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# PROLOGUE TO DISTRICT OF COLUMBIA DEMOCRACY AND THE THIRD BRANCH OF GOVERNMENT

John W. Nields and Timothy J. May\*

Why does the President of the United States appoint the judges of the District of Columbia's local court system? Why is the District of Columbia's local court system funded and overseen by the United States Congress? Why does the United States Attorney for the District of Columbia and not the Attorney General for the District of Columbia function as a local prosecutor, prosecuting most D.C. Code crimes in the District of Columbia's courts? The four essays which follow this introduction explore the rich history behind these unusual structural features of the District of Columbia government; they present the arguments for and against the status quo; and they grapple with the question of whether this structure comports with the ideals of democracy.

The essays are the scholarly work of their individual authors, but they present the findings and recommendations of the Council for Court Excellence's D.C. Third Branch Project Committee which worked together from April 2006 through May 2007. The project was one part of an extensive D.C. Democracy Initiative funded by the Trellis Fund, a District of Columbia foundation. While some organizations participating in the D.C. Democracy Initiative explored such themes as voting rights and taxing rights in the District of Columbia, the Council for Court Excellence's project focused on administration of justice matters.

The Council for Court Excellence is a twenty-five-year-old civic organization whose mission is to improve the administration of justice in the local and federal courts and related agencies in the Washington area. The Council's goal for the project was to promote serious public policy discussion of the questions set forth above. Because of the importance and the potentially controversial nature of the subject matter, the Council intentionally recruited a distinguished project committee whose members have diverse backgrounds and strong reputations for professionalism and good judgment.<sup>1</sup>

The Committee began its work by exploring how the current governance structure came to be. This involved extensive research, analysis, and discussion of the fascinating legislative histories of three key statutes passed by Congress—the 1970 D.C. Court Reorganization Act,<sup>2</sup> the 1973 D.C. Home Rule Act,<sup>3</sup> and the

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\* John W. Nields and Timothy J. May co-chaired the D.C. Third Branch Project Committee of the Council for Court Excellence.

1 The Committee's members are listed at the end of this prologue.

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

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

1997 D.C. Revitalization Act<sup>4</sup>—as well as of the long legal history of the judicial function in the District of Columbia prior to the 1970 establishment of the District of Columbia's local court system. Committee members then interviewed fifteen current and former local and federal officials with personal knowledge of or involvement in the local court system or the prosecution function in the District. The interviews explored both the legislative history and the officials' views of the positive and negative aspects of the current governance structure.

After the Committee members discussed their research results, four agreed to write the topical papers the Committee had decided on: the history of the D.C. judicial function; the appointment of D.C. judges; the prosecution of D.C. crimes; and the control of the organization, budgeting, and funding of the local D.C. courts. The Committee met to review first drafts and provide feedback to the authors, after which the authors revised the initial drafts.

At that point, the Committee members were eager to test their findings and preliminary conclusions by means of a public symposium, before reaching any final conclusions. The Committee planned the symposium along with the University of the District of Columbia Law Review and recruited a corps of prominent, engaging speakers with different perspectives and opinions on each of the issues to be discussed. The District of Columbia Third Branch Symposium, held on April 20, 2007, was hosted by Dean Shelley Broderick and the University of the District of Columbia David A. Clarke School of Law.<sup>5</sup> The symposium drew an audience of more than one hundred persons from remarkably diverse backgrounds and viewpoints. Discussions among the panels and the audience throughout the day were animated, thought-provoking, and occasionally quite surprising.

After reviewing the symposium transcript, the Committee met again in mid-May 2007 to discuss and decide on what revisions to make to the four issue papers.<sup>6</sup> After having spent a full year educating ourselves on the issues, the Committee decided unanimously that the published papers should recommend the following:

- (1) The Home Rule Act be revised to empower the Mayor to appoint D.C. judges, with confirmation by the D.C. Council;<sup>7</sup>
- (2) the Home Rule Act be revised to permit D.C.'s local prosecutor to prosecute criminal offenses under the D.C. Code, while recognizing that, because this function has never been included in the local budget, determin-

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

5 The symposium schedule and speaker list is reproduced at the end of this introduction.

6 The Council for Court Excellence had initially tasked the project committee to describe the development of the governance of the courts and the prosecution function and to discuss the political and fiscal pros and cons of changing the status quo.

7 Currently, the President and Senate are empowered to appoint D.C. judges.

ing how to implement and fund such a new function requires further study; and

(3) that no change be made to the current system of federal funding for the D.C. courts, given the restrictions now placed by Congress on the District government's right to impose taxes and the extra costs the District already bears because it is the Nation's Capital.

The D.C. Third Branch Project Committee presented its findings and recommendations to the Council for Court Excellence Executive Committee in July 2007. The Executive Committee expressed great appreciation to us for having produced the first comprehensive report about the development of the District of Columbia court system in thirty years, as well as the first study which analyzed the District's unique system of prosecuting local crimes federally instead of locally. The Executive Committee also endorsed continued public discussion of the important public policy issues addressed by the D.C. Third Branch Project's scholarship.

Continued public discussion is necessary because the District of Columbia's citizens and elected officials do not have the authority to implement our Committee's recommendations— only Congress may do so. However, it is important to note that political trends over the past year on matters of D.C. democracy are more promising than when our project began. Efforts to grant D.C. voting representation in the House of Representatives have progressed farther than would have been predicted eighteen months ago. Efforts to reduce Congressional oversight of local D.C. budget decisions and of local D.C. legislation have likewise begun to receive serious consideration in Congressional hearings. We hope that the issues discussed herein will serve to further the government's discourse, which will in turn help improve the administration of justice and uphold the values of democracy.

**MEMBERS OF THE COUNCIL FOR COURT EXCELLENCE  
D.C. THIRD BRANCH PROJECT COMMITTEE**

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*Patton Boggs LLP*

**John Nields**  
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***Members***

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*Former Chair, D.C.  
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**John Payton, Jr.**  
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**Steven Schneebaum**  
*Greenberg Traurig LLP*

**Jo-Ann Wallace**  
*National Legal Aid and Defender  
Association*

**Lois Williams**  
*Washington Lawyers' Committee*

**THE DISTRICT OF COLUMBIA THIRD BRANCH  
SYMPOSIUM SCHEDULE  
FRIDAY, APRIL 20, 2007**

- 9:45-10:00     **WELCOME:**  
**Shelley Broderick**, Dean, University of the District of Columbia  
David A. Clarke School of Law  
**Timothy May**, Co-Chair, Council for Court Excellence Third  
Branch Committee, Patton Boggs LLP
- 10:00-10:20    **HISTORY OF THE D.C. THIRD BRANCH:**  
**Steven Schneebaum**, Council for Court Excellence Board Member,  
Greenberg Traurig LLP
- 10:20-11:50    **WHO APPOINTS D.C. COURT JUDGES:**  
**Charles Miller**, Council for Court Excellence Board Member,  
Covington & Burling LLP  
**Hon. Gregory Mize**, Retired D.C. Superior Court Judge, Judicial  
Fellow at the National Center for State Courts  
**Patricia Worthy**, Professor, Howard University School of Law,  
former Chair, D.C. Judicial Nomination Commission  
**Daniel Reznick**, Senior Assistant Attorney General for the District  
of Columbia
- 12:00-1:20     **LUNCH AND KEYNOTE ADDRESS**  
**Congresswoman Eleanor Holmes Norton**, D-DC
- 1:30-3:00      **WHO PROSECUTES D.C. CODE CRIMES:**  
**John Payton**, former D.C. Corporation Counsel, former President  
of the D.C. Bar, Wilmer Hale LLP  
**Robert Spagnoletti**, former Attorney General for the District of  
Columbia, Schertler & Onorato LLP  
**Joseph diGenova**, former United States Attorney for the District of  
Columbia, diGenova & Toensing LLP  
**Angela Davis**, former Director of the D.C. Public Defender Service,  
Professor, American University Washington College of Law
- 3:10-4:40      **WHO CONTROLS THE ORGANIZATION OF THE D.C.  
COURTS:**  
**Peter Kolker**, Council for Court Excellence Board Member,  
Zuckerman Spaeder LLP  
**Samuel Harahan**, former Executive Director, Council for Court  
Excellence, Washington D.C. Police fund  
**Stephen Harlan**, former Vice Chairman of the Control Board,  
Harlan Enterprises LLC
- 4:40            **CLOSING REMARKS:**  
**John Nields**, Co-Chair, Council for Court Excellence Third Branch  
Committee, Howrey LLP  
**Shelley Broderick**, Dean, University of the District of Columbia  
David A. Clarke School of Law