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A Synopsis of the D. C. Administrative Procedure Act: As Applied to the City Council and a Selected Agency

RONALD CHARLES GRIFFIN*

FOR some time, Washington residents have been without a uniform law which would guarantee them minimum administrative due process before District agencies. In response to this need, Congress enacted (to become effective in October, 1969) a District of Columbia Administrative Procedure Act.

To date, many legal practitioners are unfamiliar with the law. With this in mind, this paper will try to explain it—showing how problems under it are resolved before a select agency and the City Council.

CITY COUNCIL

A.

Some time ago, a list of questions was circulated in the District Government relative to the application of the District of Columbia Administrative Procedure Act to the City Council. The principal question on the list was "whether the City Council's legislative function could be so characterized as to put it beyond the scope of the District's A.P.A.?" The answer, at present, is no. There are cases, not yet reversed, which say that the City Government has no inherent authority to enact local laws independent of congressional limitations.¹ The A.P.A. is a Congressional limitation upon the power exercised by the Council.² A fortiori, the Council must comply with it.

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¹ *District of Columbia v. Bailey*, 171 U.S. 161, 171 (1897); *United States ex rel. Daly v. McFarland*, 28 App. D.C. 552, 558 (1907); *Fillippo v. Real Estate Comm'n of the District of Columbia*, 223 A.2d 268, 272-273 (D.C. App. 1966).

² Because the Council is mentioned in several provisions of the Act, and because an ordinance can reasonably be construed as a statement by the Council . . . "of general . . . applicability and future effect designed to implement or pre-

The above answer is, of course, based upon what is known about the City Council. Our inquiry commences with the acts abolishing local self-Government³ in the District and establishing a commission form of Government in its place.⁴ These acts and their legislative histories are useful in that they give us a feel for what Congress desired for the District of Columbia. A recurring question, found in much of the Congressional debates, was the amount of self-governing power the new form of Government was to retain. The question put to Congress was "whether we should restore to the citizens of the District an elective franchise which would allow them, through their city Government, to control local expenditures, legislation and administrative affairs?"⁵ The ultimate answer was, of course, "no." Much of Congress was of the view that, in light of past occurrences, the commission form of Government was the best form for the District.⁶ To some, Congress could do no higher duty than to create a municipal Government which lacked legislative powers.⁷ What they envisioned were three Commissioners—officers presiding over a municipal corporation—charged with the duty of executing laws enacted by Congress for the District of Columbia.⁸

This characterization of the District Government was adopted by Congress and prevailed until 1887. In that year, Congress conferred a police power, with limitations, upon the Commissioners.⁹ This power was later broadened when Congress in 1892 invested the Commissioners with authority to enact police regulations to protect the lives, limbs, health, comfort and quiet of persons residing in the District.¹⁰ The legislative history behind this Act is unclear as to what Congress intended to restore to the District's Government.¹¹ Events suggest, however, that Congress's actions were tantamount to restoring a species of legislative authority necessary for the preserva-

scribe law," 1 D.C. CODE 1502(b) (Supp. III 1970), the term "Rule" found in subsection 6 can be read to cover the ordinance enacting function of the Council.

³ 18 Stat. 116 (1874).

⁴ 20 Stat. 102 (1878).

⁵ 7 CONG. REC. 2115, 2120, 3244, 3247 (1878).

⁶ 7 CONG. REC. 1922, 1924 (1878).

⁷ 7 CONG. REC. 2120, 3213, 3747 (1878).

⁸ 7 CONG. REC. 2532, 3213 (1878). *District of Columbia v. Bailey*, 171 U.S. 161, 176 (1897).

⁹ 1 D.C. CODE §§ 224 (1967).

¹⁰ 1 D.C. CODE §§ 226 (1967).

¹¹ 23 CONG. REC. 1132, 1229, 1328, 1471 (1892), S. Rep. No. 283, 52d Cong., 1st Sess. 1 (1892).

tion of public order.¹² There were no restrictions, other than the plain terms of the statute, as to how and over what the Commissioner's authority was to be exercised.

It is equally clear, however, that the Government, through its Commissioners, was not given unlimited authority to make local law.¹³ To this day, nothing has changed.

One might have thought, after examining the Reorganization Act of 1949,¹⁴ Reorganization Plans 3 and 5,¹⁵ that these bits of legislation changed the Government by releasing it from its police power restrictions. These measures, of course, did not do so. The Act of 1948 simply differentiated the District Government from other Federal agencies, by citing it apart from other Federal agencies,¹⁶ thereby implying that it was not an entity within the executive branch of the Federal Government.¹⁷

The importance of the Act lies in the authority it conferred upon the President to reorganize the District Government short of changing its basic ingredients.¹⁸ This legislation is the foundation for the present Reorganization Plan under which the City Government operates.¹⁹

President Lyndon B. Johnson, when he submitted Plan 3, well stated its objectives and its limitations: the plan would not change the corporate status of the District of Columbia nor minimize the powers of Congress over it.²⁰ The plan would, and did, redistribute administrative and legislative functions between a single commissioner and a nine-man council.²¹

¹² Coughlin v. District of Columbia, 25 App. D.C. 251, 254-255 (1905).

¹³ *Id.*

¹⁴ 5 U.S.C. §§ 901-913 (1967).

¹⁵ 1 D.C. CODE, ADMINISTRATION, APPENDIX, § 37 (Supp. III 1970). 1 D.C. CODE ADMINISTRATION, APPENDIX, § 103 (1967).

¹⁶ 5 U.S.C. § 905(a)(6) (1967).

¹⁷ § 905(a)(6). The 1949 Reorganization Act provides that " * * * no reorganization plan shall provide for, and no reorganization under this act shall have the effect of * * * [t]ransferring to or consolidating with any other agency the Municipal Government for the District of Columbia or all of those functions thereof which are subject to this act, or abolishing said Government or all of said functions." § 902 says, however, that the Municipal Government for the District of Columbia is subject to Reorganization. See Senate Committee on Government Organizations, Staff Memorandum No. 90-1-37, 7-8 (June 1967). Note, *District of Columbia Government Under Reorganization Plan 3 of 1967: A Survey of Effects and Problems*, 17 AM. U.L. REV. 213-215 (1968).

¹⁸ *Id.*

¹⁹ 1 D.C. CODE, ADMINISTRATION, APPENDIX, § 37 (Supp. III 1970).

²⁰ H.R. Doc. No. 132, 90th Cong., 1st Sess. VI (1967).

²¹ *Id.* at IV.

In summary, taking into account our discussion of the various acts related to and cases characterizing the District of Columbia Government, it appears that the City Council inherited limited authority, via the old Board of Commissioners, to make local regulations. In no event did Congress confer or the Council inherit sweeping authority to make local law.

How, does the A.P.A. apply to the functions carried out by the City Council? More specifically, must the City Council comply with 6(a) and other sections of the Act, before its police regulations can become law? Section 6(a) provides:²²

The Commissioner and Council and each independent agency shall, prior to the adoption of any rule or the amendment or repeal thereof, publish in the District of Columbia Register (unless all persons subject thereto named and either personally served or otherwise have actual notice thereof in accordance with law) notice of the intended action so as to afford interested persons opportunity to submit data and views either orally or in writing, as may be specified in such notice. The publication or service required by this subsection of any notice shall be made not less than thirty days prior to the effective date of the proposed adoption, amendment, or repeal, as the case may be, except as otherwise provided by the Commissioner or Council or the agency upon good cause found and published with the notice.

As always, a statute must be examined as a whole in order to discover the meaning of its constituent parts.²³ A guiding principle in this area has been that a statute, whose terms are clear and unambiguous, is the best evidence of what the legislature intended.²⁴ If on the other hand, after a reading of the statute, its meaning appears obscure, the law permits one to go beyond the statutory language to find the legislative intent.²⁵

With regard to the District of Columbia, the statutory language indicates that Congress wanted to establish an administrative procedure for the District of Columbia Government.²⁶ With respect to

²² 1 D.C. CODE § 1505(a) (Supp. III 1970).

²³ *Communist Party v. Subversive Activities Control Board*, 223 F.2d 531, 541 n.7, *rev'd on other grounds*, 351 U.S. 115 (1955). CRAWFORD, STATUTORY CONSTRUCTION, § 165 (1940).

²⁴ *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928).

²⁵ *Id.*

²⁶ 1 D.C. CODE §§ 1501-1510 (Supp. III 1970).

Section 6(a), that means that Congress was of a mind to have the City Council comply with the above section before Council regulations could become law.

Arguably, if this is so, Congress's intention undermines the relatively broad authority of the Council to enact local regulations.²⁷ The original draft of the Act²⁸ and comments upon it²⁹ indicate that Congress wanted the Act to apply to administrative agencies. The City Council is not an administrative agency, in the ordinary sense, for it performs the legislative function of the city.³⁰ Because of this fact, some argue, bearing in mind what the A.P.A. applies to, the District of Columbia Administrative Procedure Act does not and cannot apply to the City Council.

The above argument, if we accept the premise "that the City Council's sole function is legislative," is unassailable. This premise, however, does not stand up under argument. When evidence is submitted showing (1) that the Council inherited many administrative functions besides³¹ and (2) that the act itself talks about the Council,³² a conclusion other than the one reached above is warranted.

A part of the process for enacting a municipal regulation is an administrative practice which accompanies the regulation from the moment conceived through to the time it becomes law. It is to this practice which the A.P.A. applies.

In view of the above, taking into account the legislative intent

²⁷ *District of Columbia v. Thompson*, 347 U.S. 100, 111 (1952); *Fillippo v. Real Estate Comm'n of the District of Columbia*, 223 A.2d 556, 559 (D.C. App. 1969). For other cases on the regulatory authority inherited by the Council, see: *R.R. Co. v. District of Columbia*, 10 App. D.C. 111, 125 (1897); *Taylor v. District of Columbia*, 24 App. D.C. 392, 396 (1904); *Siddon v. Edmonston*, 42 App. D.C. 459, 564 (1914).

If the legislative power of the Council is as broad as the cases say, and the intent of the Administrative Procedure Act is to apply to administrative agencies, the incorporation of Council activities into the Act is a *non sequitur*. In a sentence, when the plain meaning of a statute leads to an absurd result, the courts follow the statutory purpose rather than the literal words. *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 543-44 (1940). See *BODENHEIMER, JURISPRUDENCE*, 362-364 (1967). In this instance that means that the Act is inapplicable to the Council.

²⁸ *Hearings on S. 1379 and H.R. 7417. Before the Subcomm. on the Judiciary Columbia*, 90th Cong., 2d Sess. 3, 19 (1968) [Hereinafter cited as *1968 Hearings*].

²⁹ *1968 Hearings* 1, 36.

³⁰ *Supra*, note 27.

³¹ See e.g., H.R. REP. NO. 537, APPENDIX 2, 90th Cong., 1st Sess. §§ 3-108, 3-116, 3-202, 3-204, 3-205, 4-134, 4-134(a), 4-144 (1967).

³² 82 Stat. 1203 (1968). 1 D.C. CODE §§ 1501, 1502, 1503, 1505, 1506, 1509 1510 (Supp. III 1970).

gleaned from the D.C. Act, with a view toward its application, it follows that the A.P.A. applies to the Council in its administrative capacity, and to the same in its several administrative functions woven into its legislative process.

B.

Now that we have concluded that the Act applies, "what changes will the various sections of the Act force upon the Council when it acts legislatively?" Section 4, in broad terms,³³ directs the Council to abide by the Act's minimum procedures. What those procedures are is intelligible only after reading all of the sections of the Act.

Sections 9, 10 and 11 appear to have no application to the Council because these sections regulate activities which are incompatible with the Council's legislative functions.³⁴ Section 6 and parts of Sections 7 and 8, which will be discussed later, are the only pertinent ones.

Section 6 requires the Council to publish its regulations before they can become effective, to afford interested parties a hearing, and lastly, limits the lifetime of emergency regulations.³⁵ When this section is compared with the existing "Rules of Procedure of the District of Columbia Council,"³⁶ the only noticeable difference is *the notice requirements and the life span for emergency measures*.³⁷ In all other areas, the Council rules are more detailed and comprehensive. In fact, one could say that Section 6 changes little, if anything. It simply compliments existing rules: confirming the fact that the public can be a part of the legislative process (knowing, for example, what and how regulations affect them, and their life span).

Suppose, for the moment, some citizen wants to challenge a Council regulation, either by participating in the formulative process, or subjecting the new rule to judicial review. In doing either of these things, it is imperative that he knows how the regulation is to come into being, by what authority, and its nature. Will the regulation be a subordinate rule, promulgated pursuant to authority conferred upon the Council by an act of Congress, or a rule enacted pursuant to the

³³ 1 D.C. CODE 1503 (Supp. III 1970).

³⁴ 1 D.C. CODE 1508, 1509 and 1510 (Supp. III 1970).

³⁵ 1 D.C. CODE 1505 (Supp. III 1970).

³⁶ Compare D.C. Council Res. No. 70-84 (January 20, 1970) with 1 D.C. CODE 1503, 1505 and 1506 (Supp. III 1970).

³⁷ 1 D.C. CODE 1506(a) and (c) (Supp. III 1970).

1-226 power possessed by the Council? Does the regulation pertain to an activity which is beyond the scope of its delegated authority? Will citizens of the District have an opportunity, by right, to air their views prior to the time the rule is passed, and, if so, in what form?

All of these questions must be dealt with first before a challenger can proceed against a regulation. If he is going to be effective before a regulation is passed, he must know the forums available to him where he can state his objections to the proposed law, or try to persuade others to change their views on it. If, on the other hand, the challenger's interests lie with judicial review, he should be in a position to discuss the regulation in relation to Congressional or Council enactments, and be able to say, with some confidence, that this regulation goes beyond the pale authorized by statute.

Let us suppose, for the moment, that a Council regulation is contested; that the D.C. Court of Appeals has handed down a decision to the effect that the legislative function exercised by the Council is beyond the scope of the A.P.A. What effect would such a decision have on Sections 5, 7 and 8 of the Act?

Sections 5, 7 and 8, in substance, impose a duty upon the Commissioner to compile, index and publish regulations filed in his office by his administrative agents and the City Council.³⁸ If Section 5 is read very carefully, one discovers that this section is devoted entirely to the duty imposed upon the Commissioner to publish regulations under the Act.³⁹ There is no mention of the City Council. In view

³⁸ 1 D.C. CODE 1504, 1506 and 1507 (Supp. III 1970).

³⁹ "Sec. 5. (a) The Commissioner shall publish at regular intervals not less frequently than once every two weeks a bulletin to be known as the 'District of Columbia Register,' in which shall be set forth the full text of all rules filed in the Office of the Commissioner during the period covered by each issue of such bulletin, except that the Commissioner may in his discretion omit from the District of Columbia Register rules the publication of which would be unduly cumbersome, expensive, or otherwise inexpedient, if, in lieu of such publication, there is included in the Register a notice stating the general subject matter of any rule so omitted and stating the manner in which a copy of such rule may be obtained.

"(b) All courts within the District shall take judicial notice of rules published or of which notice is given in the District of Columbia Register pursuant to this section.

"(c) Publication in the District of Columbia Register of rules adopted, amended, or repealed by the Commissioner or Council or by any agency shall not be considered as a substitute for publication in one or more newspapers of general circulation when such publication is required by statute.

"(d) The Commissioner is authorized to publish in the District of Columbia Register, in addition to rules published under authority contained in subsection (a) of this section, (1) cumulative indexed to regulations which have been adopted,

of the above, bearing in mind the legislative intent of the Act, a court decision affirming the position of the Council on its legislative authority would have no effect on Section 5. The same result would generally obtain under Sections 7 and 8, because both sections are substantially devoted to the duties assumed by the Commissioner under the Act.⁴⁰

There are, however, two exceptions—subsections 7(c) and 8(c). These subsections provide:⁴¹

“Sec. 7. * * *

(c) Except in the case of emergency rules, each rule adopted after the effective date of this Act by the Commissioner or Council or by an agency, shall be filed in the office of the Commissioner. No such rule shall become effective until after its publication in the District of Columbia Register, nor shall such rule become effective if it is required by law, other than this Act, to be otherwise published, until such rule is also published as required in such law.”

* * *

“Sec. 8. * * *

(c) The Commissioner must publish the first compilation required by subsection (a) of this section within one year after the effective date of this Act and no rule adopted by the Commissioner or by the Council or by any agency before the date of such first publication which has not been filed and published in accordance with this Act and which is not set forth in such compilation shall be in effect after one year after the effective date of this Act.”

amended, or repealed; (2) information on changes in the organization of the District government; (3) notices of public hearings; (4) codifications of rules; and (5) such other matters as the Commissioner may from time to time determine to be of general public interest.” 1 D.C. CODE 1504 (Supp. III 1970).

⁴⁰ “Sec. 7(a) Each agency, within thirty days after the effective date of this Act, shall file with the Commissioner a certified copy of all of its rules in force on such effective date.

“(b) The Commissioner shall keep a permanent register open to public inspection of all rules.”

“Sec. 8. (a) As soon as practicable after the effective date of this Act, the Commissioner shall have compiled, indexed, and published in the District of Columbia Register all rules adopted by the Commissioner and Council and each agency and in effect at the time of such compilation. Such compilations shall be promptly supplemented or revised as may be necessary to reflect new rules and changes in rules.

“(b) Compilations shall be made available to the public at a price fixed by the Commissioner.” 82 Stat. 1207 (1968). 1 D.C. CODE §§ 1506, 1507 (Supp. III 1970).

⁴¹ 1 D.C. CODE §§ 1506(c) 1507(c) (Supp. III 1970).

If the court took the position that the Council's legislative function was beyond the scope of the D.C. Administrative Procedure Act, subsections 7(c) and 8(c), as they relate to the Council, would have to be amended so as to exclude the Council, and any regulations enacted inconsistent with the 8(c) requirement would retain its force and effect as law.⁴²

Endemic to these subsections is an idea that the City Council's activities are administrative in nature, and therefore, subject to an administrative process.⁴³ Looking at a Court of Appeals decision from the point of view of causes and effects, any court decision putting the Council's regulatory authority beyond the scope of the A.P.A. would undermine the idea upon which subsections 7(c) and 8(c) were written, and undermine the intent of the Act. More fundamentally, such court decision would raise a very serious question, namely, "whether the decision, overlooking the intent of the legislature, was a form of judicial legislation prohibited by law?"

If confronted with such a question, the answer would have to be yes. A fundamental principle of law, scrupulously observed by the courts, is that the judiciary may not encroach upon the functions of the legislature,⁴⁴ or usurp its powers. Arguably, a court decision, as described above, would usurp the legislative power exercised by Congress over the District of Columbia, for Congress has put the functions of the Council under the Administrative Procedure Act and a court has taken them out.⁴⁵

Sections 7(c) and 8(c), when read together with the entire Administrative Procedure Act, suggest that the Council's activities are within the ambit of the Act. It follows, therefore, that until such time as Congress declares the Council's authority to be beyond the scope of the Act, a court decision saying that it is otherwise would raise the specter of inappropriate judicial interference with the legislative process.

⁴² Obviously any regulation enacted inconsistent with the A.P.A. would retain its force and effect as law, since a court decision affirming the claim of the Council would place the regulatory power exercised by the Council beyond the scope of the Act. If, on the other hand, the court ruled against the claim, any unpublished regulation, which remained unpublished, would, at the end of one year from the date the Act took effect, be void. 1 D.C. CODE 1507(c) (Supp. III 1970).

⁴³ See 1968 Hearings 1, 36, 56 and 57.

⁴⁴ United States v. First National Bank, 234 U.S. 245, 260 (1913). See CARDOZO, NATURE OF THE JUDICIAL PROCESS, 14-16 (1921); POUND, *Common Law and Legislation*, 21 HARV. L. REV. 383, 402 (1908).

⁴⁵ CRAWFORD, STATUTORY CONSTRUCTION, 158 (1940).

PAROLE BOARD

A.

Let us now examine the D.C. Parole Board. The best way to proceed is to take an actual case, and put it through the administrative process.

Plaintiff, hereinafter referred to as "Sam," was convicted of larceny and housebreaking and sentenced by the United States District Court for the District of Columbia, on October 28, 1955, to a term of four (4) to thirteen (13) years. He was conditionally released from Lorton Reformatory on April 14, 1964. Prior to his release, Sam informed the institution parole staff that the Parole Board had no authority over him.

On April 24, 1964, a violation warrant was issued for the released prisoner because of his failure to report to the parole office, as was customary. The warrant, however, was never executed because Sam's whereabouts were unknown. He remained at large until he was arrested in Montana. Thereupon, after it became known that he was wanted as a conditional release violator, he was taken into custody by the U.S. Marshal and returned to Lorton on June 13, 1968. On July 31, 1968, he appeared before the D.C. Parole Board for hearing concerning the possible revocation of his conditional release.

He asked the Board, at that time, to appoint counsel for him which the Board, by law, was not required to do. The Board, however, acceded to Sam's request by continuing his case so as to allow him to obtain counsel (about which there is some dispute) to represent him at the revocation hearing.

On appeal before the United States Court of Appeals following a proceeding before the U.S. District Court, Sam complained: that he was denied the right to counsel in that the Parole Board refused to appoint counsel to represent his interest at the revocation hearing; that the Board had no authority to supervise his conduct after his release from Lorton Reformatory due to the fact that his release was unconditional and not parole; and that the Board improperly transported him from California to Lorton Reformatory after arresting him on a violator's warrant which took four (4) years to execute.

The Court of Appeals reluctantly decided not to rule on the complaint, primarily because the record lacked statements of fact sufficient to execute a well-reasoned decision. Accordingly, the court re-

manded the record, in October, 1969, to the U.S. District Court for an evidentiary hearing on the following questions:

1. Whether the four (4) year's delay in executing the parole violator warrant was reasonable—in this connection, the steps taken by the United States to execute the warrant.
2. What conditions of release Sam was specifically informed of at the time of his release in April, 1964.
3. Whether Sam's efforts to obtain counsel were, in connection with Board hearings, obstructed by persons in authority.
4. Whether the Board of Parole considered the possibility of modifying the terms and conditions of Sam's parole, as provided for under 24 D.C. Code § 206 (1967 ed.), instead of acting as it did in terminating Plaintiff's parole and reinstating the remainder of original sentence; and, if the Board did consider such alternatives, what reasons were advanced to support its decision to reject them.

The above facts put into question the applicability of the D.C. A.P.A. On the facts, we are faced with "whether the questions remanded to the U.S. District Court were ones to be entertained by it in view of the fact that the D.C. Administrative Procedure Act (in operation at the time of the remand order) provides that jurisdiction over 'contested cases' resides with the D.C. Court of Appeals; . . . whether the D.C. Parole Board comes within the ambit of the Act;" and, "if so, whether 'contested cases' are reviewed under the Act by D.C. Court of Appeals where the Board is a party?"

Let us proceed by delving into the history behind and the functions of the Parole Board. All evidence points to the conclusion that the D.C. Parole Board comes within the ambit of the Act.

An agency, for the purpose of this article, is any delegatee who or which has power to determine either by rule or decision, private rights and obligations of others.⁴⁶ The D.C. Parole Board fits well into this definition, and may properly be regarded as an agency, in view of the fact that it is a delegate with the power to determine, by decision, the rights of others.⁴⁷

In March, 1875, Congress enacted a law (as amended in 1902) which provided that persons convicted of any offense against the

⁴⁶ REPORT, COMMITTEE ON ADMINISTRATIVE PROCEDURE, FOR THE UNITED STATES ATTORNEY GENERAL, S. DOC. NO. 8, 77th Cong., 1st Sess. 7 (1941).

⁴⁷ See *Fleming v. Tate*, 156 F.2d 848 (D.C. Cir. 1946).

United States, and sentenced for a definite period of time, other than life were entitled to a reduction in sentence.⁴⁸ Subsequent thereto, in 1910, Congress enacted a statute, consistent with the above, creating a Federal parole agency whose functions were, among others, to release prisoners before the end of their sentence and supervise their conduct following a showing that there was a reasonable possibility that such persons would live and remain at liberty without violating the law.⁴⁹

These functions were transferred in 1932 to a D.C. Parole Board whose jurisdiction extended over all persons confined to penal institutions of the District of Columbia.⁵⁰ In addition, by statute, the Board was given the power to adopt rules and regulations for its activities, subject to the Commissioner's approval,⁵¹ and the power to conduct hearings concerning parolees (which activity is also subject, in part, to the Commissioner's supervision).⁵²

In view of the above, the question which necessarily arises "is whether the D.C. Parole Board is, in light of its history and functions, an agency within the meaning of the D.C. Administrative Procedure Act, and thereby, subject to it?" The answer is yes. The history behind the Administrative Procedure Act indicates that Congress was desirous of subjecting the 93 administrative agencies, within the District Government, to a uniform administrative law.⁵³ To carry out its desire, Congress directed the Mayor-Commissioner, through a D.C. Administrative Procedure Act, to establish formal and informal procedures, consistent with the Act's minimum procedures, which all agencies under the Commissioner were required to follow.

The Act in pertinent part provides:⁵⁴

A 'subordinate agency' means any * * * board required by law or by the Commissioner or the Council to administer any law or any rule adopted under the authority of law.

To date all subordinate agencies, within the meaning of the above definition, are subject to the Act. In our case, the D.C. Parole Board is a subordinate agency and one, it would seem, which is

⁴⁸ *Gould v. Green*, 141 F.2d 533 (D.C. Cir. 1944).

⁴⁹ *Id.*

⁵⁰ 24 D.C. CODE §§ 201, 201(a) (1967).

⁵¹ *Id.*

⁵² 24 D.C. CODE §§ 204(b) (1967).

⁵³ 1968 *Hearings* 1, 36.

⁵⁴ 1 D.C. CODE § 1502(4) (Supp. III 1970).

subject to the Act.⁵⁵

By examining the Board's function one finds that they are, comparatively speaking, compatible with the above definition. The Board makes and administers rules required by law subject to the direction and control of the Commissioner, as well as the law governing the affairs of persons incarcerated in D.C. penal institutions.⁵⁶ Besides, the Act's legislative history indicates that no agency or agency activity, with few exceptions,⁵⁷ is excluded from its coverage.

Considering the above—namely, that the D.C. Parole Board is subject to the Administrative Procedure Act, and that one of its provisions provides that disputes, involving agencies under it, are reviewable by the D.C. Court of Appeals⁵⁸—it follows that disputes involving the Parole Board are reviewable by the same D.C. Court of Appeals. Further, that the U.S. Court of Appeals should not, in light of the applicability of the D.C. Administrative Procedure Act, remand questions, for an evidentiary hearing, to the U.S. District Court.

Assuming now that the Act applies, "Is the D.C. Court of Appeals the forum before which the remanded questions can best be answered?" The D.C. Administrative Procedure Act is silent on the question, and there is nothing in the pertinent legislative history behind the Act to guide us. Possibly, because the questions remanded are trial-type in nature and because the D.C. A.P.A. is silent on what to do with such questions, the better course would be to leave the questions with the U.S. District Court. If we take into account, for the moment, the fact that the Act took effect after Sam's action com-

⁵⁵ Our Board is subject to the control of the Commissioner. *Supra*, notes 53 and 55.

On the same point: In contrast with the position taken in the body of this paper is the view, held by some, that the D.C. Parole Board is not subject to the Administrative Procedure Act. The functions and responsibilities of the Federal and D.C. Parole Boards are much alike, except for the fact that the Federal Board is not subject to the Federal Administrative Procedure Act. *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963). By analogy, if the Federal Parole Board is not subject to the Federal Administrative Procedure Act, the D.C. Parole Board should not be subject to the D.C. Administrative Procedure Act.

This line of reasoning, however, ignores the dynamics of what takes place in a hearing to determine the desirability of revoking a person's parole. *Hyser v. Reed*, *supra* at 248-252, Judge Bazelon dissenting. It is to the *procedure for making binding determinations* that the Act relates and should be made applicable. As yet no court has said that the Act applies.

⁵⁶ 24 D.C. CODE 201, 201(a), 204 (1967).

⁵⁷ S. REP. NO. 1581, 90th Cong., 1st Sess. 6 (1968).

⁵⁸ 1 D.C. CODE 1510 (Supp. III 1970) .

menced and in the interim between the proceedings before the District Court and the one before the U.S. Court of Appeals, more confusion not less, would be created by now applying the Act. In summary, unless there is a showing (in the facts of this case) that a party's or parties' rights would somehow be impaired by a failure to execute the Act, there is no need to apply it.⁵⁹

To resolve any doubt, let us now examine the remanded questions to see what is involved and who could possibly be prejudiced if the D.C. Act is ignored: the first question goes to what, administratively speaking, was done to execute the warrant. The second goes to whether the Parole Board had jurisdiction to act; the third question goes to a denial of the right to counsel; and the fourth goes to the machinations of the administrators in arriving at their decision to revoke plaintiff's parole. There appears to be, from this examination, two administrative and two constitutional questions. In effect, we are confronted with substantial constitutional law/fact questions which are, ordinarily, entertained by a trial court in a *de novo* proceeding.

A *de novo* proceeding is one in which a trial court takes a case, previously before an administrative body and retries it in its entirety.⁶⁰ Such trials are warranted only when a constitutional right is involved or an agency has acted beyond its statutory powers,⁶¹ as for example, when the D.C. Parole Board convenes a hearing in the absence of establishing the jurisdictional fact (that there has been a violation of prisoner's parole) upon which all its hearings are based.⁶²

In our case, it appears that the D.C. Board was advised of plaintiff's parole violation by his parole officer, and that plaintiff's claim to the right of counsel, in the context of proceedings before the Parole Board, was statutory and not constitutional.⁶³ Because of these facts, bearing in mind the basis for the convocation of a *de novo* hearing, plaintiff, as far as the Board is concerned, was not entitled to have the remanded question answered before the U.S. District Court. The court, without ample justification (in the event the questions are remanded to it) would wrongfully interfere with statutory powers exer-

⁵⁹ See CRAWFORD, *STATUTORY CONSTRUCTION*, § 286 (1940).

⁶⁰ FORKOSCH, *ADMINISTRATIVE LAW*, §§ 342, 343, 345 (1956).

⁶¹ *Id.* at §§ 342, 343.

⁶² 24 D.C. CODE §§ 205, 206 (1967).

⁶³ *In re Tate*, 63 F. Supp. 961, 964 (D.C. D.C. 1961).

cised by an administrative agency.

It would seem to follow that because the questions remanded are not ones for a *de novo* type hearing and because the statutory powers of D.C. Parole Board would be improperly interfered with, the remanded questions should be referred to the D.C. Court of Appeals, which under the Act and consistent with it, would properly dispose of them.

B.

This kind of analysis, employed in the above case, should be used whenever one is confronted with the application of the Administrative Procedure Act to District agencies, for local Government yields only grudgingly to new forms and legal practices.

CONCLUSION

As it now stands: administrative law, on a local level, is virgin territory in the District of Columbia. It remains for us, the legal practitioners, to see that the recent enactment on the subject is implemented vigorously so as to assure that the ideal of *administrative due process* becomes a reality for every citizen.