

12-31-2008

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Recommended Citation

John Payton, *Should The District Of Columbia Have Responsibility For The Prosecution Of Criminal Offenses Arising Under The District Of Columbia Code?*, 11 U.D.C. L. Rev. 35 (2008).

Available at: <https://digitalcommons.law.udc.edu/udclr/vol11/iss1/6>

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SHOULD THE DISTRICT OF COLUMBIA HAVE RESPONSIBILITY FOR THE PROSECUTION OF CRIMINAL OFFENSES ARISING UNDER THE DISTRICT OF COLUMBIA CODE?*

John Payton**

I. BACKGROUND

In the United States, the establishment and operation of a criminal justice system has traditionally been one of the principal responsibilities of state and local government. This essential governmental function has five basic components: States and/or their subdivisions, through their legislative bodies, enact comprehensive criminal laws; state and local police departments enforce those laws; the state Attorney General and/or the District Attorneys prosecute violations of those state laws; state and local court systems hear the cases brought under those criminal laws by prosecutors; and state and local governments are responsible for jails, prisons, half-way houses, and related services for those under arrest or incarcerated.

Since the District of Columbia was granted home rule in 1973,¹ the District has been at times responsible for four of these five core functions of criminal justice. The District currently has responsibility for the D.C. Criminal Code and for D.C.'s Metropolitan Police Department. It currently has a limited, though important, role in the selection of the Judges in the D.C. court system. From 1973 to 1997, the District operated both the D.C. Jail and Lorton Prison. In 1997, however, pursuant to the National Capital Revitalization and Self-Government Improvement Act of 1997,² Lorton was closed and the responsibility for housing those sentenced to prison under the D.C. Code was transferred to the federal government. As a result, D.C. prisoners are now housed significantly outside the D.C. metropolitan area,³ and the District continues to operate the D.C. Jail.

* This essay was compiled by John Payton after the Symposium on District of Columbia Democracy and the Third Branch of Government. Readers of this essay should note that the views, opinions, and some factual assertions expressed are formulated from Mr. Payton's wealth of experience in the D.C. court system.

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1 See District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 777 (1973) (codified as amended at District of Columbia Home Rule Act, D.C. CODE §§ 1-201.01-207.71 (2001)).

2 National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997).

3 Although it was not part of the study, there was a strong feeling among the members of the D.C. Third Branch Project Committee that serious consideration should be given to returning to the District the responsibility for the housing of D.C. prisoners and related services. The current reality of

With respect to who prosecutes serious criminal offenses arising under the D.C. Code, however, the District has traditionally had virtually no role. Specifically, the Attorney General for D.C. is only responsible for prosecuting a narrow set of misdemeanors—“violations of all police or municipal ordinances or regulations and for violations of all penal statutes in the nature of police or municipal regulations”⁴ where the maximum punishment is either a fine or jail time of less than one year.⁵ Additionally, the Attorney General for D.C. is charged with prosecutions for disorderly conduct and lewd, indecent, or obscene acts.⁶ With limited exceptions, all other criminal prosecutions are conducted in the name of the United States by the U.S. Attorney’s Office for the District of Columbia.⁷

In short, virtually all D.C. Code felonies and most D.C. Code misdemeanors are prosecuted by the U.S. Attorney for the District of Columbia. This prosecutorial power has never resided in local officials. The U.S. Attorney is selected by the President without any requirement or even custom of consultations with the District. The U.S. Attorney can be replaced by the President for no disclosed reason. Again, this replacement process carries no opportunity for District input. The 1973 Home Rule Act specifically denies the D.C. Council any authority to change the duties and powers of the U.S. Attorney for the District.⁸

The issue this essay addresses is whether the responsibility for prosecuting criminal offenses arising under the D.C. Code should be moved from the U.S. Attorney to a D.C. governmental entity. If that responsibility should be moved to the D.C. government, a subsidiary question arises as to where it should be located in the D.C. government. Should the Attorney General’s office be given this responsibility or should a new prosecutor’s office—*e.g.* a District Attorney—be created? And, in either event, should the responsible official be elected or appointed? On these last questions, the essay will describe the various proposals that have surfaced, but this essay does not take a position on those subsidiary questions. The most important question is whether or not the District should have responsibility for the prosecution of crimes arising under the D.C. Code.

all D.C. prisoners being housed long distances from the District in the custody of another jurisdiction places a hardship on the families of those prisoners and makes it harder for those persons to be reintroduced to the community when they are released from prison. The D.C. Third Branch Project Committee is aware of the significant cost associated with this responsibility and the need to account for it, and we are aware of the need to possibly identify land in the District on which a facility could be placed to provide the housing. These are very serious obstacles that must be overcome. We believe that a serious effort to address these issues should be initiated.

4 D.C. CODE § 23-101(a) (2001).

5 *Id.*

6 *Id.* at § 23-101(b).

7 *Id.* at § 23-101(c).

8 *Id.* at § 1-206.02(a)(8).

II. REASONS FOR PLACING PROSECUTORIAL RESPONSIBILITY IN THE DISTRICT.

This is an issue of basic democracy. Just as every state is responsible for its own criminal laws, every state selects its own Attorney General or local district attorneys to prosecute violations of those criminal laws.⁹ One crucial aspect of prosecutorial power is prosecutorial discretion. That is, the prosecutor decides when and how to exercise the power entrusted to the office.

Democracy supplies an important check on the exercise of a prosecutor's discretion. Democracy helps ensure that the criminal laws reflect the concerns and values of the community. This democratic accountability of the prosecutorial function is not present in the District. The priorities of the U.S. Attorney's office come from the U.S. Department of Justice and are not subject to review by the D.C. Council, the D.C. Mayor, the D.C. Attorney General, or any official or body elected by D.C. citizens. If the D.C. Council conducts oversight hearings on how some aspect of its criminal laws are enforced or not enforced, the U.S. Attorney can choose to participate or not. If the D.C. Council, the Mayor, or the D.C. Attorney General indicates that they strongly desire an increased focus on an area that is not a priority of the U.S. Attorney or the United States, the U.S. Attorney's office can simply ignore them.

This lack of democratic accountability could result in a dramatic disconnect between the legislative function and the prosecutorial function. Suppose, for example, that the D.C. Council passed a law and the U.S. Attorney simply did not enforce it? As a structural matter, there is no accountability of the prosecutorial function to any democratically elected office in the District.

Democratic accountability is intimately linked to the perceived legitimacy of a prosecutor's office. Prosecuting local criminal matters is a prototypical responsibility of local government. Furthermore, democratic legitimacy comes from connections to the local community, both structural and operational. In every other jurisdiction, the prosecutor brings criminal cases in the name of the local community. In the District, which is unlike any other jurisdiction in the country, local criminal cases are brought in the name of the United States. It is the United States that exercises the discretion in the enforcement of the most serious elements of the District's Criminal Code. That structure signals the disconnect of the prosecutor from the community from which the criminal laws arise and to which they apply.

The basic mechanism of governmental accountability in the United States is democracy. This is not to say that the U.S. Attorney is oblivious to the governmental and non governmental voices in the District. The office has recently developed a neighborhood focus for various programs. Furthermore, through some recent legislation and understandings with the U.S. Attorney's Office, there has

⁹ Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U. L. REV. 311, 343 (1990).

been some increase in the jurisdiction of the District's Office of the Attorney General. But, those are incremental changes, not structural changes, and do not address the overall issue of democratic accountability. It is particularly dangerous to remove local accountability from the prosecutorial discretion and policy decisions routinely made by local prosecutors.¹⁰ These vital priorities "should be in local hands."¹¹

This lack of democratic accountability has a larger impact. Right now, the District does not have the information and governmental perspective of making the criminal laws *and* enforcing those same laws. The synergy of that unitary responsibility is lacking in the District. More generally, like other aspects of the District's government, the lack of democratic accountability is inconsistent with the principle that citizens of the District of Columbia should enjoy all rights enjoyed by citizens of other states, which include a local government that selects local prosecutors. This does not mean that the prosecutor's office should not enjoy some independence in exercising its powers. Rather, it means that such independence should take place within a local democratic structure.

III. REASONS AGAINST PLACING PROSECUTORIAL RESPONSIBILITY IN THE DISTRICT

There are two basic concerns with respect to moving responsibility for prosecuting crimes arising under the D.C. Code from the U.S. Attorney to the District. First, just about everyone knowledgeable about the District's criminal justice system—private attorneys, public defenders, prosecutors, and judges—commented that the U.S. Attorney's Office is well run and does a good job. The U.S. Attorney's Office enjoys a very high reputation and is able to recruit very good lawyers to the office. The office is viewed as being "professionally run" and not subject to local political pressures. Moreover, the mix of local and federal cases in fact enhances the desirability of the U.S. Attorney's Office. In other words, "if it ain't broke, don't fix it."

The second concern is implicit in the first—a worry that the District would not be able to handle this additional responsibility. Or, to put it another way, that subjecting the prosecutor's office to local political pressures would, in the name of crude democracy, actually undermine the integrity of the office. Could the office's current sense of professionalism be preserved in an office within the District government? Additionally, there have been concerns that the Office of Attorney General has traditionally been criticized for being under funded, understaffed, and lacking in appropriate technology. If prosecuting violations of

10 Congresswoman Eleanor Holmes Norton noted this in her keynote speech at the Symposium on District of Columbia Democracy and the Third Branch of Government. Transcripts of this speech are located at The District of Columbia Law Review office.

11 *Id.*

the D.C. Criminal Code were a District function, that function would be subject to the budgetary and other problems of the District. The additional cost of an office responsible for all criminal prosecutions would be substantial.

Finally, there are ancillary issues to consider. At present, a range of federal offices provide services that would have to be replaced. For example, the U.S. Marshals take care of transportation of witnesses and defendants as well as court security, and the FBI is a significant investigatory resource to the U.S. Attorney's Office. The cost of replacing these functions and many others would have to be accounted for.

The striking reality is that there is little disagreement with regard to either the reasons for or the reasons against placing prosecutorial authority with the District. The Council for Court Excellence doubts anyone would argue against the democratic value in having local control over local criminal prosecutions—a core function of local government. After all, that is the model of virtually the rest of the country. Similarly, there is no disagreement that it is essential that the prosecutor's office, wherever it resides, must be adequately funded and staffed with good personnel.

More difficult to assess is the reality that the reputation of the U.S. Attorney's Office is greater than that of D.C. Office of the Attorney General or its predecessor, the Office of the Corporation Counsel, and this is what attracts good prosecutors to the office.¹² There is more competition for U.S. Attorney's positions than for local District Attorney's positions. That, in other words, is not unique to the District. Yet, no one would seriously argue that other local district attorney's offices should be folded into U.S. Attorneys' offices because of the enhanced reputations of those offices.

Concerns about the transition from the U.S. Attorney to a well-funded D.C. prosecutor's office are not frivolous, but they are no different from those of any other local prosecutor's office. They also do not overcome our national value for and tradition of democracy. Nor do they overcome the important accountability and legitimacy considerations of democracy.

There are also significant issues about how a transition from the responsibility being in the U.S. Attorney to the District should proceed. For example, are there discrete criminal matters that could be moved to the D.C. Attorney General's Office so that this could happen gradually? Could the U.S. Attorney and the D.C. Attorney General share responsibility for some crimes? Should some personnel in the U.S. Attorney's Office be "transferred" to the District as part of a transition? All of these, and other difficult questions, must be carefully considered. But, the most important question is the basic one of the desirability of the transfer.

12 This would be true in most jurisdictions.

IV. IF THE DISTRICT SHOULD HAVE RESPONSIBILITY FOR PROSECUTING CRIMES ARISING UNDER THE D.C. CODE, WHERE SHOULD THAT RESPONSIBILITY BE PLACED IN THE DISTRICT GOVERNMENT?

In 2002, 82% of District voters approved a referendum calling for a locally elected District Attorney.¹³ The D.C. Council has passed legislation calling for the amendment of the Home Rule Act to include a District Attorney. Of course, the reality is that any change to the current arrangement must come from Congress through amendment of the Home Rule Act, as the D.C. Council is not authorized to enact any act or regulation relating to the duties and powers of the U.S. Attorney or the U.S. Marshals for the District.¹⁴

A range of solutions to the lack of D.C. prosecutorial power have been proposed in or to Congress over the years. All have failed. First, attempts have been made to alter the role of the Attorney General for the District of Columbia over the past twenty-five years.¹⁵ In 1981, the House failed to adopt legislation introduced by then D.C. Congressman Walter E. Fauntroy, which would have created an Attorney General for the District and would have transferred authority over prosecutions of D.C. crimes to a District Attorney within what was then the Corporation Counsel's Office.¹⁶ In 1989, Congress again failed to support a bill introduced by Congressman Fauntroy, which proposed a comprehensive reassignment of prosecutorial authority.¹⁷ The bill was named like its predecessor, the District of Columbia Criminal Justice Reform Act, and called for a number of changes, beginning with the establishment of an Office of the Attorney General for the District of Columbia.¹⁸ Under the suggested plan, the local Attorney General, aided by a new local District Attorney,¹⁹ would have had responsibility for prosecuting all D.C. Code violations,²⁰ except in cases where the U.S. Attorney Gen-

13 See generally Carol D. Leonnig, *Prosecutor's Hurdles Include Money, Time*, WASHINGTON POST, Jan. 13, 2007, at B03.

14 D.C. CODE § 1-206.02(a)(8) (2001).

15 The Attorney General for the District of Columbia was formerly known as the Corporation Counsel of D.C.

16 District of Columbia Criminal Justice Reform Act, H.R. 1253, 97th Cong. (1981). The bill was referred to the House Committee on the District of Columbia on Jan. 23, 1981, but it failed to advance past the committee stage. See H.R. 1253 Bill Summary, THOMAS (Library of Congress), available at <http://thomas.loc.gov/> (select Bill Summary & Status; then 97th Congress; enter H.R. 1253) (last visited Jul. 19, 2006).

17 District of Columbia Criminal Justice Reform Act, H.R. 168, 101st Cong. (1989). The bill was referred to the House Committee on the District of Columbia on Jan. 3, 1989 and subsequently to the House Subcommittee on Judiciary and Education on Feb. 22, 1989, but it failed to reach the House floor. See H.R. 168 Bill Summary, THOMAS (Library of Congress), available at <http://thomas.loc.gov/> (select Bill Summary & Status; then 101st Congress; enter H.R. 168) (last visited Jul. 19, 2006).

18 District of Columbia Criminal Justice Reform Act, H.R. 168, 101st Cong. § 201 (1989).

19 H.R. 168, § 210(a).

20 See *id.* § 206.

eral asserted a compelling federal interest.²¹ Such cases were to be prosecuted in United States District Court in the name of the United States,²² either with the consent of the local Attorney General, or,²³ if consent from the local official was not forthcoming, via a non-appealable, automatic²⁴ certification from the Clerk of the Superior Court for the District of Columbia.²⁵

More recently, the D.C. Council and Congress have considered proposals regarding local prosecutorial authority. In 1998, the D.C. Council, responding to a resolution introduced by Councilman David Catania, suggested transferring prosecutorial authority over D.C. Code violations to a local prosecutor.²⁶ The Council called for concurrent prosecutorial authority—matching the responsibilities of the Office of the U.S. Attorney for D.C. and the Office of the Corporation Counsel of D.C. with respect to D.C. Code violations—to be given to a local prosecutor.²⁷ At the federal level, Congress failed to pass the District of Columbia District Attorney Establishment Act of 2003. The bill, introduced by current D.C. Congresswoman Eleanor Holmes Norton,²⁸ sought to amend the Home Rule Act²⁹ and various provisions of the D.C. Code³⁰ to create a District Attorney responsible for prosecuting local crimes. Finally, on March 1, 2007, Congresswomen Norton introduced the District of Columbia District Attorney Establishment Act of 2007, which would establish an elected District Attorney.³¹

Any of these proposals would bring the District in line with all of the other state and local criminal justice systems and their reliance on democracy. The Council for Court Excellence takes no position on the specific means of accomplishing this important goal.

21 *See id.* § 216(d)(1).

22 *See id.* § 216(d)(5).

23 *See id.* § 216(d)(4).

24 *Id.*

25 *See id.* § 216(d)(3).

26 *See generally* PR 12-671, available at <http://www.dccwatch.com/archives/council12/12-671.htm>.

27 *Id.* § 3.

28 The bill was introduced by Congresswoman Norton on Jun. 4, 2003. It was referred to the House Committee on Government Reform on that date, but the bill did not reach the House floor for a final vote. *See* H.R. 2334 Bill Summary, THOMAS (Library of Congress), available at <http://thomas.loc.gov/> (select Bill Summary & Status; then 108th Congress; enter H.R. 2334) (last visited Jul. 19, 2006).

29 District of Columbia District Attorney Establishment Act of 2003, H.R. 2334, 108th Cong. (2003). Section 2 would amend the Home Rule Act by adding a number of sections, most notably § 496, to the Act.

30 H.R. 2334 § 3 would amend, among other provisions, § 23-101 of the D.C. Code (as codified in 2001).

31 H.R. 1296, 110th Cong. (2007); *see also* Congresswoman Eleanor Holmes Norton, *Norton Introduces Bill for an Elected D.C. District Attorney As Part of Her Free and Equal D.C. Series*, March 1, 2007, available at <http://www.norton.house.gov/index.php> (last visited Jul. 19, 2006).

