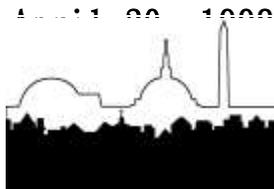

DC APPLESEED CENTER REPORT WITH PROPOSED LEGISLATION

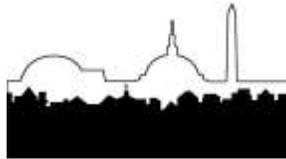
**FULFILLING A PROMISE:
STEMMING THE FLOW OF FEDERAL FACILITIES OUT OF
THE DISTRICT OF COLUMBIA**



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OF COLUMBIA**



April 30, 1998

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INTRODUCTION

The Constitution empowered Congress to create the District of Columbia as “the Seat of the Government of the United States.” In the 200 years since, Congress has molded the District to conform to the federal image of the capital city by a variety of measures—reserving the District’s physical center for federal buildings, limiting the height of commercial and residential buildings, preventing the District from taxing the income of nonresidents who work in the District, and restricting commercial activity on federal land. Advisable or not, these federal decisions have not only shaped the District’s physical landscape, but largely defined its economy.

It is, therefore, not surprising that the District has become uniquely dependent upon the location of federal facilities in the District. While the benefits to the District are clear—tax revenue created by government jobs and government-related private industry—so are the limitations—including land use and revenue restrictions that impede the development of a diversified private economy. The District’s inevitable dependence on the federal presence and the concomitant federal obligation were addressed by Congress in 1790, when it directed that “[a]ll offices attached to the seat of government shall be exercised in the District of Columbia, and not elsewhere, except where expressly provided by law.” The District was thus promised a stable federal presence in exchange for inherent limitations on its ability to establish an independent economy.

Over the past twenty years, that promise has been broken. While the limitations and burdens imposed on the District because it is the seat of government have continued undiminished, the proportion of federal civilian employees working in the District of Columbia

has declined. In 1980, 8.2% of federal civilian employees worked in the District; in 1994, that ratio had fallen below 7.0%. During this period, the District lost 12% of its federal jobs.

The reason for the continuing reduction in federal employment in the District of Columbia is clear. It results from the absence of any mechanism for assessing, evaluating, and controlling the cumulative effects of largely *ad hoc* actions by which federal facilities and jobs are transferred piecemeal from the District to suburban locations and to more distant parts of the country. As a result, the original compact that called for placing federal facilities in the District of Columbia is undermined in practice through individual decisions that often fail to take into account the federal obligation to sustain the economy of the nation's capital.

Today, federal facility location decisions are often influenced by parochial economic and political interests of other jurisdictions. Members of Congress protect and promote the interests of their constituents by influencing the federal government to locate new and preserve existing facilities in their home communities, and to relocate existing federal facilities to those communities. Because of the political disenfranchisement that accompanies its role as the nation's capital, the District lacks such powerful protectors. The District's federal facilities are, therefore, prime targets.

In this report, the DC Appleseed Center recommends adoption of a new requirement to reinvigorate the promise made by Congress when the District was created. Specifically, DC Appleseed recommends that the relocation of a substantial federal facility out of the District of Columbia should occur only if a compelling need is demonstrated, taking into account the detrimental effect that removal will have on the District. Federal facilities should not be frozen in place. But if nothing is done to stem the flow, the District's economy may be further

weakened to such an extent that it will be unable to flourish as the federal city mandated by the Founding Fathers.

Section I of this report recounts the District of Columbia's development as a federal city, emphasizing the effect of federal restrictions on the District's economic development. Section II describes the District's dependence on the presence of federal facilities within its borders, and summarizes the reductions in that presence over the past 15 years. Section III details the shortcomings of existing mechanisms for retaining federal facilities in the District; and Section IV outlines the uncoordinated processes by which federal facility location decisions are currently being made. The final part of this report, Section V, offers DC Appleseed's proposal for remedying this serious problem.

I. BACKGROUND: THE DISTRICT OF COLUMBIA WAS CREATED AND HAS DEVELOPED AS THE FEDERAL CITY.

A. The Creation of The Nation's Capital

The District of Columbia was created as “the Seat of the Government of the United States” following a lengthy debate over whether the national capital should be located within an existing state or created as a separate entity.¹ James Madison argued for the necessity of a separate entity in order to prevent the enormous riches that he assumed would inevitably flow to the federal city from inuring to the benefit of any single state.² The assumption underlying Madison’s argument was that, as long as it was located at a neutral site, the nation’s capital would be supported by all the states.³

¹ U.S. Const., art. I, § 8, cl. 17. *See generally* Kenneth R. Bowling, “The Creation of Washington, D.C.: The Idea and Location of the American Capital” (1991).

² Madison stated that he believed “the expenditures which will take place, where the Government will be established . . . , will not be less than half a million dollars per year.” 1 *Annals of Cong.* 896 (1789), as quoted in Whit Cobb, “Democracy in Search of Utopia: The History, Law, and Politics of Relocating the National Capital,” 99 *Dick. L. Rev.* 527, 532 n 16 (1995) (hereinafter “Whit Cobb”).

³ *Id.*

To prevent future debate over the capital's location, the United States Code was amended in 1790 to require that “[a]ll offices attached to the seat of government shall be exercised in the District of Columbia, and not elsewhere, except where expressly provided by law.”⁴ The solemnity of this mandate is underscored by its only specific exception: “[i]n case of the prevalence of a contagious or epidemic disease at the seat of government, the President may permit and direct the removal of any or all the public offices to such other place or places as he shall deem most safe and convenient for conducting the public business.”⁵

As early as 1808, federal officials recognized that District residents had become reliant upon the presence of federal facilities in the District. The debates in that year over the proposed return of the nation's capital from the District to Philadelphia have been described as “dominated by the notion that the federal government's presence in the District of Columbia entailed a compact or ‘bargain’ with mutual responsibilities. . . . In exchange for foregoing local control and for making the national capital a livable place, the District's citizens were entitled to receive the economic benefits of being at the seat of government.”⁶ For this reason, the law generally requiring federal offices to be located “in the District of Columbia, and not elsewhere” has

⁴ 4 U.S.C. § 72. The Act of July 16, 1790, 1 Stat. 130, provided that the District would replace Philadelphia as the seat of government on the first Monday in December 1800, and that “all offices attached to the said seat of government, shall accordingly be removed thereto by their respective holders, and shall, after the said day, cease to be exercised elsewhere.”

⁵ 4 U.S.C. § 73.

⁶ Whit Cobb at 550. For example, Virginia Representative John Love spoke of the placement of the Capital in the District as an “obligation[] solemnly entered into . . . with individuals under the faith of the seat of Government being permanently fixed at this place; who have under this view made conveyances of their property. . . .” *Id.* at 545, *quoting* 18 Annals of Cong. 1534 (Feb. 2, 1808).

remained in effect, preserving a fundamental difference between private industry—over which local jurisdictions are left free to compete—and federal facilities—which are to be preserved at the seat of government unless there is a persuasive reason for them to be located elsewhere.

B. The Constraining Effect of the Federal Presence and Federal Decisions on the District’s Economy

Since the creation of the nation’s capital, the presence of the federal government in the District has, in fact, had a dominant effect on the District’s economy and finances. Because the federal government owns more than 40% of the land area within the District, there are limited potential sites for the location of large private companies.⁷ And the District cannot tax land owned by the federal government or the international, diplomatic, and other Congressionally-designated institutions that are in the District, permanently removing much of the District’s prime commercial real estate from its revenue base.⁸

⁷ The 1997 debates over the location of the Convention Center have revealed a dearth of significant expanses of property located near the District’s downtown area. Thus, a large private business may choose to locate elsewhere due, in part, to the limitations on the number of sizeable, attractive sites in the District that result from substantial federal land holdings.

⁸ See DC Appleseed Center, “The Case for a More Fair and Predictable Federal Payment for the District” (Nov. 2, 1995), at 10-12, 38-39 (hereinafter “DC Appleseed Federal Payment Report”). The removal of federal facilities from the District will not necessarily translate into an addition of federal property to the District’s tax rolls. As noted on pages 10-11 below, many federal agencies are located in rental offices, so the land and buildings those agencies might vacate is already taxed. Moreover, when federal entities vacate federally-owned property, the property often becomes vacant (*e.g.*, the Navy Yards), resulting in the property remaining untaxable even after the federal facility has moved.

In addition to the federal presence, federal legislation has had a dramatic effect on the District’s revenue base and economic development opportunities.⁹ Congress has stripped the District of the power—commonly held by other jurisdictions—to tax commuters from the suburban areas to which much of the wealth generated in the District flows.¹⁰ In fact, federal law prohibits the District from taxing the income of anyone who earns income in the District but lives elsewhere, resulting in the District government being unable to tax nearly two-thirds of all income earned in the District.¹¹ Nonetheless, the District is required to expend its resources to provide numerous services to the institutions for whom these individuals work.

⁹ Congress has always retained ultimate authority over the District. Until 1967, the District was governed by three Commissioners, all appointed by the President. Organic Act of 1878 of the District of Columbia, 20 Stat. 102, ch. 180 (1878). The Home Rule Act, which took effect in 1975, reserved for Congress the right to legislate for the District and provides for (1) Congressional review of the District’s annual budget, with the federal Office of Management and Budget (OMB) reporting on the budget to Congress; (2) Congressional review of all laws passed by the District Council; and (3) Congressional authority to modify or eliminate Home Rule at any time. District of Columbia Self-Government and Governmental Reorganization Act (“Home Rule Act”), Pub. L. No. 93-198, 87 Stat. 774 (1973). In 1995, control over District finances was transferred to a presidentially appointed oversight body, The District of Columbia Financial Responsibility and Management Assistance Act of 1995, Pub. L. No. 104-8 (1995), and, in 1997, the “Control Board” was given responsibility for overseeing most District government functions. The Balanced Budget Act of 1997, Pub. L. No. 105-33 (1997).

¹⁰ See DC Appleseed Federal Payment Report at 12-15.

¹¹ *Id.*

The federal government has also used its authority over the District to control land use decisions, which have a particularly strong link to economic development. As far back as L'Enfant's 1792 design of the District, the federal government made clear that it intended to make the District a showcase for the permanent offices of the new government, and not to focus on developing private residential neighborhoods or commercial activities.¹² In 1899, the federal government enacted legislation limiting the height of buildings in the District, thereby reducing the value of commercial and residential real estate.¹³ And, throughout the 20th century, the federal government has established a continuing role for itself in the District's physical development by vesting land use powers in quasi-federal agencies, such as the National Capital Planning Commission and the Commission of Fine Arts.¹⁴

While federal decisions regarding the District have not been uniformly detrimental to the local economy, they have almost always considered the District's economic development as secondary to the interests of the federal government in the national capital: how else to explain,

¹² While L'Enfant's plans included details for unusually wide diagonal avenues, a 400-foot wide Mall, and preliminary ground plans for seven major public buildings, including the Capitol and White House, it did *not* indicate how the remaining 1,100+ blocks created in the District would be used. Pamela Scott, "L'Enfant's Washington Described: The City in the Public Press, 1791-1795," 3 *Washington History* 97 (1991); *see also* Richard Stephenson, *A Plan Whol[l]y New: Pierre Charles L'Enfant's Plan of the City of Washington* at 47 (1993).

¹³ The Building Heights Act of 1899 established maximum building heights of 90 feet in residential neighborhoods and 110 feet in commercial areas. D.C. Code § 5-405. Subsequent federal decisions and legislation have led to the current federally created "Schedule of Heights," which limits the height of residential buildings to 90 feet or less and commercial buildings to 160 feet or less. 11 D.C.M.R. §§ 400.1, 770.1 (1994).

¹⁴ *See* Home Rule Act. *See also* Harris, note 6 above; U.S. General Accounting Office, "Mission and Functions of the National Capital Planning Commission" (June 1983) (GAO/RCED-83-115), at 2 ("federal interest" is an ambiguous term "relating to the image, character, and functioning of Washington, D.C., and its environs as the National Capital.").

for example, the 1996 closure of part of Pennsylvania Avenue—a major artery in the heart of the District’s commercial downtown—as a measure to increase security for the White House?

To be sure, the well-known deficiencies in the District’s government and infrastructure have contributed to the District’s failure to share fully in the regional expansion of private enterprise.¹⁵ Nonetheless, the creation and maintenance of the District as home to the federal government have hampered its development as a commercial center. The system that allows the federal government to limit the District’s commercial development can only be justified by Congress’ promise, in return, to maintain federal facilities in the District.

¹⁵ See, e.g., “Most High Priority Services Get Low Ratings in Poll,” *Washington Post*, July 24, 1997, at DC1.

II. THE DISTRICT’S ECONOMY DEPENDS ON THE PRESENCE OF FEDERAL FACILITIES, WHICH HAVE BEEN STEADILY LEAVING THE DISTRICT.

A. The Unique Dependence of the District’s Economy on Federal Jobs and Facilities

As a result of the federal presence and federal legislation, the District of Columbia has become economically dependent upon the federal government to a degree that sets it apart from all other jurisdictions. Federal facilities employ a large number of District residents (as well as residents of suburban communities in Maryland and Virginia) and are the nucleus of most of the District’s private economic activities. Indeed, “federal and federally related activities comprise the District’s core business,” and “the District’s principal private sector economic functions are substantially interdependent with its federal functions and have become more so in recent years.”¹⁶

¹⁶ Stephen S. Fuller, “The Economy of the District of Columbia and its Impact on the Washington Area and its Suburbs,” George Mason University Center for Regional Analysis (Dec. 1996) at 7 (hereinafter “Fuller 1996”).

In 1996, there were 181,000 federal civilian employees working in the District, accounting for 29% of the estimated total of 620,000 jobs in the District.¹⁷ A very large portion of the remaining jobs in the District are in service sectors dependent on the presence of federal facilities, including those in national policy organizations and associations; legal, accounting, and consulting firms; and the tourism and hospitality industries. Many of these private jobs are in the District to serve the federal government offices located there. For others, the connection is indirect—they provide goods and services to those persons, including federal government employees, who work in or visit the District because of the presence of particular federal facilities.

The most obvious economic benefit to the District resulting from the presence of a federal facility is the tax revenue and economic activity generated when federal employees dine, shop, and (in some cases) live near their workplaces in the District. Additionally, federal facilities attract substantial tourist revenue to the District. In 1994, tourist spending produced an estimated \$295 million in tax revenue for the District and supported over 100,000 jobs.¹⁸ Federal tourist attractions are not limited to monuments and other structures that are unlikely to be moved out of the District. For example, one of the most popular tourist destinations is the Bureau of Engraving and Printing—part of which would be removed to Texas if recent Congressional pressures in that direction were to succeed.¹⁹

¹⁷ See Table at Appendix; estimate of total jobs in April 1996 by D.C. Department of Employment Services.

¹⁸ “1996 Annual Report and Travel Trends,” Washington, DC Convention and Visitors Association, at 36 (citing data provided by the Greater Washington Research Center).

¹⁹ “Washington DC’s Attractions: 1996 Visitor Counts,” Washington, DC Convention and

Visitors Association (July 1997); David A. Vise, "Norton to Fight Printing Bureau Move," *Washington Post*, Apr. 24, 1997, at D3.

In addition, although the federal government itself pays no property taxes on the land and buildings it owns, it does so indirectly on the property it leases, because a portion of the rent it pays covers lessors' property taxes. In 1994, more than 20% of the federally occupied property in the District of Columbia was leased.²⁰ In 1997, the federal government indirectly paid an estimated \$99 million in property taxes to the District.²¹ Moreover, because the presence of federal facilities stimulates related private activities—whether by trade associations, business visitors, or tourists—federal facilities derivatively provide substantial additional property and other tax revenues.²²

The economic benefits associated with federal facilities being located in the District extends beyond the federal city's borders. Although the Washington metropolitan area suburbs

²⁰ "Federal Office Space in the Washington Area," District of Columbia Tax Revision Commission (May 1997). The government leases twice as much space in the Maryland and Virginia suburbs as in the District itself. *Id.*

²¹ "Federal Government Payment in Lieu of Taxes," District of Columbia Tax Revision Commission (Feb. 1998).

²² When the federal government vacates leased office space, there may also be a direct reduction in property taxes collected by the District. While vacant office space is not necessarily valued differently than occupied space, District law provides that the estimated income earning potential of the property, which can be affected by occupancy rates, is one factor that may be used to value property for the purposes of determining tax assessments. D.C.M.R. §§ 305-307. In addition, when a relocated federal facility vacates leased space in the District, the removal of one federal entity from the marketplace may also cause a decrease in the demand for such space. When office buildings in the District are not fully (or even almost fully) occupied, each relocation may have an effect on the District's commercial property tax base.

There is a far greater risk that a federal agency will leave the District when it is housed in leased space than in federal government-owned buildings. In the fiscal year 1998 budget, no funds were appropriated for capital expenditures for federal facilities. Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 105-61 (1998). Conversely, federal leases of privately-owned space come up for renewal regularly, and each is then susceptible to displacement by a new lease of space owned by some Representative's or Senator's constituent who will in turn provide new jobs for a substantial number of other constituents.

are more diversified economically than the District, they derive unusually large benefits from federal activities in the District. In 1996, residents of the suburbs received over half of the personal earnings generated by the District economy, and much of the private business activity in the suburbs is derived from federal activities based in the District of Columbia.²³ While the overall benefits to the metropolitan area may continue notwithstanding relocations of federal facilities from the District to the Maryland and Virginia suburbs, those benefits are lost if facilities leave the region. And the transfer of a facility to a suburb may well be a detriment to other suburbs that are more remote from the new location than from the District. Thus, the entire metropolitan area of which the District is the center has a common interest in ensuring that federal facility locations are determined in a rational manner.²⁴

B. The Disproportionate Reduction in Federal Employment in the District and the Threat of Further Relocations

Although the White House, the Capitol, and the monuments are not likely to be moved out of the District, relocation of other federal facilities—including popular tourist destinations—is more than a theoretical concern. In 1997 alone, members of Congress exerted pressure to relocate the Bureau of Alcohol, Tobacco, and Firearms to Virginia; the few remaining District-based operations of the Food and Drug Administration to Maryland; and—as noted

²³ Fuller 1996, at 12-13, 20. Fuller notes that “[w]hile the District has accounted for 73% of the area’s total loss of federal government jobs during the past three years, these job losses have disproportionately impacted suburban residents. One consequence of federal workforce downsizing has been a loss of direct purchasing power in the suburbs. Other consequences of federal downsizing are not as visible but also underscore the important connectivity between the central and suburban economies.” *Id.* at 20.

²⁴ In addition, the federal government benefits by supporting the District’s economy through maintaining federal facilities in the District, because doing so helps create an attractive Capital City to which potential federal employees will be attracted.

above—additional facilities of the Bureau of Printing and Engraving to Texas.²⁵ Such relocation plans merely continue a trend of relocating federal facilities from the District of Columbia, not only to suburban locations but also to other parts of the country where powerful legislators have their home districts.

²⁵ See David A. Vise, “Norton Fights to Keep ATF in D.C.,” *Washington Post*, June 19, 1997, at B3; David A. Vise, “Norton to Fight Printing Bureau Move,” *Washington Post*, Apr. 24, 1997, at D3; Tanya Jones, “FDA Plans to Build Facility for \$84 Million Near UM,” *Baltimore Sun*, Apr. 16, 1996, at 4B.

As a result of these actions, the District has lost many thousands of federal jobs. If, between 1980 and 1994, the District's federal civilian workforce had grown at the same rate as the entire federal civilian workforce, the District would have had almost 36,000 *more* federal jobs than it actually had in 1994. As detailed in the Appendix attached to this report, Office of Personnel Management data reveal the opposite trend: while the total federal civilian workforce grew by 4% between 1980 and 1994, the District *lost* 26,600 federal civilian jobs during that period, or 11.8% of its 1980 jobs.²⁶ In those 14 years, the District's share of the federal civilian workforce decreased from 8.2% to less than 7%.²⁷ During that same period, 1,300 federal civilian jobs were *added* in Maryland and 14,200 were *added* in Virginia, representing a 2% and a 22% increase, respectively.²⁸ Nonetheless, when examined in a regional context, the job losses in the District overwhelmed the suburban job gains, resulting in an aggregate *loss* of 10,600 federal civilian jobs in the metropolitan area at a time when such jobs were increasing nationwide.²⁹

²⁶ "Federal Civilian Workforce Statistics: Biennial Report of Employment by Geographic Area," Office of Personnel Management (Dec. 31, 1994) at Appendix, table supplemented with 1995 and 1996 data provided by the National Capital Planning Commission (November 13, 1997).

²⁷ This movement of jobs out of the District of Columbia and the metropolitan area appears to have been unaffected by the general downsizing of the government. For example, from 1993 to 1994, the number of federal civilian jobs in the United States decreased by 1.3%, while the District lost 4.4%, and the Washington Metropolitan Area lost 4.1%, of its federal civilian jobs. *See* Appendix I; *See also* Stephen S. Fuller, "The Impact of Changes in Federal Spending on the Metropolitan Washington Economy," Greater Washington Research Center (Sept. 1995), at 2 (hereinafter "Fuller 1995").

²⁸ *Id.*

²⁹ This trend likely contributes to the continuing decline in the District's population, which fell by 13% between 1990 and 1997. "D.C. Population Drops Again; '97 Figures Show Count of

The cumulative effect of federal facilities being relocated out of the District has already been substantial, and the continuation of the trend is potentially devastating. Even as federal facilities depart, the District's burdens and obligations as the seat of government continue. Thus, the District's economic viability will inevitably wane unless something is done to preserve the primary foundation upon which a flourishing local economy depends, that is, a reasonably stable federal presence. The solution must take into account the fact that the District's lack of voting representation in Congress makes it particularly vulnerable in the face of concerted efforts by powerful legislators to advance the economic interests of their own constituencies through relocations of federal facilities without paying heed to adverse impacts on the nation's capital. As the next section of this report illustrates, the current system fails to protect the District.

528,964, Lowest Since Depression," *Washington Post*, Jan. 1, 1998, at A1. *See also* "The Exodus from D.C. Accelerates," *Washington Post*, Jan. 26, 1996, at A1.

**III. EXISTING STATUTES AND EXECUTIVE ORDERS FAIL TO PROTECT
AGAINST RELOCATIONS OF FEDERAL FACILITIES FROM THE DISTRICT.**

The long-standing commitment to the District as the nation’s capital is embodied in the general statutory requirement that all federal offices “be exercised in the District of Columbia, and not elsewhere, except as otherwise expressly provided by law.”³⁰ In this way, Congress has articulated a clear policy favoring maintenance of federal facilities at the central seat of government, *i.e.*, within the District of Columbia. Yet, while some federal agencies are required to maintain a portion of their operations in the District, federal law does little to keep federal facilities from leaving the District.

A. The Very Limited Practical Significance of “Seat of Government” Provisions in Organic Statutes

³⁰ 4 U.S.C. § 72.

Nine of the 14 executive departments—Agriculture, Commerce, Energy, Housing and Urban Development, Interior, Justice, State, Transportation, and Treasury—are established by statute “at the seat of government” of the United States.³¹ Such requirements, however, do not exist for four of the other five executive departments; the enabling legislation for Education, Health and Human Services, Labor, and Veterans’ Affairs is silent as to the location of even headquarters functions.³² And while there is a statutory reference to the “executive part” of the Department of Defense as being “at the seat of government,” it has been located at the Pentagon in Arlington, Virginia since 1949.³³

More importantly, the statutes requiring the nine departments to be located at the seat of government do not specify the extent of the presence that must be maintained in the District. In order to endow the clause “at the seat of government” with some effect, it may be presumed that executive agencies must maintain at least some part of their major headquarters functions in the District, but nothing appears to prevent them from locating the majority of their functions and personnel elsewhere in the United States.

³¹ *See*, respectively, 7 U.S.C. § 2201, 15 U.S.C. § 1501, 42 U.S.C. § 7131, 42 U.S.C. § 3532, 43 U.S.C. § 1451, 28 U.S.C. § 501, 22 U.S.C. § 2651, 49 U.S.C. § 102, and 31 U.S.C. § 301.

³² *See*, respectively, 20 U.S.C. § 3411, 42 U.S.C. § 3501, 29 U.S.C. § 551, and 38 U.S.C. § 301.

³³ 10 U.S.C. § 101(a)(7).

Moreover, there is only the most limited statutory protection for non-cabinet level entities—both subordinate offices of executive departments and independent agencies. A relatively small number are required by statute to have their “principal offices” in the District, including, for example, the Federal Communications Commission, the Small Business Administration, the Federal Crop Insurance Corporation, and the Occupational Safety and Health Review Commission.³⁴ Since none of these statutes gives any content to the term “principal office,” the maximum guarantee they provide is maintenance of some kind of formal headquarters office in the District.

The majority of federal offices and agencies have no location requirement at all. A case in point is the Bureau of Engraving and Printing, which is part of the Department of the Treasury. While Treasury itself is established “at the seat of the Government,”³⁵ the Bureau of Engraving and Printing is nowhere defined as an entity that must be located in the District.

B. The Absence of Any Statute or Executive Order Establishing a Preference For the District of Columbia or Requiring Consideration of Its Needs

³⁴ See, respectively, 47 U.S.C. § 154(e), 15 U.S.C. § 633(a), 7 U.S.C. § 1503, and 29 U.S.C. § 661(d). Similar provisions establish the District as the location of the “principal offices” of federally chartered corporations, such as the Federal National Mortgage Association, 12 U.S.C. § 1717(a)(2); the Government National Mortgage Association, *id.*; and the Overseas Private Investment Corporation, 22 U.S.C. § 2199(a). A few other offices and agencies are required to be located “in or near” the District, “in or about” the District, or in the District or the Washington metropolitan region, defined in 40 U.S.C. § 135 as including Montgomery, Prince George’s, Arlington, and Fairfax counties and the cities of Alexandria and Falls Church. For example, the Nuclear Regulatory Commission, the Federal Energy Regulatory Commission, the Equal Employment Opportunity Commission, and the Federal Election Commission are all required to have principal offices “in or near the District of Columbia,” but all of them are authorized to exercise any or all of their powers anywhere else in the United States. See, respectively, 42 U.S.C. § 2033, 42 U.S.C. § 7171(h), 42 U.S.C. § 2000e-4(f), and 2 U.S.C. § 437c(e).

³⁵ 31 U.S.C. § 301.

Apart from these limited location requirements in the organic statutes of a minority of individual federal entities, federal law contains no provision aimed at preserving federal facilities at the seat of government as was intended when the District was created. General statutes concerning the acquisition and management of owned and leased federal space and placement of federal facilities provide no guidance on the geographical location of federal facilities in the District of Columbia or elsewhere.³⁶ The handful of general provisions in other statutes and executive orders addressing the subject of federal facilities location do not focus on the District of Columbia.

³⁶ See 40 U.S.C. § 601 *et seq.* (authorizing the construction, alteration, and acquisition of public buildings by the General Services Administration (“GSA”)) and 40 U.S.C. § 490 (authorizing GSA to enter into leases of up to 20 years and to assign and reassign space).

The Rural Development Act directs agencies to give first priority to the location of new offices and other facilities in rural areas.³⁷ Two Executive Orders pull in the opposite direction, promoting the use of federal space to revitalize the nation's cities by locating federal facilities in urban areas where not inconsistent with the Rural Development Act.³⁸ These Executive Orders, however, give no preference to the District of Columbia over any other city in the United States, and they require no consideration of the District's special political and economic situation. Thus, they serve only to highlight the need for additional executive or Congressional direction in this area.³⁹

³⁷ 42 U.S.C. § 3122.

³⁸ Executive Order 12072 (Aug. 16, 1978) provides that, when agency mission and program requirements call for location in an urban area, agencies must give first consideration to central business areas ("CBAs") and other designated areas. Executive Order 13006 (May 21, 1996) establishes a preference for locating federal facilities in historic properties within historic districts. The objective of these executive orders is to use federal facilities and federal space to strengthen central cities and to make them attractive places in which to live and work, as well as to provide leadership in the preservation of historic resources by acquiring and utilizing space in suitable buildings of historic, architectural, or cultural significance. Those are, of course, legitimate goals, but they do not address the Constitutionally based and unique economic reliance of the District of Columbia on the presence of federal facilities.

³⁹ Some other federal laws may be applied to prevent relocations of federal facilities under certain circumstances. For example, the National Environmental Policy Act of 1969 ("NEPA") would require that an "environmental impact statement" ("EIS") be completed if such relocation would "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332. However, NEPA applies only to a subset of federal facility relocations and, even then, requires only that procedural steps be taken prior to relocation and does not mandate substantive protection. See *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) (socioeconomic factors alone are not sufficient to trigger the preparation of an EIS under NEPA).

In August 1997, Congress enacted legislation that might have deterred the relocation of certain federal facilities out of the District, but the legislation was repealed two months after enactment. Specifically, the law required that District officials be notified and allowed the opportunity to comment whenever the federal government (including the Architect of the Capitol) intended to take any action “affecting real estate” in the District.⁴⁰ In October 1997, the law was repealed at the urging of the Architect of the U.S. Capitol, who reportedly believed that the provision was too broadly applicable to all actions taken on Capitol grounds, including building renovations.⁴¹ While the limited provisions of this statute could have helped open the process by which some federal facility relocation decisions were made, it would not have required any structured consideration prior to proposed relocations of federal facilities out of the District.

Absent any focused institutional safeguards, federal officials are free to locate the majority of federal facilities wherever they please based on whatever factors they deem appropriate, including those driven by political concerns. Under these circumstances, the importance of maintaining a strong federal presence at the seat of government, and the economic needs of the District, are all too easily ignored.

⁴⁰ Pub. L. No. 105-33 § 11715.

⁴¹ Pub. L. No. 105-100 § 157(f); “Norton Blasts Architect of Capitol Over Community Notice Provision,” Jonathan E. Fasman, *The Hill*, Nov. 26, 1997.

IV. THE DECISION-MAKING PROCESSES UNDER EXISTING LAW DO NOT ASSURE CONSIDERATION OF THE DISTRICT’S ECONOMIC NEEDS.

Because existing statutes and executive orders impose little constraint, the process by which most decisions regarding the location of federal facilities are made is particularly susceptible to political influence. While the General Services Administration (“GSA”) and the National Capital Planning Commission (“NCPC”) have formal administrative roles in deciding where to locate federal facilities, various other interested parties commonly dictate or influence the decisions, either separately or in concert. These parties include the agencies being located (which increasingly have individual authority to determine the locations of their facilities), prospective lessors, interested communities, and, most notably, Senators, Representatives, and their staffs.

A. The Role of GSA

GSA has general statutory responsibility for the acquisition and management of much of the space that is owned or leased by the federal government.⁴² Federal law authorizes GSA to “assign and reassign space of all executive agencies in Government-owned and leased buildings in and outside the District of Columbia upon a determination by the Administrator that such assignment or reassignment is advantageous to the Government in terms of economy, efficiency,

⁴² 40 U.S.C. § 601 *et seq.*; 40 U.S.C. § 490. GSA’s responsibility generally does not, however, extend to unique (or “specialized”) space controlled by the host agency, such as National Aeronautics and Space Administration space flight centers. Furthermore, GSA lacks statutory authority over several major federal entities, such as the Pentagon Complex (Department of Defense); the National Institutes of Health (Department of Health and Human Services) campus in Bethesda, MD; the Beltsville, MD campus of the Department of Agriculture; and the National Institutes of Science and Technology (Department of Commerce) in Germantown, MD.

or national security.”⁴³ However, GSA must do so “in accordance with policies and directives prescribed by the President” and must consult with affected agencies.⁴⁴ This statutory language does not appear to authorize independent action by GSA to establish and enforce rules protecting the District, and GSA has not asserted any such authority.

Implementing the executive orders discussed above,⁴⁵ GSA has issued regulations stating certain general criteria for the location of federal facilities in urban areas. However, nothing in these regulations directs that any facility be located in the District rather than elsewhere.⁴⁶

⁴³ 40 U.S.C. § 490(e).

⁴⁴ *Id.*

⁴⁵ *See* pages 16-17 above.

⁴⁶ Until relatively recently, the criteria pertinent to facility location were contained in 41 C.F.R. Chapter 101-17, but that Chapter has been superseded by a succession of interim rules. The current Interim Rule, which is to remain in effect indefinitely, is set forth at 62 Fed. Reg. 42,070 (Aug. 5, 1997). While this Interim Rule details the requirements of the executive orders with regard to central business areas and historic preservation, as well as the Rural Development Act, its only provision relating to the District of Columbia is as follows:

(n) The presence of the Federal Government in the National Capital Region (NCR) is such that the distribution of Federal installations will continue to be a major influence in the extent and character of development. These policies shall be applied in the GSA National Capital Region, in conjunction with regional policies established by the National Capital Planning Commission and consistent with the general purposes of the National Capital Planning Act of 1959 (66 Stat. 781), as amended. These policies shall guide the development of strategic plans for the housing of Federal agencies within the National Capital Region.

As discussed on pages 23-25 below, the reference to the NCPC has limited significance because the NCPC is concerned only with planning for facilities that have otherwise been placed in the Washington area.

GSA delegates much of its formal authority to the departments and agencies themselves, particularly with respect to leased facilities (which, as previously noted, are the facilities most susceptible to relocation pressures as their leases expire). Indeed, in December 1996, GSA made what amounts to a blanket delegation of leasing authority, adopting a “Can’t Beat GSA Leasing” program under which federal agencies have the option of either using GSA to obtain new leases or conducting the lease procurement themselves.⁴⁷ Although not yet widely used, this program signifies a shift in policy toward giving each agency *carte blanche* to choose the location of its leased facilities.

In sum, the statutory authority of GSA over facility location is limited, and GSA has not interpreted that authority expansively. GSA does not, as a practical matter, deem itself free to require that federal facilities move to specific locations unless expressly required to do so by statute and executive order. Instead, GSA functions essentially as a service organization, implementing decisions made by the departments and agencies themselves.

B. The Formal and Informal Roles of Congress and OMB

⁴⁷ 61 Fed. Reg. 66,668 (Dec. 18, 1996).

The Public Buildings Act of 1959 formally involves Congress in particular decisions about the locations of all major federal facilities. The Act, as amended, requires (with limited exceptions) that the Public Works Committees of Congress approve the construction, alteration, or acquisition of a public building or lease of space for public buildings involving an annual expenditure above a certain level (currently \$1.7 million).⁴⁸ To obtain such approval, a “prospectus” must be submitted to the Committees by GSA. As a matter of executive procedure, the Office of Management and Budget (“OMB”) must approve all prospectuses prior to their submission to the Committees. Each prospectus focuses on the need for and costs of the proposed construction, acquisition, or lease and the costs of potential alternatives. There is not, however, any regime for systematically weighing the impact upon the District of any proposed change in the location of a facility.

In addition to the formal powers of the Congressional committees concerned with public works, other committees, individual members of Congress, and their staffs have substantial

⁴⁸ Specifically, 40 U.S.C. § 606(a) states, “In order to insure the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings, . . . no appropriation shall be made to construct, alter, purchase, or to acquire any building to be used as a public building which involves a total expenditure in excess of \$1,500,000 [adjusted after 1988, under subsection (f), to reflect changes in construction costs from year to year] if such construction, alteration, purchase, or acquisition has not been approved by resolutions adopted by the Committee on Environment and Public Works of the Senate and the Committee on Public Works and Transportation of the House of Representatives. No appropriation shall be made to lease any space at an average annual (*cont’d on next page*) (*footnote 48 cont’d*) rental in excess of \$1,500,000 [similarly adjusted] for use for public purposes [without the same Congressional approval]. . . . For the purpose of securing consideration for such approval, the Administrator shall transmit to the Congress a prospectus of the proposed facility”

informal influence on decisions regarding location or relocation of both large and small federal facilities through lease renewals or replacements and otherwise. Agencies exercising delegated authority to choose the locations of their offices are obviously subject to influence by their own oversight committees and by powerful individual members and staffs.

C. The National Capital Planning Commission

Pursuant to the National Capital Planning Act of 1952, NCPC is the central planning agency for the federal government in the national capital region, which includes the District of Columbia and surrounding jurisdictions.⁴⁹ NCPC has formal responsibility for preparing (with the District government) a comprehensive plan for federal facilities in the District of Columbia and for making recommendations to “the appropriate developmental agencies” in the District and to suburban governments concerning the consistency of development proposals with the comprehensive plan.⁵⁰ NCPC is a 13-member body that includes four members from the District, and at least one member representing Maryland and one representing Virginia.⁵¹

⁴⁹ The Act provides that “[t]he general objective of [its provisions] is to enable appropriate agencies to plan for the development of the Federal establishment at the seat of government in a manner consistent with the nature and function of the National Capital and with due regard for the rights and prerogatives of the adjoining States and local governments to exercise control appropriate to their functions, and in a manner which will, in accordance with present and future needs, best promote public health, safety, morals, order, convenience, (*cont’d on next page*) (*footnote 49 cont’d*) prosperity, and the general welfare, as well as efficiency and economy in the process of development.” 40 U.S.C. § 71(a).

⁵⁰ See 40 U.S.C. §§ 71-71f.

⁵¹ The other members of NCPC are the Secretaries of Interior and Defense, the Administrator of GSA, the Mayor and City Council Chair of the District, the chairpersons of the House and Senate District Committees, three citizens (including one each from Virginia and Maryland) appointed by the President, and two citizens appointed by the Mayor. 40 U.S.C. § 71a(b). Because the chairs of the House and Senate District Committees are, at times, from the Maryland and Virginia Congressional delegations, those jurisdictions are sometimes

represented by more than the one citizen member afforded to each.

By statute, NCPC's approval is required as to the location, height, and size of, as well as the open space surrounding, any federal public building in the District of Columbia (and D.C. government buildings in the central area).⁵² In other pertinent respects, NCPC is essentially a consultative and advisory body.⁵³ NCPC issues recommendations and reports on proposed capital developments and projects elsewhere in the region that are to be financed with public funds, but following "consultation and suitable consideration of the views of the Commission the agency [proposing the development or project] may proceed to take action in accordance with its legal responsibilities and authority."⁵⁴ There is no statutory requirement that NCPC be consulted with respect to the removal of federal entities from leased facilities in the District or elsewhere. The Comprehensive Plan for the National Capital recommends that any proposal by the federal government to lease space in the capital region in excess of 100,000 square feet should be submitted to NCPC for its review, and that any proposed relocations take into account their "potential economic impact on the affected jurisdiction." But this recommendation is unenforceable.

⁵² D.C. Code § 5-432; 40 U.S.C. § 71d(c).

⁵³ Additionally, the Commemorative Works Act, 40 U.S.C. § 1001 *et seq.*, provides that the NCPC, as well as the Commission of Fine Arts and (depending on the ownership of the land to be used) the Secretary of the Interior or Administrator of GSA, must approve the site and design of memorials within the District.

⁵⁴ 40 U.S.C. § 71d(a). *See Daingerfield Island Protective Society v. Babbitt*, 40 F.3d 442, 447 (D.C. Cir. 1994).

The analyses of federal facility location decisions by NCPC include consideration of economic impacts on the District and other affected parts of the region, and NCPC maintains substantial data in this regard. However, NCPC does not have authority to prevent any federal facility from being moved out of the District or to control whether a facility will be located in the District, the surrounding region, or elsewhere in the country.⁵⁵ Although NCPC's longstanding goal has been to preserve for the District of Columbia 60% of the federal jobs in the metropolitan region, this goal has no binding effect.⁵⁶ In reality, the District's share of federal jobs has fallen to below 60% in recent years.⁵⁷

* * *

Thus, the only entity with any mandate to consider the impact of federal facility location decisions upon the District's needs is NCPC, which itself includes representatives of competing jurisdictions and lacks ultimate authority to prevent removal of any facility. The result is a potential political free-for-all whenever a significant location decision is required, with the key players being the affected agencies and powerful Congressional figures who often have concerns

⁵⁵ For example, in 1994, NCPC opposed the transfer of major Internal Revenue Service functions to Maryland, as did the community where the new building was constructed. *See* "General Services Administration - Internal Revenue Service National Office Consolidation, New Carrollton, Prince George's County, Maryland," Report to the General Service Administration, National Capital Planning Commission, File No. 5091 (June 28, 1994). County officials and the local Congressional delegation succeeded, however, in forcing the transfer.

⁵⁶ "Comprehensive Plan for the National Capital: Federal Elements," National Capital Planning Commission (1989) at 98.

⁵⁷ Fuller 1995, at Table 6. *See also* "Federal Civilian Workforce Statistics: Biennial Report of Employment by Geographic Area," Office of Personnel Management (Dec. 31, 1994) at Appendix Table 1, table supplemented with 1995 and 1996 data provided by the National Capital Planning Commission (November 13, 1997), showing that 57.1% of federal employees in the Washington metropolitan area work in the District.

at odds with those of the District of Columbia. As the overall number of federal employees continues to decrease through “reinvention” of government, such concerns are bound to be exacerbated. Unless a systematic approach is instituted, the location of federal facilities will increasingly be determined by political forces in an arena where disenfranchised District residents have little leverage.

V. DC APPLESEED'S PROPOSAL

As illustrated above, two interrelated factors threaten the District's economic health and undermine the longstanding constitutional and statutory policies establishing the District's role as the national capital: (1) the *ad hoc* and highly politicized manner in which federal facility location decisions are often made; and (2) the limited representation for the District in the federal government. In order to protect the national interest in the District's economic health, DC Appleseed proposes the adoption of procedures to require consideration of the impact that will be caused by removing any substantial federal facility from the District, and to prevent any such removal that would adversely affect the District unless there is a showing of compelling governmental need.

An essential element of DC Appleseed's proposal is the requirement that the agency considering relocation prepare a "District of Columbia Impact Statement," which would include (1) a rigorous assessment of the foreseeable impact of any proposed removal of a substantial federal facility from the District, (2) a description of any compelling government need(s) for that removal, and (3) an explanation of why the compelling need warrants the removal, in light of the foreseeable detriment to the District. Under the proposal, all those having an interest, including local citizens and elected and appointed District officials, would be given an opportunity to comment on the Statement. The Office of Management and Budget would then review the Statement to evaluate whether the compelling government need warrants the removal of the federal facility from the District. This procedure would not be applicable where the director of the agency certifies that national security requires that a facility be relocated.

The proposed criteria and procedures will have the greatest success if established by legislation. A presidential Executive Order could be a viable alternative vehicle for establishing the proposed criteria and procedures, but it would have less force and a narrower scope. The DC Appleseed proposal is elaborated further in the paragraphs that follow and in the draft legislation attached to this report.

DC Appleseed's proposal would not *prevent* the transfer of employees or functions from the District to other locations in those instances where there is a compelling need to do so. Such a need, however, must be justified by more than basic fiscal considerations, *e.g.*, the savings in the cost of the space occupied by a facility. Even if the government could function more cheaply elsewhere, that should not justify further destruction of the economic foundation of the national capital or the further dismantling of the historic seat of government. Any transfer that would have a substantial adverse effect on the District of Columbia should, therefore, be permitted only if there is a compelling need.

While this proposal seeks to address only the threat that additional existing facilities will be removed from the District of Columbia, it is, of course, also important that the economic needs of the District be considered whenever federal facilities are being created or expanded. Although bringing new facilities into, or expanding existing facilities within, the District should not be expected to offset the loss of existing facilities, similar criteria should be considered whenever decisions are made to create or expand federal facilities that may appropriately be located at the seat of government.

A. Summary of the Proposed Core Requirement of Impact Analysis

The DC Appleseed proposal would apply to any proposed transfer out of the District that either involves 50 or more employees or would cause 10,000 or more square feet of federally occupied space in the District to be vacated. Executive departments, other establishments of the executive branch, independent agencies, and wholly-owned government corporations would be covered, with exceptions for the Department of Defense and for any action certified as necessary for national security.

The District of Columbia Impact Statement would be prepared by the agency proposing the transfer, with assistance from the General Services Administration.⁵⁸ The agency would be required to solicit input from interested local entities in preparing the Impact Statement and to receive and respond to public comments on the Impact Statement. GSA would be required to assist the agency proposing the transfer, and to publish an annual report on the cumulative effect of past and pending transfers of federal facilities out of the District.

1. The Content of the District of Columbia Impact Statement

⁵⁸ GSA generally administers federally owned and leased space and has the data and resources needed to analyze the effects that particular facility relocation decisions would likely have on employment and other economic factors.

The Statement would provide an explanation of any compelling need for the transfer, a projection of the effects on employees and the District economy, an analysis of possible alternatives, and a demonstration that the transfer would have the least adverse impact on the District consistent with the compelling need.⁵⁹ The analysis would further benefit from the required consultation with local agencies, notably NCPC, which independently collects and studies data on the local economy and develops plans for the location of government and private facilities.

The analysis of a proposed transfer's impact on the District would focus on several factors, including: (1) an estimate of the number of current employees who would have to move their places of residence in order to work at the new facility without unreasonable inconvenience; (2) for transfers within the Washington metropolitan area, the effect on commuter time and the availability and cost of public transportation; (3) the reduction in public and private employment in the District; and (4) effects on the District's revenues. The analysis would take into account the cumulative effect of other transfers of employees or functions within the preceding two years and any planned future transfers.

2. Consultation, Publication, and Consideration of Comments

In addition to the internal discipline inherent in a mandated analysis of the need for and effects of transfers of federal facilities, a major purpose of DC Appleseed's proposal is to provide District residents, business owners, and officials an opportunity to be heard on these important decisions, many of which are now made behind closed doors. In order to provide such increased

⁵⁹ Again, GSA already collects, or has readily available, similar data that it can provide to the agency.

opportunity for public comment and more rational policy discussion, the agency contemplating relocation would be required to consult with the Mayor, the Council, the Control Board, and NCPC in preparing the required District of Columbia Impact Statement. The Statement would then be made available to the public, with notice of its availability published in the Federal Register. The agency would be required to respond in writing to any comments received from the public, or from interested entities. Increasing the visibility of the process by which federal facility location decisions are made is designed to induce agencies to examine the justifications for their actions in good faith and to illuminate the bureaucratic and political considerations that enter into these decisions.

3. Annual Reports

GSA would be required to submit to Congress, and make available to interested local entities and the public, an annual report on transfers of federal facilities out of the District of Columbia. This would include all transfers whether or not they rise to the “substantiality” threshold for Impact Statements, and would provide cumulative employment and other economic data and analysis.

B. The Importance of a Formal Approval Procedure

Following the notice, comment, and consultation procedures outlined above, the proposed transfer would be reviewed by the Office of Management and Budget. The transfer could not proceed unless OMB determines that the Statement demonstrates (1) a compelling need, taking into account any detrimental impact the relocation would have on the District, and (2) that, among the feasible options, the proposed action would have the least adverse effect on the District. Such supervision of space procurement appears to be within the general purview of

OMB's Office of Federal Procurement Policy, and related policy issues are already being considered by the Interagency Task Force on the District of Columbia, which is contained within the Executive Office of the President.⁶⁰

The proposed bill would also require that, at the same time it is submitted to OMB, the District of Columbia Impact Statement be submitted to the House Subcommittee on Public Buildings and Economic Development, the Senate Subcommittee on Transportation and Infrastructure, and the District of Columbia Subcommittees of the House Committee on Government Reform and Oversight and the Senate Committee on Governmental Affairs. DC Appleseed does not propose that these Congressional bodies have any formal role with respect to proposed relocations, but only that they receive notification. As previously noted, the first two Subcommittees already actively participate in many decisions regarding federal facilities by reviewing prospectuses for federal construction projects and leases valued at over \$1.7 million. The Impact Statements and annual GSA reports would provide Congress with important information pertinent to its ongoing consideration of the national interest in preserving the federal presence in the District of Columbia.

Like other OMB supervision of federal agencies, the proposed approval process would be straightforward and uncomplicated, and would not involve formal hearings or judicial review; nor would it provide a private right of action. OMB would not be required to make written findings, but would simply approve or disapprove the Impact Statement, or return it to the agency concerned for further development.

⁶⁰ OMB will establish procedures for evaluating individual Statements, and may wish to obtain assistance from, or delegate responsibility to, other government entities as it deems appropriate.

C. Legislation: the Preferred Means of Achieving the Goal

Adoption of the DC Appleseed proposal in any form would be a positive development.

Because legislation would have a stronger impact than an Executive Order, DC Appleseed favors a legislative solution.

1. The Advantages of Legislation

Only Congress has plenary authority to dictate criteria and procedures to govern the locations of all Federal agencies, independent as well as executive. As with the existing prospectus procedures of 40 U.S.C. § 606(a), Congress can readily condition the use of appropriated funds upon compliance with specific procedures and criteria. Moreover, legislation enacted by Congress with the President's signature is inherently the most meaningful statement of national policy. It would be particularly appropriate here, where a substantial part of the problem arises from the fact that agency location decisions are all-too-often driven by *ad hoc* actions of individual legislators and their staffs, who have not analyzed the effects of those actions and their interrelationship with other *ad hoc* actions of a similar nature.

DC Appleseed's proposal would not (and could not) prevent Congress from passing a law directing that any particular federal facility be moved from the District. However, the presence of legislation governing the proposed removal of federal facilities from the District would at least provide those who objected to a proposed move with important information before a vote was taken in Congress, as well as the moral force of a clear legislative statement of policy.

2. The Alternative of an Executive Order

The President has unquestionable power under the Federal Property and Administrative Services Act to establish criteria and procedures controlling location decisions by departments and agencies in the Executive Branch.⁶¹ These could surely include criteria and procedures to

⁶¹ "The President may prescribe such policies and directives, not inconsistent with the provisions of this Act [the Federal Property and Administrative Services Act of 1949, as amended], as he shall deem necessary to effectuate the provisions of said Act, which policies and directives shall govern the Administrator [of GSA] and executive agencies in carrying out their

protect the national interest in the District economy. The United States Court of Appeals for the D.C. Circuit has held (*en banc*) that the President’s authority under 40 U.S.C. § 486(a) “to effectuate the provisions of the Act” is defined by the statutory goals of “economy and efficiency,” which “are not narrow terms.”⁶² In upholding an Executive Order which relied on § 486(a) as authority for a denial of government contracts to companies failing to comply with then-existing voluntary wage and price standards, the Court noted that Congress had either imposed or tolerated presidential imposition of “social and economic programs somewhat removed from a strict view of efficiency and economy,” including preferences for small businesses and domestic products, requirements relating to air pollution standards, and avoidance of employment discrimination.⁶³

respective functions hereunder.” 40 U.S.C. § 486(a).

⁶² *American Federation of Labor v. Kahn*, 618 F.2d 784, 788-89 (D.C. Cir.), *cert. denied*, 443 U.S. 915 (1979).

⁶³ *Id.* at 789-92. *Accord Hensler*, 59 Comp. Gen. 474 (1980); *Fairplain Dev. Co.*, 59 Comp. Gen. 409 (1980). The Court noted an analogous decision by the Third Circuit in *Contractors' Ass'n of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971). The more recent decision in *Chamber of Commerce of the U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996), is not to the contrary. The basis for that decision was that the Executive Order was unauthorized because it conflicted with employers’ rights under the National Labor Relations Act.

Maintaining a viable economy at the seat of government and ensuring reasonable proximity of federal offices and agencies to each other, to the White House, and to departmental headquarters plainly tend to serve efficiency and economy in the federal government.⁶⁴ Moreover, such an Executive Order would not directly regulate the conduct of private entities and thus could be based additionally on the inherent authority of the President to direct the actions of subordinates in the Executive Branch, apart from any specific statutory authority.

However, an Executive Order would lack the force of a Congressional statement of national policy, and its reach would be somewhat more limited than that of legislation. The President's power under § 486(a) is expressly limited to policies and directives governing "executive agencies" and GSA. The President's inherent power is similarly limited. Thus, an Executive Order could not directly control independent regulatory agencies, whose facilities are an important part of the federal presence in the District. To be sure, independent agencies frequently use GSA as their agent for obtaining office space, and, to that extent, an Executive Order directed to GSA could influence independent agencies' relocation decisions. But the President could do nothing to stop an independent agency from negotiating its own space arrangements, wherever it chooses, without involving GSA. Legislation is thus a preferable vehicle because it could cover independent agencies directly.

An Executive Order would, however, be a worthwhile second choice for establishing an OMB approval procedure. It would guarantee, at a minimum, that executive agencies give formal consideration to the District's needs. While it would not have the breadth of legislative

⁶⁴ Executive Order 12072, establishing a preference for urban locations, cited this statutory provision as the source of the President's authority to issue that order.

action, it would tend to open the process to public scrutiny and reasoned examination. The attached proposed bill could readily be converted into an Executive Order.

CONCLUSION

Too often, federal executives and legislators have ignored their obligation to preserve the District of Columbia as a viable seat of government when considering the relocation of federal facilities. The current process by which such decisions are made allows this trend to continue by failing to provide for systematic examination of impacts upon the District's economy and respect for its dependence upon the federal presence. The inevitable result: federal agencies are being removed from the District little by little, eroding the central economic base—and the financial viability—of our nation's capital. To further the common interest in protecting the capital's economy and to protect against *ad hoc* political decisions, the process by which federal facility location decisions are made should be reformed. This DC Appleseed report is intended to begin that process.

DISTRICT OF COLUMBIA FEDERAL FACILITY PRESERVATION ACT
105th CONGRESS
1st Session
H.R. _____

A BILL

To protect the economic needs of the District of Columbia by requiring any substantial transfer of Federal employees or Federal agency functions out of the District of Columbia to be preceded by publication of a District of Columbia Impact Statement, by consultation with appropriate local officers and agencies, by consideration of public comments, and by approval of the Office of Management and Budget, and for other purposes.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,

SEC. 1. SHORT TITLE.

This Act may be cited as the ‘District of Columbia Federal Facility Preservation Act.’

SEC. 2. REQUIREMENT FOR DISTRICT OF COLUMBIA IMPACT STATEMENT FOR FEDERAL AGENCIES PROPOSING TO TRANSFER EMPLOYEES OR FUNCTIONS OUT OF THE DISTRICT OF COLUMBIA.

(a) REQUIREMENT DESCRIBED-

(1) IN GENERAL-Except as provided in subsection (b), if a Federal agency proposes any action that will result in the permanent transfer of employees whose official station is located in the District of Columbia, or the permanent transfer of the functions performed by such employees, to another station that is not located in the District of Columbia, the agency, prior to such action, shall—

(A) prepare a District of Columbia Impact Statement (“Statement”),

(B) submit the Statement to the Subcommittee on Public Buildings and Economic Development of the Committee on Transportation and Infrastructure of the House of Representatives; the Subcommittee on Transportation and Infrastructure of the Committee on Environment and Public Works of the Senate; the Subcommittee on the District of Columbia of the Committee on Government Reform and Oversight of the House of Representatives; the Subcommittee on Oversight of Government Management, Restructuring and the District of Columbia of the Committee on Governmental Affairs of the Senate; the Office of

Management and Budget; the Mayor of the District of Columbia; the Council of the District of Columbia; the District of Columbia Financial Responsibility and Management Assistance Authority; and the National Capital Planning Commission,

(C) make the Statement available for inspection and copying by interested persons,

(D) publish notice of the issuance and availability of the Statement in the Federal Register,

(E) allow at least 60 days after such publication for comments on the Statement, and

(F) obtain the approval of the Office of Management and Budget as provided in Section 4 hereof.

In all cases, the General Services Administration shall provide assistance requested by the agency required to prepare the Statement.

(2) TREATMENT OF CONTRACTS TO CONSTRUCT, LEASE, RENOVATE, OR PURCHASE FACILITIES - For purposes of paragraph (1), the entering into of a contract to construct a new facility or to lease, renovate, or purchase a facility as the official station of employees of a Federal agency shall be considered an action of the agency.

(b) EXCEPTIONS-Subsection (a) shall not apply if-

(1) the functions to be transferred require the services of fewer than 50 employees *and* the transfer will not cause more than 10,000 square feet of space in the District of Columbia to be vacated by the Federal agency; or

(2) the Federal agency certifies, and the Office of Management and Budget concurs, that the transfer of the employees or functions is required by the national security interests of the United States.

(c) FEDERAL AGENCY DEFINED - The term 'Federal agency' means any executive department (other than the Department of Defense), any other establishment in the executive branch of the Government (including the Executive Office of the President), any wholly owned Government corporation, and any independent agency.

SEC. 3. PREPARATION OF STATEMENTS.

(a) **CONTENTS** - the Statement shall describe the proposed action that is the subject of the Statement, and shall—

(1) analyze the impact of the action upon (A) employment in the District of Columbia, including both the agency's employees and other persons providing goods and services to the agency and its employees, (B) residents and businesses in the District of Columbia, and (C) the revenues of the government of the District of Columbia. This analysis shall take into account all prior actions by Congress and Federal agencies that have resulted in transfers of employees or functions out of the District of Columbia within the preceding twenty-four months and any planned actions by Federal agencies that would result in such transfers,

(2) estimate the number of current employees who would have to move their place of residence in order to work at the new facility without unreasonable inconvenience,

(3) as to employees who would not have to move their residences, estimate any additional time and expense required for such employees' travel between their existing residences and the new location, and analyze the availability and cost of public transportation for such travel, and

(4) show that there is a compelling need for the proposed action, taking into account the economic impact on the District; analyze the possible alternatives; and show that the proposed action will have the least adverse impact on the District of Columbia.

(b) **CONSULTATION WITH LOCAL OFFICIALS AND RESPONSE TO COMMENTS** - In preparing the Statement, the Federal agency shall consult with the Mayor of the District of Columbia, the Council of the District of Columbia, the District of Columbia Financial Responsibility and Management Assistance Authority, and the National Capital Planning Commission, and the Statement shall summarize and respond to the comments of these entities. The Federal agency shall further issue a written response to any comments made after the Statement is published by any of these entities or the general public. Such response shall be disseminated and made available in the same manner as the Statement.

SEC. 4. REVIEW OF STATEMENT AND APPROVAL OR REJECTION OF TRANSFERS.

(a) **IN GENERAL**-The Office of Management and Budget shall review each proposed transfer and Statement and shall determine whether the Statement conforms with Section 3. If the Office of Management and Budget determines that the Statement does not conform with Section 3, it shall return the Statement to the Federal agency with instructions to comply with the requirements of Section 3.

(b) **STANDARD FOR APPROVAL**-The Office of Management and Budget shall not approve any transfer unless it determines that the Statement has—

- (1) analyzed the impact of the transfer on the District of Columbia;
- (2) demonstrated that there is a compelling need to implement the transfer, taking into account the economic impact on the District of Columbia;
- (3) given due weight to the views of District of Columbia officials; and
- (4) considered possible alternatives and demonstrated that the proposed action will have the least adverse impact on the District of Columbia.

SEC. 5. ANNUAL REPORTS TO CONGRESS.

The Administrator of General Services shall, during the calendar quarter following the close of each fiscal year, submit and make publicly available a report to the Senate and to the House of Representatives showing, with respect to the preceding fiscal year—

- (a) a description of each transfer of Federal functions out of the District of Columbia subject to the requirements of this Act,
- (b) the aggregate number of all Federal employees whose functions were transferred out of the District of Columbia, and the number of such Federal employees whose functions were transferred to each of the States,
- (c) an analysis of the aggregate effect of all transfers of federal functions out of the District of Columbia upon (i) employment in the District, (ii) residents and businesses in the District, and (iii) the revenues of the government of the District. This analysis shall take into account actions by Federal agencies that have resulted in transfers of employees or functions out of the District within the twenty-four months preceding the fiscal year and any planned actions by Federal agencies that would result in such transfers.

SEC. 6. JUDICIAL REVIEW.

This Act does not create any right or benefit, substantive or procedural, enforceable by law by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

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APPENDIX: Federal Civilian Employment in the United States

<u>Year</u>	<u>Metropolitan</u>			<u>Total</u>	<u>U.S. Total</u>
	<u>DC</u>	<u>MD⁽¹⁾</u>	<u>VA⁽²⁾</u>		
1980	226,014	68,618	65,488	360,120	2,753,770
1981	217,407	64,489	69,087	350,983	2,734,807
1982	209,024	64,309	70,348	343,681	2,700,609
1983	206,571	63,993	71,367	341,931	2,746,111
1984	210,872	65,153	70,871	346,896	2,776,490
1985	207,955	64,247	72,571	344,773	2,878,412
1986	202,578	66,767	71,279	340,624	2,880,881
1987	204,604	68,801	73,519	346,924	2,943,045
1988	205,718	69,665	73,102	348,485	2,967,84

						7
1989	207,019	70,446	76,813	354,278	2,977,62	1
						4
1990	208,400	69,635	75,140	353,175	2,987,28	6
						0
1991	217,515	73,320	78,634	369,469	2,976,34	2
						5
1992	216,877	72,288	80,206	369,371	2,965,64	N/A
						337,411(
						3)
1993	208,582	72,955	81,445	362,982	2,901,32	N/A
						317,871(
						3)
1994	199,400	69,943	79,695	349,038	2,863,05	
1995	190,651	69,154	77,606			
1996	181,137	65,417	71,317			

(1) Maryland counties adjacent to Washington only.

(2) Northern Virginia cities and counties only.

(3) Reflects local impact of National Performance Review, released in September 1994, to reduce civilian and uniformed military by 250,000 positions each by September 1997.

Sources: Metropolitan Washington areas data for 1980-1994 taken from "Federal Civilian Workforce

Statistics: Biennial Report of Employment by Geographic Area" (December 31, 1994) at Appendix Table 1, table supplemented with 1995 and 1996 data provided by the National Capital Planning Commission (November 13, 1997). U.S. Total data provided by National Capital Planning Commission on November 15, 1997.