The District of Columbia Bar
1426 H STREET, N.W., EIGHTH FLOOR, WASHINGTON, D.C. 20005-2184
(202) 638-1500

August 30, 1984

Ms. Lynne M. Lester
Administrative Assistant for Divisions
District of Columbia Bar
Washington, D.C. 20005

Re: Comments (Proposed Brief as an Amicus Curiae) in Cole v. U.S., Gary v. U.S., and Pee v. U.S. by Division VI (D.C. Affairs)

Dear Lynne:

Pursuant to Section 13(a) of the Division Guidelines, I am enclosing the proposed comments (Brief as an Amicus Curiae) unanimously adopted by the members of the Steering Committee of Division VI on August 29, 1984. Also enclosed is the required one-page summary of our proposed brief and the standard disclaimer required by the Guidelines.

Division VI restricts its argument to whether the legislative veto provision of 602(c)(2) of the District of Columbia Self-Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973) is severable from the grant of criminal law authority to the District of Columbia, and the impact the invalidation of the criminal law authority would have on the criminal justice system of the District of Columbia.

We are asking for your review; and, unless there is an objection to our submission in accordance with the Guidelines, Division VI intends to submit the enclosed proposed brief to the D.C. Court of Appeals on September 7, 1984 in the form attached.

Respectfully submitted,

Montague A. Buck
Co-Chairperson
Division VI (D.C. Affairs)

Enclosure

TO THE BOARD OF GOVERNORS AND DIVISION CHAIRPERSONS

SUMMARY OF PROPOSED BRIEF AS AN AMICUS CURIAE BY DIVISION VI (D.C. AFFAIRS) IN THE COLE V. U.S., GARY V. U.S., AND PEE V. U.S. BEFORE THE D.C. COURT OF APPEALS

Attached hereto is a Brief as an Amicus Curiae by Division VI which restricts its argument to whether the legislative veto provision of 602(c)(2) of the District of Columbia Self-Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973) is severable from the grant of criminal law authority to the District of Columbia, and the impact the invalidation of the criminal law authority would h ave on the criminal justice system of the District of Columbia. We are asking for your review; and, unless there is an objection to your submission in accordance with the Division Guidelines, Division VI intends to submit the enclosed proposed brief to the D.C. Court of Appeals on September 7, 1984 in the form attached.

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 83-796

MICHAEL D. GARY, Appellant

v.

UNITED STATES OF AMERICA, Appellee

No. 84-703

SYLVESTER E. COLE, Appellant

v.

UNITED STATES OF AMERICA, Appellee

No. 84-997

LEROY PEE, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeals from the Superior Court of the
District of Columbia -- Criminal Division

AMICUS CURIAE BRIEF OF DIVISION VI (DISTRICT OF COLUMBIA AFFAIRS) OF THE DISTRICT OF COLUMBIA BAR

CYNTHIA A. GIORDANO
JACQUELYN V. HELM
JAMES C. MCKAY, JR.
PHYLLIS D. THOMPSON

Members, Division VI
District of Columbia Bar
(202) 727-9813
D.C. Courthouse
500 Indiana Ave., Room 4485
Washington, D.C. 20001

STANDARD DISCLAIMER

The views expressed herein represent only those of Division VI (District of Columbia Affairs) of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors.

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PRELIMINARY STATEMENT

Appellant Cole was convicted of carnal knowledge and appellant Gary was convicted of rape under D.C. Code, sec. 28-2801. Appellant Pee was convicted of possession of a controlled substance under the District of Columbia Uniform Controlled Substances Act of 1981, D.C. Code, sec. 33-501 et seq. (Supp. 1984). Cole has moved for arrest of judgment, and Gary and Pee have appealed their convictions. Cole and Gary contend that their sentences are invalid because the statute under which they were sentenced was repealed by the District of Columbia Sexual Assault Reform Act of 1981 (Act 4-69, 28 D.C. Reg. 3409); and that that repeal was left intact because disapproval of the Sexual Assault Reform Act of 1981 by the House of Representatives pursuant to the legislative veto provision of 602(c)(2) of the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973) (hereinafter, the "Self-Government Act"), was of no effect because the legislative veto provision is unconstitutional under the decision of the Supreme Court in Immigration and Naturalization Service v. Chadha, 462 U.S. __, 103 S.Ct. 2764 (1983). Pee also argues that the legislative veto provision of the Self-Government Act is unconstitutional, but, unlike Cole and Gary, argues that the provision is inseverable from the grant of criminal law authority in the rest of the Self-Government Act; that as a result the Council lacked authority to enact the Uniform Controlled Substances Act of 1981; and, that his conviction under the Uniform Controlled Substances Act of 1981, D.C. Law 4-29, was thus invalid. The cases are consolidated for purposes of this appeal.

The trial court in United States v. Cole, Criminal Case No. F 5111-82, in a written opinion, held that section 602(c)(2) of the Self-Government Act is both invalid and insevarable from the

Self-Government Act's grant of criminal law authority to the District. The court concluded that the District had no authority to enact the Sexual Assault Reform Act of 1981 or any other criminal law. The Court, therefore, upheld defendants' convictions. No written opinions were issued in the Gary and Pee cases.

We restrict our argument to the issue of whether the legislative veto provision is severable from the grant of criminal law authority to the District, and the impact the invalidation of the criminal law authority would have on the criminal justice system of the District of Columbia.

ARGUMENT

I.

The Legislative Veto Provision Of The Self-Government Act Is Severable.

Appellant Pee, taking the position that the legislative veto provision is inserarable, cites that the absence of a severability clause in the Self-Government Act is an indication of congressional intent. However, the recent federal appellate decisions construing other Acts of Congress with legislative veto provisions have all held the provisions severable from the remainder of the Acts despite the absence of severability clauses. See Gulf Oil Corporation v. Dyke, 734 F.2d 803 ("The absence of such a clause . . . is in no way dispositive of the question of severability"); Equal Employment Opportunity Commission v. Hernando Bank, Inc., supra, 724 F.2d at 1190; Consumer Energy Council of America v. Federal Energy Regulatory Commission, 218 U.S. App. D.C. 34, 44, 673 F.2d 425, 435 (1982), aff'd sub nom. Process Gas Consumers Group v. Consumers Energy Council of America, 463 U.S. ____, 103 S.Ct. 3556 (1983). All three of these cases quote the statement of the Supreme Court in United States v. Jackson, 390 U.S. 570, 585 n. 27 (1968) that:

> . . . the ultimate determination of severability will rarely turn on the presence or absence of such a clause.

Accord, 2 C. Sands, Sutherland Statutory Construction, secs. 44.08, 44.09 (1973).

The trial court in Cole, after invalidating section 602(c)(2) of the Self-Government Act, D.C. Code, sec. 1-233(c)(2), held in Part III of its Memorandum Opinion and Order (hereinafter, "Tr. Opin.") that the section is "inextricably intertwined" with the grant of authority to the District to enact criminal laws. (Tr. Opin. at 19) The Court based its conclusion on a determination that "Congress in debating and amending the Home Rule Act demonstrated that it viewed the issue of federal retention of power as a vital part of any plan to delegate authority over the criminal code." (Tr. Opin. at 11).

We will demonstrate that under the tests articulated by the Supreme Court, section 602(c)(2) should be deemed severable from the remainder of the Self-Government Act.

A.

A Provision of the Self-Government Act Is Severable Unless It Is "Evident" That Congress Would Not Have Enacted The Act Without The Provision

The basic test of severability is "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independent of that which is not, the invalid part may be dropped, if what is left is fully operative as law." INS v. Chadha, supra, 103 S.Ct. at 2774, quoting Buckley v. Valeo, 424 U.S. 1, 108 (1976), quoting Champlin Refining Co. v. Corporation Commission, 286 U.S. 210, 234. Otherwise stated, there must be a "clear indication" that the statutes "would not have been passed without such vetoes". Gulf Oil Corporation v. Dyke, 734 F.2d 797, 804 (Em. App. 1984).

This test places a stiff burden on the proponent of inseverability. As the Fifth Circuit recently noted: "Mere uncertainty about the legislature's intent is insufficient to satisfy the test.". Equal Employment Opportunity Commission v. Hernando Bank, Inc., 724 F.2d 1188, 1192 (1984). Likewise, a demonstration of congressional concern and controversy is insufficient to support inseverability:

> The mere presence of continued and heated debates prior to the passage of the acts cannot provide the evidence necessary for us to conclude that the legislative vetoes are inseverable . . .

Gulf Oil Corp. v. Dyke, supra, 724 F.2d at 804.

In addition, the Supreme Court in Chadha stated that "[a] provision is further presumed severable if what remains after severance is fully operative as a law." 103 S.Ct. at 2775. (Emphasis added; citation omitted.)

These tests are articulations of the maxim that "[t]he cardinal principle of statutory construction is to save and not to destroy." Tilton v. Richardson, 403 U.S. 672, 684 (1971), quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). The rationale for confining the effect of invalidating a portion of a statute to the greatest extent possible was recently articulated by the Supreme Court in Regan v. Time, Inc., 104 S.Ct. 3263, 3269 (1984) (plurality opinion):

> In exercising its power to review the constitutionality of a legislative act, a federal court should act cautiously. A ruling of unconstitutionality frustrates the intent of the elected representatives of the people. Therefore, a court should refrain from invalidating more of the statute than is necessary. As this Court has observed, "whenever an act of Congress contains unobjectionable provisions it is the duty of this court to so declare, and to maintain the act in so far as it is valid." El Paso & Northeastern R. Co. v. Gutierrez, 215 U.S. 87, 96 (1909).

We submit that this Court should exercise similar caution so that it does not frustrate the intent of Congress to grant self-government to the citizens of the District.

B.

The Legislative History Of The Self-Government Act Demonstrates That It Is Not "Evident" That Congress Would Not Have Granted The District Criminal Law Authority Without The Legislative Veto

The application of the foregoing tests of severability to the Self-Government Act strongly supports the view that section 602(c)(2) is severable. The legislative history of the Self-Government Act does not make evident that Congress would not have granted the District criminal law authority without the imposition of a legislative veto requirement. Rather, the legislative history demonstrates that the critical factor in the decision to grant criminal law authority to the District was the condition that the grant be delayed to permit a comprehensive revision of the criminal code.

1.

The Legislative History In The Senate Fails To Show That It Would Not Have Granted The District Criminal Law Authority Without The Legislative Veto Provision

It is useful to examine the legislative history of the Senate's passage of its version of the Self-Government Act, S. 1435, 93d Cong., 1st Sess. (1973), not only because the Senate acted first, on July 11, 1973, but also because the Senate had passed seven home rule bills during the past 24 years prior to the 93d Congress. This examination reveals that there is no evidence of a causal connection between the Senate's inclusion of a legislative veto provision and its grant of legislative authority over the criminal laws. The court's quotation from the Senate Report (Tr. Opin. at 17) does not focus on the criminal law authority of the District, but is simply a reference to the

general legislative veto provision contained in the Senate bill. S. Rep. No. 93-219, 93d. Cong., 1st Sess. 6 (1973), Home Rule History at 2726.

Congressman Digg's statement that the legislative veto provision had facilitated the Senate's enactment of home rule bills in the past (Tr. Opin. at 18), likewise, shows no connection with the criminal code. Of the seven home rule acts enacted prior to the 93d Congress only two--the first (S. 1527, 81st Cong., 1st Sess. (1949)) and the last (S. 2652, sec. 325(d), 92st Cong., 1st Sess. (1971))--had legislative veto provisions.[1] The other five lacked such provisions, although each expressly reserved to Congress the ultimate power to enact legislation pertaining to the District.[2] The Senate bill which went to Conference, had both a legislative veto provision and a severability clause. Thus, the history of the Senate's passage of home rule bills, taken as a whole, does not demonstrate that the Senate considered the legislative veto an essential element of the Act.

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[1] Apparently, the Senate included this legislative veto provision primarily out of concern for the legality of delegating legislative authority to the District. See S. Rep. No. 630, 82d Cong., 1st Sess. 11 (1951):

> The present bill [S. 1976, 82d Cong., 1st Sess. (1951)] omits any congressional veto provision. The sponsors believe there is ample legal authority to support the constitutionality of a direct grant of legislative power over the District to a mayor and a District Council.

Two years later the Supreme Court resolved the issue by ruling that Congress could constitutionally delegate legislative power to the District under Article I, Section 8, Clause 17 of the Constitution. District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953).

[2] S. 1976, 82d Cong., 1st Sess. (1951); S. 669, 84th Cong., 1st Sess. (1955); S. 1846, 85th Cong., 2d Sess. (1958); S. 1681, 86th Cong., 1st Sess. (1959); S. 1118, 89th Cong., 1st Sess. (1965). See generally, Library of Congress, Congressional Act on District of Columbia Home Rule, 1947-1973, A Descriptive Survey, Home Rule History at 1507-1521.

The Legislative History In The House Fails To Show That It Would Not Have Granted The District Criminal Law Authority Without The Legislative Veto Provision

Likewise, the legislative history on the House side fails to demonstrate that Congress would not have given the Council criminal law authority without the legislative veto provision. Initially, the bill passed by the House lacked a legislative veto provision, criminal law authority and a severability clause. Thereafter, the Rules Committee debated the necessity for putting limitations on the authority of the Council to amend the criminal laws in the D.C. Code. (Tr. Opin. at 13-14). Subsequently, the restrictions on criminal law authority were included in a "Committee Substitute" sponsored by the proponents of home rule. See 119 Cong. Rec. 33353 (1973). Home Rule History at 2084.

We do not dispute that the prohibition of criminal law authority contained in the Committee Substitute was offered to enhance passage of the Self-Government Act in the House. However, the trial court places undue emphasis on this provision. Excerpts of a "Dear Colleague" letter by Congressman Diggs, dated October 9, 1973, (Tr. Opin. at 15) obscure the fact that the restriction on criminal law authority was but one of a number of provisions designed to protect the federal interest that were added by the "Committee Substitute" or already were in the House bill. These provisions also placed limitations on the District's power over the police, the prosecutors, the marshals, the judges, and the court system.

Already included in the reported version, H.R. 9682, were a provision retaining Congress' ultimate legislative control over the District,[3] and express prohibitions against legislation by the Council "concerning functions or property of the United States," amending title 11 of the Code relating to the D.C.

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[3] H.R. 9682, §601, Home Rule History at 2316.

Courts, or relating to the federal courts.[4] In addition, provisions were added by the Committee Substitute that (1) gave the President the power to reinstate the overridden veto of the Mayor;[5] (2) continued the judicial system of the District as established by the Court Reorganization Act.;[6] (3) prohibited District legislation affecting the power and duties of the U.S. Attorney and U.S. Marshall;[7] (4) permitted the President to assume emergency control over the Metropolitan police;[8] (5) required judicial confirmation by the Senate, rather than the Council;[9] and (6) retained congressional authority over the District's budget.[10] With this array of safeguards of the federal interest, it is difficult to demonstrate that the issue of criminal law authority was as essential as the trial court supposes. Consequently the legislative history in the House fails to show that it would not have granted the District criminal law authority without the legislative veto provision. The issue simply was not addressed.

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4 Id. §§602(a)(3), (4), (7), Home Rule History at 1316-1317.

5 "Committee Substitute" §404(e), Home Rule History at 2253-2254).

6 Id. §718(a), Home Rule History at 2334.

7 Id. §602(a)(7), Home Rule History at 2318.

8 Id. §739, Home Rule History at 2344-5.

9 Id. §325(h), Home Rule History at 2647-8.

10 Id. §§446, 603(a), Home Rule History at 2285-2286, 2319.

3.

The Legislative History Of The Conference Committee Demonstrates That The Key Factor In Granting The District Criminal Law Authority Was Not The Legislative Veto, But The Delay In Granting Criminal Authority To Permit a Comprehensive Revision Of The Criminal Code

In view of the inconsistent actions of the House and Senate, the most crucial legislative history is that of the Conferees. The Conference Report and related legislative history do not demonstrate a "mutual interdependence" between the grant of criminal law authority and the imposing of the one-house veto in section 602(c)(2). As the trial court acknowledges, this issue "was not openly debated in Conference." (Tr. Opin. at 17.) The Conference report simply describes the grant of criminal law authority subject to the delay and one-house veto. H.R. Rep. No. 93-703, 93d Cong., 1st Sess. 75-76 (1973), Home Rule History at 3013-3014. If these provisions were the result of a compromise, the report offers no explanation of the process leading to the compromise or the reason for including the provisions. The statement of Congressman Diggs on the House floor quoted by the trial court (Tr. Opin. at 17-18), addressed the general legislative veto provision and did not focus on the criminal law authority. See 119 Cong. Rec. (1973); Home Rule History at 3050.

The reasoning of the D.C. Circuit is applicable:

> The [conference] report simply describes the working of that section, and thus states that the Phase II rule will go into effect only if neither house disapproves. No one disputes that this was the intent of section 202 enacted. The question before us, however, is what Congress would have intended in the absence of section 202(c). On this question the conference report is silent.

Consumer Energy Council of America v. Federal Energy Regulatory Commission, supra, 218 U.S. App. D.C. at 51, 673 F.2d at 442. (Emphasis in original.)

Examining the Conference Report as a whole puts the one-house veto provision in perspective. It shows that all of the provisions designed to protect the federal interest, other than the withholding of criminal law authority, that were in the House bill or added by Congressman Diggs in the Committee substitute were adopted by the conferees. See p. 8, supra. With this array of protections, the legislative veto provision diminishes in importance.

Most significantly the exercise of criminal authority granted by the conferees was subjected to a much more significant restriction is in section 602(a)(9):

> (a) The Council shall have no authority . . . to:
>
> . . . (9) enact any act, resolution, or rule with respect to any provision of title 23 of the District of Columbia Code (relating to criminal procedure), or with respect to any provision of any law codified in title 22 or 24 of the District of Columbia Code (relating to crimes and treatment of prisoners) during the twenty-four full calendar months immediately following the day on which the members of the Council first selected pursuant to this act take office.

87 Stat. 813, Home Rule History at 3168.

In our view, this two-year delay in granting criminal law authority not the legislative veto provision, was the "keystone" of the Conference compromise. This is evident from the legislative history.

The full "Dear Colleague" letter by Congressman Diggs, dated December 11, 1973, reveals the real intent of the conferees:

> Dear Colleague: The Conference Report on the District of Columbia Home Rule Bill, S. 1435, is scheduled for action on the House Floor this week. Faithful to my responsibility, I have been a strong advocate of the House passed provisions and prevailed in almost every instance. There is one particular provision which was included in the House passed bill which was modified by the Conference. I wish to discuss that particular provision and why the Conference Report varies from the house passed bill.
>
> The House passed bill prohibited the Council from making any changes in Titles 22, 23 and 24 of the D.C. Code. It was felt that since the District

criminal code has not been substantially reviewed and revised for more than seventy years, this provision would hamper constructive revision of the criminal code. Since the District Committee is expected to act in the very near future on H.R. 7412, a bill which I introduced to create a law revision commission for the District, the Conference compromise was adopted. The law revision commission will be given a mandate to turn initially to revision of the D.C. Criminal Code and report its recommendations to the Congress. The Congress will then have a chance to make the much needed revision of the criminal code. This should take no longer than two years. Subsequent to that action, it seems appropriate and consistent with the concept of self determination, that the Council be given the authority to make whatever subsequent modifications in the criminal code as are deemed necessary.

Therefore, under the Conference Report, the Council is prohibited from making changes in the criminal code for two years after it takes office. Subsequent to that, the Council may make changes subject to a veto by either House of Congress within 30 days after the transmittal of the act. Additionally, any Member may bring such disapproving resolutions.

I feel that this procedure sets the best combination for protecting the Federal interest while keeping the local Council involved in the process of making the laws which will govern.

Sincerely

Charles C. Diggs, Jr.
Chairman, Committee on the District

Home Rule History at 3041-3041 (emphasis added).

The full text of the letter makes it clear that the primary reason that the Conferees were willing to give the District criminal law authority was not that its exercise would be subject to a one-house legislative veto, but rather because its exercise would be postponed to permit a total revision of the criminal code by the Law Revision Commission and its enactment by Congress before the Council assumed the authority to amend it.

The emphasis of the Conferees on the importance of delaying the transfer of criminal law authority is evident in the Conference Report:

The Conference Committee also agreed to transfer authority to the Council to make changes in Title 22, 23 and 24 of the District of Columbia Code, effective

January 2, 1977. After that date, changes in Title 22, 23 and 24 by the Council shall be subject to a Congressional veto by either House of Congress within 30 legislative days. The expedited procedure provided in section 604 shall apply to changes in Titles 22, 23 and 24.

It is the intention of the conferees that their respective legislative committees will seek to revise the District of Columbia Criminal Code prior to the effective date of the transfer of authority referred to.

H.R. Rep. No. 93-703, 93d Cong., 1st Sess. 75-76 (1973), Home Rule History at 3013-3014 (emphasis added).

4.

The Contemporaneous Legislative History of The Law Revision Commission Act Demonstrates That The Reason Congress Was Willing To Grant Criminal Law Authority To The District Was The Anticipation That The Criminal Code Would Be Comprehensively Revised Before The Grant Occurred

Indeed, a few months after the enactment of the Self-Government Act--on August 21, 1974, prior to the effective date of the Self-Government Act on January 1, 1975--the 93d Congress enacted H.R. 7412--the District of Columbia Law Revision Act. Pub. L. 93-379, 88 Stat. 480 (1974), D.C. Code §49-401 et seq. (Supp. V., 1978). That Act created a 15-member Commission with responsibility for "recommending . . . such changes in the law relating to the District of Columbia as it deems necessary . . . to bring the law relating to the District of Columbia, both civil and criminal, into harmony with modern conditions". Id. §3(4), 88 Stat. 482, D.C Code, §49-402(4) (Supp. V, 1978). Significantly, the statute gave the Commission the following specific mandate:

In carrying out its duties under this Act, the Commission shall give special consideration to the examination of the common law and statutes relating to the criminal law in the District, and all relevant judicial decisions, for the purpose of discovering defects and anachronisms in the law relating to the criminal law in the District of Columbia and recommending needed reforms.

Id. §3, 88 Stat. 482-483, D.C. Code, §49-402 (Supp. V, 1978) (emphasis added).

The connection between the establishment of the Law Revision Commission and the granting of criminal code authority to the District is made clear by the legislative history of the Law Revision Commission Act, which was considered by the same Committees and same Congress that enacted the Self-Government Act.

Identical paragraphs in the reports on the Law Revision Commission Act by the Senate and House Committees on the District of Columbia give a detailed explanation of the Conference compromise on the Self-Government Act:

> Under the Home Rule Act (Public Law 93-198, approved December 24, 1973), the District Council will receive jurisdiction over the Criminal Code twenty-four months after it takes office in January, 1975.
>
> In the course of Congressional consideration of this legislation, one of the most difficult questions was the issue of granting authority over the criminal sections of the District of Columbia Code. Drafters of the self-government legislation ultimately settled on an arrangement calling for the District of Columbia Council to acquire authority over the criminal sections of the District of Columbia Code two years after taking office in January, 1975. During the interim, it was understood, a Law Revision Commission would be created by the Congress, which would have as one of its responsibilities reviewing and recommending reforms of the Codes criminal sections.

S. Rep. No. 93-1076, 93d Cong., 2d Sess. 2 (1974); H.R. Rep. No. 93-924, 93d Cong., 2d Sess. 2 (1974). Similar statements about the basis for the Conference compromise in the Self-Government Act were made on the floor of the House. See 120 Cong. Rec. 7974 (1974) (remarks of Cong. Diggs). The bill was passed by the Senate without debate. See 120 Cong. Rec. 27423 (1974).

Further confirmation of the intent of the conferees is found in the legislative history of an Act that extended the two year period of delay to four years. Pub. L. 94-402, 90 Stat. 1220

(1976). The report stated that the purpose of the extension was to enable the Law Revision Commission to complete its revision of the District's criminal laws prior to the grant of criminal law authority to the Council. See H.R. Rep. No. 94-1418, 94th Cong., 2d Sess. 3 (1976).

Thus, the legislative history of Conference consideration of the Self-Government Act does not support court theory that the "veto provision . . . was the keystone to the delegation of authority over the criminal code" (Tr. Opin. at 19). Certainly, there is no showing that it is "evident" that Congress would not have granted the latter without the former, as required by the decisions of the Supreme Court. Indeed, the legislative history of the 93d Congress suggests that the actual "keystone" to the delegation of criminal law authority was the two-year delay in granting criminal law authority to enable the Law Revision Commission to revise the criminal code and submit it to Congress for approval.[11]

C.

The Self-Government Act Is "Fully Operative" Without The Legislative Veto Provision

In addition, an examination of the text of the Self-Government Act makes it clear that, without the legislative veto provision the Act would be "fully operative as a law" under the test stated in Chadha, 103 S.Ct. at 2775. Without this provision, all permanent acts of the Council proposing changes in

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[11] The Law Revision Commission fulfilled this mandate by producing a Basic Criminal Code which was transmitted to the Committee on the District of Columbia. See New Basic Criminal Code for the District of Columbia as Transmitted to the House District of Columbia Committee, 95th Cong., 2d Sess. (1978). Meanwhile, the Council of the District of Columbia assumed criminal law authority after the expiration of the 4-year period imposed by §602(a)(9), as amended, and the Committee took no further action on the measure. The legislation was then introduced in the Council, as Bill 3-226 (1979). Although the Basic Criminal Code has not been enacted as a whole, parts of it have been enacted by the Council as separate legislation--notably, the Theft and White Collar Crimes Act, which is based on Chapters 9, 10, and 11 of the Basic Criminal Code.

the criminal law would still be transmitted by the Chairman of the Council to the Speaker of the House and President pro tem of the Senate under 602(c), D.C. Code, §1-233(c), to lay before Congress for a 30-legislative day period. During this period, Congress could, of course, enact legislation preventing the act from taking effect. If Congress takes no action within this period, the act would take effect automatically, as have all but one of the District's criminal law enactments. The situation would be analogous to that in Gulf Oil Co. v. Dyke, supra, which stated that "[w]ithout the vetoes, sections 401 and 455 of the EPCA resemble 'report and wait' procedures specifically approved in Chadha." 734 F.2d 804. Therefore, section 602(c)(2) must be "presumed severable".

In sum, section 602(c)(2) of the Self-Government Act is severable from the District's criminal law authority because it is not "evident" that Congress would not have granted this authority without the legislative veto provision. In addition, the provision must be "presumed severable" because the Act is "fully operative" without the provision.

II.

An Invalidation of the District's Criminal Law Authority Would Have a Grave Impact on the District's Criminal Justice System

In deciding the issue of severability, the Court should consider the grave impact of a holding that the District lacks criminal law authority. Such a holding would deprive the citizens of the District of one of the fundamental rights of democracy in contravention to the primary purpose of the Self-Government Act, and would also throw into doubt thousands of convictions under the various laws passed by the Council of the District of Columbia.

The primary stated purposes of the Self-Government Act are:

> . . . to delegate certain legislative powers to the government of the District of Columbia; authorize the election of certain local officials by the registered qualified electors in the District of Columbia; grant to the the inhabitants of the District of Columbia powers of local self-government; modernize, reorganize, and otherwise improve the governmental structure of the District of Columbia; and, to the greatest extent possible, consistent with the constitutional mandate, relieve Congress of the burden of legislating upon essentially local District matters.

Self-Government Act, sec. 102(a), D.C. Code, sec. 1-201(a). As the trial court acknowledges, "the core and primary purpose of the Self-Government Act was to 'relieve Congress of the burden of legislating upon essentially local matters'". McIntosh v. Washington, D.C. App., 395 A.2d 744, 753 (1978). (Tr. Opin. at 12). The legislative veto provision, undisputably, does not serve this primary statutory purpose.

The enactment of the Self-Government Act is perhaps the most significant legislative act in the history of the District of Columbia. The act, which represents the culmination of more than 25 years of legislative debate, affects directly the lives of all of those who live in, work in, or visit the District. In the 9 years since its effective date, the Council of the District of Columbia has enacted 781 permanent laws pursuant to the authority

delegated to it by the Act. Should the validity of the Self-Government Act as a whole be successfully challenged, unimaginable chaos would result, as the myriad rights duties and programs established by those acts--and the actions taken pursuant to those acts--would be subject to question.

These acts affect life in the District of Columbia from the moment of birth to the instant of death, and afterwards. Policy determinations by the Council decided questions of parentage,[12] how a birth is recorded,[13] and who may assist in the delivery.[14] Other legislative measures set standards to protect against child abuse and neglect,[15] govern the payment of child support,[16] expand the range of educational and job opportunities,[17] and benefits,[18] and determine the legal age of majority.[19] Such

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12 D.C. Law 1-107, District of Columbia Marriage and Divorce Act (eff. April 7, 1977).

13 D.C. Law 4-34, Vital Records Act of 1981 (eff. October 8, 1981).

14 D.C. Law 5-48, Health Care and Community Residence Facility Hospice and Home Care Licensure Act of 1983 (eff. February 24, 1984).

15 D.C. Law 2-22, title IV, Neglect Proceedings Amendment Act of 1977, title V, Prevention of Child Abuse and Neglect Act of 1977 (eff. September 23, 1977).

16 D.C. Law 1-92, District of Columbia Paternity and Child Support Amendment Act (eff. Mar. 29, 1977).

17 D.C. Law 1-36, D.C. Postsecondary Education Reorganization Act Amendments (eff. Nov. 1, 1975); D.C. Law 2-152, School Transit Subsidy Act of 1978 (eff. Mar. 3, 1979); D.C. Law 1-95, Minority Contracting Act of 1976 (eff. Mar. 29, 1977); D.C. Law 3-91, Minority Contracting Amendments of 1980 (eff. Sept. 13, 1980); D.C. Law 4-167, Minority Contracting Acts of 1976 Amendments Act of 1972 (eff. Mar. 9, 1983); D.C. Law 3-46, Youth Employment Act of 1979 (eff. Jan. 5, 1980); D.C. Law 4-124, Youth Employment Act of 1979 Amendment Act of 1983 (eff. July 2, 1982); D.C. Law 4-193, Youth Employment Act of 1979 Amendments/Job Skills and Placement Programs for Public Housing Residents Act of 1982 (eff. Mar. 10, 1983).

18 D.C. Law 1-32, District of Columbia Minimum Wage Amendments Act of 1975 (eff. Nov. 1, 1975); D.C. Law 2-129, District of Columbia Unemployment Compensation Act Amendments of 1979 (eff. Mar. 3, 1979); D.C. Law 3-77, District of Columbia Worker's Compensation Act of 1979 (eff. July 1, 1980); D.C. Law 4-102, District of Columbia Workers' Compensation Act of 1982 (eff. April 22, 1982); D.C. Law 4-147, Unemployment Trust Fund Revenue and Conformity Act of 1982 (eff. Sept. 17, 1982);; D.C. Law 5-3.

(footnote continued)

ordinary aspects of daily living as how much rent is owed,[20] the wages paid for work performed,[21] the range of hospital services available the confidentiality of mental health records,[22] who may marry and when (as well as the legal bases for divorce),[23] the price of automobiles[24] and credit card fees,[25] who may incorporate a business,[26] and the availability of home ownership[27]--all have been the subject to recent local legislation. Changes have been made, as well, in establishing an official definition of death,[28] determining what means can be used to prevent the unnecessary prolonging of life against a

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District of Columbia Unemployment Compensation Act Amendment Act of 1983 (eff. May 7, 1983).

[19] D.C. Law 1-75, District of Columbia Age of Majority Act (eff. July 22, 1976).

[20] D.C. Law 2-54, Rental Housing Act of 1977 (eff. Dec. 15, 1977); D.C. Law 3-106, Rental Housing Act of 1977 Extension Act of 1980 (eff. Sept. 26, 1980); D.C. Law 4-26, Rental Housing Act of 1980 (eff. Mar. 4, 1981); D.C. Law 4-26, Rental Housing Act of 1980 Amendments Act of 1981 (eff. Aug. 1, 1981).

[21] D.C. Law 1-32, District of Columbia Minimum Wage Amendments Act of 1975 (eff. Nov. 1, 1975).

[22] D.C. Law 1-136, District of Columbia Mental Health Information Act of 1978 (eff. Mar. 3, 1979).

[23] D.C. Law Law 1-107, District of Columbia Marriage and Divorce Act (eff. April 7, 1977).

[24] D.C. Law 3-135, Motor Vehicle Finance Charge Amendments Act of 1980 (eff. Mar. 5, 1981).

[25] D.C. Law 5-62, Interest Rate Amendment Act (eff. Mar. 14, 1984); D.C. Law 4-70, Consumer Credit Interest Rate Amendments Act of 1981 (eff. Mar. 10, 1982).

[26] D.C. Law 2-117, District of Columbia Business Corporation Act Amendments of 1978 (eff. Oct. 13, 1978).

[27] D.C. Law 3-38, Interest Rate Modification Act of 1978 (eff. Nov. 20, 1979); D.C. Law 5-62, Interest Rate Amendment Act of 1973 (eff. Mar. 14, 1984); D.C. Law 2-135, District of Columbia Housing Finance Agency Act (eff. Mar. 3, 1979); D.C. Law 4-44, Home Purchase and First Right Assistance Fund Act Amendments Act of 1971 (eff. Oct. 25, 1981); D.C Law 4-28, District of Columbia Housing Finance Agency Act Amendments Act of 1971 (eff. Aug. 5, 1981).

[28] D.C Law 4-68, Uniform Determination of Death Act of 1981 (eff. Feb. 25, 1982).

person's expressed wishes,[29] deciding how wills are made and estates administered[30] concerning the disposition of bodies and body parts,[31] and aiding the discovery of legitimate heirs.[32]

One of the most significant areas of legislative action since the enactment of the Self-Government Act has been in the area of criminal law reform. Under the Self-Government Act, the transfer of primary legislative authority to the District over the criminal code was delayed until 1979.[33] The years of 1979 through 1980 were devoted to an extensive study of the D.C. Law Revision Commission's proposed Basic Criminal Code. As a result, the only criminal law legislation passed in 1980 was the District of Columbia Death Penalty Repeal Act which removed the unconstitutional and unenforceable death penalty provisions from the D.C. Code.

Although the time span of local authority over criminal code offenses has been relatively short, major legislative measures in this area have been enacted due, in large part, to the critical need for reform. As the chairman of the House Subcommittee on Judiciary and the Senate Subcommittee on Governmental Efficiency and the District of Columbia pointed out in their joint letter, dated December 5, 1978, transferring this criminal code authority:

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29 D.C. Law 4-69, Natural Death Act of 1971 (eff. Feb. 25, 1982).

30 D.C. Law 3-72, District of Columbia Probate Reform Act of 1980 (eff. June 24, 1980).

31 D.C Law 3-145, District of Columbia Tissue Bank Act Amendments of 1980 (eff. Mar. 5, 1981); D.C. Law 3-145, District of Columbia Tissue Bank Act Amendments of 1980 (eff. Mar. 5, 1981); D.C. Law 4-199, Christmas Tree Act of 1982 (eff. Mar. 10, 1983).

32 D.C. Law 3-72, District of Columbia Probate Reform Act of 1980 (eff. June 24, 1980).

33 Self-Government Act, sec. 602(a)(9), D.C. Code, sec. 1-227(a)(9), delayed the Council's authority over titles 22, 23 and 24 of the D.C Code.

> The present criminal law of the District of Columbia is an outdated relic of mosaic statutes, cases, and administrative interpretations passed into law, in a piecemeal fashion, over a period of time that stretches from 1901 to the present. Time has changed the social mores and standards by which we live today. The criminal laws of the District have not kept pace with that change.

During the past several years under the home rule form of government, significant changes have indeed been made. The District of Columbia Theft and White Collar Crimes Act of 1982, D.C Law 4-122, D.C. Code, §§22-711 to 220723, 22-2511 to 2514,22-3801 to 22-3852 (Supp. 1984), which was adopted by the Council of the District of Columbia on July 20, 1982, and which became effective on December 1, 1982, not only reformed the criminal laws of the District of Columbia so as to consolidate duplicative provisions and to remove anachronisms; it also, inter alia, prescribed several courses of conduct which had not previously been prohibited by the District's criminal laws; eliminated a number of technical distinctions between offenses; eliminated a number of potential defenses; modified the penalties attached to certain offenses (with the result, in some instances, that what were formerly jury-triable offenses are no longer offenses for which a jury trial may be requested); and changed the dollar threshold of felony offenses.

Because that Act so extensively overhauled the District's criminal laws, its invalidation would undoubtedly necessitate re-trial and resentencing of persons convicted under any of a large number of its provisions. The following is by no means an exhaustive list of the persons whose convictions or sentences; obtained or imposed during the nearly two years since the Act's effective date, would have to be disturbed if the Act is invalidated:

- persons convicted as felons pursuant to that provision of the Act permitting the value of items stolen as part of a single scheme to be aggregated for the purpose of prosecuting the offense as a felony rather than as multiple misdemeanors D.C. Code §22-3802 (Supp. 1984);

- persons who were convicted of shoplifting, false registration, or taking property without right, and who were not entitled to trial by jury because of those provisions of the Act setting for those offenses a maximum penalty that rendered them not jury-triable D.C. Code §§22-3813, 3816, 3824 (Supp. 1984);

- persons who were convicted under the Act of certain offenses against senior citizens, and whose sentences may reflect the enhanced penalty which the Act authorizes for such crimes D.C. Code §22-390 (Supp. 1984);

- persons convicted of theft, who would have to be retried under one or more of the larceny, embezzlement or false pretenses provisions of prior law, each of which requires proof of specific elements not necessary for conviction under the Act's broad theft provision D.C. Code §22-3811 (Supp. 1984);

- persons convicted of the new offenses of shoplifting or credit card fraud, whose offenses might or might not contain the elements of larceny, forgery or false pretenses, the categories under which they would be prosecuted under prior law D.C. Code §§22-3813 to 3823 (Supp. 1984); and

- persons convicted of extortion by threat of economic injury D.C. Code §22-3851(a)(1) (Supp. 1984); of commerical piracy D.C. Code §23-3814 (Supp. 1984); of accepting or soliciting bribes as a witness; of false swearing or making false statements in a notarized document D.C. Code §§22-2513, 22-2514 (Supp. 1984); or of tampering with physical evidence D.C. Code §22-723 (Supp. 1984), all of which are new offenses created under the Act, and none of which is adequately addressed by prior law.

Precise statistics with respect to the number of persons whose convictions would be disturbed if the Act were invalidated are not available. However, the following dollar statistics suggest the large numbers of convictions and sentences that are likely to be involved merely with respect to the offenses of credit card fraud and shoplifting. In its Report accompanying Bill No. 4-133,[34] the Committee on the Judiciary noted that between August 1980 and July 1981, retailers in the Washington metropolitan area suffered losses due to shoplifting of $486,250,000 and losses due to credit card fraud of $5,200,00.[35] §Moreover, that some convictions under the Act would have to be overturned entirely is suggested by the Judiciary Committee's belief that prior law had no provisions for reaching consumer fraud, obstruction of justice and other white collar crimes that the Act was specifically designed to address, and that the Committee believed to have a "severe impact" on the District community.

Nor would convictions under the Theft and White Collar Crimes Act be the only ones disturbed if the District's criminal law authority is invalidated. Convictions and sentences under the following criminal laws adopted by the Council of the District of Columbia could be similarly affected:[36]

1. The District of Columbia Bail Amendment Act of 1982, D.C. Law 4-152 (eff. Sept. 17, 1982) D.C. Code, sec. 23-134, amended provisions of the D.C. Code relating to release and pre-trial detention;

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[34] Committee Report, Subject: Bill No. 4-133, the "District of Columbia Theft and White Collar Crimes Act of 1982", dated June 1, 1982, Council of the District of Columbia, Committee on the Judiciary Bill 4-133 because D.C. Law 4-122, effective December 1, 1982.

[35] Id. p. 5.

[36] Those criminal laws numbered 1 thru 4 which fall within Titles 22, 23, and 24 would clearly be affected by an invalidation of the Council's criminal law authority. Those laws numbered 5 thru 10 could also be affected by such an invalidation if the Court adopts the reasoning of Appellant Pee.

2. The Control of Prostitution and Sale of Control Substances in Public Places Criminal Control Act of 1981, D.C. Law 4-57, D.C. Code, sec. 22-2701, which became effective on December 10, 1981 created criminal offenses for certain activities conducted for the purpose of encouraging prostitution or encouraging the sale of controlled substances in public places;

3. The District of Columbia Criminal Statute of Limitations Act of 1982, D.C. Law 4-104, D C. Code, sec. 23-113, which became effective on April 30, 1982 created a local criminal statute of limitations;

4. The District of Columbia Protection of Minors Act of 1982, D.C. Law 4-173, D.C. Code, sec. 22-2011, protects minors against sexual abuse;

5. The District of Columbia Sentencing Improvements Act of 1982, D.C. Law 4-202, D C. Code, sec. 16-710 (eff. March 10, 1983), which promotes the use of restitution and community service as sentencing options, provides for split-sentencing of offenders, limits the applicable period of probation and allows the Board of Parole to grant work release to misdemeanants;

6. The Drug Paraphernalia Act, D.C. Law 4-149 (eff. Sept. 17, 1982), D.C. Code, sec. 33-601, which defines and regulates the sale of drug paraphernalia in the District of Columbia;

7. The Victims of Violent Crime Compensation Act of 1981, D.C. Law 4-100 (eff. April 6, 1982), D.C. Code, sec. 3-401, which provides for compensation to innocent victims of violent crime who have no other source of compensation and establishes a fund for the payment of such compensation;

8. The District of Columbia Uniform Controlled Substances Act of 1981, D.C. Law 4-29 (eff. August 5, 1981), which established a uniform law concerning controlled substances including penalties for various narcotic and drug offenses. This

law also provided for increased research into the prevention of drug abuse and drug dependence and for education of abusers of controlled substances;

9. The District of Columbia Arson Reporting Immunity Act of 1982, D.C. Law 4-119, (eff. June 19, 1982), D.C. Code, sec. 4-317, increased the ability of the District of Columbia to combat arson by authorizing the Fire Marshal and other law enforcement agencies to seek disclosure of arson-related information from insurers, to require insurers to report suspicious fires to the Fire Marshal, and by providing limited immunity to persons supplying such information; and

10. The District of Columbia Traffic Adjudication Act, D.C. Law 2-104 (eff. Sept. 28, 1981), D C. Code, sec. 440-301, which decriminalized all parking and minor moving traffic violations and established a mechanism for the administrative adjudication of these offenses. Over 500,000 cases have been adjudicated by the Bureau of Traffic Adjudication, rather than the Superior Court, under this act since 1978.

These are some examples of the criminal enactments by the Council, under home rule. Many persons have been convicted and sentenced under these laws, and a multitude of rights, duties and liabilities have been created. Invalidation of these laws and rversions to prior criminal laws would cause judicial and administrative chaos in the D.C. criminal justice system.

CONCLUSION

In sum, the primary purpose of the Self-Government Act was to "relieve Congress of the burden of legislating upon essentially local matters". D C. Code, sec. 1-201(a). This purpose may be served without the legislative veto, which has in practice been used very infrequently.[37] A careful examination of

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[37] In the five years since the District assumed criminal law authority on January 1, 1979, the House's disapproval of the Sexual Assault Reform Act of 1981 has been Congress's only use of the legislative veto under section 602(c)(2). The only other use (footnote continued)

the extensive legislative history of the Self-Government Act does not show that it is "evident" that Congress would have failed to grant the Council criminal law authority without the legislative veto provision. Indeed, the legislative history demonstrates that the primary reason that the conferees were willing to grant the District criminal law authority was the agreement to postpone the grant of criminal law authority for two years to permit the Law Revision Commission to revise the Criminal Code.

The invalidation of the District's criminal law authority would have extremely grave implications not only for the democratic rights of the citizens of the District, but also for the District's criminal justice system.

Therefore, this Court should hold that Congress' grant of criminal law authority to the District under the Self-Government Act was valid.

Respectfully Submitted,

Cynthia A. Giordano
#390973

Jacquelyn V. Helms
#965228

James C. McKay, Jr.
#100464

Phyllis D. Thompson
#358948

Members, Division VI
District of Columbia Bar

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of the legislative veto was Congress's disapproval of the Location of Chanceries Amendments by concurrent resolution pursuant to section 602(c)(1), D.C. Code, sec. 1-233(c)(1).