SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al*.,	:	Case 2017 CA 005989 B
	:	
Plaintiffs,	:	Judge Puig-Lugo
	:	
vs.	:	Status Conference
	:	February 8, 2019, 2:00 PM
DAVID H. HOFFMAN, *et al.*,	:	Courtroom 317
	:	
Defendants.	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' OPPOSED MOTION TO DECLARE THE D.C. ANTI-SLAPP STATUTE UNCONSTITUTIONAL

NOTIFICATION REQUIRED UNDER D.C. SUPERIOR COURT RULE OF CIVIL PROCEDURE 5.1

TABLE OF CONTENTS

TABLE OF AUTHORITIES

D.C. Superior Court Rules of Civil Procedure

Statutes

Other

Rule 12-I Certification

Plaintiffs contacted Defendants' Counsel on January 7, 2019, to obtain their consent to this motion and Defendants refused that consent.

I. Summary of Argument

The District of Columbia Anti-SLAPP Act violates the Home Rule Act because it imposes on the District's courts new procedures, such as limits on discovery, that have not been approved by the D.C. Court of Appeals, as the Home Rule Act requires. Moreover, the Anti-SLAPP Act's provisions are unconstitutionally overbroad and impermissibly infringe on citizens' First Amendment right of access to the courts. On each of these grounds, the Act is unconstitutional, and Defendants' Special Motions to Dismiss Under the D.C. Anti-SLAPP Act ("Anti-SLAPP Motions") should be stricken.[1]

Under the Home Rule Act, D.C. Code § 1-201.01 *et seq.,* only the District's courts, not the District of Columbia Council, have the authority to create the rules that govern their work. The D.C. Superior Court is governed by its Rules of Civil Procedure (the "Rules"), unless it adopts modifications to those Rules. Rule 1; D.C. Code § 11-946. If a new rule supplants or modifies the Federal Rules of Civil Procedure, as do the Anti-SLAPP Act's procedures, D.C. Code § 16-5502, it must be approved by the D.C. Court of Appeals. But the new procedures created by the D.C. Council under the Act have neither been approved by the Court of Appeals nor adopted by the Superior Court. Their application violates the Home Rule Act and is therefore void.

Additionally, as written, the Act is unconstitutionally broad on its face and infringes impermissibly on the Plaintiffs' First Amendment right of access to the courts. The announced legislative purpose was to help defendants "fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view." (Report of the D.C. Council Committee on Public Safety on Bill 18-893, "Anti-SLAPP Act of 2010," Exhibit A,

[1] These issues argued in this Motion were raised in Plaintiffs' July 3, 2018, praecipe, and the issue of the constitutionality of anti-SLAPP statutes was raised in their first opposition filed in October 2017.

p.1.) As drafted, however, the Act is so overbroad that, whenever a case involves "an issue of public interest" (D.C. Code §§ 16-5501; 16-5502 (a) and (b)), defendants can deploy it—as they have in this case—against individuals who have legitimate claims for damages to their livelihoods and reputations caused by false and defamatory statements. Such plaintiffs are not seeking to chill free-speech rights but simply to redress the wrongs done to them.

Even for these plaintiffs, the statute automatically shifts onto them the heightened burden of proof under the "special" motion to dismiss, forces them to demonstrate the need for discovery under an automatic stay on discovery, threatens them with bearing the cost of discovery and defendants' attorneys' fees, and raises the specter of dismissal with prejudice if a judge finds discovery unwarranted and they cannot otherwise meet their heightened burden. If the Act does not thus entirely slam the door against legitimate claims, it creates constitutionally impermissible procedural obstacles to them.

The obstacles to access to the courts created by the D.C. Anti-SLAPP Act are especially pernicious when, as here, Plaintiffs are individuals with limited resources asking for redress from large, wealthy organizations: the American Psychological Association ("APA") and the law firm of Sidley Austin LLP ("Sidley"), in which David Hoffman is a partner. Relying on their easy access to the media, Defendants sparked a flood of publicity for the false accusations in the report Mr. Hoffman wrote for the APA. (That flood began when, as Plaintiffs' metadata evidence shows, Hoffman prematurely leaked the Report to *The New York Times*.) In contrast, Plaintiffs have limited resources and no effective access to the media.

Plaintiffs have a constitutional right to present to a fact-finder the now-voluminous evidence that the accusations against them constitute defamation under both a negligence and an actual-malice standard. Defendants had in their possession numerous documents, including governmental reports

and military policies as well as internal APA documents, that gave them knowledge that what they were publishing was false and defamatory. In addition, APA Board members had first-hand knowledge of the events Hoffman described and, therefore, knew that his descriptions of those events were false. Moreover, Plaintiffs have 17 affidavits from witnesses Hoffman interviewed that state he distorted, mischaracterized, or cherry-picked statements from their interviews or purposely avoided following lines of inquiry that contradicted the Report's assertions. As Hoffman acknowledged, he set out to "make [the] case" to support his conclusions. Complaint, ¶ 15.

II. The Anti-SLAPP Act Violates the Home Rule Act

A. The Anti-SLAPP Act Creates New Procedures Not Approved by the D.C. Courts.

D.C. Code § 16-5502 creates new procedures to govern the work of the courts, ones not contained in the D.C. Superior Court or Federal Rules of Civil Procedure.

When the Act was passed, the D.C. Council acknowledged that it "adds new provisions in the D.C. Official Code to provide *an expeditious process* for dealing with strategic lawsuits against public participation."[2] Both the D.C. Court of Appeals and the U.S. Court of Appeals for the District of Columbia Circuit have stated that the Act creates a new procedural mechanism. The D.C. Court of Appeals, without considering the Act's legitimacy, found that it establishes new "procedural protections" and a new "procedural mechanism" for dismissing certain cases before trial. *Doe No. 1 v. Burke,* 91 A.3d 1031, 1036 (D.C. 2014). *See Abbas v. Foreign Policy Grp., L.L.C.*, 783 F.3d 1328, 1335 (D.C. Cir. 2015) ("The D.C. Anti–SLAPP Act, to use the words of the D.C. Court of Appeals, establishes a new 'procedural mechanism' for dismissing certain cases before trial.").

Not only does the Act establish new procedures not contained in the D.C. Rules of Civil Procedure; its procedures conflict with those Rules, as the U.S. Court of Appeals for the D.C. Circuit

[2]Council of the District of Columbia, Committee on Public Safety and the Judiciary, Committee Report, dated November 18, 2010 (emphasis added). Attached as Exhibit A.

has held. Specifically, the Act requires a court to consider the legal sufficiency of the evidence presented before discovery: "unlike the D.C. Anti–SLAPP Act, the Federal Rules do not require a plaintiff to show a likelihood of success on the merits in order to avoid pre-trial dismissal. Under *Shady Grove [Orthopedic Assocs., P.A.*, *v. Allstate Ins. Co.,* 559 U.S. 393 (2010)], therefore, we may not apply the D.C. Anti–SLAPP Act's special motion to dismiss provision." *Abbas*, 783 F.3d at 1334.

Even if the Act had not created new rules or procedures governing the D.C. Courts, it is at minimum a law "with respect to" Title 11, and thus barred by the Home Rule Act.

B. The Anti-SLAPP Act Is Invalid Under the Home Rule Act.

Under U.S. Const. art. I, § 8, Congress has the exclusive power to enact legislation governing the District of Columbia. Under the 1973 Home Rule Act, while Congress delegated to the D.C. government certain powers to legislate local concerns, Congress retained ultimate legislative authority[3] and kept control of the District of Columbia courts. It expressly *prohibited* the Council from "enact[ing] any act, resolution, or rule with respect to any provision of Title 11 (relating to organization and jurisdiction of the District of Columbia courts) . . . ."[4] Title 11 prescribes all aspects of judicial civil procedure.[5]

Congress further directed the D.C. Superior Court to "conduct its business according to the Federal Rules of Civil Procedure," and it expressly gave the D.C. Courts, not the Council, the authority to adopt new civil procedure rules. D.C. Code § 11-946. Under § 11-946, any proposals to "modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court."[6] There has been no such

[3] D.C. Code § 1-201.02(a).
[4] *Id.* § 1-206.02(4).
[5] *Id.* § 11-101.
[6] *Id.* § 11-946.

approval. Consequently, the procedures established by the Act are invalid.

Before the Act was passed, the D.C. Attorney General warned the Council of the Act's conflict with the Home Rule Act. In a letter to the Council, he advised:

> To the extent that sections 3 (special motion to dismiss) and 4 (special motion to quash) of the bill would impact SLAPPs filed in the Superior Court of the District of Columbia, the legislation may run afoul of section 602(a)(4) of the District of Columbia Home Rule Act . . . which prohibits the Council from enacting any act "with respect to any provision of Title 11 [of the D.C. Code]." In particular, D.C. Official Code § 11-946 (2001) provides, for example, that the Superior Court "shall conduct its business according to the Federal Rules of Civil Procedure . . . unless it prescribes or adopts rules which modify those Rules [subject to the approval of the Court of Appeals]."[7]

The Superior Court should not enforce a law that, by creating a new procedure not contained in the D.C. Superior Court or Federal Rules of Civil Procedure, encroaches on an area delegated under Title 11 exclusively to the D.C. Courts.[8]

In finding that the Act impermissibly encroaches on the power of the judiciary, the Court may look to a similar prior attempt by the Council to legislate how the Courts conduct their affairs. In early 1976, in anticipation of the repeal of the federal "Shop-Book Rule" Act, there was agreement about the desirability of a "shop-book rule" for the Superior Court that would provide an exception to the hearsay rule for records kept in the ordinary course of business. The controversy arose over how the new rule would be created.

The Superior Court, with the approval of the D.C. Court of Appeals, promulgated Superior

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[7] Letter of Peter Nickles, Attorney General for the District of Columbia, dated Sept. 17, 2010, attached to Report of the D.C. Council Committee on Public Safety on Bill 18-893, "Anti-SLAPP Act of 2010". See Exhibit A, p. 23.

[8] *See Woodroof v. Cunningham*, 147 A.3d 777, 783-84 (D.C. 2016) ("D.C. Code § 11–946 ('The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in Title 23)' or as modified in accordance with the statute . . . ."); James C. McKay Jr., *Separation of Powers in the District of Columbia under Home Rule*, 27 Cath. U. L. Rev. 515 (1978). *See* Exhibit B.

Court Civil Rule 43-1, which, in effect, reinstated the federal "Shop-Book Rule" Act. But the D.C. Council passed a Shop-Book Rule Act to accomplish the same thing. This legislative act was opposed by both the executive and judicial branches of the District government as an infringement upon the rulemaking authority of the courts in violation of the separation of powers. Opinions from the Corporation Counsel and Department of Justice argued that the power of the D.C. courts to promulgate rules of evidence had long been considered an essential element of their judicial power. The Corporation Counsel also noted that the D.C. Council was expressly prohibited from enacting legislation with respect to D.C. Code § 11-946 (2001), the source of the courts' rulemaking authority. It concluded that the proposed act exceeded the Council's authority. Attached as Exhibit C.

Similarly, the Anti-SLAPP Act impermissibly intrudes upon the authority of the D.C. judiciary. Because the Act's procedures have not been approved by the D.C. Court of Appeals, Defendants' Anti-SLAPP Motions are moot. There is no D.C. Rule of Civil Procedure under which they may be considered. Defendants should instead be required to answer Plaintiffs' Complaint or attack it within the D.C. Rules, through Rules 11 and 56.

III. The Anti-SLAPP Act Unconstitutionally Restricts Access to the Courts

A. The Act Is Unconstitutionally Overbroad on Its Face.

In adopting the Act, the D.C. Council's stated purpose was to "'protect the targets of … suits' intended 'as a weapon to chill or silence speech.'" *Doe v. Burke*, 133 A.3d 569, 571 (D.C. 2016) (quoting *Burke,* 91 A.3d at 1033). As written, however, the Act does not apply solely to such suits. Instead, it impinges unconstitutionally on the rights of plaintiffs to bring legitimate suits to redress real wrongs to their reputations.

First, the Act does not provide a mechanism for determining if a suit is a strategic lawsuit against public participation ("SLAPP") before applying its sanctions. As drafted, therefore, the statute can be wielded not only against the sham suits it was intended to discourage, but also against

well-founded suits that seek redress for a legitimate grievance. As a result, the Act may be used, as here, to insulate well-heeled tortfeasors against plaintiffs who embody the very type of citizens it was designed to protect: citizens without the wealth or access to media that enables them to engage on equal terms with wealthy organizations such as Defendants. Plaintiffs' lawsuit is simply not a SLAPP suit of the kind the Act was enacted to prevent. (*See* Plaintiffs' Affidavits attached as Exhibit D.)

Even if a statute proscribes *unprotected* speech, it is overbroad and unconstitutional if, as with the D.C. Anti-SLAPP Act, it also proscribes *protected* speech: that is, speech that does not chill the free-speech rights of others but pursues access to the courts to redress legitimate grievances. *See Bd. of Trs. v. Fox*, 492 U.S. 469, 482-83 (1989); *R.A.V. v. St. Paul*, 505 U.S. 377, 382-84 (1992); *see also City of Ladue v. Gilleo*, 512 U.S. 43, 47-51 (1994); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-6 (1983); *Burson v. Freeman*, 504 U.S. 191, 197-200 (1992); *McDonald v. Smith*, 472 U.S. 479, 485 (1985).

Second, the Act's definition of the speech it intends to protect—speech that furthers "the right of advocacy on issues of public interest"—is grossly overbroad. It encompasses any speech "[i]n a place open to the public or a public forum in connection with an issue of public interest" or "that involves . . . communicating views to members of the public in connection with an issue of public interest." D.C. Code §§ 16-5501-2 That all-encompassing definition makes no distinction between speech exercising the right to advocacy and the kind of speech at issue in this case: statements of purported fact resulting from an internal investigation by lawyers hired "to ascertain the truth" by gathering "facts and evidence" about actions within a private organization.

Despite the Act's stated purpose, therefore, its language does not limit its sanctions to sham lawsuits designed to chill public debate.

B. Plaintiffs' First-Amendment Right to Petition the Courts Stands on Equal Footing with Defendants' First-Amendment Speech Rights.

By threatening such a broad category of speech, the Act has crossed into unconstitutional territory. Access to the courts is a fundamental right arising from "the First Amendment right to petition the Government for redress of grievances," a right applied to the states by the 14th Amendment. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Bill Johnson's Rests. v. NLRB*, 461 U.S. 731, 741 (1983); *Prof'l Real Estate Inv'rs, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49 (1993); *Borough of Duryea, Pennsylvania v. Guarnieri,* 564 U.S. 379 (2011). The importance of that right is firmly imbedded in U.S. jurisprudence. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). When "a person petitions the government" in good faith, "the First Amendment prohibits any sanction on that action." *Venetian Casino Resort, L.L.C.*, 793 F.3d at 89 (citing *Nader v. Democratic Nat'l Comm.*, 567 F.3d 692, 696 (D.C. Cir. 2009)). *See Christopher v. Harbury*, 536 U.S. 403, fn 12 (2002). Protecting this right against unwarranted intrusion by the state, as the Act has intruded, is essential to our system of checks and balances. Consequently, this right of access to the courts stands on equal footing with the right to speak and publish. *Van Deelen v. Johnson*, 497 F.3d 1151, 1156 (10th Cir. 2007) ("[a] private citizen exercises a constitutionally protected First Amendment right *anytime* he or she petitions the government for redress; the petitioning clause of the First Amendment does not pick and choose its causes.").[9]

Restrictions on speech based on content—here, Plaintiffs' suit—are "presumptively

[9] *See also* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 Ohio St. L.J. 557 (1999); Benjamin Cover, *The First Amendment Right to a Remedy*, 50 U.C. Davis L. Rev. 1741 (2017).

invalid" and subject to strict scrutiny. *Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 188 (2007); *NAACP v. Button*, 371 U.S. 415, 438-44 (1963); *In re Primus*, 436 U.S. 412, 426 (1978). *See also Citizens United v. FEC,* 558 U.S. 310, 340 (2010) ("[T]he First Amendment stands against attempts to disfavor certain subjects or viewpoints or to distinguish among different speakers, which may be a means to control content. The Government may also commit a constitutional wrong when by law it identifies certain preferred speakers . . . .") (citation omitted); *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 543-548 (2001).

The Act's infringement on First Amendment rights is especially pernicious where, as here, it amounts to a doubling up of protections for defendants' defamatory speech. In defamation suits, if a court finds plaintiffs to be public officials or limited-purpose public figures, as Defendants assert Plaintiffs to be, defendants are already given substantial protections through a heightened standard of proof (actual malice by clear and convincing evidence). The Supreme Court has refused to grant exactly this sort of additional procedural protection because it would constitute "a form of double counting." *Calder v. Jones*, 465 U.S. 783, 790-91 (1984).

To protect the constitutionality of the Illinois and Massachusetts anti-SLAPP statutes, courts in those states have read into the statute a need to review the motivation of plaintiffs in filing suit. *See Sandholm v. Kuecker*, 962 N.E.2d 418, 430 (Ill. 2012) ("[W]here a plaintiff files suit genuinely seeking relief for damages for the alleged defamation or intentionally tortious acts of defendants, the lawsuit is not solely based on defendants' rights of petition, speech, association, or participation in government."); *Duracraft Corp. v. Holmes Prods. Corp.*, 42 Mass. App. Ct. 572, 581 (1997); *Duracraft Corp. v. Holmes Prods. Corp.*, 427 Mass. 156, 167 n.19 (1998) (". . .literal application of the statutory test and procedure 'would create grave constitutional problems where, as here, the

plaintiff's action asserts a legitimate, cognizable claim . . . .'" (citation omitted)).[10]

C. The Act as Applied Restricts Plaintiffs' First Amendment Right to Petition the Courts.

The D.C. Act cannot survive the "exacting scrutiny" applied to laws that significantly impair the right of access to the courts. *R.A.V.*, 505 U.S. at 382. *See Patchak v. Jewell*, 109 F. Supp. 3d 152, 163 (D.D.C. 2015), *aff'd*, 828 F.3d 995 (D.C. Cir. 2016), *aff'd sub nom. Patchak v. Zinke*, 138 S. Ct. 897 (2018) ("Laws that 'significant[ly] impair[ ]' this right [of access to the courts for redress of wrongs] must, like all substantial constitutional burdens, survive 'exacting scrutiny.' *See Elrod v. Burns*, 427 U.S. 347, 362 (1976)." (parallel citations omitted) (brackets in original); *Elrod*, 427 U.S. at 362 (citing *Buckley v. Valeo*, 424 U.S. 1 (1976)) ("This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct . . . .")

The Act's procedures cannot survive that scrutiny. As the D.C. Court of Appeals acknowledged, the Act serves to "impose requirements and burdens on the claimant that significantly advantage the defendant." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1237 (D.C. 2016). Once a defendant "makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest," D.C. Code § 16-5502(b), the Act erects impermissible barriers to plaintiffs' exercise of their First Amendment rights.

First, as litigation begins, it imposes on them a burden far beyond anything contained in the

[10] *See also* David A. Kluft, *The Scalpel or the Bludgeon? Twenty Years of Anti-SLAPP in Massachusetts*, Boston Bar Journal (July 2014). Hoffman is licensed to practice law only in Illinois, Illinois is Sidley's principal place of business, and APA and Sidley agreed Illinois law would apply to Hoffman's engagement. Dr. Soldz, who contributed extensive research to Hoffman's false narrative, is a Massachusetts resident.

Federal Rules of Civil Procedure. They must not only demonstrate a triable issue of material fact which would defeat a summary judgment motion under Rule 56; they must also produce evidence—presumptively without the benefit of discovery—to meet the Act's heightened burden of demonstrating "that the claim is likely to succeed on the merits . . . ." §16-5502(b). Yet it is well established that the genuineness of a claim, and therefore its right to be heard by a court, is not determined by its success in court. *BE&K Constr. Co. v. NLRB*, 536 U.S. 516, 532 (2002) ("[T]he genuineness of a grievance does not turn on whether it succeeds."). Moreover, if plaintiffs fail to meet this heightened burden, they face dismissal with prejudice and, potentially, attorneys' fees for the defendants.

Second, the Act eviscerates normal discovery procedures. It stays discovery unless plaintiffs demonstrate that they require discovery to defeat the special motion to dismiss, restricts that discovery to "targeted" and "specialized" discovery even if it is granted, threatens plaintiffs with paying defendants' costs for the discovery, and orders the court to hold an expedited hearing on the motion. These obstacles to full discovery are particularly dangerous when the case involves difficult state-of-mind issues relevant to actual malice, a key issue in this case.

To avoid the D.C. Anti-SLAPP Act's infringing unconstitutionally upon the Seventh Amendment right to trial by jury,[11] the D.C. Court of Appeals has held that the Act's "likelihood of success" standard for defeating an anti-SLAPP defense mirrors the standards of Federal Rule 56. *Competitive Enter. Inst.*, 150 A.3d at 1240 n.32 ("*Abbas* [*Abbas v. Foreign Policy Group, LLC*, 783 F.3d 1328, 1335 (D.C. Cir. 2015)] recognized that at the time, this court 'has never interpreted the D.C. Anti–SLAPP Act's likelihood of success standard to simply mirror the standards imposed

[11] *But see Carbone v. Cable News Network, Inc.*, 2018WL 6565917 at *16-17 (11th Cir. Dec. 13, 2018) (Georgia anti-SLAPP statute violates Seventh Amendment right to a jury trial).

by' Federal Rule 56. (citations omitted) We do so now.") The Court of Appeals cautioned that the judge cannot weigh evidence and thus must treat the motion like a summary judgement motion.

But before a court rules upon a dispositive motion for summary judgment under Rule 56, discovery must be exhausted. *Secord v. Cockburn*, 747 F. Supp. 779, 786 (D.D.C. 1990) ("[T]his Court of course recognizes that discovery must be exhausted before a court rules upon a dispositive motion for summary judgment." (citing *Hutchinson v. Proxmire*, 443 U.S. 111, 120 (1979)); *Herbert v. Lando*, 441 U.S. 153, 159-61 (1979)); *Metabolife Int'l v. Wornick*, 264 F.3d 832, 846 (9th Cir. 2001) (where a non-movant must respond to a dispositive motion that raises issues of potentially disputed fact, the Supreme Court has "restated the rule [56] as requiring, rather than merely permitting, discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'" (citation omitted)).

Consequently, state-of-mind issues should not be resolved pretrial on an abbreviated record, without plaintiffs' access to discovery under the rules of civil procedure.[12] *Planned Parenthood Fed'n of Am. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018) (discovery provisions of California anti-SLAPP statute conflict with federal rules requiring discovery be exhausted and cannot apply in federal court if a special motion is considered as a summary judgment motion) (amended opinion *Planned Parenthood Fed'n of Am., Inc. v. Ctr. for Med. Progress*, 897 F.3d 1224 (9th Cir. Aug. 1, 2018); en banc rehearing denied 2018 LEXIS 23874 August 23, 2018; petition for certiorari filed November 21, 2018 (No. 18-696)) ("[W]hen an anti-SLAPP motion to strike challenges the factual sufficiency of a claim, then the Fed. R. of Civ. Proc. 56 standard will apply.

[12] Compare D.C. Sup. Ct. R. Civ. P. 26(d) (permitting all discovery allowed under the Rules after the parties have conducted a Rule 26(f) conference, obtained leave of court to do so without the conference, or stipulated otherwise); D.C. Sup. Ct. R. Civ. P. 26(b)(1) ("Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . .").

But in such a case, discovery must be allowed . . . .").

Third, the statute creates the risk of imposing a financial burden on plaintiffs who cannot easily bear it, and who may therefore be unable to proceed with discovery: if a court permits discovery under the Act, "[s]uch an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery." D.C. Code §16-5502(c)(2). A statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech, as does the Act's threatened imposition of costs for unsuccessful plaintiffs. *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

IV. Conclusion

For the above-stated reasons, Plaintiffs respectfully ask this Court for an Order declaring the Act void in violation of the Home Rule Act, or alternatively, unconstitutional.

Respectfully submitted,

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EXHIBIT A

Committee Report D.C. Anti-SLAPP Act

COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON PUBLIC SAFETY AND THE JUDICIARY
COMMITTEE REPORT
1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO: All Councilmembers

FROM: Councilmember Phil Mendelson,
Chairman, Committee on Public Safety and the Judiciary

DATE: November 18, 2010

SUBJECT: Report on Bill 18-893, "Anti-SLAPP Act of 2010"

The Committee on Public Safety and the Judiciary, to which Bill 18-893, the "Anti-SLAPP Act of 2010" was referred, reports favorably thereon with amendments, and recommends approval by the Council.

CONTENTS

I. BACKGROUND AND NEED

Bill 18-893, the Anti-SLAPP Act of 2010, incorporates substantive rights with regard to a defendant's ability to fend off lawsuits filed by one side of a political or public policy debate aimed to punish or prevent the expression of opposing points of view. Such lawsuits, often referred to as strategic lawsuits against public participation -- or SLAPPs -- have been increasingly utilized over the past two decades as a means to muzzle speech or efforts to petition the government on issues of public interest. Such cases are often without merit, but achieve their filer's intention of punishing or preventing opposing points of view, resulting in a chilling effect on the exercise of constitutionally protected rights. Further, defendants of a SLAPP must dedicate a substantially amount of money, time, and legal resources. The impact is not limited to named defendants willingness to speak out, but prevents others from voicing concerns as well. To remedy this Bill 18-893 follows the model set forth in a number of other jurisdictions, and mirrors language found in federal law, by incorporating substantive rights that allow a defendant to more expeditiously, and more equitably, dispense of a SLAPP.

History of Strategic Lawsuits against Public Participation:

In what is considered the seminal article regarding SLAPPs, University of Denver College of Law Professor George W. Pring described what was then (1989), considered to be a growing litigation "phenomenon":

> Americans are being sued for speaking out politically. The targets are typically not extremists or experienced activists, but normal, middle-class and blue-collar Americans, many on their first venture into the world of government decision making. The cases are not isolated or localized aberrations, but are found in every state, every government level, every type of political action, and every public issue of consequence. There is no dearth of victims: in the last two decades, thousands of citizens have been sued into silence.[1]

These lawsuits, Pring noted, are typically an effort to stop a citizen from exercising their political rights, or to punish them for having already done so. To further identify the problem, and be able to draw possible solutions, Pring engaged in a nationwide study of SLAPPs with University of Denver sociology Professor Penelope Canan.

Pring and Canan's study established the base criteria of a SLAPP as: (1) a civil complaint or counterclaim (for monetary damages and/or injunction); (2) filed against non-governmental individuals and/or groups; (3) because of their communications to a government body, official or electorate; and (4) on an issue of some public interest or concern.[2] The study of 228 SLAPPs found that, despite constitutional, federal and state statute, and court decisions that expressly protect the actions of the defendants, these lawsuits have been allowed to flourish because they appear, or are camouflaged by those bringing the suit, as a typical tort case. The vast majority of the cases identified by the study were brought under legal charges of defamation (such as libel and slander), or as such business torts as interference with contract.[3]

In identifying possible solutions to litigation aimed at silencing public participation, Pring paid particular attention to a 1984 opinion of the Colorado Supreme Court establishing a new rule for trial courts to allow for dismissal motions for SLAPP suits.[4] In recognition of the

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[1] George W. Pring, *SLAPPS: Strategic Lawsuits against Public Participation*, Pace Env. L. Rev, Paper 132, 1 (1989), *available at* http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1122&context=envlaw (last visited Nov. 17, 2010).

[2] *Id.* at 7-8.

[3] *Id.* at 8-9.

[4] Protect Our Mountain Env't, Inc. v. District Court, 677 P.2d 1361 (Colo. 1984). The three-prong test develop by the court requires:

> When [ ] a plaintiff sues another for alleged misuse or abuse of the administrative or judicial processes of government, and the defendant files a motion to dismiss by reason of the constitutional right to petition, the plaintiff must make a sufficient showing to permit the court to reasonably conclude that the defendant's petitioning activities were not immunized from liability under the First Amendment because: (1) the defendant's administrative or judicial claims were devoid of reasonable factual support, or, if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the defendant's petitioning activity was to harass the

growing problem of SLAPPs, a number of jurisdictions have, legislatively, created a similar special motion to dismiss in order to expeditiously, and more fairly deal with SLAPPs. According to the California Anti-SLAPP Project, a public interest law firm and policy organization dedicated to fighting SLAPPs in California, as of January 2010 there are approximately 28 jurisdictions in the United States that have adopted anti-SLAPP measures. Likewise, there are nine jurisdictions (not including the District of Columbia) that are currently considering legislation to address the issue. Also, one other jurisdiction has joined Colorado in addressing SLAPPs through judicial doctrine.[5]

This issue has also recently been taken up by the federal government, with the introduction of the H.R. 4363, the Citizen Participation Act of 2009. This legislation would provide certain procedural protections for any act in furtherance of the constitutional right of petition or free speech, and specifically incorporate a special motion to dismiss for SLAPPs.[6]

SLAPPs in the District of Columbia:

Like the number of jurisdictions that have sensed the need to address SLAPPs legislatively, the District of Columbia is no stranger to SLAPPs. The American Civil Liberties Union of the Nation's Capital (ACLU), in written testimony provided to the Committee (attached), described two cases in which the ACLU was directly involved, as counsel for defendants, in such suits against District residents.[7]

The actions that typically draw a SLAPP are often, as the ACLU noted, the kind of grassroots activism that should be hailed in our democracy. In one of the examples provided, the ACLU discussed the efforts of two Capitol Hill advocates that opposed the efforts of a certain developer. When the developer was unable to obtain a building permit, the developer sued the activists and the community organization alleging they "conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of ... signs, and gave statements and interviews to various media."[8] Such activism, however, was met with years of litigation and, but for the ACLU's assistance, would have resulted in outlandish legal costs to defend. Though the actions

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plaintiff or to effectuate some other improper objective; and (3) the defendant's petitioning activity had the capacity to adversely affect a legal interest of the plaintiff.

Id. at 1369.

[5] California Anti-SLAPP Project (CASP) website, Other states: Statutes and cases, *available at* http://www.casp.net/statutes/menstate.html (last visited Nov. 11, 2010).

[6] http://www.thomas.gov/cgi-bin/bdquery/D?d111:1:./temp/~bdLBBX:@@@L&summ2=m&|/home/LegislativeData.php|

[7] *Bill 18-893, Anti-SLAPP Act of 2010: Public Hearing of the Committee on Public Safety and the Judiciary*, Sept. 17, 2010, at 2-3 (written testimony Arthur B. Spitzer, Legal Director, American Civil Liberties Union of the Nation's Capital).

[8] *Id.* at 2 (quoting from lawsuit in *Father Flanagan's Boys Home v. District of Columbia et al.*, Civil Action No. 01-1732 (D.D.C)).

of these participants should have been protected, they, and any others who wished to express opposition to the project, were met with intimidation.

What has been repeated by many who have studied this issue, from Pring on, is that the goal of the litigation is not to win the lawsuit but punish the opponent and intimidate them into silence. As Art Spitzer, Legal Director for the ACLU, noted in his testimony "[*l*]*itigation itself* is the plaintiff's weapon of choice."[9]

District Anti-SLAPP Act:

In June 2010, legislation was introduced to remedy this nationally recognized problem here in the District of Columbia. As introduced, this measure closely mirrored the federal legislation introduced the previous year. Bill 18-893 provides a defendant to a SLAPP with substantive rights to expeditiously and economically dispense of litigation aimed to prevent their engaging in constitutionally protected actions on matters of public interest.

Following the lead of other jurisdictions, which have similarly extended absolute or qualified immunity to individuals engaging in protected actions, Bill 18-893 extends substantive rights to defendants in a SLAPP, providing them with the ability to file a special motion to dismiss that must be heard expeditiously by the court. To ensure a defendant is not subject to the expensive and time consuming discovery that is often used in a SLAPP as a means to prevent or punish, the legislation tolls discovery while the special motion to dismiss is pending. Further, in recognition that SLAPP plaintiffs frequently include unspecified individuals as defendants -- in order to intimidate large numbers of people that may fear becoming named defendants if they continue to speak out -- the legislation provides an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893. The legislation also allows for certain costs and fees to be awarded to the successful party of a special motion to dismiss or a special motion to quash.

Bill 18-893 ensures that District residents are not intimidated or prevented, because of abusive lawsuits, from engaging in political or public policy debates. To prevent the attempted muzzling of opposing points of view, and to encourage the type of civic engagement that would be further protected by this act, the Committee urges the Council to adopt Bill 18-893.

II. LEGISLATIVE CHRONOLOGY

June 29, 2010 — Bill 18-893, the "Anti-SLAPP Act of 2010," is introduced by Councilmembers Cheh and Mendelson, co-sponsored by Councilmember M. Brown, and is referred to the Committee on Public Safety and the Judiciary.

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[9] *Id.* at 3.

July 9, 2010	Notice of Intent to act on Bill 18-893 is published in the *District of Columbia Register.*
August 13, 2010	Notice of a Public Hearing is published in the *District of Columbia Register.*
September 17, 2010	The Committee on Public Safety and the Judiciary holds a public hearing on Bill 18-893.
November 18, 2010	The Committee on Public Safety and the Judiciary marks-up Bill 18-893.

III. POSITION OF THE EXECUTIVE

The Executive provided no witness to testify on Bill 18-893 at the September 17, 2010 hearing. The Office of the Attorney General provided a letter subsequent to the hearing stating the need to review the legislation further.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The Committee received no testimony or comments from Advisory Neighborhood Commissions.

V. SUMMARY OF TESTIMONY

The Committee on Public Safety and the Judiciary held a public hearing on Bill 18-893 on Friday, September 17, 2010. The testimony summarized below is from that hearing. A copy of submitted testimony is attached to this report.

Robert Vinson Brannum, President, D.C. Federation of Civic Associations, Inc., testified in support of Bill 18-893.

Ellen Opper-Weiner, Public Witness, testified in support of Bill 18-893. Ms. Opper-Weiner recounted her own experience in SLAPP litigation, and suggested several amendments to strengthen the legislation.

Dorothy Brizill, Public Witness, testified in support of Bill 18-893. Ms. Brizill recounted her own experience in SLAPP litigation. She stated that the legislation is the next step in advancing free speech in the District of Columbia.

Arthur B. Spitzer, Legal Director, American Civil Liberties Union of the Nation's Capital, provided a written statement in support of the purpose and general approach of Bill 18-

893, but suggested several changes to the legislation as introduced. A copy of this statement is attached to this report.

Although no Executive witness presented testimony, Attorney General for the District of Columbia, Peter Nickles, expressed concern that certain provisions of the bill might implicate the Home Rule Act prohibition against enacting any act with respect to any provision of Title 11 of the D.C. Official Code. A copy of his letter is attached to this report.

VI. IMPACT ON EXISTING LAW

Bill 18-893 adds new provisions in the D.C. Official Code to provide an expeditious process for dealing with strategic lawsuits against public participation (SLAPPs). Specifically, the legislation provides a defendant to a SLAPP with substantive rights to have a motion to dismiss heard expeditiously, to delay burdensome discovery while the motion to dismiss is pending, and to provide an unnamed defendant the ability to quash a subpoena to protect his or her identity from disclosure if the underlying action is of the type protected by Bill 18-893. The legislation also allows for the costs of litigation to be awarded to the successful party of a special motion to dismiss created under this act.

VII. FISCAL IMPACT

The attached November 16, 2010 Fiscal Impact Statement from the Chief Financial Officer states that funds are sufficient to implement Bill 18-893. This legislation requires no additional funds or staff.

VIII. SECTION-BY-SECTION ANALYSIS

Several of the changes to the Committee Print from Bill 18-893 as introduced stem from the recommendations of the American Civil Liberties Union of the Nation's Capital (ACLU). For a more thorough explanation of these changes, see the September 17, 2010 testimony of the ACLU attached to this report.

Section 1	States the short title of Bill 18-893.
Section 2	Incorporates definitions to be used throughout the act.
Section 3	Creates the substantive right of a party subject to a claim under a SLAPP suit to file a special motion to dismiss within 45 days after service of the claim.

Subsection (a) Creates a substantive right of a defendant to pursue a special motion to dismiss for a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest.

Subsection (b) Provides that, upon a prima facie showing that the activity at issue in the litigation falls under the type of activity protected by this act, the court shall dismiss the case unless the responding party can show a likelihood of succeeding upon the merits.

Subsection (c) Tolls discovery proceedings upon the filing of a special motion to dismiss under this act. As introduced the legislation permitted an exemption to this for good cause shown. The Committee Print has tightened this language in this provision so that the court may permit specified discovery if it is assured that such discovery would not be burdensome to the defendant.

Subsection (d) Requires the court to hold an expedited hearing on a special motion to dismiss filed under this act.

As introduced, the Committee Print contained a subsection (e) that would have provided a defendant with a right of immediate appeal from a court order denying a special motion to dismiss. While the Committee agrees with and supports the purpose of this provision, a recent decision of the DC Court of Appeals states that the Council exceeds its authority in making such orders reviewable on appeal.[10] The dissenting opinion in that case provides a strong argument for why the Council should be permitted to legislate this issue. However, under the majority opinion the Council is restricted from expanding the authority of District's appellate court to hear appeals over non-final orders of the lower court. The provision that has been removed from the bill as introduced would have provided an immediate appeal over a non-final order (a special motion to dismiss).

Section 4 Creates a substantive right of a person to pursue a special motion to quash a subpoena aimed at obtaining a persons identifying information relating to a lawsuit regarding an act in furtherance of the right of advocacy on issues of public interest.

Subsection (a) Creates the special motion to quash.

Subsection (b) Provides that, upon a prima facie showing that the underlying claim is of the type of activity protected by this act, the court shall grant the special

[10] *See* Stuart v. Walker, 09-CV-900 (DC Ct of App 2010) at 4-5.

motion to quash unless the responding party can show a likelihood of succeeding upon the merits.

Section 5 — Provides for the awarding of fees and costs for prevailing on a special motion to dismiss or a special motion to quash. The court is also authorized to award reasonable attorney fees where the underlying claim is determined to be frivolous.

Section 6 — Provides exemptions to this act for certain claims.

Section 7 — Adopts the Fiscal Impact Statement.

Section 8 — Establishes the effective date by stating the standard 30-day Congressional review language.

IX. COMMITTEE ACTION

On November 18, 2010, the Committee on Public Safety and the Judiciary met to consider Bill 18-893, the "Anti-SLAPP Act of 2010." The meeting was called to order at 1:50 p.m., and Bill 18-893 was the fourth item on the agenda. After ascertaining a quorum (Chairman Mendelson and Councilmembers Alexander, Cheh, and Evans present; Councilmembers Bowser absent), Chairman Mendelson moved the print, along with a written amendment to repeal section 3(e) of the circulated draft print, with leave for staff to make technical changes. After an opportunity for discussion, the vote on the print was three aye (Chairman Mendelson and Councilmembers Evans and Cheh), and one present (Councilmember Alexander). Chairman Mendelson then moved the report, with leave for staff to make technical and editorial changes. After an opportunity for discussion, the vote on the report was three aye (Chairman Mendelson and Councilmembers Evans and Cheh), and one present (Councilmember Alexander). The meeting adjourned at 2:15 p.m.

X. ATTACHMENTS

1. Bill 18-893 as introduced.
2. Written testimony and comments.
3. Fiscal Impact Statement
4. Committee Print for Bill 18-893.

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Memorandum

To: Members of the Council

From: Cynthia Brock-Smith, Secretary to the Council

Date: July 7, 2010

Subject: (Correction)
Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Legislative Meeting on Tuesday, June 29, 2010. Copies are available in Room 10, the Legislative Services Division.

TITLE: "Anti-SLAPP Act of 2010", B18-0893

INTRODUCED BY: Councilmembers Cheh and Mendelson

CO-SPONSORED BY: Councilmember M. Brown

The Chairman is referring this legislation to the Committee on Public Safety and the Judiciary.

Attachment

cc: General Counsel
Budget Director
Legislative Services

Councilmember Phil Mendelson

Councilmember Mary M. Cheh

A BILL

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

Councilmembers Mary M. Cheh and Phil Mendelson introduced the following bill, which was referred to the Committee on _____.

To provide a special motion for the quick and efficient dismissal of strategic lawsuits against public participation (SLAPPs), to stay proceedings until the motion is considered, to provide a motion to quash attempts to seek personally identifying information; and to award the costs of litigation to the successful party on a special motion.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Anti-SLAPP Act of 2010".

Sec. 2. Definitions.

For the purposes of this Act, the term:

(1) "Act in furtherance of the right of free speech" means:

(A) Any written or oral statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law;

(ii) In a place open to the public or a public forum in connection with an issue of public interest; or

(B) Any other conduct in furtherance of the exercise of the constitutional right to petition the government or the constitutional right of free expression in connection with an issue of public interest.

(2) "Issue of public interest" means an issue related to health or safety; environmental, economic or community well-being; the District government; a public figure; or a good, product or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

(3) "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.

(4) "Government entity" means the Government of the District of Columbia and its branches, subdivisions, and departments.

Sec. 3. Special Motion to Dismiss.

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of free speech within 45 days after service of the claim.

(b) A party filing a special motion to dismiss under this section must make a prima facie showing that the claim at issue arises from an act in furtherance of the right of free speech. If the moving party makes such a showing, the responding party may demonstrate that the claim is likely to succeed on the merits.

(c) Upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until notice of entry of an order disposing of the motion, except that the court, for good cause shown, may order that specified discovery be conducted.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

(e) The defendant shall have a right of immediate appeal from a court order denying a special motion to dismiss in whole or in part.

Sec. 4. Special Motion to Quash.

(a) A person whose personally identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with an action arising from an act in furtherance of the right of free speech may make a special motion to quash the discovery order, request, or subpoena.

(b) The person bringing a special motion to quash under this section must make a prima facie showing that the underlying claim arises from an act in furtherance of the right of free speech. If the person makes such a showing, the claimant in the underlying action may demonstrate that the underlying claim is likely to succeed on the merits.

Sec. 5. Fees and costs.

(a) The court may award a person who substantially prevails on a motion brought under sections 3 or 4 of this Act the costs of litigation, including reasonable attorney fees.

(b) If the court finds that a motion brought under sections 3 or 4 of this Act is frivolous or is solely intended to cause unnecessary delay, the court may award reasonable attorney fees and costs to the responding party.

Sec. 6. Exemptions.

(a) This Act shall not apply to claims brought solely on behalf of the public or solely to enforce an important right affecting the public interest.

(b) This Act shall not apply to claims brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is a representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services, and the intended audience is an actual or potential buyer or customer.

Sec. 7. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 8. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Testimony of the
American Civil Liberties Union
of the Nation's Capital

by

Arthur B. Spitzer
Legal Director

before the

Committee on Public Safety and the Judiciary
of the
Council of the District of Columbia

on

Bill 18-893, the
"Anti-SLAPP Act of 2010"

September 17, 2010

The ACLU of the Nation's Capital appreciates this opportunity to testify on Bill 18-893. We support the purpose and the general approach of this bill, but we believe it requires some significant polishing in order to achieve its commendable goals.

Background

In a seminal study about twenty years ago, two professors at the University of Denver identified a widespread pattern of abusive lawsuits filed by one side of a political or public policy dispute—usually the side with deeper pockets and ready access to counsel—to punish or prevent the expression of opposing points of view. They dubbed these "Strategic Lawsuits Against Public Participation," or "SLAPPs." *See* George W. Pring and Penelope Canan, SLAPPS: GETTING SUED FOR SPEAKING OUT (Temple University Press 1996). They pinpointed several criteria that identify a SLAPP:

— The actions complained of "involve communicating with government officials, bodies, or the electorate, or encouraging others to do so." *Id.* at 150.

— The defendants are "involved in speaking out for or against some issue under consideration by some level of government or the voters." *Id.*

— The legal claims filed against the speakers tend to fall into predictable categories such as defamation, interference with prospective economic advantage, invasion of privacy, and conspiracy. *Id.* at 150-51.

— The lawsuit often names "John or Jane Doe defendants." *Id.* at 151. "We have found whole communities chilled by the inclusion of Does, fearing 'they will add my name to the suit.'" *Id.*

The authors "conservatively estimate[d] that ... tens of thousands of Americans have been SLAPPed, and still more have been muted or silenced by the threat." *Id.* at xi. Finding that "the legal system is not effective in controlling SLAPPs," *id.*, they proposed the adoption of anti-SLAPP statutes to address the problem. *Id.* at 201.

Responding to the continuing use of SLAPPs by those seeking to silence opposition to their activities, twenty-six states and the Territory of Guam have now enacted anti-SLAPP statutes.[1]

The ACLU of the Nation's Capital has been directly involved, as counsel for defendants, in two SLAPPs involving District of Columbia residents.

In the first case, a developer that had been frustrated by its inability promptly to obtain a building permit sued a community organization (Southeast Citizens for Smart Development) and two Capitol Hill activists (Wilbert Hill and Ellen Opper-Weiner) who had opposed its efforts. The lawsuit claimed that the defendants had violated the developer's rights when they "conducted meetings, prepared petition drives, wrote letters and made calls and visits to government officials, organized protests, organized the preparation and distribution of ... signs, and gave statements and interviews to various media," and when they created a web site that urged people to "call, write or e-mail the mayor" to ask him to stop the project. The defendants' activities exemplified the kind of grassroots activism that should be hailed in a democracy, and the lawsuit was a classic SLAPP. The case was eventually dismissed, and the dismissal affirmed on appeal.[2] But the litigation took several years, and during all that time the defendants and their neighbors were worried about whether they might face liability. Because the ACLU represented the citizens and their organization at no charge, they were not financially harmed. But had they been required to retain paid counsel, the cost would have been substantial, and intimidating.

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[1] Links to these statutes can be found at http://www.casp.net/menstate.html.

[2] *Father Flanagan's Boys Home v. District of Columbia, et al.*, Civil Action No. 01-1732 (D.D.C.), *aff'd*, 2003 WL 1907987 (No. 02-7157, D.C. Cir. 2003).

In the second case we represented Dorothy Brizill, who needs no introduction to this Committee. She was sued in Guam for defamation, invasion of privacy, and "interference with prospective business advantage," based on statements she made in a radio interview broadcast there about the activities of the gambling entrepreneur who backed the proposed 2004 initiative to legalize slot machines in the District of Columbia. This lawsuit was also a classic SLAPP, filed against her in the midst of the same entrepreneur's efforts to legalize slot machines on Guam, in an effort to silence her. And to intimidate his opponents, twenty "John Does" were also named as defendants. With the help of Guam's strong anti-SLAPP statute, the case was dismissed, and the dismissal was affirmed by the Supreme Court of Guam.[3] But once again, the litigation lasted more than two years, and had Ms. Brizill been required to retain paid counsel to defend herself, it would have cost her hundreds of thousands of dollars.

As professors Pring and Canan demonstrated, a SLAPP plaintiff's real goal is not to win the lawsuit but to punish his opponents and intimidate them and others into silence. *Litigation itself* is the plaintiff's weapon of choice; a long and costly lawsuit is a victory for the plaintiff even if it ends in a formal victory for the defendant. That is why anti-SLAPP legislation is needed: to enable a defendant to bring a SLAPP to an end quickly and economically.

Bill 18-893

Bill 18-893 would help end SLAPPs quickly and economically by making available to the defendant a "special motion to dismiss" that has four noteworthy features:

- The motion must be heard and decided expeditiously.
- Discovery is generally stayed while the motion is pending.
- If the motion is denied the defendant can take an immediate appeal.
- Most important, the motion is to be granted if the defendant shows that he or she was engaged in protected speech or activity, unless the plaintiff can show that he or she is nevertheless likely to succeed on the merits.

Speaking generally, this is sensible path to the desired goal, and speaking generally, the ACLU endorses it. If a lawsuit looks like a SLAPP, swims like a SLAPP, and quacks like a SLAPP, then it probably is a SLAPP, and it is fair and reasonable to put the burden on the plaintiff to show that it isn't a SLAPP.

We do, nevertheless, have a number of suggestions for improvement, including a substantive change in the definition of the conduct that is to be protected by the proposed law.

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[3] *Guam Greyhound, Inc. v. Brizill,* 2008 Guam 13, 2008 WL 4206682.

Section 2(1). The bill begins by defining the term "Act in furtherance of the right of free speech," which is used to signify the conduct that can be protected by a special motion to dismiss. In our view, it would be better to use a different term, because the "right of free speech" is already a term in very common use, with a broader meaning than the meaning given in this bill, and it will be impossible, or nearly so, for litigants, lawyers and even judges (and especially the news media) to avoid confusion between the common meaning of the "right of free speech" and the special, narrower meaning given to it in this bill. It would be akin to defining the term "fruit" to mean "a curved yellow edible food with a thick, easily-peeled skin." This specially-defined term deserves a special name that will not require a struggle to use correctly. We suggest "Act in furtherance of the right of advocacy on issues of public interest."

Section 2(1)(A). Because there is no conjunction at the end of section 2(1)(A)(i), the bill is ambiguous as to whether sections 2(1)(A)(i) and (ii) are conjunctive or disjunctive. That is, in order to be covered, must a statement be made "In connection with an ... official proceeding" *and* "In a place open to the public or a public forum in connection with an issue of public interest," or is a statement covered if it is made *either* "In connection with an ... official proceeding," *or* "In a place open to the public or a public forum in connection with an issue of public interest"?

We urge the insertion of the word "or" at the end of section 2(1)(A)(i) to make it clear that statements are covered in either case. A statement made "In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" certainly deserves anti-SLAPP protection whether it is made in a public place or in a private place. For example, a statement made to a group gathered by invitation in a person's living room, or made to a Councilmember during a non-public meeting, should be protected. Likewise, a statement made "In a place open to the public or a public forum in connection with an issue of public interest" deserves anti-SLAPP protection whether of not it is also connected to an "official proceeding." For example, statements by residents addressing a "Stop the Slaughterhouse" rally should be protected even if no official proceeding regarding the construction of a slaughterhouse has yet begun.[4]

[4] It appears that these definitions, along with much of Bill 18-893, were modeled on the Citizen Participation Act of 2009, H.R. 4364 (111th Cong., 1st Sess.), introduced by Rep. Steve Cohen of Tennessee (*available at* http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.4364.IH:). In that bill it is clear that speech or activity that falls under any one of these definitions is covered.

Section 2(1)(B). Section 2(1)(B) expands the definition of protected activity to include "any other conduct in furtherance of the exercise of the constitutional right to petition the government or the constitutional right of free expression in connection with an issue of public interest." We fully agree with the intent of this provision, but we think it fails as a definition because it is backwards—it requires a court *first* to determine whether given conduct is protected by the Constitution *before* it can determine whether that conduct is covered by the Anti-SLAPP Act. But if the conduct is protected by the Constitution, then there is no need for the court to determine whether it is covered by the Anti-SLAPP Act: a claim arising from that conduct must be dismissed because the conduct is protected by the Constitution. And yet the task of determining whether given conduct is protected by the Constitution is often quite difficult, and can require exactly the kinds of lengthy, expensive legal proceedings (including discovery) that the bill is intended to avoid.

This very problem arose in the *Brizill* case, where the Guam anti-SLAPP statute protected "acts in furtherance of the Constitutional rights to petition," and Mr. Baldwin argued that the statute therefore provided no broader protection for speech than the Constitution itself provided. *See* 2008 Guam 13 ¶ 28. He argued, for example, that Ms. Brizill's speech was not protected by the statute because it was defamatory, and defamation is not protected by the Constitution. As a result, the defendant had to litigate the constitutional law of defamation on the way to litigating the SLAPP issues. This should not be necessary, as the purpose of an anti-SLAPP law is to provide broader protection than existing law already provides. Bill 18-893 should be amended to avoid creating the same problem here.[5]

We therefore suggest amending Section 2(1)(B) to say: "Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest."

Section 2(4). Section 2(4) defines the term "government entity." But that term is never used in the bill. It should therefore be deleted.[6]

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[5] The Supreme Court of Guam ultimately rejected the argument that "Constitutional rights" meant "constitutionally protected rights," *see id.* at ¶ 32, but that was hardly a foregone conclusion, and the D.C. Court of Appeals might not reach the same conclusion under Section 2(1)(B).

[6] The same term is defined in H.R. 4364, but it is then used in a section providing that "A government entity may not recover fees pursuant to this section."

Section 3(b). We agree with what we understand to be the intent of this provision, setting out the standards for a special motion to dismiss. But the text of this section fails to accomplish its purpose because it never actually spells out what a court is supposed to do. We suggest revising Section 3(b) as follows:

> (b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

Section 3(c). We agree that discovery should be stayed on a claim as to which a special motion to dismiss has been filed. This is an important protection, for discovery is often burdensome and expensive. Because expression on issues of public interest deserves special protection, a plaintiff who brings a claim based on a defendant's expression on an issue of public interest ought to be required to show a likelihood of success on that claim without the need for discovery.

A case may exist in which a plaintiff could prevail on such a claim after discovery but cannot show a likelihood of success without discovery, but in our view the dismissal of such a hypothetical case is a small price to pay for the public interest that will be served by preventing the all-but-automatic discovery that otherwise occurs in civil litigation over the sorts of claims that are asserted in SLAPPs.

As an exception to the usual stay of discovery, Section 3(c) permits a court to allow "specified discovery" after the filing of a special motion to dismiss "for good cause shown." We agree that a provision allowing some discovery ought to be included for the exceptional case. But while the "good cause" standard has the advantage of being flexible, it has the disadvantage of being completely subjective, so that a judge who simply feels that it's unfair to dismiss a claim without discovery can, in effect, set the Anti-SLAPP Act aside and allow a case to proceed in the usual way. In our view, it would be better if the statute spelled out more precisely the circumstances under which discovery might be allowed, and also included a provision allowing the court to assure that such discovery would not be burdensome to the defendant. For example: "...except that the court may order that specified discovery be conducted when it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery."

Finally, we note that this section provides that discovery shall be stayed "until notice of entry of an order disposing of the motion." That language tracks H.R. 4364, but "notice of entry" of court orders is not part of D.C. Superior Court procedure. We suggest that the bill be amended to provide that "... discovery proceedings on the claim shall be stayed until the motion has been disposed of, including any appeal taken under section 3(e), ..."

Sections 3(d) and (e). We agree that a special motion to dismiss should be expedited and that its denial should be subject to an interlocutory appeal. The Committee may wish to consider whether the Court of Appeals should also be directed to expedite its consideration of such an appeal. The D.C. Court of Appeals often takes years to rule on appeals.

Section 4. Section 4 is focused on the fact that SLAPPs frequently include unspecified individuals (John and Jane Does) as defendants. As observed by professors Pring and Canan, this is one of the tactics employed by SLAPP plaintiffs to intimidate large numbers of people, who fear that they may become named defendants if they continue to speak out on the relevant public issue.

There can be very legitimate purposes for naming John and Jane Does as defendants in civil litigation. The ACLU sometimes names John and Jane Does as defendants when it does not yet know their true identities—for example, when unknown police officers are alleged to have acted unlawfully.[7] It is therefore necessary to balance the right of a plaintiff to proceed against an as-yet-unidentified person who has violated his rights, and to use the court system to discover that person's identity, against the right of an individual not to be made a defendant in an abusive SLAPP that was filed for the purpose of retaliating against, or chilling, legitimate civic activity.

We believe that Section 4 strikes an appropriate balance by making available to a John or Jane Doe a "special motion to quash," protecting his or her identity from disclosure if he or she was acting in a manner that is protected by the Anti-SLAPP Act, and if the plaintiff cannot make the same showing of likely success on the merits that is required to defeat a special motion to dismiss.

Like Section 3(b), however, Section 4(b) never actually spells out what a court is supposed to do. We therefore suggest revising Section 4(b) in the same manner we suggested revising Section 3(b):

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[7] *See, e.g., YoungBey v. District of Columbia, et al.*, No. 09-cv-596 (D.D.C.) (suing the District of Columbia, five named MPD officers, and 27 "John Doe" officers in connection with an unlawful pre-dawn SWAT raid of a District resident's home).

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personally identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

Section 6(a). Section 6(a) provides that "This Act shall not apply to claims brought solely on behalf of the public or solely to enforce an important right affecting the public interest." This language is vague and tremendously broad. Almost any plaintiff can and will assert that he is bringing his claims "to enforce an important right affecting the public interest," and neither this bill nor any other source we know gives a court any guidance regarding what "an important right affecting the public interest" might be. The plaintiffs in the two SLAPP suits described above, in which the ACLU of the Nation's Capital represented the defendants, vigorously argued that they were seeking to enforce an important right affecting the public interest: the developer argued that it was seeking to provide housing for disadvantaged youth; the gambling entrepreneur argued that he was seeking to prevent vicious lies from affecting the result of an election.

Thus, this provision will almost certainly add an entire additional phase to the litigation of every SLAPP suit, with the plaintiff arguing that the anti-SLAPP statute does not even apply to his case because he is acting in the public interest. To the extent that courts accept such arguments, this provision is a poison pill with the potential to turn the anti-SLAPP statute into a virtually dead letter. At a minimum, it will subject the rights of SLAPP defendants to the subjective opinions of more than 75 different Superior Court judges regarding what is or is not "an important right affecting the public interest."

Moreover, we think the exclusion created by Section 6(a) is constitutionally problematic because it incorporates a viewpoint-based judgment about what is or is not in the public interest—after all, what is in the public interest necessarily depends upon one's viewpoint.

—Assume, for example, that D.C. Right To Life (RTL) makes public statements that having an abortion causes breast cancer. Assume Planned Parenthood sues RTL, alleging that those statements impede its work and cause psychological harm to its members. RTL files a special motion to dismiss under the Anti-SLAPP Act, showing that it was communicating views to members of the public in connection with an issue of public interest. But Planned Parenthood responds that its lawsuit is not subject to the Anti-SLAPP Act because it was

"brought ... solely to enforce an important right affecting the public interest," to wit, the right to reproductive choice.

—Now assume that Planned Parenthood makes public statements that having an abortion under medical supervision is virtually risk-free. RTL sues Planned Parenthood, alleging that those statements impede its work and cause psychological harm to its members. Planned Parenthood files a special motion to dismiss under the Anti-SLAPP Act, showing that it was communicating views to members of the public in connection with an issue of public interest. But RTL responds that its lawsuit is not subject to the Anti-SLAPP Act because it was "brought ... solely to enforce an important right affecting the public interest," to wit, the right to life.

Are both lawsuits exempt from the Anti-SLAPP Act? Neither? One but not the other? We fear that the result is likely to depend on the viewpoint of the judge regarding which asserted right is "an important right affecting the public interest." But the First Amendment requires the government to provide evenhanded treatment to speech on all sides of public issues. We see no good reason for the inclusion of Section 6(a), and many pitfalls. Accordingly, we urge that it be deleted.[8]

Thank you for your consideration of our comments.

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[8] Section 10 of H.R. 4364, on which Section 6(a) of Bill 18-893 is modeled, begins with the catchline "Public Enforcement." It therefore appears that Section 10 was intended to exempt only enforcement actions brought by the government.

Even if that is true, we see no good reason to exempt the government, as a litigant, from a statute intended to protect the rights of citizens to speak freely on issues of public interest. To the contrary, the government should be held to the strictest standards when it comes to respecting those rights. *See, e.g., White v. Lee*, 227 F.3d 1214 (9th Cir. 2000) (holding that the advocacy activities of neighbors who opposed the conversion of a motel into a multi-family housing unit for homeless persons were protected by the First Amendment, and that an intrusive eight-month investigation into their activities and beliefs by the regional Fair Housing and Equal Opportunity Office violated their First Amendment rights).

We therefore urge the complete deletion of Section 6(a), as noted above. However, if the Committee does not delete Section 6(a) entirely, its coverage should be limited to lawsuits brought by the government.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

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[redacted]

ATTORNEY GENERAL

[redacted]

September 17, 2010

The Honorable Phil Mendelson
Chairperson
Committee on Public Safety & the Judiciary
Council of the District of Columbia
1350 Pennsylvania Avenue, N.W., Ste. 402
Washington, D.C. 20004

Re: Bill 18-893, the "Anti-SLAPP Act of 2010"

Dear Chairperson Mendelson:

I have not yet had the opportunity to study in depth Bill 18-893, the "Anti-SLAPP Act of 2010" ("bill"), which will be the subject of a hearing before your committee today, but I do want to register a preliminary concern about the legislation.

To the extent that sections 3 (special motion to dismiss) and 4 (special motion to quash) of the bill would impact SLAPPs filed in the Superior Court of the District of Columbia, the legislation may run afoul of section 602(a)(4) of the District of Columbia Home Rule Act, approved December 24, 1973, Pub. L. 93-198, 87 Stat. 813 (D.C. Official Code § 1-206.02(a)(4) (2006 Repl.)), which prohibits the Council from enacting any act "with respect to any provision of Title 11 [of the D.C. Code]." In particular, D.C. Official Code § 11-946 (2001) provides, for example, that the Superior Court "shall conduct its business according to the Federal Rules of Civil Procedure...unless it prescribes or adopts rules which modify those Rules [subject to the approval of the Court of Appeals]." As you know, the Superior Court subsequently adopted rules of procedure for civil actions, including Rules 12(c) (Motion for judgment on the pleadings), 26-37 (Depositions and Discovery), and 56 (Summary judgment), which appear to afford the parties to civil actions rights and opportunities that sections 3 and 4 of the bill can be construed to abrogate. Thus, the bill may conflict with the Superior Court's rules of civil procedure and, consequently, violate section 602(a)(4) of the Home Rule Act insofar as that section preserves the D.C. Courts' authority to adopt rules of procedure free from interference by the Council. Accordingly, I suggest that – if you have not already done so – you solicit comments concerning the legislation from the D.C. Courts.

Sincerely,

Peter J. Nickles
Attorney General for the District of Columbia

cc: Vincent Gray, Chairman, Council of the District of Columbia
Yvette Alexander, Council of the District of Columbia

Government of the District of Columbia
Office of the Chief Financial Officer

Natwar M. Gandhi
Chief Financial Officer

MEMORANDUM

TO:	**The Honorable Vincent C. Gray** **Chairman, Council of the District of Columbia**
FROM:	**Natwar M. Gandhi** **Chief Financial Officer**
DATE:	**November 16, 2010**
SUBJECT:	**Fiscal Impact Statement – "Anti-SLAPP Act of 2010"**
REFERENCE:	**Bill Number 18-893, Draft Committee Print Shared with the OCFO on November 15, 2010**

Conclusion

Funds are sufficient in the FY 2011 through FY 2014 budget and financial plan to implement the provisions of the proposed legislation.

Background

The proposed legislation would provide a special motion for the quick dismissal of claims "arising from an act in furtherance of the right of advocacy on issues of public interest,"[1] which are commonly referred to as strategic lawsuits against public participation (SLAPPs). SLAPPs are generally defined as retaliatory lawsuits intended to silence, intimidate, or punish those who have used public forums to speak, petition, or otherwise move for government action on an issue. Often the goal of SLAPPs is not to win, but rather to engage the defendant in a costly and long legal battle. This legislation would provide a way to end SLAPPs quickly and economically by allowing for this special motion and requiring the court to hold an expedited hearing on it.

In addition, the proposed legislation would provide a special motion to quash attempts arising from SLAPPs to seek personally identifying information, and would allow the courts to award the costs of litigation to the successful party on a special motion.

[1] Defined in the proposed legislation as (A) Any written or oral statement made: (i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (ii) In a place open to the public or a public forum in connection with an issue of public interest; or (B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

Lastly, the proposed legislation would exempt certain claims from the special motions.

Financial Plan Impact

Funds are sufficient in the FY 2011 through FY 2014 budget and financial plan to implement the provisions of the proposed legislation. Enactment of the proposed legislation would not have an impact on the District's budget and financial plan as it involves private parties and not the District government (the Courts are federally-funded). If effective, the proposed legislation could have a beneficial impact on current and potential SLAPP defendants.

COMMITTEE PRINT

Committee on Public Safety & the Judiciary

November 18, 2010

A BILL

18-893

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To provide a special motion for the quick and efficient dismissal of strategic lawsuits against public participation, to stay proceedings until the motion is considered, to provide a motion to quash attempts to seek personally identifying information; and to award the costs of litigation to the successful party on a special motion.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "Anti-SLAPP Act of 2010".

Sec. 2. Definitions.

For the purposes of this act, the term:

(1) "Act in furtherance of the right of advocacy on issues of public interest" means:

(A) Any written or oral statement made:

(i) In connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; or

(ii) In a place open to the public or a public forum in connection with an issue of public interest.

(B) Any other expression or expressive conduct that involves petitioning the government or communicating views to members of the public in connection with an issue of public interest.

(2) "Issue of public interest" means an issue related to health or safety; environmental, economic, or community well-being; the District government; a public figure; or a good, product, or service in the market place. The term "issue of public interest" shall not be construed to include private interests, such as statements directed primarily toward protecting the speaker's commercial interests rather than toward commenting on or sharing information about a matter of public significance.

(3) "Claim" includes any civil lawsuit, claim, complaint, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.

Sec. 3. Special Motion to Dismiss.

(a) A party may file a special motion to dismiss any claim arising from an act in furtherance of the right of advocacy on issues of public interest within 45 days after service of the claim.

(b) If a party filing a special motion to dismiss under this section makes a prima facie showing that the claim at issue arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the responding party demonstrates that the claim is likely to succeed on the merits, in which case the motion shall be denied.

(c)(1) Except as provided in paragraph (2), upon the filing of a special motion to dismiss, discovery proceedings on the claim shall be stayed until the motion has been disposed of.

(2) When it appears likely that targeted discovery will enable the plaintiff to defeat the motion and that the discovery will not be unduly burdensome, the court may order that specialized discovery be conducted. Such an order may be conditioned upon the plaintiff paying any expenses incurred by the defendant in responding to such discovery.

(d) The court shall hold an expedited hearing on the special motion to dismiss, and issue a ruling as soon as practicable after the hearing. If the special motion to dismiss is granted, dismissal shall be with prejudice.

Sec. 4. Special Motion to Quash.

(a) A person whose personally identifying information is sought, pursuant to a discovery order, request, or subpoena, in connection with a claim arising from an act in furtherance of the right of advocacy on issues of public interest may make a special motion to quash the discovery order, request, or subpoena.

(b) If a person bringing a special motion to quash under this section makes a prima facie showing that the underlying claim arises from an act in furtherance of the right of advocacy on issues of public interest, then the motion shall be granted unless the party seeking his or her personally identifying information demonstrates that the underlying claim is likely to succeed on the merits, in which case the motion shall be denied.

Sec. 5. Fees and costs.

(a) The court may award a person who substantially prevails on a motion brought under sections 3 or 4 of this Act the costs of litigation, including reasonable attorney fees.

(b) If the court finds that a motion brought under sections 3 or 4 of this Act is frivolous or is solely intended to cause unnecessary delay, the court may award reasonable attorney fees and costs to the responding party.

Sec. 6. Exemptions.

This Act shall not apply to claims brought against a person primarily engaged in the business of selling or leasing goods or services, if the statement or conduct from which the claim arises is a representation of fact made for the purpose of promoting, securing, or completing sales or leases of, or commercial transactions in, the person's goods or services, and the intended audience is an actual or potential buyer or customer.

Sec. 7. Fiscal impact statement.

The Council adopts the attached fiscal impact statement as the fiscal impact statement required by section 602(c)(3) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(3)).

Sec. 8. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

EXHIBIT B

Separation of Powers in the District of Columbia

Catholic University Law Review

Volume 27
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Article 4

1978

Separation of Powers in the District of Columbia under Home Rule

James C. McKay Jr.

SEPARATION OF POWERS IN THE DISTRICT OF COLUMBIA UNDER HOME RULE

James C. McKay, Jr. *

I. INTRODUCTION

Three years ago Congress restored a measure of home rule to the citizens of the District of Columbia by its enactment of the District of Columbia Self-Government and Governmental Reorganization Act.[1] In the distribution of governmental powers, the Act closely follows the federal tripartite model, vesting the legislative power in the Council,[2] the executive power in the Mayor,[3] and the judicial power in the District of Columbia courts.[4] The importance of the principle of separation of powers to the newly formed District of Columbia government has been amply demonstrated by the number of conflicts between the three branches during this short period. Each branch has, at times, charged the

* Assistant Corporation Counsel, District of Columbia. A.B., Cornell University, 1969; J.D., University of Virginia School of Law, 1972. The opinions expressed in this article are the author's own and are not necessarily those of the Office of the Corporation Counsel.

1. Pub. L. No. 93-198, 87 Stat. 774 (1973) [hereinafter referred to as the Self-Government Act] enacted December 24, 1973. Title IV of the Act, the "District Charter," which is in effect the Constitution of the District of Columbia, became effective January 2, 1975, after acceptance by a majority of voters in a special Charter referendum. *Id.* §§ 701, 704, 771, *reprinted in* D.C. Code § 1-121 note (Supp. V 1978). (All subsequent references to the District of Columbia Code, unless otherwise indicated, are to the 1978 supplement to the 1973 edition).

Prior to this Act, the citizens of the District of Columbia had enjoyed differing degrees of self-government at various times in the past, the last time during the short life of the Legislative Assembly established by the Act of Feb. 21, 1871, ch. 62, 16 Stat. 419, and abolished by the Act of June 20, 1874, ch. 337, 18 Stat. 116. The history of self-government in the District is summarized in the committee reports on the Self-Government Act. *See* S. REP. NO. 93-219, 93d Cong., 1st Sess. 3-4 (1973); H.R. REP. NO. 93-482, 93d Cong., 1st Sess. 47-49 (1973). *See generally* Newman & DePuy, *Bringing Democracy to the Nation's Last Colony: The District of Columbia Self-Government Act*, 24 AM. U.L. REV. 537 (1975).

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

3. *Id.* § 422, D.C. Code § 1-162.

4. *Id.* § 431(a), D.C. Code, tit. 11, app., at 438. The term "District of Columbia courts" embraces the Superior Court of the District of Columbia and the District of Columbia Court of Appeals. *Id.* § 103(13), D.C. Code § 1-122(13).

other two with serious encroachments. Although the Act reserved considerable authority to the federal government over District affairs,[5] the federal government, for the most part, has played a passive role, allowing these conflicts to run their course.[6]

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

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

6. Congress has neither repealed nor disapproved by concurrent resolution a single act of the Council, and the President has only once exercised his authority to sustain the Mayor's overridden veto. *See* note 147 & accompanying text *infra*. Moreover, Charles C. Diggs, Jr., Chairman of the House District of Columbia Committee, has introduced legislation, H.R. 9404, 95th Cong., 1st Sess. (1977), which would reduce the layover period required for acts of the Council before Congress and would terminate the President's authority to veto overridden acts of the Council. The measure was redesignated H.R. 12116, 95th Cong., 2d Sess. (1978), and was reported by the committee on May 1, 1978. *See* H.R. REP. NO. 95-1104, 95th Cong., 2d Sess. (1978). President Carter has shown his support for the termination of this presidential role. *See* Remarks of the Vice President on the President's Decisions on the Task Force on the District of Columbia Recommendations, 13 WEEKLY COMP. OF PRES. DOC. 1386 (Sept. 21, 1977). On the other side, however, Congress extended the two-year prohibition of the Council's authority to enact criminal laws for another two years—that is, until Jan. 3, 1979, Act of Sept. 7, 1976, Pub. L. No. 94-402, 90 Stat. 1220 (1976), and has routinely delayed its appropriation of the District's budget. *See* Act of Dec. 9, 1977, Pub. L. No. 95-205, 91 Stat. 1460 (1977).

7. The Supreme Court has recently reaffirmed the principle of separation of powers in Buckley v. Valeo, 424 U.S. 1, 120 (1976), in which the Court invalidated parts of the Federal Election Act providing for the appointment by congressional officers of a majority of the members of the executive Federal Election Commission as violative of the appointments clause. *See also* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 441-46 (1977).

8. THE FEDERALIST Nos. 47, 48, 49, 51, 71 (New Am. Lib. ed. 1961).

of Virginia,[9] and Washington's *Farewell Address*.[10] As Madison stated in *The Federalist*, paraphrasing Montesquieu, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[11] The principle was premised on a healthy skepticism of the motives of men in positions of power. As Madison explained:

> This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power, where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other—that the private interest of every individual may be a sentinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the State.[12]

The application of the principle, of course, does not require the complete separation of governmental powers or the hermetic sealing off of each branch from the others.[13] Indeed, the integrity of each branch can only be ensured by granting each select powers over the others sufficient to check them without controlling them. Thus, under the Constitution, the President shares the legislative power by his ability to veto acts of Congress, and he exerts an influence on the judiciary by his authority to nominate all federal judges. Congress, in turn, shares the President's power of executive appointment by its ability to confirm executive officers, and it exerts an influence on the judicial branch by its authority to confirm judges appointed by the President; moreover, it keeps check on both branches by its power of the purse. The judiciary, as the ultimate interpreter of the law of the land, possesses considerable power over both branches. Of course, the power of one branch to check another, being an exception to the general distribution of governmental powers, must be expressly granted by the organic law establishing the

9. T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (Univ. of N.C. ed. 1955), *quoted in* THE FEDERALIST, *supra* note 8, No. 48 (J. Madison), at 310-11.

10. 1 MESSAGES AND PAPERS OF THE PRESIDENTS 219 (1895).

11. THE FEDERALIST, *supra* note 8, No. 47 (J. Madison), at 301.

12. *Id.* No. 51 (J. Madison), at 322.

13. *See* Buckley v. Valeo, 424 U.S. 1, 121 (1976); Springer v. Philippine Islands, 277 U.S. 189 (1928). In the latter case, the Court noted that "[t]he existence in the various constitutions of occasional provisions expressly giving to one of the departments powers which by their nature otherwise would fall within the general scope of the authority of another department emphasizes, rather than casts doubt upon, the general inviolate character of this basic rule." *Id.* at 202.

governmental entity and may not be inferred from the basic powers of the branch exerting the check. Thus, the President could hardly infer the authority to veto acts of Congress from his executive authority alone.[14] The core of the principle of separation of powers is that, subject to such well defined exceptions, one branch may not, directly or indirectly, compel or control the actions of another.[15]

In granting home rule to the District of Columbia, Congress did not divide governmental powers strictly according to the federal model. It is well settled that Congress is under no constitutional compulsion to do so as its authority over the District under article I, section 8, clause 17, is plenary.[16] The most essential difference is that the legislative power of the District, instead of being divided between two rival Houses and thus weakened, is concentrated in a unicameral, thirteen-member Council.[17] Moreover, the checks given to certain branches against the others differ in some respects from the federal model. Hence, while the Mayor, as the President, may submit legislation[18] and veto acts of the legislature,[19] he lacks the authority to nominate members of the judiciary.[20] While the Council, as the Congress, holds the power of the purse over the executive branch,[21] it may not revise the budget of the judiciary;[22] nor is it vested with the authority (with certain express exceptions) to participate in the process of executive appointment.[23] The judicial branch of the District government, in contrast, has fewer checks against it from coequal branches than does the federal judiciary.[24] These differences,

14. *See* Buckley v. Valeo, 424 U.S. 1, 285 (1976), (White, J., separate opinion).

15. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 629-30 (1935); O'Donoghue v. United States, 289 U.S. 516, 530 (1933); Massachusetts v. Melon, 262 U.S. 447, 488 (1923).

16. *See* Palmore v. United States, 411 U.S. 389 (1973) (Congress not required to assure criminal defendant in District of Columbia accused of crime against United States of a trial by an article III judge with life tenure, but may create article I courts to hear such cases); Keller v. PEPCO, 261 U.S. 428, 443 (1921); Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 225 (1908).

17. Self-Government Act §§ 401(b), 404(a), D.C. Code §§ 1-141(b), 1-144(a). Only one State, Nebraska, has a unicameral legislature. NEB. REV. STAT. Const. art. III, § 1 (1975). *See* THE FEDERALIST, *supra* note 8, No. 62 (J. Madison) at 279.

18. Self-Government Act § 422(5), D.C. Code § 1-162(5).

19. *Id.* § 404(e), D.C. Code §1-144(e).

20. His appointment authority over the District of Columbia courts is limited to his power to appoint two of the seven members of the District of Columbia Judicial Nomination Commission, *id.* § 434(b)(4)(C), D.C. Code tit. 11, app., at 442, and two of the seven members of the District of Columbia Commission on Judicial Disabilities and Tenure, *id.* § 431(e)(3)(C), D.C. Code tit. 11, app., at 439.

21. Self-Government Act § 442, D.C. Code § 47-221.

22. *Id.* § 445, D.C. Code tit. 11, app., at 443.

23. *See* Part II-A *infra*.

24. *See* Part III *infra*.

however, do not diminish the importance of the principle of separation of powers in the District government. Though the balance is somewhat different, owing to the fundamental differences between national and local government, the theory remains the same.

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

> The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.
>
> . . . .
>
> . . . Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments.[25]

And as Hamilton added:

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

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

25. THE FEDERALIST, *supra* note 8, No. 48 (J. Madison), at 309.

26. *Id.* No. 71 (A. Hamilton), at 433.

27. *See, e.g.*, Frohnmayer, *The Separation of Powers: An Essay on the Vitality of a Constitutional Idea*, 52 ORE. L. REV. 211, 215 (1973).

delegate any significant amount of its power to the Mayor, is very much warranted.

II. THE LEGISLATURE V. THE EXECUTIVE

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

A. Confirmation Requirements and the Executive Power of Appointment

One of the most essential elements of the executive power is the power of appointment. Most of the Mayor's authority, especially with regard to day-to-day governmental operations, is exercised in his behalf by the heads of agencies of the District government.[28] Typical executive functions, such as the assessment of real property for tax purposes,[29] the removal of snow and ice from public highways,[30] and the implementation of the Federal Energy Administration's weatherization assistance program for low income persons,[31] are carried out by such officers.[32] It is therefore not surprising that the scope of the Mayor's power to appoint executive officers has been the subject of controversy. Considerable

28. *See* Self-Government Act § 422(6), D.C. Code § 1-162(6):

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

29. Delegated to the Director of the Department of Finance and Revenue. Mayor's Orders Nos. 75-55, 75-114, 1 D.C. Stat. 440, 468 (1975).

30. Delegated to the Directors of the Department of Transportation and the Department of Environmental Services. Mayor's Order No. 75-218, 1 D.C. Stat. 506 (1975).

31. Delegated to the Director of the Department of Housing and Community Development. Mayor's Order No. 77-126, 24 D.C. Reg. 1917 (1977).

32. *Cf.* Myers v. United States, 272 U.S. 52, 117 (1926): "The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates . . . ." *Quoted in* Buckley v. Valeo, 424 U.S. 1, 135 (1976).

conflict between the legislative and executive branches has been generated by the Council's continual attempts to grant itself the power of confirmation. Two measures, the Confirmation Act of 1976[33] and the Organization of Offices, Agencies, Departments and Instrumentalities Act of 1976,[34] both introduced January 13, 1976, would have required the Mayor's appointments of the heads of his principal executive agencies to be submitted to and confirmed by the Council. It is clear, however, from the text and legislative history of the Self-Government Act, that the Mayor's power of executive appointment under the Charter is exclusive and may not be diluted by the Council through its use of the legislative power.

The Mayor inherited much of this power from the appointed Commissioner of the District of Columbia, the chief executive officer of the District government prior to home rule under Reorganization Plan No. 3 of 1967.[35] The vast majority of the District agencies currently in existence were created pursuant to this Reorganization Plan, and the Commissioner was vested with the sole authority to appoint executive officers.[36] The Self-Government Act continued these agencies in existence[37] and transferred all of the functions of the Commissioner to the Mayor,[38] including the exclusive power to appoint the heads of these agencies.

Moreover, the authority to appoint the officers of either existing or new agencies which may be established by the Mayor[39] or the Council[40] is clearly implicit in the language of section 422 of the Charter,[41] which vests the executive power of the District in the Mayor and makes him the chief executive of the District government. The legislative history of the Act supports this interpretation; as the Senate Report notes:

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

33. Bill No. 1-225, 22 D.C. Reg. 3781 (1976), introduced by Council members Dixon, Winter, Clarke, Coates, Wilson, Shackleton, D. Moore, and Hobson.

34. Bill No. 1-234, 22 D.C. Reg. 4008 (1976), introduced by Council member Barry.

35. 3 C.F.R. 1026 (1966-70 Comp.), *reprinted in* D.C. Code, tit. 1, app., at 150 (1973), *and in* 81 Stat. 948 (1967).

36. Reorganization Plan No. 3 of 1967, § 303, 3 C.F.R. 1029 (1966-70 Comp.), *reprinted in* D.C. Code, tit. 1, app., at 151 (1973), *and in* 81 Stat. 950 (1967).

37. Self-Government Act § 714, D.C. Code § 1-133.

38. *Id.* § 422, D.C. Code § 1-162: "In addition, except as otherwise provided in this Act, all functions granted to or vested in the Commissioner of the District of Columbia, as established under Reorganization Plan Numbered 3 of 1967, shall be carried out by the Mayor in accordance with this Act."

39. Self-Government Act § 422(12), D.C. Code § 1-162(12).

40. *Id.* § 404(b), D.C. Code § 1-144(b).

41. D.C. Code § 1-162.

> government. He shall be responsible for the proper administration of the affairs of the District coming under his jurisidiction and control. The bill confers on him the usual administrative powers and duties, *including the power to appoint personnel in the executive branch of the city government* and to remove such personnel in accordance with applicable laws and regulations. (Emphasis added).[42]

It is particularly significant that the Self-Government Act contains nothing similar to the appointments clause of the Constitution[43] conditioning the President's appointment of executive officers on the "advice and consent of the Senate." Such a diminution of this inherently executive function must be expressly granted to the legislature by the organic law[44] and may not be assumed by that branch through its legislative powers.[45] That Congress did not intend a general dilution of this power of the Mayor is clear from its inclusion in the Self-Government Act of express provisions subjecting the Mayor's appointment of the officers of certain independent agencies to "the advice and consent of the Council."[46] Other than such express limitations on the executive power of appointment in this or other acts of Congress, however, nothing qualifies the authority of the Mayor to appoint executive officers. His power is exclusive.

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

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42. S. REP. NO. 93-219, 93d Cong., 1st Sess. 7 (1973) (reporting on S. 1435, 93d Cong., 1st Sess., § 402 (1973)). *Cf.* Myers v. United States, 272 U.S. 52, 117 (1926).

43. U.S. CONST. art. II, § 2, cl. 2.

44. *See* Buckley v. Valeo, 424 U.S. 1, 121 (1976); Gillson v. Heffernan, 40 N.J. 367, 192 A.2d 583 (1963); Visone v. Reilly, 80 N.J. Super. 494, 194 A.2d 577 (1963); Walker v. Baker, 145 Tex. Civ. App. 121, 196 S.W.2d 324 (1946); People v. Shawyer, 30 Wyo. 366, 222 P. 11 (1923).

45. It is significant that earlier drafts of the United States Constitution vested the President with the exclusive authority, subject to certain express exceptions, to appoint all officers of the United States. *See* Buckley v. Valeo, 424 U.S. 1, 129-31, 271-74 (1976).

46. Namely, the Board of Elections, Self-Government Act § 491, D.C. Code § 1-1103; the Zoning Commission, *id.* § 492, D.C. Code § 5-412; the Public Service Commission, *id.* § 493, D.C. Code § 43-201a; and the Armory Board, *id.* § 494, D.C. Code § 2-1702. In addition, certain acts prior to home rule expressly vested the former District of Columbia Council with the authority to confirm certain officers appointed by the Commissioner—namely, the People's Counsel, D.C. Code § 43-205(b); the members of the Board of Equalization and Review, D.C. Code § 47-646(a); the members of the Housing Rent Commission, D.C. Code § 45-1623(a) (Supp. II 1975); and the members of the Redevelopment Land Agency, D.C. Code § 5-703(a). As the Mayor inherited the power of the Commissioner to appoint these officers, Self-Government Act § 422, D.C. Code § 1-162, the present Council of the District of Columbia inherited the power of the old District of Columbia Council to confirm these officers. *Id.* § 404(a), D.C. Code § 1-144(a).

separation of powers embodied in the Self-Government Act, and he recommended that they be disapproved.[47] Both bills subsequently died in committee.[48] The controversy, however, is far from being resolved. Bill No. 2-11,[49] introduced January 3, 1977, would subject the Mayor's appointment of all executive agency heads under the proposed District Government Independent Merit Personnel Act[50] to Council confirmation. The Corporation Counsel has reaffirmed his opposition to such an enactment.[51]

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

The Council has enacted legislation establishing several such "independent" agencies headed by officers appointed by the Mayor "with the advice and consent of the Council"—namely, the Office of Aging,[54] the Commission on the Arts and Humanities,[55] the District of Columbia

47. Unpublished Opinion of the Corp. Counsel re Bill No. 1-225 & Bill No. 1-234 (Mar. 26, 1976).

48. *See* Rule 6Q of the Rules of Organization and Procedure of the Council, Res. No. 2-1, 23 D.C. Reg. 7984, 8021 (1977).

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

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

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

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

53. *Cf.* Buckley v. Valeo, 424 U.S. 1, 137-43 (1976); Springer v. Philippine Islands, 277 U.S. 189, 202 (1928).

54. D.C. Law No. 1-24, § 302, D.C. Code § 6-1712.

55. D.C. Law No. 1-22, § 4, D.C. Code § 31-1903.

General Hospital Commission,[56] and the Commission on Licensure to Practice the Healing Arts.[57] The first measure, the Act on Aging, was signed by the Mayor without mention of this objectionable provision. However, the Mayor, on the advice of the Corporation Counsel that such provision contravened the Charter,[58] did not refer his appointment of the head of that agency to the Council for confirmation,[59] and the Council has not challenged this action. The second measure, the Commission on the Arts and Humanities Act, was vetoed by the City Administrator as Acting Mayor,[60] and, as the Council failed to override the veto within 30 days as required by the Charter,[61] the Commission has, at most, a de facto status.[62] The Mayor vetoed the final two measures, but was overridden by the Council and has permitted the Council to "confirm" his appointments. Unfortunately, the Mayor's apparent acquiescence with respect to the appointment of the officers of the agencies created by these bills runs the danger of encouraging further attempted encroachments, thereby perpetuating the controversy over the scope of the Mayor's power of appointment.

B. Legislation by Resolution: Circumventing The Veto Power of the Mayor

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

56. D.C. Law No. 1-134, §§ 202(a), 205, D.C. Code §§ 32-1312(a), 32-1315.

57. D.C. Law No. 1-106, § 2(a)(1), D.C. Code § 2-103(a)(1).

58. Opinion of the Corp. Counsel re App't of the Exec. Dir. of the Office on Aging, 1 OP. C.C.D.C. 526 (1977).

59. The Act on Aging also created an advisory Commission on Aging with 15 lay members appointed by the Mayor with the advice and consent of the Council. *Id.* § 402, D.C. Code § 6-1721. The Mayor has permitted the Council to confirm these members as the Commission has no executive authority.

60. Self-Government Act § 422(1), D.C. Code § 1-162(1), authorizes the Mayor to "designate the officer or officers of the executive department of the District who may, during periods of disability or absence from the District of the Mayor execute and perform the powers and duties of the Mayor." The power to designate such a temporary Acting Mayor is distinct from the power to delegate executive functions to subordinates to carry out the day-to-day functions of the executive under § 422(6) of the Act, D.C. Code § 1-162(6). *See* Unpublished Opinion of the Corp. Counsel re Whether the City Adm'r May Veto an Act of the Council (July 11, 1975).

61. Self-Government Act § 404(e), D.C. Code § 1-144(e).

62. The Mayor has appointed and the Council has "confirmed" members of the Commission.

63. *See generally* Opinion of the Corp. Counsel re The Legal Force & Effect of a Resolution Adopted by the Council. 1 Op. C.C.D.C. 261 (1976).

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

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

64. D.C. Code § 1-146(a).

65. Self-Government Act § 412(a), D.C. Code § 1-146(a).

66. *Id.* § 404(e), D.C. Code § 1-144(e).

67. *Id.* § 602(c), D.C. Code § 1-147(c).

68. *Id.* § 404(e), D.C. Code § 1-144(e).

69. *Id.* § 412(a), D.C. Code § 1-146(a). *See generally* Opinion of the Corp. Counsel re Emerg. Legis. Auth. of the Council. 1 Op. C.C.D.C. 467 (1977).

70. Under Council practice, resolutions may be adopted after a single reading at the biweekly legislative session. *See* Rules of Organization and Procedure of the Council, Res. No. 2-1, Rule 6, 23 D.C. Reg. 7984, 8014 (1977). Proposed resolutions (and bills) are subject to a 15 day notice requirement; however, this may be despensed with by a simple declaration by the Council that an emergency exists. Rule 6G, *id.* at 8017. Moreover, a resolution may be considered at a special session called for that purpose. Rule 6B, *id.* at 8014. Resolutions may be referred to a committee, but in practice are generally retained by the Council. Rule 6D, *id.* at 8016.

employed by the Council;[71] investigating the affairs of the District;[72] confirming nominees to District offices by the Mayor or Chairman of the Council pursuant to statutes expressly authorizing Council confirmation;[73] appointing members of District boards, commissions, or other bodies pursuant to statutes expressly authorizing such appointments;[74] disapproving executive reorganization plans;[75] and approving applications for grants to the District under federal law.

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

71. Self-Government Act § 401(c), D.C. Code § 1-141(c).

72. *Id.* § 413(a), D.C. Code § 1-148(a). *See* note 52 *supra*.

73. *See, e.g.*, Self-Government Act § 455(a), D.C. Code § 47-120(a) (District of Columbia Auditor).

74. *See, e.g., id.* § 431(e)(3)(D), D.C. Code, tit. 11, app., at 439 (one member of the District of Columbia Commission on Judicial Disabilities and Tenure); *id.* § 434(b)(4)(D), D.C. Code, tit. 11, app., at 442 (one member of the District of Columbia Judicial Nomination Commission).

75. *Id.* § 422(12), D.C. Code § 1-162(12). Congress was careful to expressly provide the Council with this power in the Charter in view of the controversy over the power of Congress to subject the President's reorganization authority to congressional veto, *see* 5 U.S.C. § 901 (1970), without express authority to do so in the Constitution. The Supreme Court, unfortunately, has declined to resolve this important issue. Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977) (4-3 decision), *cert. denied*, 98 S. Ct. 718 (1978). *See generally* Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975).

76. *See* Special Message to Congress Transmitting Reorganization Plan No. 3 of 1967 (June 1, 1967), 1 PUB. PAPERS OF PRES. JOHNSON 585, 586 (1968), *reprinted in* D.C. Code, tit. 1, app., at 163 (1973).

77. D.C. Code § 1-144(a).

78. D.C. Code § 1-162. *See* note 38 *supra*.

79. Reorganization Plan No. 3 of 1967 § 406, 3 C.F.R. 1058-59 (1966-70 Comp.), *reprinted in* D.C. Code, tit. 1, app., at 161 (1973), *and in* 81 Stat. 978 (1967).

80. *Id.* § 402(168), 3 C.F.R. 1040 (1966-70 Comp.), *reprinted in* D.C. Code, tit. 1, app., at 155 (1973), *and in* 81 Stat. 961 (1967).

rise to considerable controversy over the Council's use of its authority to adopt resolutions.

The closing of streets and alleys under the Street Readjustment Act of the District of Columbia[81] is essentially a legislative action. As the District of Columbia Court of Appeals stated, in construing that Act, "the Council in determining whether to close a street is exercising legislative discretion based upon primarily legislative facts."[82] The former Council chose to exercise this function by resolution. As the action did not concern rules, regulations, penalties, or taxes, it was not submitted to the executive. However, the ability of the former Council to take this legislative action by resolution did not authorize the present Council to do the same. The present Council is required to carry out the functions it inherited from the former Council "in accordance with the provisions of [the Self-Government] Act,"[83] and section 412 of that Act requires the Council to "use acts for *all* legislative purposes . . . ."

Perhaps misled by the practice of the former Council, the present Council adopted dozens of resolutions purporting to close various streets and alleys.[84] This practice continued until the end of 1976, despite several critical opinions issued by the Corporation Counsel.[85] In an effort to resolve this conflict, the Mayor proposed, and the Council passed, an emergency act validating all of the closings purported to be effected by

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81. D.C. Code § 7-401 to 410 (1973).

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

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

Id. at 316-17.

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

84. *E.g.*, Res. Nos. 1-128, 1-129, 1-130, 1-131, 1-132, 1-133, 1 D.C. Stat. 299, 300, 301, 302, 303, 304 (1975); Res. Nos. 1-188, 1-189, 1-209, 1-210, 1-214, 1-216, 1-231, 1-249, 22 D.C. Reg. 4191, 4193, 5059, 5062, 5368, 5489, 5497, 6472 (1976).

85. Opinion of the Corp. Counsel re The Legal Force & Effect of a Resolution Adopted by the Council, *supra* note 63; Opinion of the Corp. Counsel re Whether Certain Functions of the Council with Respect to Alley Closings, Street Dedications, & Highway Plan Amendments May be Exercised by Act or Resolution. 1 Op. C.C.D.C. 368 (1976).

resolution prior to the effective date of the act.[86] The act also delegated the function of closing streets and alleys to the Mayor, subject to Council approval, since using an executive order of the Mayor rather than an act of the Council would obviate the often extensive Congressional layover period required for all permanent acts of the Council. However, this emergency act expired March 29, 1977, and the Council has failed to enact similar permanent legislation proposed by the Mayor.[87] And although, since December 1976, the Council has used acts instead of resolutions to close streets or alleys,[88] the controversy still persists as the Council has continually asserted that it may legally close streets and alleys by resolution.[89]

C. Resolutions Compelling Executive Officers

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

86. The Emergency Street & Alley Closing Act of 1976, Act No. 1-184, 23 D.C. Reg. 4928 (1977) (eff. Dec. 29, 1976).

87. In Bill No. 2-56, 23 D.C. Reg. 5422 (1977), introduced Jan. 19, 1977, the Council excised the provisions delegating authority to the Mayor and substituted language revalidating closings validated by Act 1-184, the Emergency Street & Alley Closing Act of 1976.

88. *See, e.g.*, D.C. Laws Nos. 2-2, 2-3, 2-4, 2-5, 2-6, 23 D.C. Reg. 8193, 8197, 8200, 8203, 8206 (1977).

89. *See* Act No. 2-34, 23 D.C. Reg. 9236 (1977); Act No. 2-74, 24 D.C. Reg. 1784 (1977); Act No. 2-114, 24 D.C. Reg. 4834 (1977).

90. 1 D.C. Stat. 235 (1975).

91. 22 D.C. Reg. 5995, 5997 (1976).

92. 23 D.C. Reg. 3778 (1976). *Contra*, 1 OP. C.C.D.C. 105 (1976); *see* § 449(a) of the Charter, D.C. Code § 47-227(a), which provides that "the Mayor shall . . . prescribe the forms of receipts, vouchers, bills and claims to be used by all the agencies, offices, and instrumentalities of the District government . . . ."

Chief over the distribution of his forces, the authority of the Corporation Counsel over the invitation of litigation, and the authority of the District of Columbia Treasurer over the processing of vouchers and the issuance of checks are at the very heart of the responsibilities of those officers. The Council may not direct their activities; only the Mayor possesses such authority.

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

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

93. 22 D.C. Reg. 6392, 6393 (1976). The Mayor agreed to this project, and it was completed by the District of Columbia Department of General Services and private contractors at a cost of over $30,000.

94. 23 D.C. Reg. 660 (1976). *See* 1 OP. C.C.D.C. 89 (1976).

95. Self-Government Act § 442, D.C. Code § 47-221.

96. *See* Opinion of the Corp. Counsel re The Legal Force & Effect of a Resolution Adopted by the Council, *supra* note 63, at 280-81.

97. 1 D.C. Stat. 267 (1975).

government and its agencies to all members of the Council, the public libraries of the District . . ." and directs them "to compile and make available . . . a catalog that will index and provide a bibliography for all publications, studies, and reports, prepared by, or under the auspices of, the Government of the District of Columbia."[98] Such a monumental undertaking would have required substantial expenditures, involving diversion of funds appropriated by Congress to the District for other programs. Another example is Resolution No. 1-97, which directs the Mayor to "conduct an examination into the feasibility of implementing a residency requirement for . . . District employees, in connection with the development and administration of a personnel system . . . ."[99] Section 422(3) of the Charter[100] directs the Council to enact a District government merit system, but does not authorize it to order the Mayor to conduct such an examination. A final example is Resolution No. 1-160, which requires "[e]very District government agency [to] develop and submit to the Mayor and Council an affirmative action plan."[101] The Council, however, has no authority by resolution to require executive agencies to develop and submit such reports, and it apparently conceded as much, for it subsequently enacted legislation along similar lines.[102] The reports, compilations, and plans sought by these resolutions are quite distinct from the evidence which the Council may require of any person pursuant to a valid investigation of District affairs under section 413(a) of the Charter.[103] This provision authorizes the Council to require executive personnel to testify or produce books, papers, or other existing evidence, but does not authorize it to require such officers by resolution to collect evidence, make compilations, render judgments, or develop policy.

The Council has attempted to compel executive officers not only by the direct use of resolutions, but also by the enactment of legislation authorizing the Council to take such actions at a later date by the use of resolutions. Such legislation, however, does not legitimize a use of the resolution which is contrary to the Charter. A prime example is the Council's enactment of D.C. Law No. 1-111, the District of Columbia Fire Department Operations Act of 1976.[104] The Act was essentially an

98. *Id.*
99. 1 D.C. Stat. 265 (1975).
100. D.C. Code § 1-162(3).
101. 22 D.C. Reg. 3533 (1976).
102. The Affirmative Action Employment Plan, D.C. Law No. 1-63, D.C. Code § 1-320a-h.
103. *See* note 52 *supra*.
104. D.C. Code § 4-401.

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

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

105. *See* Wash. Star, Sept. 8, 1976, § A, at 1, col.1. (final ed.); Wash. Post, Sept. 9, 1976, § D, at 1, col. 1.

106. The incident also engendered a $5 million suit against the District. Chandler v. District of Columbia, CA No. 8623-77 (D.C. Super. Ct., filed Sept. 2, 1977). However, the suit was dismissed on the ground that the damage resulted from a discretionary action on the part of the District. Order of Revercomb, J. (Mar. 8, 1978).

107. Emergency District of Columbia Fire Department Operations Act of 1976, Emergency Act No. 1-70 (Nov. 11, 1976) (unpublished).

108. *Id.* § 2. The current law at that time, D.C. Code § 4-401 (1973), provided: "The fire department of the District of Columbia shall embrace the whole of the said District, and its personal and movable property shall be assigned and located as the [Mayor] of said District may direct within the appropriations made by Congress."

109. Unpublished veto message of the Mayor, Nov. 18, 1976. *See also* Opinions of the Corp. Counsel re Emergency Act No. 1-70. 1 OP. C.C.D.C. 336, 362 (1976).

and fire prevention shall be approved by resolution of the Council."[110] However, the substitution of this ambiguous phrase for the more precise phrase "decreases in the number of companies, changes in the type of companies, or changes in the location of stationhouses" resulted in little improvement, as any of these specific changes could be considered by the Council to constitute "[m]ajor changes in the manner the Department provides fire protection and fire prevention." Either measure represents an attempt by the Council to assume direct and continuing control over an executive function of the utmost importance to the public safety. The Mayor neither approved nor vetoed the act, and it purportedly became law without his approval.[111] Fortunately, the Council has not yet adopted a resolution pursuant to this act.

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

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

The executive has not been alone in evoking the principle of separation of powers. The Council has reciprocated by charging encroachments by the executive in the case of *District of Columbia v. Tucker*.[112] On June 6, 1977, the Corporation Counsel initiated an action in quo warranto in the

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110. D.C. Law No. 1-111, § 2, D.C. Code § 4-401.

111. The act is subject to an invalidating procedural infirmity. It was not presented to the Mayor until December 21, 1976. Section 404(e) of the Self-Government Act, D.C. Code § 1-144(e), requires that the Mayor be given 10 working days from his formal receipt of the bill to decide whether to approve or veto an act. However, the belated transmittal of the Act did not give the Mayor the required 10 days before the expiration of the first Council period on January 2, 1977 in accordance with § 401(b)(1), D.C. Code § 1-141(b)(1). The need for this time was acutely demonstrated by the large number of acts transmitted to the Mayor at the end of the year. The Council, of course, is not a continuous body, as six or seven of its membership of thirteen must be filled each biennium. *Id.* § 401(b)(4), D.C. Code § 1-141(b)(4). Acts of the Council which do not "become law" pursuant to § 404(e) before the end of the Council period in which they were enacted are nullities. *See* Opinion of the Corp. Counsel re Status of Acts of the Council of the District of Columbia Pending as of the End of the 94th Congress and the First Council Period (Dec. 30, 1976) *reprinted in* H.R. REP. NO. 95-1104, 95TH CONG., 2D SESS. 9 (1978). A recently reported congressional Bill, H.R. 12116, *supra* note 6, would clarify the pocket veto authority of the Mayor implicit in the Charter.

112. 106 DAILY WASH. L. REP. 41 (Super. Ct. D.C. 1977).

Superior Court of the District of Columbia against the Chairman of the Council on the ground that he lacked de jure title to his office by his failure to maintain the qualifications required by the Charter for holding office. Specifically, it was alleged that the Chairman engaged in outside employment for profit in violation of section 403(c) of the Charter,[113] and thereby forfeited his office pursuant to section 402.[114] The Corporation Counsel took the action in the name of the District of Columbia pursuant to D.C. Code sections 16-3521 to 3545 (1973), which authorizes the issuance of a writ of quo warranto against any person who "unlawfully holds or exercises . . . a public office of the District of Columbia, civil or military . . . ," and upon such a finding requires a judgment of ouster and exclusion from office.[115]

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

Not surprisingly, soon after the institution of the action, legislation was introduced in the Council which would divest the Corporation

113. D.C. Code § 1-143(c).

114. D.C. Code § 1-142.

115. D.C. Code § 16-3545 (1973).

116. In contrast, the Houses of Congress have such power. U.S. CONST. art. I, § 5, cl. 1.

117. 106 DAILY WASH. L. REP. at 44-45. The court further noted that even if such a provision existed, this still would not preclude an action in quo warranto by the chief legal officer to test the qualifications of a legislator. *Id.* at 44, n.20 (citing Buckman v. State *ex rel.* Spencer, 34 Fla. 48, 15 So. 697 (1894); Snowball v. People *ex rel.* Grupe, 147 Ill. 260, 35 N.E. 538 (1893); State *ex rel.* Love v. Cosgrave, 85 Neb. 187, 194, 122 N.W. 885, 888 (1909)).

118. 106 DAILY WASH. L. REP. at 45.

119. *Id.* at 51.

Counsel of his authority to institute quo warranto actions against members of the Council, thereby divesting the Superior Court of authority to adjudicate such actions.[120] However, the bill is legally defective as it would diminish the civil jurisidiction of the Superior Court in violation of the Charter.[121] This use of its legislative power as a sword to destroy the executive's authority to initiate quo warranto actions renders the Council's use of the principle of separation of powers as a shield against such actions very questionable.[122]

III. THE LEGISLATURE V. THE JUDICIARY

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

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

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

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

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

124. *Id.* § 434, D.C. Code, tit. 11, app., at 441-42.

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

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

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125. *Id.* § 433(c), D.C. Code, tit. 11, app., at 441. *See* Part IV-B *infra*.
126. *Id*, § 303(a), D.C. Code § 1-125(a).
127. *Id.* § 602(a)(4), D.C. Code § 1-147(a)(4).
128. *Id.* § 718, D.C. Code, tit. 11, app., at 443.
129. *See* STAFF OF THE HOUSE COMM. ON THE DISTRICT OF COLUMBIA, HOME RULE FOR THE DISTRICT OF COLUMBIA 1973 - 1974, 93d Cong., 2d Sess. 1074, 1097-98 (Comm. Print 1974) (markup by full Committee of H.R. 9056, July 24, 1973, remarks of Rep. Adams).
130. Self-Government Act § 445, D.C. Code, tit. 11, app. at 443.
131. Act No. 1-88, 22 D.C. Reg. 4551 (1976).
132. 28 U.S.C. § 1732(a) (1970).
133. Act of Jan. 2, 1975, Pub. L. No. 93-595, § 2(b), 88 Stat. 1926, 1949 (1975).
134. FED. R. EVID. 1101(a).

There was little disagreement about the desirability of retaining a "shop-book rule" for the Superior Court. The controversy arose over the means by which the void would be filled, or more precisely, whether it should be filled by the courts or the Council. In anticipation of the repeal of the federal "Shop-Book Rule" Act, which would coincide with the effective date of the Federal Rules of Evidence, July 1, 1975, the Superior Court, with the approval of the District of Columbia Court of Appeals, promulgated Superior Court Civil Rule 43-I and analogous rules in other divisions of the court,[135] which, in effect, reinstated the federal "Shop-Book Rule" Act in that court. The courts took this action pursuant to their power under D.C. Code section 11-946 (1973)[136] to modify federal procedural rules, which were initially made applicable to the Superior Court, and to promulgate other rules governing the business of the court. Such rules, of course, have the force and effect of law.[137]

The Council intended the proposed District of Columbia Shop-Book Rule Act[138] to accomplish exactly the same thing. This legislative solution, however, was opposed by both the executive and judicial branches of the District government as an infringement of the rulemaking authority of the courts in violation of the principle of separation of powers. The Corporation Counsel argued[139] that the power of the courts of the District of Columbia to promulgate rules of evidence had long been considered an essential element of the judicial power of such courts.[140] By vesting the judicial power of the District in the Superior Court and District of Columbia Court of Appeals[141] and by continuing them as established under the Court Reorganization Act,[142] Congress had intended to assure the inviolability of this element of the courts' authority. The

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135. SMALL CLAIMS R. 2, DOMESTIC RELATIONS R. 43-I, CRIMINAL R. 57(a), TAX DIV. R. 11(a), JUVENILE R. 114, INTRAFAMILY R. 1, NEGLECT R. 1, MENTAL HEALTH R. 4(a)(1), and MENTAL RETARDATION R. 12(g).

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

137. *See* In re C.A.P., 356 A.2d 335, 343 (D.C. 1976); Campbell v. United States, 295 A.2d 498, 501 (D.C. 1972).

138. Bill No. 1-137, 21 D.C. Reg. 3694 (1975), introduced June 17, 1975, by Council member Clarke.

139. *See* Unpublished Opinion of the Corp. Counsel re Bill 1-137, the D.C. Shop-Book Rule Act (Dec. 19, 1975).

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

141. Self-Government Act § 431(a), D.C. Code tit. 11, app., at 438.

142. *Id.* § 718(a), D.C. Code, tit. 11, app., at 443. *See* D.C. Code §§ 11-101, -701, -901 (1973).

Corporation Counsel also noted that the Council was expressly prohibited[143] from enacting legislation with respect to D.C. Code section 11-946 (1973), the source of the courts' rulemaking authority. He concluded that the power of the Council with respect to the District of Columbia courts under the Self-Government Act was miniscule in comparison with the authority of Congress over the federal judiciary under the Constitution,[144] and that the proposed act exceeded the Council's authority.

Although passed by the Council on December 16, 1975, the bill was vetoed by the Mayor on January 7, 1976 on the grounds that it exceeded the Council's authority and that it would be superfluous in light of the action of the courts.[145] The Council, however, overrode the Mayor's veto, and, pursuant to the Charter, the Act was transmitted to the President for a decision whether the veto would stand.[146] Noting that the promulgation of this procedural rule was clearly within the express power of the local courts, and, as such beyond the power of the Council, President Ford sustained the Mayor's veto.[147] This was the first and, thus far, the only time that a President has exercised his authority to sustain the Mayor's overridden veto.

The President's action temporarily ended the controversy over the respective roles of the legislative and judicial branches of the District government in the promulgation of rules of evidence and other procedural rules. A number of popular bills which contained provisions imposing rules of evidence on the Superior Court died.[148] The controversy, however, has not ended as members of the Council continue to introduce legislation imposing rules of evidence upon the District of Columbia courts. For example, the proposed Medical Records Act of 1977[149] would

143. *Id.* § 602(a)(4), D.C. Code § 1-147(a)(4).

144. The Council's authority over rules of court is more akin to the authority of the New Jersey legislature defined in Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406, *cert. denied*, 340 U.S. 877 (1950), where the court held that the state constitution provision that "[t]he Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts" ousted the power of the state legislature over rules of court. *Id.* at 414. *Accord*, Burton v. Mayer, 274 Ky. 263, 118 S.W.2d 547 (1938); Lee v. Baird, 146 N.C. 361, 59 S.E. 876 (1907).

145. Unpublished veto message of the Mayor (Jan. 7, 1976).

146. *See* Self-Government Act § 404(e), D.C. Code § 1-144(e).

147. The President's Message to the Chairman of the Council on His Disapproval of the D.C. Shop-Book Rule Act, 12 WEEKLY COMP. OF PRES. DOC. 301 (Feb. 27, 1976).

148. The Medical Records Act of 1975, Bill No. 1-149, 21 D.C. Reg. 4397 (1975) (Council member Shackleton); the D.C. Psychiatric Confidentiality Act, Bill No. 1-172, 22 D.C. Reg. 771 (1975) (Council member Shackleton); the Prior Sexual Conduct Evidence Act of 1975, Bill No. 1-214, 22 D.C. Reg. 3011 (1975) (Council member Hobson and six cosponsors).

149. Bill No. 2-233, 24 D.C. Reg. 3791 (1977).

render any "secondary medical record"[150] inadmissible as evidence in any proceeding by the courts of the District of Columbia.

The line between the rulemaking power of the courts and the legislative power of the Council was clarified somewhat by the decision of the District of Columbia Court of Appeals in *In re C.A.P.*,[151] rendered soon after the President's disapproval of the District of Columbia Shop-Book Rule Act. The court held that Superior Court Neglect Rule 18(c), which authorized, in certain circumstances, the termination of parental rights in a child neglect case, was without statutory basis[152] and beyond the inherent authority of the Superior Court.[153] The court of appeals reasoned that the termination of parental rights abridged the substantive right to conceive and raise one's children,[154] and, thus, could not be effected under the Superior Court's general authority to promulgate rules of procedure. Partially in response to this decision, the Council enacted the Prevention of Child Abuse and Neglect Act of 1977,[155] which supplied the legislative basis for the authority of the Family Division of the Superior Court to terminate parental rights pursuant to Superior Court Neglect Rule 18(c).[156]

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

IV. THE JUDICIARY V. THE EXECUTIVE

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

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

151. 356 A.2d 335 (D.C. 1976).

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

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

154. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 651 (1972).

155. D.C. Law No. 2-22, 24 D.C. Reg. 3341 (1977) (eff. Sept. 23, 1977).

156. *Id.* § 407(c), 24 D.C. Reg. at 774 (1977) (amending D.C. Code § 16-2320(a) (1973)).

involved the authority of a Superior Court judge over the Corporation Counsel, and the second involved the authority of the District of Columbia Commission on Judicial Disabilities and Tenure over a Superior Court judge.

A. Judicial Authority to Require Executive Representation of Private Litigants

The dispute which resulted in charges of judicial encroachment on the province of the executive arose over the authority of a Superior Court judge to order the Corporation Counsel to represent a private parental petitioner in a proceeding for the involuntary commitment of a mentally ill adult in the case of *District of Columbia v. Pryor*.[157] The applicable statute[158] requires a parent desiring the involuntary commitment of an adult child to petition the Commission on Mental Health, which acts as a special master for the Superior Court. After accepting the case, the Commission holds a hearing and makes findings, recommendations, and conclusions of law, which it reports to the Superior Court. A person whose commitment is sought has a right to counsel in any proceeding before the Commission or the Superior Court. There is no provision in current law, however, for the representation of the petitioner himself. Prior law provided for such representation by the Corporation Counsel, but this provision was repealed and is not in the present statute.[159]

Nevertheless, a Superior Court judge ordered the Corporation Counsel to represent the parental petitioners in two cases before the Superior Court in which the Commission on Mental Health had recommended civil commitment. After the court denied the District's motion to vacate the appointments, the District petitioned the District of Columbia Court of Appeals for a writ of prohibition, or in the alternative, for a writ of mandamus against the trial judge on the ground that the Superior Court was without authority to make the appointments. The court of appeals agreed and held that a Superior Court judge had no inherent discretionary authority to appoint the Corporation Counsel to represent private parties in such cases. Citing the statutory basis of the Corporation Counsel's responsibilities,[160] the court made the following observations:

> Subservience to the chief executive officer of the District government is the major thesis of this provision. To accept or create

157. 366 A.2d 141 (D.C. 1976).
158. D.C. Code § 21-541 (1973).
159. D.C. Code § 21-312 (1961).
160. D.C. Code § 1-301 (1973).

> an additional obligation to obey a court order to undertake representation of private citizens in mental health cases would not only be antithetical to the statute, but also would be contrary to the separation of powers concept so solidly ingrained in our governmental system. That one in public office is also a member of the Bar can be of no significance, for the two roles cannot be deemed separate and the order of appointment cannot be based on professional association as paramount to official responsibility and authority.[161]

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

B. Interference with Judicial Independence: The Powers of the Tenure Commission

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

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

161. 366 A.2d at 143 (citation omitted).
162. 427 F. Supp. 1225 (D.D.C. 1977).
163. D.C. Code § 11-1521 (1973).
164. Self-Government Act § 718(a), D.C. Code, tit. 11, app., at 443.
165. *Id.* § 431(e)(3), D.C. Code, tit. 11, app., at 439.
166. *Id.* § 432, D.C. Code, tit. 11, app., at 439-40.
167. *Id.* § 433(c), D.C. Code, tit. 11, app., at 441.

two ratings results in his automatic reappointment. A rating of "qualified" does not assure reappointment, but gives the President the option, with the advice and consent of the Senate, to reappoint the judge—the same procedure that was followed prior to home rule. A rating of "unqualified" precludes reappointment.

The first judge to be evaluated by the Tenure Commission under its new authority was Charles W. Halleck of the Superior Court, who had been appointed by President Johnson for a ten-year term expiring October 20, 1975. He received a rating of "qualified," leaving his reappointment to the President's discretion. President Ford nominated him for another term, and the Senate District of Columbia Committee reported the nomination to the full Senate. However, the Senate took no action prior to its adjournment sine die on October 1, 1976, necessitating the return of the nomination to the President.[168] Though his term had expired, Judge Halleck continued serving as a hold-over judge.[169] While Judge Halleck's nomination was pending in the Senate, the Tenure Commission, pursuant to its removal power, initiated an investigation to determine whether grounds existed for disciplinary action and served him with a Notice of Formal Proceeding based on allegations of "conduct prejudicial to the administration of justice" as defined by the Code of Judicial Conduct of the American Bar Association.[170] On the eve of the date set for the hearing on these charges, Judge Halleck filed suit in the United States District Court for the District of Columbia to enjoin the Commission from holding the hearing and for a declaratory judgment that the removal and reappointment powers of the Commission were unconsitutional encroachments on the independence of the judiciary. In addition, he contended that the Commission was unduly influenced by an "institutionalized effort" by the United States Attorney's Office for the District of Columbia to prevent his reappointment, and that this constituted an impermissible encroachment by the federal executive on the District judiciary.

The Tenure Commission, represented by the Corporation Counsel, responded that Congress, given its plenary power over the District under article I, section 8, clause 17, of the Constitution,[171] was not compelled to grant to an article I judge of the District of Columbia courts tenure equal to that given by the Constitution to an article III judge. It noted that the

168. Standing Rules of the Senate, Rule XXXVIII(6), Senate Manual, 94th Cong., 1st Sess. (1975).

169. *See* D.C. Code § 11-1502 (1973).

170. Adopted for the District of Columbia courts by the Joint Committee on Judicial Administration. *See* D.C. Code 11-1701(a) (1973); District of Columbia Courts, Annual Report 8 (1973).

171. *See* Palmore v. United States, 411 U.S. 389 (1973).

drafters of the Court Reorganization and Self-Government Acts considered the Commission's possession of these powers to enhance, rather than diminish, judicial independence. The power of removal assured a high standard of conduct in the District judiciary, raising it beyond reproach,[172] and the power of reappointment assured that the tenure of a well qualified judge would be removed from the political process.[173]

The court[174] rejected Judge Halleck's arguments and held that the principle of separation of powers was not offended by a statutory scheme which allocated to an independent agency functions that had previously been exercised not by the judiciary, but by the President and Senate.[175] Furthermore, the court rejected the charge of undue influence by the United States Attorney's Office as not supported by the evidence.[176] *Halleck v. Berliner* settled the authority of the Tenure Commission over the judicial branch of the District government. The instant controversy was laid to rest when President Carter decided not to reappoint Judge Halleck.

V. CONCLUSION

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

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172. *See* S. REP. NO. 91-405, 91st Cong., 1st Sess. 11 (1969).

173. *See* 119 CONG. REC. 40315-16 (1973) (statement of Rep. Diggs on the Self-Government Act conference report).

174. Judge Roszel C. Thomsen, Senior District Judge of the District of Maryland, sitting by designation. The judges of the District Court of the District of Columbia had all recused themselves, probably because one of their associates, Judge Gerhard Gesell, was a member of the Tenure Commission.

175. 427 F. Supp. at 1234.

176. *Id.* at 1234-35.

EXHIBIT C

Home Rule Act Opinions and Documents

DOCUMENTS REGARDING THE ACTIONS OF THE D.C. COUNCIL IN VIOLATION OF THE HOME RULE ACT

1. Unpublished Opinion of the Corp. Counsel re Bill 1-137, the D.C. Shop-Book Rule Act (Dec. 19, 1975); Memorandum to Judith W. Rogers, Special Assistant for Legislation, from C. Francis Murphy, Corporation Counsel. D.C. Re: Bill No. 1-137, the proposed "District of Columbia Shop-Book Act", December 19, 1975. (Box 36, folder "Office of Management and Budget-General (3)" of the Phillip Buchen Files at the Gerald R. Ford Presidential Library.)

2. Veto Message of the Mayor, District of Columbia (Jan. 7, 1976) re: the D.C. Shop-Book Rule Act (Box 36, folder "Office of Management and Budget-General (3)" of the Phillip Buchen Files at the Gerald R. Ford Presidential Library.)

3. Memorandum to Walter E. Washington, Mayor, D.C. from Louis P. Robbins, Acting Corporation Counsel, D.C., concerning Bill No. 1-137, the proposed "District of Columbia Shop-Book Act," February 10, 1976. (Box 36, folder "Office of Management and Budget-General (3)" of the Phillip Buchen Files at the Gerald R. Ford Presidential Library.)

4. Correspondence to Hon. James T. Lynn, Director, Office of Management and Budget, from Michael M. Uhlman Assistant Attorney General, Dept. of Justice, concerning District of Columbia enrolled bill B-1-137, District of Columbia Shop-Book Rule Act, February 20, 1976. (Box 36, folder "Office of Management and Budget-General (3)" of the Phillip Buchen Files at the Gerald R. Ford Presidential Library.)

5. Memorandum to President Gerald R. Ford from James M. Frey, Assistant Director for Legislative Reference, Re: District of Columbia Enrolled Act 1-88—District of Columbia Shop-Book Rule Act, February 20, 1976. (Box 10, folder "District of Columbia (1)" of the James M. Cannon Files at the Gerald R. Ford Presidential Library.)

6. Correspondence to Hon. Phillip W. Buchen, Counsel to the President from Gerald D. Reilly, Chief Judge, District of Columbia Court of Appeals, Re: Mayor's Veto of D.C. Council Bill No. 1-137, the proposed "D.C. Shop-Book Act", Feb. 24, 1976. (Box 36, folder "Office of Management and Budget-General (3)" of the Phillip Buchen Files at the Gerald R. Ford Presidential Library.)

7. Correspondence to Hon. Gerald D. Reilly, Chief Judge, District of Columbia Court of Appeals, from Phillip W. Buchen, Counsel to the President, Re: Mayor's Veto of D.C. Council Bill No. 1-137, the proposed "D.C. Shop-Book Act", Feb. 25, 1976. (Box 36, folder "Office of Management and Budget-General (3)" of the Phillip Buchen Files at the Gerald R. Ford Presidential Library.)

8. Memorandum to Jim Cavanaugh, Special Assistant to President Ford, from Max L. Friedersdorf, Office of Legislative Affairs, Subject: D.C. Enrolled Act 1-88 – District of Columbia Shop-Book Rule Act, February 25, 1976 (Box 10, folder "District of Columbia (1)" of the James M. Cannon Files at the Gerald R. Ford Presidential Library.)

9. Memorandum to the President from Jim Cannon, Assistant to President Ford, Subject: Presidential Policy on Home Rule, February 27, 1976 (Box 10, folder "District of Columbia (1)" of the James M. Cannon Files at the Gerald R. Ford Presidential Library.)

10. The President's Message to the Chairman of the Council on his Disapproval of the D.C. Shop-Book Rule Act, 12 Weekly Comp. of Pres. Doc 301, February 28, 1976 (Box 22 of the White House Press Releases at the Gerald R. Ford Presidential Library.)

11. White House Notice to the Press on President's Disapproval of the D.C. Shop-Book Rule Act, February 28, 1976 (Box 22 of the White House Press Releases at the Gerald R. Ford Presidential Library.)

12. Correspondence to Hon. Phillip W. Buchen, Counsel to the President, from Gerald D. Reilly, Chief Judge, District of Columbia Court of Appeals, Re: Mayor's Veto of D.C. Council Bill No. 1-137, the proposed "D.C. Shop-Book Act", March 1, 1976. (Box 36, folder "Office of Management and Budget-General (3)" of the Phillip Buchen Files at the Gerald R. Ford Presidential Library.

DOCUMENT 1

D.C. -44
May 1967

Memorandum Government of the District of Columbia

TO: Judith W. Rogers
Special Assistant for Legislation

Department, Corporation Counsel, D.C.
Agency, Office: L&O:JCM:kc

FROM: C. Francis Murphy
Corporation Counsel, D.C.

Date: December 19, 1975

SUBJECT: Bill No. 1-137, the proposed "District of Columbia Shop-Book Act".

This is in response to your request for my comments on Bill No. 1-137, the proposed "District of Columbia Shop-Book Act" introduced by Councilmember Clarke and referred to the Committee on the Judiciary. It passed on second reading December 16, 1975.

I do not believe that this bill should be approved, as it clearly exceeds the authority of the Council under the District of Columbia Self-Government and Governmental Reorganization Act.

The bill would legislatively prescribe rules of evidence governing the admissibility of business records in proceedings before the Superior Court of the District of Columbia. However, under the allocation of powers between the branches of the District Government established by the Self-Government Act, it is clear that the authority to prescribe rules of court was vested exclusively in the judiciary.

The District of Columbia Court of Appeals and the Superior Court were created by the District of Columbia Court Reorganization Act of 1970, P.L. 91-358, title 1, 84 Stat. 473, which vested these courts with the judicial power of the District of Columbia except with respect to matters of national concern. The Self-Government Act reaffirmed this power. Section 718(a) of the Act provides that "[t]he District of Columbia Court of Appeals, the Superior Court of the District of Columbia and the District of Columbia Commission on Judicial Disability

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and Tenure shall continue as provided under the District of Columbia Court Reorganization Act of 1970 subject to the provisions of Part C of title IV of the Act and section 602(a)(4)."

These two references in section 718(a) did not limit the power of the courts, but enhanced it. Section 431(a) of part C of title IV of the Act provides that "[t]he judicial power of the District is vested in the District of Columbia Court of Appeals and the Superior Court of the District of Columbia." Section 602(a)(4) of the Act assures the immunity of these courts from legislative interference by prohibiting the Council from "enact[ing] any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to the organization and jurisdiction of the District of Columbia Courts)."

The authority to prescribe rules governing trial proceedings for the proper administration of justice, including rules of evidence, has been long recognized as an essential element of the judicial power of the courts of the District of Columbia. The present District of Columbia Courts can trace this inherent power, recognized by various statutes, at least as far back as the Supreme Court of the District of Columbia. See Cropley v. Volger, 2 App. D.C. 34 (1893). In Griffen v. United States, 336 U.S. 704, 716-17 (1949), the Supreme Court of the United States held that "[i]t has become the settled practice for this Court to recognize that the formulation of rules of evidence for the District of Columbia is a matter of purely local law to be determined--in the absence of specific Congressional legislation--by the highest appellate court of the District of Columbia." Although the highest appellate court at that time was the United States Court of Appeals for the District of Columbia Circuit, this language is equally applicable to the District of Columbia Court of Appeals, which inherited this mantle through the Court Reorganization Act. D. C. Code, sec. 11-102. Accord, Fisher v. United States, 328 U.S. 463, 476-77 (1946).

Section 946 of title 11 of the D. C. Code, which was enacted by the Court Reorganization Act, recognized this rule-making authority of the District of Columbia

Courts as follows:

> "The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules. The Superior Court may appoint a committee of lawyers to advise it in the performance of its duties under this section."

This section qualifies the courts' authority by making the Federal Rules initially applicable in the Superior Court, chiefly to fill the vacuum with rules familiar to the local bar. But as is made clear by the provisions authorizing the courts, acting in conjunction, "to prescribe or adopt rules which modify those Rules" and authorizing the Superior Court to "adopt and enforce other rules" supplementing the Federal Rules, there was no Congressional intent to diminish otherwise the inherent authority of the District of Columbia Courts to prescribe rules governing their proceedings. Essentially, this section placed the burden on the courts to take affirmative action to modify the Federal Rules and subsequent amendments thereto.

Other provisions enacted by the Court Reorganization Act dealing with the courts' rulemaking power in various divisions of the Superior Court, D.C. Code, secs. 11-1203 (tax), 18-513 (probate), and 16-701 (criminal), are governed by section 11-946.

With respect to rules of evidence, the mechanism provided by section 11-946 has functioned as follows: When the Court Reorganization Act was enacted, the Federal Rules relating to evidence were chiefly contained in Fed. Civ. Pro. 43(a), which provided:

"EVIDENCE

"(a) Form and Admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under applicable statutes, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the District of Columbia. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

and Fed.R. Crim. Pro. 26, which provided:

"EVIDENCE

"In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts in the light of reason and experience."

Pursuant to D.C. Code, section 11-946, these rules automatically applied to proceedings in the Superior Court.

However, the very broad provisions relating evidence in these two rules were superseded when the Supreme Court, pursuant to the rules enabling acts (18 U.S.C. secs. 3402, 3771, 3772; 28 U.S.C. secs. 2072, 2075), promulgated the Federal Rules of Evidence, which were expressly approved by Congress to take effect July 1, 1975. P.L. 93-595, 88 Stat. 1926. Section 3 of that Act approved various amendments to the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure which were prescribed by the Supreme Court so that these rules would accord with the Federal Rules of

Evidence. Pursuant to D.C. Code, section 11-946 these amendments automatically applied in the Superior Court as of July 1, 1975.

The amendments were as follows: Fed. R. Civ. Pro. 43 was redesignated "Taking of Testimony". The provisions in section (a) thereof, quoted above, relating to evidence were abrogated, because, according to the Advisory Committee's Notes, "[the provisions] dealing with admissibility of evidence and competency of witnesses . . . are no longer needed or appropriate since those topics are covered at large in the Rules of Evidence." The remainder of subsection (a), relating to testimony, was revised to read as follows:

> "(a) Form. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an Act of Congress or by these rules, the Federal Rules of Evidence, or other rules adopted by the Supreme Court."

Fed. R. Crim. Pro. 26 was similarly revised.

Fed. R. Civ. Pro. 43 (b), relating to the scope of examination and cross-examination, was abrogated because, according to the Advisory Committee's Notes, "[t]he subdivision is no longer needed or appropriate because the matters with which it deals are treated in the Rules of Evidence." Fed. R. Civ. Pro. 43(c), relating to the record of excluded evidence, was also abrogated since the matters within its scope were covered by Rule 103 of the Federal Rules of Evidence.

Likewise, the first sentence of Fed. R. Civ. Pro. 30(c), relating to examination and cross-examination, was revised to read as follows: "Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Federal Rules of Evidence." Fed. R. Civ. Pro. 32(c), relating to depositions, was abrogated because, to quote the Advisory Committee, "it appears to be no longer necessary in light of the Rules of Evidence." Fed. R. Civ. Pro. 44.1 and Fed. R. Crim. Pro. 44.1, relating to the determination of foreign law, were both revised to include references to the Federal Rules of Evidence.

As the foregoing analysis demonstrates, the Federal Rules of Evidence are part and parcel of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. They are essentially an outgrowth of Fed. R. Civ. Pro. 43(a) and Fed. R. Crim. Pro. 26. They were promulgated pursuant to the same statutes, and their scope as stated in Rule 101 encompasses the scope of those Federal Rules. See Fed. R. Civ. Pro. 1, Fed. R. Crim. Pro. 1. The deletion of provisions in those Rules inconsistent with the Rules of Evidence and their incorporation of the Rules of Evidence by reference emphasizes this interdependence.

The inescapable conclusion is that the Federal Rules of Evidence applied to the Superior Court as of July 1, 1975 pursuant to D.C. Code, section 11-946, along with the amendments to the existing Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure. The codification of the Rules of Evidence under a separate title for purposes of convenience should not be the basis for according them different treatment. The omission of any specific reference to the Superior Court in Rule 1101(a) of the Rules of Evidence is perfectly consistent with this conclusion. For if the Rules of Evidence were made applicable to the Superior Court by their own force, the District of Columbia Courts would lose their power under D.C. Code, section 11-946, to prescribe rules of evidence modifying the Federal Rules.

Exercising this power to modify the Federal Rules, the District of Columbia Courts prescribed a modification to Fed. R. Civ. Pro. 43(a) and Fed. R. Crim. Pro. 26, by reinstating the so-called Federal Shop-Book Rule, 28 U.S.C. section 1732 (1970). Subsection (a) of that statute contained general provisions relating to the admissibility of business records and contained a provision making the entire statute applicable "in any courts established by Act of Congress" including the Superior Court. Subsection (a) was repealed by P.L. 93-595, section 2, to coincide with the approval of the Federal Rules of Evidence, because the provision was superseded by Rule 803(6) of the Federal Rules of Evidence. Subsection (b) of the statute remained, but was no longer applicable in the Superior Court as a result of the repeal of subsection (a).

Pursuant to their authority under D.C. Code, sec. 11-946, the District of Columbia Courts reinstated both subsections of this statute, incorporating them in

Superior Court Civ. R. 43-I and analogous rules in other divisions of the Court: Super. Ct. Sm. Cl. R. 2; Super. Ct. Dom. Rel. R. 43-I; Super. Ct. Crim. R. 57(a); Super. Ct. Tax Div. R. 11(a); Super. Ct. Juv. R. 114; Super Ct. Intrafam. R. 1; Super. Ct. Neglect R. 1; Super. Ct. Ment. H.R. 4(a)(1); Super. Ct. Ment. Retard. R. 12(a).

Recently, the Board of Judges of the Superior Court prescribed modifications to the abovementioned amendments to the Federal Rules by reinstating the old versions of those rules and submitted them to the District of Columbia Court of Appeals. The reinstatement of the former Fed. R. Civ. Prc. 43 (a) and Fed. R. Crim. Pro. 26 would, of course, end the applicability of the Federal Rules of Evidence in the Superior Court.

Under the scheme provided by the Court Reorganization Act and continued by the Self-Government Act, the power to modify Federal Rules prescribed by the Supreme Court pursuant to the rules enabling acts is vested exclusively in the Superior Court and the District of Columbia Court of Appeals. The power of the Superior Court, with the approval of the Court of Appeals, to prescribe rules governing trial proceedings which modify the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure pursuant to D.C. Code, sec. 11-946 is complemented by the power of the District of Columbia Court of Appeals to prescribe rules governing appeals which modify the Federal Rules of Appellate Procedure pursuant to D.C. Code, sec. 11-743. The power of these courts to prescribe rules of court is similar to the power of other courts created by Congress under Article I of the Constitution, such as the United States Military Court of Appeals, 10 U.S.C. sec. 866(f), and the United States Tax Court, 26 U.S.C. sec. 7453. In each case the rulemaking authority of these courts is shared only with Congress.

The Self-Government Act gave the Council no authority whatever to modify these Federal Rules. The absence of specific language in the Act prohibiting the Council from enacting amendments to title 14 of the D.C. Code, which this bill purports to do, is no justification whatever for the Council's attempt to assume judicial powers clearly vested in the courts.

The authority of the Councilwith respect to the District of Columbia courts under the Self-Government Act

is miniscule in comparison with the authority of Congress with respect to the Federal judiciary under the Constitution. The Council's authority over rules of court is more akin to the authority of the legislature of the State of New Jersey defined in Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406, cert. denied, 340 U.S. 877 (1950), where the court held that the state constitution providing that "the Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure of all such courts" ousted the power of the State legislature over rules of court. Accord, Burton v. Mayer, 274 Ky. 263, 118 S.W. 2d 547 (1938); Lee v. Baird, 146 N.C. 361, 59 S.E. 876 (1907).

Practical considerations mentioned in these opinions apply to the instant case. The courts, unlike the legislatures, are uniquely equipped by training and experience to formulate efficient and effective rules of court. The trial judges are daily involved with the operation of these rules. The District of Columbia Courts possess similar expertise. Congress' complete reliance on the District of Columbia judiciary to promulgate rules of court within the District government is made apparent by the provision in D.C. Code, sec. 11-946 authorizing the Superior Court to appoint a committee of lawyers to advise it in the performance of its duties under that section. The task was left to lawyers, not legislators.

In conclusion, this bill exceeds the authority of the Council granted by the Self-Government Act. It infringes upon the judicial powers vested in the District of Columbia Courts pursuant to section 431 of the Act and clearly constitutes "an act . . . with respect to [section 946] of title 11 of the District of Columbia Code in violation of section 602(a)(4) of the Act. Therefore, I strongly recommend that this bill not be approved.

DOCUMENT 2

Appendix A

January 7, 1976

TO THE COUNCIL OF THE DISTRICT OF COLUMBIA:

I am returning without my approval Bill 1-137, a bill "To enact a law of evidence to be applied in the District of Columbia Courts."

I fully support the object of this bill, which is to make the so-called "Federal Shop-Book Rule" applicable once more to proceedings in the Superior Court of the District of Columbia. This was necessary as the provision of the statute making the rule applicable in the Superior Court was repealed by Congress with the enactment of the Federal Rules of Evidence. However, the Corporation Counsel has advised me that the object of this bill has already been accomplished by the District of Columbia Courts themselves, pursuant to their rule-making powers under the District of Columbia Court Reorganization Act of 1970.

More importantly it is the opinion of the Corporation Counsel that the Council does not have the authority to enact this bill for the following reasons. The Court Reorganization Act created the Superior Court and, pursuant to D.C. Code, § 11-946, made the Federal Rules of Civil and Criminal Procedure, including rules relating to the admissibility of evidence, applicable in that

court in the first instance. However, this same section gave the Superior Court, with the approval of the D. C. Court of Appeals, the authority to prescribe rules modifying the Federal Rules. Foreseeing the void that would result from the partial repeal of the "Federal Shop-Book Rule", the Superior Court Board of Judges adopted a rule virtually identical to this rule as a modification of the Federal Rules of Civil and Criminal Procedure relating to the admissibility of evidence, and the D. C. Court of Appeals approved this modification. This rule became effective July 1, 1975 to coincide with the partial repeal of the "Federal Shop-Book Rule". As a result, this rule became a permanent addition to the rules governing proceedings in the Superior Court.

The Council's enactment of a rule identical to the rule prescribed by the District of Columbia Courts would not only be unnecessary, but would exceed the legislative authority of the Council under the Self-Government Act. Under the Court Reorganization Act, the power to prescribe rules of court modifying the Federal Rules was vested exclusively in the District of Columbia Courts, subject only to Acts of Congress. The Self-Government Act did not transfer this authority to the Council, but preserved it in the courts. Section 718(a) of the Act

provides that the District of Columbia Courts shall continue as provided under the Court Reorganization Act. Section 431 vests the judicial power of the District exclusively in these courts. Finally, section 602(a)(4) prohibits the Council from enacting any act with respect to the provisions in title 11 of the District of Columbia Code, including section 946 of that title, which is the source of the courts' rulemaking authority.

In summary, the Corporation Counsel is of the opinion that the enactment of this bill is unnecessary in view of the prior action of the District of Columbia Courts and is beyond the authority of the Council, being an infringement on the powers vested in the District of Columbia Courts under the Court Reorganization Act and the Self-Government Act. Accordingly, I am unable to give my approval to this bill.

WALTER E. WASHINGTON
Mayor

DOCUMENT 3

D.C.-44
May 1967

appendix B

Memorandum • Government of the District of Columbia

Department, Corporation Counsel, D.C.
Agency, Office: L&O:JCM:kc

TO: Mayor Walter E. Washington

FROM: Louis P. Robbins LPR
Acting Corporation Counsel, D.C.

Date: February 10, 1976

SUBJECT: Memorandum by General Counsel to the Council of January 13, 1976, concerning Bill No. 1-137, the proposed "District of Columbia Shop-Book Act."

This memorandum is addressed to the arguments set forth by Edward B. Webb, the General Counsel to the D.C. Council, in his memorandum to the Council dated January 13, 1976, concerning Bill No. 1-137, the proposed "District of Columbia Shop-Book Act." The bill was vetoed by the Mayor on January 7, 1976 and was overridden by the Council on January 27, 1976. It was transmitted to the President pursuant to section 404(e) of the Self-Government Act on January 29, 1976. Under this provision, the President has 30 calendar days from the date of transmission to sustain the Mayor's veto.

This memorandum supplements our memorandum of December 19, 1975 to Judith Rogers, special Assistant for Legislation, in which we recommended that this bill be returned without approval. A copy of this memorandum is attached.

The General Counsel contends that the Council alone is empowered to enact a "shop-book" rule of evidence. He argues (1) that "Congress has consistently considered the shop-book rule a substantive law of evidence to be promulgated by legislation"; (2) that the Federal Rules of Civil Procedure recognize statutory enactments as a means to establish rules relating to the admissibility of evidence; and (3) that Congress in enacting title 11 of the D.C. Code, recognized that substantive rules of evidence should be codified separately from provisions relating to the jurisdiction of the courts.

The General Counsel's first argument is a misstatement of a fact. Despite the opinion of the House Judiciary Committee concerning the authority of the Supreme Court to promulgate rules of evidence under the rules enabling acts, 18 U.S.C. §§ 3771, 3772, 3402; 28 U.S.C. §§ 2072, 2075 — an opinion that was not shared by the Senate Judiciary Committee, Sen. Rep. No. 93-1277, 93d Cong., 1st Sess. (1974) — Congress did not divest the Supreme Court of its authority over this area. The rules enabling acts, under which the Court has previously enacted rules governing the admissibility of evidence — Fed. R. Civ. Pro. 43(a), Fed. R. Crim. Pro. 26 — remained intact. Moreover, section 2(a) of P.L. 93-595, by which Congress enacted the Federal Rules of Evidence, gave the Supreme Court "the power to prescribe amendments to the Federal Rules of Evidence", subject, of course, to Congressional oversight. 28 U.S.C. § 2076. The only substantive diminution of the Supreme Court's rulemaking authority was the requirement that rules "creating, abolishing, or modifying a privilege" be ratified by Congress before taking effect.

Under the scheme provided by Congress, subsequent amendments to the successor of the Federal Shop-Book Rule, Fed. R. Evid. 803(6), which do not affect privilege, will be made by the judicial branch of the government, not the legislature.

The wisdom of this approach was articulated by Dean Roscoe Pound during the controversy over the civil rules of procedure:

> "Legislatures today are so busy, the pressure of work is so heavy, the demands of legislation in matters of state finance, of economic and social legislation, and of provision for the needs of a new urban and industrial society are so multifarious, that it is idle to expect legislatures to take a real interest in anything so remote from newspaper interest, so technical, and so recondite as legal procedure. I grant the courts are busy too. But rules of procedure are in the line of their business. When a judicial council or a committee of a bar association comes to a court with a project for rules of procedure, they will not have to call in experts to tell the judges what the project is about; they will not, as has happened more than once when committees of the American Bar Association

have gone before Congressional Committees— they will not have to be taught the existing practice and the mischief as well as the proposed remedy."

R. Pound, The Rule-Making Power of the Courts, Amer. Bar Ass'n J. 602 (1930).

The General Counsel's second argument begs the question. I have no quarrel with the statement that "the Federal Rules of Procedure recognize statutory enactment as a means to establish rules relating to the admissibility of evidence." The power of the Congress, which enacted the rules enabling acts, to promulgate rules of evidence for the Federal judiciary is well settled. Sibbach v. Wilson & Co., Inc., 312 U.S. 1 (1940). Likewise, the power of Congress to enact rules of evidence for the Superior Court of the District of Columbia, which it created under the District of Columbia Court Reorganization Act of 1970, P.L. 91-358, title 1, 84 Stat. 473, is beyond dispute. However, the crucial question, which the General Counsel does not address, is whether Congress delegated its ultimate legislative authority over rule-making in the District of Columbia Courts to the D. C. Council.

An examination of the Court Reorganization Act and the District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198, 87 Stat. 774, demonstrate that the power to prescribe rules of court, including rules of evidence, was vested exclusively in the District of Columbia Courts.

The Court Reorganization Act created the D. C. Court of Appeals and the Superior Court of the District of Columbia, and vested them with the judicial power of the District with respect to matters of local law. D.C. Code, § 11-101. For the convenience of the local bar, the Act made the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, promulgated by the Supreme Court, applicable in the Superior Court in the first instance. However, the Superior Court was empowered, subject to the approval of the D.C. Court of Appeals, to prescribe or adopt rules which modify the Federal Rules", and was authorized to "adopt and enforce other rules . . . [which] do not modify the Federal Rules." D.C. Code, § 11-946. No limitation was placed upon the power of the

District of Columbia Courts to modify the Federal Rules.

The "judicial power" of the District, of course, includes the long recognized authority of the District courts to prescribe rules of evidence. As the Supreme Court stated in Griffin v. United States, 336 U.S. 704, 716-717 (1949), "[i]t has become the settled practice for this Court to recognize that the formulation of rules of evidence for the District of Columbia is a matter of purely local law to the determined — in the absence of specific Congressional legislation — by the highest appellate court of the District of Columbia." Accord, Fisher v. United States, 328 U.S. 463, 476-77 (1946).

The enactment of the Self-Government Act did not diminish the rulemaking authority of the District of Columbia Courts, but solidified it. Section 718(a) of this Act provides that these courts "shall continue as provided under the District of Columbia Court Reorganization Act of 1970 . . .". Section 431(a) unqualifiedly vests the "judicial power of the District" in these courts, recognizing the continuation of the full authority of the courts granted under the Court Reorganization Act. Section 602(a)(4) supplements these provisions by expressly precluding Council action with respect to any provision of title 11 of the D.C. Code, which includes D.C. Code § 11-946, the source of the rulemaking authority of the courts.

The General Counsel assumes that the Council, merely because it is a legislature, has the authority to promulgate rules of evidence. However, the power of the Council over the District of Columbia Courts under the Self-Government Act is not analogous to the power of Congress over the Federal judiciary under the Constitution or even to the power of most State legislatures over their respective State courts. The Council's authority over rules of court is more akin to the authority of the legislature of the State of New Jersey defined in Winberry v. Salisbury, 5 N.J. 240, 74 A.2d 406, cert. denied, 340 U.S. 877 (1950), where the court held that the State constitution providing that "the Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure of all such courts" ousted the power of the State legislature over rules of court.

In his third argument, the General Counsel urges a dichotomy between rules of procedure, over which he grants the courts authority, and "substantive" rules of evidence, which he maintains are matters strictly for the legislature. He points to the separate codification of the courts' rulemaking authority — title 11, D.C. Code — and various enactments of Congress relating to evidence — title 14, D.C. Code. He contends that the absence in the Self-Government Act of a specific prohibition of Council action with respect to the provisions in title 14 leads to the conclusion that Congress intended to vest the Council with the authority to promulgate rules of evidence.

In the first place, rules of evidence have been generally considered to be predominantly procedural and not affecting substantive rights. See Sibbach v. Wilson & Co., Inc., 312 U.S. 1 (1940); Prliminary Study of the Advisability and Feasibility of Developing Uniform Rule of Evidence for the Federal Courts, 30 F.R.D. 73, 100 et. seq.

In the second place, the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure contain rules governing the admissibility of evidence. When the Court Reorganization Act was enacted, the principal rules of evidence were Fed. R. Civ. Pro. 43(a) and Fed. R. Crim. Pro. 26. Pursuant to D.C. Code, § 11-946, these rules applied in the Superior Court in the first instance, but were made subject to modification by the District of Columbia Courts.

These two rules of evidence were superseded by the Federal Rules of Evidence, enacted by P.L. 93-595, 88 Stat. 1926. In section 3 of that Act, 88 Stat. 1949, Congress expressly approved the orders of the Supreme Court, issued pursuant to the rules enabling acts, amending these rules and other rules relating to evidence. The attached memorandum of December 19, 1975 to the Special Assistant for Legislation explains in detail the interdependency of the Federal Rules of Evidence and the Federal Rules of Civil and Criminal Procedure. The Rules of Evidence are an outgrowth of these two sets of rules and are incorporated by reference in both. Though codified separately for convenience, the Rules of Evidence remain inextricably bound to the Rules of Civil Procedure

and the Rules of Criminal Procedure.

As a result, the Federal Rules of Evidence, together with the amendments to the Rules of Civil Procedure and the Rules of Criminal Procedure, became applicable in the Superior Court as of July 1, 1975 (the effective date of the Rules and the amendments) under the terms of D.C. Code, § 11-946. Thus, Fed. R. Evid. 803(6), the successor to the Federal Shop-Book Rule , repealed by P. L. 93-595, § 2(b), 88 Stat. 1949, became applicable in the Superior Court in the first instance.

The District of Columbia Courts, exercising their authority under D.C. Code, § 11-946, prescribed modifications to the amendments to the Federal Rules of Civil Procedure and Federal Rules of Criminal Procedure and thereby to the Federal Rules of Evidence, which was incorporated into these rules. Fed. R. Civ. Pro. 43 was modified by the addition of Super. Ct. Civ. R. 43-I, which reinstated the Federal Shop-Book Rule in the District of Columbia. Similar changes were made to analogous rules in the other divisions of the Superior Court.

By order dated December 23, 1975, the Superior Court Board of Judges deleted the amendments to the Federal Rules promulgated by the Supreme Court — Fed. R. Civ. Pro. 30, 32, 43, 44.1; Fed. R. Crim. Pro. 26, 26.1, 28 — which incorporated the Federal Rules of Evidence. The Board replaced them with the former versions of these rules. This action was approved by the D.C. Court of Appeals on December 28, 1975. The deletion of the references to the Federal Rules of Evidence in these rules ended their applicability in the Superior Court.

Thus, the District of Columbia Courts acting pursuant to D.C. Code, § 11-946, modified the successor to the Federal Shop-Book Rule , Fed. R. Evid. 803(6) by reinstating the old rule. Only the Courts were authorized by Congress to modify this Federal Rule. The Council was given no such authority. The power of the District of Columbia Courts in this respect is similar to the power of other courts created by Congress under Article I of the Constitution, such as the United States Military Court of Appeals, 10 U.S.C. § 866(f), and the United States Tax Court, 26 U.S.C.§ 7453. In each case, the rulemaking authority of these courts is shared only with Congress and the Supreme Court.

In the third place, the codification of certain specific rules of evidence in title 14 of the D.C. Code is not inconsistent with the grant to the Courts of general authority over rules of evidence not inconsistent with these laws. The provisions of title 14 — enacted by P.L. 88-241, 77 Stat. 517, and based upon the Act of March 3, 1903, 31 Stat. 1354 — apply to the United States District Court for the District of Columbia as well as to the local courts. This statutory enactment of rules of evidence based on laws that predated the rules enabling acts, clearly cannot be considered to diminish the basic authority of the Supreme Court or of the District of Columbia Courts over the promulgation of rules of evidence.

The absence of a specific prohibition of Council action with respect to the provisions of title 14 can scarcely support a wholesale reallocation to the Council of powers clearly vested in the District of Columbia Courts by the Court Reorganization Act and continued under the Self-Government Act. A specific prohibition is unnecessary, as the enactment of this rule of evidence by the Council would constitute an "act . . . with respect to [section 946] of title 11 of the District of Columbia Code . . ." in violation of section 602(a)(4). Moreover, it would constitute a clear encroachment on the judicial powers of the District of Columbia Courts recognized by section 431(a).

In conclusion, the authority to promulgate rules of evidence was not granted to the D.C. Council or shared with the Council, but vested exclusively in the District of Columbia Courts. Although the subject matter of this bill is not controversial since the Courts have already promulgated every word of it pursuant to their rulemaking authority, the precedent it would set would fundamentally change the balance of power between the judicial and legislative branches of the District government as envisioned by the Self-Government Act.

A number of other bills of the Council enacting rules of evidence in the Superior Court have been introduced, such as Bill No. 1-149, the "Medical Record Act of 1975", 21 D.C. Reg. 4397; Bill No. 1-172, the "District of Columbia Psychiatric Confidentiality Act", 22 D.C. Reg. 771; and Bill No. 1-214, the "Prior Sexual Conduct

Evidence Act of 1975", 22 D.C. Reg. 3011. Action on these bills has been suspended pending the resolution of the question of the allocation of powers between the judicial and legislative branches of the District government under the Self-Government Act.

The instant bill, as well as these others, represents a serious encroachment by the D. C. Council on the powers clearly granted to the District of Columbia Courts, in violation of the Self-Government Act.

DOCUMENT 4

Department of Justice
Washington, D.C. 20530

February 20, 1976

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D. C. 20503

Dear Mr. Lynn:

This is in response to your request for the views of the Department of Justice on the District of Columbia enrolled bill B-1-137, the District of Columbia Shop-Book Rule Act, which was submitted to the President for approval on January 29, 1976. Under section 404(e) of the District of Columbia Self-Government and Governmental Reorganization Act (P.L. 93-198), a bill passed by a two-thirds majority of the District of Columbia City Council over a mayoral veto becomes law at the end of the thirty-day period beginning on the date of transmission to the President, unless disapproved by the President within that period.

Bill 1-137 is substantially identical with Rule 43-I adopted by the D.C. Superior Court on June 30, 1975, which, in turn, is substantially identical with the relevant provisions of the U.S. Code since repealed. Those provisions essentially allow the introduction into evidence of records regularly made in the normal course of any recurring business, to include accurate photographic copies. They are also consistent with Rule 803 (6) of the Federal Rules of Evidence to the same effect, although different in form. Thus, there is no dispute over the substance of the enrolled bill; Mayor Washington, the D.C. Superior Court, and the D.C. City Council all agree on its desirability.

The issue between the Mayor and Council is a more fundamental one. In the Mayor's view, the Council lacks statutory authority to legislate rules of evidence, and any action by the Council to that effect must be without force. Mayor Washington's veto of the Council enactment was correct in this instance although the reasons stated in his message of January 7, 1976, sweep too broadly. The Justice Department recommends that the President disapprove the enrolled bill, enacted by the Council over the Mayor's veto.

The City Council is the sole legislative body of the District of Columbia government, and all legislative power granted to the District is vested in and may be exercised by the Council, Home Rule Act, Sec. 404(a). However, that power is subject to careful reservations by the Congress of its own constitutional powers and to specific limitations included in title VI of the Home Rule Act. Indeed, the very grant of power in section 404(a) begins with the words, "[s]ubject to the limitations specified in title VI of this Act, . . ." Thus, there are real limits on the Council's authority to act.

The most specific of those title VI limitations are set forth in Section 602 of the Home Rule Act. That section, headed "Limitations on the Council," reads in pertinent part as follows:

> (a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to --
>
> *
> *
> *
>
> (4) enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia courts); . . .

Therefore any action by the City Council with respect to matters controlled by any provision of title 11 of the District of Columbia Code is beyond the authority of the Council and should properly be disapproved by the Mayor and by the President. The question then becomes one of whether enactment of the Shop-Book Rule is such an action.

The courts of the District of Columbia are created by Act of Congress. The Court Reorganization Act (P.L. 91-358, 84 Stat. 473) forms title 11 of the present D.C. Code, a title over which the D.C. City Council has no legislative authority. Section 718(a) of the Home Rule Act continues the Superior Court and Court of Appeals for the District in existence even after Home Rule, and section 431(a) of the same Act vests the whole judicial power of the District in those two courts. That authority is to be exercised under the terms of title 11 of the D.C. Code.

Pursuant to Section 11-946 of title 11, the Superior Court must operate under the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. With the approval of the District of Columbia Court of Appeals, the Superior Court may modify those rules and may adopt and enforce such other rules as it deems necessary. The Superior Court has adopted, with the approval of the Court of Appeals, its new Rule 43-I, which is identical in substance with the enrolled bill under discussion. Rule 43-I became effective in the Superior Court June 30, 1975.

Rule 43-I is technically a rule of evidence but it is clearly in the nature of a procedural rule which could properly be encompassed within the rules of civil procedure. Prior to enactment of the Federal Rules of Evidence, several provisions of the Federal Rules of Civil Procedure contained evidentiary provisions of a similar nature. See, e.g., Rule 26(b)(2), Rule 32(a)(1), Rule 33(c), Rule 43, Rule 44, Fed. Rules of Civ. Proc. (1970). Title 11 of the District of Columbia Code clearly empowers the District of Columbia Courts to adopt rules of procedure of this nature and the Home Rule Act just as clearly restricts the power of the Council to affect such rules.

It is not necessary in this instance to determine whether title 11 of the D.C. Code empowers the courts to adopt rules of evidence of a more substantive nature (although the courts have, in fact, done so). Nor is it necessary to determine whether the Council retains authority to enact legislation altering the rules of evidence now codified in Title 14 of the D.C. Code. Promulgation of the Shop-Book Rule by the District of Columbia courts is well within the courts' express power to adopt rules of civil procedure and, as such, is beyond the power of the City Council. Because of the ramifications of a veto with respect to the separate issue of the power of the Council to modify statutory rules of evidence, such as those contained in Title 14, the Department of Justice recommends that veto of the Council's action be premised on the narrow ground that the Shop-Book Rule was adopted by the courts as an exercise of its undisputed power to adopt rules of civil and criminal procedure.

Sincerely,

Michael M. Uhlmann
Assistant Attorney General

Attachments

Home Rule Act Pub. L. 93-198, 87 Stat. 774

Sec. 404 Powers of the Council

(a) Subject to the limitations specified in title VI of this Act, the legislative power granted to the District by this Act is vested in and shall be exercised by the Council in accordance with this Act. . . .

Sec. 602 Limitations on the Council

(a) The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to--

. . .(4) enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to organization and jurisdiction of the District of Columbia courts);

D.C. Code

11-946 Rules of Court

The Superior Court shall conduct its business according to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure (except as otherwise provided in title 23) unless it prescribes or adopts rules which modify those Rules. Rules which modify the Federal Rules shall be submitted for the approval of the District of Columbia Court of Appeals, and they shall not take effect until approved by that court. The Superior Court may adopt and enforce other rules as it may deem necessary without the approval of the District of Columbia Court of Appeals if such rules do not modify the Federal Rules. The Superior Court may appoint a committee of lawyers to advise it in the performance of its duties under this section.

July 29, 1970, Pub. L. 91-358, §111, title I, 84 Stat. 487. (emphasis added)

DOCUMENT 5

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

FEB 20 1976

MEMORANDUM FOR THE PRESIDENT

Subject: District of Columbia Enrolled Act 1-88 -- District of Columbia Shop-Book Rule Act

Last Day for Action

February 27, 1976 - Friday

Purpose

To make documentary records of business transactions admissible as evidence in judicial proceedings in the courts of the District of Columbia.

Agency Recommendations

Office of Management and Budget	Disapproval (Memorandum of disapproval attached)
Department of Justice	Disapproval

Discussion

Introduction

The District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) provides that Acts of the City Council which have been vetoed by the Mayor and overridden by a two-thirds vote of the Council shall be transmitted by the Council Chairman to the President for review. These Acts become law unless the President expresses disapproval within thirty days. We understand that the Home Rule Act has been interpreted to provide that if the President declines to act, thereby approving the legislation, the Congress would then have thirty days for its consideration of the legislation. On the other hand, if the President disapproves the D.C. bill, the Mayor's veto would become final.

This is the second Council override of a mayoral veto since the Home Rule Act was enacted. A separate memorandum is being submitted to you on the other bill.

Summary of Act 1-88

This legislation would amend Title 14 of the D.C. Code, which contains rules of evidence, to exempt business records from the hearsay rule. Act 1-88, cited as the "District of Columbia Shop-Book Rule Act," provides that any documentary record (either the original written version or a photographic copy) of any business transaction, event, or occurrence shall be admissible as evidence in any civil or criminal judicial proceeding in the courts of the District of Columbia. The introduction of a reproduced record does not preclude admission of the original as evidence.

Background

Although, under the Home Rule Act, all legislative power granted to the District is vested in the Council, that power is subject to reservations by the Congress of its own constitutional powers and to specific limitations included in Title VI of the Home Rule Act. Specifically, Section 602 of that Act, headed "Limitations on the Council" prohibits the Council from enacting any act, resolution, or rule relating to the organization and jurisdiction of the District of Columbia courts, as set forth in Title 11 of the D.C. Code.

In addition, Section 602 similarly prohibits the Council from enacting any rule, resolution, or law with respect to the rules of criminal procedure for a period of two years from the date on which the first elected members of the Council take office.

The District of Columbia Court Reorganization Act of 1970, P.L. 91-358, which established the D.C. Superior Court and the D.C. Court of Appeals as local courts, forms Title 11 of the D.C. Code and provides, in part, that the Superior Court must operate under the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. It also provides that, with the approval of the D.C. Court of Appeals, the Superior Court may modify those rules and may adopt and enforce such other rules as it deems necessary. This rulemaking authority was not modified under the Home Rule Act.

Enactment of P.L. 93-595 (approved January 2, 1975), establishing new Federal Rules of Evidence, repealed certain rules of judicial procedure relating to the admissibility of evidence, including a 1936 Federal Shop-Book Rule, which was in force in the D.C. courts. P.L. 93-595, which took effect on July 1, 1975, and which includes a new shop-book rule as a rule of evidence, did not reference the D.C. courts as courts within the purview of the Act. Apparently believing that these new rules of evidence could not be applied in the D.C. Superior Court, and that the absence of a shop-book rule would have had a disruptive effect on litigation, the Board of Judges of that court reenacted a shop-book rule, which is substantially identical to this bill and the repealed 1936 Federal rule. The rule was approved by the D.C. Court of Appeals and became effective on July 1, 1975, thus coinciding with the effective date of the new Federal Rules of Evidence.

On December 16, 1975, the D.C. Council passed this legislation, because it viewed the Board of Judges' action in passing the rule as an emergency measure to be consummated by legislative enactment of substantive law. The Mayor, however, vetoed the bill on the grounds that (1) its passage was unnecessary in view of the legitimacy of the Superior Court's action, and (2) the Council exceeded its legislative authority under the Home Rule Act in passing a law affecting the judicial procedures of the D.C. courts. The Mayor's veto was overridden on January 27, 1976, by a unanimous vote of the eleven Council Members present.

Issue

The Federal interest in this matter is whether the intent of Congress in delegating legislative authority to the D.C. Council under the Home Rule Act has been appropriately carried out in this instance. The specific issue to be decided is whether or not the Council was within its authority under the Home Rule Act in enacting this bill. If not, it has exceeded its powers under the Home Rule Act and encroached upon the powers of the D.C. courts. However, neither the continued effect nor the content of the D.C. court's rule was contested by the Council; only the legitimacy of the Council's action is disputed.

Summary of Arguments

The arguments of the D.C. Corporation Counsel and the General Counsel of the D.C. Council which, respectively, formed the basis of the Mayor's veto and the Council's override are summarized below for your consideration. Briefly, the arguments presented by the Corporation Counsel are:

-- Under the D.C. Court Reorganization Act, which was not modified by the Home Rule Act, the power to prescribe rules of judicial procedure, including rules of evidence, was vested exclusively in the D.C. courts, subject only to acts of Congress.

-- The Home Rule Act prohibits the Council from enacting any act with respect to the provisions of Title 11 of the D.C. Code, which contains the courts' rulemaking authority.

-- Rules of evidence are an integral part of rules of judicial procedure, and, therefore, the D.C. courts' action in this regard was within the scope of their rulemaking authority under the 1970 D.C. Court Reorganization Act, i.e., Title 11 of the D.C. Code. For example, the Superior Court has replaced other Federal rules of procedure, including the new Federal Rules of Evidence, with the former versions of these rules.

Conversely, the General Counsel of the D.C. Council argues:

-- The shop-book-rule is a substantive law of evidence, which is quite distinct from rules of judicial procedure, and which, therefore, must be promulgated by legislation.

-- Codification of the D.C. rules of evidence in Title 14 of the D.C. Code instead of under Title 11 (dealing with the organization, jurisdiction, and authority of the D.C. courts) reflects Congressional intent that rules of evidence are not exclusively a function of the judiciary. P.L. 93-595, which established the new

Federal Rules of Evidence and affirmed the right of Congress to supersede rules of evidence promulgated by the Supreme Court, is referenced as analgous precedent.

-- The Home Rule Act limits the authority of the Council with respect to Title 11, not to Title 14.

View of the Department of Justice

The Department of Justice advises that the Shop-Book Rule, though technically a rule of evidence, is clearly in the nature of a procedural rule which could properly be encompassed within the rules of civil procedure. Therefore, promulgation of the Shop-Book Rule by the D.C. courts was well within the courts' express power to adopt rules of civil procedure, and, as such, is beyond the power of the Council under the Home Rule Act. The Department further advises that it is not necessary in this instance to determine whether Title 11 of the D.C. Code empowers the courts to adopt rules of evidence of a more substantive nature (although the courts did in fact do so on December 22, 1975). Similarly, it is not necessary to determine whether the Council retains authority to enact legislation altering the rules of evidence now codified in Title 14 of the D.C. Code. In this connection, the D.C. Corporation Counsel has noted that the Council has suspended action on a number of bills to enact rules of evidence for the Superior Court, pending your decision.

Conclusion

We concur with the views of the Mayor and the Department of Justice that this bill be disapproved on the ground that the D.C. Council has exceeded its authority in this instance and encroached upon the authority of the courts to enact rules of procedure. Your decision on this matter would, therefore, be based on a technical legal interpretation of the distinctions between rules of procedure and evidence, judgments generally reserved to the courts or the Congress. You may wish to consider the alternative of not taking any action on this bill. As noted earlier in this memorandum, the bill would then go to the Congress which would have 30 days to make its judgment. It might be more appropriate to have the Congress

settle the jurisdictional question of the relative authority of the D.C. courts and the City Council rather than draw the Presidency into narrow legal questions.

A proposed statement of disapproval to the Chairman of the City Council is attached for your consideration.

James M. Frey
Assistant Director for
Legislative Reference

Enclosures

DOCUMENT 6

DISTRICT OF COLUMBIA COURT OF APPEALS
WASHINGTON, D. C.

CHAMBERS OF
CHIEF JUDGE GERARD D. REILLY

February 24, 1976

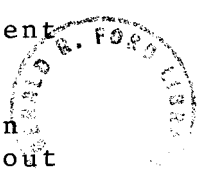
Hon. Philip W. Buchen
Counsel to the President
The White House
Washington, D.C.

Re: Mayor's Veto of D.C. Council Bill No. 1-137, the proposed "D.C. Shop Book Act".

Dear Mr. Buchen:

Inasmuch as the statutory authority of the District of Columbia courts to promulgate their own rules without interference by the City Council would be severely impaired unless the President sustains the Mayor's veto of Council Bill No. 1-137, I am writing to draw your attention to this controversy.

The Council's action in overriding the Mayor's veto was transmitted to the President on January 29, 1976, under Section 404(e) of the Self-Government Act. This provision gives the President 30 calendar days from the date of transmission to sustain the veto. As I understand it, this would mean that the President has only until February 27th to act on the matter.



In this instance, the Mayor vetoed the bill on the advice of the Corporation Counsel, who pointed out to him that enactment of the so-called Shop Book rule by the Council was beyond its powers, as D.C. Code 11-946 (a provision in the D.C. Judicial Reorganization Act of 1970) prescribes that the federal rules of procedure shall be applicable to the Superior Court, unless such court adopts rules which modify them with the approval of the District of Columbia Court of Appeals. A copy of the Mayor's veto message is enclosed as Appendix A.

The proposed local Shop Book rule itself is harmless enough as the Superior Court, with the consent of our court has already adopted it as a local exception to the recently enacted Federal Rules of Evidence Act

of 1975. But the significance of the Council action, if permitted to stand, is vastly more ominous. Backed up behind it are Council bills which would virtually prevent the local courts from effectively trying criminal cases involving rape and other serious sexual offenses, e.g., Bill No. 214, "The Prior Sexual Conduct Evidence Act of 1975", Bill No. 1-172, "The Psychiatric Confidentiality Act", etc. Council action on these bills has been temporarily deferred, presumably because of the transmission of the shop-book controversy to The White House, but their ultimate passage is regarded as almost certain unless the President upholds the Mayor's effort to stop the Council from encroaching upon matters reserved by statute to the courts.

While I recognize that The White House is ordinarily reluctant to get into District matters, I hope that because of the importance of this matter to the future of our courts that you will have time to review both the Mayor's veto and the opinion of the Corporation Counsel, also enclosed as Appendix B, and to advise the President.

Faithfully yours,

Gerard D. Reilly

Gerard D. Reilly
Chief Judge

Enclosures

DOCUMENT 7

THE WHITE HOUSE

WASHINGTON

JMB

February 25, 1976

Dear Judge Reilly:

Many thanks for your letter of February 22nd on the subject of the Mayor's Veto of D. C. Council Bill No. 1-137.

I did find, after you called, that we were aware of the problem which you had raised in your letter, and of course are giving it the serious weight which it deserves.

Your interest and concern are appreciated.

Sincerely,

Philip W. Buchen

Philip W. Buchen
Counsel to the President

The Honorable Gerard D. Reilly
Chief Judge
District of Columbia Court of Appeals
Washington, D. C.

DOCUMENT 8

THE WHITE HOUSE

WASHINGTON

February 25, 1976

MEMORANDUM FOR: JIM CAVANAUGH

FROM: MAX L. FRIEDERSDORF M.L.F.

SUBJECT: D.C. Enrolled Act 1-88 - District of Columbia Shop-Book Rule Act

The Office of Legislative Affairs concurs with the agencies that the Act be disapproved.

Attachments

THE WHITE HOUSE

ACTION MEMORANDUM WASHINGTON LOG NO.:

Date: February 23 Time: 700pm

FOR ACTION: Dick Parsons
Max Friedersdorf
Ken Lazarus
Robert Hartmann

cc (for information): Jack Marsh
Jim Cavanaugh

FROM THE STAFF SECRETARY

DUE: Date: February 25 Time: 300pm

SUBJECT:

D.C. Enrolled Act 1-88-District of Columbia Shop-Book Rule Act

ACTION REQUESTED:

____ For Necessary Action ____ For Your Recommendations

____ Prepare Agenda and Brief ____ Draft Reply

x____ For Your Comments ____ Draft Remarks

REMARKS:

Please return to Judy JOhnston, Ground Floor West Wing

Recommend disapproval in accordance with the views of the Department of Justice. Would also note that if the assertion of authority by the D.C. Council is allowed to stand in this instance, there are indications that further changes would be made in local rules of evidence which could further erode the process of law enforcement in the District.

Ken Lazarus

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

DOCUMENT 9

Last day for action:
February 27, 1976

THE WHITE HOUSE

WASHINGTON

DECISION

February 27, 1976

MEMORANDUM FOR THE PRESIDENT

FROM: JIM CANNON

SUBJECT: Presidential Policy on Home Rule

This is an important issue related to your policy of federal, state and local relationships.

In 1973, Congress passed the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) which was to provide for home rule in and by the city of Washington. Part of that law provides that if the D.C. Council passes a bill, has it vetoed by the Mayor and then overrides his veto, the bill must be sent to the President for his review. The President has 30 days in which to disapprove the bill or take no action. If he takes no action, then Congress has 30 days in which it can override the D.C. Council action. If neither the President nor Congress acts, then the bill becomes law. D.C. laws are, of course, subject to judicial review.

Up to now, this issue has not come before you. Now there are two such bills which have been presented for your review. What you do on these bills will probably set a precedent not only for your Administration but for Presidents who follow you.

PRIMARY ISSUE

The fundamental issue can be stated in these two options:

Option I
Should the President intervene in the District of Columbia home rule process only if there is a clear and compelling Federal interest?

Option II
Should the President intervene if there is a substantial Federal interest?

Arguments in Favor of Option I

A. The Presidential authority to disapprove actions of the D.C. Council was intended as a safeguard of Federal interest in the District and not as a general check on the wisdom of Council decisions.

B. Unless there is an overriding Federal interest, the President should not intervene in home rule decisions in Washington any more than he intervenes in similar decisions by, for example, the City of Baltimore.

Arguments in Favor of Option II

A. Washington is unique as a federal city, and the President has an obligation to safeguard a special Federal interest in the District.

B. The President must insure that the intent of Congress in delegating legislative authority to the D.C. Council is properly carried out.

SECONDARY ISSUES

1-87 Affirmative Action in District Government Employment Act

This bill is being viewed as an attempt to set up quotas for employment by the District government.

It is intended to promote the concept of affirmative action in D.C. government employment by establishing the goal of representation in all D.C. government jobs of minorities and women in proportion to their representation in the available work force. The "available work force" is defined as the total population of the District of Columbia between the ages of 18 and 65.

OMB, the U.S. Civil Service Commission and the U.S. Commission on Civil Rights have recommended disapproval of the bill because they believe it would require District government agencies to select minority group members and women for employment on the basis of race or sex, without regard to their qualifications for the jobs, since, in defining "available work force," no mention is made of a

skill or an ability requirement. This result is of concern to the Federal government because of the responsibility of the Civil Service Commission to insure that competitive service positions in the District government are filled in accordance with merit principles.

The Department of Justice, on the other hand, believes that a skill or an ability requirement can be read into the law and, therefore, the law can be administered in accordance with the merit system. Therfore, Justice does not oppose enactment of the law.

The OMB enrolled bill memorandum on this bill is attached at Tab A.

1-88 District of Columbia Shop-Book Rule Act

In this bill, the D.C. Council may have reached beyond its authority under the Home Rule Act. Specifically, the bill provides that any documentary record of any business transaction, event or occurrence shall be admissible as evidence in any civil or criminal judicial proceeding in the courts of the District of Columbia.

OMB and the Department of Justice have recommended disapproval of the bill on the ground that the D.C. Council had no authority to enact it. They point out that, under the D.C. Court Reorganization Act, the power to prescribe rules of judicial procedure, including rules of evidence, is vested exclusively in the D.C. courts. OMB and Justice believe there is a Federal interest here in ensuring that the intent of Congress in delegating legislative authority to the Council is being appropriately carried out.

The OMB enrolled bill memorandum on this bill is attached at Tab B.

RECOMMENDATION

1. OMB recommends disapproval of both bills.

2. The President's Counsel (Lazarus) recommends no action on 1-87 and disapproval of 1-88.

3. Max Friedersdorf, Dick Parsons and I recommend you take no action on either bill. We do not believe that the Federal interest involved in either case is sufficiently

compelling to warrant Presidential disapproval. If home rule is to have real meaning, the sanctity of the local political process must be respected where no compelling federal interest exists. This position is, I believe, also consistent with your general view that local governments should retain, to the maximum extent possible, control over local matters.

If you concur in this recommendation, I suggest you issue a statement explaining your reasons for taking no action (draft attached at Tab E).

If you decide to disapprove one bill and not the other, the draft statement at Tab E can be amended to make essentially the same point about home rule.

2/7/76 9 pm. Message from President GRF

DECISION

D.C. Enrolled Act 1-87 (Affirmative Action)

GRF ~~GRF~~ Take no action (not sustain Mayor's veto).

_____ Disapprove the bill (sustain Mayor's veto). (Statement at Tab F)

D.C. Enrolled Act 1-88 (Shop-Book Rule)

_____ Take no action (not sustain Mayor's veto).

GRF _____ Disapprove the bill (sustain Mayor's veto). (Statement at Tab G)

Unanimous vote - majority of both Houses

DOCUMENT 10

FOR IMMEDIATE RELEASE FEBRUARY 28, 1976

Office of the White House Press Secretary

D. C.
File

THE WHITE HOUSE

TO THE CHAIRMAN OF THE DISTRICT OF COLUMBIA CITY COUNCIL

In accordance with the ~~District of Columbia Self-~~ Government and Governmental Reorganization Act, I disapprove Act 1-88, the District of Columbia Shop-Book Rule Act.

The Act would make documentary records of business transactions admissible as evidence in any civil or criminal judicial proceeding in the courts of the District of Columbia. This "shop-book rule" is substantially identical to the one adopted by the D.C. Superior Court which took effect on June 30, 1975.

The issue is whether the City Council was acting within its authority under the District of Columbia Self-Government and Governmental Reorganization Act (Home Rule Act) in passing a law affecting the judicial procedures of the D.C. courts. The Federal interest is whether the intent of Congress in delegating legislative authority to the Council under the Home Rule Act has been appropriately carried out in this instance.

I am advised by the Department of Justice that this "shop-book rule" is clearly in the nature of a procedural rule which could properly be encompassed within the rules of civil procedure and that promulgation of the rule is clearly within the express power of the District of Columbia courts to adopt rules of civil procedure and, as such, is beyond the power of the City Council.

Therefore, since the Council has exceeded its statutory authority in enacting this bill, I am disapproving Act 1-88.

GERALD R. FORD

THE WHITE HOUSE,

February 27, 1976.

# #

DOCUMENT 11

FEBRUARY 28, 1976

Office of the White House Press Secretary

NOTICE TO THE PRESS

The President has taken action on two Acts of the District of Columbia Council which had been transmitted to the President for his review after being vetoed by the Mayor and then overridden by the Council. Such action is required under the District of Columbia Self-Government and Governmental Reorganization Act (the Home Rule Act), which gives the President thirty days in which to act.

The President has disapproved D.C. Enrolled Act 1-88, relating to the so-called Shop-Book Rule of evidence, on the grounds that it exceeds the authority delegated to the Council under the Home Rule Act. The President has chosen not to disapprove Act 1-87 relating to affirmative action in D.C. government employment, despite reservations.

# # #

FOR IMMEDIATE RELEASE FEBRUARY 28, 1976

Office of the White House Press Secretary

THE WHITE HOUSE

STATEMENT BY THE PRESIDENT

The District of Columbia Self-Government and Governmental Reorganization Act (the Home Rule Act) provides that Acts of the D.C. Council which have been vetoed by the Mayor and overridden by a two-thirds vote of the Council shall be transmitted to the President for his review. The President shall then have thirty days in which to disapprove these Acts or allow them to become law.

D.C. Enrolled Acts 1-87, relating to affirmative action in D.C. government employment, and 1-88, relating to the so-called Shop-Book Rule of evidence, are the first such acts to be sent to the President for his review since the Home Rule Act was enacted.

If home rule for the District is to have real meaning, the integrity and responsibility of local government processes must be respected. The Federal government should intervene only where there is a clear and substantial Federal interest.

I have been advised by the Department of Justice that, in enacting Act 1-88, the D.C. Council exceeded the authority which the Congress had delegated to it under the Home Rule Act; therefore, I disapproved it. I have chosen not to disapprove Act 1-87, however, because, while I have serious reservations about the merits of the Act, I believe my disapproval of it would violate the sound precepts of home rule. The Federal interest involved here is not clear and substantial.

# # # #

DOCUMENT 12

DISTRICT OF COLUMBIA COURT OF APPEALS
WASHINGTON, D. C.

For filing

GERARD D. REILLY
CHIEF JUDGE

March 1, 1976

Hon. Philip W. Buchen
Counsel to the President
The White House
Washington, D.C.

Dear Mr. Buchen:

I am deeply grateful to you for reviewing the problem which I raised in connection with the District of Columbia Council's overriding the Mayor's veto of their Bill No. 1-137. My colleagues and I were greatly relieved by the President's action in sustaining the Mayor's veto.

Had the matter been left to stand, it would have set a dangerous precedent by permitting the encroachment by the Council upon the rule-making powers of the courts.

With best regards,

Faithfully yours,

Gerard D. Reilly

EXHIBIT D

Plaintiffs' Declarations

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, *et. al.*,	:	
	:	
Plaintiffs,	:	Case 2017 CA 005989 B
	:	
vs.	:	Judge Hiram E. Puig-Lugo
	:	
DAVID HOFFMAN, *et. al.*,	:	
	:	
Defendants	:	
	:	

AFFIDAVIT OF MORGAN BANKS IN SUPPORT OF PLAINTIFFS' MOTION TO DECLARE THE D.C. ANTI-SLAPP STATUTE UNCONSTITUTIONAL

State of North Carolina)
) ss:
County of Moore)

1. I, Morgan Banks, having been first duly cautioned and sworn, state the following based upon personal knowledge:

2. I am a Plaintiff in the above-captioned lawsuit stemming from actions taken by the Defendants related to an internal investigation and report commissioned by the American Psychological Association (hereinafter "APA") and conducted by Mr. David Hoffman of the law firm Sidley Austin LLP regarding the Association's policies on post-9/11 involvement of psychologists in detainee interrogations, the APA Ethics Code, and related APA ethics pronouncements, including the Psychological Ethics in National Security (hereinafter "PENS") Task Force.

3. With this lawsuit, I am petitioning the court pursuant to my First Amendment right to redress wrongs to my reputation and remedy the damage done to my ability to earn a living resulting from false and defamatory statements made about me by the Defendants.

4. I am not bringing this lawsuit with an intention to harass, cause delay, punish or prevent the Defendants' expression of opposing points of view.

5. I am not bringing this lawsuit as a means to muzzle or silence Defendants' rights to free speech or their efforts to petition the government on issues of public interest.

I declare under penalty of perjury that the foregoing is true and correct.

Morgan Banks

Sworn and subscribed to before a notary public in the State of North Carolina, this

3 day of January 2019.

Jeffery Markham
Notary Public
Moore County, NC
My commission expires May 1, 2020

Notary Public

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, *et. al.*,	:	
	:	
Plaintiffs,	:	Case 2017 CA 005989 B
	:	
vs.	:	Judge Hiram E. Puig-Lugo
	:	
DAVID HOFFMAN, *et. al.*,	:	
	:	
Defendants	:	
	:	

AFFIDAVIT OF STEPHEN BEHNKE IN SUPPORT OF PLAINTIFFS' MOTION TO DECLARE THE D.C. ANTI-SLAPP STATUTE UNCONSTITUTIONAL

State of New York)
) ss:
County of Erie)

1. I, Stephen Behnke, having been first duly cautioned and sworn, state the following based upon personal knowledge:

2. I am a Plaintiff in the above-captioned lawsuit stemming from actions taken by the Defendants related to an internal investigation and report commissioned by the American Psychological Association (hereinafter "APA") and conducted by Mr. David Hoffman of the law firm Sidley Austin LLP regarding the Association's policies on post-9/11 involvement of psychologists in detainee interrogations, the APA Ethics Code, and related APA ethics pronouncements, including the Psychological Ethics in National Security (hereinafter "PENS") Task Force.

3. With this lawsuit, I am petitioning the court pursuant to my First Amendment right to redress wrongs to my reputation and remedy the damage done to my ability to earn a living resulting from false and defamatory statements made about me by the Defendants.

4. I am not bringing this lawsuit with an intention to harass, cause delay, punish or prevent the Defendants' expression of opposing points of view.

5. I am not bringing this lawsuit as a means to muzzle or silence Defendants' rights to free speech or their efforts to petition the government on issues of public interest.

I declare under penalty of perjury that the foregoing is true and correct.

X Stephen Behnke
Stephen Behnke

Sworn and subscribed to before a notary public in the State of New York, this 4th day of January 2019.

Notary Public

ALBERT C ERNI
NOTARY PUBLIC - STATE OF NEW YORK
ERIE COUNTY
LIC. # 01ER5013645
COMM. EXP. 07/15/2019

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, *et. al.*,	:	
	:	
Plaintiffs,	:	Case 2017 CA 005989 B
	:	
vs.	:	Judge Hiram E. Puig-Lugo
	:	
DAVID HOFFMAN, *et. al.*,	:	
	:	
Defendants	:	
	:	

AFFIDAVIT OF DEBRA L. DUNIVIN IN SUPPORT OF PLAINTIFFS' MOTION TO DECLARE THE D.C. ANTI-SLAPP STATUTE UNCONSTITUTIONAL

State of California)
) ss:
County of San Diego)

1. I, Debra L. Dunivin, having been first duly cautioned and sworn, state the following based upon personal knowledge:

2. I am a Plaintiff in the above-captioned lawsuit stemming from actions taken by the Defendants related to an internal investigation and report commissioned by the American Psychological Association (hereinafter "APA") and conducted by Mr. David Hoffman of the law firm Sidley Austin LLP regarding the Association's policies on post-9/11 involvement of psychologists in detainee interrogations, the APA Ethics Code, and related APA ethics pronouncements, including the Psychological Ethics in National Security (hereinafter "PENS") Task Force.

3. With this lawsuit, I am petitioning the court pursuant to my First Amendment right to redress wrongs to my reputation and remedy the damage done to my ability to earn a living resulting from false and defamatory statements made about me by the Defendants.

4. I am not bringing this lawsuit with an intention to harass, cause delay, punish or prevent the Defendants' expression of opposing points of view.

5. I am not bringing this lawsuit as a means to muzzle or silence Defendants' rights to free speech or their efforts to petition the government on issues of public interest.

I declare under penalty of perjury that the foregoing is true and correct.

Debra L. Dunivin

Sworn and subscribed to before a notary public in the State of California this 3rd day of January 2019.

Notary Public

NIKKI F. ELLIS
Commission No. 2223152
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
Commission Expires November 24, 2021

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, *et. al.*,	:	
	:	
Plaintiffs,	:	Case 2017 CA 005989 B
	:	
vs.	:	Judge Hiram E. Puig-Lugo
	:	
DAVID HOFFMAN, *et. al.*,	:	
	:	
Defendants	:	
	:	

AFFIDAVIT OF LARRY JAMES IN SUPPORT OF PLAINTIFFS' MOTION TO DECLARE THE D.C. ANTI-SLAPP STATUTE UNCONSTITUTIONAL

State of Ohio)
) ss:
County of Montgomery)

1. I, Larry James, having been first duly cautioned and sworn, state the following based upon personal knowledge:

2. I am a Plaintiff in the above-captioned lawsuit stemming from actions taken by the Defendants related to an internal investigation and report commissioned by the American Psychological Association (hereinafter "APA") and conducted by Mr. David Hoffman of the law firm Sidley Austin LLP regarding the Association's policies on post-9/11 involvement of psychologists in detainee interrogations, the APA Ethics Code, and related APA ethics pronouncements, including the Psychological Ethics in National Security (hereinafter "PENS") Task Force.

3. With this lawsuit, I am petitioning the court pursuant to my First Amendment right to redress wrongs to my reputation and remedy the damage done to my ability to earn a living resulting from false and defamatory statements made about me by the Defendants.

4. I am not bringing this lawsuit with an intention to harass, cause delay, punish or prevent the Defendants' expression of opposing points of view.

5. I am not bringing this lawsuit as a means to muzzle or silence Defendants' rights to free speech or their efforts to petition the government on issues of public interest.

I declare under penalty of perjury that the foregoing is true and correct.

Larry James

Sworn and subscribed to before a notary public in the State of Ohio, this 5 day of January 2019.

Notary Public

NOTARIAL SEAL STATE OF OHIO

ISAAC BREAZEALE
Notary Public, State of Ohio
My Commission Expires
January 26, 2022

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

STEPHEN BEHNKE, *et. al.*,	:	
	:	
Plaintiffs,	:	Case 2017 CA 005989 B
	:	
vs.	:	Judge Hiram E. Puig-Lugo
	:	
DAVID HOFFMAN, *et. al.*,	:	
	:	
Defendants	:	
	:	

AFFIDAVIT OF RUSSELL NEWMAN IN SUPPORT OF PLAINTIFFS' MOTION TO DECLARE THE D.C. ANTI-SLAPP STATUTE UNCONSTITUTIONAL

State of California)
) ss:
County of San Diego)

1. I, Russell Newman, having been first duly cautioned and sworn, state the following based upon personal knowledge:

2. I am a Plaintiff in the above-captioned lawsuit stemming from actions taken by the Defendants related to an internal investigation and report commissioned by the American Psychological Association (hereinafter "APA") and conducted by Mr. David Hoffman of the law firm Sidley Austin LLP regarding the Association's policies on post-9/11 involvement of psychologists in detainee interrogations, the APA Ethics Code, and related APA ethics pronouncements, including the Psychological Ethics in National Security (hereinafter "PENS") Task Force.

3. With this lawsuit, I am petitioning the court pursuant to my First Amendment right to redress wrongs to my reputation and remedy the damage done to my ability to earn a living resulting from false and defamatory statements made about me by the Defendants.

4. I am not bringing this lawsuit with an intention to harass, cause delay, punish or prevent the Defendants' expression of opposing points of view.

5. I am not bringing this lawsuit as a means to muzzle or silence Defendants' rights to free speech or their efforts to petition the government on issues of public interest.

6. The documents contained in the Memorandum of Points and Authorities in Support of Plaintiffs' Motion to Declare the D.C. Anti-SLAPP Statute Unconstitutional, Exhibit C: Home Rule Act Opinions and Documents, are true and correct copies of these materials held at the Ford Presidential Library in Ann Arbor, Michigan, collected and sent to me by the Library's Supervisory Archivist, Mr. Geir Gundersen.

I declare under penalty of perjury that the foregoing is true and correct.

Russell Newman

Sworn and subscribed to before a notary public in the State of California, this 3rd day of January 2019.

Notary Public

NIKKI F. ELLIS
Commission No. 2223152
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
Commission Expires November 24, 2021

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CIVIL DIVISION

STEPHEN BEHNKE, *et al*.,	:	Case 2017 CA 005989 B
Plaintiffs,	:	Judge Puig-Lugo
vs.	:	Status Conference February 8, 2018, 2:00 PM
DAVID H. HOFFMAN, *et al.*,	:	Courtroom 317
Defendants.	:	

[PROPOSED] ORDER

Upon consideration of Plaintiffs' Opposed Motion to Declare the D.C. Anti-SLAPP Act Unconstitutional, it is hereby **ORDERED** that:

The Anti-SLAPP Act is unconstitutional:

1) Under U.S. Const. art. I, § 8, Congress has the exclusive power to enact legislation governing the District of Columbia. In 1973, under the Home Rule Act, Congress retained control of the District of Columbia courts and prohibited the D.C. Council from "enact[ing] any act, resolution, or rule with respect to any provision of Title 11."[1] Title 11 prescribes all aspects of judicial civil procedure.[2] D.C. Code § 11-946 directs the D.C. Superior Court to "conduct its business according to the Federal Rules of Civil Procedure," and specifies that any rules that modify the Federal Rules must be approved by the District of Columbia Court of Appeals. The Anti-SLAPP Act creates procedures that modify the Federal Rules of Civil Procedure but have not been approved by the Court of Appeals. Consequently, the Anti-SLAPP Act violates the Home Rule Act and is void and unconstitutional.

[1] D.C. Code, § 1-206.02(4).
[2] *Id.* § 11-101

2) In adopting the Anti-SLAPP Act, the D.C. Council's stated purpose was to protect the targets of suits intended to chill or silence speech. As written, however, the Act creates obstacles to access to the courts not only for such suits but also for legitimate suits brought to redress real wrongs. Consequently, the Anti-SLAPP Act is unconstitutionally overbroad on its face.

3) The Anti-SLAPP Act is also unconstitutional because it creates impermissible obstacles to citizens' First Amendment rights to access the courts. It shifts to these plaintiffs at the beginning of litigation the burden of demonstrating that they are likely to succeed on the merits, threatens them with dismissal with prejudice if they cannot meet that burden, restricts their access to discovery to meet the burden, threatens them with paying all discovery costs if discovery is granted, and imposes payment of a defendants' attorney's fees. The First Amendment does not permit such obstacles to citizens' ability to petition the courts for redress.

WHEREFORE, the Court declares the D.C. Anti-SLAPP Act void and unconstitutional because it:

1) violates the Home Rule Act,
2) is unconstitutionally overbroad on its face, and
3) creates impermissible obstacles to the First Amendment right of access to the courts.

So ORDERED this __th day of _____ 2019.

SO ORDERED.

/s/Judge Hiram E. Puig-Lugo
Judge Hiram E. Puig-Lugo

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2019, a true and correct copy of the foregoing Plaintiffs' Opposed Motion to Declare the D.C. Anti-SLAPP Act Unconstitutional was filed through the Court's Case File Express electronic filing system, which will automatically send a Case File Express Electronic Notice to Defendants' counsel of record that this filing is completed and available for download at their convenience.

/s/ John B. Williams
John B. Williams