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Keynote Address Of Congresswoman Eleanor Holmes Norton

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EDITED PROCEEDINGS FROM THE SYMPOSIUM ON DISTRICT OF COLUMBIA DEMOCRACY AND THE THIRD BRANCH OF GOVERNMENT

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Keynote Address of
Congresswoman Eleanor Holmes Norton*

A symposium on the District of Columbia's third branch of government is as rare as an analysis of how to achieve the appropriate local control. The District's jerry built justice system is almost never put under the microscope. The justice system here is headed by a presidentially appointed U.S. Attorney for the District of Columbia, whose jurisdiction is drawn chiefly from the local D.C. Code. He plays the part of local District Attorney because almost two-thirds of his cases have no federal content. Considering the new place of security matters following 9-11, the U.S. Attorney here should be dedicated to security and administrative law cases, some of which, by law, are assigned to the D.C. Circuit and to other federal matters. The courts are similarly mismatched. Title I judges are appointed by the President of the United States, but they draw their authority exclusively from the D.C. Code and have no federal jurisdiction. The Metropolitan Police Department, however, is without similar pretense. The D.C. Police Chief is appointed by the Mayor of the District of Columbia for the purpose of policing the streets of this city. The initial Home Rule Act did not even concede that a free people must be free to police themselves. However, the District's first Mayor, Walter Washington, insisted that the District receive appointment authority and jurisdiction over its own police department.

One is left to wonder whether initial congressional opposition to autonomous police governance was a remnant of more than 150 years of colonial power during which, except for a few short years, there was no Mayor, City Council, and in short, no democracy of any kind for the residents of the Nation's Capital. The authoritarian rulers who controlled the home rule process, many of them Southern Democrats, perhaps desired to retain control over an armed potential revolutionary police force! Only a Congress that held absolute dictatorial power for nearly two centuries would have imagined a city where a chief executive would be expected to keep the public safe but could neither hire nor replace a chief who failed at this mission.

The District got the right to police but not to prosecute. Judgment was to be pronounced by men and women chosen by a sovereign who would be foreign to local concerns. Recently, at least, the District has been relieved of the double outrage of paying for courts the city does not control. During the fiscal crisis of

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the 1990s, the District sought relief as the only city required to shoulder state costs. The federal government agreed to pick up some, though not all, state costs and the District remains the only city that pays for many state costs. However, the Revitalization Act of 1997 placed the cost of the D.C. courts with the federal government and committed D.C. felons to the federal Bureau of Prisons that now pays for their incarceration. Although only our statehood bill, which we got to the House floor in 1993, would bring equal status to the District, statehood will be impossible until the District is able once again to pay for all state functions and, of course, until the political climate allows this preferred option. In the interim, our "Free and Equal D.C." series of bills, would give the city control over its core functions of budget, legislation, and criminal justice. With the shift in control of the Congress, important elements of the Free and Equal Series are out of subcommittee and expected on the floor in the next few months.

However, considering the incremental ways of the Congress, the remaining components of the District's home rule, including a coherent justice system, probably will not come together all at one time. Of the outstanding components—prisons, courts, and a district attorney—which should have priority for local control? Reclaiming prisons presents the most formidable obstacles, particularly cost and the absence of land, sufficient and suitable, for the facility. The courts would rank second in cost that the city would have to assume.

Recently, the Congress has been mostly benign, even helpful to local courts, spending millions of dollars in renovation of the historic court house needed for the D.C. Court of Appeals and other infrastructure. Of even greater significance, however, was the creation of the new Family Court Division, the first change in the D.C. Court system in thirty years. Our unlikely partner in writing the Family Court Act of 2001 was then Majority Leader Tom "the Hammer" Delay, whose concern for foster children led him to co-author the bill with me. This bill also afforded up to fifteen new superior court judges and fifteen new magistrates to go with a specialized and upgraded Family Court Division.

A D.C. District Attorney and his staff would not only be the least costly for the District to add to its budget, but residents have signaled the importance of claiming prosecution of crimes by voting for Referendum 14-494. No function of government is closer to the people than ensuring safety and security. It is no accident that the District Attorney in many jurisdictions often is an elected official, an indication that she must be appointed by the people to enjoy the confidence of the people. However, a presidentially appointed U.S. Attorney with a federal mandate comes with a writ that structurally will interfere with his primary mission to solve and prosecute local crimes. Recent U.S. Attorney appointments have been unrelated to the city where the mission must be carried out. Selections here have been Justice Department patronage appointments. The current U.S. Attorney was a special Assistant to two of the most recent Attorneys General: John Ashcroft and Alberto Gonzales.

One sure indication that the District of Columbia and its residents have figured little in the appointment of U.S. Attorneys here is the fact that Eric Holder, appointed in 1993, and Wilma Lewis, who succeeded him in 1998, were the first African Americans to hold the post, although the city has long had a black majority. Wilma Lewis also was the first and only woman. Yet the District has long had a usually large number of exceptionally well-qualified African American attorneys.

When Bill Clinton became president, we began the process of localizing the U.S. Attorney by seeking senatorial courtesy for local federal appointments. I argued that in the absence of senators, the House Member, like senators of the President's party, should select the U.S. Attorney, District Court judges, and the U.S. Marshall. As a result, I was able to appoint twelve district court judges, including the first Hispanic and the first woman in almost fifteen years. All resided in the District of Columbia. Each received considerable praise from the profession when appointed and have vindicated this confidence during their tenure on the court. Their qualifications were assured because I chose to exercise this authority through a commission of well-qualified D.C. residents chaired by former president of the District of Columbia Bar, Pauline Schneider. I sent one name for each office to the President from a list of three forwarded to me by the commission after its extensive review of the qualifications of all who applied. However, even an improvement that allowed the participation of D.C. residents in the selection of a federally appointed local prosecutor falls far short of healing the breech between the prosecutor of local crimes and the people he must serve.

A telling example of the distance between residents and the U.S. Attorney here is the troubling pattern by that office of repeatedly seeking the death penalty in this strongly anti-death penalty jurisdiction, despite an unbroken chain of failures with juries in the federal courts. The District of Columbia eliminated the death penalty shortly after obtaining home rule, and the penalty has not been applied to crimes committed in the District since 1957. Every Mayor and City Council since have opposed the death penalty. Congress imposed a death penalty referendum on the District in 1992 in the midst of a seriously escalated homicide rate, but residents nevertheless voted by a two to one margin against re-imposition of the death penalty. In 1997, the City Council again took action indicating that the District's elected representatives oppose the death penalty.

The U.S. Attorney's stubborn insistence on the death penalty has failed, measured by its own terms. A review of criminal activity since the District obtained home rule in 1974 shows that this decade has seen a remarkable drop in homicides and other violent crimes, notwithstanding the absence of the death penalty. In fact, crime in the District, including homicides, was at a twenty-one-year low last year and has been significantly trending down for years. Particularly in this climate, death penalty prosecutions have wasted scarce resources at a time when the U.S. Attorney's Office here has been so punished by insufficient staff attor-

neys that the office is seeking volunteer attorneys to help with the case load. Worse, the repeated prosecutions defy the necessary sensitivity to the families of the victims and the involved communities, where speedy convictions and resolutions have been delayed needlessly and inordinately. Repeating a process that keeps failing with no sign of breakthrough or success has been particularly futile, considering that residents are not opposed to life in prison without parole.

Nevertheless, the U.S. Attorney's Office has found a basis in federal law under the Racketeer Influenced and Corrupt Organizations Act ("RICO") for its death penalty cases, although the underlying crimes, such as murder and armed robbery are typically prosecuted by local jurisdictions. I have no quarrel with vigorous and relentless prosecution of these cases alleging particularly serious crimes, including killings and drug trafficking, in this high crime-rate city. Nor are federal RICO prosecutions of local crimes always necessarily unwise. The death penalty may be requested for the federal crimes, but this matter of prosecutorial discretion. The troublesome issues go not to matters of law or jurisdiction but to the wisdom and justice for all concerned of repeated prosecutions that inevitably fail. The U.S. Attorney's Office has persisted, despite the unsurprising resistance of juries here to agree to the death penalty, even in notorious federal cases, such as the Murder, Inc. gang case of Kevin Gray and Rodney Moore, where the jury deadlocked on the death penalty in 2005. In 2006, a federal district court disallowed a death penalty prosecution here involving American tourists in Uganda because the U.S. Attorney's Office was unable to meet the required death penalty standards. Most emblematic of the U.S. Attorney's no-holds-barred approach to the death penalty, however, was the U.S. Attorney's attempt to get the District court to remedy the professional negligence of his office in missing an indispensable deadline. The U.S. Attorney tried, but failed to obtain a waiver that would have allowed a death penalty prosecution to proceed in the Antwuan Ball and David Wilson RICO case. Yet reflexively, prosecutors are quick and resolute in arguing against relief from missed deadlines by lawyers for death row defendants, regardless of the reason and notwithstanding the finality of the sanction. Repeatedly seeking the death penalty, even where the U.S. Attorney had committed a fatal error, risked the appearance of an office seeking to show it can get death penalty convictions anywhere, even in the notoriously anti-death penalty District of Columbia. A District Attorney who had to face the people for election probably would think more carefully before seeking the death penalty for similar crimes after meeting consecutive failures with juries.

Transferring the entire justice system to the District presents far more difficult logistical, cost, and political issues than shifting the myriad of other home rule issues that remain with the Congress. The District is considerably closer to budget and legislative autonomy, for example, than it is to control of its prison felons and courts or to its own district attorney. Nevertheless, continued disaggregation of the component parts of a free standing local jurisdiction is an anachronism that

demonstrably impedes the normal functions of government. Inconsistency with the basics of democracy, inefficiency, and incoherence, however, will not decide these issues. Like every injustice that the District still shoulders, however indefensible, and every flaw in our government however clear, determined struggle bolstered by critical analysis will be required for transformation.