V. KEYNOTE ADDRESS

PROFESSOR RASKIN: Well, we already know at least one judge who believes in equal protection and the right to vote in the District of Columbia. He also thinks the plaintiffs are going to win. His name is Judge John Ferren. Now, I hasten to add that he is not on the bench now. He is the Corporation Counsel for the District of Columbia, the people's lawyer. Boy, he has breathed new life into that phrase. He's made the idea of Constitutional rights come alive for hundreds of thousands of people.

Judge Ferren, as D.C. Corporation Counsel, presides over an office of more than 200 lawyers, one of the bigger public interest law firms in Washington, D.C., where he represents all of the interests of the District of Columbia. He has stated that he thinks nothing is more fundamental than the right to vote and has launched this historic voting rights litigation, which he will discuss.

It has been a great pleasure for me to get to know Judge Ferren. He is the soul of reason and compassion, careful analysis and sobriety of mind, and seriousness of ethical purpose.

In just the course of the last several months, I have learned a great deal from Judge Ferren in my collaboration with him and with that noted radical law firm of Covington and Burling, which is the pro bono counsel working with the District of Columbia on this case.

Judge Ferren was appointed to the D.C. Court of Appeals by President Carter and served there for twenty years. Before that, he had been a partner at Hogan and Hartson in Washington. In the late 1960s, he was the director of the Legal Services Program and a lecturer at Harvard Law School. Before going to Harvard, he had been at the law firm of Kirkland and Ellis.

He has had an extremely distinguished career in the law. So we are thrilled to welcome to the Washington College of Law John Ferren, distinguished Corporation Counsel for the District of Columbia.

MR. FERREN: Thank you very much, Jamie. I don't know anyone who has described compassion and reason going together, and I was delighted that you were willing to say that about me. I hope it is true.

I am very pleased to be here. I think this is a tremendous conference. This voting rights effort for the District caused me to remember that I have voted for the House and Senate in Illinois, and in Massachusetts.

I moved here in 1970, and for twenty-eight years, I have just been anesthetized, not worried about voting. I must admit to you that when Jamie joined with us and we started to pursue the idea of this lawsuit, I got very angry. I feel it is outrageous that we don't have the right to vote in the District.

I feel there has been an awakening. The adrenaline is flowing. We are going to get the vote. Of course, I first want to acknowledge the tremendous contribution that Jamie Raskin has given us by illuminating what constitutional imperatives we should pay attention to in seeking full voting representation for the District—on par with the citizens of the fifty states. Jamie, I think without your scholarship and your unrelenting advocacy for the District's citizens, this effort to gain full voting rights would still be languishing. I want to salute you for doing that.

I also would like to stress our debt of gratitude to the law firm of Covington and Burling, particularly to Charles Miller, Tom Williamson, Robert Wick, and Evan Schultz. They have labored countless hours, pro bono of course, to construct the suit that we filed three weeks ago in the federal district court for the District of Columbia.

Through their efforts, Jamie's scholarship has been transformed into what we will call hard-nosed litigation, despite what I heard this morning. This is exactly what we are going to need to win the case. The truth is that the lead counsel in this case are the Covington crew. I want there to be no mistake about that.

Finally, I would like to acknowledge the foundational work that Professor Peter Raven-Hansen of the George Washington Law School has contributed on this issue over two decades ago.

Now I would like to address the reasons why I think this lawsuit is critically important. Then, I would like to explain why the lawsuit, which stakes a claim founded on the voting rights of individual citizens, is also about the District as a community. In answering this latter question, I hope also to answer why, as Corporation Counsel, I believed it was appropriate—indeed essential—for this suit to be brought on behalf of the District itself, not just on behalf of District citizens as individuals.

The short answer to all of these questions is simple: voting representation in both houses of Congress can be, in my opinion, the single most powerful catalyst for positive change in the District that we, as lawyers, can hope to achieve. Why is this true?

Others have spoken and will continue to speak at this conference about the compelling constitutional issues this case presents; I don't really want to talk about those. I want us to think about the day to day impact that Congress has on the lives of District citizens, and why voting representation in Congress for the District has the potential to change—for the better—the way that Congress exercises its constitutional power under the District Clause to legislate on the District's behalf. Remember, we are not talking about statehood;

Congress will still have the final word on our local legislation. Congress is our local legislature, even if we win this lawsuit.

So to begin with, let's talk about what Congress is and is not in the District of Columbia. As you know, in 1973 Congress legislated "home rule" for the District of Columbia,[137] creating for us a traditional tripartite system of government composed of an elected mayor, who is the chief executive, an elected thirteen member council, which is our legislative branch, and of course, an independent judiciary, which has both trial and appellate courts. Our local form of government is democratically constituted and resembles, in most respects, the local governments of many other jurisdictions, except for one thing: Section 102 of the Home Rule Act, the act of Congress that gave the District a traditional, elected, democratic government, begins with this huge caveat: "Subject to the retention by Congress of the ultimate legislative authority over the Nation's Capital granted by Article I, Section Eight, of the Constitution. . . ."[138] In Title VI of the Home Rule Act, Congress elaborated:

> Notwithstanding any other provision of [the Home Rule Act], the Congress of the United States reserves the right, at any time, to exercise its constitutional authority *as legislature for the District*, by enacting legislation for the District *on any subject*, whether within or without the scope of legislative power granted to the Council by this Act, including legislation to amend or repeal any law in force in the District prior to or after enactment of [the Home Rule Act] *and any act passed by the Council.*[139]

That is to say, pursuant to the Home Rule Act, Congress—a body in which District citizens have no voting representation whatsoever—can override any and every action of the democratically elected local government. Congress, therefore, is every bit as much a local legislature as it is a national legislature here, and we don't vote for either one.

The language I just quoted, declaring the right of Congress to enact legislation for the District on any subject, comes uncomfortably close to a quote Jamie used in his forthcoming law review article. He quotes Thomas Paine, who said in 1776: "Britain . . . has declared, that she has a right (not only to tax) but 'to bind us in all cases whatsoever,' and if being bound in that manner is not slavery, then there is no such thing as slavery upon the earth."[140]

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137. *See* District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973) [hereinafter Home Rule Act].

138. *Id.* § 102 (codified at D.C. CODE ANN. § 1-201(a) (1998)).

139. *Id.* § 601 (codified at D.C. CODE ANN. § 1-206 (1998)) (emphasis added).

140. *See* Raskin, *supra* note 1, at 39 (quoting THOMAS PAINE, THE AMERICAN CRISIS, NUMBER

Melodramatic words, perhaps, but think about it. To feel the true magnitude of our circumstances, imagine for a moment that Congress tomorrow told all of the citizens of the state of Montana—a state similar in population to the District—that they were being stripped of their United States Representative and two United States Senators, and that Congress—in which Montana would now have only a non-voting delegate—at any time could override any action of the state legislature and town councils, anywhere in Montana, without affording any special process whereby the views of Montanans could be heard, save through the person of their single, non-voting delegate. Would Montanans be outraged? I think so. Would the rest of the country view this deprivation of Montanans' rights as just? I think not.

Yet that is precisely the circumstance we in the District live with every day, and have lived with for the larger part of 200 years. We suffer from a kind of proxy representation, or "virtual representation," that the colonists started a revolution to change. Contrary to Judge Markman's suggestions, I don't believe that District residents' supposed ability to "schmooze" with Congresspeople in town—if we could recognize them—is going to make any difference.

So what are the consequences of this circumstance, and how might this circumstance change when our voting status changes (without a revolution), even though congressional power remains over us through the District Clause?

First, I would offer a quick survey of the ways in which congressional action has an impact on daily life in the District of Columbia. Some of my examples are familiar and well publicized. Others may surprise you. You heard about some of them this morning.

Every law passed by the Council, our local legislature, is subject to congressional review. Although congressional veto of Council-passed legislation is rare, it happens. Perhaps more importantly, the Council—in every deliberation, in every vote—must be aware that if its action displeases Congress, Congress can exercise its veto authority, either directly or through the appropriations process.

The full impact of this congressional "trump" has been demonstrated with overwhelming force in the transfer—with no participation by our Council—of much control over District government to the unelected five-member Financial Responsibility and Management Assistance Authority, commonly called the "Control Board," and its appointed Chief Management Officer. These folks, as you know, have been given tremendous executive authority, and arguably even some legislative

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ONE (R. Carlile 1819)).

authority. And they answer not to the District and to the voters, but to Congress. Virtually every initiative the District's "home rule," elected government attempts to undertake is subject to approval or veto by this congressionally-imposed, unelected "super-government."

But assuming the current control period will end in 2001 or 2002, even then Congress will exercise enormous power over the District. Although the Congress rarely exercises its direct legislative veto, it exercises a de facto veto with some regularity, through the control of the District's purse strings.[141] As most of you know, the District government lacks the authority to appropriate its own funds. Let me emphasize that this restriction does not only pertain to federal funds, which are now a negligible part of the District's budget. It also pertains to purely local funds generated by the District government from District sources. Congress, not our elected local government, ultimately decides how much we shall be taxed locally and how much we shall spend—and not spend—of our own money. The District Charter contained in the Home Rule Act states clearly:

> Nothing in this Act shall be construed as making any change in existing law, regulation, or basic procedure and practice relating to the respective roles of the Congress, the President, the Federal Office of Management and Budget, and the Comptroller General of the United States in the preparation, review, submission, examination, authorization, and appropriation of the total budget of the District of Columbia government.[142]

That is to say, if Congress won't appropriate the money (virtually all of which now comes from the District's own revenue sources), we taxpayers cannot carry out our objectives.

The effects of this congressional control over our purse strings, although buried in the depths of appropriations acts and couched in the inevitable bureaucratic language, are very tangible, as Professor Butler pointed out this morning. Congress has used its control over D.C. appropriations, for example, to prevent the District from effectuating the Health Care Benefits Expansion Act of 1992, which the Council enacted to provide for registration of domestic partnerships in the District and to allow D.C. employees and their domestic partners many of the same benefits available to married couples.[143]

I have to tell you that just this morning, a guard sitting outside the mayor's office asked me about this domestic partnership law because

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141. *See, e.g.*, District of Columbia Supplemental Appropriations and Recissions Act, H.R. 5517, 102d Cong. (1992) (vetoed by the President, Sept. 30, 1992) [hereinafter Appropriations Act] (enjoining the use of funds to implement the Health Care Benefit Expansion Act).

142. Pub. L. No. 93-198, § 603, 87 Stat. 774, 814 (1973).

143. *See* Appropriations Act, *supra* note 141.

somebody had come to the mayor's office—it is right there in the D.C. Code—and asked, "How do I sign up for it?" The fact is, in an appropriations act, Congress said, "No." It is on the books, but you can't implement it.[144]

Congress, through a rider to our appropriations bill, prohibits the District from using even local, non-federal funds to provide lawful abortion services. School voucher plans are perennially proposed as an amendment to the District appropriations bill, irrespective of our school authorities' contrary views on the subject.

In 1997 Congress enacted a provision requiring the Council of the District of Columbia to adopt the recommendations of the congressionally-created "Truth in Sentencing Commission."[145] To enforce its requirement, Congress delegated to the United States Attorney General the power to amend the D.C. Code to effectuate the Commission's recommendations if the Council, for any reason, declined to enact the recommended changes to our criminal laws in their entirety.[146]

Amendments have been attached to the House version of our fiscal year 1999 appropriations bill prohibiting even the use of local funds to carry out the District's needle exchange program, notwithstanding that local health officials say the program is needed.[147] Another amendment prohibits the use of local funds to carry out adoptions by gay couples, overruling District policy on the subject.[148]

This summer, the House approved an amendment to our appropriations bill criminalizing the possession of tobacco products by District children, but refused to approve our office's effort to retain counsel to bring litigation—similar to cases many states have brought—against the tobacco companies to recoup the Medicaid costs to the District of tobacco-related disease.[149]

In perhaps its most audacious move, the House version of the fiscal year 1999 appropriations bill, as you have heard, would prevent my office from spending even District-generated monies to pursue our

144. *See* 138 CONG. REC. S10,902 (1992) (prohibiting the use of funds to implement or enforce the domestic partnership law).

145. 143 CONG. REC. S11,211-22 (1997) (establishing the Guidelines, membership and duty of the truth in sentencing commission).

146. *Id.* at S11,211(a).

147. *See* The D.C. Appropriations Act, H.R. 4380, 105th Cong. (1998) (approving the Tiahrt Amendment, prohibiting any funds to be used on a program which distributes needles for illegal drug use).

148. *See id.* (approving the Largent Amendment which prohibits any funds to be used to carry out a joint adoption of a child between individuals who are not related by blood or marriage).

149. *See id.* (approving the Bilbray Amendment, prohibiting the possession of tabacco products by minors in the district).

constitutional voting rights case, or even to advance any further our petition to Congress for redress of our constitutional grievance.

The issue is not whether one agrees or disagrees with any of these appropriations amendments as a matter of policy. The issue is, these are congressionally-imposed edicts forced on the District through the appropriations process by members of the legislature in which District citizens have no voting representation.

Of all of the instances I have cited, Congress, which in no way is legally accountable to the District voters, is overriding laws and policies, and it is overriding the policies made by our local "home rule" government, the only governmental body in which our electorate has a voice.

But would even one vote in the House and two votes in the Senate change any of that? Would the District be routinely out-voted even on matters of strictly local importance? I don't think so, and here is why. *Roll Call*, the Capitol Hill newspaper, wrote earlier this year:

> It is no secret that the city's real bosses ... who control the city fortunes in Congress [are] Rep. Charles Taylor (R-NC), chairman of the House Appropriations Subcommittee on the District of Columbia; Sen. Lauch Faircloth (R-NC), chairman of the Senate Appropriations DC subcommittee; Rep. Thomas Davis (R-VA), chairman of the House Government Reform and Oversight District subcommittee.[150]

How different our fortunes might be if the roster read: "Sen. Eleanor Holmes Norton (D-DC), chairman of the Senate Appropriations DC subcommittee; Sen. Carol Schwartz (R-DC), ranking minority member; and Rep. Anthony Williams (D-DC), chairman of the House Appropriations subcommittee on the District of Columbia and ranking member, House Government Reform and Oversight District subcommittee." (I allocated those seats by lot!)

The prerogatives of committee chairs and even ranking members are well-established, and their control on the Hill over what hearings are held and not held, what proposals will move and will not move, and what gets funded, or will not, are well known.

"Congressional government is committee government,"[151] said Woodrow Wilson in 1884, an observation that still holds true today. Furthermore, as we all know, members of Congress, particularly senators, accord one another professional courtesies and reciprocal deference that greases the wheels of legislation. Surely a voting

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150. Duncan Spencer, *DC's Question of the Year*, ROLL CALL, Jan. 26, 1998, *available* in LEXIS, News Library, U.S. News Combined File.

151. WOODROW WILSON, CONGRESSIONAL GOVERNMENT 79 (15th ed. 1900) (1885).

delegation from the District of Columbia, eligible over time for the perks and privileges of leadership, would wield considerably more influence over the legislative process that directly affects the District than can ever occur when the most able non-voting delegate is present.

Then, too, there is the issue of "horse trading" we heard about this morning. Remember *Michael v. Anderson*,[152] the case in which a group of Republican members of the House sought to enjoin enforcement of the House rule, since repealed, that gave our delegate a vote in the House Committee of the Whole? The plaintiffs contended that our delegate's vote would dilute their power, and that it, therefore, was unconstitutional. The plaintiff members of Congress submitted affidavits which, in the court's words, "describe[d] the legislative horse trading process."[153] The court specifically recognized "that such practices may be a daily fact of life on Capitol Hill."[154] The court agreed with the plaintiffs' contention that "votes are the 'currency of the House,'"[155]—but it held that the D.C. Delegate's votes in the Committee of the Whole, which could be nullified if that delegate's vote became dispositive, amounted to "counterfeit bills," and therefore did not threaten to dilute the plaintiffs' congressional voting rights. The point is that both the plaintiffs in that case and the court would surely agree that full voting rights for the District's representative would provide her with valuable political "currency" to be expended for the District's benefit—currency which only a vote that counts can bring.

Recently I talked to a lawyer in town, a friend of mine who about ten years ago was representing Puerto Rico. He took the governor of Puerto Rico to visit a senator with whom he had made an appointment. They arrived at the senator's office, but the senator wasn't there. A staffer was there. My friend and the governor of Puerto Rico were announced, and the staffer said, "Come in, and wait a minute." For the next five minutes, they heard the ending of a marvelous Handel oratorio. Then the staffer talked to the governor. My friend said, "You know, if I had brought the governor of a state, the senator would have been there, and that staffer wouldn't have listened to that oratorio, just making us stand there." That story tells a lot. My friend now supports statehood for Puerto Rico. I think that this anecdote is a powerful vignette. I think it captures what I am talking about.

Imagine how full voting representation might change the tenor of renewed debate over the commuter tax—a form of reciprocal income

152. 817 F. Supp. 126 (D.D.C. 1993), *aff'd*, 14 F.3d 623 (D.C. Cir. 1994).
153. 817 F. Supp. at 144.
154. *Id.*
155. *Id.*

tax that is a powerful revenue generating tool used by jurisdictions across the country, including Virginia and Maryland, but which the Home Rule Charter prohibits the District to impose on the legions of suburban workers who come into the District to their jobs every day.[156]

As it stands, the members of Congress who represent our neighbors in Maryland and Virginia have little incentive to hear our case for the commuter tax, and representatives from the rest of the country have little interest. But what if the senator from Maryland or the representative from Virginia—or perhaps, more importantly, disinterested members from California, Colorado, or Georgia—needed our votes? What if they knew that the bill establishing a new Navy base on their shores, or an environmental project in their mountains, or a job initiative they were sponsoring wouldn't get through committee—or couldn't pass—without the D.C. members' votes?

Although our delegation to Congress might be small compared to those of some states, it would be precisely the same size and wield the same clout as the delegation that represents every other congressional district. Although every citizen in the land has but one representative and two senators for whom he or she votes, there is no doubt in my mind that the citizens who have that vote feel vastly more empowered, and, in fact, they are vastly more empowered, to influence and participate in affairs of the nation than those of us who have no vote.

Which brings me to why I think this case is important to the District as a community, as a local government entity, beyond the very great importance of the individual constitutional rights described in our lawsuit. For better or for worse, many aspects of our individual and community lives are governed by the laws Congress makes and, here in the District, by the money Congress lets us spend. Having a meaningful voice in the making of those laws and the appropriation of those monies—including the impact of horse trading, the respect reflected in senatorial courtesy, and the prerogatives of the chairs and ranking members—affects more than the voting rights of qualified electors in the District.

The outcome of this case has the potential to affect the legal and social environment of every woman, man, and child, citizen or alien, rich or poor, whatever the race, Democrat or Republican, who lives in the District of Columbia—all of whom, I believe, are entitled to the best that we in the District government can provide.

I pledge everything in my being to make voting rights in Congress

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