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**“When They Go Low, We Go Local”
Strategies for Pursuing DC Democracy in the Age of Trump**

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**University of the District of Columbia, David A. Clarke School of Law
Law Review Symposium
DC Democracy During the Time of Trump: 51 and 45**

April 14, 2017

Thank you, Dean Broderick, for the lovely introduction. I am delighted to be here, proud to serve on the board of the David A. Clarke School of Law School, and proud of the work you and your students are doing on behalf of DC Democracy.

This is not the symposium I thought I would be attending after the 2016 election. However, we must confront our new reality and be strategic about our pursuit of democracy for the residents of the District of Columbia. Dean Broderick asked me to discuss the lingering threat of riders to the District of Columbia’s annual appropriations bill. I would like to do so in the broader context of strategies for DC rights.

What is a rider? The best definition I can devise is the following: a rider is a noxious attachment to our budget or another piece of legislation that furthers the political interests of members of Congress opposed to our values. I view riders as the legislative equivalent of the skunk at the garden party. Examples of the most pernicious riders we have faced include: restrictions on funds for access to health care for poor women (including abortions and contraception); no funds for the District’s successful needle exchange program; elimination of adoptions by same-sex couples; and, most recently, nullification of the District’s Death with Dignity law, budget autonomy law, and reproductive rights law.

Perhaps the most sinister rider, which cuts to the very core of our full and equal rights as American citizens, was the attachment to the DC Voting Rights Act in 2009. This rider would have eliminated nearly all of the District’s gun control laws, including a ban on assault weapons. Without the rider, the voting rights bill had enough support to pass in both the House and Senate because of Democratic majorities in those bodies. However, because the rider was supported by the National Rifle Association (NRA), the Democratic leadership could not remove it from the bill without serious consequences to its members in rural states at the ballot box. As a result, District elected officials, including the Congresswoman, the Mayor, and the Council chair had to face the impossible and cruel choice of public safety versus democracy. Ultimately, they chose public safety and the District lost its best chance for voting rights as a result.

This is a legal symposium, so I should probably mention that riders have a constitutional basis. Article I, Section 8, Clause 17, allows the Congress “to exercise exclusive Legislation in all Cases whatsoever, over [the] District.” This is commonly referred to as the District Clause or the “plenary clause” of the Constitution because it grants the Congress near plenary authority over the nation’s capital. I say “near” plenary because the Congress could not impose an unconstitutional requirement or restriction on the District, such as the re-institution of slavery within the city’s borders.

As potentially damaging as riders can be, they must be viewed in the context of all of the threats that we potentially face over the next four years. We can categorize the threats posed by riders into instances where we are forced to play defense and offense.

In some ways, playing defense is an easier exercise for District residents and officials. It is reflexive for nearly every District citizen to abhor and to fight incursions into home rule, which largely come in the form of riders. As I have mentioned, these riders cover a number of national political issues such as guns (provisions to roll back our gun control laws), death with dignity (repeal of our newly passed law to allow DC residents the right to make their own choices about when to stop their medical care), abortion (no funds for abortions for poor women), and marijuana (provisions prohibiting us from taxing/regulating the sale of cannabis).

It is no accident that these riders encompass nationally controversial topics. The reason members of Congress attempt to impose these riders on the District is born out of their desire to score political points back home. It is easy for a member to propose measures for the District that he or she never could get passed on a national scale due to Congressional opposition. The District does not have a voting member of the House, nor any Senators at all, so the imposition of riders is never a fair fight. The members seeking to undermine democracy in the District routinely cloak themselves in the constitutional “prerogative” of the District Clause. This is a false claim, of course, because the framers of the Constitution never intended the District Clause to be used as a tool to impose policy restrictions on residents of the nation’s capital against their will.

The genesis of the District Clause was a dispute in Philadelphia in 1783, when angry Revolutionary War veterans confronted the Continental Congress demanding back pension payments. A mild “riot” ensued and the Congress asked Pennsylvania to call its militia to intervene. The state refused, and the Congress ensured that never again would the national government be at the whim of the local government for its safety. There is no record that the framers intended the language they crafted to respond to this issue was anything more than a public safety provision and not a tool for Congress to repeal democracy in the new national capital. Of course, this public safety rationale for the District Clause is now quaint and antiquated in the modern era in which the federal government in Washington is more than capable of taking care of itself in an emergency and certainly would not have to rely on the police powers of the District or the neighboring jurisdictions. Yet, members who attempt to use the District clause to upend democracy in the District, routinely cite the framers supposed “intent” to justify their actions, despite the historical fact that the framers actual intent was quite narrow in this regard.

Fighting riders is more difficult in the current political environment in which Democrats (who tend to be more sympathetic to our rights) do not have control of the White House, the House or the Senate. But as of this moment, the filibuster still remains in place for legislation in the Senate, despite the President's frequent taunts that the Senate should repeal it, and there are Senators (such as Maryland's Chris Van Hollen and others) who have pledged to employ the filibuster and any other tools available to the minority to protect the District's rights.

Perhaps the best tool we have to fight riders and other threats to DC democracy is our own perseverance. When the Congress comes after us, we must make them fight for it. Most members have little time and attention to devote to matters that do not directly benefit their own constituents, particularly in the House where members must run every two years to retain their seats. In other words, we must ensure that taking a shot at the District is never easy. If you choose to do so, you must expect a bruising, lengthy battle which will demand your time and attention, even if ultimately you have the votes to win, and run the risk of your constituents inquiring why you are spending so much time on a jurisdiction that is not your own. We have heard this kind of rhetoric recently in town halls around the country with respect to efforts to repeal and replace the Affordable Care Act.

Fighting back is a tactic that frequently and successfully has been employed by the District's own Congresswoman, Eleanor Holmes Norton, most recently in opposition to the congressional effort to repeal the District's Death with Dignity Act. The local measure ultimately became law because Congress ran out of time to overturn it after the Congresswoman and her allies strongly opposed the repeal (all DC civil acts are subjected to a thirty legislative day review period after which time they become law).

The second variety of threats to the District are far harder for us to combat. These issues involve instances when we must play offense rather than defense and require us to think strategically and employ multi-year efforts to attempt to secure our rights. Perhaps the best example of an issue that requires our constant affirmative attention and action is DC statehood. This issue remains stalled in this [115th] Congress because of opposition by Republican majorities in the House and Senate. Republican Senators fear that DC statehood would bring two Democratic-voting members to the Senate who would disturb the balance of power in that chamber.

While concurrently pursuing statehood, the District also has been struggling with the issue of seeking voting rights for a generation. Voting rights does not include all of the attributes of statehood, such as the District government's complete control over its own laws and budgets, nor does voting rights necessarily include granting votes in the House and Senate. The District's most recent voting rights efforts have included support for a bill that would have provided one vote each in the House for the District and for Utah (which had just missed receiving a vote in the last apportionment) but no Senator allotment for the District. The idea was that the bill would be easier for Republicans to support if the District's likely Democratic vote in the House was balanced with a likely Republican vote in Utah. This bill passed in the House and nearly passed in the Senate,

but for the imposition of the rider I discussed earlier that would have eliminated most of the District's gun control laws.

Another example of an affirmative effort by the District to gain autonomy is the successful effort to pass a local Budget Autonomy Act. The District is the only jurisdiction in the country that does not have full authority over its own local budget. The District of Columbia Home Rule Act of 1973 requires that Congress affirmatively pass the District's local budget as if it were a federal appropriations bill. This provision has led to many hardships for the District's government, including delays of the passage of its budget due to hold ups in the federal appropriations process, threats of shutdown if the budget is not passed and, of course, the imposition of policy riders on the local budget. In 2013, the District took matters into its own hands and passed a referendum in support of a local law that, based upon a novel legal theory developed by DC Appleaseed and upheld by the courts, grants the District budget autonomy without affirmative action by Congress. As a consequence of the passage of the Budget Autonomy law, the District believes that it finally has the power to pass its own budget. However, not unexpectedly, Congress does not share this view and is seeking to repeal the local Budget Autonomy Act using the legislative tool of, you guessed it, a rider to the annual appropriations bill.

Since the passage of the Budget Autonomy law, Congress has continued to pass the District's budget, which amounts to a constructive repeal-in-fact of the Budget Autonomy Act (if not yet a repeal-in-law) because federal law continues to preempt District law under the Constitution. Despite these challenges, the Budget Autonomy Act remains the greatest advance for District democracy since the passage of the Home Rule Act, and is the best example of District residents taking matters into their own hands to secure their rights.

There are many other areas in which the District could attempt to play offense to secure its autonomy, such as a local voting rights bill. The Council could adopt this bill pursuant to a legal theory similar to the theory supporting the Budget Autonomy Act that would allow the Council the authority to pass a limited voting rights bill in which the DC delegate would be permitted to vote on all House measures exclusive to the District. Other examples of affirmative efforts include legislative autonomy (which would require Congressional action), a deal on voting rights (such as splitting the Senate votes between one Republican and one Democrat), physical retrocession to Maryland (requiring the District to become part of Maryland) and political retrocession to Maryland (in which District residents would vote in Maryland but the District would not become a jurisdiction of Maryland). Another idea is the use of the District's reserve funds to pay for activities banned by riders, because the spending of such non-appropriated funds to "enact" riders would not technically violate the Home Rule Act or the Anti-Deficiency Act. Finally, DC Appleaseed and others continue to work on a potential new lawsuit to compel Congress to grant the District voting rights (the courts denied the District's last voting rights suit in 2000, in which then DC Circuit Court Judge Merrick Garland wrote the opinion). A new lawsuit would require a new cause of action not precluded by the previous case (such as equal protection claims based on the principle that Congress has the authority to grant the District voting rights but chooses not to do so). There is no guarantee, of course, that a new legal effort would be successful.

The ultimate goal for most District residents remains statehood. The recent November 2016 referendum showed that an overwhelming 86% of District residents support the District becoming a state. The District also has prepared itself for statehood. Prior to the vote, Mayor Bowser and members of the DC Statehood Commission adopted the “Tennessee Plan,” so-named because it was the method by which Tennessee entered the Union. Applying the Tennessee Plan, a territory seeking statehood must first adopt four essential elements: (1) a declaration that it wishes to become a state, (2) a promise that it will abide by a republican/representative democratic form of government, (3) a boundary map indicating the metes and bounds of the new state, and finally, and perhaps most importantly, (4) a constitution for the new state. The District adopted each of the elements in the 2016 referendum, fulfilling the basic requirements of the Tennessee Plan. But in the face of apparent opposition from the new administration and the White House, the District does not have an easy path to the final step toward statehood – congressional adoption of an admissions act.

So how can the District build support for statehood now that the Mayor has delivered the admissions package to a Congress and White House that refuse to support it? I believe that the answer lies in adopting the elements of other past successful politically-natured campaigns and focusing on strategy and less on tactics in the fight for statehood.

I have been involved in many successful political campaigns on the federal and local level, as well as successful campaigns for major legislation. Robert Raben reminds us that all successful campaigns share the following five elements:

1. Definition of Success: It may sound circular, but all campaigns must have a precise definition of success to be successful. Often this is one of the most difficult parts of any campaign to define, and it is not uncommon for there to be competing notions of success. The tension usually comes down to the following two questions: Do you define success in an incremental way? Or a holistic way? In the statehood context, the questions to answer might be: Is achieving statehood success or is building new support for statehood success?
2. Understanding Your Audience: Every campaign must ask: Who is your audience? But perhaps the more important question is: Who is the decider, namely who can grant your success? In the statehood context, the ultimate decider, of course, is Congress; however, the President also must agree. Other important “deciders” also must play a role to drive the issue forward, such as citizens here at home and around the country, other outside stakeholders and groups (such as democracy organizations, business entities, and others), and, of course, the media.
3. Finding Your Strategy: This is the intellectual underpinning of the entire campaign, and is easily the most important element. It is how the campaign organizes itself to achieve success, and it is usually the most difficult element of the campaign to devise.

A campaign's strategy is based first on understanding (a) *the competition*. In other words, who is against us? In the context of DC statehood, is our opposition the Republicans? Other States? Our own apathy? The strategy also must take into account (b) *our advantages*. For example, what do we have going for us? DC is the nation's capital, and many Americans have affection for the capital, but in this anti-government era, many do not. DC enjoys a great concentration of wealth, but are wealthy District residents willing to fund a statehood effort if they themselves are only abstract beneficiaries of statehood (they gain their rights but do not require the day to day services that an efficient state government would provide). The national media is concentrated in DC, but it is hard to get the national media's attention on local issues, even those right under their noses. The national government is located in DC, which means that all of the "deciders" are located here (many are actual DC residents) and can see the problem first hand. There also is new organization and energy not just around statehood locally, but around national democracy issues that DC shares with activists around the country (more about that in a moment).

Examples of winning strategies include: (a) *Volume*. The AARP is perhaps the best example of this. The organization recruits millions of Americans the moment they turn fifty, building a massive base of support for their issues. Another winning strategy is (b) *Passion*. Here the NRA is probably the best example. Millions of Americans join this organization based on their common passion for the 2nd amendment and fear of losing their guns. A final example of a successful strategy is (c) *Market Share*. The Human Rights Campaign (HRC) and the fight for marriage equality and LGBT rights is an excellent example of market-based strategies. LGBT rights recently have gained rapid favor in this country primarily because of the economic power of LGBT Americans who either can harm major corporations by choosing not to patronize them or benefit other corporations by favoring them based upon those companies' support for LGBT rights.

So all of this begs the question, what should the District's strategy be to advance statehood? Should we take advantage of our proximity to government, media, and economic power? Should we try to build on whatever affinity remains for the nation's capital? Nearly 30 million people visit here annually to see the monuments and celebrate America, despite most Americans low opinion of the national government. Should we affiliate ourselves with the millions of Americans who are rising up in opposition to anti-democratic principles espoused by those in power? I believe each of these strategies has merit, but the District must build consensus around a single, coherent strategy to be effective.

4. Adopt Tactics to Support Your Strategy: Tactics are tasks you employ to further your strategy. They often are mistaken for strategy. Tactics are designed to demonstrate your advantages. For example, tactics employed in successful campaigns usually include lobby days, op-eds, earned media, press conferences, organization, and smart deployment of resources, including funds. In the past, statehood and voting rights supporters have used these tactics, and others, to advance DC rights such as adoption of the "No Taxation Without Representation" license plate, staging a tea party and dumping tea into the Potomac River, and acts of civil disobedience, in which brave DC residents have allowed themselves to be arrested in support of DC rights. These

are all successful tactics, but they are only that, and even the best tactics will never be successful without a winning strategy.

5. Effectively Communicating Your Message: Communications are methods you employ to broadcast your message. Good examples of communications include: sophisticated media; grass-tops; grassroots and stakeholder outreach. These efforts often are collectively referred to as public relations, and all of these elements of communications will be required to achieve statehood.

Once the District has determined its strategy and devised the tactics required for success, it can accurately calibrate what it will cost to achieve the goal and what the timeline will likely be. I believe that the District's campaign for statehood, like all successful national campaigns, will require substantial resources, including at least tens of millions of dollars. Companies like Coca Cola and Lockheed Martin would pay millions on a "bet the company" proposition. I believe statehood is a "bet the company" proposition for DC and requires similar support. Yet, even with a smart strategy, the odds of achieving statehood in this political environment remain low. This must not deter the District from continuing to pursue statehood, however, and to be prepared for the inevitable political climate in which achieving statehood will be possible.

So ultimately, what can the District do in the age of Trump to advance DC democracy? Each of the affirmative strategies to secure our rights would require consensus among DC residents, locally elected officials, and other stakeholders to move forward, but there is another important way we can play offense. In the wake of the 2016 elections, the only place where the government is in a position to help people in need is in progressive jurisdictions around the country. While we play defense at the federal level and explore how we play can play offense at the national and local level, we also should enlarge the playing field to pursue other efforts locally, where the District has the authority to act.

Our new mantra (to borrow from New York Attorney General Eric Schneiderman) should be "when they go low, we go local."

The District is among the most progressive jurisdictions in the country. Therefore, the District government should exercise its own autonomy to enact proactive, progressive legislation that can be a model for the nation. That initiative itself, the simple act of passing a local law, can be an act of autonomy, self-government, democracy, and perhaps even defiance. Organizations like DC Appleseed and others must help provide the legal basis for such legislation and help defend such measures when they are under attack. Examples of affirmative, progressive legislation the District could pass are increasing the minimum wage and providing a true living wage for DC residents, a robust paid family leave law, public financing of local elections, and so-called "Civil Gideon (for example, a right to counsel in housing cases and other areas). We also must defend the District's "sanctuary city" status and defend threats to health care that would flow from the possible repeal and replacement of the Affordable Care Act, which has benefitted so many District residents. Efforts to pass local progressive legislation must be a crucial part of our democracy strategy. Should we abandon our quest for voting rights, statehood, and autonomy? Of course not, and we

will continue to advocate strongly for these essential democratic rights. But we must play offense, not just defense, broaden our view and enlarge the field in order to grow the movement for greater democracy for the residents of the District of Columbia.

I also believe that the unpopularity of the President presents an opportunity for the District. We should use this anti-Trump period to build a base of support here at home and around the country for DC rights. After all, home rule for the District in the early 1970s was fueled by the civil rights movement of the 1960s.

How can the Resist Trump movement fuel DC Rights and help us achieve statehood? The answer may lie in the fundamental truth that the issues driving the strongest components of the opposition to the President's policies also are DC issues. The women's movement issues are our issues (abortion). The immigration movement issues are our issues (sanctuary cities). We need to make our issues part and parcel of these growing movements to swell our ranks in DC and around the country and grow our movement, just like our forefathers and foremothers harnessed the energy of the civil rights movement to drive Home Rule.

Despite the challenges we face at the national level, and the threats the District must continue to fight, I believe we can make real gains over the next four years and lead the nation in progressive policies that will help those who are hurting the most. An Act of the Council can become an act of defiance. When they go low, we must go local. Only then, do we have a fighting chance to achieve for DC the rights enjoyed by other Americans.

