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Federal and Local Jurisdiction in the District of Columbia

The 1982 trial of John Hinckley for the attempted assassination of President Ronald Reagan brought to the public's attention a unique feature of the criminal justice system in the District of Columbia. Although federal and state charges never are joined together for trial, federal and D.C. Code charges may be joined in one indictment under section 11-502(3) of the D.C. Code,\(^1\) and tried before the United States District Court for the District of Columbia.\(^2\)

In the Hinckley case, the federal prosecutor used section 11-502(3) to join three federal and ten D.C. Code charges. This joinder required the district court to determine whether to use both federal and D.C. Code evidentiary standards during the trial, or only one standard. The court ruled that only federal standards would be used,\(^3\) and therefore placed the

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1. Under D.C. CODE ANN. § 11-502(3) (1981), the United States District Court has jurisdiction over "[a]ny offense under any law applicable exclusively to the District of Columbia which offense is joined in the same information or indictment with any Federal offense." A similar but more limited jurisdictional statute is found at D.C. CODE ANN. § 23-311(b) (1981):

   Two or more offenses may be charged in the same indictment or information as provided in subsection (a) [offenses charged are of similar character or based on same transaction] even though one or more is in violation of the laws of the United States and another is in violation of the laws applicable exclusively to the District of Columbia and may be prosecuted as provided in Section 11-502(3).

The requirements for the proper joinder of offenses under § 23-311(a) are the same as those found in FED. R. CRIM. P. 8. See infra note 99. Despite the broad language of § 11-502(3), which on its face permits joinder of even unrelated federal and local offenses in one indictment, the D.C. Circuit has read the "proper joinder" requirements of rule 8 (also described in D.C. CODE ANN. § 23-311) into § 11-502(3). United States v. Kember, 648 F.2d 1354, 1359 (D.C. Cir. 1980); United States v. Jackson, 562 F.2d 789, 793 (D.C. Cir. 1977).

2. The federal courts in the District are the United States District Court for the District of Columbia, and the United States Court of Appeals for the District of Columbia Circuit. The local trial court is the Superior Court, and the local appellate court is the District of Columbia Court of Appeals.

burden of disproving insanity upon the prosecution. In contrast, the D.C. Code places the burden of proof upon the defendant. This ruling may well have been the deciding factor in Hinckley's acquittal by reason of insanity.

This Note examines three alternative bases for the jurisdiction of the District's Article III courts6 over joined D.C. Code offenses. First, if the D.C. Code is defined as federal law,6 and D.C. Code offenses are considered "crimes against the United States,"7 D.C. Code offenses fall within federal court "arising under" jurisdiction.8 Second, Article III jurisdiction

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5. The District's federal courts are established under Article III of the U.S. Constitution, D.C. CODE ANN. § 11-101(1) (1981), and exercise the same judicial power of the United States as all other Article III courts, Palmore v. United States, 411 U.S. 389, 408-09 (1973); see also United States v. Jackson, 562 F.2d 789, 800 (D.C. Cir. 1977) ("A central purpose and policy of D.C. court reorganization was to assure that the prompt and effective discharge of [federal] responsibilities would not be impeded by the necessity of trying local criminal offenses, for which a forum was provided in an enlarged and strengthened local court system."). Andrade v. Jackson, 401 A.2d 990, 992 (D.C. 1979) (District's federal courts divested of local jurisdiction). Article III defines the boundaries of the judicial power that Article III courts may exercise. See National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 615, 645, 655 (1949) (concurring and dissenting opinions) (six Justices rejected proposition that Congress could freely expand Article III judicial power using its Article I powers); see also Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303, 304 (1809) (Article III jurisdiction may not be extended beyond Article's express limits).


over D.C. Code prosecutions may be justified because the United States is named as party plaintiff in those prosecutions: D.C. Code offenses are prosecuted by the United States Attorney in the name of the United States. Third, local offenses may be considered pendent claims when joined in one indictment with federal charges and tried in federal court.

The Note argues that Congress' exercise of its power under the Constitution to create local law for the District should not be considered an exercise of its national legislative capacity. Rather, Congress acts as a state-like sovereign when enacting local law. D.C. Code matters, therefore, do not "arise under" the "laws of the United States" and not arise under a law enacted pursuant to Congress' power to regulate the federal courts or its power to create federal jurisdiction.

In addition, federal jurisdiction "may not be invoked where the right asserted is non-federal, merely because the plaintiff's right to sue is derived from federal law... The federal nature of the right to be established is decisive—not the source of the authority to establish it." Puerto Rico v. Russell & Co., 288 U.S. 476, 483 (1933); see also Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n, 588 F.2d 1216, 1225-27 (9th Cir. 1978) (nature rather than source of claim determines whether right can be litigated in federal court; Hawaiian law enacted pre-statehood by Congress not cognizable post-statehood in federal court), cert. denied, 444 U.S. 826 (1979). Uncertainty should be resolved against extending federal jurisdiction, Romero v. International Terminal Operating Co., 358 U.S. 354, 379 (1959), particularly when local courts can give effective relief.

9. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend... to Controversies to which the United States shall be a Party...").


11. U.S. CONST. art. I, § 8, cl. 17 ("Congress shall have power... to exercise exclusive legislation in all cases whatsoever over [the] District...""); see State of Md., Act of Dec. 19, 1791, ch. 45, § 2 (codified at 2 LAWS OF MARYLAND 327 (W. Kilty ed. 1800)) (ceding present District territory to United States).


13. Congress indicates its intent to create laws of exclusively local application by enacting such legislation as part of the D.C. Code. In Key v. Doyle, 434 U.S. 59 (1977), the Supreme Court stated: It is more the nature of the D.C. Code than its limited geographical impact that distinguishes it from other federal statutes. Unlike most congressional enactments, the Code is a comprehensive set of laws equivalent to those enacted by state and local governments having plenary power to legislate for the general welfare of their citizens. Id. at 68 n.18; see United States v. McDonald, 481 F.2d 513, 522 n.24 (D.C. Cir. 1973).

D.C. Jurisdiction

D.C. Code offenses are crimes against the District of Columbia, not against the United States. Since the real party in interest in local prosecutions is the District of Columbia, in prosecuting local crimes the District's United States Attorney acts not in his capacity as a federal officer, but in a local capacity. As a result, the judicial power of Article III should not normally extend to causes of action under the D.C. Code.


criminal context, however, promotes jury hostility and creates arbitrary

differences in trial outcomes among similarly situated offenders. In civil

dependent jurisdiction cases, the trial judge must supervise litigants to pre-

vent abuse. Due to the special characteristics of criminal cases, however,

the supervisory powers of the trial judge are severely curtailed. For this

reason, pendent jurisdiction is not an appropriate concept to import to the

criminal context. The Note concludes that the District's federal courts

should be divested of the section 11-502(3) vestige of local jurisdiction.

I. Nonfederal Nature of the D.C. Code

Congress' power of local legislation over the District of Columbia is

wholly different from its national legislative powers, and precludes the

definition of the D.C. Code as "federal law." In addition, the description

of laws of exclusively local application in the District as "federal," and

therefore as within the "arising under" jurisdiction of Article III courts,

undermines a desirable uniformity in the interpretation of District law.

This description also is at odds with Congress' overriding intent in the

as "Court Reform Act"

codified at D.C. CODE ANN. tit. 11 (1981)), Congress created two separate
judicial power in the District, Court Reform Act allotted to each system its own sphere, making
neither subservient to the other). In the 1973 District of Columbia Self-Government and Governmental
codified at scattered sections of the D.C. Code, Congress created a local state-like entity in the
District, delegating its local legislative power to a Mayor, D.C. CODE ANN. §§ 1-241, 1-242 (1981),
and to a 13-member Council, id. § 1-221. The Council's powers became "as broad as those of Con-
dlegation was the power to classify certain acts as crimes. District of Columbia v. Sullivan, 436 A.2d
364, 366 (D.C. 1981). Congress did place several restrictions on the Council's legislative authority, see
D.C. CODE ANN. § 1-233(a) (1981), but in general the Council's legislative powers are limited just as
are those of the states, by Article I, § 10 of the U.S. Constitution, D.C. CODE ANN. § 1-204 (1981),
see Grant v. Cooke, 7 D.C. (2 Mackey) 165, 196-97 (1871) (identical prohibition on acts of 1871
D.C. Legislative Assembly interpreted by Court as limitation "appropriate only to States, or govern-
ments similar to them"); see also Firemen's Ins. Co. v. Washington, 483 F.2d at 1328 (District "akin
to a state").

Despite this broad delegation, Congress retained "ultimate legislative authority," D.C. CODE ANN.
§ 1-201(a) (1981), and a legislative veto power, D.C. CODE ANN. § 1-233(c) (1981 & Supp. 1982).
(The constitutionality of this veto power has been called into question by the Supreme Court's recent
opinion in Immigration & Naturalization Serv. v. Chadha, 103 S. Ct. 2764, 2787-88 (1983)). Congress
also reserved the power to legislate affirmatively for the District. D.C. CODE ANN. § 1-206
(1981). Any act passed by the Council and approved by the Mayor must be submitted to Congress; a
majority of both the House and the Senate may nullify the measure within thirty calendar days. D.C.
of either House sufficient to veto measure dealing with criminal law or procedure). In judging D.C.
Council actions, the House District Committee determines whether the action violates the Constitu-
tion or a clear federal interest, or exceeds power granted the Council in the Home Rule Act. See 127
Representatives exercised its supervisory power over Council legislation by vetoing a proposed Sexual
Assault Reform Act, D.C. Act 4-69. H. R. Res. 208, 97th Cong., 2d Sess., 127 CONG. REC. H6762
(daily ed. Oct. 1, 1981). For the history of cession and of the various District governments, see
Franchino, The Constitutionality of Home Rule and National Representation for the District of Co-
D.C. Jurisdiction

1970 Court Reform and 1973 Home Rule Acts to create autonomous federal and local legal frameworks in the District and to fashion a new federal-local court relationship analogous to that existing in the states. Finally, this “federal” definition, and the consequent description of D.C. Code offenses as “crimes against the United States,” cannot be reconciled with the actual jurisdiction conferred by Congress upon the District’s courts in the Court Reform Act. Accordingly, local criminal offenses should be redefined as “crimes against the District of Columbia.”

A. Hybrid Congressional Power

Under Article I, section 8, clause 17 of the Constitution, Congress is granted the power of “exclusive legislation in all cases” in the District. The courts have interpreted this power both as wholly national and as “plenary” in character. This interpretation has justified the extension to the District of legislation enacted under Congress’ other Article I powers that exceeds Congress’ powers as applied to states. The supposed “plenary” nature of this power in addition has given some courts sufficient justification to apply laws codified in the D.C. Code to federal matters in the District, even though legislation of this type and effect could not justifiably be enacted by a state legislature.

At the heart of these cases is a failure to recognize that clause 17 grants

18. See supra note 17 (discussing the two Acts).
20. Chief Justice Marshall, for example, maintained that the only “safe and clear rule” that may be articulated in determining the status of Congress’ clause 17 power relative to its other enumerated Article I powers is that all such powers are equal. Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 364, 424, 426 (1821) (all laws passed by Congress under its Article I powers, including clause 17, are “laws of the United States”); see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2888 n.8 (1982) (White, J., dissenting) (all Article I powers are equal); O’Donoghue v. United States, 289 U.S. 516, 539-40 (1933) (all Article I powers are for national purposes), cited with approval in National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 601 (1949); Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524, 619 (1838) (Congress has full plenary power); Neild v. District of Columbia, 110 F.2d 246, 250-51 (D.C. Cir. 1940) (Congress acts as legislature of national character when legislating for the District); United States v. Williams, 28 F. Cas. 647, 655-58 (C.C.D.C. 1833) (No. 16,712) (no distinction between federal and municipal powers in the District); O’Donoghue, The Power of Congress to Tax in Respect to the District of Columbia, 31 GEO. L.J. 146, 159 (1943) (“Congress is never a state legislature but always and necessarily the national legislature and it is only in this capacity that it can ever act.”).
21. See Employers’ Liability Cases, 207 U.S. 463, 500 (1908) (Congress’ plenary power over District justifies its application to District of measures that would violate commerce clause if applied to states); Hyde v. Southern Ry., 31 App. D.C. 466, 472-73 (1908) (same); see also Neild v. District of Columbia, 110 F.2d 246, 251 (D.C. Cir. 1940) (commerse clause no limitation on Congress’ local legislative powers, only bar to state legislation). Clause 17 also was used to justify interference with federal functions of the District’s courts. In Federal Radio Comm’n v. General Elec. Co., 281 U.S. 464, 466, 468 (1930), and in Postum Cereal v. California Fig Nut Co., 272 U.S. 693, 699-700 (1927), the Court noted that Congress had empowered the District’s courts to oversee factfinding of federal agencies, despite the fact that this function would violate the separation of powers principle if vested in Article III courts.
22. See infra p. 321.
three different types of power to Congress: first, the power to extend laws of nationwide application to the District; second, the power to protect national interests there; and third, the power to enact state-like local laws governing District residents. Clause 17 grants hybrid powers to Congress, and thus is a unique source of congressional authority, distinct from Congress' other section 8 powers of purely national scope. When Congress legislates under its other section 8 powers, it creates "laws of the United States" falling within the Article III "arising under" jurisdiction, which it may choose to enforce in Article III courts. Congress may also create "laws of the United States" under clause 17, and does so when it promulgates rules to protect the functioning of the national government.

A major component of Congress' clause 17 power, however, is the authority to enact local laws for the District. Two factors differentiate between the types of laws that may be enacted under clause 17. First, as to subject matter, the scope of local laws may be much greater than the "laws of the United States." As the Supreme Court has noted, the enactment of the D.C. Code "would exceed [Congress'] powers . . . in the context of national legislation enacted under other powers delegated to it under Art. I, § 8." Second, local laws, unlike federal laws, must be confined in application to a limited geographical area. Congress itself has recognized the intuitive distinction between federal and local laws, by codifying the D.C. Code separately from the U.S. Code. Even as a matter of history, the two types of laws are distinct: The first local laws for the District were the laws of the ceding states, which Congress adopted in toto, only gradually reshaping them over the years to meet the changing

24. See infra note 29.
26. From 1790 to 1801, the District continued to be governed by the laws of the ceding states. Act of July 16, 1790, ch. 28, § 1, 1 Stat. 130; see 13 Stats. At Large of Virginia ch. 32, at 44 (W. Hening ed. 1823); 2 Laws of Maryland ch. 45, § 2, at 327 (W. Kilty ed. 1800). In 1801, Congress reenacted those state laws previously applicable to the area ceded, Act of Feb. 27, 1801, ch. 56, § 1, 2 Stat. 103 (codified in Revised Statutes of the United States Relating to the District of Columbia § 92 (1875)), and from 1801 to 1871 the District was "governed for the most part under the laws of Maryland and Virginia as they existed at the time of cession." Byrd, District of Columbia "Home Rule," 16 Am. U.L. Rev. 254, 258 (1967). Maryland statutes were freely quoted in all compilations of laws before the first D.C. Code, of 1901, was enacted, and the 1875 edition of D.C. statutes provided that all offenses not therein defined would continue to be "punished as provided by laws in force in the District." Revised Statutes of the United States Relating to the District of Columbia § 1146 (1875). Congress also continued to distinguish between local and federal offenses. See Act of June 17, 1870, ch. 62, § 1, 16 Stat. 153 (vesting jurisdiction over both "offences against the United States" as well as "offences against any of the . . . laws of the levy court [local legislative court] of the County of Washington" in a Police Court); see also Revised Statutes of the United States Relating to the District of Columbia § 1101 (1875) (distinguishing persons convicted under "laws of the United States" from those convicted under laws of the District, providing that both types of offenders could be housed in the District's prison). This latter distinction continues today in the differentiation for fiscal purposes between D.C. Code offenders, sentenced in local or federal court, and U.S. Code offenders. The U.S. reimburses the District government for U.S.
needs of the District. In addition, Congress never required that these laws be interpreted by Article III courts. Upon cession, Congress created state-like courts of general jurisdiction to enforce the local laws, investing these courts with the same civil and criminal common law powers enjoyed by the state courts prior to cession. All of these factors point to one


27. The original courts of general jurisdiction for the District, the circuit court for the District of Columbia, created by the Act of Feb. 27, 1801, ch. 15, § 3, 2 Stat. 103, 105, and its successor, the supreme court, see Act of Mar. 3, 1863, ch. 91, § 1, 12 Stat. 762, 762-63, initially were not defined as established under Article III, United States v. Burroughs, 289 U.S. 159, 163 (1933). Since the major function of these courts was to exercise general, state court-like jurisdiction, it was believed that they could not be so established, even though they sat as “courts of the United States” exercising federal jurisdiction in special terms, and their judges were tenured. See Act of Apr. 29, 1802, ch. 31, § 24, 2 Stat. 156, 166 (circuit court to exercise power of U.S. district court in special term); Act of Mar. 3, 1863, ch. 91, § 3, 12 Stat. 762, 763 (same, for supreme court). By virtue of their special terms, however, these courts were permitted to exercise the same powers as Article III “courts of the United States.” Claiborne-Annapolis Ferry Co. v. United States, 285 U.S. 382, 391 (1932) (District’s court may set aside federal agency (ICC) orders sitting as court of the United States); Federal Trade Comm’n v. Knickerbocker, 274 U.S. 145, 154, 156, 158 (1927) (because of complete parallelism between jurisdiction of the District’s courts and of Article III courts, the District’s court may set aside federal agency (FTC) order). These extended powers may have influenced the Supreme Court’s decision in O’Donoghue v. United States, 289 U.S. 516, 538-40, 546 (1933), that Congress could not continue to deny District residents an Article III forum, and, accordingly, its courts must be considered Article III courts. See Act of June 7, 1934, ch. 426, 48 Stat. 926 (D.C. Court of Appeals changed to United States Court of Appeals for the District of Columbia); Act of June 25, 1936, ch. 804, 49 Stat. 1921 (D.C. Supreme Court became United States District Court for the District of Columbia); Act of Dec. 29, 1942, ch. 835, § 1(d), 56 Stat. 1094 (District’s became a federal judicial circuit). The District’s new Article III courts continued to hear nonfederal question matters arising under District law, and to exercise administrative and advisory functions— forbidden to other Article III courts for separation of powers reasons—previously vested in the District’s courts by virtue of their non-Article III status. The O’Donoghue opinion therefore created an anomaly: For the first time, Article III courts would exercise non-Article III functions. The conceptual difficulty of justifying Article III court exercise of these other types of jurisdiction has contributed to the confusion found in a series of extremely divided Supreme Court decisions: the 3-2-2-2 opinions in National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), the 3-2-2 opinions in Glidden Co. v. Zdanok, 370 U.S. 530 (1962), and the 4-2-3 opinions in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982). Attempting to solve the problem, the Court has created an unclear division between “Article I” (or “legislative”) and “Article III” courts. See infra note 82. In the Court Reform Act, Congress resolved the issue in the District by creating federal courts identical in jurisdiction to all other Article III courts, see supra note 5, and by restoring the local courts of the District to a position similar to the one they occupied prior to cession, as quasi-state courts of general jurisdiction, without any attributes of Article III courts. D.C. CODE ANN. § 11-921(a) (1981) (civil jurisdiction); id. § 11-923(b)(1) (criminal jurisdiction). See Palmore v. United States, 411 U.S. 389, 392 n.2 (1973) (Congress “invested the local courts with jurisdiction equivalent to that exercised by state courts”); H.R. REP. NO. 907, 91st Cong., 2d Sess. 35 (1970) (same). Local judges do not have tenure guarantees, D.C. CODE ANN. §§ 11-1523, 11-1526 (1981), and therefore local courts are not “courts of the United States” as defined in 28 U.S.C. § 451 (1976) (courts of United States are those whose judges are entitled to hold office during good behavior).

28. The local District courts possess the common law powers of the ceding states’ courts. Kendall v. United States, 37 U.S. (12 Pet.) 524, 614, 620-21 (1838); Pang-Tsu Mow v. Republic of China, 201 F.2d 195, 198 (D.C. Cir. 1952), cert. denied, 345 U.S. 925 (1953). The present D.C. Code continues in force Maryland common law, D.C. CODE ANN. § 49-301 (1981), not only that law as it was construed in Maryland at the time of cession, but also the evolving common law, Linkins v. Protestant Episcopal Cathedral Found., 187 F.2d 357, 360-61 (D.C. Cir. 1950). In interpreting this common law, the District’s courts use Maryland decisions. Watkins v. Rives, 125 F.2d 33, 35 (D.C. Jurisdiction
conclusion: "laws of the United States" and the laws of the District of Columbia should not be equated, and accordingly, the Article III judicial power does not normally encompass District local law.

The limitations upon Congress’ exercise of local powers never have been delineated with precision. As a matter of symmetry, however, since Congress may enact local laws for the District that exceed its normal powers under other parts of section 8, there is no structural reason why the limitations upon Congress’ exercise of its local legislative function should be identical to those governing its exercise of national powers. In fact, District residents are best protected by requiring instead that Congress be bound in the exercise of its local legislative capacity by constitutional restrictions similar to those that govern a state’s dealings with its citizens.


29. Several cases have recognized this distinction. In American Sec. & Trust Co. v. Rudolph, 38 App. D.C. 32, 45 (1912), the court described Congress’ federal and local powers under clause 17 as "two distinct classes of legislative powers." Under one, Congress enacts "laws that govern throughout the United States." Under the second, Congress possesses "special legislative powers to the full extent possessed by" the ceding states. These powers, exercised in the D.C. Code, "are local in their nature and purpose, and expressly limited to the boundaries of the District. They are not laws of the United States . . . ." See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858, 2874 (1982) ("powers granted under that clause are obviously different in kind from the other broad powers conferred on Congress").

30. See supra p. 298.


"The due process of the Fifth Amendment should include or imply for the inhabitants of the District of Columbia equal protection of the laws enacted by Congress as the local legislature of the District. It is unthinkable that Congress, enacting statutes applicable only in this jurisdiction, does not violate the due process clause of the Fifth Amendment if it denies the people of this District equal protection of the laws, just as a state legislature violates the "equal protection" clause of the Fourteenth Amendment if it does the same thing."

Id. at 630. Instead of adopting this restricted definition of Fifth Amendment "equal protection," the Supreme Court in Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding invalid statute authorizing racial segregation in District schools), stated that the due process clause of the Fifth Amendment embodies equal protection principles applicable to all Congressionally enacted law. The result reached in Bolling did not require such a sweeping pronouncement, for the statute in question, like the statute at issue in Hamilton National Bank, applied only to District of Columbia residents.

A similar unwarranted expansion of congressional authority took place in the field of eminent domain. In its first opinion delineating the bounds of Congress’ power to appropriate private property, the Supreme Court limited the permissible objectives of such appropriation to those that fall within the delegated enumerated powers of the federal government. Kohl v. United States, 91 U.S. 367, 372 (1876). A few years later, the Court held that in the District, Congress is not so limited in its takings power, but may appropriate property for any public use justifiable under traditional state police power. Shoemaker v. United States, 147 U.S. 282, 298 (1893) (upholding condemnation of private property in District for use as public park); see Berman v. Parker, 348 U.S. 26 (1954). This broad approach to Congress’ eminent domain power is now applied not only in the District, where it is supported by Congress’ state-like authority, but also in the states, where it has no such support. The Supreme Court now will not place any limitation upon the types of “public uses” for which Congress
D.C. Jurisdiction

The national powers of Congress contained in clause 17 also are subject to constitutional restraints. When Congress extends national legislation to the District, its actions are limited by the constitutional rights of District residents, which predate congressional sovereignty over the area. These rights were extended while the District still was a part of two states of the Union, and were not abrogated by its cession to the United States. The rights of District residents would be secured by requiring Congress to be bound, when extending national law to the District, by the standard of uniformity that governs its relationship with the states. Congress, and may appropriate property. See United States ex rel. Tennessee Valley Auth. v. Welch, 327 U.S. 546, 551 (1946) ("[i]t is the function of Congress to decide what type of taking is for a public use," not the function of the Court). As in the case of equal protection, had the Court recognized the distinction between Congress' broad police power in the District, and its restricted enumerated powers elsewhere in the Union, the expansion of Congress' power of eminent domain may well never have occurred.

These results have been made possible by the combined application of two incompatible principles: first, that Congress may exercise the police power of a state in legislating for the District, see supra note 12, and thus has much broader powers there than in any other part of United States, see Gibbons v. District of Columbia, 116 U.S. 404, 408 (1866) (in legislating for the District, "Congress, like any state legislature [is] unrestricted by constitutional provisions"), and second, that all laws enacted for the District must be considered "laws of the United States," see supra notes 6, 7. The second principle bootstraps upon the first, and the outcome is the unwarranted expansion of congressional power in the fifty states.

32. In Downes v. Bidwell, 182 U.S. 244, 260-61 (1901), the Court stated that when the District was part of the ceding states, the Constitution "attached to it irrevocably." Cession did not take the District "out of the United States or from under the aegis of the Constitution" since neither party to the cession contract "had ever consented to that construction of the cession." Since a pre-cession unconstitutional act affecting its inhabitants would have been void, "Congress could not do indirectly by carving out the District what it could not do directly." See O'Donoghue v. United States, 289 U.S. 516, 540 (1933) (District "not taken out of the Union by cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution, among which was the right to have their cases arising under the Constitution heard and determined by federal courts created under . . . Art. III"); see also National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 620-21 n.14 (1949) (Rutledge, J., concurring) (list of applicable constitutional guarantees); Hodgkin, supra note 12, at 262 (civil rights guarantees of the Constitution apply to the District, including guarantee of republican government).

33. Chief Justice Marshall may have approved of the view that in extending national law to the District, Congress should be bound by constitutional restrictions that govern its dealings with states. In Hepburn & Dundas v. Elzey, 6 U.S. (2 Cranch) 445, 453 (1805) (District not a state within original meaning of Constitution; therefore Article III diversity jurisdiction between citizens of different states may not be extended to District residents until Congress so legislates), he implied that clause 17 conveyed to Congress a power to redefine the word "state" as used in Article III to include the District. Justice Marshall thus seemed to sanction a limited use of Article I powers to expand, only for definitional purposes, the judicial power conveyed by Article III. (Congress did legislate as Justice Marshall suggested, see 28 U.S.C. § 1332(d), upheld as constitutional in National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 382 (1949)). In Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 325 (1820), Justice Marshall again suggested that Congress could use its power of redefinition to expand the meaning of "state" used in Article I, § 2, cl. 3, requiring Congress to apportion direct taxes among the states. In Loughborough, Justice Marshall stated his assumption that "the principle of uniformity, established in the constitution, secures the district from oppression." Id.

Congress always has considered itself empowered to extend constitutional guarantees referring to "states" to the District and to territories, exercising the power of redefinition recognized by Justice Marshall in Hepburn and Loughborough. For example, the interstate rendition clause, art. IV, § 2, cl. 2, refers to "states," but Congress extended its requirements to territories, Act of Feb. 12, 1793, ch. 7, § 1, 1 Stat. 302. The full faith and credit clause, art. IV, § 1, also refers only to "states," but Congress extended it to courts of territories, Act of Mar. 27, 1804, ch. 56, § 2, 2 Stat. 298, 299. The
the courts, should not be permitted to circumvent this standard simply by invoking the clause 17 "plenary" power.

Although the boundaries between the various powers conveyed by clause 17 may at times be blurred, the possibility of some ambiguity does not justify a refusal to acknowledge differences in congressional capacity when enacting federal and local law. The federal and local legal frameworks in the District plainly are separate and autonomous, and, accordingly, the description of Congress' power over the District as purely "federal" and of the D.C. Code as "laws of the United States" cannot be justified.

B. Goal of Uniformity

Local crimes in the District may be defined by three sources of authority: by Congress, by the locally elected District Council, and by the District's local courts, exercising their criminal common law powers inherited from the courts of Maryland. Local laws, no matter what their source, should be uniformly construed and applied. If the laws emanating only from the first source, Congress, are considered "federal" and therefore within Article III court "arising under" jurisdiction, arbitrary distinctions in the interpretation of District local law would result.

The needed consistency is possible only if local congressional enactments are treated as local law. It is implausible to interpret District law instead as a uniform body of federal law. The local Court of Appeals has stated that it is "quite unlikely" that the mere act of cession of the District from Maryland transformed Maryland local offenses into general federal offenses. Further, enactments of Congress and of the Council cannot be

Supreme Court held that the full faith and credit clause imposes the same obligations upon the District's courts as it does upon state courts, Loughran v. Loughran, 292 U.S. 216, 227-28 (1934). Congress extended the full Constitution to the District in 1871, Act of Feb. 21, 1871, ch. 62, § 34, 16 Stat. 419, 426, but did not specify whether it intended just to extend rights of national citizenship to District residents, or to redefine its relationship with the District along the lines of the national-state relationship embodied in the Constitution. In that same Act, Congress also created a state-like territorial government for the District, with an elected Governor (exercising the powers of today's Mayor), and a Legislative Assembly (similar to today's D.C. Council); id. § 2, 16 Stat. 419 (Governor), id. § 5, 16 Stat. 420 (Assembly). This structure lends support to the interpretation that Congress intended to treat the local entity as a state. It is difficult to interpret the Act as merely granting rights of national citizenship, since District residents unquestionably enjoyed those rights prior to 1871. Congress has reinforced this interpretation by defining the District as a state in almost 200 provisions of the U.S. Code. See U.S.C. index (District of Columbia) (1976 & Supp. V 1981).

34. See supra note 17 (discussing Council authority).
35. See supra note 28.
equated by characterizing the latter as a federal instrumentality, fashioning federal rules for the District. Unlike federal agencies, the Council is popularly elected, and may amend its own “enabling statute,” the District Charter. The Council’s power extends to all proper subjects of legislation, much like a state legislature, and its powers are limited just as are those of the states, by Article I, section 10 of the United States Constitution.

Finally, the nondelegation doctrine no longer poses a roadblock to uniformity. At one time, courts refused to permit Congress to delegate its power to define local offenses to a local legislature, holding that Congress could not delegate “general” lawmaking power. The nondelegation rule in turn was used to uphold the characterization of local offenses as crimes against the United States. The Supreme Court later disapproved this line of cases and ruled that Congress could delegate its power to define local offenses to a local legislative authority. In so doing, the Court distinguished between Congress’ local and national powers, holding that only the former may be delegated and that delegated local power may be as broad as the police power of the states. In the Home Rule Act, Congress did in fact delegate to the current District local government the power to define local offenses, and there is little doubt that this delegation is constitutional. The nondelegation justification for continuing to categorize local offenses as “crimes against the United States” therefore has been removed.

37. See supra note 17.
39. See supra note 17.
40. Fletcher v. United States, 42 App. D.C. 53, 63 (1914); United States v. Celia, 37 App. D.C. 433, 435 (1911), cert. denied, 223 U.S. 728 (1912). In Celia, the court rejected plaintiff’s argument that prosecutions under the D.C. Code should be brought in the name of the District of Columbia rather than the United States, basing its holding on the nondelegation doctrine. Since Congress may not delegate the authority to enact local criminal statutes, reasoned the court, the United States must continue to prosecute crimes under those statutes. Now that the nondelegation limitation has been overruled, see infra note 42, there is no longer any sound rationale for barring the prosecution of local offenses by the real party in interest in local District prosecutions, the District of Columbia.
41. See, e.g., Metropolitan R.R. v. District of Columbia, 132 U.S. 1, 9 (1889) (crimes committed in the District are crimes against United States because Congress, not District government, is sovereign there); Franchino, supra note 17, at 231-39 (discussing line of cases); Hodgkin, supra note 12, at 265-67 (same).
42. District of Columbia v. John R. Thompson Co., 346 U.S. 100, 108-10 (1953); see Firemen’s Ins. Co. v. Washington, 483 F.2d 1323, 1328 (D.C. Cir. 1973) (“When Congress delegates its police power to the local government, that entity’s powers become as broad as those of Congress . . . .”).
44. See supra note 17 (discussing Home Rule Act).
C. Congressional Intent and the Court Reform Act

Congress implicitly ratified the view of the D.C. Code as a body of nonfederal, state-like law in its restructuring of the court system in the District. It did not make all areas of federal and District law consistent with this approach, however: A few provisions that bear upon the federal-state relationship have not been extended to govern the federal-District one, although they are equally applicable to it.

1. Analogy to States

Congress separated federal and local jurisdiction in the District by analogy to the federal-state court system model. It created two types of courts for the District: first, Article III courts equivalent in jurisdiction to federal courts in the fifty states to determine federal matters, with no federal question jurisdiction over Acts of Congress applicable exclusively to the District of Columbia, and second, local courts equivalent to state courts of general jurisdiction. Congress structured the relationship between the federal and local courts to parallel that existing in the fifty states. The federal courts have long considered District residents to be state citizens for purposes of federal court diversity jurisdiction; now the District is defined as a state for federal civil rights jurisdiction and for removal jurisdiction, and District officials can act "under color of state law." D.C. Code statutes are considered "statutes of the District of Columbia" for purposes of federal civil rights statutes; the local Court of Appeals is defined as the "highest court of a state" for purposes of Supreme Court review, and the local courts are considered state courts for purposes of removal jurisdiction.

46. See supra note 5.
48. See supra note 27.
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The federal and local courts in the District have implemented Congress' expressed intent by fashioning their relationship according to principles of federalism and comity. The local courts have held themselves not bound by decisions of the D.C. Circuit, notwithstanding a federal constitutional basis for those decisions.\(^7\) The D.C. Circuit has interpreted the Court Reform Act to give local courts in the District "full responsibility for the development of the District's own law,"\(^8\) and has held that the federal courts must accord the "greatest deference" to local court decisions.\(^9\) The federal courts have adapted the major guidelines that shape their approach to state law and state courts—the Younger,\(^0\) Pullman,\(^6\) and Erie\(^6\) doctrines—to their dealings with District of Columbia local law matters.

2. Remaining Inconsistencies

Many provisions in the U.S. Code bear on the federal-state relationship, however, and Congress failed to amend some of these to conform to its general scheme for the District of Columbia. Noting Congress' express of state remedies prior to invocation of federal habeas corpus jurisdiction).

60. Younger v. Harris, 401 U.S. 37 (1971) (federal court must dismiss injunction action challenging state law under which plaintiff concurrently prosecuted in state court); see Rieser v. District of Columbia, 580 F.2d 647, 657 (D.C. Cir. 1978) (Younger doctrine limit on federal jurisdiction designed to protect very type of court system created in the District with pervasive local responsibilities). But see Halleck v. Berliner, 427 F. Supp. 1225, 1239 (D.D.C. 1977) (since Younger doctrine based on principles of federalism, it does not "apply with the same force" in the District).
proviso that, for purposes of federal district court jurisdiction, D.C. Code laws are not "laws of the United States," the Supreme Court in Key v. Doyle commented that this "hardly implies that Congress must have intended that references to 'laws of the United States' found in all other jurisdictional chapters and sections ... would include provisions of the D.C. Code." Yet in many instances the Supreme Court and the lower federal courts apply a presumption contrary to Congress' clear intent. Unless Congress specifically states to the contrary, these courts refuse to equate the District with states, and construe the D.C. Code not as state, but as federal, law.

In District of Columbia v. Carter, for example, the Supreme Court held that Congress did not intend the District to be considered a "State or Territory" for purposes of 42 U.S.C. § 1983, which provides a federal forum for deprivations of constitutional rights under color of state (or territorial) law. Congress soon disavowed the Supreme Court's construction, amending the section to equate explicitly the District with the states and territories.

In other cases, Supreme Court literalism has remained uncorrected. In Palmore v. United States, the Court held that D.C. Code statutes are not equivalent to state statutes for purposes of appeal as of right to the Supreme Court. In Key v. Doyle, however, the Court held that D.C. Code statutes also are not "statutes of the United States" for purposes of Supreme Court appeal. The result, as the Key dissent noted, is that

64. Id. at 67 n.12; see Note, supra note 62, at 981 (imputing any significance to Congress' failure to amend U.S. Code provision to conform to new scheme "is excessively literal, considering ... the task Congress would have faced had it decided to amend every applicable section of the judicial code in order to bring the District of Columbia courts into exact conformity with the state systems").
65. 409 U.S. 418, 432 (1973); see id. at 430 ("assumption that the Federal Government could keep its own officers under control" is equally applicable to District officers).
66. 42 U.S.C. § 1983 (Supp. V 1981); see H.R. REP. NO. 548, 96th Cong., 1st Sess. 1-3 (1979), reprinted in 1979 U.S. CODE CONG. & AD. NEWS 2609, 2609-11 (after amendment, federal courts have jurisdiction over § 1983 actions against District officials acting under authority of local laws, even if those laws were passed by Congress). Carter is an anomaly, since Congress has "established an independent court system with exclusive jurisdiction over local matters." Id. at 2, 1979 U.S. CODE CONG. & AD. NEWS at 2610. The District has the same "government structures that operate in every other locale," id., and the amendment therefore "is necessary in order to give citizens of the District of Columbia rights equal to those of citizens in the states and territories of the United States." Id. at 1, 1979 U.S. CODE CONG. & AD. NEWS at 2609.
68. Id. at 395 ("We are entitled to assume that in amending § 1257, Congress legislated with care, and that had Congress intended to equate the District Code and state statutes for the purposes of § 1257, it would have said so expressly ... ").
70. The Court reasoned that mandatory appellate jurisdiction over state court judgments is reserved for cases threatening the supremacy and uniformity of federal law; no such threat exists when state courts invalidate state statutes on federal grounds, and no automatic right of appeal is provided to the Supreme Court. "From the analogy of the local D.C. courts to state courts drawn by Congress in the 1970 Act, it follows that no right of appeal should lie to this Court when a local court of the
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D.C. Code enactments are treated as "mongrel statutes," reviewable only by writ of certiorari.\textsuperscript{71} The \textit{Key} decision invited Congress to legislate the necessary clarification, but Congress has not yet done so.

In addition, Congress has not extended the prohibition upon the issuance of federal injunctions staying state court proceedings\textsuperscript{22} to local District proceedings,\textsuperscript{73} nor has it eliminated the United States Attorney General's constructive custody over defendants sentenced by the local courts.\textsuperscript{74}

District invalidates a law of exclusively local application." \textit{Id.} at 68. The Court explained that underlying its decision in \textit{Palmore} was "the long-established principle that counsels a narrow construction of jurisdictional provisions authorizing appeals as of right to this Court." \textit{Id.} at 65. Although the \textit{Key} majority did not expressly overrule \textit{Palmore}, it did so indirectly by finding that pre-1970 methods of Supreme Court review of local law should remain applicable. \textit{Id.} at 64, 66. Separate provision for Supreme Court appeal from the local court system was last provided in the Act of Mar. 3, 1911, ch. 231, § 250, 36 Stat. 1087, 1159. Section 250(6), similar to 28 U.S.C. § 1257(1) (1976) (construed by the Court in \textit{Key}), provided for appeals in "cases in which the construction of any law of the United States is drawn in question by the defendant." Just as in \textit{Key}, the Court in American Sec. & Trust Co. v. Commissioners of the Dist. of Columbia, 224 U.S. 491, 494-95 (1912), concluded that the phrase "law of the United States" in this section did not include congressional acts applicable solely to the District. Appeals could also be taken under § 250(3) of the 1911 Act, similar to § 1257(2) (construed by the Court in \textit{Palmore}) which provided for appeals in cases involving the "constitutionality of any law of the United States." Although the same words, "law of the United States," were used in both sections of the Act, the Court concluded in Heald v. District of Columbia, 254 U.S. 20, 22-23 (1920), that appeals involving the constitutionality of local statutes should be permitted under § 250(3). \textit{Heald} found that § 250(3) simply reenacted statutes that had been interpreted to permit Supreme Court review in cases "concerning the constitutional power of Congress to enact local statutes" and that the prior construction to permit appeals in these cases should continue, 254 U.S. at 22-23, even though this forced the Court to interpret identical words in the same jurisdictional statute in different ways. The result in \textit{Palmore} cuts off one of these routes to Supreme Court review under the 1911 Act.

71. 434 U.S. at 74 (White, J., dissenting). The \textit{Key} dissent noted that \textit{Key} and \textit{Palmore} together may remove any basis even for certiorari review of local court constructions of local statutes. \textit{Id.} at 74-75 & n.6. Congress should resolve this problem by providing that for purposes of § 1257, D.C. Code provisions are state statutes. \textit{Cf.} 28 U.S.C. § 1258(2) (1976) (providing for Supreme Court appeal when a Puerto Rico statute is upheld against a challenge under the Constitution, just as state statutes may be appealed under 28 U.S.C. § 1257(2) (1976)).


The D.C. Circuit has interpreted these provisions inconsistently. In Cannon v. United States, 645 F.2d 1128 (D.C. Cir. 1981), the court held that since the District's Mayor and Council have charge of Lorton prison, \textit{id.} at 1136-37, the legal fiction of "custody of the Attorney General" does not suffice as a basis for a Lorton inmate suit against prison officials under the Federal Tort Claims Act, \textit{id.} at 1141-42. In Milhouse v. Levi, 548 F.2d 357, 363 (D.C. Cir. 1976), however, the court held that Congress' failure to amend the provision under which the Attorney General nominally regulates Lor-
Congress also has failed to exclude the local courts from the category of "courts established by Act of Congress" that may issue writs under the All Writs Act,\textsuperscript{76} and despite the existence of a separate writ statute in the D.C. Code,\textsuperscript{78} the D.C. Circuit has ruled that the local courts may issue writs under either the U.S. or the D.C. Code provision.\textsuperscript{77}

The most problematic anomaly still remaining is the continued prosecution of defendants in the local courts by the United States Attorney for the District of Columbia. Attempts to create a local prosecutor's office have failed.\textsuperscript{78} Because local cases are prosecuted by the United States Attorney, they continue to be brought in the name of the United States. This proce-
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dure in turn is used to justify the retention of Article III jurisdiction over
D.C. Code offenses and to support the characterization of D.C. Code vi-

D. "Federal" Offenses and Non-Article III Courts

The logic by which D.C. Code offenses are considered crimes against
the United States is consistent neither with the jurisdiction conferred by
Congress upon the District's two court systems, nor with the constitu-
tional power of Congress to vest certain matters in non-Article III courts.

Under the Judiciary Act, the district courts of the United States have
exclusive jurisdiction over prosecutions for crimes against the United
States. Congress has not amended that provision to carve out an excep-
tion for prosecutions under the D.C. Code. It has merely vested jurisdic-
tion over all laws applicable only to the District of Columbia in a non-
Article III court system of general jurisdiction. This division of jurisdic-
tion suggests that Congress does not intend to equate D.C. Code and U.S.

Had Congress instead defined D.C. Code violations as "offenses against
the United States" but excepted them from the exclusive jurisdiction of
Article III courts, that exception could not withstand scrutiny. Since jurisdic-
tion over offenses against the United States is part of the "protected
core" of Article III power, Congress cannot divest Article III courts of
this jurisdiction and place it instead in non-Article III courts.

79. Dobbs v. Neverson, 393 A.2d 147, 149 (D.C. 1978); see United States v. Kember, 648 F.2d
1354, 1358-59 (D.C. Cir. 1980) (U.S. Attorney's power to prosecute D.C. Code offenses supports
federal jurisdiction over local offenses despite dismissal of federal charges); United States v. Ford, 627
F.2d 807, 812 (7th Cir.) (U.S. Attorney's prosecution of local offenses in name of United States
justifies retention of jurisdiction over District offenses by federal district courts outside the District),
cert. denied, 449 U.S. 923 (1980); United States v. Jackson, 562 F.2d 789, 806 (D.C. Cir. 1977)
(MacKinnon, J., dissenting in part) (U.S. Attorney's prosecution of both federal and local offenses
supports their joinder in single trial in federal court); Hackney v. United States, 389 A.2d 1336, 1339
(D.C. 1978) (U.S. Attorney's power to prosecute D.C. Code offenses justifies return of indictments by
grand jury called by local court in either local or federal court).


81. The power of Congress to create non-Article III courts and the type of jurisdiction with which
they can be invested has been much disputed. It may be argued that the Framers never intended to
create any source of federal judicial power other than Article III. THE FEDERALIST Nos. 80, 81, 82
(A. Hamilton); 2 RECORDS OF THE FEDERAL CONVENTION 45-46, 425-26 (M. Farrand rev. ed. 1937);
P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS
AND THE FEDERAL SYSTEM 7-25 (2d ed. 1973). Attempting to ensure the separation of governmental
powers, the Framers sought an unbiased and independent judiciary that would exercise only judicial
power. THE FEDERALIST Nos. 78, 79 (A. Hamilton); 1 RECORDS OF THE FEDERAL CONVENTION,
supra, at 97-98, 108-10; 2 id. at 428-29; see O'Donoghue v. United States, 289 U.S. 516, 530-31
(1933).

Article I, § 8, cl. 9, conferring power upon Congress "to constitute Tribunals inferior to the su-
preme Court," thus may refer only to those courts that Article III permits Congress to constitute.

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Reform Act's removal of D.C. Code criminal proceedings from Article III court jurisdiction can be justified only if those proceedings are not federal in nature.

The Supreme Court confronted this issue in *Palmore v. United States*.\(^8\) In that case, the Court justified non-Article III court jurisdiction over D.C. Code offenses by analogy to state court enforcement of federal penal laws.\(^4\) Congress, however, never has required state courts to enforce fed-

Katz, supra note 14, at 894 n.2; Note, *The Distinction Between Legislative and Constitutional Courts and Its Effect on Judicial Assignment*, 62 COLUM. L. REV. 132, 137 n.28, 149-50 (1962). Although the “necessary and proper” clause, Article I, § 8, cl. 18, grants broad implied powers to Congress, it should not be interpreted to grant an additional court-creating power, since that power is enumerated in another section of the Constitution. Congress' implied power over section 8 subjects does allow it to create administrative bodies exercising quasi-judicial power; for this reason the Court held in *Ex parte Bakelite Corp.*, 279 U.S. 438, 451 (1929), that Article I courts may be created to determine matters “arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it.” Non-Article III trial courts may be constituted to determine these “public rights” cases, and the principle of separation of powers is satisfied by review of these matters in an Article III court. See *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 102 S. Ct. 2858, 2894 (1982) (White, J., dissenting).

Congress' power to create local District courts, however, derives from its general sovereign powers over the District, a wholly different source than that of its power to create courts to adjudicate “public rights.” The Supreme Court's recent opinion in *Northern Pipeline*, 102 S. Ct. at 2868-71, does not serve the cause of clarity by describing the two types of courts under a single rubric, as “legislative courts.” As the four-member dissent in that case notes, there are fatal flaws in this unitary theory, and in characterizing Congress' power to create all non-Article III courts in the District simply as "geographical." *Id.* at 2888-89 & n.8 (White, J., dissenting); see also *In re Cox Cotton Co.*, 24 B.R. 930, 952-54 (E.D. Ark. 1982) (distinguishing Districts of Columbia courts, which exercise judicial power, from other courts with narrow subject matter jurisdiction established under Article I, which do not exercise judicial power).

Although the United States is a party to criminal proceedings, those proceedings do not adjudicate "public rights." *Northern Pipeline*, 102 S. Ct. at 2871 n.24. Federal criminal proceedings remain at the "protected core" of Article III judicial power, *id.* at 2871 n.25, and must remain subject to Article III adjudication. See *infra* notes 85-88. If Congress' section 8 powers, including the power to define local criminal offenses under clause 17, are deemed to be coequal, and District offenses therefore are defined as "federal," the separation of powers principle must apply to the local courts created by Congress to try those offenses. (That Congress may vest some of the federal judicial power in state courts has no relevance to the integrity of this principle and its application to congressionally created non-Article III courts. *Northern Pipeline*, 102 S. Ct. at 2867 n.15.). The principle would require that those courts be invested with Article III tenure and salary guarantees, especially since the U.S. government prosecution of D.C. Code violations may undermine the impartiality of judges without those protections. See *Brown, The Rent in Our Judicial Armor*, 10 GEO. WASH. L. REV. 127, 129 (1941) (Article III protections doubly needed in cases in which U.S. government is party). These difficulties may be avoided, first, by defining D.C. Code offenses as "crimes against the District of Columbia," and second, by defining the District's local courts not as "federal courts with limited geographical reach" but instead as quasi-state courts, constituted under Congress' state-like power in the District, with jurisdiction over local law matters, including criminal offenses. These courts do exercise judicial power, not of the United States, but of the District of Columbia, and have nothing in common with quasi-administrative public rights adjudicatory bodies. This different theoretical framework for the two types of courts serves to explain the current status of the District's courts in a more satisfactory and consistent way.

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84. *Id.* at 402, 407. The Court in *Palmore* also analogized the jurisdiction of the District's local courts to that exercised by territorial courts, *id.* at 403, but the Court disregarded an important distinction between territorial courts and courts of the District. The federal question jurisdiction of territorial courts without Article III protections has been justified by the ephemeral nature of the territories and the temporary nature of their courts. *McAllister v. United States*, 141 U.S. 174, 187-88
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eral criminal laws. On the contrary, the Judiciary Act of 1789 vested exclusive jurisdiction over offenses against the United States in the United States courts, and Congress never has divested Article III courts of this exclusive jurisdiction. In addition, Supreme Court precedent that the states may not be required to enforce federal criminal law never has been overruled. Thus, the analysis in Palmore is exactly backward: It is not Congress’ clause 17 power to create state-like courts that allows it to vest “federal” causes of action in the District in non-Article III tribunals, but Congress’ clause 17 ability to create state-like claims that justifies the use of non-Article III courts to hear those claims.

(1891). The District, however, is a permanent entity. Residents of the District, unlike those of the territories, were entitled to an Article III forum when prosecuted for federal crimes prior to the cession of the District to the United States, and that right was not taken away by cession. O'Donoghue v. United States, 289 U.S. 516, 540 (1933). In 1801, Congress created the first court system for the District, and vested criminal jurisdiction in a tenured circuit court. See infra note 89. In 1933, the Court in O'Donoghue held that although Congress had not originally classified these courts as Article III courts, they exercised federal judicial power in part and must be considered as established under Article III. The Palmore analogy of the District's courts to territorial courts in order to justify non-Article III jurisdiction over what it described as “federal” offenses therefore is inappropriate.

85. The Court in Palmore cited Warren, Federal Criminal Laws and the State Courts, 38 HARV. L. REV. 545, 551-53, 570-72 (1925), see 411 U.S. at 402, for the proposition that “[v]ery early in our history, Congress left the enforcement of selected federal criminal laws to State courts.” Warren, however, does not support this conclusion. Warren cites only one instance in which criminal jurisdiction was conveyed by Congress to state courts, in the Act of Mar. 2, 1799, ch. 42, § 28, 1 Stat. 733, 740-41. See Warren, supra, at 554 & n.25. This statute, which created a United States Post Office, defined certain state-like offenses connected with mail delivery and provided that state courts would be permitted to exercise jurisdiction over those offenses when similar offenses were defined by the state as state law violations. By contrast, Congress never authorized state courts to try crimes that are typically federal. See Stearns v. United States, 22 F. Cas. 1188, 1192 (C.C. 1835) (No. 13,341) (state courts “cannot hold criminal jurisdiction over offences exclusively existing, as offences against the United States”). All other examples cited by Warren involve penal actions for fines and forfeitures, not criminal violations. See Stearns at 1192 (“Actions for penalties are civil actions, both in form and in substance.” State court “jurisdiction of federal causes . . . is confined to civil actions for civil demands or to enforce penal statutes”).

86. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 72, 78-79 (circuit courts of the United States “shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where . . . the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offences cognizable therein”); id. § 9, 1 Stat. 76-77 (district courts given jurisdiction over federal misdemeanors exclusively of state courts).


89. In fact, courts without Article III protections have been vested with jurisdiction over some local offenses throughout the District's history. In 1801, Congress created a tenured circuit court, Act of Feb. 27, 1801, ch. 15, § 3, 2 Stat. 103, 105, giving it jurisdiction “of all crimes and offenses committed within" the District, id. § 5, 2 Stat. 106, but simultaneously provided for the continuation of local criminal powers vested by state laws previously in force in nontenured justices of the peace.
If D.C. Code violations are not "offenses against the United States," the United States Attorney acts in a nonfederal capacity when he prosecutes claims arising under the D.C. Code. In that capacity he is not an officer of the United States but represents instead the real party in interest in local District prosecutions, the people of the District of Columbia and their local government. Accordingly, the presence of the United States in local prosecutions cannot serve as an independent basis for Article III jurisdiction over local offenses.

E. Needed Changes

The current confusion over the nature of the D.C. Code can be cleared away by simple definitional changes. In addition to identifying the real party in interest in District of Columbia local prosecutions as the local District government, violations of the D.C. Code must be defined as crimes against the District of Columbia, equivalent to state offenses, not as crimes against the United States. These changes would promote the

(who sat together as local legislative levy courts with power to define local criminal offenses). Id. § 11, 2 Stat. 107; see Franchino, supra note 17, at 215 & n.23. In 1838, Congress created a nontenured criminal court, giving it jurisdiction "of all crimes and offences against the laws now in force in" the District, exercising this jurisdiction concurrently with the justices of the peace. Act of July 7, 1838, ch. 192, § 1, 5 Stat. 306. In 1863, this criminal court was made a special term of the tenured supreme court. Act of Mar. 3, 1863, ch. 91, § 3, 12 Stat. 762, 763. In 1870, Congress divested the supreme court and the justices of the peace of their jurisdiction over all noninfamous offenses committed within the District, vesting exclusive jurisdiction over those offenses "and of all offences against any of the ordinances of the city of Washington, or of the city of Georgetown, or laws of the levy court of the county of Washington" in a nontenured police court. Act of Jun. 17, 1870, ch. 133, § 1, 16 Stat. 153. Congress provided that the cities of Washington and Georgetown, and the levy court of Washington county, would bear the costs of the new court through assessments upon District residents. In addition, Congress specified that offenses defined by the cities and by the levy courts would be prosecuted not by the U.S. Attorney but by city or levy court attorneys. Id. § 16, 16 Stat. 156. Although Congress has changed the form of the District's courts several times since 1870, it is clear from the foregoing history that Congress has never considered offenses defined by local District authorities to be offenses against the United States.

90. See supra note 16.

91. Id. Because the D.C. government may not change the duties of the District's U.S. Attorney, D.C. CODE ANN. § 1-233(a)(8) (1981), Congress must make this definitional change.

92. See supra note 15. An additional reason to change the present nomenclature is that local District prisoners, considered to have committed "crimes against the United States," are classified for purposes of incarceration as "federal" prisoners. Under D.C. CODE ANN. § 24-425 (1981), the U.S. Attorney General may designate D.C. Code violators not only to Lorton, where they are considered for parole under District parole standards, see D.C. CODE ANN. § 24-204 (1981), but also to any federal prison, where they receive federal parole consideration due to the U.S. Parole Commission's interpretation of D.C. CODE ANN. § 24-209 (1981) (federal parole board given "same power and authority" to parole prisoners convicted in the District of "crimes against the United States" as is vested in the District's parole authority). The Commission interprets § 24-209 as a grant of authority to determine parole of D.C. Code offenders housed in federal facilities under the federal parole statute and regulations. See Cosgrove v. Smith, 697 F.2d 1125, 1129 (D.C. Cir. 1983). The author of this Note has represented inmates who challenged this interpretation on two grounds: first, that § 24-209 requires that the U.S. Parole Commission apply the District's parole criteria, and second, that the use of two different parole statutes and regulations in determining the parole of similar D.C. Code offenders violates equal protection. Id. Compare 18 U.S.C. § 4206 (1976) (federal parole statute) and 28
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uniform treatment of District residents by the various sources of authority in the District and would best comport with Congress’ intent in restructuring the local and federal governmental and judicial frameworks in the District into separate and autonomous units. Defining the D.C. Code as nonfederal removes actions arising under that Code from the category of cases that may fall within the “arising under” jurisdiction of Article III courts. The Code instead would be interpreted and enforced uniformly by an independent court system. Under this framework, section 11-502(3) may not be interpreted as a mere allocation of “federal” jurisdiction among the courts of the District, but instead as a statutory embodiment of the pendent jurisdiction concept applied to criminal cases.

II. Examining “Criminal Pendent Jurisdiction”

The standards for the exercise of pendent jurisdiction have been delineated by the Supreme Court in United Mine Workers v. Gibbs, and are applicable to pendent local District claims for the same reasons that they govern pendent state law claims. Under Gibbs, the federal court has “power” to hear local causes of action normally outside its limited jurisdiction when the federal and local claims derive from a “common nucleus of operative fact.” The “power” requirement must also be met in criminal pendent actions under section 11-502(3); it is satisfied if the federal and local charges arise out of the “same transaction” and may be joined for trial under Federal Rule of Criminal Procedure 8(a).


93. See supra note 14.
94. See supra note 10.
99. Two or more offenses may be charged in the same indictment or information in a separate
vests certain supervisory responsibilities in the trial court, and identifies situations in which pendent civil claims should be dismissed without prejudice. Due to the different characteristics of criminal trials, however, the trial court in criminal pendent jurisdiction cases cannot fulfill its Gibbs responsibilities.

A. The Gibbs Requirements in the Civil Context

Under Gibbs, the federal court has no subject matter jurisdiction over any case in which the federal claims are insubstantial. Even when the court has jurisdictional power, it should exercise its discretion to refuse to adjudicate certain local claims. For example, when all federal claims are dismissed before trial, the local District claims should be dismissed as well. The action should also be dismissed when a District claim raises a novel and unsettled issue of law; the federal court should allow local courts the opportunity to first decide the issue, since the District of Columbia, like the states, is entitled to an internally consistent elaboration of its law by its own courts. The coherence of local law is disrupted by

count for each offense if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.


104. Lee v. Flintkote Co., 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) ("[W]here we do not yield a measure of deference to the District of Columbia Court of Appeals, two courts—neither of which could review the other's decisions—would engage independently in the process of formulating the local law of the District. That would subvert the dual aims of . . . discouraging forum shopping and promoting uniformity within any given jurisdiction on matters of local substantive law."); Bethea v. United States, 365 A.2d 64, 71 (D.C. 1976) ("In our system of jurisprudence, which so greatly values the doctrine of stare decisis, the ability to shape and control the precedential foundations of the law is essential to the independence of a particular judicial structure." The D.C. Court of Appeals has an
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federal court interpretations, since local courts may be reluctant to create a conflict with a federal construction, and therefore may be constrained in their later consideration of the same issues. The chilling effect is especially disturbing in the District, where courts of general jurisdiction, created a mere thirteen years ago, have not yet had an opportunity to develop a substantial body of law. The federal court also should exercise its discretion to dismiss pendent claims if the joinder of federal and local claims may confuse the jury.

B. Applying Gibbs in the Criminal Context

The federal court can fulfill its Gibbs responsibilities only if it is able to refuse jurisdiction, since the distinctive characteristic of the Gibbs test is the supervisory responsibility it places upon the federal trial court to preserve comity between federal and local courts, to prevent "forum-shopping" by dismissing cases with insubstantial federal claims, and to promote fairness by dismissing claims likely to confuse a jury. But in the criminal context, the court’s discretion to refuse to adjudicate a pendent claim is restricted, if not entirely eliminated. In criminal prosecutions, unlike civil suits, jeopardy attaches to all charges as soon as a jury is empaneled or the judge begins to hear evidence. Following that attachment, charges dismissed in the federal court cannot be brought in the local court; there is no possibility of “dismissal without prejudice.”

Perhaps due to this consequence of dismissing pendent local criminal charges, the District’s federal courts have been reluctant to order dismissal, even in cases in which they should have no jurisdictional power to

“obligation to fulfill the mandate of the Court Reorganization Act by preserving the autonomous authority of our judicial structure”), cert. denied, 433 U.S. 911 (1977); 74 HARV. L. REV. 1660, 1662 (1961) (state normally entitled to elaboration of its law by its own courts).

105. Wechsler, supra note 102, at 232 (federal courts are not authorized state law expositors; no mechanism by which state courts can correct federal court errors), cited with approval in United Mine Workers v. Gibbs, 383 U.S. 715, 726 n.15 (1966); Note, supra note 98, at 666 (state consideration limited following federal court’s holding on novel issue of state law; because of possible reliance, state court hesitant to create conflict with federal determination).

106. See Financial Gen. Bankshares, Inc. v. Metzger, 680 F.2d 768, 771 (D.C. Cir. 1982) (district court improperly retained jurisdiction over local claim because District’s local courts had not yet had opportunity to define applicable standards).


108. Note, supra note 98, at 666.

109. U.S. CONST. amend. V ("No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . ").


112. A defendant can be brought to trial again only in very limited circumstances. See Westen & Drubel, Toward a General Theory of Double Jeopardy, 1978 SUP. CT. REV. 81.
hear the local claims.\textsuperscript{113} This practice promotes jury prejudice, and allows prosecutors to "forum shop" for federal evidentiary rules that may have a material effect on the outcome of the litigation, even though the federal count used to gain access to that forum is insubstantial and ultimately is dropped.\textsuperscript{114} Further, these restrictions on the federal court's supervisory power hamper its ability to prevent the harsher treatment produced by the joinder statute for defendants convicted of U.S. Code offenses within the District compared to U.S. Code violators in the fifty states.

1. \textit{Multiplicity and Jury Prejudice}

Courts and commentators have noted that the practice of charging multiple counts under a single code for one criminal act increases the possibility of jury prejudice and hostility, and the danger of a compromise verdict.\textsuperscript{115} Multiplicitous indictments are tolerated, and defendants may not move to strike counts on grounds of multiplicity, because courts presume that Congress legislates with care and intends that the offenses it defines in separate sections of the U.S. Code (or of the D.C. Code) will be separately charged.\textsuperscript{116} The presumption that Congress does not intend duplic-
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cation does not hold once two separate codes are available to the prosecutor for charging. 117 The two codes often are aimed at deterring and punishing the same criminal conduct, and aside from federal jurisdictional elements, they describe the "same offenses" in many parallel provisions. 118 Recognizing this, the District's federal courts refuse to permit double convictions for similar U.S. and D.C. Code charges. 119

By increasing the number of available charging provisions, section 11-502(3) joinder expands the prosecutor's already broad discretion to include multiple charges in a single indictment, and creates a corresponding increase in jury prejudice. The effects of the availability of two self-contained codes for charging must nullify the presumption that multiplicity is tolerable. 120 The absence of any checks on the prosecutor's section 11-

117. The D.C. Circuit has held, however, that "it is for the U.S. Attorney to determine whether to prosecute under both [federal and local] statutes or only one." United States v. Shepard, 515 F.2d 1324, 1336 (D.C. Cir. 1975).

118. The test used to determine whether two statutory provisions describe two offenses or only one is "whether each provision requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932). Only the "essential elements" of two offenses need be the same under Blockburger, United States v. Sampol, 636 F.2d 621, 653-54 (D.C. Cir. 1980), and the only difference between many D.C. and U.S. Code offenses is the element of federal jurisdiction—not an "essential element" for Blockburger purposes. United States v. Blessingame, 427 F.2d 329, 330 (2d Cir. 1970) (federal jurisdiction element "is logically no part of the crime itself" and therefore prosecution need not prove defendant's knowledge of that element), cert. denied, 402 U.S. 945 (1971); see United States v. Hooper, 432 F.2d 604, 605 (D.C. Cir. 1970) (questioning cumulative federal-District sentences for offenses "factually the same crime, except for the addition of a federal element of which defendant had no knowledge"); see also U.S. NAT'L COMM'N ON REFORM OF FED. CRIMINAL LAWS, Final Report § 103 comment (1971) (jurisdiction not element of offense because not relevant to crim-inality, but only goes to power of government to prosecute); Annot., 67 A.L.R.3d 988, 1000 (1975 & Supp. 1982) (listing cases in which jurisdictional element not required to be proved beyond reasonable doubt). But see United States v. Girst, 636 F.2d 316, 322-23 (D.C. Cir.) (separate punishments for offenses that differ only by jurisdictional element consistent with congressional intent), vacated, 645 F.2d 1014 (D.C. Cir. 1979); United States v. Butler, 462 F.2d 1195, 1198-99 (D.C. Cir. 1972) (existence of separate offenses depends on Congress', not on defendant's, intent).

At the very least, when a U.S. Code offense requires proof of only one fact in addition to those required for the D.C. Code offense to which it is joined, the D.C. Code offense should be considered a lesser included offense, and for double jeopardy purposes, greater and lesser included offenses define the "same offense." Brown v. Ohio, 432 U.S. 161, 168 (1977). The U.S. Attorney, however, does not charge D.C. Code offenses as lesser included offenses. United States v. Jones, 527 F.2d 817, 829 nn.14-15 (D.C. Cir. 1975); United States v. Hill, 470 F.2d 361, 368 (D.C. Cir. 1972).


120. The Supreme Court has held that the federal prosecutor's charging discretion is broad, and that "when an act violates more than one [U.S. Code] criminal statute, the Government may prosecute under either so long as it does not discriminate against any class of defendants." United States v. Batchelder, 442 U.S. 114, 123-24 (1979); see Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978); Oyler v. Boles, 368 U.S. 448, 456 (1962); United States v. Jones, 527 F.2d 817, 820 (D.C. Cir. 317
502(3) charging power may well result in harsher treatment for District defendants charged under both federal and local Codes than for defendants charged under only one Code.121

2. Disparity of Outcome Among D.C. Code Violators

Many defendants charged under both the U.S. and D.C. Codes and tried in federal court ultimately are sentenced only for D.C. Code offenses.122 The D.C. Circuit has ruled that this fact notwithstanding, it is “patently not feasible for the District Court to try a defendant, charged with both local and federal offenses, under differing evidentiary rules” and that therefore federal rules must apply.123 At the same time, the D.C. Circuit has permitted the use of D.C. Code evidentiary standards if all federal charges are disposed of prior to the start of evidence.124 Thus, the district court may determine which standards to apply by reference to a purely arbitrary factor: the stage of the proceeding at which all federal charges have been dismissed. Based solely on this factor, trial outcomes of federal court defendants ultimately sentenced for identical D.C. Code of-
fenses may differ materially.

The practice of using federal evidentiary standards in the federal court trial of D.C. Code offenses results in an additional disparity between federal and local court treatment of D.C. Code offenders. The different evidentiary standards applied by the two court systems—local or federal—burdens of proof, presumptions, and tests for witness competency, for example—are substantive, and may have substantial effects upon trial outcomes. The difference in outcomes that may result between offenders tried for identical D.C. Code violations because of the happenstance of the court in which they are tried contradicts the fairness and uniformity principles underlying the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*. Erie sacrificed uniformity among federal court decisions to achieve uniformity among federal and local courts sitting in the same jurisdiction in adjudications of local law matters. Erie embodies two principles equally applicable to criminal cases. The first is an equal protection principle: Litigants with similar claims should be treated similarly, regardless of the court in which those claims are adjudicated. The second is a fairness principle: Litigants with a choice between state and federal forums should not be permitted unilaterally to choose the rules and thereby affect the outcome of the litigation.

The policies of *Erie* are implemented in the Federal Rules of Evidence, which require that federal courts, when adjudicating state


127. 304 U.S. 64 (1938). It is unclear whether the Rules of Decision Act, 28 U.S.C. § 1652 (1976), interpreted by the Supreme Court in *Erie*, encompasses District law when requiring federal courts to enforce "state law" as the Rule of Decision when determining state claims. See Ely, supra note 126, at 701-02 (rejecting "state enclave" theory as basis for *Erie* doctrine, opening way for *Erie*’s application to District law as to state law); Note, supra note 62, at 980, 983 (autonomy and stature of local courts require federal court use of *Erie* principles); see supra note 62 (discussing *Erie* doctrine).


129. 304 U.S. at 75; see Hanna v. Plumer, 380 U.S. 460, 467 (1965); see also Lee v. Flintkote Co., 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) (unfair for litigation result materially to differ because suit is brought in federal rather than local court); Comment, supra note 128, at 548; Note, supra note 62, at 983-92.

claims, apply state substantive rules regarding presumptions as to facts that are elements of a claim or defense (including burdens of proof), and competency of witnesses. The *Erie* rationale also requires that federal courts trying D.C. Code offenses apply the substantive evidentiary standards found in that Code or developed by the local District courts. It is true that the Rules of Decision Act, interpreted by the Supreme Court in *Erie*, by its terms applies only to civil trials. Because federal courts in general may not enforce state criminal laws, however, there never has been a need for an *Erie*-type rule in criminal cases. When the Supreme Court did have the opportunity to confront a unique situation in which a federal officer, indicted by a state, removed his trial to federal court, the Court had no difficulty ruling that "the Circuit courts of the United States . . . adopt and apply the laws of the State in civil cases, and there is no more difficulty in administering the State's criminal law." Similarly, in the federal trial of D.C. Code charges, the federal court should "adopt and apply the laws" of the District of Columbia. This procedure would promote the *Erie* goals of treating litigants with similar claims uniformly, regardless of the court in which they find themselves situated, and of discouraging prosecutor "forum-shopping" for evidentiary rules.

Evidence, federal courts will continue to apply state-defined evidentiary "rules that in form only regulate evidence but in fact are closely associated with substantive rights").

131. Although the state claim in *Erie* was heard by a federal court under its diversity jurisdiction, the *Erie* doctrine is equally applicable to pendent state claims. Rental Car v. Westinghouse Elec. Corp., 496 F. Supp. 373, 380 (D. Mass. 1980); G. WRIGHT, supra note 130, § 19, at 109.

132. **FED. R. EVID.** 302.

133. **FED. R. EVID.** 601.


138. Even prior to the Court Reform Act, the Supreme Court refused to substitute its judgment on evidentiary matters for that of the local courts, creating, in effect, a quasi-*Erie* doctrine for those courts. Griffin v. United States, 336 U.S. 704, 712-18 (1949); Fisher v. United States, 328 U.S. 463, 476 (1946). The Court approached local rules in the territories with the same degree of deference. De Castro v. Board of Comm'rs, 322 U.S. 451, 459 (1944) (policy reason for *Erie* equally applicable to territorial courts). The Supreme Court recently has departed from this long-standing policy of deferring to local court interpretation in Whalen v. United States, 445 U.S. 684, 687-88 (1980) (construing D.C. Code statute not yet considered by D.C. Court of Appeals rather than remanding, justifying action on grounds that deference to local courts is "a matter of judicial policy, not a matter of judicial power"); cf. Pernell v. Southall Realty, 416 U.S. 363, 369 (1973) (new court structure of the District "lends additional support to our longstanding practice of not overruling the District on local law matters 'save in exceptional situations where egregious error has been committed.' [citations omitted]. This principle . . . [is] now supported by the clear intent of Congress in enacting the 1970 Court Reform Act, [and] must serve as our guide in the present case.".).
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While, as a matter of fairness to defendants, *Erie* requires the application of different substantive evidentiary standards to federal and to pendent local claims, the use of two standards may cause jury confusion. In these circumstances, the rule of *United Mine Workers v. Gibbs* requires the trial court to exercise its discretion to dismiss the pendent claims. The jeopardy element in criminal procedure, however, hampers the trial court's exercise of that discretion. The likelihood of jury confusion in such cases mandates not that local evidentiary standards be abandoned, but that the use of section 11-502(3) joinder be curtailed.

3. Disparity of Outcome Among U.S. Code Violators

Using section 11-502(3), the federal prosecutor is able to circumvent a U.S. Code hierarchy of greater and lesser-included charges and penalties. The prosecutor may charge a District defendant with a greater federal offense in one count, and with a lesser D.C. Code offense, instead of the parallel U.S. Code provision, in a second count, mindful of the fact that the local provision carries a greater maximum penalty than its federal counterpart. In this way, the prosecutor ensures that if the defendant is convicted of both charges, he may receive a total sentence longer than the maximum authorized under the federal scheme. Alternatively, if the greater offense cannot be proved at trial, or if the defendant pleads guilty to the lesser charge as part of a plea bargain, the defendant will receive a harsher punishment than similar defendants in other federal courts who can be charged only under the U.S. Code. The district court compounds the problem of disparate treatment for District defendants by on occasion applying D.C. Code provisions to the trial of joined D.C. and U.S. Code offenses, or even of U.S. Code offenses alone. Although the D.C. Cir-

139. *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966); *Houlihan v. Anderson-Stokes*, Inc., 434 F. Supp. 1324, 1330 (D.D.C. 1977); see C. WRIGHT, supra note 130, § 93, at 627 ("possibility of jury confusion is a recognized reason for refusing to exercise jurisdiction over a pendent state claim, and this is the course the court should follow when contradictory rules" apply).

140. See supra p. 315.

141. See, e.g., *United States v. Leek*, 665 F.2d 383, 386 (D.C. Cir. 1981) (U.S. Attorney reached outside Federal Bank Robbery Act to "circumvent the scheme's carefully crafted hierarchy of penalties"); *United States v. Canty*, 469 F.2d 114, 128 (D.C. Cir. 1972) ("by reaching out to a catchall assault provision in the District of Columbia Code . . . venturing outside the federal scheme, the prosecution was able to circumvent the scheme's carefully crafted hierarchy of penalties . . . [and] to obtain a sentence longer than the maximum authorized under the highest tier of the bank robbery scheme"); see also *United States v. Jones*, 527 F.2d 817, 832 (D.C. Cir. 1975) (Wright, J., dissenting) ("It is obvious . . . that being put at risk of receiving a prison term five times as great, and actually receiving a sentence two and a half times as great, as a defendant in any other federal District Court might receive is an 'adverse consequence.'").

circuit in most cases reverses this use of the D.C. Code, it has not definitely ruled that D.C. Code provisions never should be applicable to U.S. Code trials in the District.

C. Joinder and Equal Protection

In several cases, the D.C. Circuit has acknowledged that section 11-502(3) can lead to disparities in treatment among U.S. Code offenders and among D.C. Code offenders. The court has reached conflicting conclusions, however, about the legitimacy of these results.

In United States v. Jones, the court held that the increase in risk exposure in federal court is a classification "based on location" that "clearly" has a "rational basis." In a dissent, Judge Wright objected that the use of section 11-502(3) "create[s] an invidious discrimination based solely on the fact that the trial occurred within the District of Columbia." Later cases seem to follow this dissenting view. In United States v. Leek, the court noted that the district court's dual criminal jurisdiction under section 11-502(3) engenders a "potential equal protection issue"; in United States v. Garnett, it criticized the statute's "potential for differing treatment of similarly situated defendants solely by virtue of the forum in which they are prosecuted." The Garnett court described section 11-502(3) as "a troublesome anomaly among federal jurisdictional statutes," disagreeing with the Supreme Court's characterization of this provision as a "minor exception" to the local court's exclusive jurisdiction over local criminal cases.

U.S. or D.C. Code insanity standard applies to U.S. Code defendants); United States v. Caldwell, 543 F.2d 1333, 1366 (D.C. Cir. 1974) (same), cert. denied, 423 U.S. 1087 (1976); United States v. Gooding, 477 F.2d 428, 431 (D.C. Cir. 1973) (deciding that federal, rather than District, nighttime search provision applies to federal court trial of federal offenses by principle that the "more specific and more recent" statute, i.e., the federal statute, should govern), aff'd, 416 U.S. 430 (1974).

143. In United States v. Hairston, 495 F.2d 1046 (D.C. Cir. 1974) the court noted that to apply D.C. Code evidentiary provisions to U.S. Code defendants would place criminal defendants prosecuted in the federal courts of the District of Columbia on a different footing from those tried in any other federal circuit, although both classes of defendants may be charged under the same U.S. Code provisions. This treatment of similarly situated persons in a different fashion is fraught with equal protection overtones . . . .


144. 527 F.2d 817 (D.C. Cir. 1975).
145. Id. at 821-22 & n.6.
146. Id. at 832 (Wright, J., dissenting).
148. Id. at 388 n.43.
149. 653 F.2d 558 (D.C. Cir. 1981).
150. Id. at 561.
151. Id.
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Despite its awareness of the problems raised by section 11-502(3), the D.C. Circuit has not taken any steps to limit the use of the statute.\(^{168}\) The court did limit another Court Reform Act jurisdictional statute, however, reading it narrowly in light of Congress' overriding intent of separating federal and local court jurisdiction.\(^{164}\)

D. Congressional Intent and Efficiency Considerations

The D.C. Circuit has also reached conflicting conclusions about Congress' purpose in enacting section 11-502(3). The only legislative history existing for the section is the following short paragraph:

Some overlapping of jurisdiction will inevitably remain, that being only a minor percentage of cases primarily arising when the same person is accused of infractions which are both Federal and purely local violations (and in those cases the United States Attorney will handle all charges with minimal procedural difficulties).\(^{155}\)

In *United States v. Jackson*,\(^{168}\) the court pointed out that the confusion engendered by section 11-502(3) joinder "belies the optimism of the House Committee's parenthetical remark." Congress, said the *Jackson* court, "simply did not consciously confront the sort of problem" that the statute creates.\(^{187}\)

The court in *United States v. Shepard*\(^{168}\) interpreted the section differently, finding that its mere existence demonstrates that Congress had determined that "the District court was to be the preferred forum whenever federal and local offenses were joinable in the same indictment and that a single trial was to be preferred over two separate trials."\(^{159}\) Writing in

\(^{153}\) The D.C. Circuit and Congress are the only authorities that may place limits on the use of § 11-502(3), since the Home Rule Act expressly forbids the District Council from regulating federal court jurisdiction. D.C. CODE ANN. § 1-233(a)(8) (1981). In *United States v. Jackson*, 562 F.2d 789, 793 (D.C. Cir. 1977), the court did mention that the U.S. Attorney should not be able to confer jurisdiction on the federal court by the "simple expedient of adding at least one federal count to any indictment. Plainly, this would be an unacceptable situation" in light of Congress' clear Court Reform Act intent to vest jurisdiction over local offenses in the local courts.

\(^{154}\) Thompson v. United States, 548 F.2d 1031, 1036-37 (D.C. Cir. 1976) (limiting reach of D.C. CODE ANN. § 11-301 (1981)). The court in *Thompson* held that an expansive reading of the statute, which on its face seems to grant broad power to the D.C. Circuit to review local decisions, would "defy the overarching congressional intent that the courts in the District of Columbia be reconstituted into separate and independent systems." *Id.* at 1036. By contrast, a narrow reading, allowing review only for a limited period of time, "is at once more in accord with Congress' 'federalization' scheme [for the District] and more nearly symmetrical with others of the provisions . . . in the Court Reform Act." *Id.* at 1037.


\(^{156}\) 562 F.2d 789 (D.C. Cir. 1977).

\(^{157}\) *Id.* at 799.

\(^{158}\) 515 F.2d 1324 (D.C. Cir. 1975).

\(^{159}\) *Id.* at 1330.
dissent in *United States v. Jackson*, Judge MacKinnon described section 11-502(3) as "serv[ing] the convenience of defendants, the Government, the witnesses, lawyers, and grand and petit juries. . . . Congress intended to insure that both types of offenses were prosecuted with the least complications possible."  

It is a truism that in criminal cases, fairness to defendants must be accorded great weight, and that efficiency and resource conservation goals should play a more limited role than in the civil context. Because of the restrictions upon the trial court’s supervisory power over joined local claims in criminal trials, however, the effect of section 11-502(3) joinder is to accord less fairness to criminal defendants in the District than to civil litigants.

In evaluating the joinder provision, the public interest requires a balancing of the unfairness to defendants resulting from its use against its potential for increasing efficiency or conserving judicial resources, with less weight given to efficiency than in the civil context. There are two different types of joinder that occur under section 11-502(3): joinder of charges that define the “same offense,” and joinder of charges that define different offenses, but arise out of the same criminal transaction. “Same offense” joinder and “same transaction” joinder have different efficiency and fairness properties, and must be evaluated individually.

Charges that define the “same offense” cannot be separately prosecuted without violating double jeopardy. When these charges are prosecuted together, if convictions on both U.S. and D.C. Code “same offense” counts are returned by the jury, one conviction must be vacated. Joinder in these circumstances does not promote efficiency; instead it may hamper it by forcing the D.C. Circuit to police trial court convictions to ensure that

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161. The Federal Rules of Civil Procedure embody a principle of judicial economy, encouraging resolution of all aspects of a dispute in one suit; pendent jurisdiction is another tool to achieve this goal. Note, supra note 98, at 661. The principles underlying the Federal Rules of Criminal Procedure are very different. Boddie v. Connecticut, 401 U.S. 371, 390-91 (1971) (Black, J., dissenting) (contrasting constitutional “strict and rigid due process rules” that protect criminal defendants, with rules that govern civil trials. The Constitution “does not place such private disputes on the same high level as it places criminal trials and punishment.”). (Justice Black’s position in *Boddie*, that strict due process rules applicable to criminal trials normally are unnecessary in civil trials, was adopted in *United States v. Kras*, 409 U.S. 434, 444-46 (1973)). *See* Gideon v. Wainwright, 372 U.S. 335, 344 (1963) (constitutional emphasis on procedural and substantive safeguards for criminal defendants); *see also* United States v. Jackson, 562 F.2d 789, 799 (D.C. Cir. 1977) (“as a general matter, wholesale importation of civil law concepts into the criminal sphere is a practice fraught with danger. . . . Efficiency—the conservation of judicial energy and the avoidance of multiplicity of litigation—which may be pursued with single-minded devotion in the rules and doctrines of civil procedure,” in criminal procedure “must sometimes give way to the need to protect the rights of defendants”); 8 J. MOORE, supra note 116, ¶ 8.02[1] (“The civil model . . . is often inappropriate in criminal procedure, and no subject illustrates this fact better than joinder.”).
162. *See* supra note 118.
163. *See* supra p. 317.
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no dual jury convictions for the "same offense" are permitted to stand.\[164\]

In contrast, there undoubtedly are efficiency gains from joining charges arising from a single criminal transaction that otherwise would have to be prosecuted in separate federal and local court trials.\[165\] "Same transaction" joinder, however, itself promotes further discrimination against District residents, by singling them out for routine dual prosecutions under both federal and local Codes. State defendants are treated differently; only in extraordinary circumstances will they be prosecuted by the United States following a state court prosecution for the same criminal act.\[166\]

"Same offense" joinder should not be permitted, first, because the possibility of dual convictions is much greater when violations of two Codes have been charged than in ordinary trials, and second, because there is no efficiency justification for "same offense" joinder to balance the prejudice it creates. But it is impossible for the prosecutor to determine in advance which charges will result in convictions, and, accordingly, whether two offenses of conviction will define the same or different offenses. Thus, im-

\[164\] See supra note 119 (D.C. Circuit may vacate either D.C. or U.S. sentence, or may remand to trial court with instructions to do so).

\[165\] The D.C. Circuit has justified § 11-502(3) joinder of all offenses arising out of the same transaction on the grounds that joinder places District defendants and defendants in the fifty states on an equal footing: The latter may be prosecuted by both their federal and state sovereigns for a single criminal act, but District defendants may be prosecuted only by the federal sovereign. The court reasons that the double jeopardy clause requires a single proceeding for prosecution of District defendants for U.S. and D.C. Code offenses. See United States v. Alston, 609 F.2d 531, 537 (D.C. Cir. 1979), cert. denied, 445 U.S. 918 (1980); United States v. Jones, 527 F.2d 817, 821 (D.C. Cir. 1975); United States v. Shepard, 515 F.2d 1324, 1331 (D.C. Cir. 1975); United States v. Canty, 469 F.2d 114, 128-29 n.20 (D.C. Cir. 1972). The double jeopardy clause, however, does not prevent the U.S. Attorney from prosecuting a District defendant in separate proceedings for different D.C. and U.S. Code offenses arising out of the same act or transaction. The Supreme Court has not adopted the "same transaction" test, first used to define a "criminal unit" for double jeopardy purposes by Justice Brennan in a concurring opinion in Ashe v. Swenson, 397 U.S. 157 (1970). Instead, the test of Blockburger v. United States, 284 U.S. 82 (1932), remains the accepted guide for determining when two separately defined crimes constitute the "same offense" for double jeopardy purposes. Simpson v. United States, 435 U.S. 6, 11 (1978).

\[166\] The premise behind the idea that § 11-502(3) will equalize defendants, i.e., that defendants in the fifty states, unlike District defendants, may be prosecuted twice for the same act by both state and federal sovereigns, by and large is a myth. By a policy of 25-years’ standing, the Justice Department will not prosecute a defendant for an act for which he already has been brought to trial in a state court, other than "in instances of peculiar enormity, or where the public safety demand[s] extraordinary rigor." Rinaldi v. United States, 436 U.S. 6, 11 (1978). (citing Fox v. Ohio, 46 U.S. (5 How.) 410, 435 (1847)); see Note, The Problem of Double Jeopardy in Successive Federal-State Prosecutions: A Fifth Amendment Solution, 31 Stan. L. Rev. 477, 486-96 (1979). In addition, over half the states bar state proceedings following federal proceedings in certain circumstances. See Venial & Gilbert, Preclusion of Duplicative Prosecutions: A Developing Mosaic, 47 Mo. L. Rev. 1, 32-36 (1952); see also United States v. Knight, 509 F.2d 354, 361 (D.C. Cir. 1974) (per curiam) ("[t]he problem . . . is not insignificant when persons in the District of Columbia are branded for both federal and District of Columbia Code felonies for what is essentially a single transaction. The problem is accentuated, and with constitutional considerations, if persons in every state of the Union committing the same act are not put under a multiple federal-state brand—whether because of constitutional barriers or because of the realistic consideration . . . that except in unusual or emergency cases there is no sound warrant for multiple federal and state convictions even assuming constitutional authority.").
permissible joinder cannot be separated at the outset from efficient joinder. As a consequence, both types of joinder under section 11-502(3) should be curtailed, for whatever efficiency gains are realized by the statute cannot justify its effects.

The hierarchies of D.C. Code criminal offenses and penalties are flexible, as are the U.S. Code hierarchies. In most instances the public interest and the interests of defendants are best served by a trial of D.C. Code offenses in the local court, or instead by a trial in the federal court of U.S. Code offenses only.

Conclusion

The interests of residents of the District can best be protected if their legal relationship to Congress in its dual role as the District’s federal and local sovereign is both consistent and well-defined. Because of the current ambiguous status of District local law, prosecutors and judges may construe that law at whim as either federal or local. Criminal defendants in the District are particularly prejudiced by this easy definitional manipulation, since the use of either federal or local standards at any stage of the criminal justice process, from bail to parole, may easily be justified. The safest way to prevent these ill effects is to establish three presumptions. First, when Congress enacts laws of nationwide applicability, it should not be permitted to single out District residents for different treatment, using the justification that its powers over the District are “plenary” in nature. Second, when Congress exercises its authority as a state legislature for the District, it should choose to be bound by constitutional principles that define and delimit the relationship between states and their citizens. Third, the principles that govern the interactions between federal and state courts also should govern the dual court system in the District.

These presumptions would bring to light and hold up for scrutiny legislation like section 11-502(3), which is inconsistent with the presumptions of uniformity and of a federal-state court relationship, and which in addition creates classifications that discriminate against District residents. In view of the longstanding restrictions upon the exercise by District residents of political rights, as well as their inability to effect a repeal of section 11-502(3) or to prevent its use by the United States Attorney, these classifications must be judged with particular scrutiny. The D.C. Circuit has held that “[i]t is not enough for such classifications to be

168. Nationally disenfranchised District residents “occupy a profoundly anomalous position in the federal system.” United States v. Thompson, 452 F.2d 1333, 1340 (D.C. Cir. 1971), cert. denied, 405 U.S. 998 (1972), and may be classified as “a paradigmatically powerless class politically.” See J. ELY, DEMOCRACY AND DISTRUST 83 (1980).
merely rational or even plausible; the justification offered must actually be *convincing.*\(^{9}\) Section 11-502(3) joinder does not meet this requirement.

169. *Thompson,* 452 F.2d at 1341; see United States v. Brown, 483 F.2d 1314, 1317 n.14 (D.C. Cir. 1973). *Thompson* noted that "we normally depend upon the vote as 'preservative of other basic civil and political rights,' " 452 F.2d at 1341 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)), but "it is senseless to remit District residents to the political process, since for them there is no political process." In the District "the normal arguments for judicial restraint become no more than hollow shibboleths grotesquely detached from the logic which once supported them. There is no reason to pay deference to the views of a representative body which does not in fact represent those against whom it is discriminating." *Thompson,* 452 F.2d at 1341.