The testimony of the Criminal Law and Individual Rights Section of the D.C. Bar on statehood for the District of Columbia addresses some of the constitutional issues involved and discusses problems pertaining to the District's lack of control over its legislation, budgets, and judicial system.

Without statehood, the District not only lacks full and equal congressional representation, but all legislation and budgets duly passed by District legislators are subject to congressional and presidential scrutiny and veto. Congress and the President have used their power over the District to reverse many of the progressive policies passed by the District Council and control actions of the District. The lack of self determination for District residents is also acute in the area of judicial control. In the District of Columbia, unlike states, the President appoints all local judges and prosecutors. The net effect of federal control over the District's judiciary has resulted in a disjointed system of crime control. For example, although the District is not allowed to decide which crimes to prosecute and what sentencing schemes to pursue, it is left to deal with the serious problem of prison overcrowding.

There is no constitutional impediment to granting statehood to the residents of the District of Columbia, retrocession to Maryland is not a viable option, and Maryland's consent is not required. The citizens of the District of Columbia seek no more than citizens in any other state -- the right to self determination, full and equal voting representation in Congress, and local legislative, budgetary and judicial autonomy.

CRIMINAL LAW AND INDIVIDUAL RIGHTS SECTION

The District of Columbia Bar

COMMENTS OF THE SECTION ON CRIMINAL LAW AND INDIVIDUAL RIGHTS OF THE DISTRICT OF COLUMBIA BAR REGARDING STATEHOOD FOR THE DISTRICT OF COLUMBIA BEFORE THE COMMITTEE ON SELF DETERMINATION COUNCIL OF THE DISTRICT OF COLUMBIA

Laurie B. Davis, Co-Chair
Grace M. Lopes, Co-Chair
John Chamble
Jennifer P. Lyman
Charles M. Rust-Tierney
Nkechi Taifa
Cynthia M. Wimer-Lobo

Steering Committee of the
Section on Criminal Law and
Individual Rights of the
District of Columbia Bar[1]

APRIL 28, 1993

STANDARD DISCLAIMER

"The views expressed herein represent only those of the Section on Criminal Law and Individual Rights of the District of Columbia Bar and not those of the D.C. Bar or of its Board of Governors."

[1] These comments were principally prepared by Nkechi Taifa, member of the Section's Criminal Rules and Legislation Committee. Other members of the Steering Committee who participated in the preparation of these comments are: Laurie B. Davis, Grace M. Lopes, and Charles M. Rust-Tierney. Also participating in the preparation was Lisa C. Wilson, a member of the Section.

The Section on Criminal Law and Individual Rights of the District of Columbia Bar (the "Section") is composed of over 800 criminal justice and civil rights practitioners, legal educators and other members of the District of Columbia Bar who have interests in criminal law and individual rights. The views expressed herein represent only those of the Section on Criminal Law and Individual Rights of the District of Columbia Bar, and not those or the District of Columbia Bar or its Board of Governors.

We are pleased to provide testimony today in support of the New Columbia Admission Act (H.R. 51). The Act provides for congressional representation for over 600,000 residents of the nation's capital, and creates the same measure of economic, judicial, and legislative autonomy for the District's residents that is enjoyed by the residents of every other state in the country. Since the 100th Congress, legislation advocating statehood for the non-federal areas of the District of Columbia has undergone extensive examination by scholars, economists, planners, government officials and Members of Congress.

This testimony will address some of the constitutional issues raised and discuss problems pertaining to the District's lack of control over its legislation, budgets, and judicial system. The Section on Criminal Law and Individual Rights is concerned with the protection of personal liberties and criminal justice issues. The denial of fundamental rights faced by the

residents of our nation's capital stands at the core of the issues which are important to our Section.

Without statehood, the District not only lacks full and equal congressional representation, but all legislation and budgets duly passed by District legislators are subject to congressional and presidential scrutiny and veto. Congress and the President have used their power over the District to reverse many of the progressive policies passed by the District Council and control actions of the District. For example, Congress attached a provision to the D.C. budget which instructed the District Council to amend its Human Rights Act to permit discrimination by religious institutions against gay men and women. (This provision was later invalidated by the D.C. Court of Appeals). More recently, Congress precluded the District from spending locally-generated funds in support of the Health Care Benefits Expansion Act which would have extended health care benefits to domestic partners of city employees and created a registration procedure for domestic partners throughout the city. Congress opposed the District's gun control legislation passed by this body and forced this Council to overturn legislation to curb murder and violence in the District. Congress commanded that District voters hold a referendum on a death penalty measure that was harsher than the federal death penalty which Congress passed for the country as a whole. And, despite consistent attempts by this Council to fund Medicaid abortions for poor women using locally-raised revenues, then-President Bush vetoed the D.C.

appropriations bill until that funding was removed, despite Congressional support. In a classic case of governmental micromanagement, Congress once attached a rider to an appropriations bill that forbid the Woodrow Wilson High School swimming pool from being used after 9:00 p.m.

The lack of self determination for District residents is particularly acute in the area of judicial control. States have complete authority over their judicial systems; it is one of the inherent attributes of state sovereignty to provide a structure for the resolution of cases and controversies and the adjudication of offenses committed within state borders. In the District of Columbia, however, unlike states, counties or municipalities, the President appoints all local judges and prosecutors.[2] Thus, the U.S. Attorney for the District of Columbia prosecutes violations of both federal and local law. Congress has forbidden the Council of the District of Columbia from enacting any legislation relating to the powers of the U.S. Attorney.

The net effect of federal control over the District's judiciary has resulted in a disjointed system of crime control. Law enforcement is funded and controlled by the District of Columbia government, while prosecutors and judges are beholden to the federal government. Although the District is not allowed to

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[2] Similarly, the President appoints and the Senate confirms all federal judges. Because the District has no Senator, however, it has no voice in that process, or in the process of confirming Supreme Court Justices.

decide which crimes to prosecute and what sentences or sentencing alternatives to pursue, it is left to deal with the serious problem of overcrowded prisons.

The recent decision by President Clinton to include Congresswoman Eleanor Holmes Norton and other locally elected officials in the appointment of a new U.S. Attorney is a positive development. Unfortunately, however, such courtesies are dependent upon the wishes and ideology of the Administration in power, and thus potentially reversible with successive Administrations.

On January 6, 1993 the non-voting delegates to Congress won the right to vote in the Committee of the Whole of the House of Representatives, allowing delegates to vote on virtually all business of the House of Representatives. The D.C. Bar's Section on Criminal Law and Individual Rights filed an amicus brief in support of the delegates from the District of Columbia, Guam, the Virgin Islands, American Samoa, and the Resident Commissioner from Puerto Rico, in opposition to a motion for a preliminary injunction. Because of a new House rule which requires that a delegate's vote be discounted should it be the decisive factor on a given piece of legislation, Judge Harold H. Greene's ruling in favor of the delegates was premised on the notion that their votes are "meaningless" and would not tip a legislative balance.

While we are pleased that the delegates have been granted this vote in the Committee of the Whole, it cannot be seriously argued that it is an adequate substitute for full representation.

Moreover, even if it had been determined that the vote in the Committee of the Whole "counted", voting representation by itself is not a replacement for statehood. All locally passed legislation and budgets would still be subject to congressional and presidential veto and the District would still lack control over its judiciary.

The District meets the historical three-part Congressional test for statehood: District residents have, through a democratic process, expressed their desire to be a state; they have agreed to accept the republican (representative) form of government practiced in the United States, and there are sufficient people and wealth to support a state. The District of Columbia, with a population of 609,000, has nearly as many or more people than six states, each of which has two senators.

Moreover, the District of Columbia is the only entity subject to United States jurisdiction that is taxed without having a full voting representative in Congress. Puerto Rico, Guam, the Virgin Islands and American Samoa, all U.S. territories, pay no federal income taxes. District residents, however, are not only taxed, but pay more in federal taxes than eight states, and more per capita than 49 of the 50 states. D.C. residents have fought and died in every war since the War for Independence, yet have no decisive vote on matters of policy. During the Viet Nam war, D.C. suffered more casualties than ten states, and more killed per capita than 47 states. Of the 115 nations in the world with elected national legislatures, the U.S.

stands alone in denying representation to the citizens of its capital.

There is no constitutional impediment to granting statehood to the residents of the District of Columbia. The Constitution's District Clause, Article 1, Section 8, Clause 17, grants Congress the power to "exercise exclusive legislative authority in all cases whatsoever, over such District not exceeding 10 miles square ..." This includes the power to redefine the geographic size of the District and the power to carve out a new state from the nonfederal portions of District territory as long as such reconfiguration does not exceed the maximum size limitation on the federal seat of government. H.R. 51 preserves the constitutionally mandated federal seat of government by maintaining the District of Columbia which will be comprised of key federal buildings, agencies, and monuments, with the remaining territory admitted into the Union as the 51st state.

Congress has previously exercised its authority to alter the District's size. In 1846, at the request of the Virginia legislature, Congress returned or retroceded the 33 square miles that Virginia had earlier ceded to comprise the District. The Supreme Court later rejected a taxpayer challenge to this retrocession in Phillips v. Payne, 92 U.S. 130 (1887). The District, thus, has been less than 10 miles square (100 square miles) for over a century; in fact, it has been approximately 67 square miles since the Virginia retrocession. The New Columbia Admission Act merely once again reduces the size of the seat of

government, in concert with constitutional authority as well as historical precedent.

Article IV, Section 3, Clause 1 of the Constitution (the Admission Clause) provides that "no new State shall be formed or erected within the Jurisdiction of any other State... without the Consent of the Legislatures of the States concerned...". It has been argued that granting statehood to the District of Columbia would violate the constitutional requirement of consent of affected states and the terms of Maryland's act of cession. Maryland's consent is not required because Maryland permanently relinquished sovereignty over the territory to the federal government in its 1791 cession of land. The Maryland legislature was on notice that its consent was constitutionally required to create a state from land within its borders and could have reserved this consent power over the territory it ceded to make up the District. However, Maryland declined to reserve such power. According to the Act passed by the Maryland General Assembly, Maryland expressed clear intent to "forever cede and relinquish ... in full and absolute right and exclusive jurisdiction," the land to the federal government.

Furthermore, the language of the Maryland cession act is in direct contrast to the terms of most state statutes which cede land for federal use and provide for reversion of the land upon termination of the federal use or ownership. The Maryland legislature neither retained a specific reversionary interest in the land nor evidenced the legislative intent to have this land

returned to the state should Congress no longer use it for the seat of government.

Retrocession or the return of District lands to Maryland has been advocated as a solution to resolve the problem of disenfranchisement for District residents. This "solution" fails. Retrocession cannot be imposed on Maryland or D.C. residents because in a democracy, government exists with the "consent of the governed." District citizens have voted for statehood, not to become subsumed within Maryland. The Maryland state legislature would also have to approve. A recent survey reflected that only seven of the 189 Maryland legislators were willing to have the District ceded back to their state. Thus, it is apparent that both D.C. and Maryland have overwhelmingly rejected retrocession.

In sum, the citizens of the District of Columbia seek no more than citizens in any other state -- the right to self determination, full and equal voting representation in Congress, and local legislative, budgetary and judiciary autonomy.

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