

University of the District of Columbia Law Review

Volume 27 | Issue 1

8-12-2024

Statehood: The Bridge to Transforming the District of Columbia's Criminal Justice System

Shelley Broderick

Follow this and additional works at: <https://digitalcommons.law.udc.edu/udclr>



Part of the [Civil Law Commons](#), [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

Shelley Broderick, *Statehood: The Bridge to Transforming the District of Columbia's Criminal Justice System*, 27 U.D.C. L. Rev. (2024).

Available at: <https://digitalcommons.law.udc.edu/udclr/vol27/iss1/4>

This Article is brought to you for free and open access by the Journals at Digital Commons @ UDC Law. It has been accepted for inclusion in University of the District of Columbia Law Review by an authorized editor of Digital Commons @ UDC Law. For more information, please contact lawlibraryhelp@udc.edu.

University of the District of Columbia Law Review
David A. Clarke School of Law

Volume 27

Spring 2024

Article 1

**STATEHOOD: THE BRIDGE TO TRANSFORMING THE DISTRICT OF
COLUMBIA’S CRIMINAL JUSTICE SYSTEM**

Shelley Broderick*

Introduction

The power to govern the District’s criminal justice system is found in the U.S. Constitution,¹ in which Congress retained the power to exercise “exclusive legislation in all cases whatsoever” over the “Seat of Government of the United States.”² Congress established the District of Columbia as the seat of government after the Constitution was ratified.³ Congress has elucidated its power over specific components of the DC criminal justice system in three additional documents, the District of Columbia Court Reorganization Act of 1970 (Court Reorganization Act),⁴ the Home Rule Act (HRA),⁵ and the District of Columbia Revitalization Act of 1997 (Revitalization Act).⁶ Each of these documents will be discussed in more detail below as appropriate. Because of its unique governance structure, and the lack of statehood, the District of Columbia is the only jurisdiction in the United States in which the federal government manages and controls the local criminal justice system.

State officials, both elected and appointed, manage state criminal justice systems. In doing so, state officials tend to act in accordance with state values and priorities as they are answerable to state residents who vote. District residents have no vote, and little say in the manner in which the District’s criminal justice system is run. As a direct result of federal control, District residents experience one of the highest incarceration rates in the country, a rate of 899

* Katherine “Shelley” Broderick, Dean Emerita and Joseph L. Rauh, Jr. Chair of Social Justice, University District of Columbia David A. Clarke School of Law. The author is grateful to the Federal City Council for its commitment to Statehood Research D.C. and for actively commissioning research into the negative effects experienced by District residents as a result of not having statehood. The author is also forever grateful to Julian Hunter Pendarvis whose incisive and deft hand at editing is only matched by his footnote wizardry, good humor, and patience. Finally, the author thanks Alan Morrison for his close read, helpful comments, encyclopedic knowledge, and ongoing efforts to move the needle forward on D.C. democracy.

¹ U.S. CONST. art. I, § 8, cl. 17 [hereinafter, the District Clause].

² *Id.*

³ The Residence Act of 1790, Pub. L. No. 1–28, 1 Stat. 130 (1790).

⁴ District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91–358, 84 Stat. 473 (1970).

⁵ District of Columbia Self Government and Governmental Reorganization Act, Pub. L. No. 93–198, 87 Stat. 774 (1973).

⁶ National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105–33, 111 Stat. 712 (1997).

per 100,000.⁷ District residents experience racially disparate treatment throughout the criminal justice system. For example, tragically, 95.7% of the District residents incarcerated in the Bureau of Prisons (BOP) are Black or African American while the District population overall is 45% Black or African American.⁸ District residents also experience poor management and service delivery, underfunding, inattentive leadership, and countless other injustices throughout the system, as will be described in this article.

District of Columbia voters long for local control and have made some incremental progress toward achieving some measures of democracy. For example, in 2010, 76% of District voters approved a referendum requiring an amendment to the Home Rule charter to transform the attorney general from an appointed to an elected office,⁹ and in 2013, 86% of D.C. voters approved another referendum to secure budget autonomy.¹⁰ Most recently, District voters overwhelmingly—by 86%—approved passage of the Washington D.C. Statehood Referendum, which included approval of a new state constitution¹¹ and new boundaries for the District.¹² That constitution will provide District residents with the rights and responsibilities available to residents of every state in the union. Importantly, the District will at last secure local control of its criminal justice system. On November 8, 2016, the day District residents approved the new state constitution,¹³ President Trump was elected, the Democratic party lost control of Congress, and the hopes for D.C. statehood were crushed for the time being.

⁷ See EMILY WIDRA & TIANA HERRING, STATES OF INCARCERATION: THE GLOBAL CONTEXT 2021 app. 1, PRISON POLICY INITIATIVE (2021), https://www.prisonpolicy.org/global/appendix_states_2021.html [<https://perma.cc/BY38-4R4L>] (D.C. would have the eighth worst rate in the nation). See EMILY WIDRA & TIANA HERRING, STATES OF INCARCERATION: THE GLOBAL CONTEXT 2021, PRISON POLICY INITIATIVE (2021), <https://www.prisonpolicy.org/global/2021.html> [<https://perma.cc/b6cx-k2et>].

⁸ *Federal Bureau of Prisons*, D.C. JUST. STAT. ANALYSIS TOOL, <https://www.dcjsat.net/Agency%20Dash%20-%20FBOP.html> [<https://perma.cc/VWS7-7LUA>]; U.S. Census, U.S. *QuickFacts: District of Columbia*, <https://www.census.gov/quickfacts/fact/table/DC/PST045222> [<https://perma.cc/QT7G-GTRR>].

⁹ District of Columbia Board of Elections, General Election 2010 - Certified Results, https://electionresults.dboe.org/election_results/2010-General-Election, [<https://perma.cc/2ZJC-973Z>]; D.C. Code § 1-204.35.

¹⁰ Budget autonomy is the ability to spend local tax revenues without an affirmative Congressional appropriation. District of Columbia Board of Elections, Special Election 2013 - Certified Results, https://electionresults.dboe.org/election_results/2013-Special-Election [<https://perma.cc/LPN9-HPQT>]; See Walter A. Smith Jr. & Kevin M. Hilgers, *Laboratory Of Democracy: How the District of Columbia is Using the Home Rule Act to Achieve Elements of Statehood*, 21 UDC L. REV. 108, 114-122 (2019) (describing the processes and politics involved in these efforts).

¹¹ D.C. CONST. (as enacted in D.C. Res. 21-621).

¹² Voters approved the measure by 85.69%. District of Columbia Board of Elections, General Election 2016 - Certified Results, https://electionresults.dboe.org/election_results/2016-General-Election [<https://perma.cc/BYN4-H9AX>]. Three weeks before election day, the D.C. Council passed legislation approving the constitution for the State of Washington D.C., (standing for Douglass Commonwealth). The Council substituted the new name for “State of New Columbia,” which appeared on the referendum. The new boundaries created a small federal District including only major federal buildings and the mall.

¹³ D.C. CONST. (as enacted in D.C. Res. 21-621).

When the D.C. Statehood Admission Act¹⁴ is passed, and the constitution for the State of Washington Douglass Commonwealth comes into effect, the District will launch the process of assuming complete local control for the first time over the courts, the prosecution function, and pardons and clemency. The District of Columbia will also commence the process of regaining local control over the administration of a prison over which it, not the federal government, will have dominion. This will also give the District of Columbia authority over auxiliary agencies such as the Court Services and Offender Supervision Agency (CSOSA), the Pretrial Services Agency (PSA), and the Public Defender Service (PDS).

This article will describe the current political structure governing each of the components of the District's criminal justice system. Each section will then detail injustices District residents experience resulting from Congressional or Executive Branch control. Finally, each section will review recommendations made by the thoughtful and committed organizations and individuals determined, with local control, to transform the District's criminal justice system into one aligned with District values and priorities and, as a result, one that is significantly more fair and just. The article will identify structural, legislative, and policy options that are available to the District as it centers D.C. values in planning for the future. In doing so, this article makes clear why the time for D.C. statehood is now!

I. Governing Authority over the Courts and the Prosecution Function

The HRA, which was enacted in 1973, expressly prohibited the D.C. Council from exercising any legislative authority over the organization and jurisdiction of the District of Columbia courts or the duties or powers of the United States Attorney for the District of Columbia.¹⁵ Congress has always retained its authority over the District's courts and prosecutorial functions and, within limits, the power to amend its criminal laws.¹⁶

¹⁴ Washington, D.C. Admission Act, H.R. 51, 118 Cong. (2023). The Statehood Admission Act of 2023 was re-introduced by Eleanor Holmes Norton most recently on January 9, 2023, but is not expected to become law with a Republican majority in the House of Representatives. In 2020 and again in 2021, the House of Representatives passed Statehood Admissions bills, but they did not receive votes in the Senate. Still, this is the most likely mechanism by which statehood for the District will be achieved.

¹⁵ Home Rule Act § 602(a)(4), (8), 87 Stat. at 813-14. (Limitations on the Council. The Council shall have no authority to pass any act contrary to the provisions of this Act except as specifically provided in this Act, or to— ... (4) enact any act, resolution, or rule with respect to any provision of title 11 of the District of Columbia Code (relating to D.C. code organization and jurisdiction of the District of Columbia courts); ... (8) enact any act or regulation relating to the United States District Court for the District of Columbia or any other court of the United States in the District other than the District courts, or relating to the duties or powers of the United States attorney or the United States Marshal for the District of Columbia).

¹⁶ Home Rule Act §§ 601-602(a)(9), 87 Stat. at 813-14.

A. *The Courts*

1) The Current Processes for Appointing and Removing Judges

The Court Reorganization Act established the District of Columbia Court of Appeals and the Superior Court of the District of Columbia pursuant to Article I of the U.S. Constitution.¹⁷ The Act defined the jurisdiction¹⁸ of the District's courts.¹⁹ The Court Reorganization Act authorized the President of the United States to nominate, and with the advice and consent of the U.S. Senate, to appoint all judges to the D.C. Superior Court and to the D.C. Court of Appeals.²⁰ The Court Reorganization Act also established a Commission on Judicial Disabilities and Tenure (the Commission) with the power to suspend, involuntarily retire, or remove judges.²¹ The Home Rule Act refined some provisions of the Court Reorganization Act such that the President of the United States appoints one of the five members of the commission²² and the Chief Judge of the U.S. District Court for the District of Columbia appoints another member who must be an active or retired federal judge.²³ These two members of the Commission are not answerable to District residents, and they are in a position to sway critical decisions regarding reappointment, suspension, and removal.

The HRA²⁴ established the D.C. Judicial Nominations Committee (JNC), which screens, selects, and recommends to the President of the United States three candidates to fill each vacancy for the District's local courts.²⁵ Two of the seven members of the JNC, one appointed by the president and one appointed by the presidentially appointed Chief Judge of the U.S. District Court,²⁶ are not accountable to District residents. These two members are in a position to sway decisions regarding characteristics sought in judicial candidates and to vote in favor of or against particular judicial applicants. The JNC sends three candidates to the President, all of whom are selected with the President's values and interests in mind.

Since the Court Reorganization Act was enacted in 1970, ten presidents have appointed judges to the D.C. Superior Court and the D.C. Court of Appeals. Six of those Presidents serving

¹⁷ Court Reorganization Act § 11-101(2), 84 Stat. 475. The Act consolidated the three existing courts, the court of General Sessions, the Juvenile Court, and the Tax Court and transferred jurisdiction over local matters formerly handled by the U.S. District Court for the District of Columbia. § 11-901, 84 Stat. 482.

¹⁸ A court's power to decide a case or issue a decree. *Jurisdiction*, BLACK'S LAW DICTIONARY (11th ed. 2019).

¹⁹ Court Reorganization Act §§ 11-501, -502, 84 Stat. at 476 (United States District Court); §§ 11-921, -923, 84 Stat. at 484, 486 (District of Columbia Superior Court). The Home Rule Act codified the jurisdiction of the Superior Court and the District of Columbia Court of Appeals. *See* D.C. Code 1-204.31(a).

²⁰ Court Reorganization Act § 11-1501, 84 Stat. at 491.

²¹ Court Reform Act § 11-1521, 84 Stat. at 473, 492.

²² Home Rule Act § 431(e)(3)(A), 87 Stat. at 794.

²³ *Id.* § 431(e)(3)(E) (Other members are appointed by the Board of Governors of the D.C. Bar (2), the Mayor (1), and the D.C. Council (1)).

²⁴ Home Rule Act § 434, 87 Stat. at 796-97. The HRA codified components of the Reorganization Act, in some areas adding additional clarification or refinement.

²⁵ *Id.*

²⁶ Home Rule Act § 434(b)(4), 87 Stat. at 797.

a combined eight terms were Republican²⁷ while four of those Presidents serving a combined six terms have been Democratic.²⁸ The District of Columbia has long voted overwhelmingly Democratic. In the most recent Presidential election, 92.1% of District voters voted Democratic, while 5.4 % voted Republican and 2.5 % did not vote for one of the two major parties.²⁹

When Presidents, particularly Republican Presidents, appoint judges to the D.C. courts, they are not representing the values and priorities of District residents. Nevertheless, these judges are empowered to make critical decisions in the criminal justice system, sometimes for decades. These decisions range from pretrial release to rulings on evidentiary and other trial matters, as well as sentencing, re-sentencing, probation revocation, and compassionate release. No other jurisdiction has the lack of local empowerment and accountability in judicial selections that the District experiences to the detriment of those enmeshed in the system.

The administration of justice in the District suffers severely as a result of the lack of local control over the D.C. courts. Once the JNC sends candidates for judicial selection to the President, the President makes a selection and forwards the nomination to the Senate Homeland Security and Government Affairs Committee.³⁰ The District does not have senators who can advocate for timely floor consideration.³¹

The Senate Committee is notorious for failing to act and for interfering with nominations to the D.C. courts for months and often years.³² As of February 27, 2024, fourteen of the sixty-

²⁷ Nixon; Ford; Reagan; Bush, Sr.; Bush, Jr.; and Trump.

²⁸ Carter, Clinton, Obama, and Biden.

²⁹ District of Columbia Board of Elections, General Election 2020 - Certified Results, https://electionresults.dco.org/election_results/2020-General-Election, [<https://perma.cc/Q6WT-U232>].

³⁰ In addition to “the municipal affairs of the District of Columbia,” and the Department of Homeland Security, the Committee’s governmental affairs responsibilities include the Archives of the United States, budgeting and accounting measures generally, government contracting, the Census and collection of statistics, Congressional organization, the Federal Civil Service, government information, intergovernmental relations, the organization and management of U.S. nuclear export policy, the organization and reorganization of the executive branch, the Postal Service, and the status of officers and employees of the U.S., including their classification, compensation, and benefits. It’s not surprising that the confirmation of the District’s local Article I judges does not appear to be a high priority for the Committee.

³¹ Article III federal judges, from the District and from all states, are referred to the Senate Judiciary Committee. U.S. CONST. art. II, § 2, cl. 2; COMM. ON RULES AND ADMIN., STANDING RULES OF THE SENATE, S. Doc. No. 117-9 at 25-26 (providing for Judiciary Committee jurisdiction over “all proposed legislation, messages, petitions, memorials, and other matters relating to ... 5. Federal courts and judges[.]”).

³² Meagan Flynn & Michael Brice-Saddler, *D.C. pleads for attention from Senate, Biden on big judicial vacancies*, WASH. POST (Nov. 23, 2022, 6:00 AM), <https://www.washingtonpost.com/dc-md-va/2022/11/23/dc-pleads-attention-senate-biden-major-judicial-vacancies/> [<https://perma.cc/J7YA-4WF7>] (In just one recent example, in October, 2022, Senator Gary Peter (D. Mich.) highlighted problems caused by judicial vacancies at a hearing on three candidates. Nevertheless, Senator Rick Scott (R. Fla.) blocked the effort to confirm the candidates by unanimous consent noting that he “had absolutely no faith that Joe Biden’s radical far-left nominees will uphold the rule of law.”); *See also* Bridget Bowman, *Congressional Judicial Backlog Creates Problem for D.C. Court*, ROLL CALL (Dec. 3, 2015, 5:00 AM), <https://rollcall.com/2015/12/03/congressional-judicial-backlog-creates-problem-for-d-c-court/> [<https://perma.cc/SZ3D-ZUK3>] (A minority member of the committee called the D.C. Court backlog “outrageous.”).

two D.C. Superior Court seats were vacant, one since 2018.³³ Two of the nine D.C. Court of Appeals seats are vacant,³⁴ and one has been since 2013.³⁵ In 2022, Court spokesperson Doug Buchanan gave a lengthy statement to the Washington Post in which he acknowledged the “long standing vacancy crisis within the local D.C. Court system, regardless of which party controls the Senate.”³⁶ He described the impact, noting that the lack of judicial resources in the Court of Appeals led to delays in 200 cases per year, which in turn led to “aging caseloads, increased workloads on existing judges, and an increase in the average time on appeal.”³⁷ With regard to the D.C. Superior Court, Buchanan concluded that “Without additional judges this significant increase in our workload is untenable and will adversely impact the Court’s ability to meet basic constitutional requirements of providing speedy trials in cases across the criminal division.”³⁸ Charles Allen, then Chair of the D.C. Council Committee on the Judiciary and Public Safety pointed out that “the vacancies cause delays in justice for perpetrators, victims and survivors,” adding that “some people have been waiting for trial in the D.C. Jail for longer than they would serve if they were convicted.”³⁹

Congresswoman Eleanor Holmes Norton reintroduced the D.C. Courts Vacancy Reduction Act, on January 24, 2023,⁴⁰ which would create a 30-day Congressional review period for local D.C. judicial nominations. Under the proposed act, if Congress does not object to a nominee within 30 working days, the nominee would be automatically confirmed. Norton’s

³³ JUD. NOMINATION COMM’N, D.C. COURTS VACANCIES & NOMINATIONS (2024), [https://jnc.dc.gov/sites/default/files/dc/sites/jnc/page_content/attachments/DC Courts Vacancies- Nominations- Website_2-27-2024.pdf](https://jnc.dc.gov/sites/default/files/dc/sites/jnc/page_content/attachments/DC%20Courts%20Vacancies-%20Nominations-Website_2-27-2024.pdf) [<https://perma.cc/3XQE-NBU6>].

³⁴ *Id.*; Press Release, Jud. Nomination Comm’n, Notice of Judicial Vacancy on the District of Columbia Court of Appeals, (Dec. 7, 2023), <https://jnc.dc.gov/release/notice-judicial-vacancy-district-columbia-court-appeals-2> [<https://perma.cc/3XQE-NBU6>]; *see generally*, Meagan Flynn & Michael Brice-Saddler, *D.C. courts ‘sound the alarm’ on judicial vacancies as local officials demand movement in Senate*, WASH. POST (Jan. 1, 2022, 9:52 AM), <https://www.washingtonpost.com/dc-md-va/2022/01/01/dc-judges-vacancy-senate/> [<https://perma.cc/XW9Z-QML8>].

³⁵ JUD. NOMINATION COMM’N, *supra* note 33. Judge Oberly retired from the court on November 1, 2013, and President Obama nominated former D.C. Solicitor General Todd Kim to the seat in February 2014. The Senate did not schedule a hearing, and the nomination was returned to the White House in December 2014 under the Senate’s rules. President Obama re-nominated Todd in April 2015, but the Senate still did not hold a hearing, and his nomination was returned to the (soon-to-be Trump) White House in January 2017. The nomination sat at the Trump White House for 3.5 years. In June 2020, President Trump nominated John P. Howard III to the Oberly seat in June 2020, but no hearing was conducted before President Trump’s term ended. (Judge Howard has since been nominated and confirmed for a separate seat by President Biden). President Biden withdrew that nomination in early 2021 and nominated another candidate in June 2021. That candidate asked the White House to withdraw her nomination in July 2022. No further nominations have been made for this position. D.C. JUD. NOMINATION COMM’N, DISTRICT OF COLUMBIA JUDICIAL NOMINATION COMMISSION REPORT OF RECOMMENDATIONS AND CHIEF JUDGE DESIGNATIONS AND PRESIDENTIAL APPOINTMENTS TO THE DISTRICT OF COLUMBIA COURT OF APPEALS AND THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA MAY 8, 1975 TO SEPTEMBER 30, 2022 3-4, n.16-17 (2022), https://jnc.dc.gov/sites/default/files/dc/sites/jnc/publication/attachments/2022%20JNC%20Report%20of%20Recommendations_FINAL%20v2.pdf [<https://perma.cc/9YVQ-DM5R>].

³⁶ Meagan Flynn & Michael Brice-Saddler, *supra* note 34.

³⁷ *Id.*

³⁸ Meagan Flynn & Michael Brice-Saddler, *supra* note 34.

³⁹ Meagan Flynn & Michael Brice-Saddler, *supra* note 35.

⁴⁰ H.R. 483, 118th Cong. (2023).

introductory remarks described the sole purpose of the bill as “protect[ing] public safety and promot[ing] justice by ending the perpetual judicial vacancy crisis in the local D.C. courts.”⁴¹ The Bill was referred to the Committee on Oversight and Accountability and to the Rules Committee, but no further action is expected, as Congress has not demonstrated a will to address the District’s judicial selection crisis. The delay and disfunction continue unabated.

2) The D.C Courts After Statehood

The D.C. Constitution, which would only become binding law when D.C. is admitted as a state, requires that the Legislative Assembly convene a Constitutional Convention to be held no later than the second anniversary of the date of admission to “assess the functionality of this Constitution in the transition from a federal district to statehood.”⁴² The Legislative Assembly will be free to consider appointive⁴³ or elective methods⁴⁴ of judicial selection. Thirty-three states and the District of Columbia choose at least some judges via the appointive process according to The Fund for Modern Courts.⁴⁵ Judicial elections would be a significant change for the District, and while many view it as the most democratic option, the downsides associated with politicizing the judiciary may outweigh any potential benefits.⁴⁶ The District may be ready to make the change, much as it did when it opted to change from an appointed Attorney General to an elected Attorney General in 2010.⁴⁷ At that time, the Council cited its purpose, “To clarify the independence of the Attorney General for the District of Columbia and the obligation of that position to represent the public interest[.]”⁴⁸ Regardless of the means chosen, with statehood, D.C. judges will be selected by and accountable to District residents.

⁴¹ 169 Cong. Rec. E49 (daily ed. Jan. 24, 2023) (statement of Rep. Norton).

⁴² D.C. CONST. art. VII, § 4(a) (as enacted in D.C. Res. 21-621).

⁴³ Judicial selection in the states, https://ballotpedia.org/Judicial_selection_in_the_states [<https://perma.cc/63FA-L5RP>] (Appointive methods include assisted appointment in which the governor appoints state judges with help from a nominating commission or board, gubernatorial appointment, or legislative appointment in which state legislators choose judges.).

⁴⁴ *Id.* (Elective methods of judicial selection include partisan and nonpartisan elections, in which political affiliation is noted on the ballot or not, and the Michigan method, a process that combines non-partisan elections preceded by a partisan candidate selection process.).

⁴⁵ Methods of Judicial Selection, Fund for Modern Courts, <https://moderncourts.org/programs-advocacy/judicial-selection/methods-of-judicial-selection/> [<https://perma.cc/47YZ-3AZK>].

⁴⁶ *Id.* (“Those who favor elections argue that the people are given a voice in the third branch of Government; that the people are permitted to choose their own ‘judicial representatives;’ and that judges will assume office based on the will of the majority, not based on nepotism or personal connections.”); *but see, e.g.*, Richard Lorren Jolly, *Judges as Politicians*0:.

The Enduring Tension of Judicial Elections in the Twenty-First Century, 92 NOTRE DAME L. REV. ONLINE 71 (2017) (rejecting the view of elected courts as “democratic and disinterested” and concluding “elections are incompatible with judicial impartiality” and that “the elected judiciary of the twenty-first century is a third political branch”).

⁴⁷ Forty-three states had elected Attorneys General in 2010 when the D.C. Council adopted the Attorney General for the District of Columbia Clarification Act; *see* William W. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 YALE L.J. 2446, 2448 n.3 (2006).

⁴⁸ Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2010, D.C. Law 18-160; 57 D.C. Reg. 3012 (2010).

Article III of the D.C. Constitution⁴⁹ continues the assisted appointment method of judicial selection now in place, at least until the Constitutional Convention is held two years after Washington D.C. is admitted as a state. Under the assisted appointment scheme, local control will be achieved as the Governor (now the Mayor) will replace the President, and the Legislative Assembly (now the D.C. Council) will replace the U.S. Senate in the process.⁵⁰ The D.C. Constitution continues the JNC, but the Legislative Assembly will be empowered to assure local control and representation as it “provide(s) for the composition, method of selection and the procedures for the State of Washington D.C. JNC to use in carrying out its duties[.]”⁵¹ Similarly, the Commission will be empowered to reappoint, remove, or sanction a judge, and the Legislative Assembly will be empowered to assure local control and representation as the Assembly “provide(s) for the composition, method of selection, and procedures for the Commission ... to use in carrying out its duties[.]”⁵² Federal actors will no longer play any role in the District’s judicial selection and removal processes.

Currently, D.C. judges serve 15-year terms,⁵³ which is longer than judicial terms in most states.⁵⁴ The 2016 D.C. Constitution continues the 15-year terms currently served by Superior Court and D.C. Court of Appeals judges⁵⁵ because the timeline is working to assure judicial independence.⁵⁶ Still, the Legislative Assembly may want to consider the wide range of initial appointment terms among the states as described in the Blueprint.⁵⁷

The Legislative Assembly will have an array of additional options to consider as it moves forward to determine the best structures to put in place for Washington D.C. In 2022, D.C. Applesseed prepared a “Blueprint for Elements of the D.C. Criminal Justice System After Statehood” for Mayor Muriel Bowser.⁵⁸ In the section covering the Courts, the Blueprint explores the varied makeup of Judicial Nomination Commissions, which range from six to seventeen members, some with a majority of lawyers.⁵⁹ Terms of service on JNCs range from two to six years and the number of recommendations per vacancy varies from two to seven.⁶⁰

The Blueprint notes that applicants for judgeships must be D.C. residents and must remain so as long as they serve.⁶¹ Although the Blueprint asserts that a change in that requirement is not justified, the report acknowledges that gentrification may serve to reduce

⁴⁹ D.C. CONST. art. III (as enacted in D.C. Res. 21-621).

⁵⁰ D.C. CONST. art. III, § 2(a) (as enacted in D.C. Res. 21-621).

⁵¹ D.C. CONST. art. III, § 2(c) (as enacted in D.C. Res. 21-621).

⁵² D.C. CONST. art. III, § 3(c) (as enacted in D.C. Res. 21-621).

⁵³ Home Rule Act § 431(c), 87 Stat. at 793.

⁵⁴ INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., UNIV. OF DENVER, JUDGES IN THE UNITED STATES 6 (2014) (noting that “[i]n states where judges do not enjoy life tenure, judicial terms range in length from four years to 15 years.”).

⁵⁵ D.C. CONST. art. III, § 2(b) (as enacted in D.C. Res. 21-621).

⁵⁶ Memorandum from D.C. Applesseed Center for Law and Justice to Mayor Muriel Bowser 54 (May 24, 2022) (on file with Author) [hereinafter D.C. Applesseed Blueprint].

⁵⁷ *Id.*

⁵⁸ *Id.* at 1.

⁵⁹ *Id.* at 51.

⁶⁰ *Id.* at 51-52.

⁶¹ *Id.* at 54 (citing D.C. Code § 1-204.33).

minority applicants.⁶² It exhorts elected officials to explore ways to avoid this potential problem.⁶³

The Legislative Assembly will need to consider the various methods of reappointment or reelection of judges; whether to require performance reviews; options for the removal of judges; retirement requirements; selection, service, and pay schemes for senior judges; selection and terms for chief judges; and a local rather than federal management system for court administration. The Blueprint provides a detailed description of available choices and options.⁶⁴

B. *Prosecution*

The prosecution function in the District of Columbia is served by two separate offices, the federal United States Attorney Office (USAO) and the local Office of the Attorney General (OAG). The District of Columbia is the sole jurisdiction in which the USAO, not local prosecutors, prosecutes violations of the local criminal code in addition to violations of federal law. The D.C. USAO is the largest office in the United States with more than 330 Assistant U.S. Attorneys and about the same number of support staff.⁶⁵ The Superior Court Division is responsible for prosecuting nearly all local non-federal crimes.⁶⁶

The OAG has approximately 275 attorneys and 300 professional staff members.⁶⁷ The Court Reorganization Act severely limited the District's authority to prosecute adult criminal offenses to a narrow set of misdemeanors.⁶⁸ The OAG is the chief prosecutor of juvenile criminal offenses for the District. All other prosecutions are conducted by the United States Attorney for D.C.⁶⁹

1) The United States Attorney

The President of the United States appoints and may remove the United States Attorney for D.C.⁷⁰ All United States Attorneys are required to live in the District to which they are appointed, with the exceptions of the District of Columbia (and two others) who may live within 20 miles of their District.⁷¹ The United States Attorneys of the Eastern and Southern Districts of New York, the other exceptions, are the only two working in different parts of the same city.

⁶² *Id.* at 55.

⁶³ *Id.*

⁶⁴ *Id.* at 67.

⁶⁵ *About Us*, United States Attorney's Office: District of Columbia, <https://www.justice.gov/usao-dc/about-us> [https://perma.cc/GR68-BBJN].

⁶⁶ *Superior Court Division*, United States Attorney's Office: District of Columbia, <https://www.justice.gov/usao-dc/superior-court-division> [https://perma.cc/RBP5-55EJ].

⁶⁷ *What We Do*, Office of the Attorney General for the District of Columbia, <https://oag.dc.gov/about-oag/what-we-do>.

⁶⁸ Court Reform Act § 23-101(a-b), 84 Stat. at 604-05.

⁶⁹ Court Reform Act § 23-101(c), 84 Stat. at 605.

⁷⁰ 28 U.S.C. § 541(a-c).

⁷¹ 28 U.S.C. § 545.

Congresswoman Norton introduced legislation⁷² in 2021 that would require the D.C. U.S. Attorney to live in the District of Columbia, noting that “[t]hey should be part of the community they serve and fully understand the unique issues facing District residents, which can only be fully realized by residing in the District.”⁷³ There is currently no requirement that the U.S. Attorney for D.C. ever have lived or practiced law in the District of Columbia prior to appointment, much less share the District’s values and priorities. D.C. deeply values local residence as evidenced by D.C. law requiring senior appointed and elected officials to live in the District.⁷⁴

The Mayor, the D.C. Council, and D.C. residents play no role in the appointment, removal, or oversight of the individual who prosecutes local D.C. Code offenders. The fact that local D.C. Code offenders are not prosecuted by local prosecutors has had serious negative consequences for the District. In 2022, the USAO declined to prosecute 67% of those arrested by police officers who would have been tried in D.C. Superior Court.⁷⁵ According to the Washington Post, local prosecutors in Wayne County, which includes Detroit, declined to prosecute 33% of its cases last year, while Philadelphia prosecutors declined 4%, and Cook County, which includes Chicago, declined 14%.⁷⁶ Matthew Graves, the D.C. U.S. Attorney said cases declined for prosecution were mostly gun, drug possession, and misdemeanor cases.⁷⁷ He cited expenses associated with the need to send forensic evidence to outside laboratories and the decision to reassign 15 prosecutors from D.C. Superior Court to prosecute the January 6th-related federal offenses as reasons for the precipitous drop in local prosecutions.⁷⁸ By contrast, in 2022, the D.C. OAG declined to prosecute just 26% of its far less serious criminal caseload.⁷⁹ If the locally elected OAG had the authority to prosecute felony violations of the D.C. Code, the office would not be distracted by the responsibility for prosecuting federal offenses. Local control would lead to different prosecution outcomes for the District.

⁷² H.R. 3786 117th Cong. (2021).

⁷³ Press Release, Eleanor Holmes Norton, Member, House of Representatives, Norton to Introduce Bill to Require U.S. Attorney, Federal Judges and U.S. Marshals Serving D.C. To Live In D.C. (June 2, 2021), <https://norton.house.gov/media-center/press-releases/norton-to-introduce-bill-to-require-us-attorney-federal-judges-and-us> [<https://perma.cc/J438-TVSV>].

⁷⁴ D.C. Code § 1–515.03 (including all agency heads, positions in the excepted service, Senior Executive Attorney Service, positions in the legal service of the Council, and new employees hired or new rehires in the Career Management Supervisory, or Educational Service with a starting annual salary of \$150,000 or more).

⁷⁵ Keith L. Alexander, *D.C. U.S. attorney declined to prosecute 67% of those arrested. Here’s why.*, WASH. POST (Mar. 29, 2023) <https://www.washingtonpost.com/dc-md-va/2023/03/29/us-attorneys-office-charges-declined-dc-police/#> [<https://perma.cc/N36K-QWB2>].

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

2) The D.C. Attorney General

The D.C. Attorney General (AG) is elected to a four-year term in a partisan election.⁸⁰ In contrast to the Presidentially appointed D.C. U.S. Attorney, candidates for election as D.C. AG must be bona fide residents of the District, and members in good standing with the bar of the District of Columbia for at least five years.⁸¹ In addition, candidates must have been actively engaged, for at least five of the ten years immediately preceding the assumption of the position of Attorney General as an attorney in the practice of law in the District of Columbia, a judge of a court in the District of Columbia, a professor at a law school in the District of Columbia or an attorney employed by the United States or the District of Columbia.⁸² The D.C. Council developed these criteria in order to ensure that its top legal officer has knowledge of, connection to, and experience with the District in order to best serve D.C. residents.

The Office of the Attorney General (OAG) is the chief legal officer of the District of Columbia. In addition to the juvenile and select adult misdemeanor case authority handled by its Public Safety Division,⁸³ nine other divisions are charged with enforcing the laws of the District, providing legal advice to the District's government agencies, and promoting the interests of D.C. residents.⁸⁴

3) The D.C. Criminal Code

State legislatures enjoy plenary power to legislate in keeping with the values and priorities of the voters in their states. By contrast, Congress retains plenary power over the District of Columbia.⁸⁵ Congress recently exercised its awesome power over the District⁸⁶ when it passed a joint resolution disapproving the D.C. Criminal Code Revision Act in 2023, which had been approved unanimously by the D.C. Council.⁸⁷ Neither Congress nor the Executive Branch could have interfered with the same legislation if approved by any state. District voters had no vote and no say.

⁸⁰ D.C. Code § 1-204.35(a).

⁸¹ D.C. Code § 1-301.83(a)(2-4).

⁸² D.C. Code § 1-301.83(a)(5)(A-D).

⁸³ *What we do, supra* note 70 (other divisions include Child Support; Civil Litigation; Commercial; Family Services; Legal Counsel; Personnel, Labor and Employment; Public Advocacy; Support Services; and the Office of the Solicitor General).

⁸⁴ *Id.*

⁸⁵ Home Rule Act § 601, 87 Stat. at 813; *see also* D.C. Code § 1-206.01 (“Notwithstanding any other provision of this Act, the Congress of the United States reserves the right, at any time, to exercise its constitutional authority as legislature for the District, by enacting legislation for the District on any subject, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of this Act and any act passed by the Council.”).

⁸⁶ Home Rule Act § 602(c)(2), 87 Stat. at 814.

⁸⁷ H.R.J. Res. 26, 118th Cong., 137 Stat. 3 (2023); *See also* CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., IN12119, CONGRESSIONAL DISAPPROVAL OF DISTRICT OF COLUMBIA LAWS UNDER THE HOME RULE ACT (2023).

The newly revised criminal code, a 450-page document 16 years in the making,⁸⁸ is much needed and long overdue. The goal of the reform was to ensure that “that provisions are reviewed and revised together, rather in isolation, to ensure the entire legal framework is clear, complete, consistent, and proportionate.”⁸⁹ The current D.C. criminal code has been ranked among the worst codes in the county.⁹⁰

Because the District does not have the powers associated with statehood, D.C. residents will continue to suffer as they will continue to be prosecuted for violation of non-federal laws under the outdated and deeply flawed D.C. Code promulgated by Congress in 1901. With statehood, the District Legislative Assembly will be free to effectuate the will of District voters and approve a new criminal code along with other legislation related to the criminal justice system.⁹¹

4) The Prosecution Function After Statehood

D.C. Appleseed’s “Blueprint for Elements of the D.C. Criminal Justice System After Statehood,” identifies three options for the prosecution function: (1) assign responsibility for the prosecution of D.C. Code offenses now handled by the federal OUSA for D.C. to the local OAG; (2) create a new local District agency to handle all criminal prosecution including the minor matters now handled by the OAG; or (3) create a new local D.C. agency to handle only the prosecution of D.C. Code offenses now handled by the Office of the U.S. Attorney for D.C. and leave the matters now handled by the OAG in place.⁹² The Blueprint includes a description of the organizational structures of four cities of similar size and/or racial makeup to the District, each of which has two local agencies, one that operates like an attorney general and another that operates like a District attorney.⁹³ Typically, the Attorneys General are appointed and the District Attorneys are elected.⁹⁴ By contrast, at the state level, the vast majority of Attorneys General are elected. Just five are appointed at the state level.⁹⁵

Concluding that the separate agency structure works well in the four similar cities reviewed, the Blueprint recommends the hybrid approach, in which the OAG would retain its

⁸⁸ Martin Austerhuhle, *D.C. Council Approves Sweeping Overhaul Of Criminal Code, Though Changes Won’t Take Effect Until 2025*, DCIST (Nov 15, 2022, 4:36 PM), <https://dcist.com/story/22/11/15/dc-council-approves-major-overhaul-criminal-code/> [<https://perma.cc/2CEB-G7DS>].

⁸⁹ Transmittal Letter from Richard Schmechel, Exec. Dir., D.C. Crim. Code Reform Comm’n, to Muriel Bowser, Mayor & Phil Mendelson, Chairman, Council of D.C. (2021), <https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/CCRC-Executive-Director-Transmittal-Letter-to-the-Mayor-and-Council-March-31-2021.pdf> [<https://perma.cc/42KK-SUMG>].

⁹⁰ Michael Cahill et al., *The Five Worst (and Five Best) American Criminal Codes*, 45 NW. U.L. REV. 1, 61 (2000) (ranking the District’s criminal code 45 out of 52 (the list included all fifty states, D.C., and the U.S.C.)).

⁹¹ D.C. JUST.LAB, DISTRICT VOTERS OVERWHELMINGLY SUPPORT REVISED CRIMINAL CODE ACT (2022), https://dcjusticelab.org/wp-content/uploads/2022/07/RCCA-Glossy_final.pdf [<https://perma.cc/SB58-FWGR>] (a poll conducted by HIT Strategies showed 83% of District voters supported passage of the new criminal code).

⁹² D.C. Appleseed Blueprint, *supra* note 56 at 22-23.

⁹³ *Id.* at 34 (analyzing Boston, Philadelphia, Denver, and Seattle).

⁹⁴ *Id.*

⁹⁵ *Id.*

current juvenile and minor misdemeanor responsibilities and the District would create a new District Attorney agency to assume the current USAO responsibilities. According to the Blueprint, this approach would leverage the OAG’s existing knowledge and experience, promote stability, and provide the opportunity for enhanced coordination between prosecutorial functions for adults while not overburdening the OAG and subjecting it to more political pressure.⁹⁶ The Blueprint recommends that the new District Attorney be an elected position in keeping with the District’s “commitment to a robust democracy.”⁹⁷

The Blueprint does point out positive implications associated with the option of transferring the USAO responsibilities to the OAG. These include the ease of transition, leveraging OAG knowledge and experience, and the opportunity for enhanced coordination by “having all local prosecutorial functions within a single entity, accountable to a single front office, [which] would make coordinating between divisions easier and more efficient.”⁹⁸ Locating all prosecution authority within one entity would also allow for more efficient coordination with law enforcement and with the community.⁹⁹

Current D.C. Attorney General Brian Schwalb strongly supports expanded Home Rule authority and eventually statehood for the District and believes that the OAG is best suited to take on the responsibility of prosecuting all local crime.¹⁰⁰ General Schwalb notes several reasons in support of his approach. First, the Attorney General is an elected prosecutor, accountable and responsive to the community. Second, OAG is already prosecuting juvenile crime and some adult misdemeanors and therefore has the experience, infrastructure, and personnel in place to expand its prosecutorial role. Third, efficiencies would be achieved with one entity handling all criminal and juvenile matters. Fourth, the expense and effort of holding elections for two separate prosecutorial offices is unnecessary.¹⁰¹ Finally, the OAG Office of the Solicitor General is well suited to expand its capacity to handle criminal appeals.¹⁰²

In fact, General Schwalb reported that the:

OAG has a strong relationship with USAO-DC and has the expertise to take on an expanded prosecutorial role. OAG coordinates with USAO-DC to address public safety in its overlapping spheres of authority, including addressing [Metropolitan Police Department] practices that impact criminal and juvenile prosecutions, developing recommendations for changes to District criminal law, and consulting on cases in which USAO is considering prosecuting a child as an adult. Additionally, pursuant to a memorandum of understanding (MOU) between the

⁹⁶ *Id.* at 42-43.

⁹⁷ *Id.* at 43.

⁹⁸ *Id.* at 38.

⁹⁹ *Id.*

¹⁰⁰ Telephone Interview with Brian Schwalb, D.C. Att’y Gen. (June 20, 2023).

¹⁰¹ *Id.*

¹⁰² *Id.*

OAG and the OUSA, at any given time, several Assistant AGs are working as Special Assistant U.S. Attorneys. These SAUSAs prosecute serious crimes of importance to District residents that would not otherwise be prioritized by USAO, including elder abuse and public corruption cases. General Schwalb sees a clear roadmap for OAG to assume responsibility for prosecution of all local criminal cases, beginning with OAG taking over prosecution of misdemeanors (which account for approximately 73.2% of all criminal cases brought in the District).¹⁰³ Absent congressional action, this effort would require an MOU between the OAG and the USAO. The District budget for OAG would have to be increased to hire additional lawyers and staff, but presumably elected officials would support this as a means of achieving greater democratic local control over what cases are prosecuted and empowering local prosecutors to exercise discretion about whether to seek pretrial release, diversion, and particular sentencing options in D.C. Code offender's cases.¹⁰⁴

With statehood, the Legislative Assembly would design the structure and jurisdiction of the office. Whichever approach is taken, a newly created office for criminal prosecution, adding more criminal prosecution authority to the OAG, or a hybrid approach, at long last local prosecutors would make charging decisions and sentencing recommendations for D.C. Code offenders. The Legislative Assembly will also have the authority to adopt a modern criminal code that better serves District residents by reflecting the values and priorities of the District.

II. Clemency

A. *Authority to Grant Clemency*

Historically, clemency in the District of Columbia, except for a few minor offenses covered by the D.C. Code,¹⁰⁵ has been governed by the U.S. Constitution,¹⁰⁶ which confers the power to grant reprieves and pardons for all offenses against the United States on the President of the United States. Petitions for clemency for D.C. Code offenders are sent to the Office of the

¹⁰³ In FY22, USAO presented 3,250 misdemeanor cases and 1,804 felony cases. DEP'T OF JUST., UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT 65 (2022), <https://www.justice.gov/usao/file/1574596/dl?inline> [<https://perma.cc/EQ8T-G5YP>]. According to the OAG, OAG opened 1,678 misdemeanor cases from Jan 1, 2022–Nov. 15, 2022. *Prosecution Data Portal: Cases Disposed*, Office of the Attorney General for the District of Columbia, <https://oag.dc.gov/prosecution-data-portal-cases-disposed-0> [<https://perma.cc/4D5F-R4D3>] (portal data as of Mar. 6, 2024 on file with author).

¹⁰⁴ E-mail from Brian Schwalb, D.C. Att'y Gen., to Shelley Broderick, Professor of L., David A. Clarke School of L. (Sept. 7, 2023, 10:00 EST) (on file with author).

¹⁰⁵ D.C. Code § 1-301.76.

¹⁰⁶ U.S. Const. art. II, § 2; *See also*, Letter from Roger C. Adams, Pardon Attorney, to David A. Guard, Crim. Just. Pol'y Found. (2001) (on file with author) [hereinafter Pardon Attorney Letter] (outlining rationale for Presidential authority over majority of clemency decisions for D.C.).

Pardon Attorney housed in the Department of Justice.¹⁰⁷ This office otherwise only handles requests for clemency for those convicted of federal offenses. All fifty states manage their own clemency processes for state law offenders.¹⁰⁸ Only the District of Columbia does not.

In 2016, advocacy groups and elected officials began taking steps to try to achieve some local control over the clemency process. The Council for Court Excellence and the Community Justice Project, a clinical program at Georgetown University Law Center, jointly published “Toward Greater Access: A Proposal for A Clemency Solution for D.C.” in order to “create an effective clemency system for D.C.” and to “increase local control over D.C. affairs.”¹⁰⁹ Additionally, the Council for Court Excellence testified in favor of the Clemency Board Establishment Act of 2018 and worked with the D.C. Council Committee on the Judiciary and Public Safety to build support for the legislation.¹¹⁰

Also in 2016, D.C. Congresswoman Eleanor Holmes Norton introduced legislation that would have allowed the District to establish law authorizing the grant of clemency,¹¹¹ and she wrote to President Obama requesting that he delegate presidential authority to the mayor.¹¹² The Department of Justice concluded that the President’s Article II power to grant clemency was nondelegable.¹¹³

In 2018, the D.C. Council approved the Clemency Board Establishment Act.¹¹⁴ The Clemency Board is composed of nine members including two federal employees, the D.C. Public Defender and the United States Attorney for D.C. or their designees.¹¹⁵ These board members are not accountable to elected officials or residents of the District and may potentially sway policy as well as actual clemency decisions. Still, the new legislation, for the first time, provides the District with a modicum of local control. D.C. Code offenders may now send their applications directly to the D.C. Clemency Board. The legislation requires the Board to “review each application and determine, within six months after a complete application is received,

¹⁰⁷ See Pardon Attorney Letter, *supra* note 106; see also, 28 C.F.R. §§ 0.35, 0.36, and 1.1–1.11 (outlining clemency procedures).

¹⁰⁸ See Kathleen (Cookie) Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?*, Fall 2009 CRIM. JUST. 31 (Surveying all fifty States Clemency power structures, the authors found that there are three broad categories: 1) states with the clemency power vested exclusively in the Governor, 2) states with the clemency power vest exclusively in an executive board, and 3) states with a hybrid system.).

¹⁰⁹ TIM HUETHER ET AL., TOWARD GREATER ACCESS: A PROPOSAL FOR A CLEMENCY SOLUTION FOR DC, COUNCIL FOR COURT EXCELLENCE 4 (2016).

¹¹⁰ *D.C.’s New Clemency Board*, APRIL 2019 NEWSL. (Council for Ct. Excellence, Washington, D.C.), Apr. 2019, at 3.

¹¹¹ District of Columbia Home Rule Clemency Act, H.R. 4338, 114th Cong. (2016). (The bill was referred to the House Oversight Committee January 6, 2016, where no further action was taken. The bill has been reintroduced in 2017, 2019, 2021, and 2023).

¹¹² Press Release, Eleanor Holmes Norton, Member, House of Representatives, Norton Asks President Obama to Give Local Clemency Authority to DC Mayor (March 21, 2016), <https://norton.house.gov/media-center/press-releases/norton-asks-president-obama-to-give-local-clemency-authority-to-dc-mayor> [https://perma.cc/M2GZ-3MR3].

¹¹³ Letter from Peter Kadzik, Assistant Att’y Gen., to Congresswoman Eleanor Holmes Norton (2016) (on file with author) (asserting that the clemency power is a nondelegable presidential power).

¹¹⁴ D.C. Code § 24–481.03.

¹¹⁵ D.C. Code § 24–481.04.

whether to recommend the application to the President of the United States[.]”¹¹⁶ When the Board sends recommendations to the President, it must also forward the recommendation to the Department of Justice Office of the Pardon Attorney.¹¹⁷ These recommendations are not applications for clemency, and individuals must still formally request clemency from the Pardon Attorney.¹¹⁸ The hope is that positive recommendations from the D.C. Clemency Board will better engage the attention of the Pardon Attorney who will be more likely to make positive recommendations to the President. At a minimum, the D.C. Clemency Board will have an opportunity to make recommendations expressing D.C. values, and those values will be part of the mix considered by the Pardon Authority and the President.

After years of delay, the Executive Office of the Mayor “stood up” to the new D.C. Clemency Board and in March of 2022, the Clemency Board announced that they were accepting applications from D.C. Code offenders.¹¹⁹ The Executive Office of the Mayor (EOM) is working to generate completed applications, but the process is not easy.¹²⁰

First, applicants must satisfy a set of eligibility requirements which include a conviction of a D.C. Code offense, exhaustion of administrative remedies, and passage of five years since the applicant was released from incarceration, or the date of conviction if no sentence of incarceration was imposed.¹²¹ The applicant, except in the case of actual innocence, must write an essay demonstrating rehabilitation and describing how the commutation or pardon will help him or her achieve goals and contribute to the community.¹²² Finally, the applicant must sign six requests for information.¹²³ Not surprisingly, the hardest obstacle is getting the information requests returned.¹²⁴

¹¹⁶ D.C. Code § 24–481.03(b)(2).

¹¹⁷ D.C. Code § 24–481.03(b)(8)(A).

¹¹⁸ See D.C. Code § 24–481.03(a) (There is established a Clemency Board within the EOM to *review the applications* of individuals convicted of violating District laws or regulations and *determine* which applicants to *recommend* to the President of the United States for clemency.) (emphasis added).

¹¹⁹ Paul Duggan, *Only the president can pardon D.C.’s convicted offenders, but a city panel will begin making recommendations to the White House*, WASH. POST (Mar. 18, 2022 5:56 PM), <https://www.washingtonpost.com/dc-md-va/2022/03/18/dc-prisoners-clemency-board/> [https://perma.cc/GL7C-PDAF].

¹²⁰ E-mail from Betsy Cavendish, Gen. Counsel, Exec. Off. of the Mayor, to Shelley Broderick, Professor of L., David A. Clarke School of L. (Sept. 18, 2023, 10:30 AM EST) (on file with author) [hereinafter Gen. Counsel Cavendish Email]. One explanation proffered for the lack of completed applications thus far is that the District has progressive policies like “Ban the Box” along with progressive programs for affirmative second chance hiring, training programs like Project Empowerment, and grant money for starting businesses --all of which may make the arduous process of applying for clemency seem unnecessary. *Id.*

¹²¹ D.C. Code § 24–481.05. In addition, the applicant cannot have been convicted of another related offense and cannot be party to a past or pending civil suit relevant to the case for which clemency is sought. *Id.*

¹²² *Id.* (Special consideration will be given to applicants who are terminally ill, elderly, or to those who no longer pose a danger to the community. Special consideration is also available if a new sentencing scheme is now in place in which the penalties are less harsh than when the applicant was sentenced.)

¹²³ D.C. CLEMENCY BD., DC CLEMENCY BOARD APPLICATION WITH ROI FORMS 13–26 (2023). (Releases are required from the BOP, a combined form for the MPD, CSOSA, and the D.C. Superior Court, a CSOSA medical release form, a DOJ Office of the Pardon Release form, a juvenile records release form and a confidential and sealed records release form from D.C. Superior Court.)

¹²⁴ See Gen. Counsel Cavendish Email, *supra* note 120.

The EOM has hosted community events to make the process more accessible to potential applicants and their families and to increase the likelihood of success.¹²⁵ Elizabeth Oyer, the Federal Pardon Attorney, staff members from her office, along with members of the Clemency Board, EOM staff, the Public Defender Service,¹²⁶ and a person who has received a pardon have participated in three community events in different quadrants of the District with a fourth planned.¹²⁷ The Clemency Board, the Mayor’s Office of Returning Citizen Affairs, and the Mayor’s Office of Religious Affairs, planned additional outreach to potential applicants and their families and friends at churches, and with governmental employers of returning citizens, among others.¹²⁸ The hope is that the Clemency Board will begin holding its first hearings toward the end of 2024.¹²⁹

Clemency offers a stark example of the ways in which D.C. residents receive unjust treatment as a result of not being a state. As of May 16, 2023, Presidents have awarded clemency to 1,992 federal offenders and pardons to another 950 since the Clinton presidency.¹³⁰ Just two D.C. Code offenders have received any form of clemency, either commutation or pardon, during that 30-year period.¹³¹

Nation-wide, state-code offenders petition their state clemency board. Family and community advocates can weigh in with the state boards and governors. State clemency boards are accountable to state officials and others who appoint them. Governors are accountable to state residents who elect them. State governors and clemency boards make decisions in keeping with the values and interests of their particular states. D.C. has never had local control of the clemency process.¹³² As a result, D.C. code offenders deserving of clemency must appeal directly to the DOJ pardon attorney¹³³ and then to the President, neither of whom has any accountability to the District of Columbia. Even with the advent of the new D.C. Clemency Board, the current clemency process for D.C. Code offenders does not work for D.C. residents.

¹²⁵ *Id.*

¹²⁶ PDS assists potential applicants with related needs including, e.g., straightening out good time credits, applying for medical, geriatric, or general parole, applying for a reduction in minimum sentence, applying for IRRA “second-look” and compassionate release. *Id.*

¹²⁷ Liz Oyer participates “to let people know that even though the D.C. process is only for a letter of recommendation, the Federal Pardon Attorney takes the D.C. process very seriously.” *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Office of the Pardon Attorney, Clemency Statistics, Dep’t of Justice, <https://www.justice.gov/pardon/clemency-statistics> [<https://perma.cc/5FTG-RXAV>].

¹³¹ Office of the Pardon Attorney, Clemency Recipients, Dep’t of Justice, <https://www.justice.gov/pardon/clemency-recipients> [<https://perma.cc/P8CC-NXQV>] (Select Pardon or Clemency for each President, Clinton through Biden and search (via command + f on a mac or control+ f on pc) Columbia) (The second of these was approved by President Biden on April 26, 2022).

¹³² Pardon Attorney Letter, *supra* note 106.

¹³³ *Id.*; see also, 28 C.F.R. §§ 0.35, 0.36, and 1.1–1.11 (outlining clemency procedures).

B. Clemency After Statehood

With the achievement of statehood and implementation of the D.C. Constitution, the Governor will be granted “[t]he plenary power to grant pardons, computations, and reprieves and to remit, forgive, or reduce fines and forfeitures for all offenses against the laws of the State of Washington D.C.”¹³⁴ The D.C. Clemency Board, made up entirely of D.C. residents reflecting D.C. values, would send recommendations for clemency for D.C. Code offenders directly to the Governor for consideration.

With statehood, the District’s Legislative Assembly may choose to continue with the hybrid process established in the D.C. Constitution or select another hybrid model, in which the Governor shares power with a board (where the Governor is a member of the board, the Governor may consult with the board, or both).¹³⁵ The District may prefer to establish an independent clemency board as the best choice to increase the number of clemency grants. Six states—across the political spectrum—have independent pardon and parole boards, which regularly grant a large percentage of pardon petitions.¹³⁶ For example, in 2019, Alabama granted 889 pardons, which represented 79% of petitions heard.¹³⁷ That same year, Connecticut granted 760 full pardons, for an 80% overall grant rate.¹³⁸

Whichever model is selected, D.C. Code offenders will be better served with local control¹³⁹ of a system that can better achieve the ideals articulated in the Toward Greater Access report: (1) Engage in individual consideration of applicants; (2) Give holistic considerations to applicants; (3) Provide for efficient evaluation of applicants; (4) Regularly grant clemency; (5) Engage a variety of stakeholder perspectives; and (6) Provide transparent and predictable decisions.¹⁴⁰ The report concluded that “an effective clemency system should adjudicate applications in a timely manner and grant clemency on a frequent and regular basis” and further that such a system “should allow for applicants to find out within months if they have received clemency.”¹⁴¹

¹³⁴ D.C. Const. Art. II pt. 2 § 3(k) (as enacted in D.C. Res. 21-621).

¹³⁵ Margaret Colgate Love, *50-State Comparison: Pardon Policy & Practice*, Restoration of Rights Project, COLLATERAL CONSEQUENCES RES. CTR., <https://ccresourcecenter.org/state-restoration-profiles/50-state-comparisoncharacteristics-of-pardon-authorities-2/> [<https://perma.cc/US6C-QW25>] (Section 3 outlines various models for pardon administration).

¹³⁶ *Id.* (Alabama, Connecticut, Georgia, Idaho, South Carolina, and Utah).

¹³⁷ ALABAMA BUREAU OF PARDONS & PAROLES, FY 2019 ANNUAL REPORT 8 (2019).

¹³⁸ CONNECTICUT BOARD OF PARDONS AND PAROLES, DEPARTMENT OF CORRECTION, 2018-2019 DIGEST OF ADMINISTRATIVE REPORT TO THE GOVERNOR 3 (2019).

¹³⁹ Since Nixon, U.S. Presidents have granted only 6.7% of clemency petitions. OFFICE OF THE PARDON ATTORNEY, CLEMENCY STATISTICS, DEP’T OF JUSTICE, <https://www.justice.gov/pardon/clemency-statistics> [<https://perma.cc/5FTG-RXAV>].

¹⁴⁰ HUETHER ET AL., *supra* note 109, at 4.

¹⁴¹ *Id.*

III. The Impact of the Revitalization Act

The District of Columbia nearly went bankrupt as a result of declining population and lowered tax base, fiscal mismanagement,¹⁴² and the structural deficit Congress baked into the Home Rule Act.¹⁴³ With the grant of Home Rule, former federal employees including teachers, police, and firefighters, among others, were reclassified as District employees and the District inherited a \$2 billion unfunded pension liability.¹⁴⁴ That liability grew to \$5 billion over the next 20 years.¹⁴⁵

In 1997, Congress enacted the Revitalization Act to address the District's unfunded pension liability, as well as its \$722 million operating deficit and junk bond status, which hugely inflated the cost of borrowing for the District.¹⁴⁶ The Revitalization Act significantly impacted the District's criminal justice system by mandating (1) closure of Lorton Prison and the transfer of sentenced felons to the Federal Bureau of Prisons;¹⁴⁷ (2) the transfer of authority for parole matters to the U.S. Parole Commission and the abolition of the D.C. Board of Parole;¹⁴⁸ (3) the establishment of the Court Services and Offender Supervision Agency (CSOSA), an independent federal agency¹⁴⁹ within the Executive Branch¹⁵⁰ now responsible for supervising D.C. residents on pretrial release, probation, and parole; (4) the establishment of the Public Defender Service

¹⁴² D.C. POLICY CENTER, THE DISTRICT OF COLUMBIA'S CRIMINAL JUSTICE SYSTEM UNDER THE REVITALIZATION ACT 1 (2023) [hereinafter CRIMINAL JUSTICE UNDER THE REVITALIZATION ACT].

¹⁴³ Home Rule Act § 602(a)(5), 87 Stat. at 813-14 (Prohibiting the taxation of income of non-residents); See JEFFERY WILKINS, D.C. OFF. OF THE CHIEF FIN. OFFICER, OFF. OF REVENUE ANALYSIS, DISTRICT OF COLUMBIA ECONOMIC AND REVENUE TRENDS Tbl. 6 line 24 Column 2 (2023), <https://ora-cfo.dc.gov/page/economic-and-revenue-trend-reports-march-2023> (In FY 2022, 61.7% of the total income earned in DC was earned by non-residents whom the District is banned from taxation. No state is banned from taxing non-residents who earn income within their boundaries.); OFF. OF REVENUE ANALYSIS, D.C. OFF. OF THE CHIEF FIN. OFFICER, D.C. TAX FACTS iv (2022), <https://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/Tax%20Facts%202022%20081522.pdf> ("Some of the revenue implications due to the extraordinary federal presence include: (1) a narrower property tax base because of the substantial amount of federally owned tax-exempt property in the city; (2) a reduced income and sales tax base because of the tax-exempt status of the federal government, which is the city's second largest employer (the federal government has about 240,567 employees as of January 2022 while the private sector has approximately 486,933 employees with a 33,667 decrease from last year, and (3) a significant amount of tax-exempt educational, religious, and foreign government properties. Federal actions could also (1) restrain economic development and (2) limit the District's tax revenues through the prohibition of taxing non-resident income earned in the District."); Yesim Yilmaz, *The Effect of Federal Preemption on the District of Columbia's Tax Revenue*, STATE TAX NOTES, Jan. 5, 2009 at 31-32 (Finding that preemption of D.C.'s taxing authority resulted in an estimated \$2.2 billion in lost income taxes and \$540 million in lost property tax value (while noting that the property tax numbers were a "gross underesti[mate]" due to lack of current data)).

¹⁴⁴ CRIMINAL JUSTICE UNDER THE REVITALIZATION ACT, *supra* 142 at 1; JON BOUKER, BUILDING THE BEST CAPITAL CITY IN THE WORLD: APPENDIX ONE 85 (2008).

¹⁴⁵ *Id.*

¹⁴⁶ BOUKER, *supra* note 144 at 81 (2008).

¹⁴⁷ Revitalization Act § 11201, 111 Stat. at 734-37.

¹⁴⁸ Revitalization Act § 11231, 111 Stat. at 745-46.

¹⁴⁹ Press Release, Dep't of Just., New Fed. Agency For D.C. Debuts (Aug. 5, 2000) <https://www.justice.gov/archive/opa/pr/2000/August/457dag.htm> [<https://perma.cc/FVM8-92D3>].

¹⁵⁰ Revitalization Act § 11233, 111 Stat. at 748-51.

(PDS) as a federally funded entity and; (5) the establishment of the Truth in Sentencing Commission.¹⁵¹

With the grant of statehood, the District will be able to garner the revenues necessary to effectively administer each of the components of the criminal justice system, making federal control unnecessary. The District will eliminate the structural deficit Congress created with the restrictions imposed in the Home Rule Act.¹⁵² For the first time, the District will be able to tax nonresidents who earn 57.7% of total income earned in the District.¹⁵³ The ability to build buildings higher than approximately ten stories, the maximum height now permitted by the Home Rule Act,¹⁵⁴ will provide previously unavailable and highly remunerative development and taxing opportunities for the District.

A. Prisons, the D.C. Jail, and Halfway Houses

1) Prisons

Because the District no longer has local control of a prison,¹⁵⁵ D.C. Code offenders who are convicted of felonies are delivered into the custody of the U.S. Bureau of Prisons (BOP), and at any given time they are housed in all or nearly all 122 BOP facilities in 37 states across the country.¹⁵⁶ As of July 31, 2023, 95.6% of D.C. resident prisoners,¹⁵⁷—1,208—were African American.¹⁵⁸ D.C. Congresswoman Eleanor Holmes Norton introduced a bill in 2023 that would require the BOP to place D.C. Code offenders in facilities within 250 miles of the District with the goal of helping them to “maintain relationships with family and support networks and help them reenter society”¹⁵⁹ The bill would also require the BOP to provide the District with

¹⁵¹ CRIMINAL JUSTICE UNDER THE REVITALIZATION ACT, *supra* note 142, at 2.

¹⁵² Home Rule Act § 602(a)(5), 87 Stat. at 813-14; WILKINS, *supra* note 143; D.C. TAX FACTS, *supra* note 143 at iii; Yilmaz, *supra* note 143, at 31–32.

¹⁵³ Home Rule Act § 602(a)(5), 87 Stat. at 813-14; WILKINS, *supra* note 143; D.C. TAX FACTS, *supra* note 143, at iii.

¹⁵⁴ Home Rule Act § 602(a)(6), 87 Stat. at 813.

¹⁵⁵ CRIMINAL JUSTICE UNDER THE REVITALIZATION ACT, *supra* note 142 at 3 (Lorton Prison was under local control when it was built in 1910 and came under the auspices of the D.C. Department of Corrections beginning in 1946 when the D.C. DOC was established. The revitalization act “closed the Lorton Correctional Facility and transferred custody over D.C. Code offenders with sentences that exceed a year to the Bureau of Prisons).

¹⁵⁶ Bureau of Prisons, *Our Locations*, <https://www.bop.gov/locations/list.jsp> [<https://perma.cc/H88N-NGG6>] (select “Prisons” under Facility Type and select “By State” under Category). *See also* Beyond Second Chances *supra* note 205, at 8.

¹⁵⁷ *Federal Bureau of Prisons*, D.C. JUST. STAT. ANALYSIS TOOL, <https://www.dcjsat.net/FBOP.html> [<https://perma.cc/49PE-3WZJ>]; *see also* Cmty. Supervision Program, Ct. Servs. and Offender Supervision Agency, Cong. Budget Justification Fiscal Year 2024 49 (2023) (sixty-six of the prisoners were female).

¹⁵⁸ *See Federal Bureau of Prisons*, D.C. JUST. STAT. ANALYSIS TOOL, <https://www.dcjsat.net/FBOP.html> [<https://perma.cc/49PE-3WZJ>].

¹⁵⁹ Improving Reentry for District of Columbia Residents in the Bureau of Prisons Act of 2023, H.R. 3339, 118th Cong. (2023) (the bill was referred to the House Judiciary Committee where no action has been taken—nor is any action expected to be taken).

information to enable the District to provide necessary and appropriate services to returning citizens.

Much has been written about the injustices faced by D.C. Code offenders in federal facilities and the poor outcomes they experience.¹⁶⁰ In 2016, the D.C. Corrections Information Council (CIC)¹⁶¹ visited Hazleton, a medium-security Federal Correctional Institution located 194 miles from D.C.—one of the closer facilities to the city. The report from their visit identified several problems D.C. inmates said they faced:

The majority of D.C. residents reported that staff treats them worse than other inmates and that other inmates treat D.C. residents the same. D.C. residents reported staff harassment due to their D.C. residency status and that they are more likely to have their visitors turned away. The CIC also received reports that D.C. residents are discriminated against with regard to employment and recreation. Incarcerated D.C. residents were nearly unanimous in expressing their desire to move closer to home.¹⁶²

In February of 2022, the Public Defender Service filed a federal class action lawsuit¹⁶³ against the BOP alleging that the BOP’s two-tiered system for calculating criminal history scores is arbitrary, capricious, and contrary to law, in violation of the Administrative Procedures Act¹⁶⁴ and racially discriminatory in violation of the Equal Protection Clause of the Fifth Amendment.¹⁶⁵ The complaint alleges that D.C. Code offenders are treated unfairly because the system used to calculate their security designations, the BOP’s Program Statement 5100.08, systematically leads to higher criminal history scores than does the U.S. Sentencing Guidelines system used to calculate security designations for those charged with federal offenses in D.C. and across the federal system.¹⁶⁶

¹⁶⁰ See Martin Austerhuhle, *D.C. Inmates Serve Time Hundreds Of Miles From Home. Is It Time To Bring Them Back?*, American University Radio, (Aug. 10, 2017), <https://wamu.org/story/17/08/10/d-c-inmates-serving-time-means-hundreds-miles-home-time-bring-back/> [<https://perma.cc/WQ44-ZYBX>].

¹⁶¹ *About the DC Corrections Information Council*, DC Corrections Information Council, <https://cic.dc.gov/page/about-cic> [<https://perma.cc/C6Q8-8Y5T>] (“The ... CIC is an independent monitoring body mandated by [] Congress and the D.C. Council to inspect, monitor and report on the conditions of confinement at facilities where D.C. residents are incarcerated. ... The CIC was established by the Revitalization Act and expanded through the D.C. Jail Improvement Act of 2003.”); DC Code § 24-101.01.

¹⁶² D.C. CORR. INFO. COUNCIL, FCI HAZELTON INSPECTION REPORT 2 (2016).

¹⁶³ Class Action Complaint for Declaratory and Injunctive Relief, *Blades v. Garland*, Case 1:22-cv-00279 (D.D.C. Feb. 3, 2022) [hereinafter PDS Complaint] The case is currently stayed and mediation has been extended until July 19, 2024. Minute Order, 1:22-cv-00279 (2024).

¹⁶⁴ 5 U.S.C. § 501, *et seq.*

¹⁶⁵ PDS Complaint, *supra* note 163 at 4.

¹⁶⁶ *Id.* at 2-3. Specifically, the lawsuit alleges that D.C. Code § 24-101 requires that individuals “sentenced pursuant to the D.C. Code *** shall be subject to any law or regulation applicable to persons committed for violations of laws of the United States *** and the Bureau of Prisons shall be responsible for [their] custody.” Therefore, security designations for D.C. Code offenders should be calculated using the same system applied to federal offenders. PDS Complaint, *supra* note 163, at 30. Moreover, the lawsuit alleges that there is no rational basis for treating the D.C. Code offenders differently. *Id.*

According to the complaint, as a direct result of the system applied, D.C. Code offenders are more likely to serve time in higher security facilities where they are subjected to greater violence and have more rigorous constraints on their liberty. They also have less access to programming, work opportunities, and religious activities, and are denied opportunities to seek release to home confinement than what might otherwise be available to them.¹⁶⁷ Perhaps most damning, according to the lawsuit, is that 39% of people convicted of D.C. offenses—95.6% of whom are Black—are incarcerated in high-security facilities, compared to 12% of the overall BOP population, which is majority white.¹⁶⁸

In Fall of 2020, the Council for Court Excellence (CCE) obtained and analyzed the point-in-time data acquired from the BOP that describes D.C. Code offenders incarcerated on July 4, 2020.¹⁶⁹ Several disturbing facts were uncovered. CCE found that very few people nearing release on D.C. Code offenses had participated in any kind of program, notwithstanding a BOP policy that prioritizes participation in programs for people within two years of release.¹⁷⁰ One-third of people had taken part in the most common program, a drug education program within two years of release.¹⁷¹ However, participation in the more intensive behavioral health programming was much more limited, with only 10% participating in the BOP’s Non-residential Drug Abuse Program and only 2% participating in either the Residential Drug Abuse Program or the BOP’s Cognitive Behavioral Therapy Program called “Challenge.”¹⁷² Especially concerning, only seven of the 1,024 individuals who were returning home from the BOP within the next two years had completed at least one parenting, technology, or vocational education program.¹⁷³ BOP’s failure to adequately prepare D.C. Code offenders for successful re-entry into the community is tragic for the returning citizens, their families, and the community.

More Than Our Crimes¹⁷⁴ and The Washington Lawyers’ Committee published “Voices From Within the Federal Bureau of Prisons: A System Designed to Silence and Dehumanize,” in

¹⁶⁷ *Id.* at 3, 30-31.

¹⁶⁸ *Id.* at 3-4.

¹⁶⁹ COUNCIL FOR COURT EXCELLENCE, ANALYSIS OF BOP DATA SNAPSHOT FROM JULY 4, 2020 FOR THE DISTRICT TASK FORCE ON JAILS & JUSTICE (2020). The Council for Court Excellence (CCE) received funding from the Office of Victim Services and Justice grants (OVSJG) in January 2019 to “build stakeholder engagement and solicit feedback related to the design and construction of a new correctional facility in the District of Columbia.” CCE partnered with the National Reentry Network for Returning Citizens and the Vera Institute of Justice and created the D.C. Task Force on Jails & Justice, a 26-member independent blue ribbon advisory Board now in its fourth year of operation. CCE also published the three Task Force reports issued to date, *Jails & Justice: A Framework For Change*, *Jails & Justice: Our Transformation Starts Today*, and *Jails & Justice: Tracking Change*. The author is honored to chair the Task Force.

¹⁷⁰ DISTRICT TASK FORCE ON JAILS & JUSTICE, *JAILS & JUSTICE: OUR TRANSFORMATION STARTS TODAY* 16 (2021) [HEREINAFTER TASK FORCE: PHASE II].

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ More than our Crimes is a nonprofit initiative under the fiscal sponsorship of the Justice Policy Institute. The organization advocates for and gives voice to individuals detained in federal prisons, with a special sub-focus on those from the District of Columbia. See More Than our Crimes, <https://morethanourcrimes.org/>.

September 2022.¹⁷⁵ Chapter by chapter, the report describes a parade of horrors associated with medical care; mental health; on-the-job training, drug abuse treatment, and education programming; food and daily life; lockdowns; abuse; grievances; and retaliation within the Federal BOP.¹⁷⁶ In addition to providing investigative reports by the Office of the Inspector General and other reports from neutral observers, media coverage, and research studies, the report centers the harrowing accounts by currently incarcerated individuals who speak their truths regarding their nightmarish experiences in the Federal BOP.¹⁷⁷ Each of the conditions described applies to facilities and conditions experienced every day by D.C. Code offenders across the country in Federal BOP facilities. The report concludes with a call to action recommending that Congress create an independent body with oversight authority and that the grievance process be mandated to be safe and fair.¹⁷⁸ The answer for D.C. Code offenders is to remove them from the Federal BOP and bring them home to D.C.

2) The D.C. Jail

An important District priority is to achieve local control over D.C. Code offenders, reducing the number of D.C. residents who are incarcerated, and ensuring those who are incarcerated are housed in local facilities. The D.C. Task Force on Jails & Justice (Task Force),¹⁷⁹ conducted extensive community engagement,¹⁸⁰ and developed eighty recommendations and a detailed implementation plan designed to overhaul the District's jails and justice system in three stages over ten years and restore local control over D.C. Code offenders.¹⁸¹ Community investments in treatment and housing along with legislative and policy changes¹⁸² are called for that, when implemented, will shrink the number of people incarcerated and the length of time for which they are incarcerated by one-third to one-half over ten years.¹⁸³

The Task Force plan calls for continuing the use of both D.C. jails, the Correctional Detention Facility (CDF) and the Correctional Treatment Facility (CTF) during the first stage, until FY 26, while building a new, smaller non-traditional jail correctional treatment facility, (CTF Annex).¹⁸⁴ The Task Force recommended that as soon as space permits, D.C. Code offenders in BOP facilities should be transferred to D.C. Department of Corrections (DOC)

¹⁷⁵ MORE THAN OUR CRIMES, VOICES FROM WITHIN THE FEDERAL BUREAU OF PRISONS: A SYSTEM DESIGNED TO SILENCE AND DEHUMANIZE (2022).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 70-72.

¹⁷⁹ See TASK FORCE: PHASE II, *supra* note 170.

¹⁸⁰ *Id.* at 17-22.

¹⁸¹ *Id.* at 23.

¹⁸² *Id.* at 25-76.

¹⁸³ *Id.* at 58 (The D.C. Jail population shrank by 30% during the pandemic. With the passage of emergency legislation, PR25-0341, on July 11, 2023, providing for presumptive pre-trial detention for adults and juveniles charged with many felonies, the jail population has risen by 12.4% from 1341 to 1507.). D.C. DEP'T OF CORR., THE DAILY POPULATION REPORT FROM SEPTEMBER 2ND THROUGH SEPTEMBER 8TH 2023 (on file with author); D.C. DEP'T OF CORR., THE DAILY POPULATION REPORT FROM JUNE 17TH THROUGH JUNE 23RD 2023 (on file with author).

¹⁸⁴ *Id.*

custody.¹⁸⁵ As of September 8, 2023, 1507 individuals were incarcerated in CDF (1123) and CTF (383).¹⁸⁶ The DOC lists CDF capacity as 2,164 and CTF as 1,400, for a total DOC capacity of 3,624.¹⁸⁷ The Task Force recommends that CTF house one prisoner per cell rather than two which will reduce the capacity of CTF to 700 and the total jail capacity to 2,924.¹⁸⁸ The Task Force calls for prioritizing the return of “those who are within two years of release; are housed on a dedicated medical unit; have minor children; have passed their initial parole eligibility date; are eligible for Second Look Amendment Act resentencing; are eligible for special education services under the Intellectual Disabilities Education Act; and/or have been diagnosed with a serious mental illness, intellectual or developmental disabilities, or traumatic brain injury.”¹⁸⁹

Both District jails are in dire need of replacement, and in the opinion of the U.S. Marshal Service, CDF does not meet minimum federal standards.¹⁹⁰ The Task Force proposed a three-stage timeline to replace the current jails with a new main facility and annex, with reliance on BOP ending in FY 2030.¹⁹¹

According to the Task Force, when the time comes for the District to move forward on local control, prior to statehood, the Mayor, the DOC, and the BOP will need to broker an agreement to transfer D.C. Code offenders to the DOC, and the D.C. Council will need to increase the D.C. Budget for this purpose.¹⁹² The DOC and the BOP will need to negotiate the rate to be paid per inmate.¹⁹³

The Blueprint¹⁹⁴ listed three options for local control of D.C. prisoners: “build a prison in the District of Columbia, agree with another state to build a prison, or contract with other prisons, either federal, private or in nearby states,”¹⁹⁵ but strongly recommended that the District build a prison in the District, following the three-stage process described by the Task Force for returning BOP prisoners to local control.¹⁹⁶ A recent report from the D.C. Policy Center also recommends the best option for the District is to build “build a unified system for the entirety of its incarcerated population—including a state prison, a jail, Correctional Treatment Facility

¹⁸⁵ *Id.* at 60.

¹⁸⁶ D.C. DEP’T OF CORR., THE DAILY POPULATION REPORT FROM SEPTEMBER 2ND THROUGH SEPTEMBER 8TH 2023 (on file with author).

¹⁸⁷ *Id.*

¹⁸⁸ TASK FORCE: PHASE II, REPORT OF THE COMMITTEE ON FACILITIES & SERVICES TO THE DISTRICT TASK FORCE ON JAILS & JUSTICE 8 (2020).

¹⁸⁹ TASK FORCE: PHASE II, *supra* note 170 at 60.

¹⁹⁰ Press Release, U.S. Marshals Serv., Statement by the U.S. Marshals Service Re: Recent Inspection of DC Jail Facilities (Nov. 2, 2021) <https://www.usmarshals.gov/news/press-release/statement-us-marshals-service#:~:text=The%20U.S.%20Marshal's%20inspection%20of%20Central%20Detention%20Facility%20revealed%20that,Federal%20Performance%2DBased%20Detention%20Standards.> [https://perma.cc/N8W5-EHTF].

¹⁹¹ TASK FORCE: PHASE II, *supra* note 170 at 59.

¹⁹² *Id.* at 60.

¹⁹³ *Id.* (The District has refused to accept the \$80 per day per person rate the BOP pays. DOC spends \$120-\$130 per day per person).

¹⁹⁴ D.C. Appleseed Blueprint, *supra* note 58

¹⁹⁵ 58*Id.*; *ee also infra* Calma & Saxin note 198 (reporting only 74 unfilled beds in Maryland).

¹⁹⁶ D.C. Appleseed Blueprint, *supra* note 58 at 8.

(CTF), and halfway homes” noting that “six other states with populations similar to D.C.’s have such systems, including Alaska, Connecticut, Delaware, Hawaii, Rhode Island, and Vermont.”¹⁹⁷

This approach, in the authors’ view, would allow the District to “leverage the [DOC] existing budget, existing facilities, and even settle on policies that reduce the number of incarcerated D.C. residents.”¹⁹⁸

The District is committed to improving conditions for individuals who are incarcerated in D.C. Jail facilities, which are under local control and doing so with significant input from the community. This approach stands in sharp contrast to the BOP under federal control, which does not seek input from District officials or residents. The Mayor’s Fiscal Year 2025 budget includes \$463 million for the new CTF Annex.¹⁹⁹ The initial stages of the design process for the CTF Annex are underway,²⁰⁰ with significant input from the Task Force. The scope of work for CGL, the architectural planning consultant firm, requires surveys of employees and inmates in the D.C. Jail and of the advocacy community as well as consultation throughout the process with the Task Force.²⁰¹

The District has not announced plans for a second correctional facility or to demolish either the CDF or the CTF as recommended by the Task Force. Still, CDF at least is expected to be demolished, which will require the new correctional annex to house the higher security level offenders now housed in CDF.²⁰²

3) Prisons after Statehood

With statehood, BOP custody of sentenced D.C. Code offenders will end, and the District DOC will resume authority over them. When D.C. Code offenders return to the District, they will have more access to family, friends, and religious activities and benefit from behavioral health, workforce development, educational and vocational opportunities not available in the BOP facilities where the majority are housed. Research has shown that contact with family while

¹⁹⁷ Emilia Calma & Yesim Saxin, *How much Would it Cost to Build and Maintain a New D.C. Prison*, D.C. POLICY CENTER (Mar. 8, 2023), <https://www.dcpolicycenter.org/publications/cost-new-dc-prison/> [<https://perma.cc/Q2E7-SC3Q>].

¹⁹⁸ *Id.*

¹⁹⁹ D.C. Dep’t of Gen. Servs., *New DC Jail - Construction of a New Corrections Facility*, <https://dgs.dc.gov/page/new-dc-jail-construction-new-corrections-facility> [<https://perma.cc/7GJB-CUQ3>].

²⁰⁰ Press Release, D.C. Dep’t of Corr. & Dep’t of Gen. Servs., *Bowser Administration Announces Selection of Architectural Program Consultant for Correctional Treatment Facility Annex at DC Jail* (May 13, 2023) <https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DOCDGSPressReleaseCTFJailAnnex.pdf> [<https://perma.cc/5XB8-NEW6>].

²⁰¹ D.C. DEP’T OF CORR., *DCAM-23-CS-RFP-0007, REQUEST FOR PROPOSAL: ARCHITECTURAL PROGRAM CONSULTANT- CORRECTIONAL TREATMENT FACILITY ANNEX 12* (2023).

²⁰² DOC Director Thomas Faust, in a meeting with the author in her capacity as chair of the Task Force, noted that he is committed to ensuring that the new correctional annex provides more programming and services, including mental health services, for this higher security jail population as its needs are greater. He encouraged the Task Force to advocate for funding for this purpose. Director Faust’s collaborative efforts are much appreciated by the Task Force. Interview with Thomas Faust, D.C. Dep’t of Corr. Dir. (Aug. 9, 2023).

in prison is a predictor of strong job prospects after release and lower recidivism rates.²⁰³ As long as the District budgets appropriately, DOC (rather than BOP) custody will have a positive impact on the rate of recidivism and successful re-entry.

4) Halfway Houses

D.C. residents experience a range of injustices due to federal control of its halfway houses. The BOP contracts with residential reentry centers (RRCs) to provide reentry services to men and women who are nearing release from custody.²⁰⁴ The BOP has done a wholly inadequate job of ensuring that appropriate housing and services are made available to D.C.'s returning citizens.

a. Hope Village

For example, the BOP operated Hope Village, a men's halfway house in Southeast D.C., for 42 years. It was the subject of sharp criticism by the Council for Court Excellence (CCE) in its December 2016 report, *Beyond Second Chances Returning Citizens: Reentry Struggles and Successes in the District of Columbia*,²⁰⁵ and by the 2013 D.C. Corrections Council inspection report.²⁰⁶ After conducting a listening session jointly with University Legal Services, CCE reported Hope Village resident complaints about inadequate job search assistance, including transportation assistance, and inadequate drug treatment and medical care, among other issues.²⁰⁷ These complaints mirrored those found by the CIC inspection, which also raised concerns about inadequate grievance and disciplinary procedures at Hope Village.²⁰⁸ CCE recommended that the BOP not renew the contract with Hope Village and that the BOP use the new DOJ RRC statement of work²⁰⁹ to "hold a new halfway house provider accountable for offering high quality services, including workforce engagement, connection to behavioral and physical health services, and securing housing, family support and offense-specific issues, by tracking outcomes such as employment, treatment engagement, and recidivism."²¹⁰

Finally, the Washington Lawyers' Committee filed a federal lawsuit on behalf of inmates who alleged a lack of cleaning supplies and inability to practice social distancing during the

²⁰³ CHARLES COLSON TASK FORCE ON FEDERAL CORRECTIONS, *TRANSFORMING PRISONS, RESTORING LIVES* 39-41 (2016).

²⁰⁴ Bureau of Prisons, *Completing the Transition*, https://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp [<https://perma.cc/ST2G-A3PK>].

²⁰⁵ COUNCIL FOR CT. EXCELLENCE, *BEYOND SECOND CHANCES* 14-20 (2016).

²⁰⁶ D.C. CORR. INFO. COUNCIL, *CIC HOPE VILLAGE REPORT* (2013).

²⁰⁷ *BEYOND SECOND CHANCES*, *supra* note 205, at 14-20.

²⁰⁸ *CIC HOPE VILLAGE REPORT*, *supra* note 206, at 13-36.

²⁰⁹ DEP'T OF JUST., *STATEMENT OF WORK RESIDENTIAL REENTRY CENTER* (2016).

²¹⁰ *BEYOND SECOND CHANCES*, *supra* note 205, at vii.

pandemic.²¹¹ The lawsuit resulted in the closure of Hope Village at last on April 30, 2020. More than four years later, the District still does not have a replacement. After Hope Village closed, the BOP sent some of the inmates to a Baltimore halfway house operated by Volunteers of America.²¹² Congresswoman Eleanor Holmes Norton decried the move noting that “only contact with family and friends appears to have any affect [sic] on recidivism,”²¹³ and Mayor Muriel Bowser agreed.²¹⁴ Kevin Donahue, then D.C. deputy mayor for Public Safety and Justice, wrote to the BOP offering several immediately available housing options for the men, including some at no cost to the BOP.²¹⁵ Notwithstanding these pleas and offers, the BOP continues to send returning D.C. men elsewhere for halfway house services.²¹⁶

The BOP asserts that RRCs “provide programs that help inmates rebuild their ties to the community and reduces the likelihood that they will recidivate.”²¹⁷ Common sense suggests that successful reentry is less likely to happen when a returning citizen is assigned to a halfway house in a distant jurisdiction staffed by individuals without knowledge or connection to the District of Columbia. Returning citizens need assistance with the transition back to the community in which they will live and work, attend vocational school or pursue an academic route, secure substance abuse, health, and mental health treatment, and most importantly, connect with family, friends, and faith-based options. Failure to make an effective transition leads to potential danger for D.C. citizens and property. Regaining local control is imperative if D.C. is to improve outcomes for returning citizens.²¹⁸

²¹¹ Class Action Complaint for Injunctive and Declaratory Relief and Class Petition for Writs of Habeas Corpus, *Williams v. Fed. Bureau of Prisons*, No. 1:20-cv-890-RC (D.D.C. Apr. 2, 2020), *dismissed*, Notice of Dismissal of Action Without Prejudice, *Williams v. Fed. Bureau of Prisons*, No. 1:20-cv-890-RC (D.D.C. Apr. 28, 2020) (case was dismissed without prejudice following BOP actions that rendered the matter moot).

²¹² Justin Wm. Moyer, *D.C.’s Hope Village halfway house sees exodus after coronavirus lawsuit*, WASH. POST. (Apr. 28, 2020, 6:36 PM), https://www.washingtonpost.com/local/dcs-hope-village-halfway-house-sees-exodus-after-coronavirus-lawsuit/2020/04/28/e355a3f6-88a8-11ea-9759-6d20ba0f2c0e_story.html [<https://perma.cc/37EV-U4PC>].

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ Letter from Kevin Donahue, Deputy Mayor for Pub. Safety and Just., Gov’t of the D.C. to Hugh Hurwitz, Assistant Dir., Fed. Bureau of Prisons, Reentry Servs. Div. (Apr. 27, 2020), https://cic.dc.gov/sites/default/files/dc/sites/cic/release_content/attachments/Letter%20to%20BOP%20re%20Hope%20Village%2004.27.20%20%284%29.pdf [<https://perma.cc/GB7L-LA22>].

²¹⁶ In April 2022, 101 District residents were in BOP overseen by RCC or Community Placement. *See Federal Bureau of Prisons*, D.C. JUST. STAT. ANALYSIS TOOL, <https://www.dcjsat.net/Agency%20Dash%20-%20FBOP.html>, [<https://perma.cc/49PE-3WZJ>]; Fifty-four, or just over 50%, of that population was housed in an RCC in Baltimore. *See* D.C. CORR. INFO. COUNCIL, VOLUNTEERS OF AMERICA RESIDENTIAL REENTRY CENTER 3 (2022).

²¹⁷ Bureau of Prisons, *Completing the Transition*, https://www.bop.gov/about/facilities/residential_reentry_management_centers.jsp.

²¹⁸ From September 2021–August 2022 (the most recent data available) an average of 105 D.C. residents were in a BOP Residential Reentry Center or Community Placement. *See Federal Bureau of Prisons*, D.C. JUST. STAT. ANALYSIS TOOL, <https://www.dcjsat.net/Agency%20Dash%20-%20FBOP.html> [<https://perma.cc/49PE-3WZJ>].

b. Core D.C.

The BOP awarded a \$64 million contract to a new Halfway House provider, Core D.C., in June 2020.²¹⁹ After multiple delays due to wrangling among D.C. Council members and residents of Wards 5 and 7,²²⁰ the 300-bed Core D.C. Halfway house is targeting a 2024 opening.²²¹ Core D.C. is looking at the feasibility of retrofitting two former warehouses on the site to create a campus where training and educational programming along with services could be provided to residents.²²² The building, located at 3701 Benning Road NE, is in an industrial area behind a shopping mall close to train tracks.²²³ Mayor Bowser has raised a concern about the size of the facility and would like to see the number of beds reduced.²²⁴ With local control the mayor will control the size and location of the facilities provided for returning citizens.

c. Fairview

The BOP contracts with Reynolds and Associates, Inc., which has operated Fairview, the District of Columbia's halfway house for women located at 1430 G. St. NE for more than 20 years.²²⁵ Reynolds' mission is "to prepare persons in custody for return to the community as more self-supporting contributing members."²²⁶ According to the Reynolds RRC Handbook, Fairview works to meet this by "offering services in the area of counseling, drug education, relapse prevention, and life skills development ... to assist adult female offenders, in developing positive life patterns that transfer into a successful reentry into the community."²²⁷ Fairview has a capacity of sixty women but at the time of the most recent CIC inspection, only 20 were under supervision.²²⁸ The DOJ Office of the Inspector General conducted an audit of the BOP contract with Reynolds to operate Fairview in September 2018.²²⁹ The audit concluded that the BOP

²¹⁹ Justin Wm. Moyer, *Halfway house for 300 men will open in Northeast after departure of Hope Village*, WASH. POST (June 8, 2020 6:47 PM) https://www.washingtonpost.com/local/halfway-house-for-300-men-will-open-in-northeast-after-departure-of-hope-village/2020/06/08/d93aa506-a996-11ea-868b-93d63cd833b2_story.html [<https://perma.cc/36QM-9UEC>] [Hereinafter *Hope Village Article*].

²²⁰ *Id.*

²²¹ Reverend Graylan Hagler, Speech to the D.C. Task Force on Jails & Justice, (Sept. 7, 2023) (The delays caused by excess water, which must be pumped. The modular components for the building are being manufactured in Pennsylvania and will be trucked to D.C. when the foundation is completed.).

²²² *Id.*

²²³ *Hope Village Article*, *supra* note 219.

²²⁴ The Politics Hour with Kojo Namdi, *The Politics Hour: April 2, 2021*, AM. UNIV. RADIO at 12:43:44, <https://wamu.org/story/21/04/02/the-politics-hour-april-2-2021/> [<https://perma.cc/T3NF-LBVL>].

²²⁵ D.C. CORR. INFO. COUNCIL, FAIRVIEW OF REYNOLDS AND ASSOCIATES, INC. RESIDENTIAL REENTRY CENTER 6 (2019).

²²⁶ *Id.* at 5 n.2.

²²⁷ *Id.* at 5 n.3

²²⁸ *Id.* at 5 ("At the time of the inspection, there were 20 residents under Fairview supervision, 16 of whom were living at the facility (15 BOP and one DOC) and four of whom were on home confinement.").

²²⁹ U.S. DEP'T OF JUST., OFF. OF THE INSPECTOR GEN., AUDIT OF THE FEDERAL BUREAU OF PRISONS' RESIDENTIAL REENTRY CENTER CONTRACTS AWARDED TO REYNOLDS & ASSOCIATES, INC., WASHINGTON, D.C., (2018) <https://www.oversight.gov/sites/default/files/oig-reports/a1830.pdf> [<https://perma.cc/EW47-3VAE>].

could improve its monitoring of Reynolds' compliance with tracking longstanding repetitive deficiencies, that Reynolds had significant record-keeping shortcomings regarding provision of core services (like drug and alcohol testing) such that the company could not document that it fully provided services under the contract, and that Reynolds needed to strengthen its internal controls and provide complete employment information to substantiate the fees collected from those in custody.²³⁰ The Inspector General also recommended that Reynolds document explanations for why eligible inmates were not placed in home confinement.²³¹

5) Halfway Houses After Statehood

With or without statehood, the District needs to do more for returning citizens. The Task Force recommended that the District “increase support for the successful reentry of people returning to D.C. from prison and jail by investing in housing, education, training, and employment, behavioral health treatment and social and emotional support, and providing protections in law from discrimination in housing, employment, education and other areas based on criminal record.”²³² The Task Force is committed to continuing to advocate for legislative, policy, and budgetary changes needed to achieve better outcomes for D.C. residents.

When the District has statehood, D.C. will control its own halfway houses and operate them in a manner consistent with D.C. goals and values. The District should immediately reverse the policy currently employed by the BOP, which authorizes halfway houses to take “subsistence payments,” in the amount of 25% of resident’s gross wages and funds from Veterans Assistance, Worker’s Compensation, Social Security, retirement income, and income from the sale of property as a means to “promote financial responsibility.”²³³ This practice results in preventing reentering citizens from “saving for rent, paying child support, and paying fees and fines.”²³⁴ Halfway houses are permitted to charge subsistence payments even when they are supervising individuals living in home confinement.²³⁵ CCE suggested that “putting 25% of resident’s wages into savings accounts to be used by the resident upon completing the RRC term would better support successful reentry.”²³⁶

The D.C. Department of General Services (DGS) will manage leases and local elected officials and agency staff familiar with the needs of D.C.’s returning citizens will have the authority to determine the locations selected, the most appropriate size for the facilities, and the services and programming to be offered. Returnees will have improved access to local job training; educational, vocational, and workforce development opportunities. Never again will

²³⁰ *Id.* at 28.

²³¹ *Id.* at 29.

²³² DISTRICT TASK FORCE ON JAILS & JUSTICE, JAILS & JUSTICE: A FRAMEWORK FOR CHANGE 43 (2019) [HEREINAFTER TASK FORCE: PHASE I].

²³³ DEP’T OF JUST., STATEMENT OF WORK RESIDENTIAL REENTRY CENTER 61-63 (2016).

²³⁴ BEYOND SECOND CHANCES, *supra* note 205 at 15.

²³⁵ *Id.*

²³⁶ *Id.* at 16.

returning citizens be sent to other jurisdictions. Families and friends will be close by and more readily able to offer the love and support that are so important to successful reentry and reduced recidivism.

B. *Post-incarceration Supervision of D.C. Code Offenders*

1) The U.S. Parole Commission (USPC)

The USPC assumed authority over all decisions regarding the release of incarcerated D.C. Code offenders in 2000, after the Revitalization Act came into effect.²³⁷ The Truth in Sentencing Commission,²³⁸ also created by the Revitalization Act, was directed to develop recommendations to the D.C. Council on amendments to the D.C. Code with respect to sentences to be imposed for felonies committed on or after 2000. As a result of their efforts, two separate systems now govern the release of D.C. Code offenders after imprisonment.²³⁹ Individuals convicted prior to the implementation of the Revitalization Act were given indeterminate sentences, for example, 10 to 30 years. They must serve at least the minimum period, in this example 10 years, and are then parole eligible for the remaining 20 years of their sentence under the authority of the USPC.²⁴⁰ Congress was explicit, however, in requiring that USPC “shall” exercise its authority “pursuant to the parole laws and regulations of the District of Columbia ...” as opposed to the federal parole laws.²⁴¹

D.C. Code offenders convicted after August 5, 2000 are subject to the Truth in Sentencing guidelines.²⁴² They receive determinate sentences and may also be sentenced to a period of supervised release, for example, 30-years of incarceration plus five years of supervised release.²⁴³ They must serve a minimum of 85% of their sentence.²⁴⁴ Inmates may earn up to a maximum of 15% off their sentence for participating in academic programs or other programs and earning good time credits.²⁴⁵

The USPC employs only two commissioners²⁴⁶ who are appointed by the President of the United States and confirmed by the Senate.²⁴⁷ The USPC caseload is dwindling after the abolition of federal parole in 1984.²⁴⁸ In fact, the USPC was set to be shuttered in the 2000s but

²³⁷ *Infra* RESTORING LOCAL CONTROL note 239 at 22.

²³⁸ Revitalization Act § 11211, 111 Stat. at 740-41.

²³⁹ JUST. POL'Y INST., RESTORING LOCAL CONTROL OF PAROLE TO THE DISTRICT OF COLUMBIA 6 (2019) [Hereinafter RESTORING LOCAL CONTROL OF PAROLE].

²⁴⁰ D.C. Code § 24-404.

²⁴¹ D.C. Code § 24-131(c); Revitalization Act § 11231, 111 Stat. at 745.

²⁴² Revitalization Act § 11211, 111 Stat. at 740-41.

²⁴³ CRIMINAL JUSTICE UNDER THE REVITALIZATION ACT, *supra* note 142 at 25.

²⁴⁴ 18 U.S.C. § 3624.

²⁴⁵ 18 U.S.C. § 3624(b).

²⁴⁶ Acting Chair, Patricia Cushwa, a former member of the Maryland Parole Board for twelve years and Charles Massarone, a former police officer who later served for three years as a member of the Kentucky Parole Board.

²⁴⁷ U.S. Parole Comm'n, Acting Chairman, U.S. Parole Commission Patricia K. Cushwa, <https://www.justice.gov/uspc/staff-profile/patricia-k-cushwa> [<https://perma.cc/38W5-M37C>]; U.S. Parole Comm'n, Commissioner, U.S. Parole Commission Charles T. Massarone, <https://www.justice.gov/uspc/staff-profile/charles-t-massarone> [<https://perma.cc/38W5-M37C>].

²⁴⁸ Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (1984).

gained new life when D.C. Code offenders came under its jurisdiction.²⁴⁹ Today, D.C. Code offenders comprise 86% of the USPC caseload, or 5,141, of which 1,275 (21%) are D.C. parolees and 3,866 (65%) are on supervised release.²⁵⁰ Currently, D.C. has no say in determining who will be appointed to manage the release and supervision of D.C. Code offenders. The commissioners are not required to live in the District.²⁵¹

D.C. Code offenders experience over-incarceration under federal control as evidenced by the Justice Policy Institute (JPI) Report, which criticizes both the USPC's imposition of unusually long periods of incarceration and its parole revocation record, calling the USPC's approach "out of step with practices now used in many other jurisdictions."²⁵² The USPC has also been criticized for not providing notice to those on parole of their right to request early termination, which has led to individuals staying on parole for longer periods than are necessary.²⁵³ The USPC is required to review each case after two years to determine whether the supervisee has demonstrated conduct consistent with early termination of parole.²⁵⁴ If early termination is denied, the supervisee has a presumption of termination at five years barring evidence of future criminal behavior.²⁵⁵ The JPI Report noted complaints of individuals continuing on parole beyond five years despite no evidence of future criminal conduct.²⁵⁶

The JPI Report finds USPC revocations for technical violations particularly troubling noting that typical sentences for technical violations are twelve to sixteen months.²⁵⁷ Unlike D.C. under the USPC, many states have set revocation caps substantially limiting prison time for parole violations.²⁵⁸ The JPI Report raises the concern that revocation decisions are made pursuant to policy positions set by two parole commissioners who have "no connection to the D.C. community or government and may be out-of-step with local priorities and national trends."²⁵⁹ USPC has been criticized for a practice of sometimes revoking parole or supervised release leading to incarceration after a finding of probable cause on a new arrest, using a preponderance of the evidence standard, even when the person under supervision is found not

²⁴⁹ For several years, the sunset provision was moved back in two-year blocks until 2022 when it was extended for only one year. DEP'T OF JUST., U.S. PAROLE COMMISSION FY 2024 BUDGET REQUEST AT A GLANCE I, https://www.justice.gov/d9/2023-03/uspc_fy_24_budsum_ii_omb_cleared.pdf. See, Pub. L. 118-42, div. G, title III, §302(b), Mar. 9, 2024, 138 Stat. 451, (extending the period from 36 years and 129 days to 36 years and 335 days, through October 1, 2024.)

²⁵⁰ DEP'T OF JUSTICE, FY 2023 PERFORMANCE BUDGET USPC 13 (2022).

²⁵¹ U.S. Parole Comm'n, Acting Chairman, U.S. Parole Commission Patricia K. Cushwa, <https://www.justice.gov/uspc/staff-profile/patricia-k-cushwa>; see U.S. Parole Comm'n, Commissioner, U.S. Parole Commission Charles T. Massarone, <https://www.justice.gov/uspc/staff-profile/charles-t-massarone> (bio indicates that the Chairman lives in Maryland).

²⁵² RESTORING LOCAL CONTROL OF PAROLE, *supra* note 239 at 34.

²⁵³ *Id.* at 35.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*; see also U.S. Parole Comm'n, *supra* note 231.

guilty or when the case is dismissed before trial.²⁶⁰ By contrast, D.C. Superior Court judges normally revoke probation only after a finding of guilt on a new arrest.²⁶¹

2) Court Services and Offender Supervision Agency (CSOSA)

a. Release on Parole, Supervised Release, and Probation

The USPC has jurisdiction over the Court Services and Offender Supervision Agency (CSOSA), which through its Community Supervision Program (CSP) determines whether and when to grant parole to those who are eligible, enforces parole conditions, and may revoke parole after violations.²⁶² USPC through CSOSA's CSP also determines conditions of release and revocation for those sentenced to supervised release under the Truth in Sentencing guidelines.²⁶³ In addition, CSOSA's CSP supervises adults released by the Superior Court of the District of Columbia on probation.²⁶⁴ Finally, the CSP develops and provides the court and the USPC with information for sentencing determinations, supervision conditions, and offender compliance.²⁶⁵

According to the Supervised Offender Summary, in FY 2022, CSP monitored or supervised approximately 6,550 adults on any given day and 9,963 persons in total over the course of the fiscal year.²⁶⁶ During FY 2022, 4,151 persons entered CSOSA supervision: 3,614²⁶⁷ individuals were ordered to CSOSA supervision by the Superior Court of the District of Columbia and 537 offenders released from incarceration in a Federal BOP facility on parole or supervised release.²⁶⁸ In FY 2022, CSOSA supervised 663 parolees and 1,517 people on supervised release.²⁶⁹

CSOSA assumed the adult probation function from the Superior Court of the District of Columbia and the parole function from the D.C. Board of Parole.²⁷⁰ The D.C. Board of Parole based its decisions regarding D.C. Code offenders with indeterminate sentences on the 1987 Regulations, along with the 1991 Guidelines (which were adopted to ensure uniform application

²⁶⁰ RESTORING LOCAL CONTROL OF PAROLE, *supra* note 239 at 30, 34.

²⁶¹ Memorandum from proponents of the Superior Ct. of the D.C. Paroling Authority Model to the Council of Ct. Excellence Task Force on Jails & Justice 3 (2020) [hereinafter Superior Ct. Memorandum] (on file with author).

²⁶² CT. SERVS. AND OFFENDER SUPERVISION AGENCY, CONG. BUDGET JUSTIFICATION FY2024 3 (2023) [hereinafter CSOSA FY2024 BUDGET].

²⁶³ PUB. DEF. SERV. FOR D.C., CRIM. PRAC. INST. MANUAL § 12.1 (2015).

²⁶⁴ CSOSA FY2024 BUDGET *supra* note 262 at 3 (The CSP also supervises a smaller number of individuals subject to Deferred Sentencing Agreements (DSA) or Civil Protection Orders (CPOs)).

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 3-4 (approximately 88% of supervisees during the year were male and 12% were female).

²⁶⁷ *Id.* (This number includes offenders sentenced to probation and individuals with CPOs and DSAs.)

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ CRIMINAL JUSTICE UNDER THE REVITALIZATION ACT, *supra* note 144 at 3.

of the 1987 Regulations).²⁷¹ CSOSA is legally required to apply that system for D.C. Code offenders with indeterminate sentences.²⁷²

USPC's 2000 Parole Guidelines were put in place to govern those with determinate sentences.²⁷³ For the most part, the two regulatory regimes are the same with regard to the procedures for revocation, fact-finding and sentencing guidelines.²⁷⁴ The two systems produce notably different outcomes, however, as the USPC system employs different definitions of program achievement and negative institutional behavior, a different scoring system that gives more weight to the type of offense and added language, which affords additional discretion in some parole decisions.²⁷⁵

D.C. Code offenders fared much better when the locally appointed D.C. Board of Parole made decisions regarding release on parole. According to the D.C. Policy Center, parole was granted to approximately 77% of D.C. Code offenders within one year of their initial eligibility under the prior regime.²⁷⁶

The D.C. Policy Center notes that release decisions and length of sentences-served data is not made available by the USPC, making comparisons impossible.²⁷⁷ However, the District Court in *Sellmon v. Riley* found that the 2000 USPC Guidelines could “substantially increase the risk [of serving] additional time.”²⁷⁸ The Court “grant[ed] hearings to many plaintiffs sentenced between 1985 and 2000 who could factually demonstrate that the effect of the new policies substantially increased the risk of lengthier incarceration[.]”²⁷⁹ Data analysis conducted by the Government Accountability Office revealed that only 53% of D.C. Code offenders eligible for parole between 2002 and 2014 had been granted parole.²⁸⁰ The rate of release is much lower in part because application of the USPC Guidelines results in much higher criminal history scores, which in turn results in D.C. Code offenders being assigned to much higher security facilities where they are much less likely to find programming required to secure a favorable score on the “program achievement” measure.²⁸¹ These facilities also have a higher incidence of violence, which impacts the “negative institutional behavior” measure.²⁸² Another factor impacting the lower rate of release is the lower frequency of parole hearings. USPC conducts hearings every three to five years rather than annually as was the D.C. Parole Board practice.²⁸³ The lower rate

²⁷¹ *Id.* at 25.

²⁷² *Id.* at 26.

²⁷³ *See Id.* at 14-15, 24-27 (noting the change from indeterminate to determinate system under changes in 2000); *see also* D.C. Code § 24-404.

²⁷⁴ CRIMINAL JUSTICE UNDER THE REVITALIZATION ACT, *supra* note 144 at 23-24.

²⁷⁵ *Id.* at 26.

²⁷⁶ *Id.* at 25 (40% at the initial hearing and an additional 61.4% at the first rehearing).

²⁷⁷ *Id.* at 24.

²⁷⁸ *Sellmon v. Riley*, 551 F. Supp. 2d 66, 92 (D.D.C. 2008); *see also* Sophia Browning, Note, *Three Ring Circus: How Three Iterations of D.C. Parole Policy Have up to Tripled the Intended Sentence for D.C. Code Offenders*, 14 GEO. J.L. PUB. POL'Y 577, 594.

²⁷⁹ CRIMINAL JUSTICE UNDER THE REVITALIZATION ACT, *supra* note 144, at 26.

²⁸⁰ *Id.*

²⁸¹ PDS Complaint *supra* note 163, at 3.

²⁸² Browning, *supra* note 278, at 585-91.

²⁸³ CRIMINAL JUSTICE UNDER THE REVITALIZATION ACT, *supra* note 144, at 26.

may also reflect the fact that the few remaining inmates sentenced pre-2000, are serving longer sentences for more severe crimes.²⁸⁴

JPI's 2019 report, *Restoring Local Control of Parole to the District of Columbia*, described challenges and concerns raised by attorneys and stakeholders who work on D.C. parole applications with the USPC, justice-involved individuals, and their families.²⁸⁵ For example:

the USPC systematically denies parole based on the severity of an individual's original offense, rather than on evidence of a person's progress toward rehabilitation ... 'This approach imposes the USPC as a sort of re-sentencing court, usurping control over sentencing from the sentencing judge and substituting its own judgment about how much time a prisoner should serve[.]'²⁸⁶

The JPI Report raised a panoply of additional concerns including: poor communication between the BOP and the USPC with parole applicants regarding parole eligibility, notification, and scheduling; the need for attorneys to file FOIA requests to receive critical relevant information from BOP and USPC in preparation for parole hearings; lost documents; extensive unnecessary delays; refusal to allow more than one representative such that witnesses, family and supporters are not permitted; rejection of positive parole recommendations by hearing examiners based on the nature of the offense; insufficient guidance on how to mitigate factors that led to denial; and recommendations for programs either unavailable at the prison where the inmate is housed or no longer available at all.²⁸⁷

The President of the United States appoints the Director of CSOSA who must be confirmed by the Senate.²⁸⁸ The Director, charged with overseeing thousands of D.C. Code offenders, is not accountable to elected officials or to the residents of the District. D.C. Congresswoman Eleanor Holmes Norton introduced legislation in 2023 that would require the Directors of both CSOSA and PSA to live in D.C., noting that the primary reason that residency laws exist is so that "government officials have a connection to the residents they serve, and in-depth knowledge of the unique issues and challenges faced by residents."²⁸⁹

²⁸⁴ *Id.*

²⁸⁵ RESTORING LOCAL CONTROL OF PAROLE, *supra* note 239, at 30 n.74.

²⁸⁶ *Id.* at 31, 34 (quoting Philip Fornaci, Washington Lawyers' Committee for Civil Rights and Urban Affairs); *See also*, Scott Rodd, *D.C.'s Broken Parole System*, WASH. CITY PAPER, <https://washingtoncitypaper.com/article/194525/dcs-broken-parole-system/> (Sept. 30, 2016) [<https://perma.cc/SJ3A-SL5D>] (describing an open letter signed by seventeen judges, prosecutors, defense attorneys, and legal advocates arguing that many D.C. offenders serving parole sentences have "languished behind bars significantly longer than intended" and that the USPC ignores the judges sentences and makes its own decisions regarding the length of time an offense is worth.).

²⁸⁷ RESTORING LOCAL CONTROL OF PAROLE, *supra* note 239 at 31-33.

²⁸⁸ Ct. Serv's & Offender Supervision Agency for D.C., *Who we are, about the Director*, <https://www.csosa.gov/about-the-director/> [<https://perma.cc/6RV8-JAML>].

²⁸⁹ Press Release, Eleanor Holmes Norton, Member, House of Representatives, Norton Introduces Bill to Require Federal Officials in Charge of D.C. Supervision Agencies to Reside in D.C. (July 17, 2023), <https://norton.house.gov/media/press-releases/norton-introduces-bill-require-federal-officials-charge-dc-supervision>

The current system in D.C. is broken. Our “parole system is not transparent” with “surprisingly little public information on the outcomes of parole hearings and whether USPC makes timely decisions to reduce the amount of time served after eligibility for parole or supervision.”²⁹⁰ D.C., under statehood, would appoint D.C. residents with stakes in the community to the leadership of agencies charged with making incarceration and release decisions for D.C. Code offenders.

b. Revocation

In 2022, CSOSA initiated revocation proceedings by filing 3,315 Alleged Violation Reports (AVR).²⁹¹ Thirty-two (11%) of the revocations were for purely technical violations²⁹² and 77% of the revocations were based a combination of new arrest and technical violations.²⁹³

In 2022, 285 individuals successfully completed parole, 859 successfully completed supervised release, and 2,890 successfully completed probation.²⁹⁴ “D.C. Code offenders under probation typically remain under CSP supervision for nearly two years, D.C. Code offenders under parole for 12 to 18 years, and those under supervised release for typically longer than three years.”²⁹⁵

3) Pretrial Services Agency (PSA)

The PSA became an independent entity within CSOSA with its own budget and organizational structure per the Revitalization Act.²⁹⁶ PSA makes pretrial release recommendations to the courts regarding those who are arrested in the District.²⁹⁷ PSA also provides supervision and coordinated services, which include: treatment needs assessment, drug court for misdemeanants and non-violent felonies and special services for defendants with mental health treatment needs.²⁹⁸ According to PSA’s 2024 Budget justification, during 2022,

[<https://perma.cc/3ZTS-5U6H>] [hereinafter Norton Supervision Press Release] (The bill was previously introduced in 2018, 2019, and 2022).

²⁹⁰ CRIMINAL JUSTICE UNDER THE REVITALIZATION ACT, *supra* note 144 at 30.

²⁹¹ CSOSA FY2024 BUDGET, *supra* note 262 at 31 (of these, 34% were on parole or supervised release, 64% were on probation, and 2% were interstate authorities).

²⁹² *Id.* at 31, 35-37 (More than 87% of technical violations were drug related, the remainder were for violations such as failure to report for supervision, a GPS violation, or failure to complete CSOSA programs.).

²⁹³ *Id.* at 31.

²⁹⁴ *Id.* at 33.

²⁹⁵ CRIMINAL JUSTICE UNDER THE REVITALIZATION ACT, *supra* note 142 at 28.

²⁹⁶ 28 C.F.R. § 800 (2023); Ct. Servs. & Offender Supervision Agency, *Who we are | Our History*, <https://www.csosa.gov/our-history/> [<https://perma.cc/KW48-2W48>].

²⁹⁷ CRIMINAL JUSTICE UNDER THE REVITALIZATION ACT, *supra* note 142 at 10.

²⁹⁸ *Id.*

PSA served more than 15,500 arrestees and defendants.²⁹⁹ PSA provided services to 10,300 additional arrestees and defendants, which included completing criminal history checks for persons who were released on citation or personal recognizance, and conducted drug testing for nearly 6,000 non-defendants, bringing the Agency’s total responsibility to just under 32,600 individuals.³⁰⁰ During 2022, defendants remained under supervision for an average of 134 days.³⁰¹

PSA staff are federal employees not accountable to elected officials or D.C. residents. The executive committee for the agency includes just two District employees, the chief judge for the D.C. Court of Appeals, who serves as chair, and the chief judge of the D.C. Superior Court.³⁰² All other members—two federal judges, the U.S. Attorney and Public Defender for the District, and the director of CSOSA—are federal employees. The executive committee, without requiring input or oversight from District residents, sets policy and direction for the agency, which oversees the incarceration status of thousands of primarily low-income African American alleged D.C. Code offenders.³⁰³

The Task Force made 11 recommendations to address perceived shortcomings by improving PSA operations and policies in order to promote transparency; reduce the burdens of supervision and the risk of revocation; add due process and other procedural protections for both those on release and victims of crime; increase training; and increase community resources, among other goals.³⁰⁴ These changes will require additional budgetary support, legislative and policy changes, and education for role players in the criminal justice system. After statehood is achieved, the District can adopt changes that will result in fairer and more just outcomes for individuals charged with crimes in D.C.

4) Pretrial Release, Parole, Supervised Release, and Probation after Statehood

When the USPC authorization sunsets—or when statehood is achieved—the District will have the opportunity to select the systems, policies, and procedures best suited to serve the District’s values and priorities. The District is likely to continue with the determinate sentencing regime put in place with the Revitalization Act as research shows that states with determinate sentencing systems and presumptive sentencing guidelines have both lower rates of incarceration and lower prison population growth.³⁰⁵ States with discretionary release experienced faster

²⁹⁹ PRETRIAL SERVS. AGENCY FOR D.C., CONG. BUDGET JUSTIFICATION FISCAL YEAR 2024 1 (2023) (of those on pretrial release, nearly 92% were awaiting trial in DC Superior Court, with the remainder facing trial in Federal District Court).

³⁰⁰ *Id.* at 1-2.

³⁰¹ *Id.* (This number has risen a dramatic 42% from the pre-pandemic average of 94 days.).

³⁰² Both of whom are appointed by the President. *See supra* Part III The Courts.

³⁰³ Norton Supervision Press Release, *supra* note 289.

³⁰⁴ TASK FORCE: PHASE II, *supra* note 170 at 46-51.

³⁰⁵ *See* DON STEMEN ET AL., OF FRAGMENTATION AND FERMENT: THE IMPACT OF STATE SENTENCING POLICIES ON INCARCERATION RATES, 1975-2002, 11 (2005).

prison growth during the high growth years of 1980 to 2009 and still have the highest incarceration rates.³⁰⁶ Parole boards composed of appointed members are subject to outside pressure from state governors, area advocates, and the media, and they become “risk averse.” During the get-tough-on-crime era of the 1980s and 1990s, parole boards adopted harsher release policies.³⁰⁷

District advocates call for reducing the District’s incarceration rate,³⁰⁸ but a split of opinion exists about whether the D.C. Superior Court or a new D.C. Parole Board is best suited to make post-conviction release decisions.³⁰⁹ This was the sole recommendation that members of the Task Force could not come to a consensus on³¹⁰ and as a result, the Task Force Local Control Committee Report in 2020 developed competing memoranda, one prepared by proponents of the D.C. Superior Court as paroling authority and one by proponents of establishing a new D.C. Parole Board to assist elected officials in determining which route to choose.³¹¹ While it appeared for a time that Mayor Bowser was committed to supporting federal legislation that would establish a new District paroling authority,³¹² momentum has “vanished” in the words of one commentator and advocacy efforts have languished in the face of a “newly hostile Congress” regarded as highly unlikely to support local paroling authority for the District and “ongoing divisions among advocates.”³¹³ Whenever the Congressional landscape changes, and the push for local control gains fresh momentum, the pros and cons of the two options addressed by the Task Force will likely be reconsidered.

Each memo addressed four qualities that the District’s new paroling authority should ensure.³¹⁴ The paroling authority will reduce incarceration while increasing public safety and accountability; there will be strong local control of paroling authority and accountability to D.C.; there will be strong protections for people seeking a parole grant or facing revocation of parole or supervised release; and a new paroling authority in D.C. should embody the humane, equitable approach to criminal justice articulated by the full Task Force, including a public health approach to community safety and incarceration, fairness in administration, treating all with dignity and encouraging restorative practices and trauma-informed healing -centered

³⁰⁶ RESTORING LOCAL CONTROL OF PAROLE, *supra* note 239 at 38.

³⁰⁷ *Id.* at 39.

³⁰⁸ See e.g., TASK FORCE: PHASE I, *supra* note 232 at 43 (“The District should reduce the number of admissions and length of stay for people in its secure detention facilities, using incarceration only when an individual poses a specific risk of violence or harm that no community-based resources may mitigate.”).

³⁰⁹ Superior Ct. Memorandum, *supra* note 232; Memorandum from proponents New Board of Parole Paroling Authority Mode to the Council of Ct. Excellence Task Force on Jails & Justice 3 (2020) [hereinafter New Parole Bd. Memorandum] (on file with author).

³¹⁰ TASK FORCE: PHASE II, *supra* note 170 at 11 (All recommendations were approved by at least 70% of those present at the three December 2020 Task Force meetings.).

³¹¹ Superior Ct. Memorandum, *supra* note 232; New Parole Bd. Memorandum, *supra* note 309.

³¹² Alex Koma, *D.C.’s Efforts to Take Back Control of Parole from the Feds Are ‘As Good as Dead’*, WASH. CITY PAPER (Aug. 29, 2023), <https://washingtoncitypaper.com/article/621314/d-c-s-efforts-to-take-back-control-of-parole-from-the-feds-are-as-good-as-dead/> [https://perma.cc/GGB6-9JE3] (quoting Mayor Bowser’s 2020 letter to Congresswoman Norton in support of local control).

³¹³ *Id.*

³¹⁴ Superior Ct. Memorandum, *supra* note 232; New Parole Bd. Memorandum, *supra* note 309.

practices.³¹⁵ Each quality is accompanied by detailed descriptions providing additional guidance,³¹⁶ regardless of the authority chosen. Each memorandum makes important points and there is evident merit to both options.

Proponents of assigning parole grant and revocation authority to the D.C. Superior Court argue that the judges are already experienced in making probation, compassionate release, and “second-look” (The Incarceration Reduction Amendment Act) release decisions;³¹⁷ the court already has the infrastructure in place to conduct hearings and appeals;³¹⁸ they are not dependent on political will or community pressure and hence less likely to be risk averse;³¹⁹ and they have the authority to bring prisoners to the District for hearings, which “allows for more meaningful access to counsel, investigation, mitigation, expert testimony, and release planning.”³²⁰ Proponents of the Superior Court model say that judicial efficiency will make judges more likely to grant parole and less likely to revoke for minor violations.³²¹

Proponents of the court’s model acknowledge that there is no study or collection of data regarding the relative incarceration rates of judges versus boards.³²² Still, they highlight the American Law Institute, which referred to parole boards as “failed institutions” that lack transparency, are highly susceptible to political pressure, offer poor procedural protections and insufficient due process, and contribute to the growth of the prison population.³²³ Court proponents note additional concerns that parole boards include some non-lawyers who are unfamiliar with standards of proof or burdens and presumptions;³²⁴ setting up a whole new agency in the District would add to the criminal justice bureaucracy;³²⁵ and parole boards have a vested interest in maintaining and growing the number of people who are incarcerated.³²⁶

Proponents of assigning paroling authority to a newly established D.C. Parole Board argue that the District has the opportunity to create something qualitatively different in which the Board, as part of its central mission, can actively work to reduce incarceration and advance the rights and opportunities of returning citizens.³²⁷ Proponents assert that the legislation can establish qualifications for members³²⁸ and the basis for decision-making,³²⁹ and it can tailor due process and procedural protections that are identical to or more comprehensive than those of the

³¹⁵ Superior Ct. Memorandum, *supra* note 232; New Parole Bd. Memorandum, *supra* note 309.

³¹⁶ COMMITTEE ON LOCAL CONTROL, DISTRICT TASK FORCE ON JAILS & JUSTICE, REPORT 5-6 (2020).

³¹⁷ Superior Ct. Memorandum, *supra* note 232 at 2.

³¹⁸ *Id.* at 4.

³¹⁹ *Id.* at 2.

³²⁰ *Id.* at 6.

³²¹ *Id.* at 3.

³²² *Id.* at 1.

³²³ *Id.* at 1 (citing American Law Institute, Model Penal Code: Sentencing, Proposed Final Draft, (approved May 2017), at 148).

³²⁴ *Id.* at 2.

³²⁵ *Id.*

³²⁶ *Id.* at 3.

³²⁷ New Parole Board Memorandum, *supra* note 309 at 1.

³²⁸ *Id.* (proposals include representation of returning citizens and individuals from under-represented Wards 7 and 8, among others).

³²⁹ *Id.*

D.C. Superior Court.³³⁰ It can also provide for comprehensive training for Board members.³³¹ The legislation can emphasize restorative justice and reconciliation rather than aggressive enforcement of restrictive supervision rules.³³² Proponents of the new parole board imagine restoring the presumption of innocence in revocation hearings, placing the burden on CSOSA (or presumably on the post-statehood local successor supervision agency) to prove a violation.³³³ Federal prosecutors would have no role as they do in the Superior Court approach.³³⁴

Proponents of a new parole board estimate the cost at \$4 million annually, after startup costs.³³⁵ Proponents of the Superior Court model opine that there would be no added expense using the existing judiciary.³³⁶

The Blueprint recommended a hybrid approach, at least until D.C. gets local control of judicial appointments,³³⁷ in which the D.C. Superior Court would continue to have jurisdiction over second-look sentencing and compassionate release and the new parole board would handle parole grants, revocations, and early terminations.³³⁸ The Blueprint raises many of the concerns noted in section III(A) regarding injustices experienced by D.C. residents because of the lack of local control over judicial appointments.

Under the Blueprint approach:

[T]he DC Council would enact legislation creating a new DC paroling authority. The governor would appoint the members of the new parole board who would reflect the values, culture, and customs of the new state of Washington DC. The legislation would include new parole guidelines and provide the board with the legal authority to promulgate additional regulations. The board could be established either as an executive branch agency, reporting to the mayor, or as an independent agency or commission. The DC Council would have oversight over the board's performance and budget. As a result, the parole board would be accountable to DC elected officials who would appoint and remove members in keeping with DC ethical and transparency requirements.³³⁹

³³⁰ *Id.* at 5.

³³¹ *Id.* at 2.

³³² *Id.* at 5.

³³³ *Id.*

³³⁴ *Id.*

³³⁵ *Id.* at 2 (USPC expends \$13 million annually).

³³⁶ Superior Ct. Memorandum, *supra* note 232; *contra* D.C. Appleseed Blueprint, *supra* note 58 at 11 (finding the costs of hiring additional judges “are estimated to be far more than the cost of a local parole board” further noting that “Superior Court is currently woefully understaffed” and cannot “undertake new responsibilities at or near current staffing levels.”)

³³⁷ D.C. Appleseed Blueprint, *supra* note 56 at 11.

³³⁸ *Id.*

³³⁹ *Id.* at 10.

The Blueprint makes specific recommendations regarding the new local parole board including board membership, and mechanisms to ensure equity, justice and “successful reentry outcomes.”³⁴⁰ Finally, the Blueprint cited the Justice Policy Institute’s concerns about legislative challenges and recommendations for specific legislative changes that would be required to amend local and federal law to eliminate the USPC and otherwise take the steps for local control of the parole function.³⁴¹

The JPI Report recommends a different hybrid approach in which those subject to indeterminate sentences would have their parole release decided by an independent parole board while those subject to determinate sentences would have parole decided by a judge.³⁴² The authors opined that asking the D.C. Superior Court to handle all District release decision-making would “create a potentially significant burden on the courts... as the additional daily responsibilities of managing parole supervision and revocation hearings will create substantial staffing, budgeting and physical space challenges[.]”³⁴³

Under the JPI approach, all D.C. Code offenders would have the option to apply for a second-look judicial review after serving 15 years.³⁴⁴ The D.C. Superior Court would bear the cost of providing legal counsel.³⁴⁵ JPI would assign the responsibilities for parole supervision oversight, and for setting standards of practice for CSOSA regarding both community supervision and revocation hearings, now handled by USPC, to the new local parole authority.³⁴⁶

The JPI report identifies additional aspirational goals for a model parole system, and it includes 15 recommendations for parole release decision-making and supervision based on best practices gleaned from published resources, discussions with national technical assistance experts, and a review of the effectiveness of state systems and procedures.³⁴⁷ Additional recommendations regarding operational considerations focused on professionalizing parole are also identified.³⁴⁸

The D.C. Jails & Justice Task Force called for Congress to abolish the USPC’s authority over people convicted of D.C. Code offenses and urged the District to plan now to localize parole and supervised release decision-making.³⁴⁹ In its Phase II Report, the Task Force published ten recommendations regarding probation, parole, and supervised release that would reduce onerous periods of supervision and the frequency of reporting, reduce revocations for

³⁴⁰ *Id.* at 12.

³⁴¹ *Id.* at 12-14 (citing RESTORING LOCAL CONTROL OF PAROLE, *supra* note 239 at 82-89).

³⁴² RESTORING LOCAL CONTROL OF PAROLE, *supra* note 239 at 86.

³⁴³ *Id.* at 16.

³⁴⁴ *Id.* at 15-16 (finding support for a second-look provision is growing nationally, in part because of the proliferation of far longer sentences than those in other western democracies. The judge, or judicial panel would reevaluate the sentence applying current standards of review with an eye toward determining whether the purposes of the sentence would be better addressed with a modification. “Decisions would be shaped by guidelines designed to ensure fairness, proportionality, consistency and transparency[.]”).

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 86.

³⁴⁷ *Id.* at 8-14.

³⁴⁸ *Id.* at 14.

³⁴⁹ TASK FORCE: PHASE I, *supra* note 232 at 44.

technical violations, prohibit revocations based on new charges unless a finding of guilt has been made, and raise the evidentiary standard at revocation hearings to clear and convincing, among other improvements.³⁵⁰ The Task Force urged adoption of a mechanism that will reduce incarceration consistent with public safety, strengthen due process and other protections, and ensure local control, transparency, and accountability over process and decisions.³⁵¹

As a practical matter, the hybrid approach suggested by the Blueprint makes the most sense as the D.C. Superior Court does not have the judicial, financial, or spatial resources to take on the burden of handling parole in addition to its existing obligations. Further, the District has no authority or mechanism to require Congress to appoint currently approved judges, much less the power to secure funding for the additional judges needed to undertake the paroling task. Advocates and experts have laid out comprehensive recommendations, options, and rationales, which will guide the District's elected officials going forward. Whichever approaches are selected, the District, with local control, will have the opportunity to establish a model for the nation and to radically improve the fairness, consistency, transparency, and effectiveness of its treatment of D.C. Code offenders—all impossible now under the federal regime.

C. The Public Defender Service for the District of Columbia

The Court Reorganization Act also established the Public Defender Service (PDS) for the District of Columbia.³⁵² The powers of PDS are vested in what is now, pursuant to the Home Rule Act and then the Revitalization Act, an 11-member Board of Trustees,³⁵³ which sets policy but does not direct the conduct of particular cases. The Board members are appointed by a panel including the Chief Judges of the U.S. District Court, the D.C. Court of Appeals and the D.C. Superior Court, and the Mayor.³⁵⁴ The panel is presided over by the Chief Judge of the D.C. Court of Appeals or her designee.³⁵⁵ Four members of the Board must be D.C. residents who are not lawyers.³⁵⁶ Judges may not be appointed.³⁵⁷ The PDS website describes the importance of the Board of Trustees because it establishes and maintains PDS's independence and serves as a monitor and protector.³⁵⁸

³⁵⁰ TASK FORCE: PHASE II, *supra* note 170 at 67-72.

³⁵¹ *Id.* at 72.

³⁵² Court Reorganization Act §§ 301-309. (The Reorganization Act redesignated what had been the Legal Aid Agency for the District as the new PDS).

³⁵³ D.C. Code § 2-1603.

³⁵⁴ D.C. Code § 2-1603(b)(1)(A-D).

³⁵⁵ D.C. Code § 2-1603(b)(2-4).

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Our Leadership, Board of Trustees*, PUB. DEF. SERV. FOR D.C., <https://www.pdsdc.org/about/our-leadership> [<https://perma.cc/QZR3-CN49>] (select Board of Trustees after navigating to the page).

The Revitalization Act provided for PDS to become an independent federally funded public defender service.³⁵⁹ PDS is funded by a direct appropriation from Congress.³⁶⁰ PDS has suffered at the hands of the federal government because of a lack of local control. As a recent prime example, in 2019, the Government Services Administration (GSA) determined to move PDS to a location 1.1 miles from the D.C. Superior Court.³⁶¹ Such a move would have posed real hardship, including unnecessary travel time and expense for indigent clients served by PDS and their families. It would have had a deleterious impact on PDS lawyers and staff by adding to commuting time through downtown traffic, sometimes multiple times a day to get to court or choosing to find a place to work in the busy courthouse to ensure timely court appearances. After much hoopla over a two-year period, including multiple lawsuits, intervention by Congresswoman Holmes Norton, and the employment of legal counsel to represent PDS interests, the GSA canceled the request for lease proposals.³⁶²

The GSA manages real estate for the entire federal government in 50 states, 5 territories, and District of Columbia agencies funded by the federal government.³⁶³ The GSA budget is more than \$10 billion, and a miniscule portion is allocated to the District.³⁶⁴ The GSA is not accountable to D.C. residents. It does not have the necessary commitment to or prioritization of D.C.'s needs and requirements, and it does not monitor progress toward achieving District goals.

1) PDS After Statehood

PDS is highly regarded locally and nationally as the gold standard for indigent defense.³⁶⁵ In recognition of its excellent quality, the Blueprint recommends that PDS maintain its independent status under the authorizing statute.³⁶⁶ With statehood, the Legislative Assembly will have the opportunity to remove the federally appointed Chief Judge of the U.S. District Court from the PDS Board of Trustees to ensure local control and accountability going forward. With statehood, the PDS budget will become a District responsibility.

With statehood, local control, and budget authority, PDS property needs will be addressed by the DGS, whose mission is to “build, maintain, and sustain the District of

³⁵⁹ CRIMINAL JUSTICE UNDER THE REVITALIZATION ACT, *supra* note 142 at 2.

³⁶⁰ *Mission and Purpose*, PUB. DEF. SERV. FOR D.C., <https://www.pdsdc.org/about/mission-purpose> [<https://perma.cc/H4ST-7X4U>] (beginning with the 2007 Appropriation Act).

³⁶¹ Radley Balko, *The government wants to move the D.C. public defender's office. That could be disastrous.*, Wash. Post. (Dec. 12, 2019, 1:51PM), <https://www.washingtonpost.com/opinions/2019/12/12/government-wants-move-dc-public-defenders-office-that-could-be-disastrous/>.

³⁶² Tristan Navera, *GSA Halts contested relocation of federal agencies*, WASH. BUS. J. (May 19, 2021), <https://www.bizjournals.com/washington/news/2021/05/19/gsa-halts-contested-relocation-pds-court-services.html> [<https://perma.cc/UHC8-VVWW>].

³⁶³ GOV'T SERVS. ADMIN., FISCAL YEAR 2024 ANNUAL PERFORMANCE PLAN AND FISCAL YEAR 2022 ANNUAL PERFORMANCE REPORT 4 (2023).

³⁶⁴ GOV'T SERVS. ADMIN., SUMMARY OF THE FISCAL YEAR 2024 CONGRESSIONAL JUSTIFICATION 4 (total gross budget authority was \$16.4b in FY2022, \$10.4b in FY2023, and the GSA requested \$21.7b for FY2024).

³⁶⁵ Balko, *supra* note 361.

³⁶⁶ D.C. Appleseed Blueprint, *supra* note 56 at 19.

Columbia's real estate portfolio, which includes more than 42 million square feet of District-owned and leased property and roughly \$19.8 billion in assessed District-owned property in Washington D.C."³⁶⁷ PDS can advocate directly with DGS to ensure that its needs, and more importantly, the needs of PDS clients are met. DGS is accountable to D.C. residents and to elected D.C. officials who conduct oversight hearings and otherwise monitor progress toward achieving District priorities.

Conclusion

Statehood is the bridge to transforming the District of Columbia's criminal justice system. Under the current system with federal prosecutors making charging decisions and sentencing recommendations, judges appointed by the President of the United States making sentencing and some revocation decisions, and CSOSA, a federal agency, overseeing supervision, revocation and release, the District experiences over-incarceration, rampant racial disparities and a host of other injustices throughout its criminal justice system.³⁶⁸ With the achievement of statehood, the District can reverse course as it identifies and selects systems, policies, procedures, and personnel focused on applying D.C. values and priorities to reduce over-incarceration, address racial disparities, enhance community services, and improve management and service delivery throughout its criminal justice system. The time for D.C. statehood is now!

³⁶⁷ Dept. Gen. Servs., <https://dgs.dc.gov/page/about-department-general-services> [<https://perma.cc/UYQ9-HAER>].

³⁶⁸ WIDRA & HERRING, *supra* note 7; *Federal Bureau of Prisons*, D.C. JUST. STAT. ANALYSIS TOOL, <https://www.dcjsat.net/FBOP.html> [<https://perma.cc/49PE-3WZJ>]; U.S. Census, U.S. *QuickFacts: District of Columbia*, <https://www.census.gov/quickfacts/fact/table/DC/PST045222> [<https://perma.cc/QT7G-GTRR>].