D.C.'s dwindling cash supply and its inevitable need to borrow from U.S. Treasury); *see also* H.R. REP. NO. 104-96, at 11-13 (decrying D.C. Mayor Barry's repeated requests for additional federal aid).

59. *See* Vernon Loeb, *At Snow Emergency Drill, Barry Says the City is Ready*, WASH. POST, Dec. 8, 1996, at B9 (describing lessons learned from previous year's "blizzard" and District's attempts to remedy problem); *see also All Year, One Problem After Another; Snow Fell; City Agencies Faltered; The Budget Crisis Went On and On*, WASH. POST, Dec. 25, 1996, at J1 (reminiscing over year of debacles in District government, including problems associated with winter of 1996 snow storms).

60. *See supra* note 5 (citing several media reports of public works failures).

61. *See* Cheryl W. Thompson, *On the Clock in D.C., On the Job in Virginia; District Official Used Workers at Her Home*, WASH. POST, June 4, 1997, at B1 (reporting on city workers performing services for Department of Corrections administrator while on the clock for the city).

62. *See* Eric H. Holder, Jr., United States Attorney for the District of Columbia, *The District of Columbia Steering Committee: Review and Analysis of the Metropolitan Police Department*, Feb. 22, 1995 (on file with *The American University Law Review*) [hereinafter *Holder Report*] (describing MPD deficiencies in personnel, management, technology and equipment).

63. *See id.* at 2. In addition to the high murder rate, the violent crime rate in Washington in 1993 was exceeded only by Atlanta, Miami, St. Louis, and Baltimore. *See id.*

64. *See* BOOZ-ALLEN & HAMILTON INC., BASELINE REPORT: CRIME FIGHTING EFFORTS IN THE DISTRICT OF COLUMBIA, III-1 (1997) (prepared for District of Columbia Financial Responsibility

On February 26, 1997, the Authority issued the *Resolution, Order and Recommendation Concerning the Metropolitan Police Department* ("MPD Resolution") as the first step toward reforming the Metropolitan Police Department.[65] The findings accompanying the MPD Resolution expose significant management weaknesses in the department.[66] The study identified the absence of a consistent law-enforcement strategy, poor internal organization, and a police chief who was not "empowered to take the necessary steps for both immediate and long-run reduction of crime and the fear of crime," as significant factors contributing to poor performance.[67]

E. District of Columbia Public Schools

Cited by many former D.C. citizens as the primary reason for leaving the District,[68] Washington's troubled public schools have been plagued with hundreds of fire code violations, school closures, and poor educational opportunities.[69] A recent comprehensive study of the D.C. Public Schools, undertaken by the Authority, found that although the District spends more per student than any other school district in the country, save Newark, New Jersey, students' performance on standardized tests is well below the national average.[70]

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and Management Assistance Authority). Increases in individual crime statistics for the District of Columbia from 1985-1996 are even more striking: Homicide-169%; Robbery-50%; Assault-39%; Burglary-13%; Theft-33%; Motor Vehicle Theft-98%. *See id.*

65. District of Columbia Financial Responsibility and Management Assistance Authority, *Resolution, Order and Recommendations Concerning the Metropolitan Police Department*, Feb. 26, 1997 [hereinafter *MPD Resolution*].

66. The Authority's findings were based on a report generated by the consulting firm of Booz-Allen & Hamilton. *See supra* note 64. The Authority contracted with Booz-Allen to perform a thorough review of MPD operations, incorporating the firm's subsequent recommendations into the MPD Resolution. *See MPD Resolution, supra* note 65, at 2.

67. *See id.*

68. In a June 1997 survey of District residents' opinion of twenty-seven government services, the quality of D.C.'s public schools ranked twenty-six, with 55% of those surveyed rating the public schools as poor or very poor. *See* BELDEN & RUSSONELLO RESEARCH AND COMMUNICATIONS, WASHINGTON, D.C. RESIDENTS STUDY: RESEARCH FINDINGS OF A CITYWIDE SURVEY FOR THE DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY 18, 120 (1997) (providing statistical analysis of District residents' responses to questions regarding city services). Street repair and maintenance ranked last. *See id.* at 18.

69. Indeed, according to a 1996 report issued by the Authority, the District of Columbia Public Schools did not know how many persons it employed. *See* DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY, CHILDREN IN CRISIS: A REPORT ON THE FAILURE OF D.C.'S PUBLIC SCHOOLS 21 (1996) (providing detailed analysis of District of Columbia Public Schools' ("DCPS") financial, management, and educational failings).

70. This is also true when the performance of District students is compared with students from school districts of similar demographic compositions. For example, the average composite SAT score for DCPS students in 1995 was 717, as contrasted with Baltimore (723) and Philadelphia (740). DCPS students also scored short of the national average (910), and even more striking, more then 200 points below the average of neighboring school districts (993). *See id.* at *Statistics, Facts and Figures Page 6* (providing graphical comparison of DCPS SAT scores with

III. THE D.C. FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE ACT

On April 17, 1995, President Clinton signed the District of Columbia Financial Responsibility and Management Assistance Act ("DCFRA"),[71] creating the "strongest financial oversight authority in our Nation's history."[72] It was clear that Congress' patience with the District of Columbia had reached an end: "The problems this legislation is designed to alleviate now approach horrendous proportions. The District of Columbia ("The City") is facing its worst crisis in over a century. Every Member of Congress is familiar with The City's financial woes. Many Americans know of its severity."[73]

With the DCFRA, Congress intended to create a financial control board that would undertake "[a] comprehensive approach to fiscal, management, and structural problems . . . which exempts no part of the District government."[74] This section examines the functions and powers Congress provided to the Authority in order that it may undertake this "comprehensive approach" to management reform. This section also examines the primary legal challenge made to Authority action under the original DCFRA.

A. Structure of the Authority

The Authority consists of a board of five presidentially-appointed individuals, including a chairperson, who serve without pay for three-year terms.[75] The DCFRA empowers the Authority and its staff[76] only during "control periods."[77] At all other times, the Authority lies in a

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those from districts around country).

71. DCFRA, Pub. L. No. 104-8, 109 Stat. 97 (1995).

72. 141 CONG. REC. H4066 (daily ed. Apr. 3, 1995) (statement by Mr. Davis). Congress examined other Control Boards that exist or have existed in several other cities and states. *See* H.R. REP. NO. 104-96, at 19-22 (1995) (describing experiences of Cleveland, New York City, Yonkers (N.Y.), Philadelphia, and the Chicago School District with financial control boards).

73. H.R. REP. NO. 104-96, at 4.

74. DCFRA, Pub. L. No. 104-8, § 2(a)(5), 109 Stat. 97, 98 (1995).

75. *See id.* § 101(b)-(d) (discussing terms of authority membership). Following the initial three years, board members' terms become staggered. *See id.* The current board members are: Dr. Andrew F. Brimmer (chairman), Stephen D. Harlan, Edward A. Singletary, Joyce A. Ladner, and Constance B. Newman. *See generally* David A. Vise, *Control Board Chairman Won't Serve Second Term*, WASH. POST, Mar. 21, 1998, at A1 (listing current members and noting Brimmer's and Singletary's intention to step down after current term expires).

76. The staff of the Authority is headed by an Executive Director, appointed by the chair with the approval of the other board members. *See id.* § 102(a). The Executive Director is authorized to appoint additional paid personnel, with approval of the chair. *See id.* § 102(b). The current staff of the Authority numbers approximately thirty-five, and includes an assistant Executive Director, Chief Financial Officer, four lawyers (including the General Counsel), Media Coordinator, and support personnel.

77. *See id.* § 209(b)(1); *see also infra* Part V.A.3 (providing recommendations concerning the Sunset Clause in the DCFRA).

dormant state, allowing the local government established by the Home Rule Act to proceed normally.[78] A control period was deemed to exist upon enactment of the DCFRA, and will continue until the District's budget is balanced for four consecutive years and the District has access to short and long-term credit markets at "reasonable" interest rates.[79]

As described above, Congress intended the Authority to investigate, and if necessary, reform, nearly every aspect of the District's municipal government.[80] The essence of this power lies in the Authority's ability to review and approve all legislation passed by the Council,[81] issue recommendations to the mayor and city council,[82] review and approve all contracts and leases entered into by the City,[83]

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78. A control period is triggered, reactivating the dormant Authority, by any of the following seven events: (1) the Mayor requests an advance from the United States Treasury; (2) the District government fails to contribute sufficiently to a debt service fund established by the Authority; (3) the District government defaults on a payment to any creditor; (4) the District government fails, during any pay period, to meet its payroll; (5) when at the end of a quarter in any fiscal year, the District's estimated expenditures exceed its estimated revenues for the remainder of the fiscal year or the remainder of the fiscal year plus the first six months of the next fiscal year; (6) the District government fails to make the necessary pensions and benefits payments for District employees; and (7) the District government defaults on a payment required as part of an interstate compact. *See* DCFRA § 209(a)(1)-(a)(7) (defining events which initiate a control period).

79. *See id.* § 209(b)(1)(A), (B) (outlining conditions for termination of control period). Determining what is a "reasonable" interest rate to "meet the District's borrowing needs" interjects a subjective element into the determination of whether a control period has ended. Because only two factors are necessary to terminate a control period, and one of them is objective (four consecutive balanced budgets), considerable attention will be focused on the subjective element of "reasonable interest rates" once the objective criteria is met.

Both the Authority and its critics may manipulate the "reasonableness" language in order to accomplish either an extension or an early end to a control period. The statute requires the Authority to make a subjective determination, which may provide the basis for arguing for extending a control period beyond what critics feel is necessary to accomplish the objectives mandated by Congress. Alternatively, critics of the Authority may use the subjective nature of this clause to argue for the early end of a control period after the objective criteria is reached, despite the need for additional management reforms. *See infra* Part V.A.3 (recommending amendment or repeal of DCFRA Sunset Clause provisions).

80. The courts of the District of Columbia, including their officers and employees, are expressly exempted from Authority control. *See* DCFRA § 2(c)(3)-(4).

81. All Acts passed by the Council and either signed by the Mayor, or re-passed by a two-thirds majority after a mayoral veto, are sent to the Authority for review. *See* DCFRA § 203(a)(1). The Authority then has seven days to review the Act and the potential financial impact it will have on the District. *See id.* § 203(a)(5). If the Authority determines the act to be "significantly inconsistent" with the District's financial plan and budget, the Authority will notify the Council of the determination, and the Council is forbidden to send the Act to Congress for final approval. *See id.* § 203(a)(3) (describing process of approval or rejection of Acts); *see also* Home Rule Act, Pub. L. No. 93-198, § 602(c), 87 Stat. 774, 814 (1973) (codified as amended at D.C. CODE ANN. §§ 1-201 to 1-299.7 (1981)) (requiring all Acts passed by Council to be sent to Congress for approval).

82. *See* DCFRA § 207 (describing Authority's power to make recommendations); *infra* Part III.B (discussing extent of Authority's "recommending" power).

83. *See* DCFRA § 203(b)(1), (4) (requiring Authority to approve contracts based on their consistence with District's financial plan and budget, and stating that contracts requiring Council approval actually be approved by Council before being submitted to Authority for final

and review and approve the city budget.[84]

Complementing these powers and responsibilities, the Authority is authorized to enter into contracts,[85] to hold hearings,[86] issue subpoenas,[87] and seek judicial enforcement of its actions.[88] In addition, the DCFRA limits the application of D.C. laws to the Authority to only three sections of the D.C. Code:[89] portions of the D.C. Freedom of Information Act,[90] the Government in the Sunshine Act,[91] and portions of the District of Columbia Campaign Finance Reform and Conflict of Interest Act.[92]

B. The "Recommending Power" Under the Original DCFRA

As described above, Congress intended to create a control board with the authority necessary to effect substantial reform of the District's management structure. The recommending power, described in Section 207 of the DCFRA,[93] constitutes the primary statutory vehicle through which the Authority was able to implement permanent

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approval).

84. Congress must ultimately adopt the budget for the District of Columbia. The process of delivering a budget to Congress, however, is perhaps the most complicated and convoluted of all processes in the District of Columbia. *See id.* §§ 201-202 (describing budget submission process). Essentially, both the Mayor and Council have the opportunity to submit a financial plan and budget to the Authority for certification. If rejected, each may submit a revised plan and budget. If rejected again, each may submit their uncertified plans to Congress. The Authority may also submit its own plan to Congress. This complicated process, remedied to some degree by the D.C. Revitalization Act, discussed *infra* at Part IV, resulted in three budgets being submitted to Congress for approval for fiscal year 1998. *See* Testimony of the Honorable Marion Barry Jr., Mayor, District of Columbia, Before the House Committee on Appropriations Sub-Committee on the District of Columbia, July 16, 1997, *available in* LEXIS, Legis Library, Cngtst File (describing 1997 budget process and reasons for lack of consensus budget); David A. Vise, *D.C. Budget Battle To Go To Congress; City, Control Board Have Competing Plans*, WASH. POST, June 13, 1997, at A1 (citing Washington's loss of credibility in Congress for failure to submit consensus budget); Editorial, *How Not to Write a D.C. Budget*, WASH. POST, June 14, 1997, at A18 (describing D.C.'s complicated budget process).

85. *See* DCFRA § 103(g).

86. *See id.* § 103(a).

87. *See id.* § 103(e)(1).

88. The DCFRA requires any action against the Authority, or action arising from the DCFRA, to be brought in the United States District Court for the District of Columbia. *See id.* § 105(a). In addition, the DCFRA prohibits any injunctive or declaratory relief against the Authority from becoming effective until a final decision is entered in the case, or the opportunity to appeal has expired. *See id.* § 105(c). Mitigating the unavailability of immediate injunctive relief, the DCFRA requires that any action against the Authority be given expedited consideration by the District Court, the U.S. Court of Appeals for the D.C. Circuit, and the United States Supreme Court. *See id.* § 105(d).

89. *See id.* § 108(a) (listing D.C. laws that apply to Authority). This section also prohibits the Mayor or Council from exercising "any control, supervision, oversight, or review over the Authority or its activities." *Id.* § 108(b)(1).

90. D.C. CODE ANN. §§ 1-1521 to 1-1526 (1981).

91. *Id.* § 1-1504.

92. *Id.* § 1-1461.

93. *See* DCFRA § 207.

policy or structural changes in District departments and agencies.[94]

Specifically, the recommending power allows the Authority to identify problem areas and issue recommendations for remedial action to either the Mayor or Council, or directly to the appropriate department of government.[95] The Mayor or Council (whichever has authority over the recommended action) then has ninety days to notify the Authority as to whether the District will adopt or reject the recommendation.[96] If the recommendation is rejected, or approved but not implemented, the Authority is authorized to take whatever action is necessary to implement the recommendation, after consultation with the House Committee on Government Reform and Oversight and the Senate Committee on Government Affairs in Congress.[97] The Authority is thus able to make recommendations and assure their implementation, exercising both legislative and executive power in the District.

The Authority's interpretation of its ability to issue recommendations includes the power to promulgate *orders*, which would be binding on D.C. government agencies, without going through the recommending process delineated in Section 207.[98] The DCFRA and accompanying legislative materials lend some support to this interpretation. The DCFRA refers to "orders" in Section 103(i)(1)(A), which proscribes criminal penalties for violating valid "orders of the Authority."[99] This section does not, however, establish the ability to

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94. As demonstrated by the Lottery Board Order, discussed *infra* at note 98.

95. Section 207 uses broad language to identify the areas of the D.C. government subject to the Authority's recommendations: "The Authority may at any time submit recommendations . . . to ensure compliance by the District government with a financial plan and budget or to otherwise promote the financial stability, management responsibility, and service delivery efficiency of the District government . . . ." DCFRA § 207(a).

96. *See id.* § 207(b)(1).

97. *See id.* § 207(c)(1).

98. This interpretation formed the basis for the Authority's action with regard to the District of Columbia Lottery Board. On September 21, 1996, the Authority issued the *Resolution, Recommendations and Order Concerning the Lottery Board* ("Lottery Board Order"). Citing declining revenue, a loss of public confidence, politicization and factionalization, and possible illegal activity, the Authority issued three recommendations and seven "orders" to the Lottery Board, Mayor, and Chief Financial Officer of the District of Columbia. *See* DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY RESOLUTIONS, RECOMMENDATIONS AND ORDER CONCERNING THE LOTTERY BOARD 2-3 (1996) (outlining findings used in support of Authority's actions).

The recommendations essentially dissolved the Lottery Board and transferred supervision of its operations and personnel to the Office of the Chief Financial Officer. *See id.* at 3-4. The seven "orders" focus on forcing the Lottery Board to reinstate the executive director, whom it had previously dismissed, and to prevent the Board members from destroying office records before the recommendations were implemented. *See id.* at 4-5.

99. *See* DCFRA § 103(i)(1)(A) ("Any officer or employee of the District government who . . . takes any action in violation of any valid order of the Authority or fails or refuses to take any action required by any such order . . . shall be guilty of a misdemeanor.").

issue orders. One must look elsewhere in the DCFRA to determine what type of orders the Authority may issue, the violation of which invokes the penalties described in Section 103(i)(1)(A).[100]

Section 207 itself expressly provides an "ordering power" when Authority recommendations are rejected, allowing the Authority to "take such action concerning [a rejected] recommendation ... it deems appropriate ...."[101] Such action certainly encompasses an "order," but is of limited application since Section 207 grants the Authority this power only after providing the affected D.C. government agency the opportunity to act on its own and after consultation with Congress.[102]

Whether or not an "ordering power" can be inferred from the original DCFRA, Congress clearly intended the Authority, the Mayor, and the Council to work together to solve the City's problems.[103] The House Report accompanying the DCFRA anticipated the cooperation of Washington's elected officials,[104] and provided incentive for the Authority to behave cooperatively in instituting reforms. Tellingly, the DCFRA made it difficult for the Authority to act unilaterally and impose recommendations without giving the Council or Mayor the first opportunity to negotiate a solution.[105]

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100. This Section may, however, presuppose the existence of an ordering authority. The reference to "valid orders of the Authority," combined with the Committee on Government Reform and Oversight's insistence that "the Authority have the power necessary to accomplish the purposes [of the DCFRA]" suggest that an ordering power was intended. *See* H.R. REP. NO. 104-96, at 40 (1995); *infra* note 103 (describing DCFRA drafters' intent that the Authority have "absolute" power to implement its recommendations). *But see infra* note 102 (suggesting that language of legislative history accompanying "Superpowers" amendment indicates the conferral of a *new* ordering power).

101. DCFRA § 207(c)(1).

102. *See supra* text accompanying notes 95-96. The "Superpowers" Amendment, discussed *infra* at Part III.C, expressly grants the Authority the power to issue orders. In conference report accompanying the amendment, the enhancement is described as "providing" the Authority with rule-making power. *See* H.R. REP. NO. 104-863, at 1180 (1996). By using the word "provide," Congress implies the delegation of a power that had not been previously conferred.

103. Although cooperation was important to the drafters of the DCFRA, the legislative history of the DCFRA makes it clear that any dispute between D.C. government agencies or elected officials and the Authority was to be decided in favor of the Authority:

> In the event that there is a stalemate, an impasse between the authority and city government, the bill allows the authority to implement its own recommendations, whether they be executive or legislative in nature. This power is absolute and it is absolutely necessary if the authority is to be effective and have the desired impact on the efficient operation of District government. *This Authority needs to have control. It is our intention that it have control.*

141 CONG. REC. H4068 (daily ed. Apr. 3, 1995) (statement of Mr. Walsh) (emphasis added).

104. *See* H.R. REP. NO. 104-96, at 43 (1995) ("The Committee expects that some of the most important work of the Authority will be in working with the District government to design recommendations ....").

105. The intransigence of D.C.'s local government in instituting financial and management reform weighed heavily on several Congresspersons. They wanted to be certain that, in the event that D.C. officials failed to institute the Authority's recommendations, that the Authority

C. The "Superpowers" Amendment

On September 30, 1996, an amendment to the DCFRA was passed that dramatically increased the Authority's ability to effect management reform in the District.[106] Passed quickly and with no floor debate,[107] the "Superpowers" amendment added a short subsection to Section 207 of the DCFRA:

> [T]he Authority may at any time issue such orders, rules, or regulations as it considers appropriate to carry out the purposes of this Act and the amendments made by this Act, to the extent that the issuance of such an order, rule, or regulation is *within the authority of the Mayor or the head of any department or agency of the District government*, and any such order, rule, or regulation shall be legally binding to the same extent as if issued by the Mayor or the head of any such department or agency.[108]

The new Section 207(d)(1) allows the Authority to "stand in the shoes" of the Mayor or any department or agency head and issue any

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would have full *executive and legislative* powers to institute them. Thus, there was the following exchange between Senators William V. Roth and William S. Cohen regarding the Section 207 recommending powers:

> Mr. Roth: I have been concerned that the bill does not make clear our intent that the [Authority] will have sufficient authority to ensure that its recommendations are adopted. I have thought that such authority should be expressly stated in the statute, in order to leave no ambiguity in enacting section 207. Is it the Senator's belief that the intention of Congress is sufficiently clear, nonetheless, that the Authority may implement any recommendations it has made to the Mayor or Council, but were rejected?
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> . . . .
>
> Mr. Cohen: Yes it is. [I]t is clearly the intent of this section to give the Authority as broad a range of *legislative, executive, and administrative powers as the Mayor and Council possess*, while expecting that the District government will be given the opportunity to act first.

141 CONG. REC. S5517 (daily ed. Apr. 6, 1995) (statements of Sens. Roth and Cohen) (emphasis added). Seeking approval of the House Committee on Government Reform and Oversight as well as the Senate Committee on Government Affairs would likely take time, perhaps more time, Congress hoped, then simply negotiating with the District's elected officials to reach a compromise on the proposed recommendation.

106. *See* Omnibus Appropriations Act, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. (110 Stat.) 3009-500 (1996).

107. Discussion of this dramatic increase in the Authority's power is limited to one sentence in the Conference Report accompanying Public Law 104-208:

> Subsection (f) provides the control board with rule-making authority to carry out the purposes of Public Law 104-8 and waives all judicial review as to the authority of the control board to issue orders, rules, or regulations but does not waive judicial review as to the content of the orders, rules, or regulations.

H.R. REP. NO. 104-863, at 1182 (1996); *see also* Shook v. District of Columbia Fin. Responsibility & Management Assistance Auth., 132 F.3d 775, 778-79 (D.C. Cir. 1998) (interpreting the preclusion of judicial review provision to apply only to the Authority's internal decision making process and not to the content of individual orders).

108. DCFRA § 207, *as amended by* Pub. L. No. 104-208, § 5203, 110 Stat. 3009, 3501-03 (1996) (emphasis added).

orders within their power to issue.[109] The amendment does not, however, provide the Authority with the power to issue orders or perform functions reserved to the Council by the Home Rule Act.[110] For reasons discussed below, this relatively small amendment has shown a great potential for diminishing Home Rule.[111]

1. Authority action concerning the D.C. Board of Education

The Authority's first exercise of its new power occurred on November 15, 1996, when it ordered the transfer of the bulk of the power and responsibilities of the District's elected Board of Education[112] to a new "Emergency Transitional Education Board of Trus-

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109. *See* Pub. L. No. 104-208, § 5203(f), 110 Stat. 3009, 3502 (1996).

110. While the Superpowers amendment provides the Authority with a broad new ability to effect changes in the District, it limits the scope of these orders to those within the authority of the Mayor or other Executive branch agencies to issue. *See* DCFRA § 207(d), *as amended by* Pub. L. No. 104-208, § 5203(f) (1996); *see also* Shook v. District of Columbia Fin. Responsibility & Management Assistance Auth., 132 F.3d 775, 779 (D.C. Cir. 1998) (stating that the authority provided by Section 207(d) to "stand in the Mayor's shoes" does not apply to the D.C. Council).

111. The word "potential" is used because the full power of this amendment has not yet been exercised. The Authority's action with regard to the D.C. public schools, discussed *supra* at Part II.C is the principal action taken thus far by the Authority utilizing this new "ordering power," and resulted in the takeover of the D.C. Public School System. The D.C. Revitalization Act, passed in August, 1997, required the Authority to take over nine additional government agencies, but provided its own statutory basis for the action. *See infra* Part IV (discussing D.C. Revitalization Act).

In the absence of any legislative history expounding on the purpose of the 207(d)(1) amendment, speculation over Congress' motivation for expanding the DCFRA yields two possibilities. First, Congress may have deemed the DCFRA as not providing an "ordering power" other than the Authority's ability to implement rejected recommendations, and recognizing that such an ordering power is necessary for the Authority to carry out its mandate to reform the D.C. government in general, and the public schools in particular. The legislation accompanying the 207(d)(1) amendment in Public Law 104-208 also transfers approximately $40,700,000 to the Authority to be used for improving public school facilities. *See* Pub. L. No. 104-208, § 5201 (1996); *see also* H.R. REP. NO. 104-863, at 1178 (1996) (describing conferees intention that Authority manage funds allocated for facilities improvement). Congress may have felt the ordering power necessary to ensure the Authority's ability to institute rapid changes in the public schools and other parts of the government, without relying on the lengthy process of issuing recommendations.

The second possible explanation for the expansion of the DCFRA is that Congress was merely clarifying a power it intended the Authority to have under the original DCFRA. Clearly this is the position the Authority takes, as demonstrated by its pre-207(d)(1) Lottery Board Order. Coincidentally, the Lottery Board Order was issued on September 21, 1996, just nine days before the 207(d)(1) amendment was passed. Presumably, a new order by the Authority, citing its new 207(d)(1) ordering ability as the basis for the same action as taken by the *Lottery Board Order*, would render moot any argument that the Authority acted *ultra vires*.

112. The Home Rule Act provides for an eleven-member board of education to be elected on a non-partisan basis. *See* Home Rule Act, Pub. L. No. 93-198, § 495, 87 Stat. 774 (1973) (codified as amended at D.C. CODE ANN. §§ 1-201 to 1-299.7 (1981)). The Home Rule Act also provides for a layer of insulation separating the Board of Education from the new municipal agencies, departments, and officials; Congress designated the Board of Education an "independent agency," thus preventing Mayoral or Council intrusions in this area. *See id.*

The D.C. Code defines an independent agency as "any agency of the government of the District with respect to which the Mayor and the Council are not authorized by law, other than this

tees" ("Board of Trustees").[113] Although it surfaced strong emotions from D.C. community activists, the Authority's action was initially upheld as a legitimate exercise of its statutory authority in *Shook v. District of Columbia Financial Responsibility and Management Assistance Authority.*[114]

On appeal, the D.C. Circuit also recognized the sweeping powers Congress had granted the Authority in Section 207(d)(1).[115] In a blow that was more political than substantive,[116] the Court rejected a portion of the reasoning used by the Authority[117] to effectuate the transfer of power from the elected Board of Education to the new Board of Trustees.[118] Because these opinions are likely to impact future Authority actions,[119] the School Board Order and the *Shook* challenge will be discussed in detail.

a. The Authority's mandate in education

The Authority's mandate to reform the District of Columbia Public Schools emanates from the DCFRA and the reports accompanying both the DCFRA and the Superpowers amendment. Both reports refer directly to the chronic problems in the District's schools, and both anticipate that their accompanying legislation will allow the

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subchapter, to establish administrative procedures." D.C. CODE ANN. § 1-1502(5) (1981).

Four other District agencies were so designated: the Zoning Commission, the Armory Board, the Public Service Commission, and the Board of Elections and Ethics. *See* Home Rule Act §§ 491-495.

113. *See* DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY, RESOLUTION, ORDER AND RECOMMENDATION CONCERNING DISTRICT OF COLUMBIA PUBLIC SCHOOL SYSTEM 10 (1996) [hereinafter SCHOOL BOARD ORDER] (limiting functions of Board of Education to providing "input, advice, counsel and guidance" on matters of education in District).

The same day, members of the District of Columbia Board of Education sought a Temporary Restraining Order ("TRO") from the United States District Court for the District of Columbia to enjoin the Authority from taking any action affecting the "structure or responsibilities of the Board of Education." Shook v. District of Columbia Fin. Responsibility and Management Assistance Auth., 964 F. Supp. 416, 419 (D.D.C. 1997), *aff'd in part and rev'd in part*, 132 F.3d 775 (D.C. Cir. 1998). The TRO was rejected. *See* Order Denying Temporary Restraining Order, *Shook*, 964 F. Supp. 416 (D.D.C. 1996) (No. 96-2601) (denying Plaintiffs' request for TRO).

114. 964 F. Supp. 416 (D.D.C. 1997).

115. *See infra* Parts III.C.1, III.C.2 (describing D.C. Circuit opinion).

116. The plaintiffs in *Shook* made much of the partial reversal of Judge Kessler's decision in the District Court. The D.C. Circuit opinion leaves unquestioned, however, the Authority's ability to run the schools. *See infra* Part III.C.2.b (describing structural changes in public schools implemented as a result of the *Shook* decision).

117. *See infra* note 131 (describing process used by the Authority to create the "Emergency Transitional Education Board of Trustees" ("Board of Trustees"), and to empower the Board with the powers and responsibilities of the elected Board of Education).

118. *See infra* Part III.C.2.a (discussing D.C. Circuit's decision in *Shook*).

119. No additional departments or agencies have been taken over by the Authority under its 207(d)(1) ordering power. This inaction, as discussed *infra* at notes 170-72 and accompanying text, was one of the reasons Congress passed the D.C. Revitalization Act, which forced the Authority to take over most of the District government.

Authority to address those problems.[120]

In furtherance of this mandate, the Authority performed a bottom-up review of the D.C. Public School System.[121] Wielding the results of the study as support for its impending action,[122] the Authority announced on November 15, 1996, that it was replacing the existing superintendent[123] with a "CEO-Superintendent"[124] and appointing the Board of Trustees.[125] The new Board of Trustees would exercise most of the authority then possessed by the elected Board of Education for an "emergency" period ending June 30, 2000.[126]

b. Mechanics of the School Board Order

The structure of the School Board Order is significant because it could serve as a template for future Authority takeovers or restructurings. Indeed, the legal reasoning used by the Authority to achieve the desired power structure in the D.C. public schools was strongly ratified by the U.S. District Court in *Shook v. District of Columbia Financial Responsibility and Management Assistance Authority.*[127] On appeal,

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120. *See* DCFRA, Pub. L. No. 104-8, § 2(a)(2), 109 Stat. 97, 98 (1995) (describing District's failure to provide a decent education for its citizens); H.R. REP. NO. 104-96, at 38-39 (1995) ("The Committee fully intends that the Authority will carefully examine the operation of the School Board and include it in the necessary actions to solve the District's budget, fiscal, and management problems."); H.R. REP. NO. 104-863, at 1178 (1996) (expressing desire of conferees that "strong and immediate action" be taken in public schools); *see also* SCHOOL BOARD ORDER, *supra* note 113, at 1-5 (relating abysmal conditions in public schools as findings which support the Authority's action).

121. The information gathered by the Authority was assembled into a scathing report on D.C. public schools. The report, *Children in Crisis: A Report on the Failure of D.C.'s Public Schools,* was made public in November, 1995. *See* Shook v. District of Columbia Fin. Responsibility & Management Assistance Auth., 964 F. Supp. 416, 420 (D.D.C. 1997) (discussing issuance of this report).

122. The School Board Order cites the findings of *Children in Crisis* extensively as support for its action. *See* SCHOOL BOARD ORDER, *supra* note 113, at 1-4 (relating findings of poor educational opportunities and substandard learning environments for children in D.C. public schools).

123. *See* Pub. L. No. 104-208, § 5204(a) (1996) (providing the Authority with power to declare any District employee's services "no longer required").

124. *See* SCHOOL BOARD ORDER, *supra* note 113, at 7. The CEO-Superintendent was identified as an agent of the Authority and a member of the Board of Trustees. *See id.*

125. *See id.* at 5-6.

126. *See id.* at 6 (identifying length of the "emergency" period). The School Board Order requires that the nine-member Board of Trustees consist of five appointees of the Authority, an appointee of the Authority chosen from a list of three parents of school children submitted by the Mayor, an appointee of the Authority chosen from a list of three teachers in the D.C. public schools submitted by the Council, the CEO-Superintendent, and the President of the D.C. Board of Education. *See id.* at 5-6. Thus, eight of the nine members of the Board of Trustees were to be selected by the Authority.

The elected Board of Education retained authority over the District's charter schools, and the ability to provide "input, advice, counsel, guidance, reports and recommendations on general educational policy." *Id.* at 10 (designating Board of Education as an "eligible chartering authority for Public Charter Schools" and listing other functions).

127. 964 F. Supp. 416 (D.D.C. 1997).

the D.C. Circuit largely affirmed the District Court, recognizing Congress' intent that the Authority have the "extraordinary" power necessary to remedy the various crises in the public schools.[128]

For the Authority to accomplish the objectives set out in the School Board Order it had to establish its ability to issue orders to independent agencies.[129] The Authority argued that the term "agency" as used in the text of the 207(d)(1) amendment encompasses any sub-category of agency, including *independent agencies.* The U.S. Court of Appeals for the D.C. Circuit affirmed the District Court's acceptance of this argument in *Shook.*[130]

After establishing its statutory authority to issue orders to the Board of Education, the Authority performed a series of power delegations designed to reallocate responsibility for the public schools to the new Board of Trustees and CEO-Superintendent.[131] The resulting fully-empowered Board of Trustees had the necessary power, the

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128. *See* Shook v. District of Columbia Fin. Responsibility & Management Assistance Auth., 132 F.3d 775, 790 (D.C. Cir. 1998). While the D.C. Circuit rejects a portion of the delegation process used by the Authority, its opinion appears to contain significant legal and factual errors, indicating that it is likely to be narrowly construed and eventually, distinguished into oblivion. *See, e.g.,* D.C. Lottery Board Chairman v. District of Columbia Fin. Responsibility & Management Assistance Auth., No. 96-2273 (D.D.C. Feb. 11, 1998) (order denying preliminary injunction) (refusing to declare an Authority order overruling a Lottery Board decision *ultra vires* in light of *Shook*); *see also infra* Part III.C for a discussion of the D.C. Circuit's opinion in *Shook.*

129. *See supra* note 112 (listing other independent agencies).

130. *See Shook,* 132 F.3d at 787-90 (recognizing Congress' intent that the Authority's 207(d) power encompass independent agencies, and stating that if Congress intended to exempt independent agencies from Authority orders it could have so stated). Section 207(d)(1) allows the Authority to issue any order that the head of any *agency* is capable of issuing, and states that such an order is binding on that agency. *See supra* text accompanying note 108 (citing Superpower amendment).

131. To create the new Board of Trustees and CEO-Superintendent position, and vest them with much of the power of the elected Board of Education, the Authority relied on D.C. Code § 31-107. This Section allows the Board of Education to delegate *any* of its authority to the Superintendent, and the Superintendent is permitted to re-delegate *any* of his or her authority granted by the Board of Education. The Authority, interpreting *any* to include *all,* ordered the Board of Education to delegate most of its authority to the Superintendent, and from the Superintendent to the new Board of Trustees: "[T]he authority of the Board of Education shall be delegated to the Board of Trustees *through and pursuant to* D.C. Code Section 31-107." SCHOOL BOARD ORDER, *supra* note 113, at 7 (emphasis added).

Although the wording in the School Board Order is not explicit in its description of the delegation process, the Order's reference to D.C. Code § 31-107 and the words "through and pursuant to" are clearly intended to refer the legal-minded reader to the appropriate source of authority. At least the District Court in *Shook* followed the Authority's reasoning. After explaining the series of delegations necessary to accomplish the Authority's intended result, the Court held, "the delegation, when undertaken by the Control Board, standing in the Board of Education's shoes, must also be lawful under [DCFRA] section 207(d)." *Shook,* 964 F. Supp. at 429. *But see Shook,* 132 F.3d at 783 (stating that if the intent of the Authority was to transfer authority from the Board of Education to the Board of Trustees *through* the Superintendent, then the School Board Order was "not phrased in appropriate terms."). On appeal, however, the D.C. Circuit took a different view of some of these delegations. *See supra* Part III.C (discussing D.C. Circuit's opinion).

Authority believed, to undertake substantive reforms aimed at fixing the public school system, subject to the supervision of the Authority.[132]

2. *The* Shook *case and future Authority actions*

a. *The D.C. Circuit's opinion in* Shook

As described above, the School Board Order created a new Temporary Emergency Education Board of Trustees, vesting its members with the bulk of the elected Board of Education's powers. To accomplish the necessary delegation of authority, the Authority "stood in the shoes" of the Board of Education and, pursuant to D.C. Code § 31-107, delegated its powers and responsibilities to the new Board of Trustees.[133]

Although the language of the School Board Order is not explicit on whether the Authority contemplated a direct delegation of power from the elected Board to the Board of Trustees or a delegation in which the necessary authority passes through the Superintendent,[134] the D.C. Circuit rejected both scenarios.[135] The court stated that the Authority's delegation scheme violated "the structure that Congress created to run the D.C. schools."[136] Herein lies the fundamental error permeating much of the opinion: *Congress did not create this structure.* The portion of D.C. Code § 31-107 dealing with delegation of authority does not originate from an Act of Congress, as the opinion states, but an Act of the Council of the District of Columbia.[137]

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132. The School Board Order required the Board of Trustees to report to the Authority with respect to:

> [i]ts activities and performance, the nature of the reforms which it has instituted, the effect these reforms have had [on] the operation and administration of the public school system and the performance of students, teachers, and staff of the public school system, and on such other matters as the Authority or the Board of Trustees deem necessary or appropriate to help assure continuing improvement in the public school system.

SCHOOL BOARD ORDER, *supra* note 113, at 9. The School Board Order expressly designates the Board of Trustees "as agents of the Authority." *Id.* at 5.

133. D.C. Code § 31-107 states, in pertinent part: "The Board of Education is authorized to delegate any of its authority to the Superintendent. The Superintendent is authorized to redelegate any of his or her authority subject to the approval of the Board."

134. The Authority argued in *Shook* that although D.C. Code § 31-107 does not expressly permit delegation from the Board of Education directly to a third party, the statute should not be read as *prohibiting* it. *See Shook*, 132 F.3d at 782.

135. Despite the D.C. Circuit's difficulty determining the Authority's intended pattern of delegation, it would seem that the School Board Order's invocation of § 31-107 indicates a delegation in which authority passes through the Superintendent to the Board of Trustees; the statute expressly allows for this type of delegation. A direct delegation would be outside the scope of § 31-107, thereby rendering its invocation in the School Board Order meaningless.

136. *Id.* at 782-83.

137. D.C. Code § 31-107 amends two Acts of Congress dealing with D.C. public schools. *See*

The portion of the *Shook* opinion dealing with the Authority's delegation to the Board of Trustees is largely based on its interpretation of a local D.C. Act mistakenly given the weight of an Act of Congress. Because the District Court interpreted the statute as a matter of first impression, and the D.C. Circuit chose to disregard this interpretation, a better course would have been to certify the issue to the D.C. Court of Appeals for clarification.[138]

The misclassification of D.C. Code § 31-107 as an Act of Congress is significant because the Court interprets the Authority's delegation as "inconsistent with congressional intent."[139] In fact, the only *congressional* intent implicated by the Authority's delegation is found in the legislative history cited by the Court, which emphasizes Congress' desire that the Authority reform the school system.[140]

In short, the D.C. Circuit's opinion is based in part on a false premise regarding the origin of D.C. Code § 31-107.[141] If the Court disagreed with the District Court's interpretation, the matter could have been certified to the appropriate local court with the expertise to render an official interpretation. As it stands, the Court's opinion

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Act of June 20, 1906, 34 Stat. 317, ch. 3446, § 3 (providing Superintendent with authority over "all matters pertaining to the instruction in all schools under the Board of Education"), *as amended by* Act of April 22, 1968, 82 Stat. 102. The D.C. Council's modification of those Acts contains the first provision regarding delegation of authority. *See* D.C. Law 2-139 § 3204(h), 25 D.C. Reg. 5740, 6056 (1978). The § 31-107 provision permitting the Superintendent to delegate authority received from the Board of Education is not an Act of Congress. As stated above, this error is repeated throughout the opinion and clearly affects the legal reasoning on which the Court bases its rejection of the Authority's delegation to the Board of Trustees: "It is unlikely that *Congress drafted section 31-107* to reassure doubters that a Superintendent could indeed be the beneficiary of some general power of delegation possessed by the Board of Education . . . ."; "*[C]ongress provided* that the Board of Education could delegate to its subordinate executive, the Superintendent"; "[i]t would be unusual, if not unprecedented, for *Congress to authorize* the Board of Education to delegate its own governing authority . . . to another outside multi-member body"; "The Control Board's notion is inconsistent with the hierarchical framework *Congress provided.*" *Shook*, 132 F.3d at 782-83 (emphasis added).

138. *See* D.C. CODE § 11-723(a) (1981) (allowing certification to D.C. Court of Appeals from U.S. Courts of Appeals when the certified question of law may be "determinative of the cause pending in such certifying court" and there is no controlling precedent in the D.C. Court of Appeals).

139. *Shook*, 132 F.3d at 783.

140. *See id.* at 781 ("We think the Control Board can, by using section 207(d), assume any or all of the Board of Education's powers, and once it does so it surely 'occupies the field.'"); *see also supra* note 121 (citing legislative history indicating Congress' intent that the Authority take immediate action to reform the D.C. public schools).

141. *See Shook*, 132 F.3d at 781-82. The Court also found the Authority's dismissal of the Superintendent to be "contrary to law": "For one thing, the Control Board, acting in the stead of the Board of Education, summarily fired the Superintendent without even mentioning a cause as required by section 31-110." *Id.* The Court presumes that the Authority was "acting in the stead of the Board of Education" when the Superintendent was fired. The School Board Order clearly states, however, that the Authority determined that the "services and employment" of the Superintendent were "no longer required" pursuant to Section 5024(a) of Public Law 104-208. Needless to say, Section 5024(a) does not require the Authority to state a "cause" before taking this action. *See* Pub. L. No. 104-208, § 5024(a) (1997).

is at war with itself. The Court recognizes Congress' intent that the Authority have the "extraordinary" power necessary to remedy the various crises in the public schools.[142] The Court also recognizes that the Home Rule Act can be "modified either expressly or impliedly by Congress," and indeed identifies implied modifications to the Act necessary for the "ordering power" to have the effect Congress intended.[143] Yet when the Authority delegated the Board of Education's responsibilities to the Board of Trustees vis-à-vis the Superintendent, the Court rejects the transfer on the grounds that the "organizational structure" envisioned by Congress (actually the D.C. Council) was violated.[144]

*b. Authority action post-*Shook

On February 12, 1998, the Authority issued the Second Resolution and Order Concerning District of Columbia Public School System ("Revised School Board Order").[145] The new Order states openly that its issuance was predicated by the D.C. Circuit decision and is an attempt to "effectuate the decision of the panel."[146] The Revised School Board Order makes two significant changes from the original. First, the Authority assumed "all the authority, powers, functions, duties, responsibilities, exemptions, and immunities of the Board of Education."[147] Under the original School Board Order, the Board of Trustees assumed responsibility "for the operation and management of the District of Columbia school system."[148] The second and most significant modification made by the revised order assigns the Board of Trustees the task of making recommendations to the Authority.[149] The new order states that "great weight" shall be accorded recom-

142. *Shook*, 132 F.3d at 784 (rejecting appellants' argument that takeover of the school system jeopardizes the structure established by Congress in the Home Rule Act).

143. *See id.* at 780.

144. *See id.* at 783. As for Congress' actual intent, the legislative history accompanying Section 207(d)(1) anticipates a broad interpretation, at least an interpretation that would allow a reform of the District's public schools. *See supra* note 130 (describing intended extent of the 207(d)(1) amendment's authority); *supra* note 121 (setting out Congressional intent for Authority action in the public schools); *see also* Associated Gen'l Contractors v. California State Council of Carpenters, 459 U.S. 519, 530 (1983), *quoted in Shook*, 964 F. Supp. at 425 ("A proper interpretation of the section cannot . . . ignore the larger context in which the entire statute was debated."); Tataranowicz v. Sullivan, 959 F.2d 268, 276 (D.C. Cir. 1992) (stating that Congress' intentions for statute are understood only after examining context in which it was enacted).

145. DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY, SECOND RESOLUTION AND ORDER CONCERNING DISTRICT OF COLUMBIA PUBLIC SCHOOL SYSTEM (1998) [hereinafter REVISED SCHOOL BOARD ORDER].

146. *See id.* at 1.

147. *See id.* at 2.

148. *See* SCHOOL BOARD ORDER, *supra* note 113, at 5.

149. *See* REVISED SCHOOL BOARD ORDER, *supra* note 145, at 2.

mendations from the Board of Trustees and that the current composition of the Board would remain the same.[150]

These two significant changes bring the Authority's School Board Order into compliance with the D.C. Circuit opinion in *Shook*. Indeed, the *Shook* court expressly recommended this type of arrangement.

> The Control Board might wish to call upon others in the community to provide advice as to the Control Board's exercise of its authority over the D.C. schools. It may wish to use a body with the prestige and expertise of the Board of Trustees to fill that role, reconstituted perhaps as an advisory board charged with recommending certain actions and policies to the Control Board.[151]

Prior to the Court's decision in *Shook*, the Authority potentially could have drastically altered the structure of the District of Columbia, even establishing a City Manager form of government and severely limiting the Mayor's authority. The D.C. Code provides the Mayor with the power to delegate *any* of his or her responsibilities or powers to any director of an Executive agency or office.[152] Thus, the Authority could have issued an order delegating the bulk of the Mayor's authority to a new Office of the City Manager, designated as an "executive agency," which would report only to the Authority.[153] Despite the *Shook* opinion's apparent aversion to Authority delegations of power to third parties, the opinion, for reasons stated above, will probably be interpreted narrowly so as to apply only to the D.C. public schools.[154]

Although the Superpowers amendment provides the Authority with enormous power to require changes in the District, it does not go as far as it could have. The amendment continues to require the Authority to utilize its recommending powers to implement changes in areas under Council control. In addition, the amendment does not *require* the ordering power to be used.[155] The Authority is free to

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150. *See id.*

151. *Shook*, 132 F.3d at 784.

152. The D.C. Code states that the Mayor may delegate any of his or her authority, with the exception of the responsibility for signing/vetoing legislation passed by the Council and approving contracts between the District and the federal government. *See* D.C. CODE § 1-422 (1981 & Supp. 1997) (setting out powers and responsibilities of the Mayor). Both of these excepted responsibilities, however, were already subject to Authority oversight. *See supra* notes 81, 83 (citing Authority's responsibility to approve all legislation and contracts entered into by District of Columbia).

153. The D.C. Revitalization Act, discussed *infra* at Part IV, provides for essentially the same Authority control.

154. *See supra* III.C.2.a and accompanying text (analyzing *Shook* opinion and its impact on other Authority actions).

155. The D.C. Revitalization Act, discussed *infra* at Part IV, *required* immediate Authority

use it as leverage, however, by motivating District officials to implement reforms that, absent the threat of receiving an order, they might be reluctant to act on.[156]

IV. THE 1997 DISTRICT OF COLUMBIA REVITALIZATION ACT

Widely proclaimed by D.C. Mayor Marion Barry as "the rape of democracy,"[157] the National Capital Revitalization and Self-Government Improvement Act of 1997[158] was signed into law by President Clinton around noon on April 5, 1997. Approximately two hours later, the Authority held a public meeting announcing the D.C. Revitalization Act's immediate implementation.[159]

A. Overview of the D.C. Revitalization Act

At just under 100 pages, the D.C. Revitalization Act relieves the District government of significant financial obligations, but also re-

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action.

156. After the School Board Order and the decision upholding its application in most circumstances, *Shook v. District of Columbia Fin. Responsibility and Management Assistance Auth.*, 132 F.3d 775 (D.C. Cir. 1998), it was clear that the Mayor and heads of D.C. departments and agencies could be ordered to comply with the Authority's reform efforts. Prior to 207(d)(1), the Mayor could virtually ignore Authority recommendations, knowing that it would be at least ninety days before the Authority could go to Congress seeking approval to take action on its own.

On February 26, 1997, a new spirit of cooperation appeared to overcome the Mayor as he voluntarily relinquished control over the Metropolitan Police Department. *See* MARION BARRY, JR., OFFICE OF THE MAYOR OF THE DISTRICT OF COLUMBIA, DELEGATION OF PERSONNEL AUTHORITY IN THE METROPOLITAN POLICE DEPARTMENT TO THE CHIEF OF POLICE, MAYOR'S ORDER 97-43 (1997) (providing Chief of Police with control over promotions and disciplinary action in MPD); *MPD Resolution*, *supra* note 65, at 3 (delegating to MPD Chief of Police the power to request that the Authority terminate those officers whose "employment was no longer needed").

157. *See supra* note 14 and accompanying text. After initially calling the Act "a big win for the District," D.C.'s non-voting delegate to the House of Representatives, Eleanor Holmes Norton, later retracted that statement and has denounced the legislation. *See* Patricia F. Eaton, *Shame and Blame; Get a Grip, Eleanor: Your Stand on Home Rule Was Right the First Time*, WASH. POST, Aug. 17, 1997, at C1 (suggesting that many D.C. residents were pleased to see Norton's initial support for D.C. Revitalization Act); Eleanor Holmes Norton, Editorial, *The Loss is Personal*, WASH. POST, Aug. 27, 1997, at A19 (explaining her change of position on D.C. Revitalization Act).

158. D.C. Revitalization Act, Pub. L. No. 105-33, 111 Stat. 251 (1997).

159. *See* DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY, ORDER OF AUGUST 5, 1997 (implementing National Capital Revitalization and Self-Government Improvement Act of 1997). The announcement was made in a public meeting held near the Authority's offices. Present were several dozen protesters who heckled Authority Chairman Dr. Andrew F. Brimmer as he read his prepared statement. Eventually, a large group of protesters stormed the stage and had to be dispersed by several dozen officers of the Metropolitan Police Department. The meeting ultimately adjourned early after a bomb threat was received. *See* Transcript, *Public Meeting of the District of Columbia Financial Responsibility and Management Assistance Authority*, Aug. 5, 1997, at 3-5, 28 (recording numerous interruptions and disruptions of meeting); Hamil R. Harris, *Home Rule Activists Disrupt Control Board Meeting*, WASH. POST, Aug. 6, 1997, at A6 (reporting disruptions and arrests at public meeting).

lieves its elected leaders of control over a large portion of the District government.

Subtitle B[160] of the D.C. Revitalization Plan, titled "District of Columbia Management Reform Act of 1997,"[161] subjects nine departments of the government to a new reform system.[162] The system required the Authority to contract with private consultants within ninety days to develop "management reform plans" for each of the nine departments.[163] For each management reform plan developed by the consultants, a "management reform team" was created to coordinate its implementation through the individual department

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160. In addition to subtitle B, described in the text, the D.C. Revitalization Act contains seven other subtitles. Each makes substantial changes to either the structure or financial obligations of the District government.

Subtitle A, the "District of Columbia Retirement Protection Act of 1997," relieves the D.C. government of nearly $4.8 billion in unfunded pension liabilities for police officers, firefighters, teachers and judges. *See* D.C. Revitalization Act §§ 11001-11002.

Subtitle C, titled "Criminal Justice," will transfer responsibility for the District's sentenced felons to the federal Bureau of Prisons, close the Lorton Correctional Complex, and requires at least 50% of the District's sentenced felons to be housed in private correctional institutions by September 30, 2003. *See id.* § 11201. Subtitle C also transfers financing of the local D.C. court system to the federal government. *See id.* §§ 11241-11242.

Subtitle D, "Privatization of Tax Collection and Administration," authorizes the Chief Financial Officer of the District to enter into private contracts for tax collection. *See id.* § 11302.

Subtitle E, "Financing of District of Columbia Accumulated Deficit," provides the District with access to intermediate-term advances from the U.S. Treasury for the purpose of liquidating the District's accumulated operating deficit. *See id.* §§ 11402-11405; *see also id.* § 602(a) (authorizing advance of funds provided the District has balanced budget by 1998).

Subtitle F, "District of Columbia Bond Financing Improvements," updates the "bond authorization provision" of the Home Rule Act to conform with "changes in the municipal securities marketplace." *See id.* § 11502(1).

Subtitle G, "District of Columbia Government Budget" reduces the annual federal contribution to the District to $190,000,000 for 1998, requires the District to submit a balanced budget for fiscal year 1998, streamlines the process for preparing and submitting an annual budget to Congress, and increases the maximum amount the District is able to borrow. *See id.* §§ 11601-11604.

Subtitle H, "Miscellaneous Provisions," requires the Authority to review all D.C. regulations, permit, and application processes for the purpose of revising or repealing those which "impair economic development or financial stability" in the District of Columbia. *See id.* § 11701(a), (b).

161. *Id.* § 11101.

162. *See id.* § 11102(b). The nine departments are: (1) Administrative Services; (2) Consumer and Regulatory Affairs; (3) Corrections; (4) Employment Services; (5) Fire and Emergency Medical Services; (6) Housing and Community Development; (7) Human Services; (8) Public Works; and (9) Public Health.

Noticeably absent from this list are the Metropolitan Police Department and the D.C. Public Schools. The Authority explained this omission as a recognition that it had already taken action in these areas, e.g., the *MPD Order*, *supra* at 65, and the School Board Order, discussed *supra* at Part III.C.1. *See* Transcript, *Public Meeting of the District of Columbia Financial Responsibility and Management Assistance Authority*, Aug. 5, 1997, at 5 (statement of Chairman Brimmer) (suggesting omission of these two departments was result of Authority's previous efforts).

163. *See* D.C. Revitalization Act § 11103(b). The Act required the private consultants to submit the plans within a maximum of 120 days. *See id.* § 11103(c) (authorizing the Authority to carry out the contracts).

heads.[164] Most importantly, department heads now report to the Authority.[165]

In addition to requiring the development of management reform plans, Congress also changed the appointment procedures for the nine affected department heads.[166] Initially, the Revitalization Act removed the Council from the appointment process, only to partially restore their role in confirming Mayoral nominations in a subsequent Act.[167] The new legislation also specifies that any of the nine department heads may be removed only by the Authority, or by the Mayor with Authority approval.[168]

B. Impact of the D.C. Revitalization Act's Management Reforms

Why did Congress require the takeover of nine D.C. government agencies when the Superpowers amendment potentially provided the necessary authority to effect the same action?[169] Indications of Congress' frustration with the slow pace of the Authority's reform efforts[170] and the continued intransigence of Washington's elected politicians demonstrate an intention on the part of Congress to force the

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164. *See id.* § 11104(a). The management reform teams consist of the Chair of the Authority or designee, the Chair of the Council or designee, the Mayor or designee, and the head of the department involved. *See id.*

165. *See id.* § 11104(b)(3).

166. *See id.* § 11105.

167. Under the Revitalization Act, the Authority submits a recommendation to the Mayor for appointment as head of one of the nine departments of government. *See id.* § 11105(a)(1)(A)(i). The Mayor then nominates an individual, notifies the Council of the nomination, and submits the name to the Authority for approval. *See id.* § 11105(a)(1)(A)(iv). If the Mayor does not make a nomination within thirty days of a vacancy, the Authority can appoint an individual to the position. *See id.* § 11105(a)(1)(B). This process essentially forces the Mayor to submit a name he or she knows will be accepted by the Authority. Otherwise, the process begins again, continuing until the Mayor makes a selection that meets with the Authority's approval. *See id.* The 1998 Appropriations Act for the District of Columbia modifies this process by restoring the Council's ability to approve the Mayor's department head selection. Those nominees confirmed by the Council then must be approved by the Authority. *See* District of Columbia Appropriations Act for 1998, Pub. L. No. 105-100, § 131, 111 Stat. 2160, 2174.

168. The Authority possessed this power prior to the new legislation. *See supra* note 141 (describing Authority's ability under the 207(d)(1) amendments to determine the employment by the District government of any individual "no longer required").

169. The answer to this question may prove pivotal in a future lawsuit against the Authority. Congressional intent, as expressed in the legislative history of the 207(d)(1) amendment, was relied on by the District Court in *Shook* when it affirmed the School Board Order. *See* Shook v. District of Columbia Fin. Responsibility and Management Assistance Auth., 964 F. Supp. 416, 420 (D.D.C. 1997), *aff'd in part, rev'd in part*, 132 F.3d 775 (D.C. Cir. 1998) (citing importance of interpreting statute in light of its accompanying legislative history). Future challenges to Authority action under the D.C. Revitalization Act may be similarly upheld if the legislative history demonstrates Congress' intent that it be interpreted broadly. *But see Shook*, 132 F.3d at 783-84 (rejecting Authority's delegation process despite clear legislative intent that the Authority reform the public schools).

170. *See* Michael Powell & David A. Vise, *A Stern Taskmaster for the District*, WASH. POST, Sept. 17, 1997, at A1 (describing Congressman Taylor's frustration at the "glacial pace of reform [that] would exasperate the patience of Job").

Authority to take more drastic action.[171] Alternatively, Congress may have enacted the D.C. Revitalization Act to provide some degree of legal certainty to the Authority's anticipated restructuring of municipal agencies.[172]

The municipal structure which emerged under the D.C. Revitalization Act was one in which the Authority oversaw the daily operation of the District government through the department heads it approved.[173] The Authority's selection of a "Chief Management Officer" ("CMO")[174] may have relieved the necessity of constant direct contact

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171. The placing of time limits on Authority execution of the Management Reforms indicates Congress' concern that the Authority was "dragging its feet."

172. *See id.* An order from the Authority implementing a City Manager system would have effected the same basic structure as that created by the D.C. Revitalization Act; the heads of the major District departments would report to a "city manager," who would in turn report to the Authority. Such an order would undoubtedly result in a lawsuit, tying up valuable resources. *See, e.g., Shook*, 964 F. Supp. at 427-29 (challenging the Authority's School Board Order); Brewer v. District of Columbia Fin. Responsibility and Management Assistance Auth., 953 F. Supp. 406 (D.D.C. 1997) (challenging the Authority's *Lottery Board Order*); University of the District of Columbia Faculty Assoc. v. Board of Trustees, No. 97-1080, 1998 WL 51198 (D.D.C. Feb. 3, 1998) (challenging Authority's order to cut spending at the University of the District of Columbia). These difficulties could be avoided by an Act of Congress.

173. At a meeting of the new department heads, the Authority distributed a Management Directive, setting out its expectations for the departments and their heads and requiring them to "think innovatively about solutions to management issues." *See* DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY, MANAGEMENT DIRECTIVE NUMBER 97-1, at 1 (1997) (providing first official direction to department heads from their new Authority bosses); *see also* DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY, ORDER OF AUGUST 5, 1997, at 3 (designating all forthcoming Management Directives as having the force of an Authority Order).

A Management Charge to Agency Directors was also distributed at this meeting. Unlike the Management Directive, it lacked the force of an Order of the Authority, but was clearly intended to be taken seriously by the department heads:

> The Authority expects results–not plans; performance–not platitudes. Those individuals accepting this management charge are committing themselves to a reformation in government that the District previously has not experienced. Managers unwilling to accept this challenge—those who believe this is another case of business as usual or who doubt the Authority's seriousness of purpose–should find other employment.

DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY, MANAGEMENT CHARGE TO AGENCY DIRECTORS 1 (distributed Aug. 6, 1997) (on file with *The American University Law Review*).

174. *See* DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY, RECRUITMENT BULLETIN FOR POSITION OF CHIEF MANAGEMENT OFFICER (Oct. 31, 1997). The qualifications and job description for the CMO position are remarkably similar to that of a City Manager. Substituting "Authority" for "Mayor" or "City Council," the following excerpts from the Recruitment Bulletin could be used by any city seeking a City Manager: "Executes the management policies established by the Authority." *Id.* at 1. "Supervises the management reforms and functioning of the nine Departments in a manner that ensures the delivery of high quality services to the public." *Id.* "Provides direction, guidance, and oversight to all strategic planning activities . . . ." *Id.*

The recruitment of an individual with the skills described in the Recruitment Bulletin demonstrates the Authority's recognition that its new responsibilities exceed the expertise of its members and staff; by requiring the Authority to take over the bulk of the District government, Congress effectively converted a financial control board into a fully empowered municipal government.

between Authority Board members, and was certainly the capstone to the District's new governing structure.

In contrast to its effect on the Authority, the D.C. Revitalization Act dramatically reduced the power and influence of the Mayor and Council. As the District's new Chief Executive, the Authority must approve all mayoral actions related to the nine affected departments, converting the office of Mayor into a largely figurehead position.[175]

V. RECOMMENDATIONS

The Superpowers amendment and the D.C. Revitalization Act transformed what was a "financial control board"[176] into a fully-empowered city government.[177] Few municipal functions of any significance are outside the Authority's control, and arguably none are beyond its influence.[178]

The following recommendations acknowledge this arrangement as an exercise of Congress' constitutionally-derived plenary power over the District of Columbia.[179] No opinion is given as to appropriateness; the suggestions are recommended as actions that may be implemented within the current political environment to hasten the District's recovery from its financial and management crises.

On December 22, 1997, the Authority named Camille Cates Barnette as Chief Management Officer. While the appointment of a CMO was a prudent, if not necessary, measure taken in response to the enormous responsibility placed on the Authority's shoulders, it is not expressly provided for in the D.C. Revitalization Act.

175. *See* D.C. Revitalization Act, Pub. L. No. 105-33, § 11104(b)(3), 111 Stat. 251, 732 (1997) (requiring department heads to report to Authority); DISTRICT OF COLUMBIA FINANCIAL RESPONSIBILITY AND MANAGEMENT ASSISTANCE AUTHORITY, ORDER OF AUGUST 5, 1997, at 2 ("All Mayor's orders and administrative issuances . . . must be approved by the Authority prior to issuance."). In addition, as mentioned above, the role of the Council in approving department head nominations was initially eliminated, then partially restored by the 1998 District of Columbia Appropriations Act. *See supra* note 167 (describing partially-restored role in appointment process); D.C. Revitalization Act § 11105(a)(1)(A)(ii) (requiring originally that the Council be notified of Mayor's nominations for appointment).

176. *See* Note, *Missed Opportunity: Urban Fiscal Crises and Financial Control Boards*, 110 HARV. L. REV. 733, 734 (1997) (defining "financial control board" as "any state-created agency established by statute to oversee the financial affairs of a city during a fiscal crisis") [hereinafter *Missed Opportunity*]; *see also supra* note 101 (explaining that original DCFRA envisioned a cooperative effort between the Authority and the District's elected officials to resolve financial and management crises).

177. Although 207(d)(1) allowed the Authority to "stand in the shoes" of the Mayor and department heads, the Revitalization Act forced the Authority to take action that transformed its members into the "Chief Executive Officers" of the District of Columbia. *See* D.C. CODE ANN. § 1-242 (1981) (designating Mayor as Chief Executive Officer of the District).

178. *See* D.C. Revitalization Act § 11102(b) (listing departments now under the Authority's management).

179. *See* U.S. CONST. art. I, § 8, cl. 17.

A. Congress

1. Congressional support for Authority actions

As the governing body ultimately responsible for the District's success or failure, Congress is obligated to provide the Authority with not only the statutory tools to fulfill its mandate, but public support and encouragement for its actions. Public criticism of the Authority by its overseers in Congress[180] merely encourages further intransigence from the City's elected politicians and weakens what legitimacy the Authority possesses. Congressional concerns over Authority action (or inaction) can be effectively communicated in the absence of television cameras and newspaper reporters.

2. Expansion of Authority's ordering power

Congress should amend the Superpowers amendment to allow the Authority to "stand in the shoes" of not only the mayor, but also of the Council.[181] Currently, the Authority is able to force legislation by issuing a recommendation which, if not enacted, can become law after the Authority consults Congress.[182] Congress recognized the inefficiency of this system when it passed the Superpowers amendment, but failed to fully correct the problem.[183]

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180. *See supra* note 170 (citing examples of congressional criticism of Authority).

181. *See supra* note 74 and accompanying text (stating that the Authority's mandate covers entire District government); *see also* DCFRA, Pub. L. No. 104-8, § 2(a)(5), 109 Stat. 97, 98 (1995) (stating that "[a] comprehensive approach to fiscal, management, and structural problems must be undertaken which exempts no part of the District government and which preserves home rule for the citizens of the District of Columbia"). The statutory powers provided to the Authority should reflect its status as an agent of Congress. As Congress' agent, the Authority should possess the *full* ordering power possessed by its creator, the power to issue orders to any District government entity and to reconstitute the governmental structure in such a way as would best allow Congress' goals of a fiscal and management recovery in the District to be achieved. This would loose the shackles on the Authority, allowing it to pursue its broad mandate.

182. *See supra* Part III.B (discussing recommending power of the Authority).

183. *See* Pub. L. No. 104-208, § 5203 (1996), *amending* DCFRA, Pub. L. No. 104-8, 109 Stat. 97 (1995). The amended text of the 207(d)(1) amendment would strike language as follows:

> (d) Additional Power to Issue Orders, Rules and Regulations.—
>
> (1) In general.—In addition to the authority described in subsection (c), the Authority may at any time issue such orders, rules, or regulations as it considers appropriate to carry out the purposes of this Act and the amendments made by this Act. ~~to the extent that the issuance of such an order, rule, or regulation is within the authority of the Mayor or the head of any department or agency of the District government, and any such order, rule, or regulation shall be legally binding to the same extent as if issued by the Mayor, or the head of any such department or agency.~~

See id.

3. Repeal of DCFRA Sunset Clause

Congress should abolish the Sunset Clause in the DCFRA.[184] Under the current arrangement, D.C. politicians can expect to regain control of the District government after four years of balanced budgets and favorable access to bond markets.[185] Thus, the conditions triggering the end of a control period are independent of whether true management reform has occurred. The current Sunset Clause provisions resemble those of control boards in other cities,[186] and do not take into account the Superpowers amendment and the D.C. Revitalization Act: The Authority is no longer a traditional control board. Although the its mission has not changed, Congress' approach, and by extension the Authority's, is very different from what was envisioned in 1995 when the DCFRA was passed. The criteria for ending a control period must be adjusted in recognition of the new role the Authority has been given.

Specifically, the existence of a control period should be linked to the implementation of the management reform plans[187] developed by private consultants as required under the D.C. Revitalization Act.[188] A control period should end when, in addition to the current requirements, each of the nine district government agencies reach the established performance objectives outlined in the management reform plans.[189]

B. The President

The President should establish a commission to study potential solutions to the democracy problem in the District of Columbia.[190] This

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184. *See* DCFRA § 107.

185. Although the City submitted a balanced budget for 1998, this progress cannot be attributed to efforts by Washington's elected leaders; the 1998 balanced budget, with the necessary spending cuts, was submitted to Congress *by the Authority*.

186. *See* H.R. REP. NO. 104-96, at 24-25 (1995) (describing sunset clause provisions of other financial control boards in other cities).

187. *See supra* note 163 and accompanying text (explaining how consultants submit reform plans for the District). The Authority should require the private consultants to identify an acceptable standard of service that can serve as a performance objective.

188. *See* D.C. Revitalization Act, Pub. L. No. 105-33, § 11103(a), 111 Stat. 251, 731-32 (1997).

189. Under the current system, incentive is placed only on achieving a balanced budget, which leads to cutting expenditures and services rather than reforming the broken management system. *See Missed Opportunity, supra* note 176, at 740 (arguing that control boards may bring quick solutions but fail to explore the origins of problems). The proposed changes provide the Mayor with incentive to institute and maintain an efficient city management system recommended by *outside*, private consultants.

190. Aside from the salient fact that District residents cannot participate in a significant portion of the democratic process, the Authority is the most visible assailant in the attack which Home Rule and Statehood activists feel is being perpetrated against the citizens of Washington. Thus, the Authority often bears the brunt of their attacks, both in the press and in the form

will at least provide a forum for District residents and activist groups to formally propose and debate Constitutional alternatives to Congress' "exclusive legislative authority" over the District.[191] As the only federal official for whom District residents may vote,[192] the President possesses at least some minimal degree of accountability to District residents.[193]

C. *The Authority*

1. *Increase management expertise*

The D.C. Revitalization Act removed from the Authority the luxury of being selective on the timing, nature, and targets of its management reform actions;[194] the Act forced the immediate takeover of the bulk of the D.C. government. Without the constraints of political ambition or the accountability inherent in a democracy,[195] the Authority should, in theory, be able to introduce any and all of the necessary reforms required for a full recovery.

As the District's new Chief Executive, however, the Authority is no longer in the comfortable position of analyzing departmental behavior from the outside, recommending changes, or issuing orders when necessary. Under the D.C. Revitalization Act, the Authority must run the government and is *directly* accountable for the success of its reform efforts.[196] With this increase in the Authority's direct manage-

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of protests and other disruptions. The creation of a Presidential commission designed to find a solution to this problem may diffuse, or at least divert, some of this energy away from the Authority and allow it to act relatively unencumbered.

191. U.S. CONST. art. I, § 8, cl. 17.

192. *See* U.S. CONST. amend. XXIII.

193. Indeed, the President has shown a willingness to negotiate on behalf of District residents for changes in the D.C. Revitalization Act. *See* David A. Vise, *Teams of Consultants to Begin Overhaul of D.C. Government*, WASH. POST, Aug. 8, 1997, at B3 (citing Clinton budget director Raines' willingness to negotiate for return of Council's role in confirming department head nominations).

Congress could not credibly undertake this task. As the government body which would stand to lose plenary legislative authority over more than 500,000 non-voting citizens, an enormous conflict of interest exists in having Congress appoint and supervise a commission tasked with providing a democratic alternative for the District of Columbia. Indeed, Congress has used the District unabashedly for its own private experiments with new social programs and passed laws benefiting individual constituencies. *See* D.C. Revitalization Act § 11201 (closing Lorton Correctional Complex and returning valuable land to Virginia); David A. Vise, *House Votes Vouchers for D.C. Students*, WASH. POST, Oct. 7, 1997, at A1 (describing Congress' push to institute school voucher program in District of Columbia).

194. *See* D.C. Revitalization Act §§ 11101-11104 (placing timetable on implementation of components of D.C. Revitalization Plan); *supra* note 162 (identifying nine departments subject to Authority control); *supra* note 163 (describing required action under D.C. Revitalization Act with regard to nine departments).

195. *See Missed Opportunity*, *supra* note 176, at 737 (discussing how the performance of control boards can be affected by their non-elective status).

196. Prior to the D.C. Revitalization Act, the Mayor could be blamed for interfering with

ment responsibilities, the Authority must augment the management expertise of its staff,[197] beyond the hiring of a "Chief Management Officer." The Authority should hire additional, equally qualified personnel, and place them *inside* each of the nine departments. With these individuals in place, the CMO will be able to receive information directly from a qualified individual employed by the Authority.[198]

2. Improve public relations

Although the Authority may make significant progress utilizing its statutory powers alone, public understanding and support for the Authority's efforts would create a more conducive atmosphere for change. Currently, the Authority operates within a veil of secrecy, rarely providing insight into the decision making process of the Board members, and making little effort to respond to attacks in the press.[199]

The Authority should hire a public relations specialist, tasked with not only fielding questions from the press, but also with the promotion of the Authority's reform efforts in the community. Adopting such a policy serves two purposes. First, it creates increased community awareness of the Authority's reform efforts, which may increase pressure on Washington's elected officials to work cooperatively. Second, a public relations effort may assist in marginalizing the more acerbic elements of the Home Rule/D.C. Statehood.

CONCLUSION

The District of Columbia is constitutionally subject to Congress' plenary legislative authority. Congress is therefore responsible for the success or failure of the municipal structure created to govern the District. Recognizing the failure of Washington's Home Rule re-

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Authority initiatives, because at the time he had the power to do so.

197. The D.C. Revitalization Act directs the Authority to contract with private consultants to develop "management reform plans" for each of the nine affected departments of government. *See* D.C. Revitalization Act § 11103(a). Although these provisions recognize the Authority's limited capacity to perform the type of review and analysis necessary to develop a reform plan for each agency, the Revitalization Act does not provide for an independent means of evaluating the reform plans submitted by the private consultants. *See id.* The effect is "government by private consultant." The Authority receives recommendations by the private consultants, and because of its small, highly specialized staff, is unable to evaluate the details and efficacy of each plan, forcing it to rely on consultants for reports on the progress being made inside each department.

198. This structure will decrease the Authority's reliance on private consultants and ensure qualified appraisals of the District's progress toward implementing the management reform plans and achieving the recommended performance objectives.

199. Working sessions of the Authority are private. Adoption of new Authority Orders or other official actions are made in public, but rarely offer insight into the processes that went into their production.

gime to provide the most basic city services to its residents, Congress created a control board to impose change.

The Authority can no longer be properly termed a "Financial Control Board." Amendments to its enabling act have transformed the Authority into a fully-empowered, unelected city government; the City's elected officials now serve in largely advisory capacities. This condition need not be permanent. The DCFRA provides a Sunset Clause which allows for the return of "home rule" in a minimum of four years, and if amended as suggested, will guarantee the return of a city with measurably improved city services.

To accomplish this formidable task, the Authority must not shrink from its duties to impose the necessary reforms and engender the public awareness and support necessary to maintain momentum once the control period ends. Congress must also recognize the enormity of the Authority's task by amending the Superpowers amendment to provide for an ordering power coextensive with Congress' own authority, and a Sunset Clause that reflects the Authority's new mandate. With these changes in place and the necessary reform efforts underway, Washington will be poised to become a truly Capital City.