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EQUAL REPRESENTATION IN CONGRESS: PROVIDING VOTING RIGHTS TO THE DISTRICT OF COLUMBIA

HEARING

BEFORE THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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EQUAL REPRESENTATION IN CONGRESS: PROVIDING VOTING RIGHTS TO THE DISTRICT OF COLUMBIA

TUESDAY, MAY 15, 2007

U.S. SENATE,
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 10:03 a.m., in Room SD–342, Dirksen Senate Office Building, Hon. Joseph I. Lieberman, Chairman of the Committee, presiding.

Present: Senators Lieberman, Akaka, Pryor, Landrieu, McCaskill, Collins, and Warner.

OPENING STATEMENT OF CHAIRMAN LIEBERMAN

Chairman LIEBERMAN. The hearing will come to order. We welcome everybody here this morning. I note that Congressman Davis is here, and I would gather that our other colleagues are on the way.

This is an important hearing on a very important matter. To me, what we are gathered here to do today is to mend a tear in the fabric of our American democracy, and I am talking, of course, about the fact that the citizens of the District of Columbia lack voting representation in the Congress of the United States.

In fact, America is the only democracy in the world that denies the citizens of its capital city democracy's most essential right, which is representation in the national legislature. That is an embarrassment.

The people of this city, in my opinion, have waited too long for that right. I believe that the tide is changing this year and that this is the year we can and will give the citizens of the District of Columbia the civic entitlement that every other Federal taxpaying American citizen enjoys, no matter where he or she lives.

I want to thank, in particular, my good friends Senator Orrin Hatch and Senator Bob Bennett for increasing the odds for success this year with their cosponsorship of this effort. And as if on cue, as I mentioned his name, Senator Hatch enters the room. I would like you to think that we had rehearsed this, but we had not.

Senator Hatch, I was just thanking you for cosponsoring this measure and increasing the possibilities of success in this effort.

Earlier this month, Senator Hatch and I and Senator Bennett introduced S. 1257,[1] which would provide the District of Columbia with a voting representative in the House and also give the State of Utah the fourth congressional seat it deserves, based on the 2000 census.

I also want to thank the two people in the House, colleagues and friends, without whose leadership we would not be here today with the hopefulness that we have in our hearts, and that is, DC Delegate Eleanor Holmes Norton and Congressman Tom Davis, who worked together so cooperatively and productively to pass a similar bill in the House in April by a vote of 241–177.

Notwithstanding the remarkable, effective service of Congresswoman Norton, the citizens of the District of Columbia deserve more than a non-voting delegate in the House. They deserve a representative who can vote not just in Committee, as Delegate Norton now can, but also can vote on the House floor, which she cannot. I would bet—as a matter of fact, not only bet, but I have seen polls to suggest that most Americans would be shocked to hear that the residents of the District and their delegate cannot vote on the House of Representatives' floor.

I also want to thank and welcome Mayor Fenty, whose first few months in this job have been marked by a strong advocacy for voting rights in Congress for the people he serves. And no wonder. The people of the District of Columbia have been the target directly of terrorist attacks, and yet they have no voting power in the major questions that we decide here about how the Federal Government provides the residents of the District and all Americans homeland security. The people of the District have given their lives to protect our country in foreign wars but have no say in our foreign and defense policy, no actual voting say. They pay taxes, like every other American. In fact, they pay more taxes than most Americans. Per capita, District residents have the second highest Federal tax obligation. Yet they have no voting voice in how those taxes will be raised or how they will be spent.

The District is also the only jurisdiction in the United States of America that must seek congressional approval—through the appropriations process—before spending locally generated tax dollars. So when Congress fails to pass appropriations bills before the beginning of the fiscal year, the District's budget is essentially frozen. And yet here, too, the District has no actual voting representation or involvement in the appropriations process.

Giving the residents of the District voting representation in the House is, therefore, to me the right and just thing to do. But I will add it is also the popular thing to do. A 2005 poll by KRC Research found that 82 percent of the American people believe that it is time to end this bias against the District.

So we have a great group of witnesses here. I do not want to waste a moment. I just want to say that this is the moment to act together to do something right and good for our country. The legislation introduced in both the House and the Senate is an expression of a fundamental American value of fairness and inclusivity, and I think it is also—has been in the House and will be in the

[1] Copy of S. 1257 appears in the Appendix on page 139.

Senate—an example of what we can do if we work together across party lines.

Senator Collins.

OPENING STATEMENT OF SENATOR COLLINS

Senator COLLINS. Thank you. Mr. Chairman, I know how strongly you feel about this issue. Your statement today was very eloquent, and I am very grateful that you have scheduled this hearing to hear testimony today on legislation to provide the District of Columbia with representation in the U.S. House of Representatives.

I read a lot about this issue and have learned a great deal during the last month as I have focused on it, and it has a truly fascinating history. Recognition of the need for a national capital controlled solely by the national government predates our Constitution.

In January 1783, before there was a fixed location for the national capital, the Continental Congress was meeting in Philadelphia. Revolutionary War veterans gathered outside, aggressively demanding their back pay. Congress sought protection from authorities in Pennsylvania and did not receive it, and as a result, Members of Congress actually fled the city. This incident helped form the view that future Congresses should be able to meet on neutral ground under Federal control, beholden to no State.

When the Constitutional Convention of 1787 convened, its members took the same view as the Continental Congress on the need for Federal control over the seat of national government. And in the Federalist Papers, James Madison said that the point of "complete [Federal] authority at the seat of government" was to avoid depending for protection on the State in which it sat.

Some speakers at the Constitutional Convention, including Alexander Hamilton, argued that the residents of the new Federal District ought to have Congressional representation. Unfortunately, no such provision was adopted.

The initial impact was not nearly as significant back then as it is today. When the District officially became the capital in 1800, it had only 14,000 residents, many of whom lived in the section that was later returned to Virginia.

But today, more than 200 years later, the District of Columbia is home to more than half a million American citizens. These citizens serve in the Armed Forces, pay Federal taxes, participate in and benefit from numerous Federal programs, and support a local government. Yet they cannot choose a Representative with full voting rights for the House that sits in their midst.

A fundamental point in this issue is that the District is not a State. The Constitution describes the selection and residency of Members of the House of Representatives in terms of States. In 1998, the DC Circuit concluded that "Constitutional text, history, and judicial precedent bar us from accepting [the] contention that the District of Columbia may be considered a state for purposes of congressional representation."

A proposed structural remedy—a 1978 constitutional amendment—failed because, unfortunately, only 16 States ratified it before it expired.

Without such an amendment, the Constitution does not expressly supply the remedy sought by many District residents.

But I want to emphasize that this does not end the debate. The Constitution's "District Clause" gives the Congress "exclusive" power to legislate with respect to the District. We can apply tax laws to the District, and we have. We can grant or withdraw powers of local government. We can send the District's sons and daughters to war. No State can assert legislative jurisdiction here. That is the meaning of exclusivity.

Our legislative authority in the District, while exclusive, is not boundless. We are constrained by the language of the same Constitution that made the grant of exclusive legislative authority.

If Congress can constitutionally pass legislation to grant the District a fully empowered Member of the House of Representatives, I will gladly support that measure.

If, however, legislation granting the District a voting representative in Congress violates the Constitution, then it will fail as surely as if we attempted to suspend the right of free speech.

So that is the question before this Committee. Can we constitutionally pass legislation creating a congressional seat for the residents of the District of Columbia? The Constitution, in my judgment, forecloses our legislating Senate representation for the District because it is, after all, not a State. But the question of House representation is far less clear-cut. It may well pass constitutional muster to provide a population-based House seat even though representation in the Senate would clearly fail to pass constitutional scrutiny.

Our witnesses today will help us understand the constitutional ramifications of these questions.

Let me close my opening remarks by making clear that I am sympathetic to the goal of providing representation in the House of Representatives for the District of Columbia. I enthusiastically support reaching that goal. That seems to me to be a matter of fundamental fairness. I look forward to listening to the experts today on how we can accomplish that goal within the confines of our Constitution.

Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thank you very much, Justice Collins.

[Laughter.]

Senator COLLINS. Now, you meant that very respectfully, right?

Chairman LIEBERMAN. I did. Actually, that is not a bad idea. But I thank you for a very learned statement, and I appreciate very much the work that you have done in preparing for the hearing. I think you set out one of the baseline issues very clearly, and I hope the witnesses today will help convince you. But I respect what you said, and I take it to be encouraging.

I welcome Senator Pryor here as well this morning. Thanks for taking the time to be here.

We have a great first panel, all elected officials. Unless they insist that we ask them questions, we are not going to ask them questions, and we will understand if their schedules require them to leave after they testify. But each of the four has played, is playing, and will continue to play a very important leadership role in righting this wrong, in my opinion.

Senator Hatch, we have worked together on many things in the past, across party lines. You are a stand-up, straight-shooter of a guy. You stepped out on this one and, I think, created a critical turning point in the historic effort to give residents of the District of Columbia voting representation in the House. So I cannot thank you enough, and I welcome you now to make an opening statement.

TESTIMONY OF HON. ORRIN G. HATCH,[1] A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you so much, Mr. Chairman and Senator Collins. I appreciated both of your statements, and I appreciate the leadership you provide for us here in the Senate on this great Committee. You are both very dear friends, and I appreciate both of you.

I appreciate the opportunity to advocate for legislation that would for the first time give voting representation in the House of Representatives to the residents of the District of Columbia and also a fourth congressional seat for my home State of Utah.

As you may be aware, I have partnered with Chairman Lieberman in drafting the District of Columbia House Voting Rights Act of 2007, S. 1257. This legislation not only rectifies the District's undemocratic political status, but it gives my home State of Utah a long overdue fourth voting Member in the House of Representatives.

During the 2000 Census, Utah missed receiving a fourth seat by only 857 people. Valid questions were raised about the methodology of that count, leading most in our State to believe that we were not treated very fairly. Since then, our population has only grown. In fact, the southern city of St. George, Utah, continues to be the fastest growing metro area in the entire Nation and was rated the top retirement community in the country. Some have suggested that I need to go there.

[Laughter.]

Chairman LIEBERMAN. Not yet. We need you.

Senator HATCH. I am also very impressed with my colleagues here at this table and the efforts that they have put forward in trying to resolve these very important problems. They are terrific people, and I just want to express my support for them. I am confident that our subsequent population growth in Utah makes clear that Utah deserves an additional House seat.

During drafting of S. 1257, Chairman Lieberman and I worked to resolve what we felt were deficiencies in the House measure. I have both constitutional and policy concerns about that bill because it imposes an at-large seat upon Utah. In States with more than one seat in the House, Members are expected to represent insular constituencies. Under H.R. 1905, residents of one State would be represented by two House Members, while citizens in other States would only have one.

In our constitutional system, States are responsible for elections, and Utah has chosen the approach it wants to take by redistricting. Now, I see no reason for Congress to undermine this and impose upon Utah a scheme it has not chosen for itself. Thus, in the pro-

[1] The prepared statement of Senator Hatch appears in the Appendix on page 35.

posed Senate legislation, I insisted that Utah be required to redistrict to provide for the new seat. As far as I can see, no one should have any objection to that. It will be done fairly.

I believe that Utah's legislators deserve the freedom to determine their Representatives' districts without unjustified intrusion or mandate of the Federal Government.

Now, this bill would also provide, as we all know, for the full House representation for District residents. District residents pay taxes. They vote in presidential elections. They serve in the military. Yet more than half a million Americans do not have a full voting representative in Congress. Eleanor Holmes Norton is a wonderful representative, but as you know, she is barred from voting under certain circumstances, and that is just plain not fair.

Their elected Delegate, while subject to the same restrictions and regulations as other House Members, cannot vote in all matters relating to House business, and her participation can change as House rules and majorities change. This legislation would end such inconsistency.

America's founders established that population would be represented in the House and that States would be represented equally in the Senate, and that equally in the Senate by equal suffrage is a very important concept. As a result, while the District's significant population justifies representation in the House, it must actually be a State for such equal representation in the Senate. And on that point, I agree with America's founders that the Nation's capital should not be one of the Nation's constituent States.

Let me say just a word about the argument that granting the District a full House Member is unconstitutional, as I know other witnesses will focus more fully on this point. The Constitution grants Congress broad authority to exercise what it calls "exclusive legislation in all cases whatsoever" regarding the District. The main constitutional question, I believe, is whether the Constitution separately prevents the full House representation that this broad authority appears to allow. Some point to the provision saying that the House "shall be composed of members chosen . . . by the people of the several states." Congressional action and judicial precedent throughout American history, however, suggest that the word "states" is not an obstacle in providing full House representation for the District.

In 1820, the Supreme Court held that Congress could impose direct Federal taxes on District residents, despite Article I, Section 2, of the Constitution, which then said that "direct taxes shall be apportioned among the several states." If the word "states" did not prevent Congress from imposing taxes on District residents then, how can it prevent Congress from granting House representation to District residents now?

Article III grants the Federal courts jurisdiction over controversies "between citizens of different states." Noting that it would be "extraordinary" for courts to be open to citizens of States but not citizens of the District, the Supreme Court unanimously held that Congress may correct this anomaly and later upheld Congress' decision to do so. If the word "states" did not prevent the Congress from granting access to the Judicial Branch then, how can it pre-

vent Congress from granting access to the Legislative Branch today?

And even more to the current point, the Supreme Court in 2000 affirmed a lower court decision that while the Constitution does not itself grant District residents the right to House representation, they may pursue that goal in "other venues" including the "political process."

Which brings us here today.

I recognize there are many who strongly oppose this legislation. There are many who wish the District voting rights issue would go away. It is not going to go away until we do the right thing and give those who live in the District of Columbia a vote in the House of Representatives. And I must note that this Democratic-controlled Congress could have simply pushed legislation focusing solely on the District. Instead, I am pleased that Chairman Lieberman has taken a more balanced and bipartisan approach.

Indeed, this is a historic time for the citizens of the District of Columbia and a unique opportunity for my home State of Utah to receive a long overdue fourth congressional seat. I intend to make the most of it and hope that my fellow Senate colleagues will support me in this endeavor.

I want to personally thank all who testify in favor of this and those who testify against it. I know that their thoughts are well taken and well thought out, but I believe this is the right thing to do. I want to thank those who are sitting here beside me at this witness table for the efforts that they have put forth because this will never happen without the help of them. And, in particular, these two Congress people and this Mayor, I personally appreciate them and personally support them, and I hope that we can get this through.

Thank you, Mr. Chairman, for the opportunity to testify. If you will forgive me, I am due at two other venues right now, but it is a privilege to testify before you.

Chairman LIEBERMAN. Thanks, Senator Hatch, for an excellent statement. If I may just say, your reference to the composition of the House and Senate brings to mind, if I may be slightly parochial, that original decision was made at the Constitutional Convention in response to a suggestion made by two of Connecticut's delegates—Roger Sherman and Oliver Ellsworth. Of course, it became known forever as the "Connecticut Compromise," which defined the basis for membership in the House and the Senate.

But I mention it to get to your second point, which I appreciate very much, that right at the outset we defined ourselves as a body in the spirit of compromise. There is not, in my opinion, enough compromise here these days—not compromising principle but compromising starting positions so you can get to common ground where you can get something done. And I think in this partnership that was started in the House and that you and I have now continued in the Senate, which corrects injustices against both the District and Utah—the District injustice being, of course, longstanding, the one in the case of Utah based on the 2000 Census—is in that same spirit of compromise.

So I thank you also for your learned statement, and I look forward to working with you to see this through the Senate. We are

going to try to move the bill through this Committee and out to the Senate floor as soon as we can.

Senator HATCH. Well, thank you.

Chairman LIEBERMAN. Thank you very much.

Congressman Davis, you have been a great leader here and brought us to where we are now. Thanks for being here, and we welcome your testimony now.

TESTIMONY OF HON. TOM DAVIS,[1] A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. DAVIS. Well, thank you, Senator Lieberman and Senator Collins, and I want to acknowledge my senior Senator, Senator Warner, and thank you, Senator Pryor, for being here as well.

I have to say that the road moving this bill forward has been a long one, but at each step I am once again reminded it is an honor to work as part of a team that seeks to create a more perfect union.

In talking about this legislation, the most important point I make is that no one can explain with a straight face why this country, the capital of the free world, is willing to send soldiers around the world to extend liberty to every corner of the globe, yet Americans living in this Federal District, who have fought and died in ten wars and pay Federal taxes, do not have any representation in the Federal legislature. The United States is quite right to sacrifice for liberty around the world, but we need to walk the walk at home as well. The District of Columbia House Voting Rights Act gives us a chance to do just that.

People continuously ask me why I don't support a constitutional amendment or campaign for retrocession. I have two answers. First, I believe we should attempt what is achievable. At the present time, we have made a strong case that Congress has the authority—at least with respect to the House of Representatives—to remedy this problem and, by legislation, give the District a voting member in that body.

Second, I think every single day that passes with Americans living in the District unrepresented is a travesty and an indictment of our government. The day has long passed for multi-year campaigns and pleas to unsympathetic partners. Congress can solve this problem—and it should.

I think the Founders knew there would be unforeseen problems created in the ratification and everyday use of the Constitution. In the District Clause, they gave Congress the flexibility to use its power to solve those kinds of problems. All that is lacking now is the will to solve them.

Another question I am continually asked is: What about the Senate? Doesn't this bill start us down a slippery slope to Senate representation? My answer is no. First of all, this action by this Congress does not obligate any future Congress to provide Senate representation. Moreover, since the basis of this legislation is the power of the Congress, no court can force us to exercise our prerogative against our will.

But, more importantly, remember the House and the Senate are intrinsically different bodies created for different purposes, rep-

[1] The prepared statement of Mr. Davis appears in the Appendix on page 38.

resenting different entities. It is easy to see the House and the Senate as simply two hurdles on the same track, and perhaps in some ways they are. But each hurdle is there for a different reason. This is old stuff to most of us, but when it comes to the District of Columbia and the House of Representatives, the difference is real.

James Madison put it best in Federalist Paper 39 when he explained the reason for having a bicameral legislative body. He said, "The next relation is, to the sources from which the ordinary powers of government are to be derived. The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. So far the government is national, not federal."

And I would remind my friends that when this was written and in the first 12 years of the Constitution, the members of the District were among the several States and voted for the House of Representatives.

Madison goes on to state, "The Senate, on the other hand, will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress."

So the House represents people, Senators represent States. Our body is national in nature; yours is Federal in nature.

It is likely the only road to Senate representation is actual statehood—not the other way around. But, at any rate, giving the District a voting member in the House neither advances nor hinders the statehood effort. But it does give the District representation under the Constitution today.

By now, every member is aware of the constitutional arguments. I ask that you think carefully about what you hear today. Every first year law student in this country learns that you cannot just read the Constitution and figure out what it means. But that is where the other side's argument starts and stops on this issue.

Those opposing this bill ignore 200 years of case law and clear instruction from the court that this is a congressional matter and requires a congressional solution. Under their reading:

District residents would have no right to a jury trial. You have to be from a State to have that right;

District residents would have no right to sue people from outside the District in the Federal courts under diversity. Only people from States have that right;

The Full Faith and Credit clause would not apply to the District. That applies only between States;

The Federal Government would not be allowed to impose Federal taxes on District residents. The Constitution says direct taxes shall be apportioned among the several States;

The District would be able to pass laws which interfere with interstate commerce. The Commerce Clause only allows Congress to regulate commerce among the several States. But they apply it to the District under the District Clause.

In each of these cases the Supreme Court has held that Congress can consider the District a "state" for purposes of applying those fundamental provisions. Now, if Congress has the authority to do so regarding those constitutionally granted rights and duties, there

should be no question we have the same authority to protect the most sacred right of every American—to live and participate in a representative republic.

As the Senate considers what the House has done and decides how it will proceed, it is my hope you will look for ways to agree with the House on this matter; that instead of looking for potholes you will look for roads. Of course, there are potholes in the road, and some today will point them out to you. But at its core, the Constitution is a road to guaranteeing liberty and dignity under the consent of the governed. Now is not the time to fail to walk that road.

And, finally, let me just say on the Utah provisions, our original bill allowed Utah to represent. This has gone back and forth. Chairman Sensenbrenner, who is the chairman of the Judiciary Committee, would have supported a bill in the House that allowed Utah to do the apportionment. He opposed this on the basis of at-large. So, personally, I have no problem with what Senator Hatch has suggested.

Thank you for you time.

Chairman LIEBERMAN. Thanks, Congressman Davis. Excellent statement.

Congresswoman Norton, great to see you. I have probably said it too often, but in this very interesting constitutional situation, I cannot control myself from pointing out that we met each other a few years ago when we were both law school students at the same law school, and I was impressed by you then and admired you greatly, as I continue to do. Thank you for your great leadership in this cause. We welcome your testimony now.

TESTIMONY OF HON. ELEANOR HOLMES NORTON,[1] A DELEGATE IN CONGRESS FROM THE DISTRICT OF COLUMBIA

Ms. NORTON. Thank you very much, Mr. Chairman. If I may say so, we were both on our way to a certain civil rights movement at that time.

Chairman LIEBERMAN. Yes, we were.

Ms. NORTON. Members of the Committee and Mr. Chairman, I must say that, Mr. Chairman, after I heard the remarks of my good friend, Mr. Hatch, the Senator from Utah, I was inclined to associate myself with the remarks of the Senator from Utah and simply shut up. So I ask that you listen closely to him. As much as Senator Hatch and Senator Bennett, who are original cosponsors of this bill, want an extra seat, a seat that they feel very indignant at having been denied, went all the way to the Supreme Court to try to get it, I think they would have gotten it had the Supreme Court noted that the State of Utah had the population but they were out doing missionary work. You can imagine the outrage of the people of Utah when the few votes short comes because people are spreading the gospel as they see it.

So they bring a kind of zeal to this that should not be forgotten, and I think that you heard in Senator Hatch's testimony—and I should say that I am so appreciative of the way that Senator Hatch

[1] The prepared statement of Ms. Norton appears in the Appendix on page 41.

and Governor Jon Huntsman have spoken equally of the need to grant the rights to the District of Columbia.

I appreciate, Mr. Chairman, that you and Senator Hatch and Senator Bennett sent a letter just as the House was about to finish business when it looked like this bill would indeed pass a Republican House and asked that the bill be brought to the floor immediately.

I believe if it had been brought to the floor in that posture, as a matter of senatorial courtesy the Senate, the Republican Senate, seeing that there was before them a bill that affected no other State and in the great traditions of the Senate, when a bill affects no other State, I believe that the Senate, the Republican Senate, would have passed that bill. And we are asking no less of the Senate today.

This bill was born bipartisan, and it was not born on my side of the aisle. It was born at my right hand here. And Representative Tom Davis has never let up, has never been discouraged, and there were many moments when my side and his side both gave us reason. There was never any lessening of his zeal, and I was totally dependent upon him because I was in the minority. And we shall never forget the way in which he persevered against the odds.

Now, my good friend Mr. Davis and I have been, in separate appearances, on the "Colbert Report." Colbert invites me on. He likes me because he likes to make fun of the fact that the residents of the District of Columbia do not have the vote. But I think that he invited Mr. Davis on, I think even after the vote. The last time I went on right after the vote, I said to Mr. Colbert, "Look, the residents of the District of Columbia are entirely gracious people. They will accept either your congratulations or your apology." But Mr. Colbert, being Mr. Colbert, I think I got neither.

But when Mr. Davis went on, I have not seen this, Mr. Davis, but I believe he asked if Mr. Davis and I were having an affair.

[Laughter.]

Ms. NORTON. Now, if there is any such thing as a political affair, I think that I have to plead guilty, and I hope I have given you—

[Laughter.]

Ms. NORTON [continuing]. The right cover to your wife now, Mr. Davis.

Mr. Chairman, I have taken some pains at written testimony, and I am not going to tell you what witnesses you have invited are likely to tell you. I very much appreciated the very incisive testimony of my partner, Mr. Davis. But I am going to try to tell you a few things that may not have come to your attention, not that they are unknown.

I would like to say a word on the constitutional point. The former constitutional lawyer in me will not rest. But I am really going to leave that to Professor Viet Dinh.

Now, I want to alert you, pay attention to Professor Dinh, please, and do not listen to my good friend, Mr. Turley.

[Laughter.]

Ms. NORTON. He and I come from the same fraternity. I continued as a professor at Georgetown University Law Center, but I certainly do not associate myself with his remarks. I understand that in his professorial zeal he has practiced being on the other side. I

cannot believe that he is really on the other side here. But Professor Dinh is not just on my side—and here you will have to forgive me several times—he is on the right side. He is testifying for the third time. And I think when you testify on the constitutionality of a bill for the third time and you come from a conservative Republican Administration, you must really mean it.

You may know, of course, that Professor Dinh was President Bush's point man on constitutional matters when he served in the Ashcroft Justice Department. I do not believe he would come forward with so convincing testimony if it did not comport with his own sense of the Constitution. He was the Attorney General for Legal Policy in the Administration.

I have to tell you that when I had a chance to see the President recently, I said to him that I thought he would be receiving a bill shortly and that he might have some pesky aides in the Justice Department who would advise him not to sign the bill. So I said to him that I hoped he would take into account that the constitutional scholars we relied on were former Court of Appeals Judge Kenneth Starr and Professor Viet Dinh.

At that point, the President looked me dead in the eye and said, "Wow." I am quoting, Mr. Chairman. And I think he was surprised, and you may be surprised, too. But I wish you would listen to what Professor Dinh has to say. Yes, listen to Professor Turley. I have listened to both sides. Fortunately, the District of Columbia has the better side of the case.

Second, I want to say a word about originalism or what the Framers meant because I cannot let rest the slander that the Framers of our Constitution would have fought a war for representation and then turned around and denied representation to the citizens of their own capital. It is a slander, and it makes me angry every time I hear it. If you want to say that the bill does not meet some kind of constitutional standard, blame it on somebody else. Blame it on Jonathan Turley. But don't blame it on the Framers of the Constitution.

The veterans of the Revolutionary War were living on the land that three Framers from Virginia and three Framers from Maryland signed the Constitution turning over that land and making it the capital of the United States. It is inconceivable that they would have signed on to a document believing that they were denying their own residents the vote that they then had. And the fact that they continued to have that vote for 10 years during the transition period and that the first Congress in its very first session assured those two States that it would carry out the will by law, guarding the rights of those citizens, ought to be enough to lay to rest the notion that it was the Framers that did it to the District of Columbia. There was no capital at the time, Mr. Chairman. So the Framers could not, in fact, give the vote to the capital. It was a plot of land in transition to become the capital under the jurisdiction of the Congress of the United States.

Remember, the Framers had never done this before. They know how to give the vote in their States, but how do you give a vote when you think people already have the vote and when what is necessary is for the Congress to recognize the vote? You are the Framers. You know that the people who will be in that first Con-

gress and who will be sitting there have been there. You understand originalism. Then it seems to me inconceivable to argue that somehow the document was planted with the notion that the people who lived in the capital would have no vote.

Now, the Framers knew just how to deny rights to people because they certainly did not give African Americans the right that we had to fight a civil war to have. It certainly did not give women the right to vote. The Framers knew exactly how to say that there would or would not be rights. So if you want to hang your notion on the Constitution, make sure where you are hanging it, and do not hang it around the neck of the Framers of the Constitution.

The second issue I want to bring to your attention is one that is seldom spoken of. The reason it is seldom spoken of is that every single human being who lives in the District of Columbia has been denied the right to vote. Those who were white, those who were black, wherever you came from. If you became simultaneously a citizen of the United States and of the District of Columbia, you would be without a vote. If you had the vote where you lived and you walked over the District line and said, "I live here now," you were deprived of the vote.

Until the late 1950s, the majority of the people living in the District of Columbia were white. But the District of Columbia, because it was so close to the Confederate States, the States of Maryland and Virginia always had a large influx of African Americans.

My party, Mr. Chairman, has had more to do with the fact that the District of Columbia was a segregated jurisdiction, that I went to segregated schools, that I could not go in the Warner Theater downtown, and race had everything to do with the fact that the residents of the District of Columbia, white and black, were denied the vote.

If I may quote a Southern Senator, who I think put it the way things used to be put in this body when it came to race, straight out, there was no shame, and I am quoting a Senator from Alabama: "The Negroes flocked in, and there was only one way out, and that was to deny suffrage entirely to every human being in the District."

Mr. Chairman, race is a part of the legacy. Race is not the reason. The reasons are many, but there is no way to overlook the fact that this is the Voting Rights Act of 2007, just as last year we passed the Voting Rights Act of 2006.

Mr. Chairman, finally, could I just indicate what I can only call a sentimental point, a point I never raised until Mr. Davis and I got agreement on the bill, and it really has to do with what you raised in the beginning: My own civil rights past.

I went into the South as a member of the Student Non–Violent Coordinating Committee into the thick of Mississippi, and I have to laugh now. This was in the early 1960s. I went South as a kid when there was no mayor like the young man sitting to my left. There was no council. There was no delegate. There was no democracy. And here was I, entranced by the larger-than-life civil rights movement, still in law school. I could not see or did not see—of course, I understood, but I did not see the forest—I saw the forest, rather. The forest was the civil rights movement. I did not see the

trees that had no leaves on them. The trees were the city where I was born and where I was raised.

Mr. Chairman, I have to say to you, and I had to confess to myself, that the bill meant a great deal to me personally, that it meant a great deal to me personally because I am the daughter of Coleman Holmes; I am the granddaughter of Richard Holmes, who entered the DC Fire Department in 1902 and had to petition a few years later for an all-black company because blacks could not become an officer in a paramilitary institution; and I am the great-granddaughter of Richard Holmes, who walked off a slave plantation in Virginia in the 1850s and got as far as the District of Columbia and started our family and a church here with other runaway slaves.

My great-grandfather Richard was in the District of Columbia, a slave, in 1863, when Abraham Lincoln freed the slaves 9 months ahead of the Emancipation Proclamation. So when Mr. Davis and I reached agreement, I allowed myself a moment to think about my own family and especially about Richard Holmes, who came to the District searching not for a vote but for freedom—for freedom which is now available in every State of the Union, but not in the capital of the United States.

So, Mr. Chairman, Members of the Senate can find any way, any reason they want to do it. If they do not want to do it for the District, do it for the House. The House deserves the comity. Only the House is affected. Your house is not affected. For you to deny what our House has fought for and died and done in a bipartisan way is to show no deference, no respect to the House of Representatives of the United States. So if you do not want to do it for the District, do it for the House. And if you do not want to do it for the District, do it for Utah, who feels outrage at 10 years that we have felt for 206 years.

I do not care how you do it, Mr. Chairman. The people of the District of Columbia ask only this: Let this be the last year that you ask us to do what the 16th Amendment does not say in its words. It says only the States shall pay Federal income taxes. You deny this vote, a lot of us will be coming to get a lot of money back because the Supreme Court, which is quoted, had no trouble saying we see that the District of Columbia is not mentioned in the 16th Amendment and you have got to pay up anyway.

So I am saying if you do not want to do it for us, if you do not want to do it for Utah, if you do not want to do it for the House, do it in the name of the young men and women who are now fighting in Iraq and Afghanistan and particularly in the name of those whose funerals I have attended. I ask you in the name of the people I represent for the first time in 206 years to do what the House would do for its body, to do what the people's House wants to do, and grant us the right, not in your House, but in the House of Representatives of the United States of America.

Thank you, Mr. Chairman.

Chairman LIEBERMAN. Thank you, my dear friend.

[Applause.]

Normally we don't allow applause in this hearing room, but I join in that applause for you. That was a powerful, compelling statement. It was moving. It was brilliant. It was informed. It was con-

vincing. Your service is a blessing to the people of the District and our Nation. In your life, you speak to all that America is about and has not yet achieved. But you drive us forward, as you do in this case. I thank you very much.

I think about the best thing I can tell you in response to your statement is that Senator Pryor just came over to me on the way out—he had to go to another meeting—and he said, "I want you to know I have listened to Delegate Norton, and I am going to sign on as a cosponsor of your legislation."

[Applause.]

Okay. Mayor Fenty, thanks for being here. That is a tough one to follow.

Senator LANDRIEU. Mr. Chairman, could I just say—

Chairman LIEBERMAN. Yes, go ahead, Senator Landrieu.

OPENING STATEMENT OF SENATOR LANDRIEU

Senator LANDRIEU. Thank you.

Mayor, I am going to have to step out to be on the floor to offer an amendment at 11 o'clock, but I wanted to be here to support the legislation. I signed on as a cosponsor. I do not know if this is accurate, but I am going to check, and I am so pleased that Senator Pryor has signed on as a cosponsor.

We may be the first two Democratic Senators to support this legislation. I am not sure. But of those currently serving, we are the first two. There may have been others in the past, but we are pleased to do that and very supportive of and recognize the historical significance of what we are working on and that it has been a bipartisan effort.

It is going to take a great deal of support in the Senate from our Republican colleagues to move past the cloture vote. I am hoping that the testimony this morning can move at least 10, if not more, Republican colleagues to join with us in getting this historic piece of legislation passed. Thank you.

Chairman LIEBERMAN. Well, thank you, Senator Landrieu. We have a little momentum going here.

Mayor Fenty, thank you very much for being here. As I said in my opening statement, you took this on right away. You understand its importance as a matter of principle, but also as a matter of the practical ability to govern and lead this city and move it forward. So I thank you for that, and we look forward to your testimony now.

TESTIMONY OF HON. ADRIAN M. FENTY,[1] MAYOR, DISTRICT OF COLUMBIA

Mayor FENTY. Well, thank you very much, Mr. Chairman, Ranking Member Collins, Senator McCaskill, Senator Warner, Secretary Kemp, Congressman Davis, and certainly our more than able Congresswoman Norton. It is my pleasure to be here today to speak to you about S. 1257, the District of Columbia Voting Rights Act. My name is Adrian Fenty, for the record, and I took office this past January as the fifth elected Mayor of the District of Columbia.

[1] The prepared statement of Mr. Fenty appears in the Appendix on page 45.

The District of Columbia has 572,000 residents. Our population is approximately 75,000 people greater than that of the State of Wyoming, which, as everybody is aware, has two Senators and a Member of the House of Representatives.

The District of Columbia Voting Rights Act represents the latest step in an expansion of democracy for the District of Columbia. The District had brief home rule in the 19th Century. We voted in our first presidential election in 1964. We elected our first local board of education in 1968, and Congress restored the position of non-voting Delegate to the House in 1970. Our modern home rule government, including the Mayor and the Council, began in 1973.

Today, my constituents—your neighbors—are the only people in the United States of America who pay Federal income taxes and have no voting representation in the U.S. Congress. Our Federal taxes, to the tune of about $6 billion a year, are the second highest per capita among the States. Yet we have no say in how that money is spent. We serve on Federal juries, with no say in the laws we take an oath to uphold at the courthouse. And we have suffered casualties in every major war—including Iraq—without ever having a vote in the legislative body that approves and funds military action.

As you know, Congress also oversees our locally funded budget and our locally passed laws.

Mr. Chairman and Members of the Committee, we are the only capital of a democracy on Earth that has no vote in the national legislature. I am here to testify to you that we cannot continue to be an example in the eyes of the rest of the world when this is the case. This injustice has stood for more than 200 years, and today I join this distinguished panel in saying that you have the power to end it. It is Congress that eliminated voting rights for the District of Columbia in 1801, and it is Congress that can give them back.

I am aware of the political reality of adding a seat in a narrowly divided House for a jurisdiction that tends to elect Democrats. Congresswoman Norton and Congressman Davis, a Republican, have struck a balance in the District of Columbia Voting Rights Act by adding a seat for Utah as well. That State, as you all know, missed an additional congressional district by 857 people in the last census, amid objections over not including 11,000 overseas missionaries.

Such expansions of Congress have historically come in balanced pairs, such as the addition of seats for Republican Alaska and Democratic Hawaii in 1959. Notably, it is a bipartisan pair of Senators who have brought the Voting Rights Act into this body, and we thank both you, Chairman Lieberman and Senator Hatch.

I am also aware of the constitutional objections to this legislation. As the chief executive for the District of Columbia, I have taken an oath to defend the Constitution of the United States. Thus, while it is my desire to see the District represented in the House, it is also my responsibility to endorse only a means of doing so that would be constitutional.

Opponents of the District of Columbia Voting Rights Act contend that it is unconstitutional because the Constitution limits the House of Representatives to members elected by "the several

States" and, therefore, cannot include the District of Columbia. We disagree strongly and have no shortage of legal opinions from scholars on both sides of the aisle who share our view. Congress has acted literally hundreds of times under the District Clause and other parts of the Constitution to treat the District of Columbia as a "state" for other reasons, including taxation, as has been mentioned, and diversity of citizenship in Federal court. The fundamental right of electoral participation should also be included in this list.

I join this distinguished panel when I say that I believe the Framers of the Constitution could never have imagined a thriving metropolis of more than half a million people living year-round in the District of Columbia, many unconnected to the District's original purpose of housing the Federal Government.

It is beyond good sense that the Framers of the Constitution would intend to deprive residents of the Nation's capital of their fundamental right to vote.

It is also beyond good sense that our lack of democracy continues, more than 200 years later. Thus, on behalf of the 572,000 residents of the District of Columbia, I urge you to take action on this important legislation as soon as possible, and I thank you again for calling this hearing and allowing me to testify today.

Chairman LIEBERMAN. Thank you very much, Mayor Fenty. If I might continue the judicial metaphor, I thought that was an excellent closing statement, concluding statement for the argument.

I thank the panel, and I know all of you have to go on to other work, but you have really started us off in a very thoughtful, indeed an inspiring way. Thank you very much. Have a good day.

We will call the second panel: Hon. Jack Kemp, Wade Henderson, Viet Dinh, and Jonathan R. Turley. We thank the members of this panel. We are honored to have you all here and know that the Committee will benefit greatly from your testimony.

We are going to begin with the Hon. Jack Kemp. Great to have you here, Secretary Kemp. Mr. Kemp, if I may put it this way, does not have to do this. He is a believer. And it is totally consistent with a life that has been all about fighting for justice and fighting for the American dream, really, for people.

Mr. Kemp, as you know, has been a Member of Congress, a member of the Cabinet. I might say that Jack Kemp and I belong to a very exclusive club: The Association of Unsuccessful Vice Presidential Candidates.

[Laughter.]

Mr. KEMP. Sad for the country, Mr. Chairman.

Chairman LIEBERMAN. Yes, I agree.

Senator COLLINS. As do I.

Chairman LIEBERMAN. Thank you. Did Senator McCaskill want to say a word before we go to the witnesses?

Senator MCCASKILL. If I could just briefly.

Chairman LIEBERMAN. Go ahead.

OPENING STATEMENT OF SENATOR McCASKILL

Senator MCCASKILL. I am going to have to leave. Hopefully I will be back. I want to thank all of you for being here. I also want to particularly thank Jack Kemp for being engaged in this issue.

As the Chairman said, you do not have to, and it says a lot about who you are as an American that you are here and taking your valuable time to do this.

I just want to say, Mr. Chairman, that when I first got elected to office in 1983 as a Missouri State Representative, the civil rights organizations in Missouri came to me as a freshman State Representative in Missouri and laid out the case for a resolution recognizing the District of Columbia for full representation in voting rights. And I was young and naive, and I said, "Well, of course, I will sponsor that." And so I did.

And I remember vividly the committee hearing that we had on that resolution in 1983 in the Missouri Legislature, and everyone was very quiet and did not ask very many questions. And later on, one of the good old boys came up to me out in the hallway and said, "Do you have any idea what little chance that resolution has in the Missouri Legislature?" And I said, "Well, it seems to me the right thing to do."

Now, I do not know what it says about our country that almost 25 years later I am sitting here in the U.S. Senate and we are still grappling with what should be a basic of this democracy. I am ashamed of our country that we have not fixed this, and I would certainly welcome the opportunity to add on to this legislation as a cosponsor to right what I believe is a significant wrong in a country where we brag about our ability to allow every person in our country to have a say in the way their government is run.

Thank you very much, Mr. Chairman.

Chairman LIEBERMAN. Thank you, Senator McCaskill. Great statement, and thanks for your support.

Mr. Kemp, welcome.

TESTIMONY OF HON. JACK KEMP,[1] FOUNDER AND CHAIRMAN, KEMP PARTNERS

Mr. KEMP. Well, Mr. Chairman and Senator Collins, this is a great pleasure. Thank you, Senator McCaskill, for that comment.

Let me tell you why I am here. Not only is it the right thing to do, but I think history is shining a very bright light on those of us in both political parties. I loved Eleanor Holmes Norton's testimony, and she got emotional about being a black woman in SNCC, going South to defend the whole issue of voting rights for all Americans and then returning to her own city where she could not have a vote in the Congress. She has a right to get emotional.

She mentioned her party. I want to mention my party, Mr. Chairman. I will let the constitutional issues be handled by Viet Dinh and Ken Starr and my friend Wade Henderson and folks from DC Vote. I want to talk politics—raw, pure politics. It is not good for this country to have the Democratic Party that had a horrible history and overcame it and the Republican Party with a wonderful legacy established by Abraham Lincoln, Frederick Douglass, the Chairman of the D.C. Republican Party, U.S. Grant sending Federal troops as the first President of the United States to send Federal troops, a Republican President, to Mississippi and Louisiana to guarantee the voting rights of emancipated slaves and to break

[1] The prepared statement of Mr. Kemp appears in the Appendix on page 48.

up the KKK. We know what Dwight Eisenhower had to do in order to integrate the public schools in Arkansas.

And then, unfortunately, Barry Goldwater, our candidate and the titular leader of the Republican Party, who I supported—I was playing professional football at the time—in October or September of 1964 voted against the 1965 civil rights act.

I did not say anything. I plead ignorance. I just did not consider that as great an issue as my black teammates did. And I apologize for that. I was not in Selma on the Edmund Pettus Bridge with John Lewis in 1965, where he got his head bashed in.

As I said, my party had a great history, Senator Collins, and we walked away from it. We cannot walk away from this. Mr. Lincoln said to the 1862 Congress, "We cannot escape history." We cannot escape this vote. It is going to come. We are being watched by the whole world, as was pointed out by Adrian Fenty and Tom Davis. Fighting for democracy in Baghdad and Kabul and not allowing it to take root after more than 200 years in the District of Columbia?

I am on the board of Howard University. Last Saturday, we had our graduation ceremony. The respect in that audience of 35,000 people for the speakers, for the men and women who got the honorary degrees, for Oprah Winfrey's speech talking about morality and God and country—and she did not mention the DC vote, but it was one of the most—I am going to use the word "conservative"—small "c"—in the original meaning of the word to be respectful of our history. It was conservative. Kids thanked their parents and thanked their teachers and professors.

Now, we have a chance to do right or wrong, as was pointed out, and I think it has got to be done. I do not live in the District. My son does. My four grandsons—I am getting emotional now. My four grandsons live here. I was told by a member of the Republican Party, Senator, "If they want to vote someday, let them move to Maryland."

It has been said that the opposite of love is not hate; it is indifference. To be indifferent to the aspirations of 572,000 people whose sons and daughters are in harm's way, watching this vote and deny them the democratic vote, to me is shameful. And as Delegate Norton said, it is slanderous to the people of this District.

Now I want to talk about the White House. I am 71 years old. I have no aspirations. I am a recovering politician.

[Laughter.]

My day, I am sure some will say, has passed. But my voice I hope is heard down the street. The advisers to the President of the United States, in my opinion, are putting him in harm's way politically to leave a legacy of denying this vote either by a veto or by encouraging a filibuster on the floor of the U.S. Senate. I hope we get those 10 votes in the Republican Party. I think we will because I do not think you can listen to the testimony of Viet Dinh, Ken Starr, Wade Henderson, and, with all due respect to my friend Jonathan Turley, I would hate to be him today.

[Laughter.]

He said to me I was right.

The President has a lot on his plate. I do not think he has yet heard the arguments well enough, and I hope Viet Dinh and Ken

Starr and other members who understand the constitutional ramifications of this bill get a chance to be heard at the right level.

Now, it is true that Article I, Section 2, of the Constitution is an argument that is being used to deny this vote. Viet Dinh will point out Article I, Section 8—clause 17, is it, Viet?

Mr. DINH. Yes.

Mr. KEMP. Gives the authority to the U.S. Congress to grant the vote. If there is a doubt constitutionally—and there can be doubts. Men and women of good will can come to different conclusions. But if there is a doubt, let it be adjudicated at the highest level, not by a staffer who is opposed—excuse me, staff. I love the work you do.

[Laughter.]

But I have read some of the statements that have been made in the House by the Republican Members of the Congress, and they are just absolutely embarrassing to the party of Abraham Lincoln and Frederick Douglass.

Daddy King was a Republican. The father of Martin Luther King, Jr., was a Republican. He was preaching in the Ebenezer Baptist Church in Atlanta in 1960 when Richard Nixon, our candidate, refused to call Coretta Scott King to express any sympathy for Dr. King being in the Georgia State Penitentiary for a parking violation. Raise your hands if you have ever been in the penitentiary for a parking violation. We know why he was there, handcuffed, shackled. And Coretta Scott King got a call from John F. Kennedy, the candidate of your party, Mr. Lieberman, and he talked for 10 seconds, 15 seconds, and she told Daddy. He got up the next morning in Ebenezer Baptist and said he was going to take a suitcase full of votes to John F. Kennedy. That switched the election in 1960. It was not Chicago. It was not New Orleans or Louisiana or Houston, Texas. It was the failure of the Republican candidate to maintain his capital built by Abraham Lincoln, Frederick Douglass, U.S. Grant, and Dwight Eisenhower. And he went from 70 percent or so of the black vote down to about 9 percent, and we have been there ever since. That to me is disgraceful. It hurts this country. It hurts the Senate. It hurts our party. It hurts the black community, in my opinion. I am not black, but it is not good for black folks to be taken for granted by one party and written off by our party.

So, Senator Collins, you have a big burden on your shoulders.

[Laughter.]

I appreciate your comments. I am not putting you on the spot. I am putting the party on the spot. I am putting the notice to the party of the people I have mentioned and the White House to open their eyes. They are not going to get another chance. This is not going to change the vote of America per se. But it will be a beginning of showing, as the extension of the Voting Rights Act, and signed by President Bush.

I mentioned I was on the board of Howard. Howard was set up by a Republican Congress, by a Republican President, out of the Freedmen's Bureau, and a Democratic President vetoed the funding for Howard University and the Freedmen's Bureau, and guess what? A Republican Congress in 1866 overrode President Johnson's veto of the funding for Howard.

So, look, I am just suggesting and stating the great history of the Republican Party, but we have walked away from it; the terrible history of the Democratic Party that has been overcome thanks to Lyndon Baines Johnson. I will never forget—and I will close with this wonderful story on the History Channel—watching Lyndon Johnson lean into George Wallace in the Oval Office. He said: Governor, which side of history do you want to be remembered by? Standing in the school door preventing those little black children from going to school and preventing black folks from having the vote? Or do you want to be recorded in the annals of history with those who stood up for all Americans and their civil, human, equal, voting rights? And it changed George Wallace. I do not know if it changed his heart, but he went outside of the Oval Office, held a press conference out of the White House, and announced his switch.

I do not know what is in the hearts and minds of my colleagues, but we have a chance to be recorded in the annals of the history books on the right side of a civil rights issue as much as any issue that has come before this U.S. Congress.

So, Mr. Chairman, thank you for your sponsorship, Senator Collins, for your friendship and leadership and tremendous sympathy for this issue. I would love to help you get those necessary Republican votes and then get it signed by the President of the United States. Thank you, sir.

Chairman LIEBERMAN. Mr. Kemp, thank you. You said you were going to talk pure politics. You talked purely principled politics.

Mr. HENDERSON. Absolutely.

Chairman LIEBERMAN. And you spoke from the best tradition of the principles of the Republican Party. There is no one like you. If anybody says your time is over, do not believe them.

[Laughter.]

You have a lot of time on the clock, and I know that you have already been out there talking to Republican colleagues in the Senate. You give me hope that we are going to get more than 60 votes in the Senate for this. We are going to conference it. And then let us not assume that this President will not sign this bill. I take your point there and look forward to working with you on it. Thanks, Mr. Kemp.

Wade Henderson, thank you very much for being here. You are a familiar figure and a greatly respected figure here on the Hill now as President and Chief Executive Officer of the Leadership Conference on Civil Rights. Thank you for your testimony.

TESTIMONY OF WADE HENDERSON,[1] PRESIDENT AND CHIEF EXECUTIVE OFFICER, LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Mr. HENDERSON. Thank you, Chairman Lieberman and Ranking Member Collins, Senator Akaka, other Members of the Committee. Indeed, I am Wade Henderson, the President of the Leadership Conference on Civil Rights, the Nation's oldest and largest civil and human rights coalition.

[1] The prepared statement of Mr. Henderson appears in the Appendix on page 52.

I am also the Joseph Rauh Professor of Public Interest Law at the University of the District of Columbia Law School, and so I am here today in both capacities, and I am honored to speak before you about the Leadership Conference's strong support for providing voting rights to the District of Columbia and in support of the District of Columbia Voting Rights Act.

Mr. Chairman, let me say at the outset that I am deeply grateful to you for this hearing and also for your many years of support for voting rights for District residents. Your record of commitment to this issue is second to none, and so it is a privilege to appear before you.

It is also a privilege to serve on the panel with this incredible force of nature to my right, Secretary Jack Kemp, who has been so extraordinary and such a committed advocate on behalf of voting rights, second to none in the city, and obviously with my other colleagues, I am happy to be here.

Now, you have assembled a level of expertise and eloquence that is really remarkable in the panelists today, and it gave me a bit of difficulty in organizing my own testimony because many of the things that I will say have already been said well and eloquently, or they will be well said, by my fellow witnesses. But it did occur to me that it is common in organizing these hearings to bring both expertise, which I think I bring, but also I come before you as an affected individual because of my residence in the District of Columbia, having been born here.

Now, with those two roles in mind, I would like to proceed by answering what I see as the two most fundamental questions that have brought us here today: First, why this issue? And, second, why this approach?

Now, in answering the first question, I will begin really on a personal level. I do want to associate myself with the remarks of Delegate Eleanor Holmes Norton. I am a long-time resident of the District of Columbia, having been born here, and I am a graduate of Howard University, which Jack Kemp mentioned—he serves on its board—as well as the Rutgers University School of Law.

I have seen many changes that have made the Nation a better place, more aligned with its ideals. I have worked my life as a civil rights advocate, and I have come before Congress on many occasions on behalf of my fellow Americans. And certainly the changes that we have seen for African Americans, Latinos, Asian Americans, gays and lesbians, women, literally the entire country, have been significant and Congress has led the way.

Now, I have seen great progress in the District as well. And when I was born at the old Freedmen's Hospital, on Howard University's campus, the city's hospitals were racially segregated by law. That is no longer the case. LeDroit Park, where I grew up and where I now own a home, was once an all-black neighborhood by law and by custom. Today, people of all races from all around the world have made it a global village.

Gone, too, is the legalized system of separate schooling that sent me to an all-black elementary school, despite the fact that I started grade school after the landmark ruling in *Brown v. Board of Education* had officially outlawed racial segregation in public schools.

And yet one thing still has yet to change: As a lifelong resident of the District and in spite of all my efforts to speak out on Capitol Hill on behalf of other Americans, I have never had anyone on Capital Hill who can speak out legitimately on my behalf. My hundreds of thousands of neighbors in this city and I have always been mere spectators to our democracy. And even though we pay Federal taxes, fight courageously in wars, and fulfill all other obligations of citizenship, we still have no voice when Congress makes decisions for the entire Nation on matters as important as war and peace, taxes and spending, health care, education, immigration policy, or the environment.

Now, while Congress does have special powers over the District, it decides purely local matters for us without giving us a single, solitary vote. It decides which judges will hear purely local disputes under our city's laws or how to spend local tax revenues. It can even decide what slogan the city may print on its license plates. Adding insult to injury, Congress in recent years has even kept our elected city officials from using our own tax dollars to advocate for a change in this situation. Now, it is really enough to make people feel like dumping crates of tea, if not their tax dollars, into the Potomac River.

Shifting to a broader civil and human rights perspective, the disenfranchisement of District residents before Congress stands out as the most blatant violation today of the most important civil right we have—the right to vote. Without the ability to hold our leaders accountable, all of our other rights are illusory. Our Nation has made tremendous progress throughout history in expanding this right, including through the 15th, 19th, and 26th Amendments; and in the process, it has become a role model for the rest of the world.

And the Voting Rights Act of 1965 has long been the most effective civil rights law we have. It has resulted in a Congress that looks more like the Nation we represent. Its unanimous renewal by this chamber last year, despite some unfortunate resistance in the House, stands out as one of Congress' proudest moments in many years.

In spite of this progress, however, one thing remains painfully clear: The right to vote is meaningless if you cannot put anyone in office who has a vote. Until District residents have a vote in Congress, they will not be much better off than African Americans in the South were before 1965, and the efforts of the civil rights movement will remain incomplete.

Disenfranchisement also undermines our Nation's moral high ground in promoting democracy and human rights in other parts of the world. Indeed, the international community has already taken notice. In December 2003, for example, the Organization of American States declared the United States in violation of provisions of the American Declaration of the Rights and Duties of Man. In 2005, the Organization for Security and Cooperation in Europe also weighed in, urging the United States to "adopt such legislation as may be necessary" to provide District residents with equal voting rights.

Now, for reasons like these, extending voting rights to District residents is one of the Leadership Conference's highest legislative priorities and will remain so every year until it is achieved.

Now, turning to my second more specific question—Why this approach?—I must admit that when Representative Tom Davis and Delegate Norton first supported pairing a first-ever vote in the House for the District of Columbia with an additional House seat in Utah, I was skeptical. While I greatly appreciated the efforts, I recognized that there indeed were some political problems. But a few things have changed.

Last year, the Supreme Court, for better or worse, upheld mid-decade redistricting in Texas in *LULAC v. Perry*, which was one of our key concerns. And, in addition, last fall the governor and legislature of Utah went to great lengths to propose a new congressional map that avoided the kinds of problems that many of us anticipated. And by preserving the congressional balance of power, the seemingly impossible now becomes attainable.

At the same time, the District of Columbia Voting Rights Act is still not without its critics, and I would like to address some of the other concerns that have been raised. I am going to leave it to my colleague Viet Dinh to lead the conversation on constitutionality, although I am prepared to discuss it in full, and I will answer any questions that you may have. But I do want to focus in the limited time that I have left on two issues.

First, when the District of Columbia was envisioned, I think we have heard that indeed there was no precondition that we be excluded from the right to vote. It came about because of the unique circumstances and belief that those who had close proximity to Congress had an advantage that was not available to other citizens. The Internet, telephone, and telegraph have now made that, of course, an obsolete observation, and things have changed.

I think that there is a real set of concerns that we should talk about, and that is with what has been proposed as the alternatives. And I would like to mention two alternatives and to speak about them. While both of them, I think, certainly represent good-faith contributions to a broader debate, they also pose major practical and legal hurdles that would need to be addressed, and it makes it impossible for the Leadership Conference to support either of them at this time.

One alternative is to amend the Constitution to provide the District with congressional representation, and we would support that, of course, if the Federal courts deemed it absolutely necessary. But I think any fair interpretation of how constitutional changes are made in this country recognizes that the Constitution should never be amended unless it becomes absolutely necessary and unless we have exhausted all other means of achieving the objective that a constitutional amendment would address.

Until such time as the Federal courts reject the constitutional interpretation that Professor Dinh, Professor Ken Starr, or others, myself included, support, it would seem that a constitutional amendment is premature.

The second alternative is retrocession, returning the District to its former home in Maryland, and it is another legitimate effort, but we cannot support it. It would require the consent of Maryland,

and achieving the political consensus necessary would be all but impossible. The consequences for both District and Maryland residents would be tremendous, and we would still need to amend the Constitution in order to repeal the 23rd Amendment. Given the drastic nature of this approach, we cannot support it.

So, ultimately, we believe that the District of Columbia Voting Rights Act is the best approach for Congress to take on behalf of the residents of both the District and Utah. It presents a politically neutral approach; it has a solid chance of surviving constitutional scrutiny; and unlike the above options that I have mentioned, it can be passed and signed into law this year. The residents of the District and Utah have already waited far too long. We deserve better. That concludes my prepared remarks, and thank you for the opportunity.

Chairman LIEBERMAN. Thank you very much, Mr. Henderson. Excellent statement. Very thoughtful and very helpful to the Committee.

Our next witness is Professor Viet Dinh, former Assistant Attorney General for Legal Policy, now a professor of law at the Georgetown University Law Center. Thanks for being here, and we welcome your testimony.

TESTIMONY OF VIET D. DINH,[1] PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER

Mr. DINH. Thank you very much for having me, Mr. Chairman, Ranking Member Collins, and Senator Akaka. Great to see you again. Thank you for the honor of testifying today on S. 1257, which would provide the District with a voting seat in the House of Representatives.

Since the House passed a similar measure last month, I know there has been a lot of debate, there has been a lot of high eloquence, there has been a lot of heated rhetoric both in favor of and in opposition to the bill facing this Committee and this body right now. I have neither the personal history nor the political expertise nor the eloquence to talk about the policy and politics, but I can say that having been at a number of these hearings, I have never heard such compelling testimony and such high eloquence as has been heard today. So I would not seek to even try to add my voice to the policies and politics of the measure. Rather, I will limit myself and my testimony to the central question that Senator Collins posed, which is the constitutionality of the measure facing you today.

Even with respect to the purely legal aspect of this bill, there have been some overblown arguments, and so what I would like to do is take a step back and be as frank and as clear with you as possible on the competing constitutional arguments and look at the text, the precedent, and the history of our Constitution to see how these arguments can be reconciled because, like any good constitutional dispute, it is one of characterization. It is never easy to resolve these kinds of high constitutional principles; otherwise, we would not need the type of debate that we have today. Wade Henderson, Jonathan Turley, and I would be out of a job as constitu-

[1] The prepared statement of Mr. Dinh appears in the Appendix on page 58.

tional law professors, and it would be a lot easier simply to pick up the Constitution and read it.

The characterization here is between two provisions of the Constitution that seem at first glance to be in tension. Article I, Section 8, clause 17, the District Clause, gives Congress the power "to exercise exclusive legislation in all cases whatsoever over the District." Exclusive legislation in all cases whatsoever. There are no limitations in that phrase. That is why the courts have characterized this as plenary and exclusive in power. And it makes good structural sense, also, because the District Clause works an exception to the system of federalism that defines our entire Constitution. Article I, Section 8, defines the powers of Congress, limited in their nature. Article I, Section 9, limits the power of Congress. Article I, Section 10, limits the power of State legislatures. That is the definition of our federalism.

With respect to the District, Article I, Section 8, clause 17, says that Congress has the complete, total power of the legislature. It has the power of Congress to legislate. It also has the power of any State legislature because there is no competing State legislature to exercise the traditional police power. That is why the courts have consistently interpreted this power to be plenary and exclusive; this phrase is majestic in its scope, sweeping and inclusive in character, and extraordinary and plenary.

One would think, therefore, that this power, this clause, this sweeping, majestic, and broad interpretation would extend to granting something as basic as House representation. However, opponents of the bill also have a very good point and look to Article I, Section 2, which has already been mentioned, which says that representatives are to be chosen "by the people of the several states." Because the District of Columbia is not a State, so goes the argument, Congress cannot change the Constitution by statute and allow District residents to vote for a representative.

So when we are faced with two provisions of the Constitution that are seemingly in conflict as we are here, it is very easy for me to play the academic demagogue and say that one side has the trump card, that Judge Starr, Judge Wald, the ABA, and so many others are right and, therefore, Article I, Section 8, clause 17, trumps Article I, Section 2, or vice versa. But that would neither be a satisfying exercise for you all nor I think would it be a correct constitutional exercise in analysis. Rather, what I will try to do is simply back up and try to see how we can try to reconcile these two provisions in a logical, textually consistent manner that comports with our history and our Supreme Court precedents.

And so when one does that, one sees—and I think it is my confident conclusion here—that Congress has ample authority to enact S. 1257, and let me explain why. I will start with the most difficult argument in opposition, that is, the text of Article I, Section 2, the Apportionment Clause, which says, again, "The House of Representatives shall be composed of members chosen every second year by the people of the several states."

Let me go further and state very clearly that, in my opinion, the District of Columbia is not a State. Period. Full stop. So the Supreme Court was right in *Hepburn v. Ellzey* by saying that because the District is not a State, citizens of the District cannot sue under

diversity's jurisdiction under Article III the citizen of another State. Likewise, I agree with the District of Columbia Circuit, in Judge Merrick Garland's excellent opinion in *Adams v. Clinton,* that said that District residents, not being citizens of States, do not have an inherent constitutional right to House representation.

So when these cases, *Hepburn* and *Adams*, are cited in opposition to congressional authority to enact S. 1257, I think they really serve as red herrings. The reason why they serve as red herrings is because Article I, Section 2, says that representatives are to be chosen "by the people of the several states." It does not say further that States and only States or citizens of States and nothing else. And so the argument in opposition, although seemingly textual in nature, is really one of negative inference from what is not said in the Constitution and not one of clear and authoritative, affirmative text. And it is the negative inference which normally would control but in this case must be reconciled with the express affirmative grant of plenary and exclusive power in all cases whatsoever under the District Clause, Article I, Section 8, clause 17.

So I think a perfectly logical and textually consistent way to reconcile these provisions is to recognize that even though the District is not a State under the Constitution, that same Constitution grants Congress the power to treat the District like a State and give District residents the right to elect a representative under Article I, Section 2. And, not surprisingly, as Congressman Davis had pointed out, this reading is consistent with how the Supreme Court has treated similar questions.

In *Hepburn*, for example, the case I cited earlier, even as Chief Justice Marshall decided that the District is not a State for diversity jurisdiction purposes, in the very next breath he noted that, "This is a subject for legislative, not judicial consideration." Congress took up that invitation and passed a statute giving diversity jurisdiction, beyond just between citizens of different States, as the Constitution puts it, to "citizens of different States or citizens of the District of Columbia and any State or Territory." That is the law that the Court upheld in *Tidewater,* where three Justices, led by Justice Jackson, explicitly cited Justice Marshall's invitation to reaffirm Congress' power under Article I, Section 8, clause 17, to expand the rights of District residents to sue under diversity jurisdiction.

Now, the courts have employed similar reasoning to uphold treatment of District residents like State residents under constitutional provisions for tax apportionment and the 16th Amendment; international treaties, the Commerce Clause; the Sixth Amendment right to a jury trial; and State sovereign immunity under the 11th Amendment—even though each and every single one of these provisions in our Constitution refers only to States. The court followed the same kind of logic of reconciliation of the constitutional text as I have outlined here.

Finally, let me spend a brief minute on the relevant historical record. As has been noted before, in 1788 and 1789, Maryland and Virginia, respectively, ceded land to the U.S. Congress in order to build this capital. Congress accepted that land in the Residence Act of 1790 and said point-blank, "It is hereby accepted." An unbroken

line of Supreme Court precedents has held that the act of acceptance constituted the completion of the cession.

But Congress did not stop there. It provided that the laws of Maryland and Virginia during the transition period would operate in the 10-year period until 1800, when Congress would assume legal jurisdiction, even though it had already assumed title and jurisdiction in 1790 with the acceptance of the cession.

During that period, District residents had a right to vote. It is important to remember that the cession was completed in 1790, and so the only reason those District residents had the right to vote under Maryland law or under Virginia law is because Congress granted that right to vote in the Residence Act itself. That terminated in 1800 when Congress assumed full jurisdiction. My contention is that what Congress implicitly, quietly, by omission, took away in 1800, it had granted in 1790 and can re-grant now in 2007.

I know Mr. Turley has cited to a case of 1960 called *Albaugh v. Tawes* that holds that District residents do not have residual rights of citizenship in Maryland and Virginia and so, therefore, do not have an inherent right to vote in those elections. I think that case, rather than contradicting the argument, actually affirms it because that case stands for the proposition that after the cession of the land from Maryland and Virginia, the rights as citizens of those States ended. And so Congress, by virtue of the Residence Act of 1790, affirmatively used its authority in order to grant back that residual right. So in that sense, I would urge you to look at the historical evidence and treat this as the Framers treated it, how to reconcile these various provisions and conclude in a consistent, textual, perfectly logical, and historically correct manner that Congress has the authority to grant House representation under Article II, Section 8, clause 17, notwithstanding Article I, Section 2. Thank you very much.

Chairman LIEBERMAN. Thanks very much, Professor Dinh. This has been an extraordinary morning of testimony. I was actually thinking, considering Professor Henderson and now you, I remember once years ago that a friend of mine who is a lawyer in Connecticut said it was about 15 years after he got out of law school that he felt ready to go to law school and get something out of it. And I feel that way this morning.

[Laughter.]

Continuing at this high level of presentation, Professor Turley, thank you for being here. You are a distinguished member of the faculty at the George Washington University Law Center.

TESTIMONY OF JONATHAN R. TURLEY,[1] SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. TURLEY. Thank you, Chairman Lieberman, Ranking Member Collins, Senator Warner, my Senator, and Senator Akaka. Thank you for the honor of addressing you today. I hope that we start out in consideration of the Senate bill with an understanding of people of good faith, that this is not a debate between those who favor

[1] The prepared statement of Mr. Turley appears in the Appendix on page 78.

votes for District residents and those who want to keep them without a vote. The fact that the District residents are not voting citizens in terms of Congress is a terrible historical mistake and one that should be corrected. This is and has always been not a question of ends but of means. In a Madisonian system, it matters as much how we do something as what we do, and sometimes that principle imposes a burden that is very hard to shoulder.

I should thank my very good friend, Eleanor Holmes Norton, for her introduction. I thought she was introducing Dr. Evil, but——

[Laughter.]

Apparently she was referring to me. I feel like when I went with my late father to an Irish wake decades ago, and the first toast that was given was to the body at the table, and the people said, "We want to thank Tommy for bringing us together." I now know how Tommy feels.

But what I am here to suggest is that there are many ways to address historical wrong. But it is not always easy, and, in fact, convenience has always been the enemy of principle. And it causes me great regret that I have to say this is the wrong means. I do not share the view of my friend, Viet Dinh, that this is a close question—there are close constitutional questions—or my friend, Professor Henderson. I do not believe this is one of them. I also do not believe that this is properly viewed as a civil rights matter.

This struggle, which has been going on for 4 years now, is to give District residents partial representation that could be taken away at a whim and a moment of Congress. I do not consider that a civil rights victory. That is like allowing Rosa Parks to move halfway up the bus. What the District residents deserve is full representation and done in a constitutional way so it could never be taken away, so that it extends to them as citizens and remains with them. And that is the reason why I believe that this bill is the most premeditated unconstitutional act of Congress in decades.

I believe it is my duty to say that. I have submitted 60 pages of testimony so there can be no question about the historical or textual record in this case.

The status of the residents of the District of Columbia was debated. It was as controversial in the 18th Century as it is today. It was not an oversight. It was not forgotten. It was a controversy. It was referred to before the ratification of the Constitution and was referred to thereafter almost on an annual basis as a point of great contention.

Now, my friend, Delegate Norton, said that it is a slander upon the Framers to say that they would do this. Well, as someone who also teaches torts, I know that the defense of defamation is always truth. And I believe that this is not a slander upon the Framers. It is the truth. Now, you may think that the Framers made a terrible mistake, but they made the decision.

Now, how do we know that? Well, first of all, we can start with the text. That is usually where constitutional analysis begins and ends. The text in Article I, Section 2, is a model of clarity. It refers to "representatives of the several states." The District Clause refers to inherent powers of the U.S. Congress. It refers to your ability to dictate conditions within the District of Columbia. That distinction of your jurisdiction within the District was referred to before

ratification as a guarantee to those who were uncomfortable about the capital city, that it would not extend beyond the borders of the District.

Yes, you can tax. Yes, you can impose all types of programs. You can have the District residents pay taxes or you can have them pay no taxes. Why? Because within those borders you do have exclusive control. They referred to the exclusive authority over cases. Over cases. It was a very practical provision giving jurisdiction of Congress to determine what will happen within the capital city.

The context, as I have laid out in the Constitution, reinforces this view. The District Clause is in the same clause as the power that you have over forts in Federal territories. It was meant to refer to your inherent authority. In fact, it was said that your authority over the District is a like authority that you exercise over forts. I do not understand why that language is not perfectly clear and controlling.

Now, the original purpose of Article I, Section 2, is also clear. As the Chairman stated, it was indeed the result of the Connecticut Compromise, something your State can be very proud of. But it was a vital part. It is called the Composition Clause, and who voted it in Congress was vitally important to the Framers. They were obsessed with the authority of States, and many of them were uncomfortable with the creation of a Federal city, of a capital city.

The Composition Clause was the structural clause of Article I. The District Clause is not part of that. It is part of those enumerated powers that go from post offices to forts in Section 8.

Not only was this discussed, it was discussed, for example, in the 3rd Congress where another great Connecticut representative, Representative Swift, actually a few years after the Constitution passed, objected to a non–State member voting in Congress, and everyone agreed just a few years afterward that, in fact, only members of the States could vote in Congress.

But the original understanding I think should carry this effort. The idea that this was an oversight is irrefutably untrue because we have the record. You can read things like "Federal Farmer" from January 1788, which talks about how obnoxious it was that the city would be created without the guarantees of the "principles of freedom." The status of the residents was known. What was not discussed was the details, and the reason it was not discussed is because it was being left to Congress. They did not have to discuss it. It would be left to Congress. But the status of the District was discussed. It was created for the purpose of being a non–State entity under the exclusive control of Congress.

During ratification, before the ratification of the Constitution, many people objected, including Framers. Alexander Hamilton introduced an amendment specifically to change the clause we are talking about. The amendment that he offered, July 22, 1788, would have read, "The inhabitants of said District shall be entitled to the like essential rights as the other inhabitants of the United States in general." It would have addressed this very issue. It was rejected. So was another amendment in that State.

In one of the States, there was actually a proposal to do what this bill does—to give the District a vote in the House of Representatives. It was raised repeatedly, and it lost.

Now, this point is emphasized by Edmund Pendleton, who was the President of the Virginia Ratification Convention. When he was asked about this District, the concern was not the status of the residents. Many people believed that the District residents were getting a great economic advantage by being in the capital city. And the biggest concern was that they would be too powerful. Pendleton stood up and said, "No, you do not understand how we handle this." He correctly tied the Composition Clause to the District—I should say he was primarily talking about the Composition Clause, not the District. But he said that the composition of Congress prevents States from being roughed up, essentially, by this new Federal Government. He said the reason is because you cannot have a Member of Congress without a State legislature. So no State legislature means no Member of Congress, and no Member of Congress means no Congress. He directly tied the fact that they did not have to fear because of the Composition Clause.

The retrocession movement, as I have laid out, brought this even to a greater level of clarity. The retrocession movement began almost immediately upon ratification. The reason is that Virginians did not like their status. And so Virginians came forward and said: We hate this; we want a vote in Congress. And various people at that time agreed with them and referred to keeping the people in this degraded condition and laws not made of their own consent and being vassals of Congress. It is a debate that you could virtually take from today's arguments, but it occurred just after the ratification of the Constitution and continued that controversy.

Ultimately, Virginia did retrocede. At the time, the District of Columbia was given the opportunity to retrocede. There was a similar movement, particularly in Georgetown. The residents chose not to, and reports of the period said that residents had decided that they would prefer to stay within the District despite the fact that they could not vote.

Now, I have in my testimony laid out responses to my friend, Viet Dinh. We obviously have a good-faith disagreement here. But I want to emphasize that, as moving as the testimony has been, please, do not dismiss what you are about to do in terms of its significance. You are about to manipulate the size of Congress, create districts on your own authority, out of what is a Federal enclave. That can be done for a number of Federal enclaves. Puerto Rico could claim six seats. There are huge territories with a huge number of citizens. Millions of citizens are in the same status. Do not assume that a future Congress will not take this opportunity to manipulate those numbers further.

I also want to emphasize that the suggestion that this interpretation could not add a seat in the Senate I find baffling. There is no limitation in the language of the Constitution that would stop the same argument from being used to add a Member of the Senate.

Now, let me close, if I may, by telling you my favorite story that my Dad always told me when I was about to do something that he disagreed with. And he always used to tell me the same story over and over again to beat it into my head. And he told me about this guy who was walking down the street and saw in the night a man underneath a lamp post, and he was looking for something. And so the man got down on his knees. He said, "What are you looking

for?" He said, "I dropped my wedding ring." And so he looked for about an hour all around this lamp post, and he finally turned to the guy and said, "You know, Mister, are you sure you dropped it here? Because I cannot find it." He said, "Oh, no, no, no. I did not drop it here. I dropped it down the street, but the light is better here."

And the point is that sometimes we do things, we look in places because they are easier. This bill is an easy place to look, but it is the wrong place. The vote of the residents was lost elsewhere. I have suggested ways that we can get it back, but I must respectfully suggest this is not one of those ways. Thank you.

Chairman LIEBERMAN. Thanks, Professor Turley. A provocative last witness for sure.

We have a time problem. I am going to ask one question, and then—yes, Senator Akaka?

Senator AKAKA. May I ask that my full statement and questions be included in the record.

Chairman LIEBERMAN. Without objection. I think Senator Collins is going to have to do that as well to get to the vote and then to go on to another meeting.

[The prepared statement of Senator Akaka follows:]

PREPARED STATEMENT OF SENATOR AKAKA

Mr. Chairman. I want to thank you for holding this hearing. It's a good opportunity to provide some clarity on a complicated but critically important issue.

We are here today to discuss a fundamental right of all Americans—the right to be represented by a voting member of Congress. As we all know, this is a right the District of Columbia currently does not have. Constitutional scholars, fellow members of Congress, civil rights advocates, and citizens of the District of Columbia will testify this morning, providing much needed perspective on the importance and impact of voting rights legislation for DC.

I do not take this issue lightly. Hawaii was just a territory when I was born. Almost 50 years ago Hawaii became the 50th State in the Union and was only then offered full rights and privileges, including full representation in Congress. So, I understand the struggle and challenges facing the citizens of the District.

Three amendments to the Constitution deal specifically with the extension and protection of voting rights for Americans. More than 500,000 citizens in our Nation's capital—some here in this room—pay Federal taxes, fight in our military, and defend our Constitution. However, because they live inside the District and not in a State, they are denied a full voting member of the House.

Some argue that the 23th Amendment provides Congress the authority to give DC voting rights. Others argue that Article 1 of the Constitution prevents it saying it applies only in areas defined as a "State." The courts have supported actions that treat the District as a State in other matters. Why not this one?

I am not an attorney or a judge. Where the law is said to be ambiguous, we should seek clarification. As a legislator for more than 30 years, the separation of powers is clear to me. We should not attempt to preempt the judgment of the Courts. The Judicial Branch should have the opportunity to interpret the legislation. Today is not the first day of this discussion and certainly not the last. But it is a clear and decisive step forwards. And I look forward to taking action on this matter.

Chairman LIEBERMAN. Let me try to summarize, at least as I heard it, what Professor Turley said, and then ask for a response from Mr. Henderson and Mr. Dinh.

Everybody agrees on the panel, as Mr. Turley said, that it is wrong that the residents of the District are denied voting representation in Congress. So the question is how to right that wrong.

Now, those of us who are sponsoring this legislation—actually, I speak for myself—find that the Constitution is, at best, unclear here. I do not see anything in the Constitution that would prohibit

us from doing what we are doing. And I take Mr. Henderson's point that amending the Constitution ought to be the last resort, and it ought to be only done in this case if there is an adverse decision of the Supreme Court which says you just did something in giving the District residents the vote that is unconstitutional, you have to amend the Constitution to do that.

In some ways, Professor Turley is saying the history that you have cited really gives a clearer message than the Constitution in the two relevant clauses, and therefore, you cannot do this.

I want to ask Mr. Henderson and Mr. Dinh to just respond briefly, if you can, to that and then more extensively on the record.

Mr. HENDERSON. Well, thank you Senator. I certainly associate myself with your analysis, which is to say that amending the Constitution is a step of last resort. And until such time as Congress enacts legislation which is ultimately ruled unconstitutional, I think we have to take the legislative step first as an exhaustive requirement to try to accomplish the objective that I think we share in common.

Second, as my colleague Professor Dinh has cited, Congress did both grant and subsequently remove the power of the District of Columbia to exercise a vote. They did so for a variety of reasons. They treat the District as a State for certain Federal programs and in certain instances, and that, it seems to me, makes clear at least that there is a plausible argument in favor of Congress' ability to enact this legislation. Let the courts ultimately decide. And I think that is really the benefit of the approach, the bipartisan approach, that is being taken with this important bill.

Chairman LIEBERMAN. Thank you. Professor Dinh.

Mr. DINH. Very quickly, on both halves of your question, Mr. Chairman, on your role as a conscientious legislator, I think you have a duty to ascertain the constitutionality in the first instance of your act, but also to make a predictive analysis as to what the courts would do. Because you are not reckless, you recognize the power of judicial review, as do I. I am not here to offer up my head for nine members of the Supreme Court in order to declare that I am categorically wrong. In that sense, I am very confident to advise you that the Congress does have this power, and if challenged, which is unquestionable, the bill will sustain the Supreme Court review based upon the long history of precedent that I, Tom Davis, Wade Henderson, and so many others have recounted, a precedent that is unbroken in the relevant analysis.

With respect to the provocative, lengthy, and very eloquent analysis of history that Professor Turley has pointed out, I can only say that it is interesting but largely irrelevant because whether the Framers debated whether or not the District residents have the vote, just as we have today, does not answer the question whether or not Congress can act under the Constitution to grant that vote. As a matter of fact, much of that history, as Mr. Turley pointed out, rests with the final argument that Congress can decide. That is exactly what James Madison said, as I cited in my paper. Let Congress decide if the States that ceded the land want to protect their citizens; then Congress can protect it—which is exactly what they did in 1790 to 1800. There is little doubt in my mind that if Congress, in 1801, passed this measure that we are considering

today, it would have had the constitutional authority to do so, and we would not be sitting here. They did not. That is why we are sitting here, and the constitutional analysis of congressional authority does not change.

Chairman LIEBERMAN. Thanks, Professor Dinh.

Professor Turley, I want to apologize to you because I have got to run before the vote runs out.

Mr. TURLEY. No apology needed.

Chairman LIEBERMAN. You are right. Like the late Tommy at the wake, you brought us all together.

[Laughter.]

We are going to leave the record of this hearing open for 10 days for additional statements. Members of the Committee, I know, want to submit questions to you. We are going on the Memorial Day recess at the end of next week. We will come back early in June, and it is my intention to bring this measure before the full Committee for a markup sometime hopefully in the first couple of weeks of June. But it gives us some time to consider all the arguments.

I thank you very much. It has been a very important morning, and I remain committed to moving this legislation forward. Thank you all. The hearing is adjourned.

[Whereupon, at 12 p.m., the Committee was adjourned.]

APPENDIX

TESTIMONY OF THE HONORABLE ORRIN G. HATCH
UNITED STATES SENATOR

Before the

Committee on Homeland Security and Governmental Affairs
United States Senate

Concerning

Equal Representation in Congress:
Providing Voting Rights to the District of Columbia

May 15, 2007

Good morning, Mr. Chairman, Senator Collins, and other Members of the Committee. I appreciate the opportunity to advocate for legislation that would – for the first time – give voting representation in the House of Representatives to the residents of the District of Columbia and also add a fourth congressional seat for the State of Utah.

As you may be aware, I have partnered with Chairman Lieberman in drafting the District of Columbia House Voting Rights Act of 2007, S. 1257. This legislation not only rectifies the District's undemocratic political status, but it gives my home state of Utah a long overdue fourth voting member in the House of Representatives.

During the 2000 Census, Utah missed receiving a fourth seat by only 857 people. Valid questions were raised about the methodology of that count, leading most in our State to believe we were not treated fairly. Since then, our population has only grown. Today, the southern city of St. George, Utah, continues to be the nation's fastest growing metro area in the nation. I am confident that our subsequent population growth makes clear that Utah deserves an additional House seat.

During drafting of S. 1257, Senator Lieberman and I worked to resolve what we felt were deficiencies in the House measure. For example, I have constitutional concerns about the House-passed bill, H.R. 1905, because it imposes an at-large seat upon Utah. In states with more than one seat in the House, members are expected to represent insular constituencies. Under H.R. 1905, residents of one state would be represented by two House members, while citizens in other states would have one.

In our constitutional system, states are responsible for elections, and Utah has chosen the approach it wants to take by redistricting. I see no reason for Congress to undermine this and impose upon Utah a scheme it has not chosen for itself. Thus, in the proposed Senate legislation, I insisted that Utah be required to redistrict to provide for the new seat. I believe that Utah's legislators deserve the freedom to determine their representatives' districts without unjustified intrusion or mandate of the federal government.

Also, a key part of the balance in this legislation is a full House member for the District of Columbia. During my Senate service, I have heard from many District residents who believe strongly that their voice should be heard in Congress. They pay taxes, vote in presidential elections, and serve in the military. Yet, more than half a million Americans do not have a full voting representative in Congress. Their elected delegate, while subject to the same restrictions and regulations as other House members, cannot vote in all matters relating to House business and her participation can change as House rules and majorities change. This legislation would end such inconsistency.

America's founders wisely chose not to make the Nation's Capitol one of the nation's constituent states. They also provided for population to be represented in the House and for only states to be represented equally in the Senate. While the District's significant population justifies

representation in the House, it must actually be a state for such equal representation in the Senate. While I believe that the arguments against making the District a state remain compelling, giving the half a million Americans living in the District a full voice in the House is justified.

I understand the argument that congressional representation is dependent on statehood and, therefore, the Constitution would need to be amended before the District is given a voting representative in Congress. While the Constitution does not affirmatively grant District residents the right to vote in congressional elections, it does affirmatively grant Congress plenary power to govern the District's affairs. The Constitution says that Congress may "exercise exclusive legislation in all cases whatsoever, over such district ... as may ... become the seat of the government of the United States." The same provision says that the House of Representatives "shall be composed of members chosen ...by the people of the several states." The question is whether the fact that the District is not a state trumps Congress' legislative authority. Congressional action and judicial precedent throughout American history suggest that the answer is no.

Article I, Section 2, of the original Constitution, for example, said that "direct taxes shall be apportioned among the several states." In 1820, the Supreme Court unanimously held that Congress, exercising its legislative authority over the District, could impose direct federal taxes on District residents. Chief Justice John Marshall wrote that "certainly the Constitution does not consider [the District's] want of a representative in Congress as exempting it from equal taxation." If the word "states" did not prevent Congress from imposing taxes on District residents then, how can it prevent Congress from granting representation to District residents now?

Article III grants the federal courts jurisdiction over controversies "between citizens of different states." Noting that it would be "extraordinary" for courts to be open to citizens of states but not citizens of the District, the Supreme Court unanimously held that Congress may correct this anomaly, and later upheld Congress' decision to do so. If the word "states" did not prevent Congress from granting access to the judicial branch then, how can it prevent Congress from granting access to the legislative branch today?

And even more to the current point, the Supreme Court in 2000 affirmed a lower court decision that while the Constitution does not itself grant District residents the right to House representation, they may pursue that goal in "other venues" including the "political process."

Which brings us here today.

I recognize there are many who strongly oppose this legislation. There are many who wish the District voting rights issue would go away. I must noted that this Democratic-controlled Congress could have simply pushed forward with legislation giving the District of Columbia a seat without balancing a "Democrat" seat with a "Republican" seat. I am pleased that Chairman Lieberman was willing to work in a bipartisan manner.

Indeed, this is a historic time for the citizens of the District of Columbia and a unique opportunity for Utah to receive a long overdue fourth congressional seat. I intend to make the most of it and hope that my fellow Senate colleagues will support me in this endeavor.

Thank you for this opportunity to testify.

Statement of Rep. Tom Davis
Before the Senate Homeland Security and
Government Affairs Committee
S. 1257 the District of Columbia House Voting Rights Act of 2007
May 15, 2007

Thank you, Senator Lieberman and Senator Collins for inviting me to testify before your committee today. I have to say the road moving this bill forward has been a long one, but at each step I am once again reminded it is an honor to work as part of a team that seeks to create a more perfect union.

In talking about this legislation, the most important point I make is that no one can explain with a straight face why this country is willing to send soldiers around the world to extend liberty to every corner of the globe, yet Americans living in this Federal District don't have representation in the Federal legislature." The United States is quite right to sacrifice for liberty around the world, but we need to walk the walk at home as well. The D.C. House Voting Rights Act gives us a chance to do that.

People continuously ask me why I don't support a Constitutional Amendment or campaign for retrocession. I have two answers for them. First, I believe we should attempt what is achievable. At the present time, we have made a strong case that Congress has the authority – at least with respect to the House of Representatives – to remedy this problem and, by legislation, give the District a voting member in that body.

Second, I believe every single day that passes with Americans living in this District unrepresented is a travesty and an indictment of our government. The day has long passed for multi-year campaigns and pleas to unsympathetic partners. Congress can solve this problem – and it should.

I believe the Founders knew there would be unforeseen problems created in the ratification and everyday use of the Constitution. In the District Clause, they gave Congress the flexibility to use its power to solve those kinds of problems. All that's lacking is the will to solve them.

Another question I am continually asked is, "What about the Senate – doesn't this bill start us down a slippery slope to Senate representation?" My answer is "no." First of all, this action by this Congress does not obligate any future Congress to provide Senate representation. Moreover, since the basis of this legislation is the power of the Congress, no court can force us to exercise our prerogative against our will.

But more importantly, remember the House and the Senate are intrinsically different bodies created for different purposes, representing different entities. It's easy to see the House and the Senate as simply two hurdles on the same track, and perhaps in some ways they are. But each hurdle is there for a different reason. This is old stuff to most of us, but when it comes to the District of Columbia and the House of Representatives, the difference is critical.

James Madison put it best in Federalist Paper 39 when he explained the reason for having a bi-cameral legislative body.

> "The next relation is, to the sources from which the ordinary powers of government are to be derived. The House of Representatives will derive its powers from **the people of America**; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. So far the government is NATIONAL, not FEDERAL."
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> "The Senate, on the other hand, will derive its powers **from the States**, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress."

So the House of Representatives represents the people of America, and the Senate represents the States of America. One body is National in nature and the other is Federal in nature.

It is likely the only road to Senate representation for the District is actual statehood – not the other way around. At any rate, giving the District a voting member in the House of Representatives neither advances nor hinders the statehood effort. But it does give the District representation under the Constitution -- today.

By now, every member is aware of the Constitutional arguments. I ask that you think carefully about what you hear today. Every first year law student in this country learns that you can't just read the Constitution once-over to figure out what it means. But that's where the other side's argument starts and stops on this issue.

Those opposing this bill ignore 200 years of case law and clear instruction from the court that this is a congressional matter and requires a congressional solution. Under their reading of the Constitution:

- District residents would have no right to a jury trial – you have to be from a **state** to have that right.
- D.C. residents would have no right to sue people from outside D.C. in the federal courts – only people from **states** have that right.
- The Full Faith and Credit clause would not apply to D.C. – that applies only between **states**; and,
- The federal government would not be allowed to impose federal taxes on District residents – the Constitution says direct taxes shall be apportioned among the **several states.**

- The District would be able to pass laws which interfere with interstate commerce – the Commerce Clause only allows Congress to regulate commerce among **the several states**.

But in each of those cases the Supreme Court has held that Congress can consider the District a "state" for purposes of applying those fundamental provisions. If Congress has the authority to do so regarding those constitutionally granted rights and duties, there should be no question we have the same authority to protect the most sacred right of every American – to live and participate in a representative republic.

As the Senate considers what the House has done and decides how it will proceed, it is my hope you will look for ways to agree with the House on this matter – that instead of looking for potholes you will look for roads. Of course, there are potholes in the road, and some today will point them out to you. But at its core, the Constitution is a road to guaranteeing liberty and dignity under the consent of the governed. Now is not the time to fail to walk that road.

Thank you again for you time.

Congresswoman Eleanor Holmes Norton -- Senate Testimony on S. 1257 -- May 15, 2007

May I express my appreciation to the Committee and particularly to the original cosponsors of S. 1257 to give new seats to Utah and to the District of Columbia. Chairman Joe Lieberman has been the dedicated sponsor of my original bill, the No Taxation Without Representation Act, and has enthusiastically embraced this bill as well. I am grateful for the discussions with my old friend Utah Senator Orrin Hatch and how he and the junior Senator Bob Bennett have responded to the same strong sense of denial of the citizens of their state as I have to District of Columbia residents. We are deeply grateful to the Utah delegation and its Governor for their steadfast determination to join with us after the state barely lost a seat according to the 2000 census, most likely because Mormon missionaries were temporarily out of the state on a religious mission. As Governor Jon Huntsman said, "The people of Utah have expressed outrage over the loss of one congressional seat for the last 6 years. I share their outrage. I can't imagine what it must be like for American citizens to have no representation at all for over 200 years." In fact this bill was born bipartisan, initially not from me or any D.C. resident. Rather, it was an outlander, my regional colleague Ranking Member Tom Davis, Committee on Oversight and Government Reform who was moved by his personal sense of right and wrong when he was chair and used his insider political knowledge, his stature as a leader of his party, and his chairmanship to start us down the bipartisan path which must be traveled to expand representation in Congress. The thousands of Americans and others around the world, in the more than four years we have sought this bill cannot all be named, but the bill in the House was made possible as a personal priority of Speaker Nancy Pelosi, the out-spoken determination of Majority Leader Steny Hoyer, the splendid guidance of two chairmen, John Conyers and Henry Waxman; Utah Governor Jon Huntsman and the Utah delegation, Representatives Rob Bishop, Chris Canon, and Jim Matheson who forged a unique partnership on their understanding that Utah and D.C. citizens felt the same sense of loss, were after the same precious right, and could get there together; the local and national civil rights organizations that formed themselves into a formidable D.C. voting rights coalition, led by the Leadership Conference on Civil Rights and D.C. Vote; the Organization of American States and the Organization for Security and Cooperation in Europe, international organizations that asked the United States to come into conformance with international law by granting voting rights to the citizens of its capital; my own colleagues of both parties and especially my Republican colleagues who have joined this effort for D.C. and for Utah out of principle; and, of course, Mayor Adrian Fenty and elected officials and the residents of this city, living and dead, who have fought for equal citizenship over the ages.

We are late in relieving our country of the unique standing as the only nation that denies representation to the citizens of its capital. If ever a case has been made, the case for representation of every citizen, excluding none, in every nation's legislature, has been made here and around the world, ironically, most recently by the words and actions of our own country itself around the world. For most Americans, the case is made when they understand that the No Taxation Without Representation slogan of our own American Revolution of 1776 has yet to apply to the citizens of the nation's capital, which ranks second in federal income taxes that support the government of the United States. For others, the case is closed at the funerals of

District residents who have died fighting for the vote for the citizens of Iraq and Afghanistan, as Washingtonians have in every war, including the war for the "Republic for which we stand."

Well, as the hearing proceeds, District residents are again serving in a shooting war. Andy Shallal, a D.C. citizen said it best, "People like me of Iraqi ancestry and even my son, who was born in the United States, are entitled to vote in the Iraqi's election, due in large part to the service of the citizens of the District of Columbia and other Americans who have fought and died in Iraq."

A vote for our capital also will erase the slander that the founders of our country who staged their revolution because they were denied representation would then almost immediately deny representation to the residents of their own capital city. Professor Viet Dinh, President Bush's former assistant attorney general for constitutional matters has wiped away the major argument that because the District is not a state its American citizens cannot vote in the House, by detailing the many ways in which "since 1805 the Supreme Court has recognized that Congress has the authority to treat the District as a state and Congress has repeatedly exercised this authority." The personal favorite of District residents is the 16th Amendment which requires only that citizens of states pay federal income taxes. Why then have District residents continuously been taxed without representation?

S. 1275 it must be said, will finally erase a history of wrong. As our country has unequivocally embraced equal rights regardless of race or color, the denial of a vote to the residents who live in our capital, where Black people are the majority, carries unintended messages around the world, S. 1275 will relieve the Congress of the terrible racial burden that has been at the core of the denial of the rights of D.C. citizens. Congress required the same racial segregation here in schools and public accommodations as the southern states mandated in their jurisdictions until the 1954 Brown decision. The denial of representation was part of that pattern. As one southern Senator put it, "The Negroes . . . flocked in . . . and there was only one way out . . . and that was to deny … suffrage entirely to every human being in the District." Former Republican Senator Edward Brooke, a native Washingtonian and the nation's first popularly elected black Senator wrote, "The experience of living in a segregated city and of serving in our segregated armed forces perhaps explains why my party's work on the Voting Rights Act reauthorization last year and on the pending D.C. House Voting Rights Act has been so important to me personally. The irony of course, is that I had to leave my hometown to get representation in Congress and to become a Member." The importance of giving representation to the only Americans denied it makes our bill the Voting Rights Act of 2007 just as last year Congress reauthorized the 1965 Voting Rights Act.

Utah and the District jumped high hurdles by successfully addressing the two most prominent issues that stood in the way – the necessity for political balance and to show that our bill is constitutional. Our bill concedes a virtual historical mandate that additional representation requires political balance. The required balance is modeled most recently on Alaska and Hawaii, both admitted to the Union in 1959 after Congress assured itself that their entry would benefit both parties. Our bill went further in the last Republican Congress session than many expected, getting a large bipartisan majority in two committees. After requiring Utah to draw a new map, the chairman of the committee, Rep. Jim Sensenbrenner, waived mark-up, but the bill

nevertheless failed to move during the lame duck session. However, in the final days of the session when it appeared that the bill would pass the House, the two Utah senators and Senator Joe Lieberman wrote a letter to their respective leadership asking immediate consideration on the Senate floor upon House passage. They were acting in the traditions of the Senate which has traditionally deferred to senators when a bill affects only their state. I ask that deference for the Utah sponsors of the bill. I also ask that the Senate grant deference and courtesy to the House because only the House is affected by S. 1275. You have asked constitutional scholars to speak on those issues, but as a lawyer who practiced constitutional law I would like to summarize my thoughts on the bills constitutionality as well. It is not surprising that unprecedented bills would attract claims of unconstitutionality, beyond those that are often offered as little more than political cover by opponents. There is some respectable opinion against the bill on constitutional grounds, but fortunately, the District has the better side of the case. Conservative scholars Kenneth Starr (former Court of Appeals Judge) and Professor Viet Dinh (former Assistant Attorney General under Attorney General Ashcroft) have both testified that our bill is constitutional. Although the District of Columbia is not at state, as Professor Dinh testified, the District meets the constitutional standards for House representation because "since the birth of the Republic, courts have repeatedly affirmed treatment of the District as a "state" for a wide variety of statutory, treaty, and even constitutional purposes." Judge Starr testified that the District Clause, which gives Congress authority "[t]o exercise exclusive legislation in all cases whatsoever" – is "majestic in its scope" – and authorizes Congress to enact our bill. Most telling is the certainty that the framers did not and could not have intended to deny voting rights to the residents of the new capital. In accepting the land for the District, the first Congress, by law, guaranteed that the existing laws of the donor states, Maryland and Virginia, would be observed until jurisdiction passed to Congress, which would then, "by law provide" the laws for the District. Until the day that Congress took jurisdiction, for ten years, citizens living in the District continued to exercise their congressional voting rights "*not* because they were citizens of those states" – the cession had ended their political link with those states. . ." Dinh testified, [but because] their voting rights derived from Congressional action under the District Clause recognizing and ratifying the ceding states' law as the applicable law." Particularly considering that veterans of the revolutionary war who fought to get representation were living on the land ceded in the constitution for the new capital, it is unthinkable that Maryland and Virginia would have agreed to the sacrifice of the basic rights of their citizens as they donated the land or that the constitutional framers would have required it.

The only real obstacles to S. 1257 are political. Yet, this is one of those moments when I believe that democratic principles can prevail. I hope I can be forgiven a personal reference that I can no longer deny. I am counted among the veterans of the southern civil rights movement for equal rights for African Americans, beginning with my work in Mississippi with the Student Nonviolent Coordinating Committee. The irony is that I went South for equal rights when the city where I lived and was born had no rights, no mayor, no city council, no delegate, no self government, no democracy. The larger than life civil rights movement was the world changing forest that overshadowed the trees without leaves at home. By the time I was elected to the House, it was not difficult to translate the world view that had led me to go South to the issues of self governance and representation in Congress at home. The struggle been for my constituents, the citizens of the District of Columbia, by the here and now. Yet I cannot deny the personal side of this quest, epitomized by my family of native Washingtonians, my father Coleman

Holmes, my grandfather, Richard Holmes, who entered the D.C. Fire Department in 1902 and whose picture hangs in my office, a gift from the D.C. Fire Department, but especially my great-grandfather Richard Holmes, a slave who walked off a Virginia plantation in the 1850s, made it to Washington, and while still a slave settled our family here. By definition, subliminal motivation is unknown and unfelt, but today as I testify in the Senate I embrace the memory of Richard Homes, a slave in the District of Columbia until Lincoln freed the slaves here nine months before the Emancipation Proclamation. I embrace the memory of my great grandfather who came here in a furtive search for freedom itself, not the vote on the House floor. I cannot help but wonder what a man who lived as a slave in the District, and others like him, would think if Richard's great-granddaughter became the first to cast the first full vote for the District of Columbia on the House floor. I hope to have the special honor of casting the vote I have sought for 17 years. I want to cast that vote for the residents of my city whom I have had the great privilege of representing and who have fought and have waited for so long. Yes, and I want to cast that vote in memory of my great-grandfather, Richard Holmes.

S. 1257: THE DC VOTING RIGHTS ACT

UNITED STATES SENATE
COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS

THE HONORABLE JOSEPH LIEBERMAN, CHAIRMAN
THE HONORABLE SUSAN COLLINS, RANKING MEMBER

TESTIMONY OF ADRIAN M. FENTY
MAYOR
DISTRICT OF COLUMBIA

TUESDAY, MAY 15, 2007

Mr. Chairman, Ranking Member Collins and distinguished committee members, it is my pleasure to be here today to speak to you about S. 1257, the DC Voting Rights Act. My name is Adrian Fenty, and I took office this past January as the fifth elected Mayor of the District of Columbia.

The District of Columbia has 572,000 residents. Our population is approximately 75,000 people greater than that of Wyoming, which has two Senators and a member of the House.

The DC Voting Rights Act represents the latest step in an expansion of democracy for the District of Columbia. The District had brief home rule in the 19th Century. We voted in our first presidential election in 1964. We elected our first local board of education in 1968, and Congress restored the position of nonvoting Delegate to the House in 1970. Our modern home rule government began in 1973.

Today, my constituents – your neighbors – are the only people in the United States who pay federal income taxes and have no voting representation in the United States Congress. Our federal taxes, to the tune of about $6 billion a year, are the second highest per capita among the states. Yet we have no say in how that money is spent. We serve on federal juries, with no say in the laws we take an oath to uphold at the courthouse. And we have suffered casualties in every major war – including Iraq – without ever having a vote in the legislative body that approves and funds military action.

As you know, Congress also oversees our locally-funded budget and our locally-passed laws.

Mr. Chairman, Members of the Committee, we are the only capital of a democracy on Earth that has no vote in the national legislature. We cannot be an example in the eyes of the rest of the world when this is the case.

This injustice has stood for more than 200 years. You have the power to end it. It is Congress that eliminated voting rights for the District of Columbia in 1801, and it is Congress that can give them back.

I am aware of the political reality of adding a seat in a narrowly-divided House for a jurisdiction that tends to elect Democrats. Congresswoman Norton and Congressman Tom Davis, a Republican, have struck a balance in the DC Voting Rights Act by adding a seat for Utah as well. That state missed an additional congressional district by 857 people in the last census, amid objections over not including 11,000 overseas missionaries.

Such expansions of Congress have historically come in balanced pairs, such as the addition of seats for Republican Alaska and Democratic Hawaii in 1959. Notably, it is a bipartisan pair of Senators who have brought the Voting Rights Act into this body.

I am also aware of the constitutional objections to this legislation. As the chief executive for the District of Columbia, I have taken an oath to defend the Constitution of the United States.

Thus, while it is my desire to see the District represented in the House, it is my responsibility to endorse only a means of doing so that would be constitutional.

Opponents of the DC Voting Rights Act contend that it is unconstitutional because the Constitution limits the House of Representatives to members elected by "the several States" and therefore cannot include the District of Columbia. We disagree, and we have no shortage of legal opinions from scholars on both sides of the aisle who share our view. Congress has acted hundreds of times under the District Clause and other parts of the Constitution to treat the District as a "state" for other reasons, including taxation and diversity of citizenship in federal court. The fundamental right of electoral participation should be included in this list.

I believe the framers of the Constitution could not have imagined a thriving metropolis of more than a half-million people living year-round in the District of Columbia, many unconnected to the District's original purpose of housing the federal government. So it is beyond good sense that the framers of the Constitution would intend to deprive residents of the nation's capital of their fundamental right to vote.

It is also beyond good sense that our lack of democracy continues, more than 200 years later.

I urge you to take action on this important legislation as soon as possible.

Thank you again for the opportunity to testify today. I'm happy to answer any questions.

TESTIMONY BEFORE THE U.S.
SENATE

COMMITTEE ON HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS

BY

THE HONORABLE JACK KEMP

FORMER MEMBER OF CONGRESS
FORMER SECRETARY OF HOUSING AND URBAN DEVELOPMENT
FOUNDER AND CHAIRMAN OF KEMP PARTNERS

May 15, 2007

I am honored to be testifying before this prestigious and critically important committee whose Chairman Joe Lieberman and Ranking Member Susan Collins are such outstanding leaders in this Senate, their states, and our nation. I would like to thank the many people who have contributed to getting this legislation to the cusp of reaching President Bush's desk, Tom Davis, Eleanor Holmes Norton, and DC Vote who alongside the Leadership Council on Civil Rights have brought together a diverse coalition of support from both political parties to advocate a creative solution to this unique historical injustice.

I am not here as a Constitutional scholar, nor did I serve in the Congress as an economist, but that never stopped me from standing up to speak on behalf of sound policy. I believe that the legislation quite accurately addresses two injustices, the first being that US citizens of the District of Columbia pay taxes, serve in the military, have access (as only citizens of the "different states" do) to federal courts through diversity jurisdiction, but do not have the full representation of one Member of the House of Representatives determined by population. The second injustice is that Utah, resulting from its significant growth quickly passed the threshold for another seat in the House of Representative soon after the 2000 census. Therefore, American citizens living in both Utah and the District of Columbia were not fairly represented in the House of Representatives.

The DC voting rights struggle is a great civil rights challenge facing our nation. The nearly 600,000 people living in America's capital have no vote on issues of war and peace, taxes and spending, and foreign policy. Washington DC, according to the 2000 U.S. Census, has an African-American majority of residents. Given our troubled history with race relations in this country, this fact alone should propel us to make sure that race has no part of why DC residents remain disenfranchised.

My passion on this issue stems from the great history of our nation and the Republican Party, which finds itself with a historic opportunity to showcase our progressive philosophy best exemplified in the leadership of President Abraham Lincoln.

Let me address my own party for a moment; do we want as Republicans to be recorded with Mr. Lincoln and Frederick Douglass or those who used the Constitution to deny freedom, property, education, and the vote to African Americans for almost 200 years?

Don't forget it was a Republican President, Abraham Lincoln who issued the Emancipation Proclamation in 1863. It was a Republican Congress that overrode a Presidential veto and helped finance the Freedmen's Bureau in 1866 out of which emanated the great historical black college, Howard University. Howard University was first chartered and funded by a Republican Congress.

It was a Republican President, Ulysses S. Grant who sent federal troops to the deep south in 1870 and 1871 to guarantee the voting rights of emancipated blacks and to break up the KKK.

It was a Republican President, Dwight D. Eisenhower who sent federal troops to Arkansas to integrate public schools in 1957.

It was a Republican Congress in 2006 which helped pass the historic extension of the Voting Rights Act of 1965 and was signed into law by President Bush.

So now to my Republican friends in the Senate, you've sent members of the Army, Navy, Marines and Air Force from this capital city to Baghdad and Kabul to expand democracy in the those capitals, now you need to ask yourselves the question, which side of history do you want to be on when it comes to democracy for this great nation's capital?

Some political leaders have used the Constitution to deny the vote to women, segregate the races in schools, housing, sports and public accommodations. Don't say it's unconstitutional, if there is any doubt, if you have a question let it be adjudicated by the Supreme Court on an expedited basis.

In my opinion, White House advisors are putting the President of the United States in the position of outspoken opposition to expanding the democratic ideal here in the nation's capital, while simultaneously the White House argues the President has the constitutional authority to defend freedom and extend democratic rights to the people of Baghdad and Kabul.

Throughout our nation's history, the District of Columbia's citizens have given the full measure of their allegiance to the United States. They have fought in, and some have died, in every war in which the United States was engaged; they have paid billions in taxes; and they have provided labor and resources to the US economy and government, yet for over 200 years, District residents have been bystanders in the governance of their own destiny.

With regard to the constitutional arguments, my friend and one of the leading conservative lights in the US House of Representatives, Mike Pence of Indiana wrote, "Opponents of D.C. Voting understandably cite the plain language of Article I that the House of Representatives be comprised of representatives elected by 'the people of the several states', If this were the only reference to the powers associated with the federal city, it would be most persuasive but it is not. Article I, Section 8, Cl. 17 provides, 'The Congress shall have power...to exercise exclusive legislation in all cases whatsoever' over the District of Columbia.

Justice Antonin Scalia observed in 1984, that the Seat of Government Clause of the Constitution, gives Congress "extraordinary and plenary" power over our nation's capital. Scalia added that this provision of the Constitution "enables Congress to do many things in the District of Columbia which it has no authority to do in the 50 states...There has never been any rule of law that Congress must treat people in the District of Columbia exactly the same as people are treated in various states". United States v. Cohen, 733 F.2d 128, 140(D.C. Cir. 1984)." Pence courageously and wisely, as well as 21 other

Republicans, voted yes against White House wishes and sadly those of the GOP leadership.

Chief Justice John Marshall acknowledged in the early 19th century that "it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon [District citizens]. But, he explained, "this is a subject for legislative, not for judicial consideration." Chief Justice Marshall thereby laid out the blueprint by which Congress, rather than the courts, could treat the District as a state under the Constitution for the purposes of enfranchisement.

Neither I, nor Tom Davis nor Mike Pence are arguing for the District of Columbia to become a state. From the inception of our nation the founders believed the House of Representatives was the House of the people and I believe passionately that the architects of the American Constitution left us the tools to ensure that all American people should have a voice and vote in the "people's house."

Republicans have historically supported civil, human, and voting rights, including passage of the 13th, 14th and 15th Amendments. There is a great history of bipartisan support for civil rights, but it was our Presidential candidate in 1964 that refused to take a stand for civil rights and social justice for African Americans. My question is, do Republican Senators want to continue the legacy of Lincoln, Grant and Eisenhower, or that of Barry Goldwater in 1964. Goldwater was not a racist, but in his campaign in 1964, he voted against the civil rights act on constitutional grounds and cost the GOP sadly, the friendship and support of millions of black voters who were sympathetic and friendly to the party of Lincoln and Frederick Douglas. The GOP has received single digits of black support ever since. What a pity for the country and the African American community.

I'm concluding with Professor Viet Dinh's testimony to the House Committee on Government Reform in November of 2004, "The right to vote is regarded as 'a fundamental political right, because preservative of all rights. Such a right 'is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.' Given these considerations, depriving Congress of the right to grant the District Congressional representation pursuant to the District Clause thwarts the very purposes on which the Constitution is based. Allowing Congress to exercise such a power under the authority granted to it by the District Clause would remove a political disability with no constitutional rationale, give the District, which is akin to a state in virtually all important respects, its proportionate influence in national affairs, and correct the historical accident by which District residents have been denied the right to vote in national elections."

To do anything less then passing this DC Voting Rights Bill is to confine the Party of Lincoln, Douglass, Eisenhower, Ronald Reagan and George H.W. Bush to a minority status in perpetuity among people of color. I was not in Selma, AL in 1965 on the Edmund Pettus Bridge, but I am here today with you addressing what I consider a similar injustice with an opportunity to improve our great democratic experiment that is the United States of America.

Thank you.

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STATEMENT OF
WADE HENDERSON, PRESIDENT & CEO,
LEADERSHIP CONFERENCE ON CIVIL RIGHTS

HEARING ON EQUAL REPRESENTATION IN CONGRESS: PROVIDING VOTING RIGHTS TO THE DISTRICT OF COLUMBIA

SENATE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

MAY 15, 2007

Chairman Lieberman, Ranking Member Collins, and members of the Committee: I am Wade Henderson, President and CEO of the Leadership Conference on Civil Rights (LCCR). I appreciate the opportunity to speak before you today regarding LCCR's strong support for providing voting rights to the District of Columbia, in general, and for S. 1257, the "District of Columbia House Voting Rights Act of 2007," in particular.

LCCR is the nation's oldest and most diverse coalition of civil rights organizations. Founded in 1950 by Arnold Aronson, A. Philip Randolph, and Roy Wilkins, the Leadership Conference seeks to further the goal of equality under law through legislative advocacy and public education. LCCR consists of approximately 200 national organizations representing persons of color, women, children, organized labor, persons with disabilities, the elderly, gays and lesbians, and major religious groups. I am privileged to represent the civil and human rights community in submitting testimony for the record to the Committee.

Mr. Chairman, first let me say that I am deeply grateful for both this hearing and for your continued efforts over the years to provide DC residents with meaningful representation in Congress. Given the expertise and the eloquence of the truly remarkable panelists that you have assembled here today, I must admit that organizing my testimony came as a bit of a challenge, because so much of what I would like to say has already been well-said, or will be well-said, by my fellow witnesses.

It occurred to me, however, that it is common in organizing legislative hearings such as this to distinguish between expert witnesses, on one hand, and affected individuals, or what Congressional staffers sometimes refer to as "victims," for lack of a better term, on the other. Interestingly enough, I come before you today as both. And with those two roles in mind, I would like to proceed by answering what I see as the two basic, fundamental questions that have brought us here today: first, why this issue? And second, why this approach?

Why this issue?

In answering the first question, I would like to begin on a personal level. As a lifelong civil rights advocate, I have always spoken out on Capitol Hill on behalf of my fellow Americans. And throughout the course of my career, I have seen changes that have made the nation a better, stronger place, more aligned with its founding principles. African Americans, Latinos, Asians, other minorities, and women now hold legislative office in both houses of Congress, which continue to more closely reflect the make-up of our great nation.

I have seen great progress in the District of Columbia as well. When I was born in the old Freedman's Hospital, on Howard University's campus, the city's hospitals were segregated along racial lines by law. That is no longer the case.

LeDroit Park, where I grew up and where I now own a home, was once an all-black neighborhood by law and by custom. Today, people of all races and from all around the world live in the area. Gone, too, is the legalized system of separate schooling that sent me to an all-black elementary school, despite the fact that I started grade school after the landmark ruling in *Brown v. Board of Education* had officially outlawed racial segregation.

Yet one thing still has yet to change: as a lifelong resident of Washington, and in spite of all my efforts to speak out on Capitol Hill on behalf of other Americans, I have never had anyone on Capitol Hill with the ability to speak out on my own behalf. For over 200 years, my hundreds of thousands of neighbors in this city and I have been mere spectators to our great democracy. Even though we pay federal taxes, fight courageously in wars, and fulfill all of the other obligations of citizenship, we still have no voice when Congress makes decisions for the entire nation on matters as important as war and peace, taxes and spending, health care, education, immigration policy, or the environment.

And while we DC residents understand the unique nature of our city in the American constitutional system, and we recognize Congress' expansive powers in operating the seat of our federal government, we are not even given a single vote in decisions that affect DC residents and DC residents alone. Without as much as a single vote cast on behalf of DC residents, Congress decides which judges will hear purely local disputes under our city's laws, how it will spend local tax revenues, and it even has the power to decide what words the city is allowed to print on its residents' license plates. Adding insult to injury, we have not even been able to cast a single vote when Congress has decided, in recent years, to prevent our elected city officials from using our own taxes to advocate for a meaningful voice in our democracy.

It is enough to make people feel like dumping crates of tea into the Potomac River.

Shifting my focus from that of a DC resident to a broader civil and human rights perspective, the continued disenfranchisement of DC residents before Congress stands out as the most blatant violation today of the most important civil right we have, the right to vote. Without it, without the ability to hold our leaders accountable, all of our other rights are illusory. Our nation has made tremendous progress throughout history in expanding this right, including through the 15th, 19th, and 26th Amendments; and in the process, it has become more and more of a role model to

the rest of the world. The Voting Rights Act of 1965 has long been the most effective law we have to enforce that right, and it has resulted in a Congress that increasingly looks like the nation it represents. Its unanimous renewal by this chamber last year, despite some unfortunate resistance in the House, stands out as one of Congress' proudest moments in many years.

In spite of this progress, however, one thing remains painfully clear: the right to vote is meaningless if you cannot put anyone into office. Until DC residents have a vote in Congress, they will not be much better off than African Americans in the South were prior to August 6, 1965, when President Johnson signed the Voting Rights Act into law – and the efforts of the civil rights movement will remain incomplete.

Their situation will also undermine our nation's moral high ground in promoting democracy and respect for human rights in other parts of the world. Indeed, the international community has already been taking notice. In December of 2003, for example, a body of the Organization of American States (OAS) declared the U.S. in violation of provisions of the American Declaration of the Rights and Duties of Man, a statement of human rights principles to which the U.S. subscribed in 1948.[1] In 2005, the Organization for Security and Cooperation in Europe, of which the U.S. is a member, also weighed in. It urged the United States to "adopt such legislation as may be necessary" to provide DC residents with equal voting rights.[2]

Extending voting rights to DC residents is one of the highest legislative priorities of the Leadership Conference on Civil Rights this year, and will remain so every year, until it is achieved.

Why this approach?

Mr. Chairman, while you have been a loyal friend to the civil rights movement for many decades now, with a record dating all the way back to your volunteer work in Mississippi in 1963 to register African American voters, I am greatly encouraged to see that you are continuing to gain more allies in one of your more recent civil rights endeavors, that of expanding the franchise to DC residents, as evidenced by the recent House passage of the "District of Columbia House Voting Rights Act of 2007" ("DC VRA"). I would now like to turn to a discussion of that specific proposal.

I must admit that when Representative Tom Davis (R-VA) first proposed pairing a first-ever vote in the House for the District of Columbia with an additional House seat for Utah, a state which had been shortchanged in the last reapportionment of Congressional seats in 2001, I was skeptical. While I greatly appreciated Rep. Davis' creative effort, I testified before his committee in 2004 about two concerns I had with his approach. First, his bill, like yours today, would have required a mid-decade redrawing of Utah's federal legislative districts, a move that I believed raised constitutional concerns and that could set a dangerous precedent for diluting the votes of racial and ethnic minorities. Second, unlike the "No Taxation Without Representation

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[1] Inter-American Commission on Human Rights, *Statehood Solidarity Committee/United States*, Report No. 98/03, Case 11.204 (Dec. 29, 2003).
[2] OSCE Parliamentary Authority, Washington, *DC Declaration and Resolutions Adopted at the Fourteenth Annual Session*, July 1-5, 2005.

Act" that you and Delegate Eleanor Holmes Norton (D-DC) had sponsored in previous years, I was concerned about the fact that the DC VRA would only provide DC residents with a vote in the House, stopping short of providing the full representation that DC deserves.

A few things have changed, however. For one, last year, the Supreme Court settled the issue of whether mid-decade redistricting is constitutional, by upholding the 2003 redrawing of Texas' congressional map in *League of United Latin American Citizens v. Perry*.[3] In addition, when it appeared that the DC VRA was picking up momentum in the House of Representatives last fall, the Governor and the legislature of Utah showed extraordinary care in proposing a new Congressional map that would avoid the kinds of problems that had made LCCR so skeptical of mid-decade redistricting in the first place.

I am also less troubled than I was before about the fact that the DC VRA only provides DC with representation in the House. To be sure, LCCR still strongly supports the full representation, in both the House and the Senate, of District of Columbia residents. At the same time, I have been pleasantly surprised at the attention that the debate over the DC VRA has brought to not only the issue of DC disenfranchisement but also the more recent unfair dilution of the votes of Utah citizens, and at the number of new – and in some cases unexpected – allies we have recruited along the way. While any political compromise involves the risk that it will cut off future progress, I have grown more optimistic that the enactment of this legislation will mark the beginning of the debate, rather than the end.

At the same time, I recognize that the bill is still not without its critics, and I would like to address some of the other concerns that have been raised about it. During the debate over the DC VRA on the House floor several weeks ago, I must say I was profoundly disappointed in the objections that several Members raised. For example, one member referred to the bill as a "cynical political exercise,"[4] while another labeled it "a raw power grab by the new Democrat majority."[5]

To anyone who would resort to such harsh rhetoric, in criticizing the approach taken by the DC VRA, I would simply ask: what is your alternative, and what have you been doing to turn it into law? Sadly, only a very small number of Members who opposed the DC VRA in the House would be able to provide a credible answer to that question. Some opponents paid lip service to the idea of returning most of DC to the state of Maryland, a complicated but legitimate option that I will discuss below.[6] Yet when they were given opportunities to offer an amendment or even a complete substitute to the bill, in the form of a "motion to recommit," on two separate occasions, opponents attempted to simply derail the current proposal instead.

Putting aside the more reckless and partisan arguments that have been made against the DC VRA, other opponents have argued that while DC residents deserve Congressional

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[3] 126 S. Ct. 2594 (2006).
[4] Rep. Pete Sessions (R-TX), Congressional Record, 110th Cong., 1st Session at H3569 (Apr. 19, 2007).
[5] Rep. Patrick McHenry (R-NC), Congressional Record, 100th Cong., 1st Session at H3574 (Apr. 19, 2007).
[6] Rep. Ralph Regula (R-OH) has, to his credit, proposed retrocession for a number of years. Only a very small number of his colleagues, however, have supported his efforts. On April 16 of this year, three days before the House attempted for a second time this year to bring H.R. 1905 to a vote on final passage, Rep. Louie Gohmert (R-TX) introduced a similar counter-proposal.

representation, Congress does not have the power to treat DC as a "state" for the purpose of giving it that representation. While I anticipate that Professor Dinh will respond to this argument more thoroughly, I would like to respond with two brief points.

First, when the District of Columbia was first envisioned, it was primarily created in order to keep any one state from controlling and possibly harming the seat of the federal government. The creation of a "no man's land," where the most important civil right we have in a democratic system would simply not apply, was not necessary to this end. While there was some debate over the issue of whether residents of the new district would be represented in Congress, and while those opposed to initially granting DC representation certainly prevailed with the passage of the Organic Act of 1801, the decision at the time involved an important trade-off that no longer applies: long before such developments as the telephone, air travel, and the Internet made it far easier for citizens across the nation to communicate with their legislators, the very small population that resided in the District in 1801 did enjoy greater access to Congress than other citizens had, even in the absence of actual voting representation.[7] Over the past two centuries, however, particularly after the abolition of slavery, the size and the relative influence of the native DC population has changed so drastically that the assumptions made in 1801 simply no longer apply.

Second, while Article 1, Section 2 of the Constitution does indeed provide that House members shall be chosen "by the people of the several States," there is room for disagreement over how narrowly or broadly the word "state" should be interpreted. In a number of other contexts, the use of the term "state" in the Constitution has been interpreted to include the District of Columbia. While there were competing justifications given, a majority of the Supreme Court in 1949 ruled, in *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[8] that the District could be treated as a state for the purpose of federal diversity jurisdiction. Few people if any would argue that the right to a "speedy and public trial" under the Sixth Amendment, or the Equal Protection clause of the Fourteenth Amendment, does not apply in the District of Columbia, even though their text refers to the actions of a "state." Most recently, the U.S. Court of Appeals for the D.C. Circuit held that the Second Amendment applies with full force in the District of Columbia, even though its text also refers to "the security of a free State."[9]

Given these examples, and given the principles on which the then-recent American Revolution had been based, it is certainly plausible – at the very least – that our Founding Fathers would have wanted Congress to have maximum leeway in preventing the evil of "taxation without representation" from ever being imposed on citizens again. In fact, given the current size and relative political weakness of the DC population today, they most likely would be horrified that Congress had not addressed it a long time ago.

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[7] *See, e.g.*, remarks of Rep. Huger in 1803: "Gentlemen, in looking at the inconvenience attached to the people of the Territory, do not sufficiently regard the superior convenience they possess. Though the citizens may not possess full political rights, they have a greater influence upon the measure of the Government than any equal number of citizens in any other part of the Union." Annals of Congress 489 (Feb. 1803).
[8] 337 U.S. 582 (1949).
[9] *Shelly Parker, et al. v. District of Columbia and Adrian M. Fenty*, 478 F.3d 370, 395 (D.C. Cir. 2007).

Finally, I would like to discuss two alternatives that DC VRA opponents frequently raised during last month's debate on the House floor.[10] While both of them have their merits, and both certainly represent good-faith contributions to the broader debate over DC representation, they are also accompanied by serious practical and legal hurdles that would need to be addressed before LCCR could support either approach.

One alternative is to amend the Constitution to provide DC with Congressional representation purposes. LCCR would certainly support an effort to amend the Constitution, if it is ultimately deemed necessary. However, our nation has an extensive legal and political tradition of amending the Constitution, our nation's most precious document, only as a last resort when other efforts to address the problem at hand have been tried and have failed. With regard to DC representation, and in light of the fact that the Supreme Court has yet to rule definitively on Congress' authority to provide representation, I do not believe we are at that point yet.

Retrocession, or returning most of what is currently the District of Columbia to its former home in Maryland, is another option that has been under discussion for a number of years. The federal government would retain a small and essentially uninhabited area of DC as a "National Capital Service Area," and current DC residents would be given full voting rights as new citizens of Maryland.

It is also a legitimate topic of discussion, and because Congress returned another portion of the original District of Columbia to Virginia in 1846, there is also clear legislative precedent for such an approach. At the same time, however, retrocession would require the consent of Maryland, and achieving the political consensus necessary to return the District to Maryland could be all but impossible. The political and economic consequences of the move would be dramatic and far-reaching for the populations of both DC and Maryland. In addition, it could not be undertaken through legislation alone: Congress and the states would still need to amend the Constitution in order to repeal the 23rd Amendment. Given the drastic nature of the approach, I believe that retrocession is premature, but it deserves further study.

Ultimately, I believe the DC VRA is the best approach for Congress to take on behalf of the residents of both DC and Utah. It presents a politically neutral approach, it has a solid chance of surviving constitutional scrutiny, and unlike the above two options, it can be passed and signed into law this year. The residents of both DC and Utah have already waited far too long.

This concludes my prepared remarks. Again, I want to thank you for the opportunity to speak before your committee today. I look forward to answering any questions you may have.

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[10] There are certainly other alternatives. DC statehood is another option that has been debated in the past, and Rep. Dana Rohrabacher has long supported a measure, most recently H.R. 492 in the current Congress, to treat DC voters as Maryland residents for federal election purposes. *See* Eugene Boyd, *CRS Reports for Congress: District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals*, Congressional Research Service, Updated Jan. 30, 2007.

PREPARED STATEMENT OF

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Before the

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

of the

U.S. SENATE

On

EQUAL REPRESENTATION IN CONGRESS: PROVIDING VOTING RIGHTS TO THE DISTRICT OF COLUMBIA

May 15, 2007

As delegates gathered in Philadelphia in the summer of 1787 for the Constitutional Convention, among the questions they faced was whether the young United States should have an autonomous, independent seat of government. Just four years prior, in 1783, a mutiny of disbanded soldiers had gathered and threatened Congressional delegates when they met in Philadelphia. Congress called upon the government of Pennsylvania for protection; when refused, it was forced to adjourn and reconvene in New Jersey.[1] The incident underscored the view that "the federal government be independent of the states, and that no one state be given more than an equal share of influence over it..."[2] According to James Madison, without a permanent national capital,

> not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty might bring on the national councils an imputation of awe or influence, equally dishonorable

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[1] KENNETH R. BOWLING, THE CREATION OF WASHINGTON, D.C. 30-34 (1991), *cited in Adams v. Clinton*, 90 F. Supp. 2d 35, 50 n.25 (D.D.C. 2000), *aff'd*, 531 U.S. 940 (2000).

[2] STEPHEN J. MARKMAN, STATEHOOD FOR THE DISTRICT OF COLUMBIA: IS IT CONSTITUTIONAL? IS IT WISE? IS IT NECESSARY? 48 (1988); *see also Adams*, 90 F. Supp. 2d at 50 n.25 (quoting THE FEDERALIST NO. 43) (James Madison) ("The gradual accumulation of public improvements at the stationary residence of the Government, would be . . . too great a public pledge to be left in the hands of a single State"); *id.* at 76 (Oberdorfer, J., dissenting in part) ("What would be the consequence if the seat of the government of the United States, with all the archives of America, was in the power of any one particular state? Would not this be most unsafe and humiliating?" (quoting James Iredell, Remarks at the Debate in North Carolina Ratifying Convention (July 30, 1788), *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 219-20 (Jonathan Elliot ed., 2d ed. 1907), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987))); Lawrence M. Frankel, Comment, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. PA. L. REV. 1659, 1684 (1991); Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 HARV. J. ON LEGIS. 167, 171 (1975) ("How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the sessions and deliberations of Congress, would they be secure from insults, or the influence of such state?" (quoting James Madison in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 433 (Jonathan Elliot ed., 2d ed. 1907)); Raven-Hansen, 12 HARV. J. ON LEGIS. at 170 (having the national and a state capital in the same place would give "'a provincial tincture to your national deliberations.'" (quoting George Mason in JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 332 (Gaillard Hund & James B. Scott eds., 1920)).

> to the Government and dissatisfactory to the other members of the confederacy.[3]

The Constitution thus authorized the creation of an autonomous, permanent District to serve as the seat of the federal government. This clause was effectuated in 1790, when Congress accepted land that Maryland and Virginia ceded to the United States to create the national capital.[4] Ten years later, on the first Monday of December 1800, jurisdiction over the District of Columbia (the "District") was vested in the federal government.[5] Since then, District residents have not had a right to vote for Members of Congress.

The *District of Columbia House Voting Rights Act of 2007*, S.1257, (the "Act"), would grant District residents Congressional representation by providing that the District be considered a Congressional district in the House of Representatives, beginning with the 111th Congress.[6] To accommodate the new representative from the District, membership in the House would be permanently increased by two members.[7] One newly created seat would go to the representative from the District, and the other would be assigned to the State next eligible for a Congressional district, Utah.[8]

Congress has ample constitutional authority to enact the *District of Columbia House Voting Rights Act of 2007*. The District Clause, U.S. Const. Art. I, § 8, cl. 17, empowers Congress to "exercise exclusive Legislation in all Cases whatsoever, over such District" and thus grants Congress plenary and exclusive authority to legislate all matters concerning the District. This broad legislative authority extends to the granting of

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[3] THE FEDERALIST NO. 43, at 289 (James Madison) (Jacob E. Cooke ed., 1961).

[4] Act of July 16, 1790, ch. 28, 1 Stat. 130; see also Act of Mar. 3, 1791, ch. 27, 1 Stat. 214. The land given by Virginia was subsequently retroceded by act of Congress (and upon the consent of the Commonwealth of Virginia and the citizens residing in such area) in 1846. See Act of July 9, 1846, ch. 35, 9 Stat. 35.

[5] *See* Act of July 16, 1790, ch. 28, § 6, 1 Stat. 130; *see also Hobson v. Tobriner*, 255 F. Supp. 295, 297 (D.D.C. 1966).

[6] S. 1257, 110th Cong. § 3(a) (2007).

[7] *See id.*

[8] *See id.*, § 3(c).

Congressional voting rights for District residents—as illustrated by the text, history and structure of the Constitution as well as judicial decisions and pronouncements in analogous or related contexts. Article I, section 2, prescribing that the House be composed of members chosen "by the People of the several States," does not speak to Congressional authority under the District Clause to afford the District certain rights and status appurtenant to states. Indeed, the courts have consistently validated legislation treating the District as a state, even for constitutional purposes. Most notably, the Supreme Court affirmed Congressional power to grant District residents access to federal courts through diversity jurisdiction, notwithstanding that the Constitution grants such jurisdiction only "to all Cases . . . between Citizens of different States."[9] Likewise, cases like *Adams v. Clinton*, 90 F. Supp. 2d 35, 50 n.25 (D.D.C.), *aff'd*, 531 U.S. 940 (2000), holding that District residents do not have a judicially enforceable constitutional right to Congressional representation, do not deny (but rather, in some instances, affirm) Congressional authority under the District Clause to grant such voting rights.

I. Congress Has the Authority under the District Clause to Provide the District of Columbia with Representation in the House of Representatives.

The District Clause provides Congress with ample authority to give citizens of the District representation in the House of Representatives. That Clause provides Congress with extraordinary and plenary power to legislate with respect to the District. This authority was recognized at the time of the Founding, when (before formal creation of the national capital in 1800) Congress exercised its authority to permit citizens of the District to vote in Maryland and Virginia elections.

A. The Constitution Grants Congress the Broadest Possible Legislative Authority Over the District of Columbia.

The District of Columbia as the national seat of the federal government is explicitly created by Article I, § 8, clause 17 (the "District Clause"). This provision authorizes Congress

[9] U.S. CONST. art. III, § 2.

> [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States...

This clause, which has been described as "majestic in its scope,"[10] gives Congress plenary and exclusive power to legislate for the District.[11] Courts have held that the District Clause is "sweeping and inclusive in character"[12] and gives Congress "extraordinary and plenary power" over the District.[13] It allows Congress to legislate within the District for "every proper purpose of government."[14] Congress therefore possesses "full and unlimited jurisdiction to provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end," subject, of course, to the negative prohibitions of the Constitution.[15]

To appreciate the full breadth of Congress' plenary power under the District Clause, one need only recognize that the Clause works an exception to the constitutional structure of "our Federalism,"[16] which delineates and delimits the legislative power of Congress and state legislatures. In joining the Union, the states gave up certain of their powers. Most explicitly, Article II, section 10 specifies activities which are prohibited to the States. None of these prohibitions apply to Congress when it exercises its authority under the District Clause. Conversely, Congress is limited to legislative powers

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[10] Common Sense Justice for the Nation's Capital: An Examination of Proposals to Give D.C. Residents Direct Representation Before the House Comm. On Government Reform, 108th Cong. 2d Sess. (June 23, 2004) (statement of the Hon. Kenneth W. Starr).

[11] *Sims v. Rives*, 84 F.2d 871, 877 (D.C. App. 1936).

[12] *Neild v. District of Columbia*, 110 F.2d 246, 249 (D.C. App. 1940).

[13] *United States v. Cohen*, 733 F.2d 128, 140 (D.C. Cir. 1984).

[14] *Neild*, 110 F.2d at 249.

[15] *Id.* at 250; *see also Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899); *Turner v. D.C. Bd. of Elections & Ethics*, 77 F. Supp. 2d 25, 29 (D.D.C. 1999). As discussed *infra*, the terms of Article I, § 2 do not conflict with the authority of Congress in this area.

[16] *Younger v. Harris*, 401 U.S. 37, 44 (1971).

enumerated in the Constitution; such limited enumeration, coupled with the reservation under the Tenth Amendment, serves to check the power of Congress vis-à-vis the states.[17] The District Clause contains no such counterbalancing restraints because its authorization of "exclusive Legislation in all Cases whatsoever" explicitly recognizes that there is no competing state sovereign authority. Thus, when Congress acts pursuant to the District Clause, it acts as a legislature of national character, exercising "complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other."[18] In few, if any, other areas does the Constitution grant any broader authority to Congress to legislate.

B. Evidence at the Founding Confirms that Congress' Extraordinary and Plenary Authority under the District Clause Extends to Granting Congressional Representation to the District.

There are no indications, textual or otherwise, to suggest that the Framers intended that Congressional authority under the District Clause, extraordinary and plenary in all other respects, would not extend also to grant District residents representation in Congress. The delegates to the Constitutional Convention discussed and adopted the Constitution without any recorded debates on voting, representation, or other rights of the inhabitants of the yet-to-be-selected seat of government.[19] The purpose for establishing a federal district was to ensure that the national capital would not be subject to the influences of any state.[20] Denying the residents of the District the right to vote in elections for the House of Representatives was neither necessary nor intended by the Framers to achieve this purpose.[21]

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[17] *See United States v. Lopez*, 514 U.S. 549, 552 (1995); New York v. United States, 505 U.S. 144, 155-56 (1992).

[18] *Neild*, 110 F.2d at 250.

[19] *Adams*, 90 F. Supp. 2d at 77 (Oberdorfer, J., dissenting in part).

[20] Frankel, *supra* note 2, at 1668; Raven-Hansen, *supra* note 2, at 178.

[21] Frankel, *supra* note 2, at 1685; Raven-Hansen, *supra* note 2, at 178. Nor is there any evidence that the Framers explicitly intended Congress to have no power to remedy the situation. Frankel, *supra* note 2, at 1685.

Indeed, so long as the exact location of the seat of government was undecided, representation for the District's residents seemed unimportant.[22] It was assumed that the states donating the land for the District would make appropriate provisions in their acts of cession for the rights of the residents of the ceded land.[23] As a delegate to the North Carolina ratification debate noted,

> Wherever they may have this district, they must possess it from the authority of the state within which it lies; and that state may stipulate the conditions of the cession. Will not such state take care of the liberties of its own people?[24]

James Madison also felt that "there must be a cession, by particular states, of the district to Congress, and that the states may settle the terms of the cession. The states may make what stipulation they please in it, and, if they apprehend any danger, they may refuse it altogether."[25] The terms of the cession and acceptance illustrate that, in effect, Congress exercised its authority under the District Clause to grant District residents voting rights coterminous with those of the ceding states when it accepted the land in 1790. Maryland ceded land to the United States in 1788.[26] Virginia did so in 1789.[27] The cessions of land by Maryland and Virginia were accepted by Act of Congress in 1790.[28] This Act also established the first Monday in December 1800 as the official date

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[22] Raven-Hansen, *supra* note 2, at 172.

[23] *Id.*

[24] 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 219-20 (Jonathan Elliot ed., 1888).

[25] 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 433 (Jonathan Elliot ed., 2d ed. 1907) (*cited in District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109-10 (1953)).

[26] An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of the Government of the United States, 1788 Md. Acts ch. 46, *reprinted in* 1 D.C. Code Ann. 34 (2001) (hereinafter "Maryland Cession").

[27] An Act for the Cession of Ten Miles Square, or any Lesser Quantity of Territory Within This State, to the United States, in Congress Assembled, for the Permanent Seat of the General Government, 13 Va. Stat. at Large, ch. 32, *reprinted in* 1 D.C. Code Ann. 33 (2001) (hereinafter "Virginia Cession").

[28] Act of July 16, 1790, Ch. 28, 1 Stat. 130.

of federal assumption of control over the District.[29] Because of the lag between the time of cession by Maryland and Virginia and the actual creation of the District by the federal government, assertion of exclusive federal jurisdiction over the area was postponed for a decade.[30] During that time, District residents voted in Congressional elections in their respective ceding state.[31]

In 1800, when the United States formally assumed full control of the District, Congress by omission withdrew the grant of voting rights to District residents. The legislatures of both Maryland and Virginia provided that their respective laws would continue in force in the territories they had ceded until Congress both accepted the cessions and provided for the government of the District.[32] Congress, in turn, explicitly acknowledged by act that the "operation of the laws" of Maryland and Virginia would continue until the acceptance of the District by the federal government and the time when Congress would "otherwise by law provide."[33] The laws of Maryland and Virginia thus remained in force for the next decade and District residents continued to be represented by and vote for Maryland and Virginia congressmen during this period.[34]

The critical point here is that during the relevant period of 1790-1800, District residents were able to vote in Congressional elections in Maryland and Virginia not because they were citizens of those states—the cession had ended their political link with those states.[35] Rather, their voting rights derived from *Congressional action under the District Clause* recognizing and ratifying the ceding states' law as the applicable law for

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[29] *See id.* § 6.

[30] Raven-Hansen, *supra* note 2, at 173.

[31] *Adams*, 90 F. Supp. 2d at 58, 73, 79 & n.20.

[32] Maryland Cession, *supra* note 26; Virginia Cession, *supra* note 27.

[33] Act of July 16, 1790, ch. 28, § 1, 1 Stat. 130.

[34] *Adams*, 90 F. Supp. 2d at 58, 73, 79 & n.20; Raven-Hansen, *supra* note 2, at 174.

[35] *See Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901); *Reily v. Lamar*, 6 U.S. (2 Cranch) 344, 356 (1805); *Hobson v. Tobriner*, 255 F. Supp. 295, 297 (D.D.C. 1966).

the now-federal territory until further legislation.[36] It was therefore not the cessions themselves, but the federal assumption of authority in 1800, that deprived District residents of representation in Congress. The actions of this first Congress, authorizing District residents to vote in Congressional elections of the ceding states, thus demonstrate the Framers' belief that Congress may authorize by statute representation for the District.

II. Article I, Section 2, Clause 1 Does Not Speak to Congressional Authority to Grant Representation to the District.

The District is not a state for purposes of Congress' Article I, section 2, clause 1, which provides that members of the House are chosen "by the people of the several States." This fact, however, says nothing about Congress' authority under the District Clause to give residents of the District the same rights as citizens of a state. As early as 1805 the Supreme Court recognized that Congress had authority to treat the District like a state, and Congress has repeatedly exercised this authority. This long-standing precedent demonstrates the breadth of Congress' power under the District Clause.

A. Congress May Exercise Its Authority Under the District Clause to Grant District Residents Certain Rights and Status Appurtenant to Citizenship of a State, Including Congressional Representation.

Article I, § 2, clause 1 of the Constitution provides for the election of members of the House of Representatives. It states:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the *State* Legislature. [emphasis added].

Although the District is not a state in the same manner as the fifty constituent geographical bodies that comprise the United States, the failure of this clause to mention citizens of the District does not preclude Congress from legislating to provide representation in the House.

[36] Indeed, even after the formal assumption of federal responsibility in December 1800, Congress enacted further legislation providing that Maryland and Virginia law "shall be and continue in force" in the areas of the District ceded by that state. Act of Feb. 27, 1801, ch. 15, § 1, 2 Stat. 103.

Case law dating from the early days of the Republic demonstrates that Congressional legislation is the appropriate mechanism for granting national representation to District residents. In *Hepburn v. Ellzey*,[37] residents of the District attempted to file suit in the Circuit Court of Virginia based on diversity jurisdiction.[38] However, under Article III, section 2, of the Constitution, diversity jurisdiction only exists "between citizens of different States."[39] Plaintiffs argued that the District was a state for purposes of Article III's Diversity Clause.[40] Chief Justice Marshall, writing for the Court, held that "members of the American confederacy" are the only "states" contemplated in the Constitution.[41] Provisions such as Article I, section 2, use the word "state" as designating a member of the Union, the Court observed, and the same meaning must therefore apply to provisions relating to the judiciary.[42] Thus, the Court held that the District was not a state for purposes of diversity jurisdiction under Article III.

However, even though the Court held that the term "state" as used in Article III did not include the District, Chief Justice Marshall acknowledged that "it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon [District citizens]."[43] But, he explained, "this is a subject for legislative, not for judicial consideration."[44] Chief Justice Marshall thereby laid out the blueprint by which *Congress*, rather than the courts, could treat the District as a state under the Constitution.

Over the many years since *Hepburn*, Congress heeded Chief Justice Marshall's advice and enacted legislation granting District residents access to federal courts on

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[37] 6 U.S. (2 Cranch) 445 (1805).

[38] *Id.* at 452.

[39] U.S. CONST. art. III, § 2, cl. 1.

[40] *Hepburn*, 6 U.S. (2 Cranch) at 452.

[41] *Id.*

[42] *Id.* at 452-53.

[43] *Id.* at 453.

[44] *Id.*

diversity grounds. In 1940, Congress enacted a statute bestowing jurisdiction on federal courts in actions "between citizens of different States, or citizens of the District of Columbia . . . and any State or Territory."[45] This statute was challenged in *National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co.*[46] Relying on *Hepburn* as well as Congress' power under the District Clause, the Court upheld the statute. Justice Jackson, writing for a plurality of the Court, declined to overrule the conclusion in *Hepburn* that the District is not a "state" under the Constitution.[47] Relying on Marshall's statement that "the matter is a subject for 'legislative not for judicial consideration,'"[48] however, the plurality held that the conclusion that the District was not a "state" as the term is used in Article III did not deny Congress the power under other provisions of the Constitution to treat the District as a state for purposes of diversity jurisdiction.[49]

Specifically, the plurality noted that the District Clause authorizes Congress "to exercise exclusive Legislation in all Cases whatsoever, over such District,"[50] and concluded that Chief Justice Marshall was referring to this provision when he stated in *Hepburn* that the matter was more appropriate for legislative attention.[51] The responsibility of Congress for the welfare of District residents includes the power and duty to provide those residents with courts adequate to adjudicate their claims against, as well as suits brought by, citizens of the several states.[52] Therefore, according to the

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[45] Act of April 20, 1940, ch. 117, 54 Stat. 143.

[46] 337 U.S. 582 (1949).

[47] *Id.* at 587-88 (plurality opinion). Justices Black and Burton joined the plurality opinion.

[48] *Id.* at 589 (quoting Hepburn, 6 U.S. (2 Cranch) at 453).

[49] *Id.* at 588.

[50] *Id.* at 589.

[51] *Id.*

[52] *Id.* at 590. The plurality also made a distinction between constitutional issues such as the one before it, which "affect[] only the mechanics of administering justice in our federation [and do] not involve an extension or a denial of any fundamental right or immunity which goes to make up our freedoms" and "considerations which bid us strictly to apply the Constitution to congressional enactments which invade

plurality, Congress can utilize its power under the District Clause to impose "the judicial function of adjudicating justiciable controversies on the regular federal courts..."[53] The statute, it held, was constitutional. Justice Rutledge, concurring in the judgment, would have overruled *Hepburn* outright and held that the District constituted a "state" under the Diversity Clause.[54]

The significance of *Tidewater* is that the five justices concurring in the result believed either that the District was a state under the terms of the Constitution or that the District Clause authorized Congress to enact legislation treating the District as a state. The decision did not overrule *Hepburn*, but it effectively rejected the view that "state" has a "single, unvarying constitutional meaning which excludes the District."[55] Although both Article I, section 2, and Article III, section 2, refer to "States" and by their terms do not include the District, *Tidewater* makes clear that this limitation does not vitiate Congressional authority to treat the District like a state for purposes of federal legislation, including legislation governing election of members to the House.[56]

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fundamental freedoms or which reach for powers that would substantially disturb the balance between the Union and its component states ..." Id. at 585.

[53] *Id.* at 600; *see also id.* at 607 (Rutledge, J., concurring) ("[F]aced with an explicit congressional command to extend jurisdiction in nonfederal cases to the citizens of the District of Columbia, [the plurality] finds that Congress has the power to add to the Article III jurisdiction of federal district courts such further jurisdiction as Congress may think 'necessary and proper' to implement its power of 'exclusive Legislation' over the District of Columbia") (citations omitted). The plurality also quoted Chief Justice Marshall's opinion in McCulloch v. Maryland, where he held that "[l]et the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *Id.* at 604 n.25.

[54] *Id.* at 617-18 (Rutledge, J., concurring). Justice Murphy joined Justice Rutledge's opinion.

[55] Raven-Hansen, *supra* note 2, at 183.

[56] We have not considered whether Congress could similarly enact legislation to provide the District of Columbia with voting representation in the United States Senate. That question turns additionally on interpretation of the text, history, and structure of Article I, section 3, and the 17th Amendment to the U.S. Constitution, which is outside the scope of this opinion. We note only that, like Article I, section 2, these provisions specify the qualification of the electors. Compare U.S. Const. art. I, § 2 ("chosen every second year by the People of the several States") with *id.* art. I, § 3 ("chosen by the Legislature thereof") and *id.* amend. XVII ("elected by the people thereof"). However, quite unlike the treatment of the House of Representatives, the constitutional provisions relating to composition of the Senate additionally specifies that there shall be two senators "from each State," see U.S. Const. art. I, § 3; *id.* amend. XVII, thereby arguably giving rise to interests of states *qua* states not present in Article I, section 2.

Adams v. Clinton[57] is not to the contrary. Rather, the decision reinforces Chief Justice Marshall's pronouncement that Congress, and not the courts, has authority to grant District residents certain rights and status appurtenant to state citizenship under the Constitution. In *Adams*, District residents argued that they have a constitutional right to elect representatives to Congress.[58] A three-judge district court, construing the constitutional text and history, determined that the District is not a state under Article I, section 2, and therefore the plaintiffs do not have a judicially cognizable right to Congressional representation.[59] In so doing, the court noted specifically that it "lack[ed] authority to grant plaintiffs the relief they seek," and thus District residents "must plead their cause in *other venues*."[60] Just as Chief Justice Marshall in *Hepburn* and Justice Jackson in *Tidewater* recognized that the District Clause protected the plenary and exclusive authority of Congress to traverse where the judiciary cannot tread, so too the court in *Adams v. Clinton* suggested that it is up to Congress to grant through legislation the fairness in representation that the court was unable to order by fiat.

Tidewater is simply the most influential of many cases in which courts have upheld the right of Congress to treat the District as a state under the Constitution pursuant to its broad authority under the District Clause. From the birth of the Republic, courts have repeatedly affirmed treatment of the District a "state" for a wide variety of statutory, treaty, and even constitutional purposes.

In deciding whether the District constitutes a "state" under a particular statute, courts examine "the character and aim of the specific provision involved."[61] In *Milton S. Kronheim & Co. Inc. v. District of Columbia*,[62] Congress treated the District as a state for

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[57] 90 F. Supp. 2d 35 (D.D.C. 2000), *aff'd*, 531 U.S. 940 (2000).

[58] *Id.* at 37.

[59] *Id.* at 55-56.

[60] *Id.* at 72 (emphasis added).

[61] *District of Columbia v. Carter*, 409 U.S. 418, 420 (1973).

[62] 91 F.3d 193 (D.C. Cir. 1996).

purposes of alcohol regulation under the Alcoholic Beverage Control Act.[63] The District of Columbia Circuit held that such a designation was valid and it had "no warrant to interfere with Congress' plenary power under the District Clause '[t]o exercise exclusive Legislation in all Cases whatsoever, over [the] District.'"[64] In *Palmore v. United States*,[65] the Court recognized and accepted that 28 U.S.C. § 1257, which provides for Supreme Court review of the final judgments of the highest court of a state, had been amended by Congress in 1970 to include the District of Columbia Court of Appeals within the term "highest court of a State."[66] The federal district court in the District found that Congress could treat the District as a state, and thus provide it with 11th Amendment immunity, when creating an interstate agency, as it did when it treated the District as a state under the Washington Metropolitan Area Transit Authority.[67] Even *District of Columbia v. Carter*,[68] which found that the District was not a state for purposes of 42 U.S.C. § 1983,[69] helps illustrate this fundamental point. In the aftermath of the *Carter* decision, Congress passed an amendment treating the District as a state under section 1983,[70] and this enactment has never successfully been challenged. Numerous other examples abound of statutes that treat the District like a state.[71]

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[63] *Id.* at 201.

[64] *Id.*

[65] 411 U.S. 389 (1973).

[66] *Id.* at 394.

[67] *Clarke v. Wash. Metro. Area Transit Auth.*, 654 F. Supp. 712, 714 n.1 (D.D.C. 1985), aff'd, 808 F.2d 137 (D.C. Cir. 1987).

[68] 409 U.S. 418 (1973).

[69] *Id.* at 419.

[70] Act of Dec. 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (codified at 42 U.S.C. § 1983 (2003)).

[71] *See, e.g.*, 18 U.S.C. § 1953(d) (interstate transportation of wagering paraphernalia); 26 U.S.C. § 6365(a) (collection of state incomes taxes); 29 U.S.C. § 50 (apprentice labor); 42 U.S.C. § 10603(d)(1) (crime victim assistance program); 42 U.S.C. § 2000e(i) (civil rights/equal employment opportunities).

The District may also be considered a state pursuant to an international treaty. In *de Geofroy v. Riggs*,[72] a treaty between the United States and France provided that:

> In all states of the Union whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title, and in the same manner, as the citizens of the United States.[73]

The Supreme Court concluded that "states of the Union" meant "all the political communities exercising legislative powers in the country, embracing, not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as 'territories' and the 'District of Columbia.'"[74]

Courts have even found the District to constitute a state under other provisions of the Constitution. The Supreme Court has held that the Commerce Clause[75] authorizes Congress to regulate commerce across the District's borders, even though that Clause only refers to commerce "among the several States."[76] Similarly, the Court has interpreted Article I, section 2, clause 3, which provides that "Representatives and direct Taxes shall be apportioned among the several States ... according to their respective Numbers," as applying to the District.[77] The Court also found that the Sixth Amendment right to trial by jury extends to the people of the District,[78] even though the text of the Amendment states "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime

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[72] 133 U.S. 258 (1890).

[73] *Id.* at 267-68.

[74] *Id.* at 271.

[75] U.S. CONST. art. I, § 8, cl. 3.

[76] *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889).

[77] *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319-20 (1820). The clause at issue has since been amended by the 14th and 16th Amendments.

[78] *Callan v. Wilson*, 127 U.S. 540, 548 (1888); *see also Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899) ("It is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia.").

shall have been committed..."[79] And the District of Columbia Circuit held that the District is a state under the Twenty-First Amendment,[80] which prohibits "[t]he transportation or importation into any state, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof..."[81] If the District can be treated as a "state" under the Constitution for these and other purposes,[82] it follows that Congress can legislate to treat the District as a state for purposes of Article I representation.[83]

B. Other Legislation Has Allowed Citizens Who Are Not Residents of States to Vote in National Elections.

A frequent argument advanced by opponents of District representation is that Article I explicitly ties voting for members of the House of Representatives to citizenship in a state. This argument is wrong.

The Uniformed and Overseas Citizens Absentee Voting Act[84] allows otherwise disenfranchised American citizens residing in foreign countries while retaining their American citizenship to vote by absentee ballot in "the last place in which the person was domiciled before leaving the United States."[85] The overseas voter need not be a citizen of the state where voting occurs. Indeed, the voter need not have an abode in that state,

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[79] U.S. CONST. amend. VI (emphasis added).

[80] *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 198-99 (D.C. Cir. 1996).

[81] U.S. CONST. amend. XXI (emphasis added).

[82] *See Hobson v. Tobriner*, 255 F. Supp. 295, 297 (D.D.C. 1966) (noting that District residents are afforded trial by jury, presentment by grand jury, and the protections of due process of law, although not regarded as a state).

[83] It is of little moment that allowing Congress to treat the District as a state under Article I would give the term a broader meaning in certain provisions of the Constitution than in others. The Supreme Court has held that terms in the Constitution have different meanings in different provisions. For example, "citizens" has a broader meaning in Article III, § 2, where it includes corporations, than it has in Article IV, § 2, or the Fourteenth Amendment, where it is not interpreted to include such artificial entities. *See Tidewater*, 337 U.S. at 620-21 (Rutledge, J., concurring).

[84] Pub. L. 99-410, 100 Stat. 924 (1986), codified at 42 U.S.C. §§ 1973ff *et seq.* (2003).

[85] 42 U.S.C. § 1973ff-6(5)(B) (2003); *Att'y Gen. v. United States*, 738 F.2d 1017, 1020 (9th Cir. 1984).

pay taxes in that state, or even intend to return to that state.[86] Thus, the Act permits voting in federal elections by persons who are not citizens of any state. Moreover, these overseas voters are not qualified to vote in national elections under the literal terms of Article I; because they are no longer citizens of a state, they do not have "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[87] If there is no constitutional bar prohibiting Congress from permitting overseas voters who are not citizens of a state to vote in federal elections,[88] there is no constitutional bar to similar legislation extending the federal franchise to District residents.

Justice Kennedy's concurring opinion in *U.S. Term Limits, Inc. v. Thornton*[89] provides further evidence that the right to vote in federal elections is not necessarily tied to state citizenship. In his opinion, Justice Kennedy wrote that the right to vote in federal elections "do[es] not derive from the state power in the first instance but...belong[s] to the voter in his or her capacity as a citizen of the United States..."[90] Indeed, when citizens vote in national elections, they exercise "a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere."[91]

Needless to say, the right to vote is one of the most important of the fundamental principles of democracy:

> No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote

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[86] *Att'y Gen. v. United States*, 738 F.2d at 1020; Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 185 (1991).

[87] U.S. CONST. art. I, § 2, cl. 1.

[88] Since the Uniformed and Overseas Citizens Absentee Voting Act was enacted in 1986, the constitutional authority of Congress to extend the vote to United States citizens living abroad has never been challenged. *Cf. Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001).

[89] 514 U.S. 779 (1995).

[90] *Id.* at 844 (Kennedy, J., concurring).

[91] *Id.* at 842, 845.

> is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.[92]

The right to vote is regarded as "a fundamental political right, because preservative of all rights."[93] Such a right "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[94] Given these considerations, depriving Congress of the right to grant the District Congressional representation pursuant to the District Clause thwarts the very purposes on which the Constitution is based.[95] Allowing Congress to exercise such a power under the authority granted to it by the District Clause would remove a political disability with no constitutional rationale, give the District, which is akin to a state in virtually all important respects, its proportionate influence in national affairs, and correct the historical accident by which District residents have been denied the right to vote in national elections.[96]

III. The Twenty-Third Amendment Does Not Affect Congressional Authority to Grant Representation to the District.

Although District residents currently may not vote for representatives or senators, the 23rd Amendment to the Constitution provides them the right to cast a vote in presidential elections. The 23rd Amendment, ratified in 1961, provides:

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:
>
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State;... but they shall be considered, for the purposes of the

[92] *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

[93] *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

[94] *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

[95] Frankel, *supra* note 2, at 1687; Raven-Hansen, *supra* note 2, at 187.

[96] Raven-Hansen, *supra* note 2, at 185.

> election of President and Vice President, to be electors appointed by a State...[97]

Opponents of District representation argue that the enactment of the Amendment demonstrates that any provision for District representation must be made by constitutional amendment and not by simple legislation.

The existence of the 23rd Amendment, dealing with presidential elections under Article II, has little relevance to Congress' power to provide the District with Congressional representation under the District Clause of Article I. Not only does the Constitution grant Congress broad and plenary powers to legislate for the District by such clause, it provides Congress with sweeping authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its Article I powers.[98] The 23rd Amendment, however, concerns the District's ability to appoint presidential electors to the Electoral College, an entity established by Article II of the Constitution.[99] Congressional authority under Article II is very circumscribed[100]—indeed, limited to its authority under Article II, § 1, clause 4, to determine the day on which the Electoral College votes. Because legislating with respect to the Electoral College is outside Congress' Article I authority, Congress could not by statute grant District residents a vote for President; granting District residents the right to vote in presidential elections of necessity had to be achieved via constitutional amendment.[101] By contrast, providing the

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[97] U.S. CONST. amend. XXIII, § 1.

[98] U.S. CONST. art. I, § 8, cl. 18.

[99] *See id.* art. II, § 1, cls. 2-3 & amend. XII.

[100] *See Oregon v. Mitchell*, 400 U.S. 112, 211-12 (1970) (Harlan, J., concurring in part and dissenting in part).

[101] In *Oregon v. Mitchell*, 400 U.S. 112 (1970), a five-to-four decision, the Court upheld a federal statute that, *inter alia*, lowered the voting age in presidential elections to 18. *Id.* at 117-18 (opinion of Black, J.). Of the five Justices who addressed whether Article I gives Congress authority to lower the voting age in presidential elections, four found such authority lacking because the election of the President is governed by Article II. *See id.* at 210-12 (Harlan, J., concurring in part and dissenting in part); *id.* at 290-91, 294 (Stewart, J., concurring in part and dissenting in part). Four other justices based their decision on Congress' authority under § 5 of the 14th Amendment. *See id.* at 135-44 (Douglas, J., concurring in part and dissenting in part); *id.* at 231 (Brennan, J., concurring in part and dissenting in part). This rationale is unavailable to citizens of the District. See *Adams*, 90 F. Supp. 2d at 65-68. Thus, any Congressional authority to allow District residents to vote in presidential elections by statute must lie in Article I. Lacking authority by statute to grant District residents the right to vote in presidential elections, Congress needed to

District with representation in Congress implicates Article I concerns and Congress is authorized to enact such legislation by the District Clause. Therefore, no constitutional amendment is needed, and the existence of the 23rd Amendment does not imply otherwise.[102]

* * *

Although this opinion is limited to analyzing the legal basis of Congressional authority to enact the *District of Columbia House Voting Rights Act of 2007* and does not venture a view on its policy merits, it is at least ironic that residents of the Nation's capital continue to be denied the right to select a representative to the "People's House." My conclusion that Congress has the authority to grant Congressional representation to the District is motivated in part by the principle, firmly imbedded in our constitutional tradition, that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."[103]

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amend the Constitution through the 23rd Amendment. These obstacles to legislation in the context of presidential elections are not present here, however, because Article I (not Article II) governs Congressional elections and it provides Congress with plenary authority over the District in the District Clause.

[102] The cases rejecting constitutional challenges to the denial of the vote in presidential elections to citizens of Puerto Rico and Guam are not to the contrary. *See Igartua de la Rosa v. United States*, 32 F.3d 8, 10 (1st Cir. 1994); *Att'y Gen. v. United States*, 738 F.2d 1017, 1019 (9th Cir. 1984). While those cases contain some dicta related to the 23rd Amendment, neither addressed the affirmative power of Congress to legislate under the District Clause. Indeed, the language of the District Clause seems broader than that of the Territories Clause (which governs the extent of Congress' authority over Puerto Rico and Guam). *See* U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to...make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States").

[103] *Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964).

STATEMENT FOR THE RECORD
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EQUAL REPRESENTATION IN CONGRESS:
PROVIDING VOTING RIGHTS TO THE DISTRICT OF COLUMBIA

MAY 15, 2007

COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS
THE UNITED STATES SENATE

I.
INTRODUCTION

Chairman Lieberman, Ranking Member Collins, members of the Committee, it is an honor to appear before you today to discuss the important question of the representational status of the District of Columbia in Congress. At the outset, I believe that it is important for people of good faith to acknowledge that this is not a debate between people who want District residents to have the vote and those who do not. I expect that everyone here today would agree that the current non-voting status of the District is fundamentally at odds with the principles and traditions of our constitutional system. As Justice Black stated in *Wesberry v. Sanders*:[1] "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

Today, we are all seeking a way to address the glaring denial of basic rights to the citizens of our Capitol City.[2] Yet, unlike many issues before Congress, there has always been a disagreement about the means rather than the ends of full representation for the District residents. Regrettably, I

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[1] 376 U.S. 1, 17-18 (1964).

[2] While I am a former resident of Washington, I come to this debate with views primarily of an academic and litigator. In addition to teaching at George Washington Law School, I was counsel in the successful challenge to the Elizabeth Morgan Act. Much like this bill, a hearing was held to address whether Congress had the authority to enact the law -- the intervention into a single family custody dispute. I testified at that hearing as a neutral constitutional expert and strongly encouraged the members not to move forward on the legislation, which I viewed as a rare example of a "Bill of Attainder" under Section 9-10 of Article I. I later agreed to represent Dr. Eric Foretich on a pro bono basis to challenge the Act, which was struck down as a Bill of Attainder by the Court of Appeals for the District of Columbia. *Foretich v. United States,* 351 F.3d 1198 (D.C. Cir. 2003). The current bill is another example of Congress exceeding its authority, though now under sections 2 and 8 (rather than section 9 and 10) of Article I.

believe that S. 1257 is the wrong means.[3] Despite the best of motivations, the bill is fundamentally flawed on a constitutional level and would only serve to needlessly delay true reform for District residents.[4] Indeed, considerable expense would likely come from an inevitable and likely successful legal challenge -- all for a bill that would ultimately achieve only partial representational status. The effort to fashion this as a civil rights measure ignores the fact that it confers only partial representation without any guarantee that it will continue in the future. It is the equivalent of allowing Rosa Parks to move halfway to the front of the bus in the name of progress. District residents deserve full representation and, while this bill would not offer such reform, there are alternatives, including a three-phased proposal that I have advocated in the past.

As I laid out in detail in my prior testimony on this proposal before the 109th Congress[5] and the 110th Congress,[6] I must respectfully but strongly disagree with the constitutional analysis offered to Congress by Professor Viet Dinh,[7] and the Hon. Kenneth Starr.[8] Notably, since my first testimony

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[3] *See generally* Jonathan Turley, *Too Clever By Half: The Unconstitutional D.C. Voting Rights Bill*, Roll Call, Jan. 25, 2007, at 3; Jonathan Turley, *Right Goal, Wrong Means*, Wash. Post, Dec. 12, 2004, at 8.

[4] In this testimony, I will not address the constitutionality of giving the District of Columbia and other delegates the right to vote in the Committee of the Whole. *See Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994) (holding that "Article I, §2 . . . precludes the House from bestowing the characteristics of membership on someone other than those 'chosen every second year by the People of the several States."). The most significant distinction that can be made is that the vote under this law is entirely symbolic since it cannot be used to actually pass legislation in a close vote.

[5] *District of Columbia Fair and Equal House Voting Rights Act of 2006*, before the Subcommittee on the Constitution, United States House of Representatives, 109th Cong., 2nd Sess. 2 (testimony of Jonathan Turley).

[6] *District of Columbia Fair and Equal House Voting Rights Act of 2007*, before the Committee on the Judiciary, United States House of Representatives, 110th Cong., March 14, 2007 (testimony of Jonathan Turley).

[7] This analysis was co-authored by Mr. Adam Charnes, an attorney with the law firm of Kilpatrick Stockton, LLP. Viet Dinh and Adam Charnes, "The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives,"

on this issue, the independent Congressional Research Service joined those of us who view this legislation as facially unconstitutional.[9] Likewise, the White House recently disclosed that its attorneys have reached the same conclusion and found this legislation to be facially unconstitutional.[10] President Bush has indicated that he will veto the legislation on constitutional grounds.

Permit me to be blunt, I consider this Act to be the most premeditated unconstitutional act by Congress in decades.[11] I have taken the liberty of submitting 60 pages of testimony today in the hope of leaving no question as to the clarity of the textual language and historical record on this point. As shown below, on every level of traditional constitutional analysis (textualist, intentionalist, historical) the unconstitutionality of this legislation is plainly evident. Conversely, the interpretations of Messrs. Dinh and Starr are based on uncharacteristically liberal interpretations of the text of Article I, which ignore the plain meaning of the word "states" and the express intent of the Framers.

Nov. 2004 found at http://www.dcvote.org/pdfs/congress/vietdinh 112004.pdf. This analysis was also supported recently by the American Bar Association in a June 16, 2006 letter to Chairman James Sensenbrenner.

[8] Testimony of the Hon. Kenneth W. Starr, House Government Reform Committee, June 23, 2004.

[9] Congressional Research Service, The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole, January 24, 2007, at i (Analysis by Mr. Eugene Boyd) (concluding "that case law that does exist would seem to indicate that not only is the District of Columbia not a 'state' for purposes of representation, but that congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation.").

[10] Suzanne Struglinski, *House OKs a 4th seat for Utah*, Deseret Morning News, April 20, 2007, at 1; Christina Bellantoni, *Democrats Adjust Rules for D.C. Vote Bill*, Wash. Times, April 19, 2007, at A5.

[11] To the credit of Congress, the Elizabeth Morgan Law was blocked by members on the House floor due to its unconstitutionality and was only passed when it was added in conference and made part of the Transportation Appropriations bill – a maneuver objected to publicly by both Senators and Representatives at the time. Efforts to allow a vote separately on the Act were blocked procedurally after the conference.

The bill's drafters have boldly stated that "[n]otwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives."[12] What this language really means is: "notwithstanding any provision of the Constitution." The problem is that this Congress cannot set aside provisions of the Constitution absent a ratified constitutional amendment. Of course, the language of S. 1257 is strikingly similar to a 1978 constitutional amendment that failed after being ratified by only 16 states.[13] Indeed, in both prior successful and unsuccessful amendments[14] (as well as in arguments made in court),[15] the Congress has conceded that the District is not a State for the purposes of voting in Congress. Now, unable to pass a constitutional amendment, sponsors hope to circumvent the process laid out in Article V[16] by claiming the inherent authority to add a non-state voting member to the House of Representatives.

The Senate has wisely changed the at-large provision for the Utah district to require the creation of new individual districts. However, given the House bill, I wish to stress that I also believe that the concurrent awarding of an at-large seat would raise difficult legal questions, including

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[12] S. 1257 §2.

[13] Likewise, in 1993, a bill to create the State of New Columbia failed by a wide margin.

[14] *See* U.S. Const. XXIII amend. (mandating "[a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a State.*")

[15] *Michel v. Anderson*, 14 F.3d 623, 630 (D.C. Cir. 1994) ("despite the House's reliance on the revote mechanism to reduce the impact of the rule permitting delegates to vote in the Committee of the Whole, [the government] concede[s] that it would be unconstitutional to permit anyone but members of the House to vote in the full House under any circumstances.").

[16] U.S. Const. Article V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof . . .").

but not limited to the guarantee of "one person, one vote." I will address each of these arguments below. However, in the hope of a more productive course, I will also briefly explore an alternative approach that would be (in my view) both unassailable on a legal basis and more practicable on a political basis.

II.
THE ORIGINAL PURPOSE OF A FEDERAL ENCLAVE IN THE 21ST CENTURY

The non-voting status of District residents remains something of a historical anomaly that should be a great embarrassment for all citizens. Indeed, with the passage of time, there remains little necessity for a separate enclave beyond the symbolic value of "belonging" to no individual state. To understand the perceived necessity underlying Article I, Section 8, one has to consider the events that led to the first call for a separate federal district.

On January 1, 1783, Congress was meeting in Philadelphia when they were surprised by a mob of Revolutionary War veterans demanding their long-overdue back pay. It was a period of great discontentment with Congress and the public of Pennsylvania was more likely to help the mob than to help suppress it. Indeed, when Congress called on the state officials to call out the militia, they refused. To understand the desire to create a unique non-state enclave, it is important to consider the dangers and lasting humiliation of that scene as it was recorded in the daily account from the debates:

> On 21 June 1783, the mutinous soldiers presented themselves, drawn up in the street before the state-house, where Congress had assembled. [Pennsylvania authorities were] called on for the proper interposition. [State officials demurred and explained] the difficulty, under actual circumstances, of bringing out the militia . . . for the suppression of the mutiny . . . . [It was] thought that, without some outrages on persons or property, the militia could not be relied on . . . . The soldiers remained in their position, without offering any violence, individuals only, occasionally, uttering offensive words, and, wantonly pointing their muskets to the windows of the hall of Congress. No danger from premeditated violence was apprehended, but it was observed that spirituous drink from the tippling-houses adjoining, began to be liberally served out to the soldiers, and might

> lead to hasty excesses. None were committed, however, and, about three o'clock, the usual hour, Congress adjourned; the soldiers, though in some instances offering a mock obstruction, permitting the members to pass through their ranks. They soon afterwards retired themselves to the barracks.[17]

Congress was forced to flee, first to Princeton, N.J., then to Annapolis and ultimately to New York City.[18]

When the framers gathered again in Philadelphia in the summer of 1787 to draft a new constitution, the flight from that city five years before was still prominent in their minds. Madison and others called for the creation of a federal enclave or district as the seat of the federal government – independent of any state and protected by federal authority. Only then, Madison noted, could they avoid "public authority [being] insulted and its proceedings . . . interrupted, with impunity."[19] Madison believed that the physical control of the Capitol would allow direct control of proceedings or act like a Damocles' Sword dangling over the heads of members of other states: "How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the sessions and deliberations of Congress, would they be secure from insults, or the influence of such a state?"[20] James Iredell raised the same point in the North Carolina ratification convention when he asked, "Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress?"[21] By creating a special area free of state control, "[i]t is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself."[22]

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[17] 25 Journals of the Continental Congress 1774-1789, at 973 (Gov't Printing Office 1936) (1783).

[18] Turley, *supra*, at 8.

[19] The Federalist No. 43, at 289 (Madison, J.) (James E. Cooke ed., 1961).

[20] 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 433 (Madison, J.) (Jonathan Elliot, ed., 2d ed. 1907).

[21] 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, *supra*, reprinted in 3 The Founders' Constitution 225 (Philip B. Kurland & Ralph Lerner eds., 1987).

[22] *Id.*

In addition to the desire to be free of the transient support of an individual state, the framers advanced a number of other reasons for creating this special enclave.[23] There was a fear that a state (and its representatives in Congress) would have too much influence over Congress, by creating "a dependence of the members of the general government."[24] There was also a fear that symbolically the honor given to one state would create in "the national councils an imputation of awe and influence, equally dishonorable to the Government and dissatisfactory to the other members of the confederacy."[25] There was also a view that the host state would benefit too much from "[t]he gradual accumulation of public improvements at the stationary residence of the Government."[26] Finally, some framers saw the capitol city as promising the same difficulties that London sometimes posed for the English.[27] London then (and now) often took steps as a municipality that challenged the national government and policy. This led to a continual level of tension between the national and local representatives.

The District was, therefore, created for the specific purpose of being a non-State without direct representatives in Congress. The security and operations of the federal enclave would remain the collective responsibilities of the entire Congress – of all of the various states. The Framers, however, intentionally preserved the option to change the dimensions or even relocate the federal district. Indeed, Charles Pinckney wanted that District Clause to read that Congress could "fix and *permanently* establish the seat of the

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[23] The analysis by Dinh and Charnes places great emphasis on the security issue and then concludes that, "[d]enying the residents of the District the right to vote in elections for the House of Representatives was neither necessary nor intended by the Framers to achieve this purpose." Dinh & Charnes, *supra*. However, this was not the only purpose motivating the establishment of a federal enclave. Moreover, the general intention was the creation of a non-state under complete congressional authority as a federal enclave. The Framers clearly understood and intended for the District to be represented derivatively by the entire Congress.

[24] The Federalist No. 43, at 289 (Madison, J.) (James E. Cooke ed., 1961).

[25] *Id.*

[26] *Id.*

[27] Kenneth R. Bowling, The Creation of Washington, D.C.: The Idea and Location of The American Capitol 76 (1991).

Government . . ."[28] However, the framers rejected the inclusion of the word "permanently" to allow for some flexibility.

While I believe that the intentions and purposes behind the creation of the federal enclave are clear, I do not believe that most of these concerns have continued relevance for legislators. Since the Constitutional Convention, courts have recognized that federal, not state, jurisdiction governs federal lands. As the Court stressed in *Hancock v. Train*,[29] "because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is 'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.'"[30] Moreover, the federal government now has a large security force and is not dependent on the states. Finally, the position of the federal government vis-à-vis the states has flipped with the federal government now the dominant party in this relationship. Thus, even though federal buildings or courthouses are located in the various states, they remain legally and practically separate from state jurisdiction – though enforcement of state criminal laws does occur in such buildings. Just as the United Nations has a special status in New York City and does not bend to the pressure of its host country or city, the federal government does not need a special federal enclave to exercise its independence from individual state governments.

The original motivating purposes behind the creation of the federal enclave, therefore, no longer exist. Madison wanted a non-state location for the seat of government because ""if any state had the power of legislation over the place where Congress should fix the general government, this

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[28] *See generally* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160, 168 (1991) (citing James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America 420 (Gaillard Hund & James Brown Scott eds., 1920)).

[29] 426 U.S. 167, 179 (1976).

[30] *See also Paul v. United States*, 371 U.S. 245, 263 (1963); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954); *California ex rel State Water Resources Control Board v. EPA*, 511 F.2d 963, 968 (9th Cir. 1975).

would impair the dignity, and hazard the safety, of Congress."[31] There is no longer a cognizable "hazard [to] safety" but there certainly remains the symbolic question of the impairment to the dignity for the several states of locating the seat of government in a specific state. It is a question that should not be dismissed as insignificant. I personally believe that the seat of the federal government should remain completely federal territory as an important symbol of the equality of all states in the governance of the nation. The actual seat of government, however, is a tiny fraction of the current federal district.

Throughout this history from the first suggestion of a federal district to the retrocession of the Virginia territory, the only options for representation for District residents were viewed as limited to either a constitutional amendment or retrocession of the District itself.[32] Those remain the only two clear options today, though retrocession itself can take many different forms in its actual execution, as will be discussed in Section V.

III.
THE UNCONSTITUTIONALITY OF THE CREATION OF A SEAT IN THE HOUSE FOR THE DISTRICT UNDER ARTICLE I

A. S. 1257 Violates Article I of the Constitution in Awarding Voting Rights to the District of Columbia.

As noted above, I believe that S. 1257 would violate the clear language and meaning of Article I. To evaluate the constitutionality of the legislation, one begins with the text, explores the original meaning of the language, and then considers the implications of the rivaling interpretations for the Constitution system. This analysis overwhelmingly shows that the creation of a vote in the House of Representatives for the District would do great violence to our constitutional traditions and values. To succeed, it would require the abandonment of traditional interpretative doctrines and could invite future manipulation of one of the most essential and stabilizing

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[31] 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 89 (Madison, J.) (Jonathan Elliot ed., 2d ed. 1907).

[32] Efforts to secure voting rights in the courts have failed, *see Adams v. Clinton*, 90 F. Supp. 2d 35, 50 (D.D.C. 2000).

components of the Madisonian democracy: the voting rules for the legislative branch.

1. *The Text of the Constitutional Provisions.*

Any constitutional analysis necessarily begins with the text of the relevant provision or provisions. To the extent that the language clearly addresses the question, there is obviously no need to proceed further into other interpretative measures that look at the context of the provision, the historical evidence of intent, etc. The instant question could arguably end with this simple threshold inquiry.

Article I, Section 2 is the most obvious and controlling provision on this question – not the District Clause. The Framers defined the voting membership of the House in that provision as composed of representatives of the "several States." Conversely, the District Clause was designed to define the power of Congress *within* the federal enclave.

The language of Article I, Section 2 is a model of clarity:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch in the States Legislature.[33]

As with the Seventeenth Amendment election of the composition of the Senate,[34] the text clearly limits the House to the membership of representatives of the several states.

On its face, the reference to "the people of the several states" is a clear restriction of the voting membership to actual states. The reference to "states" is repeated in the section when the Framers specified that each representative must "when elected, be an inhabitant of that State in which he shall be chosen." Moreover, the reference to "the most numerous Branch in the States Legislature" clearly distinguishes the state entity from the District.

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[33] U.S. Const. Art. I, Sec.2.

[34] While not directly relevant to S. 1257, the Seventeenth Amendment contains similar language that mandates that the Senate shall be composed of two senators of each state "elected by the people thereof."

The District had no independent government at the time and currently has only a city council. In reading such constitutional language, the Supreme Court has admonished courts that "every word must have its due force, and appropriate meaning; . . . no word was unnecessarily used or needlessly added."[35] Here the drafters refer repeatedly to states or several states as well as state legislatures in defining the membership of the House of Representatives. Putting aside notions of plain meaning,[36] the structure and language of this provision clearly indicate that the drafters were referencing formal state entities. It takes an act of willful blindness to ignore the obvious meaning of these words.

Academics have also noted that the use of the term "members" in the Composition Clause was a clear distinction in the minds of the Framers between voting and non-voting representatives. Professors John O. McGinnis and Michael B. Rappaport address this very point and note that word "members" was meant to protect the essential structural role by guaranteeing that representatives of the states -- and only the states -- would vote in Congress:

> If the House could deprive Representatives from certain states of the right to vote on bills or *could assign that right to non-members of its choosing*, a majority of the House could circumvent the carefully crafted structure established by the Framers to govern national legislation. This structure maintained important compromises that were essential to the Constitution's creation, such as the equilibrium between large and small states. The structure also protected minorities by making it more difficult for unjust legislation to pass. It is inconceivable that the Framers would have permitted a majority of the House to subvert this arrangement.[37]

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[35] *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840).

[36] It is true that plain meaning at times can be over-emphasized. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 67 (1994) ("Plain meaning as a way to understand language is silly. In interesting cases, meaning is not 'plain'; it must be imputed; and the choice among meanings must have a footing more solid than a dictionary."). Yet, it should not be ignored when the context of the language makes its meaning plain, as here.

[37] John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules,* 47 Duke L.J. 327, 333 (1997).

The second provision is the District Clause found in Article I, Section 8 which gives Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over such District." As will be discussed more fully below, the obvious meaning of this section is supported by a long line of cases that repeatedly deny the District the status of a state and reaffirm the intention to create a non-state entity. This status did not impair the ability of Congress to impose other obligations of citizenship. Thus, in *Loughborough v. Blake*,[38] the Court ruled that the lack of representation did not bar the imposition of taxation. Lower courts rejected challenges to the imposition of an unelected local government. The District was created as a unique area controlled by Congress that expressly distinguished it from state entities. This point was amplified by then Judge Scalia of the D.C. Circuit in *United States v. Cohen*:[39] the District Clause "enables Congress to do many things in the District of Columbia which it has no authority to do in the 50 states. There has never been any rule of law that Congress must treat people in the District of Columbia exactly as people are treated in the various states."

2. *The Context of the Language.*

In some cases, the language of a constitutional provision can change when considered in a broad context, particularly with similar language in other provisions. The Supreme Court has emphasized in matters of statutory construction (and presumably in constitutional interpretation) that courts should "assume[] that identical words used in different parts of the same act are intended to have the same meaning."[40] This does not mean that there cannot be exceptions[41] but such exceptions must be based on circumstances under which the consistent interpretation would lead to conflicting or clearly unintentional results.[42]

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[38] 18 U.S. (5 Wheat.) 317, 324 (1820).

[39] 733 F.2d 128, 140 (D.C. Cir. 1984).

[40] *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986).

[41] *See, e.g., District of Columbia v. Carter*, 409 U.S. 418, 419-20 (1973) ("[w]hether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.").

[42] *See, e.g., Milton S. Kronheim & Co., v. District of Columbia*, 91 F.3d 193, 198-99 (D.C. Cir. 1996) (holding that the Commerce Clause and the

An interpretation of the Composition Clause turns on the meaning of "states." A review of the Constitution shows that this term is ubiquitous. Within Article I, the word "states" is central to defining the Article's articulation of various powers and responsibilities. Indeed, if states were intended to have a more fluid meaning to extend to non-states like the District, various provisions become unintelligible. For both the composition of the House and Senate, the defining unit was that of a state with a distinct government, including a legislative branch. For example, before the 17th Amendment in 1913, Article I read: "The Senate of the United States shall be composed of two Senators from each state, chosen by the Legislature thereof . . ." For much of its history, the District did not have an independent government, let alone a true state legislative branch.

Likewise, the Framers referred to electors of the House of Representatives having "the Qualifications requisite for Electors of the most numerous Branch of the State legislature" in Article I, Section 2. The drafters also referred to the "executive authority" of states in issuing writs for special elections to fill vacancies in Article I, Section 2. Like the absence of a legislative branch, the District did not have a true executive authority.

Article I also requires that "[n]o person shall be a Representative who shall not . . . be an Inhabitant of that state in which he shall be chosen." The drafters could have allowed for inhabitants of federal territories or the proposed federal district. Instead, they chose to confine the qualification for service in the House to being a resident of an actual state.

In the conduct of elections under Article I, Section 4, the drafters again mandated that "each state" would establish "[t]he Times, Places, and Manner." This provision specifically juxtaposes the authority of such states with the authority of Congress. The provision makes little sense if a state is defined as including entities created and controlled by Congress.

Article I also ties the term "several states" to the actual states making up the United States. The drafters, for example, mandated that "Representatives and direct Taxes shall be apportioned among the several

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Twenty-First Amendment apply to the District even though "D.C. is not a state.").

states which may be included within this union, according to their respective Numbers." The District was neither subject to taxes at the beginning of its existence nor represented as a member of the union of states.

Article I, clause 3 specified that "each state shall have at Least one Representative." If the Framers believed that the District was a quasi-state under some fluid definition, the District would have presumably had a representative and two Senators from the start. At a minimum, the Composition Clause would have reference the potential for non-state members, particularly given the large territories such as Ohio, which were yet to achieve state status. Yet, there is no reference to the District in any of these provisions. It is relegated to the District Clause, which puts it under the authority of Congress.

The reference to "states" obviously extends beyond Article I. Article II specified that "the Electors [of the president] shall meet in their respective States" and later be "transmit[ted] to the Seat of the Government of the United States," that is, the District of Columbia. When Congress wanted to give the District a vote in the process, it passed the 23rd Amendment. That amendment expressly distinguishes the District from the meaning of a state by specifying that District electors "shall be considered, for the purposes of the election of President and Vice President, to be electors by a state."

Notably, just as Article I refers to apportionment of representatives "among the several states," the later Fourteenth Amendment adopted the same language in specifying that "Representatives shall be apportioned among the several States according to their respective numbers." Thus, it is not true that the reference to states may have been due to some unawareness of the District's existence. The Fourteenth Amendment continued the same language in 1868 after the District was a major American city. Again, the drafters used "state" as the operative term– as with Article I – to determine the apportionment of representatives in Congress. The District was never subject to such apportionment and, even under this bill, would not be subject to the traditional apportionment determinations for other districts.

Likewise, when the Framers specified how to select a president when the Electoral College is inconclusive, they used the word "states" to designate actual state entities. Pursuant to Article II, Section 1, "the Votes shall be taken by States the Representation from each State having one Vote."

Conversely, when the drafters wanted to refer to citizens without reference to their states, they used fairly consistent language of "citizens of the United States" or "the people." This was demonstrated most vividly in provisions such as the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[43] Not only did the drafters refer to the two common constitutional categories for rights and powers (in addition to the federal government), but it cannot be plausibly argued that a federal enclave could be read into the meaning of states in such provisions.

The District Clause itself magnifies the distinction from actual states. It is referred to as the "Seat of Government" and subject to the same authority that Congress would exercise "over all Places purchased by the Consent of the Legislature of the State . . ." Under this language, the District as a whole was delegated to the United States. As the D.C. Circuit stressed recently in *Parker,* "the authors of the Bill of Rights were perfectly capable of distinguishing between "the people," on the one hand, and "the states," on the other." Likewise, when the drafters of the Constitution wanted to refer to the District, they did so clearly in the text. This was evident not only with the original Constitution and the Bill of Rights, but much later amendments. For example, the Twenty-Third Amendment giving the District the right to have presidential electors expressly distinguishes the District from the States in the Constitution and establishes, for that purpose, the District should be treated like a State: mandating "[a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a State.*"[44] This amendment makes little sense if Congress could simply bestow the voting rights of states on the District. Rather, it reaffirmed that, if the District

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[43] *See generally Lee v. Flintkote Co.,* 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) ("[t]he District, unlike the states, has no reserved power to be guaranteed by the Tenth Amendment."). The same can be said of the Eleventh Amendment. *See LaShawn v. Barry*, 87 F.3d 1389, 1394 n.4 (D.C. Cir. 1996) ("The District of Columbia is not a state . . . Thus, [the Eleventh Amendment] has no application here.").

[44] U.S. Const. XXIII amend. Sec. 1.

wishes to vote constitutionally as a State, it requires an amendment formally extending such parity.[45]

These textual references illustrate that the drafters knew the difference between the nouns "state," "territory," and "the District" and used them consistently. If one simply takes the plain meaning of these terms, the various provisions produce a consistent and logical meaning. It is only if one inserts ambiguity into these core terms that the provisions produce conflict and incoherence.

When one looks to the District Clause, the context belies any suggested reservation of authority to convert the district into a voting member of either house. Instead of being placed in the structural section with the Composition Clause, it was relegated to the same section as other areas purchased or acquired by the federal government. Under this clause, Congress is expressly allowed "to exercise like Authority [as over the District] over all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings." If this clause gives Congress the ability to make the federal district into a voting member, then presumably Congress could exercise "like Authority" and give the Department of Defense ten votes in Congress.

The effort to focus on the District Clause rather than the Composition Clause is unlikely to succeed in court. The context of this language reinforces the plain meaning of the text itself. The District Clause concerns the authority of Congress over the internal affairs of the seat of government. To elevate that clause to the same level as the Composition Clause would do great violence to the traditions of constitutional interpretation.

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[45] Even collateral provisions such as the prohibition on federal offices and emoluments in Article I, Section 6 make little sense if the drafters believed that the District could ever be treated like a state. For much of its history, the District was treated either like a territory or a federal agency. Lyndon Johnson appointed Mayor Walter Washington to his post by executive power over federal agencies. Officials held their offices and received their salaries by either legislative or executive action. Since the District was a creation and extension of the federal government, its officials held federal or quasi-federal offices. In the 1970s, Home Rule created more recognizable offices of a city government – though still ultimately under the control of Congress.

3. The Original and Historical Meaning.

i. The Original Understanding of the Composition Clause.

The intent behind the Composition Clause was clear throughout the debates as a vital structural provision. The Framers were obsessed with the power of the states and the structure of Congress. Few matters concerned the Framers more than who could vote in Congress and how they were elected. Indeed, some delegates wanted the House to be elected by the state legislatures as was the Senate.[46] This proposal was not adopted, but the clear import of the debate was that representatives would be elected from the actual states. The very requirement of qualifications being set by "state legislature" was meant to reaffirm that the composition of Congress would be controlled by states.

This view was reinforced by Framers at the time. It was precisely the control of the states of the composition of both houses and the presidency that was the principle argument for the Constitution. The Composition Clause was vital to securing the votes of reluctant members, particularly Antifederalists. Madison emphasized this point in *Federalist No. 45* when he pointed out that "each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence."[47]

In his first comments after the Constitutional Convention, James Wilson emphasized the Composition Clause and the requirement that members be elected by actual states. In an October 6, 1787 speech, Wilson responded to Anti-Federalists who feared the power of the new Congress – a speech described at the time as "the first authoritative explanation of the principles of the NEW FEDERAL CONSTITUTION."[48] Wilson stressed that Congress would be tethered closely to the states and that only states could elect members:

> [U]pon what pretence can it be alleged that it was designed to annihilate the state governments? For, I will undertake to prove that

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[46] 1 Records of the Federal Convention of 1787, at 359 (Max Farrand ed., rev. ed. 1966)

[47] The Federalist No. 45, at 220 (J. Madison).

[48] 13 Documentary History of the Ratification of the Constitution 337, 342 (John P. Kaminski & Gaspare J. Saladino, eds., 1981)

> upon their existence, depends the existence of the foederal plan. For this purpose, permit me to call your attention to the manner in which the president, senate, and house of representatives, are proposed to be appointed. . . . The senate is to be composed of two senators from each state, chosen by the legislature; and therefore if there is no legislature, there can be no senate. The house of representatives, is to be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature,--*unless therefore, there is a state legislature, that qualification cannot be ascertained*, and the popular branch of the foederal constitution must likewise be extinct. From this view, then it is evidently absurd to suppose, that the annihilation of the separate governments will result from their union; or, that having that intention, the authors of the new system would have bound their connection with such indissoluble ties.[49]

Wilson's comments, in what was billed at the time as the first public defense of the draft Constitution by a Framer, illustrate how important the Composition Clause of Article I, Section 2 was to the structure of government.[50] It was not some ambiguity but the very cornerstone for the new federal system. It is safe to say that the suggestion that the District could achieve equal status to states in Congress would have been viewed as absurd, particularly given the fact that there could be no state legislature for the federal city. Wilson and others made clear that voting members of Congress would be reserved to the representatives of the actual states.

This view was again reaffirmed in the Third Congress in 1794 – only a few years after ratification. The issue of the meaning of Article I, Section 2 was raised when a representative of the territory of Ohio sought admission as a non-voting member to the House. Connecticut Rep. Zephaniah Swift objected to the admission of anyone who is not a representative of a state:

> The Constitution has made no provision for such a member as this person is intended to be. If we can admit a Delegate to Congress or a member of the House of Representatives, we may with equal

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49 *Id.*

50 *Id.*

propriety admit a stranger from any quarter of the world.[51] Although non-voting members would be allowed, the members on both sides agreed that the Constitution restricted voting members to representatives of actual states. This debate, occurring only a few years after the ratification (and with both drafters and ratifiers) serving in Congress reinforces the clear understanding of the meaning and purpose of the language.

ii. The Original Understanding of the District Clause.

Conversely, the District Clause was not part of the debate or the provisions relating the structure of the government itself. It was contained with a list of enumerated powers of Congress in Section 8 that cover everything from creating post offices to inferior courts. It was notably placed in the same clause as the power of the Congress over "the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings." Nevertheless, the creation of a seat of government was an issue of interest and concern before ratification.

As noted above, the status of the federal district was also clearly understood as a non-state entity. The Supreme Court has observed that "[t]he object of the grant of exclusive legislation over the district was . . . national in the highest sense, and the city organized under the grant became the city, not of a state, not of a district, but of a nation."[52] While Madison conceded that some form of "municipal legislature for local purposes" might be allowed, the district was to be the creation of Congress and maintained at its discretion.[53]

It has been repeatedly asserted by defenders of this legislation that the Drafters simply did not consider the non-voting status of District residents and could not possibly have intended such a result. This argument is clearly and irrefutably untrue. The political status of the District residents was a controversy then as it is now. The Federal Farmer captured this concern in his January 1788 letter, where he criticized the fact that there was not "a single stipulation in the constitution, that the inhabitants of this city, and

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[51] 4 Annals of Cong 884 (Nov 17, 1794). This debate is detailed in David P. Currie, *The Constitution in Congress: The Third Congress* 1793-1795, 63 U. Chi. L. Rev. 1, 42 (1996).

[52] *O'Donoghue*, 289 U.S. at 539-40.

[53] The Federalist No. 43, at 280 (J. Madison).

these places, shall be governed by laws founded on principles of Freedom."[54]

The absence of a vote in Congress was clearly understood as a prominent characteristic of a federal district. However, being a resident of the new capitol city was viewed as compensation for this limitation. Indeed, it was the source of considerable competition and jealousy among the states.[55] In the Virginia Ratification Convention, Patrick Henry observed with unease how they have been

> told that numerous advantages will result, from the concentration of the wealth and grandeur of the United States in one happy spot, to those who will reside in or near it. Prospects of profits and emoluments have a powerful influence on the human mind.[56]

Since residence would be voluntary within the federal district, most viewed the representative status as a *quid pro quo* for the obvious economic and symbolic benefit. Indeed, despite the fact that the citizens of the capitol city would be disenfranchised, many cities from Baltimore to Philadelphia to Elizabethtown vied for the opportunity to be selected for the honor.[57] Moreover, it is not true that few people thought that the capitol city "would evolve into the vibrant demographic and political entity it is today."[58] To the contrary, the competition among the states for this designation was due in great part to the expectation that it would grow to be the greatest American city. Indeed, some cities vying for the status were already among

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[54] Letters from the Federal Farmer to the Republican, XVI (January 20, 1788) reprinted in 2 The Complete Anti-Federalist 327 (Herbert J. Storing, ed., Univ. of Chicago Press 1981); *see also* The Founders' Constitution, *supra*, at 220.

[55] Notably, during the Virginia Ratification Convention, when Grayson describes the District as "detrimental and injurious to the community, and how repugnant to the equal rights of mankind," he is not referring to the lack of voting rights but the anticipated power that District residents would wield over the rest of the nation due to "such exclusive emoluments." The Founders' Constitution, *supra,* at 190.

[56] *Id.*

[57] Bowling, *supra*, at 78-79, 182-190.

[58] Richard P. Bress & Lori Alvino McGill, "Congressional Authority to Extend Voting Representation to Citizens of the District of Columbia: The Constitutionality of H.R. 1905, American Constitutional Society, May 2007, at 3.

the largest cities like Baltimore, Annapolis, and Philadelphia. The new capitol city was expected to be grand. Ultimately, Pierre Charles L'Enfant designed a city plan to accommodate 800,000 people – a huge city at that time.[59]

It is true that there was little consideration of how residents would fare in terms of taxation, civil rights, conscription and the like.[60] There is a very good reason for this omission: the drafters understood that these conditions would depend entirely on Congress. Since these matters would be left to the discretion of Congress, the details were not relevant to the constitutional debates. However, the *status* of the residents was clearly debated and understood: residents would be represented by Congress as a whole and would not have individual representation in Congress.

During ratification, various leaders objected to the disenfranchisement of the citizens in the district. In New York, Thomas Tredwell objected that the non-voting status of the District residents "departs from every principle

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[59] *Adams v. Clinton*, 90 F. Supp. 2d 35, 49 n. 24 (D.D.C. 2000).

[60] Various references were made to potential forms of local governance that might be allowed by Congress. Madison noted that:

> as the [ceding] State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting [the federal district]; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated.

The Federalist Papers No. 43, *supra*, at 280 The drafters correctly believed that the "inducements" for ceding the land would be enough for residents to voluntarily agree to this unique status. Moreover, Madison correctly envisioned that forms of local government would be allowed – albeit in varying forms over the years.

of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote."[61] Some delegates even suggested amendments that would have addressed the problem. One such amendment was offered by Alexander Hamilton, who wanted the District residents to be able to secure representation in Congress once they grew to a reasonable size.[62] On July 22, 1788, Hamilton asked that the District Clause be amended to mandate that "the Inhabitants of the said District shall be entitled to the like essential Rights as the other inhabitants of the United States in general."[63] Indeed, at least two amendments were proposed to give residents representations in that convention alone. Other such amendments were offered in states like North Carolina and Pennsylvania. These efforts to give District residents conventional representation failed despite the advocacy of no less a person than Alexander Hamilton.[64]

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[61] 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 402 (Jonathan Elliot ed., 1888). The whole of Thomas Tredwell's comments merit reproduction:

> The plan of the federal city, sir, departs from every principle of freedom, as far as the distance of the two polar stars from each other; for, subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote, is laying a foundation on which may be erected as complete a tyranny as can be found in the Eastern world. Nor do I see how this evil can possibly be prevented, without razing the foundation of this happy place, where men are to live, without labor, upon the fruit of the labors of others; this political hive, where all the drones in the society are to be collected to feed on the honey of the land. How dangerous this city may be, and what its operation on the general liberties of this country, time alone must discover; but I pray God, it may not prove to this western world what the city of Rome, enjoying a similar constitution, did to the eastern.

[62] 5 The papers of Alexander Hamilton 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

[63] *Id.*

[64] This is not to say that the precise conditions of the cessation were clear. Indeed, some states passed Amendments that qualified their votes – amendments that appear to have been simply ignored. Thus, Virginia ratified the Constitution but specifically indicated that some state authority

Notably, in at least one state convention, the very proposal to give the District a vote in the House but not the Senate was proposed. In Massachusetts, Samuel Osgood sought to amend the provision to allow the residents to be "represented in the lower House."[65] No such amendment was enacted. Instead, some state delegates like William Grayson distinguished the District from a state entity in Virginia. Repeatedly, he stressed that the District would not have basic authorities and thus "is not to be a fourteenth state."[66]

Objections to the political status of the District residents were unpersuasive before ratification. The greatest concern was that the District could become create an undue concentration of federal authority and usurp state rights. Even with the express guarantees of state powers under the Composition Clause, there were many who were still deeply suspicious of the ability of the federal government to "annihilate" state authority.[67] Antifederalists like George Mason viewed the existence of a district under the exclusive control of Congress to be threatening.[68] He was not alone. Many viewed the future city to be a likely threat not just to other cities but

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would continue to apply to citizens of the original state from which "Federal Town and its adjacent District" was ceded. Moreover, Congress enacted a law that provided that the laws of Maryland and Virginia "shall be and continue in force"[64] in the District – suggesting that, unless repealed or amended, Maryland continues to have jurisdictional claims in the District.

[65] *Id.*

[66] The Founders' Constitution, *supra*, at 223.

[67] *Id.*

[68] In the Virginia Ratification Convention, notes record how George Mason stressed his view that

> few clauses in the Constitution so dangerous as that which gave Congress exclusive power of legislation within ten miles square. Implication, he observed, was capable of any extension, and would probably be extended to augment the congressional powers. But here there was no need of implication. This clause gave them an unlimited authority, in every possible case, within that district. This ten miles square, says Mr. Mason, may set at defiance the laws of the surrounding states, and may, like the custom of the superstitious days of our ancestors, become the sanctuary of the blackest crimes.

the nation due to its power and size. Samuel Osgood noted that he had "finally fixed upon the exclusive legislation in the Ten Miles Square . . What an inexhaustible fountain of corruption we are opening?"[69] A member of the New York Ratification Convention compared the new Capitol City to Rome and complained that it could prove so large and powerful as to control the nation as did that ancient city.[70] There would have been a riot if, in addition to creating a federal district, Congress could give it voting status equal to a state. The possibility of a federal district or territory being made voting members of Congress would have certainly endangered – if not doomed -- the precarious majority supporting the Constitution.

In order to quell fears of the power of the District, supporters of the Constitution emphasized that the exclusive authority of Congress over the District would have no impact on states, but was only a power related to the *internal* operations of the seat of government. This point was emphasized by Edmund Pendleton on June 16, 1788 as the President of the Virginia Ratification Convention. He assured his colleagues that Congress could not use the District Clause to affect states because the powers given to Congress only affected District residents and not states or state residents:

> Why oppose this power? Suppose it was contrary to the sense of their constituents to grant exclusive privileges to citizens residing within that place; the effect would be directly in opposition to what he says. It could have *no operation without the limits* of that district. Were Congress to make a law granting them an exclusive privilege of trading to the East Indies, it could have no effect the moment it would go without that place; for their exclusive power is confined to that district. . . . This exclusive power is limited to that place solely for their own preservation, which all gentlemen allow to be necessary ...[71]

Pendleton's comments capture the essence of the problem then and now. Congress has considerable plenary authority over the District, but that authority is lost when it is used to change the District's status vis-à-vis the states. Such external use of District authority is precisely what delegates were assured could not happen under this clause.

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69 Bowling, *supra*, at 81.

70 *Id.*

71 The Founders' Constitution, *supra*, at 180.

iii. Retrocession and the Affirmance of the Non-Voting Status of District Residents.

The knowledge of the non-voting status of the Capitol City was again reaffirmed not long after the cessation when a retrocession movement began. Within a few years of ratification, leaders continued to discuss the disenfranchisement of citizens from votes in Congress was clearly understood. Republican Rep. John Smilie from Pennsylvania objected that "the people of the District would be reduced to the state of subjects, and deprived of their political rights."[72] The passionate opposition to the non-voting status of the District was a strong as it is today:

> We have most happily combined the democratic representative with the federal principle in the Union of the States. But the inhabitants of this territory, under the exclusive legislation of Congress, partake of neither the one nor the other. They have not, and they cannot possess a State sovereignty; nor are they in their present situation entitled to elective franchise. They are as much the vassals of Congress as the troops that garrison your forts, and guard your arsenals. They are subjects, not merely because they are not represented in Congress, but also because they have no rights as freemen secured to them by the Constitution.[73]

Members questioned the need to "keep the people in this degraded situation" and objected to subjecting American citizens to "laws not made with their own consent."[74] The federal district was characterized as nothing more than despotic rule "by men . . . not acquainted with the minute and local interests of the place, coming, as they did, from distances of 500 to 1000 miles."[75] Much of this debate followed the same lines of argument that we hear today. While acknowledging that "citizens may not possess full political rights," leaders like John Bacon of Massachusetts noted that they

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[72] 10 Annals of Cong. 992 (1801); *see also* Congressional Research Service, *supra*, at 6.

[73] Mark Richards, Presentation before the Arlington Historical Society, May 9, 2002 (citing Congressional Record, 1805: 910) (quoting Rep. Ebenezer Elmer of New Jersey).

[74] Richards, *supra*, at 3

[75] *Id.* (quoting Rep. Smilie)

had special status and influence as residents of the Capitol City.[76] Yet, retrocession bills were introduced within a few years of the actual cessation – again prominently citing the lack of any congressional representation as a motivating factor. Indeed, the retrocession of Virginia highlights the original understanding of the status of the District. Virginians contrasted their situation with those residents of Washington. For them, cessation was "an evil hour, [when] they were separated" from their state and stripped of their political voice.[77] Washingtonians, however, were viewed as compensated for their loss of political representation. As a committee noted in 1835, "[o]ur situation is essentially different, and far worse, than that of our neighbors on the northern side of the Potomac. They are citizens of the Metropolis, of a great, and noble Republic, and wherever they go, there clusters about them all those glorious associations, connected with the progress and fame of their country. They are in some measure compensated in the loss of their political rights."[78]

Thus, during the drive for retrocession that began shortly after ratification, District residents appear to have opposed retrocession and accepted the condition as non-voting citizens in Congress for their special status. Indeed, the only serious retrocession effort focused on Georgetown and not the Capitol City itself. Some in Maryland vehemently objected to the non-voting status, complaining to Congress that "the people are almost afraid to present their grievances, least a body in which they are not represented, and which feels little sympathy in their local relations, should in their attempt to make laws for them, do more harm than good."[79] Yet, even in a vote taken within Georgetown, the Board of Common Council voted overwhelmingly (549 to 139) to accept these limitations in favor of staying with the federal district.[80]

During the Virginia retrocession debate, various sources reported the strong opposition of residents in the city to returning to Maryland – even though such retrocession would return their right to full representation. The reason was financial. District residents received considerable economic

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[76] *Id.* at 4.
[77] *Id.*
[78] *Id.*
[79] *Id.* (quoting memorial submitted by Maryland Senator William D. Merrick).
[80] *Id.*

advantages from living within the federal city. These benefits were not as great in the Virginia areas, a point made in congressional report:

> The people of the county and town of Alexandria have been subjected not only to their full share of those evils which affect the District generally, but they have enjoyed none of those benefits which serve to mitigate their disadvantages in the county of Washington. The advantages which flow from the location of the seat of Government are almost entirely confined to the latter county, *whose people, as far as your committee are advised, are entirely content to remain under the exclusive legislation of Congress*. But the people of the county and town of Alexandria, who enjoy few of those advantages, are (as your committee believe) justly impatient of a state of things which subjects them not only to all the evils of inefficient legislation, but also to political disfranchisement.[81]

The result of this debate was the retrocession of Northern Virginia, changing the shape of the District from the original diamond shape created by George Washington.[82] The Virginia land was retroceded to Virginia in 1846. The District residents chose to remain as part of the federal seat of government – independent from participation or representation in any state. Just as with the first cession, it was clear that residents had knowingly "relinquished the right of representation, and . . . adopted the whole body of Congress for its legitimate government."[83]

Finally, much is made of the ten-year period during which District residents voted with their original states – before the federal government formally took over control of the District. As established in *Adams*, this argument has been raised and rejected by courts as without legal

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[81] *Retrocession of Alexandria to Virginia*, Daily Nat'l Intelligencer, Mar. 20, 1846, at 1 (reprinting committee report).

[82] Under the Residence Act of July 16, 1790, Washington was given the task – not surprising given his adoration around the country and his experience as a surveyor. Washington adopted a diamond-shaped area that included his hometown of Alexandria, Virginia. This area included areas that now belong to Alexandria and Arlington. At the time, the area contained two developed municipalities (Georgetown and Alexandria) and two undeveloped municipalities (Hamburg – later known as Funkstown—and Carrollsburg).

[83] *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 324 (1820).

significance.[84] This was simply a transition period before the District became the federal enclave. Under the Residence Act of 1790, entitled An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, Congress selected Philadelphia as the temporary capitol while authorizing the establishment of the federal district.[85] This law allowed the District to continue under the prior state systems pending the implementation of federal jurisdiction. That law expressly states that, while the District was being surveyed and established, "the operation of the laws of the State within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide."[86] Clearly, Congress could use its authority regarding the internal affairs of the District to continue such state functions pending its final takeover – to avoid a dangerous gap in basic governmental functions. It was clearly neither the intention of the drafters nor indicative of the post-federalization status of residents. Rather, as indicated by the Supreme Court,[87] the exclusion of residents from voting was the consequence of the completion of the cessation transaction – which transformed the territory from part of a state, whose residents were entitled to vote under Article I, to being the seat of government, whose residents were not. Although Congress' exercise of jurisdiction over the District through passage of the Organic Act was the last step in that process, it was a step expressly contemplated by the Constitution.[88]

iv. *Modern Evolution of the District Government as a Non-State Entity.*

When one looks at the historical structure and status of the District as a governing unit, it is obvious that neither the drafters nor later legislators would have viewed the District as interchangeable with a state under Article I. When this District was first created, it was barely a city, let alone a substitute for a state: "The capitol city that came into being in 1800 was, in

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[84] *Adams v. Clinton*, 90 F. Supp. 2d 35, 62 (D.D.C. 2000); *Albaugh v. Tawes,* 233 F. Supp. 576, 576 (D.Md. 1964) (per curiam).

[85] Act Establishing the Temporary and Permanent Seat of the Government of the United States, ch. 28, 1 Stat. 130 (1790).

[86] *Id.*

[87] *Reily v. Lamar*, 6 U.S. (2 Cranch) 344, 356-57 (1805).

[88] *Adams v. Clinton*, 90 F. Supp. 2d 35, 62 (D.D.C. 2000).

reality, a few federal buildings surrounded by thinly populated swampland, on which a few marginal farms were maintained."[89]

For much of its history, the District was not even properly classified as an independent city. In 1802, the first mayor was a presidential appointee -- as was the council.[90] Congress continued to possess authority over its budget and operations. While elections were allowed until 1871, the city was placed under a territorial government and effectively run by a Board and Commissioner of Public Works – again appointed by the President. After 1874, the city was run through Congress and the Board of Commissioners.[91]

President Lyndon Johnson expressly treated the District as the equivalent of a federal agency when he appointed Walter Washington to be mayor in 1967.[92] Under Johnson's legal interpretation, giving the District a vote in Congress would have been akin to making the Department of Defense a member to represent all of the personnel and families on military bases. In granting this form of home rule, Congress retained final approval of all legislative and budget items. In 1973, when it passed the Self-Government Act, Congress noted that it was simply a measure to "relieve Congress of the burden of legislating upon essentially local District matters."[93] Congress again retained final approval.

Thus, for most of its history, the District was maintained as either a territory, a federal agency, or a delegated governing unit of Congress. Both of these constructions is totally at odds with the qualification and descriptions of voting members of Congress. The drafters went to great lengths to guarantee independence of members from federal offices or benefits in Article I, Section 6. Likewise, no members are subject to the potential manipulation of their home powers by either the federal government or the other states (through Congress).

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89 Philip G. Schrag, *By the People: The Political Dynamics of a Constitutional Convention*, 72 Geo. L.J. 819, 826 (1984) (noting that "[t]he towns of Georgetown and Alexandria were included in the District, but even Georgetown was, to Abigail Adams, 'the very dirtyest Hole I ever saw for a place of any trade or respectability of inhabitants").

90 *Id.* at 826-828.

91 *Id.*

92 *Id.* at 829-830.

93 D.C. Code 1981, § 1-201(a).

The historical record belies any notion that either the drafters or later legislators considered the District to be fungible with a state for the purposes of voting in Congress. These sources show that the strongest argument for full representation is equitable rather than constitutional or historical. As will be shown in the final section of this statement, the inequitable status of the District can and should be remedied by other means.

4. A Response to Messrs. Dinh, Starr et al.

Given the unwavering consistency between the plain meaning of the text of Article I and the historical record, it is baffling to read assertions by Professor Dinh that "[t]here are no indications, textual or otherwise" to suggest that the Framers viewed the non-voting status of the District to be permanent or beyond the inherent powers of Congress to change.[94] Indeed, in the last hearing, Professor Dinh repeated his position that this issue was no consideration during the drafting and ratification. He (and Mr. Charnes) have written that the non-voting status "was neither necessary nor intended by the Framers" and further assert that the only purpose of establishing a federal district was "to ensure that the national capitol would not be subject to the influences of any state."[95] They insist that the "representation for the District's residents seemed unimportant" at the time.[96] The record, however, directly contradicts these statements. As noted earlier, there were various stated purposes behind the federal district and the non-voting status was repeatedly raised before final ratification. Most importantly, the non-voting status of residents was tied directly to the concept of a seat of government under the control and exclusive jurisdiction of Congress. The non-voting status of the District was viewed as obnoxious by some and essential by others before ratification and during the early retrocession movement.

It is true that the District is viewed as "an exceptional community" that is "[u]nlike either the States or Territories,"[97] this does not mean that this unique or "*sui generis*" status empowers Congress to bestow the rights and privileges to the District that are expressly given to the states. To the contrary, Congress has plenary authority in the sense that it holds legislative

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94 Dinh & Charnes, *supra*, at 6.

95 *Id.*

96 *Id.* at 6.

97 *District of Columbia v. Carter*, 409 U.S. 418, 452 (1973)

authority on matters *within* the District.[98] The extent to which the District has and will continue to enjoy its own governmental systems is due entirely to the will of Congress.[99] This authority over the District does not mean that it can increase the power of the District to compete with the states or dilute their constitutionally guaranteed powers under the Constitution. Indeed, as noted below, the District itself took a similar position in recent litigation when it emphasized that it should not be treated as a state under the Second Amendment and that constitutional limitations are not implicated by laws affecting only the federal enclave with "no possible impact on the states."[100]

The repeated reference to the District Clause in terms of taxation, conscription, and other state-like matters is entirely irrelevant. Congress can impose any of these requirements within the District. However, it cannot use the authority over the internal operations of the District to change its political status vis-à-vis the states. Ironically, just as the non-voting status of the District was discussed before ratification, so was the distinction between exercising powers within the District and using the same powers against states. For example, during the Virginia debates, Pendleton defended the District Clause by noting that "this clause does not give Congress power to impede the operation of any part of the Constitution, or to make any regulation that may affect the interests of the citizens of the Union at large." The dangers posed by a "Federal Town" were muted by the fact that Congress would control its operations and Congress' exclusive legislation concerned its internal operations.

It is equally hard to see the "ample constitutional authority" alluded to by Dinh and Charnes for Congress using its authority over the internal operations of the District to change the composition of voting members in a house of Congress.[101] To the contrary, the arguments made in their paper strongly contradict suggestions of inherent authority to create de facto state members of Congress. For example, it is certainly true that the Constitution gives Congress "extraordinary and plenary power to legislate with respect to

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[98] *Id.*, 409 U.S. at 429 ("The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs.").

[99] *See* Home Rule Act of 1973, D.C. Code §§1-201.1 *et seq.*

[100] Brief for the District of Columbia in *Parker v. District Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007), at 38.

[101] Dinh & Charnes, *supra*, at 4.

the District."[102] However, this legislation is not simply a District matter. This legislation affects the voting rights of the states by augmenting the voting members of Congress. This is legislation with respect to Congress and its structural make-up. More importantly, Dinh and Charnes go to great lengths to point out how different the District is from the states, noting that the District Clause

> works an exception to the constitutional structure of 'our Federalism," which delineates and delimits the legislative power of Congress and state legislatures. In joining the Union, the states gave up certain of their powers. Most explicitly, Article II, section 10 specifies which are prohibited to the States. None of these prohibitions apply to Congress when it exercises its authority under the District Clause. Conversely, Congress is limited to legislative powers enumerated in the Constitution; such limited enumeration, coupled with the reservation under the Tenth Amendment, serves to check the power of Congress vis-à-vis the states.[103]

This is precisely the point. The significant differences between the District and the states further support the view that they cannot be treated as the same entities for the purposes of voting in Congress. The District is not independent of the federal government but subject to the will of the federal government. Nor is the District independent of the states, which can exercise enormous power over its operations. The drafters wanted members to be independent of any influence exerted through federal offices or the threat of arrest. For that reason, they expressly prohibited members from holding offices with the federal government[104] other than their legislative offices and protected them under the Speech or Debate Clause.[105]

The District has different provisions because it was not meant to act as a state. For much of its history, the District was treated like a territory or a federal agency without any of the core independent institutions that define most cities, let alone states. Thus, the District is allowed exceptions because it is not serving the functions of a state in our system.

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102 *Id.*
103 *Id.* at 6.
104 U.S. Const. Art. I, Sec. 6, cl. 1.
105 U.S. Const. Art. I, Sec. 6, cl. 2.

It has been argued by both Dinh and Starr that the references to "states" are not controlling because other provisions with such references have been interpreted as nevertheless encompassing District residents. This argument is illusory. The relatively few cases extending the meaning of states to the District often involved irreconcilable conflicts between a literal meaning of the term state and the inherent rights of all American citizens under the equal protection clause and other provisions. District citizens remain U.S. citizens, even though they are not state citizens. The creation of the federal district removed one right of citizenship – voting in Congress – in exchange for the status of being part of the Capitol City. It was never intended to turn residents into non-citizens with no constitutional rights. As the Court stated in 1901:

> The District was made up of portions of two of the original states of the Union, and was not taken out of the Union by cessation. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution . . . The Constitution had attached to [the District] irrevocably. There are steps which can never be taken backward . . . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession.[106]

The upshot of these opinions is that a literal interpretation of the word "states" would produce facially illogical and unintended consequences. Since residents remain U.S. citizens, they must continue to enjoy those protections accorded to citizens.[107] Otherwise, they could all be enslaved or impaled at the whim of Congress.

Likewise, the Commerce Clause is intended to give Congress the authority to regulate commerce that crosses state borders. While the Clause refers to commerce "among the several states," the Court rejected the notion

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[106] *O'Donoghue v. United States*, 289 U.S. 516, 540-541 (1933) (quoting *Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901)).

[107] *See, e.g., Callan v. Wilson,* 127 U.S. 540, 550 (1888) (holding that District residents continue to enjoy the right to trial as American citizens.).

that it excludes the District as a non-state.[108] The reference to several states was to distinguish the regulated activity from intra-state commerce. As a federal enclave, the District was clearly subsumed within the Commerce Clause.

None of these cases means that the term "states" can now be treated as having an entirely fluid and malleable meaning. The courts merely adopted a traditional interpretation as a way to minimize the conflict between provisions and to reflect the clear intent of the various provisions.[109] The District clause was specifically directed at the meaning of a state – it creates a non-state status related to the seat of government and particularly Congress. Non-voting status directly relates and defines that special entity. In provisions dealing with such rights as equal protection, the rights extend to all citizens of the United States. The literal interpretation of states in such contexts would defeat the purpose of the provisions and produce a counterintuitive result. Thus, Congress could govern the District without direct representation but it must do so in such a way as not to violate those rights protected in the Constitution:

> Congress may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, *so long as it does not contravene any provision of the Constitution of the United States*.[110]

Supporting the textual interpretation of the District Clause is the fact that Congress had to enact statutes and a constitutional amendment to treat the District as a quasi-state for some purposes. Thus, Congress could enact a law that allowed citizens of the District to maintain diversity suits despite the fact that the Diversity Clause refers to diversity between "states." Diversity jurisdiction is meant to protect citizens from prejudice of being tried in the state courts of another party. The triggering concern was the

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108 *Stoutenburgh v. Hennick*, 129 U.S. 141 (1888).

109 *See also District of Columbia v. Carter,* 409 U.S. 418, 420 (1973) ("Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.").

110 *Palmore v. United States*, 411 U.S. 389, 397-398 (1973).

fairness afforded to two parties from different jurisdictions. District residents are from a different jurisdiction from citizens of any state and the diversity conflict is equally real.

The decision in *National Mutual Ins. Co. v. Tidewater Transfer Co., Inc.*,[111] is heavily relied upon in the Dinh and Starr analyses. However, the actual rulings comprising the decision would appear to contradict their conclusions. Only two justices indicated that they would treat the District as a state in their interpretations of the Constitution. The Court began its analysis by stating categorically that the District was not a state and could not be treated as a state under Article III. This point was clearly established in 1805 in *Hepburn v. Ellzey,*[112] only a few years after the establishment of the District. The Court rejected the notion that "Columbia is a distinct political society; and is therefore "a state" . . . the members of the American confederacy only are the states contemplated in the constitution."[113] This view was reaffirmed again by the Court in 1948:

> In referring to the "States" in the fateful instrument which amalgamated them into the "United States," the Founders obviously were not speaking of states in the abstract. They referred to those concrete organized societies which were thereby contributing to the federation by delegating some part of their sovereign powers and to those that should later be organized and admitted to the partnership in the method prescribed. They obviously did not contemplate unorganized and dependent spaces as states. The District of Columbia being nonexistent in any form, much less a state, at the time of the compact, certainly was not taken into the Union of states by it, nor has it since been admitted as a new state is required to be admitted.[114]

However, the Court also ruled that Congress could extend diversity jurisdiction to the District because this was a modest use of Article I authority given the fact that the "jurisdiction conferred is limited to controversies of a justiciable nature, the sole feature distinguishing them from countless other controversies handled by the same courts being the fact

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111 337 U.S. 582 (1948)
112 6 U.S. (2 Cranch) 445 (1805).
113 *Id.* at 453.
114 *National Mutual Ins.*, 337 U.S. at 588.

that one party is a District citizen."[115] Thus, while residents did not have this inherent right as members of a non-state, Congress could include a federal enclave within the jurisdictional category.

When one looks at the individual opinions of this highly fractured plurality decision, it is hard to see what about *Tidewater* gives advocates so much hope.[116] Dinh and his co-author Charnes state that "[t]he significance of *Tidewater* is that the five justices concurring in the result believed either that the District was a state under the terms of the Constitution or that the District Clause authorized Congress to enact legislation treating the District as a state."[117] Yet, to make this bill work, a majority of the Court would have to recognize that the District clause gives Congress this extraordinary authority to convert the District into an effective state for voting purposes. In *Tidewater*, six of nine justices appear to reject the argument that the clause could be used to extend diversity jurisdiction to the District, a far more modest proposal than creating a voting non-state entity. It was the fact that five justices agreed *in the result* that produced the ruling, a point emphasized by Justice Frankfurter when he noted with considerable irony in his dissent:

> A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected -- but not the same majority. And so, conflicting minorities in combination bring to pass a result -- paradoxical as it may appear -- which differing majorities of the Court find insupportable.[118]

When one reviews the insular opinions, it is easy to see what Frankfurter meant and why this case is radically overblown in its significance to the immediate controversy. Justices Rutledge and Murphy, in concurring, based their votes on the irrelevance of the distinction between a state citizen and a District citizen for the purposes of diversity. This view, however, was

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115 *Id.* at 592.

116 The Congressional Research Service included an exhaustive analysis of the case in its excellent study of this bill and its constitutionality. Congressional Research Service, *supra*, at 16.

117 Dinh & Charnes, *supra*, at 13.

118 *Tidewater*, 337 U.S. at 654

expressly rejected by the Jackson plurality of Jackson, Black, and Burton. The Jackson plurality did not agree with Rutledge that the term "state" had a more fluid meaning – an argument close to the one advanced by Dinh and Starr. Conversely, Rutledge and Murphy strongly dissented from the arguments of the Jackson plurality.[119] Likewise, two dissenting opinions, Justice Frankfurter, Vinson, Douglas and Reed rejected arguments that Congress had such authority under either the District Clause or the Diversity Clause in the case. The Jackson plurality prevailed because Rutledge and Murphy were able to join in the result, not the rationale. Rutledge and Murphy suggested that they had no argument with the narrow reading of the structuring provisions concerning voting members of Congress. Rather, they drew a distinction with other provisions affecting the rights of individuals as potentially more expansive:

> [The] narrow and literal reading was grounded exclusively on three constitutional provisions: the requirements that members of the House of Representatives be chosen by the people of the several states; that the Senate shall be composed of two Senators from each state; and that each state "shall appoint, for the election of the executive," the specified number of electors; all, be it noted, provisions relating to the organization and structure of the political departments of the government, not to the civil rights of citizens as such.

Thus, Rutledge saw that, even allowing for some variation in the interpretation of "states," there was distinction to be drawn when such expansive reading would affect the organization or structure of Congress. This would leave at most three justices who seem to support the interpretation of the District clause advanced in this case.

The citation of *Geofroy v. Riggs*,[120] by Professor Dinh is equally misplaced. It is true that the Court found that a treaty referring to "states of the Union" included the District of Columbia. However, this interpretation was not based on the U.S. Constitution and its meaning. Rather, the Court relied on meaning commonly given this term under international law:

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[119] *Id.* at 604 ("But I strongly dissent from the reasons assigned to support it in the opinion of MR. JUSTICE JACKSON.")

[120] 133 U.S. 258 (1890).

> It leaves in doubt what is meant by "States of the Union." Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, §§ 5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government.[121]

This was an interpretation of a treaty based on the most logical meaning that the signatories would have used for its terminology. It was not, as suggested, an interpretation of the meaning of that term in the U.S. Constitution. Indeed, as shown above, the Court begins by recognizing the more narrow meaning under the Constitution before adopting a more generally understood meaning in the context of international and public law for the purpose of interpreting a treaty.

Finally, Professor Dinh and Mr. Charnes place great importance on the fact that citizens overseas are allowed to vote under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[122] This fact is cited as powerful evidence that "[i]f there is no constitutional bar prohibiting Congress from permitting overseas voters who are not citizens of a state to vote in federal elections, there is no constitutional bar to similar legislation extending the federal franchise to District residents." Again, the comparison between overseas and District citizens is misplaced. While UOCAVA has never been reviewed by the Supreme Court and some legitimate questions still remain about its constitutionality, a couple of courts have found the statute to be constitutional.[123] In the overseas legislation, Congress made a logical choice in treating citizens abroad as continuing to be citizens of the last state in which they resided. This same argument was used and rejected

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[121] *Id.* at 268.

[122] Pub. L. 99-410, 100 Stat. 924 (1986), codified at 42 U.S.C. §§ 1973ff et seq. (2003).

[123] *See Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001); *De La Rosa v. United States*, 842 F. Supp. 607, 611 (D. P. R. 1994).

in *Attorney General of the Territory of Guam v. United States*.[124] In that case, citizens of Guam argued (as do Dinh and Charnes) that the meaning of state has been interpreted liberally and the Overseas Act relieves any necessity for being the resident of a state for voting in the presidential election. The court categorically rejected the argument and noted that the act was "premised constitutionally on prior residence in a state."[125] The court quoted from the House Report in support of this holding:

> The Committee believes that a U.S. citizen residing outside the United States can remain a citizen of his last State of residence and domicile for purposes of voting in Federal elections under this bill, as long as he has not become a citizen of another State and has not otherwise relinquished his citizenship in such prior State.[126]

Given this logical and limited rationale, the Court held that UOCAVA "does not evidence Congress's ability or intent to permit all voters in Guam elections to vote in presidential elections."[127]

Granting a vote in Congress is not some tinkering of "the mechanics of administering justice in our federation."[128] This would touch upon the constitutionally sacred rules of who can create laws that bind the nation.[129] This is not the first time that Congress has sought to give the District a voting role in the political process that is given textually to the states. When Congress sought to allow the District to participate in the Electoral College, it passed a constitutional amendment to accomplish that goal – the Twenty-Third Amendment. Likewise, when Congress changed the rules for electing

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124 738 F.2d 1017 (9th Cir. 1984).

125 *Id.* at 1020.

126 *Id.* (citing H.R. Rep. No. 649, 94th Cong., 1st Sess. 7, reprinted in 1975 U.S. Code Cong. & Ad. News 2358, 2364).

127 *Id.*

128 *National Mutual Ins.* at 585.

129 In the past, the District and various territories were afforded the right to vote in Committee. However, such committees are merely preparatory to the actual vote on the floor. It is that final vote that is contemplated in the constitutional language. *See Michel v. Anderson*, 14 F.3d 623, 629 (D.C. Cir. 1994) (recognizing the constitutional limitation that would bar Congress from granting votes in the full House).

members of the United States Senate, it did not extend the language to include the District. Rather, it reaffirmed that the voting membership was composed of representatives of the states. These cases and enactments reflect that voting was a defining characteristic of the District and not a matter that can be awarded (or removed) by a simple vote of Congress.

The overwhelming case precedent refutes the arguments of Messrs. Dinh and Starr. Indeed, just recently in *Parker v. District of Columbia*,[130] the United States Court of Appeals for the District of Columbia reaffirmed in both majority and dissenting opinions that the word "states" refers to actual state entities.[131] *Parker* struck down the District's gun control laws as violative of the Second Amendment.[132] That amendment uses the term "a free state" and the parties argued over the proper interpretation of this term. Notably, in its briefs and oral argument, the District appeared to take a different position on the interpretation of the word "state," arguing that the court could dismiss the action because the District is not a state under the Second Amendment—a position later adopted by the dissenting judge. The District argued:

> The federalism concerns embodied in the Amendment have no relevance in a purely federal entity such as the District because there is no danger of federal interference with an effective *state* militia. This places District residents on a par with state residents. . . . The Amendment, concerned with ensuring that the national government not interfere with the "security of a free State," is not implicated by local legislation in a federal district having no possible impact on the states or their militias.[133]

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[130] *Parker v. District of Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007).

[131] The D.C. Circuit is the most likely forum for a future challenge to this law.

[132] U.S. Const. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.").

[133] Brief for the District of Columbia in *Parker v. District Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007), at 38 (emphasis in original). Adding to the irony, the District's insistence that it was a non-state under the Constitution was criticized by the Plaintiffs as "specious" because the Second Amendment uses the unique term of "free

In the opinion striking down the District's laws, the majority noted that the term "free state" was unique in the Constitution and that "[e]lsewhere the Constitution refers to 'the states' or 'each state' when unambiguously denoting the domestic political entities such as Virginia etc." While the dissent would have treated "free state" to mean the same as other state references, it was equally clear about the uniform meaning given the term states:

> The Supreme Court has long held that "State" as used in the Constitution refers to one of the States of the Union. [citing cases] . . . In fact, the Constitution uses "State" or "States" 119 times apart from the Second Amendment and in 116 of the 119, the term unambiguously refers to the States of the Union.[134]

The dissent goes on to specifically cite the fact that the District is not a state for the purposes of voting in Congress.[135] Thus, in the latest decision from the D.C. Circuit, the judges continue the same view of the non-state status of the District as described in earlier decisions of both the Supreme Court and lower courts.

B. S. 1257 Would Create Both Dangerous Precedent and Serious Policy Challenges for the Legislative Branch.

The current approach to securing partial representation for the District is fraught with dangers. What is striking is how none of these dangers have been addressed by advocates on the other side with any level of detail. Instead, members are voting on a radical new interpretation with little thought or understanding of its implications for our constitutional system. The Framers created clear guidelines to avoid creating a system on a hope and a prayer. It would be a shame if our current leaders added ambiguity

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states" rather than "the states" or "the several states." This term, they argued, it was intended to mean a "free society," not a state entity. Reply Brief for the Plaintiff-Appellant in *Parker v. District Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007), at 15 n.4.

[134] The dissent noted that the three instances involve the use of "foreign state" under Article I, section 9, clause 8; Article III, section 2, clause 1; and the Eleventh Amendment.

[135] *Id.*

where clarity once resided in the Constitution on such a question. The burden should be on those advocating this legislation to fully answer each of these questions before asking for a vote from Congress. Members cannot simply shrug and leave this to the Court. Members have a sacred duty to oppose legislation that they believe is unconstitutional. While many things may be subject to political convenience, our constitutional system should be protected by all three branches with equal vigor.

i. Partisan Manipulation of the Voting Body of Congress. By adopting a liberal interpretation of the meaning of states in Article I, the Congress would be undermining the very bedrock of our constitutional system. The membership and division of Congress was carefully defined by the Framers. The legislative branch is the engine of the Madisonian democracy. It is in these two houses that disparate factional disputes are converted into majoritarian compromises – the defining principle of the Madisonian system. By allowing majorities to manipulate the membership rolls, it would add dangerous instability and uncertainty to the system. The obvious and traditional meaning of "states" deters legislative measures to create new forms of voting representatives or shifting voters among states.[136] By taking this approach, the current House could award a vote to District residents and a later majority could take it away. The District residents would continue to vote, not as do other citizens, but at the whim and will of the Congress like some party favor that can be withdrawn with the passing fortunes of politics. Moreover, as noted below in the discussion of the Utah seat, the evasion of the 435 membership limitation created in 1911 would encourage additional manipulations of the House rolls in the future. Finally, if the Congress can give the District one vote, they could by the same

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[136] This latter approach was raised by Judge Leval in *Romeu v. Cohen*, 265 F.3d 118, 128-30 (2d Cir. 2001) when he suggested that Congress would require each state to accept a certain proportion of voters in territories to give them a voice in Congress. This view has been rejected, including in that decision in a concurring opinion that found "no authority in the Constitution for the Congress (even with the states' consent) to enact such a provision." *Id.* at 121 (Walker, Jr., C.J., concurring); *see also Igartua-De La Rosa v. United States*, 417 F.3d 145, 154 n9 (1st Cir. 2005). According to Chief Judge Walker, there are "only two remedies afforded by the Constitution: (1) statehood . . ., or (2) a constitutional amendment." *Id.* at 136.

authority give the District ten votes or, as noted below, award additional seats to other federal enclaves.

ii. Creation of New Districts Among Other Federal Enclaves and Territories. If successful, this legislation would allow any majority in Congress to create other novel seats in the House. This is not the only federal enclave and there is great potential for abuse and mischief in the exercise of such authority. Under Article IV, Section 3, "The Congress shall have Powers to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." Roughly thirty percent of land in the United States (over 659 million acres) is part of a federal enclave regulated under the same power as the District.[137] The Supreme Court has repeatedly stated that the congressional authority over other federal enclaves derives from the same basic source:[138]

> This brings us to the question whether Congress has power to exercise 'exclusive legislation' over these enclaves within the meaning of Art. I, § 8, cl. 17, of the Constitution, which reads in relevant part: 'The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever' over the District of Columbia and 'to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.' The power of Congress over federal enclaves that comes within the scope of Art. I, § 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia. The cases make clear that the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action.[139]

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[137] *See* http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/FRPR_5-30_updated_R2872-m_0Z5RDZ-i34K-pR.pdf

[138] In addition to Article I, Section 8, the Territorial Clause in Article IV. Section 3 states that "[t]he Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

[139] *Paul v. United States*, 371 U.S. 245, 263-64 (1963).

Congress could use the same claimed authority to award seats to other federal enclaves. Indeed, since these enclaves were not established with the purpose of being a special non-state entity (as was the District), they could claim to be free of some of these countervailing arguments against the District. Indeed, they are often treated the same as states for the purposes of federal jurisdiction, taxes, military service etc. There are literally millions of people living in these areas, including Puerto Rico (with a population of 4 million people -- roughly eight times the size of the District). Puerto Rico would warrant as many as six districts.[140] It is not enough to assert that the District has a more compelling political or historical case. Advocates within theses federal enclaves and territories can (and have)[141] cited the same interpretation for their own representation in Congress.

It is no answer to this concern to note that territory residents do not bear full taxation burdens, military conscription, or the right to vote in presidential elections.[142] Congress determines whether these territories will bear taxation or service burdens – just as it did for the District. The District previously did not share the taxation burden, but now does as a result of congressional fiat. As for the presidential election, it took the 23rd Amendment to secure that right for the District residents. If anything, voting in the presidential elections is proof that the District is not distinct from territories. Finally, it is argued that residents in the territories only have nationality not citizenship.[143] In fact, there are millions of citizens residing in federal enclaves and territories. More to the point, the interpretation being advanced in this legislation turns on the authority of Congress, not the status of residents, to justify the creation of a new district.

iii. Expanded Senate Representation. While the issue of Senate representation is left largely untouched in the Dinh and Starr analyses,[144]

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[140] Indeed, citing this bill, some have already called for Puerto Rico to be given multiple seats in Congress. Jose R. Coleman Tio, *Comment: Six Puerto Rican Congressmen Go to Washington*, 116 Yale L.J. 1389 (2007).

[141] *Id.*

[142] Bress & McGill, *supra,* at 8.

[143] *Id.*

[144] In their footnote on this issue, Dinh and Charnes note that there may be significance in the fact that the Seventeenth Amendment refers to the election of two senators "from each state." Dinh & Charnes, *supra*, at n. 57. They suggest that this somehow creates a more clear barrier to District representatives in the Senate – a matter of obvious concern in that body.

there is no obvious principle that would prevent a majority from expanding its ranks with two new Senate seats for the District. Two Senators and a member of the House would be a considerable level of representation for a non-state with a small population. Yet, this analysis would suggest that such a change could take place without a constitutional amendment. When asked about the extension of the same theory to claiming two Senate seats in the last hearing before the House Judiciary Committee, Professor Dinh once again said that he had not given it much thought. Yet, since his first report in 2004, this issue has been repeatedly raised to Dinh without a response. Likewise, Richard Bress has given legal advice to the House Committee on the constitutionality of the legislation for years and was asked the same question in the last hearing. He also insisted that he had not resolved the question. This month, Mr. Bress published a defense of the current bill and, despite the earlier questions from members on this point, he again declined to answer and dismissed the issue as "entirely speculative."[145]

In the last hearing, Dinh ventured to offer a possible limitation that would confine his interpretation to only the House. He cited Article I, Section 3 and (as he had in his 2004 report) noted that "quite unlike the treatment of the House of Representatives, the constitutional provisions relating to composition of the Senate additionally specifies that there shall be two senators 'from each State.'" However, as I pointed out in the prior hearing, Section 2 has almost similar language related to the House, specifying that "each State shall have at Least one Representative." It remains unclear why this language does not suggest that same "interests of states qua states" for the House as it does for the Senate. Conversely, if this language can be ignored in Section 2, it is not clear why it cannot also be

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The interpretation tries too hard to achieve a limiting outcome, particularly after endorsing a wildly liberal interpretation of the language of Article I. Article I, Section 2 refers to members elected "by the People of the several states" while the Seventeenth Amendment refers to two senators "from each State" and "elected by the people thereof." Since the object of the Seventeenth Amendment is to specify the number from each state, it is hard to imagine an alternative to saying "two Senators from each State." It is rather awkward to say "two Senators from each of the several states."

[145] Richard P. Bress & Lori Alvino McGill, "Congressional Authority to Extend Voting Representation to Citizens of the District of Columbia: The Constitutionality of H.R. 1905, American Constitutional Society, May 2007, at 9.

ignored in Section 3. One would expect at a minimum that after three years, these advocates could answer this question with the certainty that they offer on the House question. There is an element of willful blindness to the implications of the new interpretation. To his credit, at the last hearing, Bruce Spiva of DC Vote answered the question directly. He stated that he wanted to see such Senate representation and believed that the same arguments could secure such an expansion. Legislators should not vote on a radical new interpretation without confirming whether the same argument would allow the addition of new members in the Senate.

iv. One Person, One Vote. This legislation would create a bizarre district that would not be affected by a substantial growth or reduction in population. The bill states that "the District of Columbia may not receive more than one Member under any reapportionment of Members."[146] Thus, whether the District of Columbia grew to 3 million or shrank to 30,000 citizens, it would remain a single congressional district – unlike other districts that must increase or decrease to guarantee such principles as one person/one vote. This could ultimately produce another one person/one vote issue. If the District shrinks to a sub-standard district size in population, other citizens could object that the District residents are receiving greater representation. Since it is not a state under Article I, Section 3 (creating the minimum of vote representative per state), this new District would violate principles of equal representation. Likewise, if it grew in population, citizens would be underrepresented and Congress would be expected to add a district under the same principles – potentially giving the District more representatives than some states.

v. Non-severability. The inevitable challenge to this bill could produce serious legislative complications. With a relatively close House division, the casting of an invalid vote could throw future legislation into question as to its validity. Moreover, if challenged, the status of the two new members would be in question. This latter problem is not resolved by Section 7's non-severability provision, which states "[i]f any provision of this Act, or any amendment made by this Act, is declared or held invalid or unenforceable, the remaining provisions of this Act and any amendment made by this Act shall be treated and deemed invalid and shall have no force or effect of law." However, if the D.C. vote is subject to a temporary or permanent injunction (or conversely, if the Utah seat is enjoined), a

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[146] S. 1257, Sec. 2.

provision of the Act would not be technically "declared or held invalid or unenforceable." Rather, it could be enjoined for years on appeal, without any declaration or holding of unenforceability. This confusion could even extend to the next presidential election. By adding a district to Utah, that new seat would add another electoral vote for Utah in the presidential election. Given the last two elections, it is possible that we could have another cliffhanger with a tie or one-vote margin between the main candidates. The Utah vote could be determinative. Yet, this is likely to occur in the midst of litigation over the current legislation. My challenge to the Elizabeth Morgan Act took years before it was struck down as an unconstitutional Bill of Attainder.[147] Thus, we could face a constitutional crisis over whether the Congress will accept the results based upon this vote when both the Utah and District seats might be nullified in a final ruling.

vi. Qualification issues. Delegates are not addressed or defined in Article I, these new members from the District or territories are not technically covered by the qualification provisions for members of Congress. Thus, while authentic members of Congress would be constitutionally defined,[148] these new members would be legislatively defined – allowing Congress to lower or raise such requirements in contradiction to the uniform standard of Article I. Conversely, if Congress treats any district or territory as "a state" and any delegate as a "member of Congress," it would effectively gut the qualification standards in the Constitution by treating the title rather than the definition of "members of Congress" as controlling. Another example of this contradiction can be found in the definition of the districts of members versus delegates. Members of Congress represent districts that are adjusted periodically to achieve a degree of uniformity in the number of constituents represented, including the need to add or eliminate districts for states with falling constituencies. The District member would be locked into a single district that would not change with the population. The result is undermining the uniformity of qualifications and constituency provisions that the Framers painstakingly placed into Article I.

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147 *Foretich v. United States,* 351 F.3d 1198 (D.C. Cir. 2003).

148 *See* Art. I, Sec. 2 ("No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.")

vii. Faustian Bargain. This legislation is a true Faustian bargain for District residents who are about to effectively forego true representation for a limited and non-guaranteed district vote in one house. S. 1257 would only serve to delay true representational status for district residents. On a practical level, this bill would likely extinguish efforts at full representation in both houses. During the pendency of the litigation, it is highly unlikely that additional measures would be considered – delaying reforms by many years. Ultimately, if the legislation is struck down, it would leave the campaign for full representation frozen in political amber for many years.

IV.
THE CONSTITUTIONAL AND STATUTORY PROBLEMS WITH THE CREATION OF A NEW DISTRICT IN UTAH

While most of my attention has been directed at the addition of a voting seat for the District, I would like to address the second seat that would be added to the House. In my first testimony in the House on this matter, I expressed considerable skepticism over the legality of the creation of an at-large seat in Utah, particularly under the "one-man, one-vote" doctrine established in *Wesberry v. Sanders*.[149] It was decided after the hearing that Utah would take the extraordinary step of holding a special session to create new congressional districts to avoid the at-large problem. The Senate now appears inclined to return to the option of creating a new Utah district. This was a better solution on a constitutional level, but as I argued in a recent article,[150] there seems to be a misunderstanding as to how those seats could be filled.

A. The New Utah Districts Would Present Logistical Barriers to the Inclusion in the 110th Congress.

There has been an assumption that both the D.C. and Utah seats could be filled immediately and start to cast votes. However, since the districts would change, these would not constitute ordinary vacancies that could be filled by the same voters in the same district.[151] This would require the three

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[149] 376 U.S. 1 (1964).

[150] Jonathan Turley, *Too Clever By Half: The Unconstitutional D.C. Voting Rights Bill*, Roll Call, Jan. 25, 2007, at 3.

[151] Pursuant to U.S. CONST. art. 1, § 3, states are allowed to address such vacancies and this authority is codified at 2 U.S.C. § 8 (1994) ("The

current members to resign to create vacancies. At a minimum, all four members would have to stand for election and, as new districts (like redistricted districts), the four Utah districts arguably should be filled at the next regular election in two years for the 111th Congress. Reportedly, the prospect of a special election led to the abandonment of the new districts and a return to the more questionable use of an at-large seat.[152]

Thus, while constitutionally superior, the creation of a new seat comes with practical issues that have been largely ignored. If the reciprocity policy contained in this legislation is honored, the District would not begin to exercise its vote until Utah could exercise its vote. However, the non-severability clause refers to portions of the bill being struck down in court rather than simply delayed by the election cycle. The District would be able to exercise its vote immediately while Utah may be delayed until the 111th Congress.

I commend the Senate in adopting this approach to the Utah portion of the legislation. Section 4 of the Senate bill addresses this problem by specifying that these changes would not occur until the 111th Congress at the earliest. This creates a very significant departure from the House bill. While the new districts could always be challenged under conventional gerrymandering allegations, the new language avoids the constitutional problems associated with both an at-large seat and an effort to exercise the new voting district in the 110th Congress.

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time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively."). The presumption is that any special election would be confined to the preexisting district. *See, e.g.*, N.C. GEN. STAT. § 163-13(a) (1995) ("If at any time after expiration of any Congress and before another election, or if at any time after an election, there shall be a vacancy in this State's representation in the House of Representatives of the United States Congress, the Governor shall issue a writ of election, and by proclamation fix the date on which an election to fill the vacancy shall be held in the appropriate congressional district.").

[152] Elizabeth Brotherton, *Utah Section of D.C. Bill to be Reworked*, Roll Call, at Feb. 27, 2007, at 1.

B. An At-Large Seat in Utah Would Raise Serious Constitutional and Policy Questions.

Since the House bill has the at-large seat provision and the matter might have to be resolved in conference, it is important to understand why the at-large seat option would guarantee that the Utah portion of the legislation would invite a serious constitutional challenge. There is no question that Congress has profound authority over the regulation and recognition of congressional elections.[153] This power includes determinations on matters related to the manipulation of district borders.[154] Obviously, there are limitations on this authority within the structure of the Constitution. Moreover, at-large seats have long been viewed with suspicion by both the courts and Congress, particularly due to their past use to diminish minority voting. For this reason, 2 U.S.C. §2c codifies a congressional policy against the use of such districts:

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative.[155]

The Supreme Court has noted that this provision controls in the creation of districts "unless the state legislature, and state and federal courts, have all failed to redistrict" in accordance with the federal law.[156] In this circumstance, there would be no new apportionment or redistricting. Rather, the House would simply pass an at-large district over the full range of all other existing districts.

As opposed to the District portion of the legislation, the Utah at-large seat raises some close questions as well as some fairly metaphysical notions

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153 *See, e.g., Smiley v. Holm*, 285 U.S. 355, 366 (1932); *United States v. Gradwell*, 243 U.S. 476, 483 (1917) .

154 *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *see also Oregon v. Mitchell*, 400 U.S. 112, 131-22 (1970).

155 2 U.S.C. §2c.

156 *Branch v. Smith*, 538 U.S. 254, 274 (2003).

of overlapping representation and citizens with 1.4 representational status.[157] On one level, the addition of an at-large seat would seem to benefit all Utah citizens equally since they would vote for two members. Given the deference to Congress under the "necessary and proper" clause, an obvious argument could be made that it does not contravene the "one person, one vote" standard. Moreover, in *Department of Commerce v. Montana*,[158] the Court upheld the method of apportionment that yielded a 40% differential off of the "ideal." Thus, a good-faith effort at apportionment will be given a degree of deference and a frank understanding of the practical limitations of apportionment.

However, there are various reasons a federal court might have cause to strike down this portion of the House bill. Notably, this at-large district would be roughly 250% larger than the ideal district in the last 2000 census (2,236,714 v. 645, 632). In addition, citizens would have two members serving their interests in Utah -- creating the appearance of a "preferred class of voters."[159] On its face, it raises serious questions of equality among voters:

> To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People.'[160]

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[157] There remains obviously considerable debate over such issues as electoral equality (guaranteeing that every vote counts as much as every other) and representational equality (guaranteeing that representatives represent equal numbers of citizens). *See Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part). Of course, when Congress is allowing citizens of one state to have two representatives, this distinction becomes less significant.

[158] 503 U.S. 442 (1992).

[159] *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications . . . The conception of political equality . . . can mean only one thing – one person, one vote.").

[160] *See Wesberry,* 376 U.S. at 7-8.

This massive size and duplicative character of the Utah district draws obvious points of challenge.[161] In *Wesberry v. Sanders,*[162] the Court held that when the Framers referred to a government "by the people," it was articulating a principle of "equal representation for equal numbers of people" in Congress.[163] While not requiring "mathematical precision,"[164] significant differences in the level of representation are intolerable in our system. This issue comes full circle for the current controversy: back to Article I and the structural guarantees of the composition and voting of Congress. The Court noted that:

> It would defeat the principle solemnly embodied in the Great Compromise - equal representation in the House for equal numbers of people - for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.[165]

While the Supreme Court has not clearly addressed the interstate implications of "one person, one vote," this bill would likely force it to do so.[166] The Court has stressed that the debates over the original Constitution reveal that "one principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress."[167] Moreover, the Court has strongly indicated that there is no conceptual barrier to applying the *Wesberry* principles to an interstate rather than an intrastate controversy:

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161 *Cf.* Jamie B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 Harv. C.R.-C.L. L. Rev. 39 (1999) (discussing "one person, one vote" precedent vis-à-vis the District).

162 376 U.S. 1 (1964).

163 *Id.* at 18.

164 *Id.*

165 *Id.* at 14.

166 *But see Department of Commerce*, 503 U.S. at 463 ("although 'common sense' supports a test requiring 'a goodfaith effort to achieve precise mathematical equality' within each state, *Kirkpatrick v. Preisler*, 394 U.S. at 530-531, the constraints imposed by Article I, § 2, itself make that goal illusory for the Nation as a whole.").

167 *Wesberry*, 376 U.S. at 10.

> the same historical insights that informed our construction of Article I, 2 ... should apply here as well. As we interpreted the constitutional command that Representatives be chosen "by the People of the several States" to require the States to pursue equality in representation, we might well find that the requirement that Representatives be apportioned among the several States "according to their respective Numbers" would also embody the same principle of equality.[168]

Awarding two representatives to each resident of Utah creates an obvious imbalance vis-à-vis other states. House members are expected to be advocates for this insular constituency. Here, residents of one state could look to two representatives to do their bidding while other citizens would limited to one. Given racial and cultural demographic differences between Utah and other states, this could be challenged as diluting the power of minority groups in Congress.

Moreover, while interstate groups could challenge the disproportionate representation for Utah citizens, the at-large seat could also be challenged by some intrastate groups as diluting their specific voting power as in *City of Mobile v. Bolden.*[169] At-large seats have historically been shown to have disproportionate impact on minority interests. Indeed, in *Connor v. Finch,* the Supreme Court noted at-large voting tends "to submerge electoral minorities and over-represent electoral majorities."[170] Notably, during the heated debates over the redistricting of Utah for the special session, there was much controversy over how to divide the districts affecting the urban areas.[171] The at-large seat means that Utah voters in concentrated areas like Salt Lake City will have their votes heavily diluted in the selection of their additional representative. If Utah simply added an additional congressional district, the ratio of citizens to members would be reduced. The additional member would represent a defined group of people who have unique geographical and potentially racial or political

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[168] *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 461 (1992).

[169] 446 .U.S. 55 (1980) (striking down an at-large system); see also *Rogers v. Lodge,* 458 U.S. 613, (1982).

[170] 431 U.S. 407, 415 (1977).

[171] *See, e.g.,* Bob Bernick Jr., *Why is GOP so Nice about Redistricting?*, Deseret Morning News, Dec. 1, 2006, at 2. Lisa Riley Roche, *Redistricting Narrowed to 3 proposals*, Deseret Morning News, Nov. 22, 2006, at 1.

characteristics.[172] However, by making the seat at large, these citizens would now have to share two members with a much larger and more diffuse group – particularly in the constituency of the at-large member. It is likely that the member who is elected at large would be different from one who would have to run in a particular district from the more liberal and diverse Salt Lake City.

Another concern is that this approach could be used by a future majority of Congress to manipulate voting and to reduce representation for insular groups.[173] Rather than creating a new district that may lean toward one party or have increased representation of one racial or religious group, Congress could use at-large seats under the theory of this legislation. Congress could also create new forms of represented districts for overseas Americans or federal enclaves.[174] The result would be to place Congress on a slippery slope where endangered majorities tweak representational divisions for their own advantage.

The lifting of the 435 limit on membership of the House established in 1911 is also a dangerous departure for this Congress.[175] While membership was once increased on a temporary basis for the admission of Alaska and Hawaii to 437, past members have respected this structural limitation. These members knew instinctively that, while there was always the temptation to tweak the membership rolls, such an act would invite future manipulation and uncertainty. After this casual increase, it will become much easier for future majorities to add members. When presented with a plausible argument that a state was short-changed, a majority could simply add a seat. Use of an at-large seat magnifies this problem by abandoning the principle of

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[172] *See Davis v. Bandemer*, 4328 U.S. 109, 133 (1986) (reviewing claims of vote dilution for equal protection violations "where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively.").

[173] At-large districts have been disfavored since *Wesberry*, a view later codified in federal law. *See* 2 U.S.C. § 2c.

[174] Notably, rather than try to create representatives for overseas Americans as some nations do, Congress enacted a law that allows citizens to use their former state residence to vote if the state complies with the requirements of the Uniformed and Overseas Citizens Absentee Voting Act. 42 U.S.C. §1973ff.

[175] Act of Aug. 8, 1911, ch. 5 §§ 1-2, 37 Stat. 13, 14.

individual member districts of roughly equal constituencies. By using the at-large option, politicians can simply give a state a new vote without having to redistrict existing districts.

Finally, while it is difficult to predict how this plan would fare under a legal challenge, it is certain to be challenged. This creates the likelihood of Congress having at least one member (or two members if you count the District representative) who would continue to vote under a considerable cloud of questioned legitimacy. In close votes, this could produce great uncertainty as to the finality or legitimacy of federal legislation. This is entirely unnecessary. If a new representative is required, it is better to establish a fourth district not just a fourth at-large representative for legal and policy reasons.

V.
THE MODIFIED RETROCESSION PLAN: A THREE-PHASE ALTERNATIVE FOR THE FULL REPRESENTATION OF CURRENT DISTRICT RESIDENTS IN BOTH THE HOUSE AND THE SENATE

In some ways, it was inevitable (as foreseen by Alexander Hamilton) that the Capitol City would grow to a size and sophistication that representation in Congress became a well-founded demand. Ironically, the complete bar to representation in Congress was viewed as necessary because any half-way measure would only lead to eventual demands for statehood. For example James Holland of North Carolina noted that only retrocession would work since anything short of that would be a flawed territorial form of government:

> If you give them a Territorial government they will be discontented with it, and you cannot take from them the privilege you have given. You must progress. You cannot disenfranchise them. The next step will be a request to be admitted as a member of the Union, and, if you pursue the practice relative to territories, you must, so soon as their numbers will authorize it, admit them into the Union. Is it proper or politic to add to the influence of the people of the seat of Government by giving a representative in this House and a representation in the

> Senate equal to the greatest State in the Union? In my conception it would be unjust and impolitic.[176]

We are, hopefully, in the final chapter of this debate. One hundred and sixty years ago, Congress retroceded land back to Virginia under its Article I authority. Retrocession has always been the most direct way of securing a resumption of voting rights for District residents.[177] Most of the District can be simply returned from whence it came: the state of Maryland. The greatest barrier to retrocession has always been more symbolic than legal. Replacing Washington, DC with Washington, MD is a conceptual leap that many are simply not willing to make. However, it is the most logical resolution of this problem.[178]

For a number of years, I have advocated the reduction of the District of Columbia to the small area that runs from the Capitol to the Lincoln Memorial. The only residents in this space would be the First Family. The remainder of the current District would then be retroceded to Maryland.

Such retrocession can occur without a constitutional amendment in my view. Ironically, in 1910 when some members sought to undo the Virginia retrocession, another George Washington Law Professor, Hannis

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[176] Mark Richards, Presentation before the Arlington Historical Society, May 9, 2002 (citing Congressional Record, 1805: 979-980) (quoting Rep. James Holland of North Carolina).

[177] An alternative but analogous retrocession plan has been proposed by Rep. Dana Rohrabacher. For a recent discussion of this proposal, *see* Dana Rohrabacher, *The Fight Over D.C.; Full Representation for Washington – The Constitutional Way*, Roll Call, Jan. 25, 2007, at 3.

[178] At first blush, there would seem to be a promising approach found in legislation granting Native Americans the right to vote in the state in which their respective reservation is located. 8 U.S.C. § 1401(a)(2). After all, these areas fall under congressional authority in the provision: Section 8 of Article I. However, the District presents the dilemma of being intentionally created as a unique non-state entity – severed from Maryland. For this approach to work, the District would still have to be returned to Maryland while retaining the status of a federal enclave. *See also Evans v. Cornman*, 398 U.S. 419 (1970) (holding that residents on the campus of the National Institutes of Health (NIH) in Maryland could vote as part of that state's elections).

Taylor, supplied the legal analysis that the prior retrocession was unconstitutional without an amendment.[179] I have to respectfully disagree with my predecessor. In my view, Congress can not only order retrocession but can do it without the prior approval of Maryland – though I believe that this would be a terrible policy decision. This land was ceded to Congress, which always had the right to retrocede it. Obviously, no one is suggesting such a step. However, as a constitutional matter, I do not see the barrier to retroceding the Maryland portion of the original federal enclave. As John Calhoun correctly noted in 1846 "[t]he act of Congress, it was true, established this as the permanent seat of Government; but they all knew that an act of Congress possessed no perpetuity of obligation. It was a simple resolution of the body, and could be at any time repealed."[180]

I have also proposed a three-phase process for retrocession. In the first phase, a political transfer would occur immediately with the District securing a House seat as a Maryland district and residents voting in Maryland statewide elections. In the second phase, incorporation of public services from education to prisons to law enforcement would occur. In the third phase, any tax and revenue incorporation would occur.

These phases would occur over many years with only the first phase occurring immediately upon retrocession. Indeed, I recommend the creation of a three-commissioner body like the one that worked with George Washington in the establishment of the original federal district. These commissioners would recommend and oversee the incorporation process. Moreover, Maryland can agree to continue to treat the District as a special tax or governing zone until incorporation is completed. Indeed, Maryland may choose to allow the District to continue in a special status due to its historical position. The fact is that any incorporation is made easier, not more difficult, by the District's historic independence. Like most cities, it would continue to have its own law enforcement and local governing authority. However, the District could also benefit from incorporation into Maryland's respected educational system and other statewide programs related to prisons and other public needs.

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[179] S. Doc. No. 286, 61st Cong., 2d Sess. 4 (1910) (Opinion of Hannis Taylor as to the Constitutionality of the Act of Retrocession of 1846).
[180] *See* Cong. Globe, 29th Cong., 1st Sess. 1046 (1846).

In my view, this approach would be unassailable on a legal level and highly efficient on a practical level. I realize that there remains a fixation with the special status of the city, but much of this status would remain. While the city would not technically be the seat of government, it would obviously remain for all practical purposes our Capitol City.

This is not to suggest that a retrocession would be without complexity. Indeed, the Twenty-Third Amendment represents an obvious anomaly. Section one of that amendment states:

> The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct:
>
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.[181]

Since the only likely residents would be the first family, this presents something of a problem. There are a couple of obvious solutions. One would be to repeal the amendment, which is the most straight-forward and preferred.[182] Another approach would be to leave the amendment as constructively repealed. Most presidents vote in their home states. A federal law can bar residences in the new District of Columbia. A third and related approach would be to allow the clause to remain dormant since it states that electors are to be appointed "as the Congress may direct."[183] Congress can enact a law directing that no such electors may be chosen. The

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[181] U.S. Const. amend. XXIII.

[182] I have previously stated that my preference would be to repeal the entire Electoral College as an archaic and unnecessary institution and move to direct election of our president. But that is a debate for another day.

[183] *See generally* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160, 187-88 (1991); Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 Cath. U.L. Rev. 311, 317 (1990).

only concern is that a future majority could do mischief by directing an appointment when electoral votes are close.

VI.
CONCLUSION

There is an old story about a man who comes upon another man in the dark on his knees looking for something under a street lamp. "What did you lose?" he asked the stranger. "My wedding ring," he answered. Sympathetic, the man joined the stranger on his knees and looked for almost an hour until he asked if the man was sure that he dropped it here. "Oh, no," the stranger admitted, "I lost it across the street but the light is better here." Like this story, there is a tendency in Congress to look for answers where the political light is better, even when it knows that the solution must be found elsewhere. That is the case with S. 1257, which mirrors an earlier failed effort to pass a constitutional amendment. The 1978 amendment was a more difficult course but the answer to the current problems can only be found constitutionally in some from of either an amendment or retrocession.

Currently, the drafters of the current bill are looking where the light is better with a simple political trade-off of two seats. It is deceptively easy to make such political deals by majority vote. Not only is this approach facially unconstitutional, but the outcome of this legislation, even if sustained on appeal, would not be cause for celebration. Indeed, S. 1257 would replace one grotesque constitutional curiosity in the current status of the District with new curiosity. The creation of a single vote in the House (with no representation in the Senate) would create a type of half-formed citizens with partial representation derived from residence in a non-state. It is an idea that is clearly put forward with the best of motivations but one that is shaped by political convenience rather than constitutional principle.

It is certainly time to right this historical wrong, but, in our constitutional system, it is often more important how we do something than what we do. This is the wrong means to a worthy end. However, it is not the only means and I encourage the Members to direct their considerable efforts toward a more lasting and complete resolution of the status of the District of Columbia in Congress.

Thank you again for the honor of speaking with you today and I would be happy to answer any questions that you might have. I would also be happy to respond to any questions that Members may have after the hearing on the constitutionality of this legislation or the alternatives available in securing full voting rights for District residents.

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110TH CONGRESS
1ST SESSION

S. 1257

To provide the District of Columbia a voting seat and the State of Utah an additional seat in the House of Representatives.

IN THE SENATE OF THE UNITED STATES

MAY 1, 2007

Mr. LIEBERMAN (for himself, Mr. HATCH, and Mr. BENNETT) introduced the following bill; which was read twice and referred to the Committee on Homeland Security and Governmental Affairs

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A BILL

To provide the District of Columbia a voting seat and the State of Utah an additional seat in the House of Representatives.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia House Voting Rights Act of 2007".

SEC. 2. TREATMENT OF DISTRICT OF COLUMBIA AS CONGRESSIONAL DISTRICT.

(a) IN GENERAL.—Notwithstanding any other provision of law, the District of Columbia shall be considered

1 a Congressional district for purposes of representation in
2 the House of Representatives.

3 (b) CONFORMING AMENDMENTS RELATING TO AP-
4 PORTIONMENT OF MEMBERS OF HOUSE OF REPRESENTA-
5 TIVES.—

6 (1) INCLUSION OF SINGLE DISTRICT OF COLUM-
7 BIA MEMBER IN REAPPORTIONMENT OF MEMBERS
8 AMONG STATES.—Section 22 of the Act entitled "An
9 Act to provide for the fifteenth and subsequent de-
10 cennial censuses and to provide for apportionment of
11 Representatives in Congress", approved June 28,
12 1929 (2 U.S.C. 2a), is amended by adding at the
13 end the following new subsection:

14 "(d) This section shall apply with respect to the Dis-
15 trict of Columbia in the same manner as this section ap-
16 plies to a State, except that the District of Columbia may
17 not receive more than one Member under any reapportion-
18 ment of Members.".

19 (2) CLARIFICATION OF DETERMINATION OF
20 NUMBER OF PRESIDENTIAL ELECTORS ON BASIS OF
21 23RD AMENDMENT.—Section 3 of title 3, United
22 States Code, is amended by striking "come into of-
23 fice;" and inserting the following: "come into office
24 (subject to the twenty-third article of amendment to

1 the Constitution of the United States in the case of
2 the District of Columbia);".

3 **SEC. 3. INCREASE IN MEMBERSHIP OF HOUSE OF REP-**
4 **RESENTATIVES.**

5 (a) PERMANENT INCREASE IN NUMBER OF MEM-
6 BERS.—Effective with respect to the 111th Congress and
7 each succeeding Congress, the House of Representatives
8 shall be composed of 437 Members, including the Member
9 representing the District of Columbia pursuant to section
10 2(a).

11 (b) REAPPORTIONMENT OF MEMBERS RESULTING
12 FROM INCREASE.—

13 (1) IN GENERAL.—Section 22(a) of the Act en-
14 titled "An Act to provide for the fifteenth and subse-
15 quent decennial censuses and to provide for appor-
16 tionment of Representatives in Congress", approved
17 June 28, 1929 (2 U.S.C. 2a(a)), is amended by
18 striking "the then existing number of Representa-
19 tives" and inserting "the number of Representatives
20 established with respect to the 111th Congress".

21 (2) EFFECTIVE DATE.—The amendment made
22 by paragraph (1) shall apply with respect to the reg-
23 ular decennial census conducted for 2010 and each
24 subsequent regular decennial census.

1 (c) TRANSMITTAL OF REVISED APPORTIONMENT IN-
2 FORMATION BY PRESIDENT.—
3 (1) STATEMENT OF APPORTIONMENT BY PRESI-
4 DENT.—Not later than 30 days after the date of the
5 enactment of this Act, the President shall transmit
6 to Congress a revised version of the most recent
7 statement of apportionment submitted under section
8 22(a) of the Act entitled "An Act to provide for the
9 fifteenth and subsequent decennial censuses and to
10 provide for apportionment of Representatives in
11 Congress", approved June 28, 1929 (2 U.S.C.
12 2a(a)), to take into account this Act and the amend-
13 ments made by this Act and identifying the State of
14 Utah as the State entitled to one additional Rep-
15 resentative pursuant to this section.
16 (2) REPORT BY CLERK.—Not later than 15 cal-
17 endar days after receiving the revised version of the
18 statement of apportionment under paragraph (1),
19 the Clerk of the House of Representatives shall sub-
20 mit a report to the Speaker of the House of Rep-
21 resentatives identifying the State of Utah as the
22 State entitled to one additional Representative pur-
23 suant to this section.

1 **SEC. 4. EFFECTIVE DATE; TIMING OF ELECTIONS.**

2 The general election for the additional Representative
3 to which the State of Utah is entitled for the 111th Con-
4 gress and 112th Congress and the general election for the
5 Representative from the District of Columbia for the
6 111th Congress and the 112th Congress shall be subject
7 to the following requirements:

8 (1) The additional Representative from the
9 State of Utah will be elected pursuant to a redis-
10 tricting plan enacted by the State, such as the plan
11 the State of Utah signed into law on December 5,
12 2006, which—

13 (A) revises the boundaries of Congressional
14 districts in the State to take into account the
15 additional Representative to which the State is
16 entitled under section 3; and

17 (B) remains in effect until the taking ef-
18 fect of the first reapportionment occurring after
19 the regular decennial census conducted for
20 2010.

21 (2) The additional Representative from the
22 State of Utah and the Representative from the Dis-
23 trict of Columbia shall be sworn in and seated as
24 Members of the House of Representatives on the
25 same date as other Members of the 111th Congress.

1 **SEC. 5. CONFORMING AMENDMENTS.**

2 (a) REPEAL OF OFFICE OF DISTRICT OF COLUMBIA
3 DELEGATE.—

4 (1) REPEAL OF OFFICE.—

5 (A) IN GENERAL.—Sections 202 and 204
6 of the District of Columbia Delegate Act (Pub-
7 lic Law 91–405; sections 1–401 and 1–402,
8 D.C. Official Code) are repealed, and the provi-
9 sions of law amended or repealed by such sec-
10 tions are restored or revived as if such sections
11 had not been enacted.

12 (B) EFFECTIVE DATE.—The amendments
13 made by this subsection shall take effect on the
14 date on which a Representative from the Dis-
15 trict of Columbia takes office for the 111th
16 Congress.

17 (2) CONFORMING AMENDMENTS TO DISTRICT
18 OF COLUMBIA ELECTIONS CODE OF 1955.—The Dis-
19 trict of Columbia Elections Code of 1955 is amended
20 as follows:

21 (A) In section 1 (sec. 1–1001.01, D.C. Of-
22 ficial Code), by striking "the Delegate to the
23 House of Representatives," and inserting "the
24 Representative in Congress,".

25 (B) In section 2 (sec. 1–1001.02, D.C. Of-
26 ficial Code)—

(i) by striking paragraph (6); and

(ii) in paragraph (13), by striking "the Delegate to Congress for the District of Columbia," and inserting "the Representative in Congress,".

(C) In section 8 (sec. 1–1001.08, D.C. Official Code)—

(i) in the heading, by striking "Delegate" and inserting "Representative"; and

(ii) by striking "Delegate," each place it appears in subsections (h)(1)(A), (i)(1), and (j)(1) and inserting "Representative in Congress,".

(D) In section 10 (sec. 1–1001.10, D.C. Official Code)—

(i) in subsection (a)(3)(A)—

(I) by striking "or section 206(a) of the District of Columbia Delegate Act"; and

(II) by striking "the office of Delegate to the House of Representatives" and inserting "the office of Representative in Congress";

(ii) in subsection (d)(1), by striking "Delegate," each place it appears; and

(iii) in subsection (d)(2)—

(I) by striking "(A) In the event" and all that follows through "term of office," and inserting "In the event that a vacancy occurs in the office of Representative in Congress before May 1 of the last year of the Representative's term of office,"; and

(II) by striking subparagraph (B).

(E) In section 11(a)(2) (sec. 1–1001.11(a)(2), D.C. Official Code), by striking "Delegate to the House of Representatives," and inserting "Representative in Congress,".

(F) In section 15(b) (sec. 1–1001.15(b), D.C. Official Code), by striking "Delegate," and inserting "Representative in Congress,".

(G) In section 17(a) (sec. 1–1001.17(a), D.C. Official Code), by striking "the Delegate to Congress from the District of Columbia" and inserting "the Representative in Congress".

(b) REPEAL OF OFFICE OF STATEHOOD REPRESENTATIVE.—

(1) IN GENERAL.—Section 4 of the District of Columbia Statehood Constitutional Convention Ini-

1 tiative of 1979 (sec. 1–123, D.C. Official Code) is
2 amended as follows:
3 (A) By striking "offices of Senator and
4 Representative" each place it appears in sub-
5 section (d) and inserting "office of Senator".
6 (B) In subsection (d)(2)—
7 (i) by striking "a Representative or";
8 (ii) by striking "the Representative
9 or"; and
10 (iii) by striking "Representative shall
11 be elected for a 2-year term and each".
12 (C) In subsection (d)(3)(A), by striking
13 "and 1 United States Representative".
14 (D) By striking "Representative or" each
15 place it appears in subsections (e), (f), (g), and
16 (h).
17 (E) By striking "Representative's or" each
18 place it appears in subsections (g) and (h).
19 (2) CONFORMING AMENDMENTS.—
20 (A) STATEHOOD COMMISSION.—Section 6
21 of such Initiative (sec. 1–125, D.C. Official
22 Code) is amended—
23 (i) in subsection (a)—

1 (I) by striking "27 voting mem-
2 bers" and inserting "26 voting mem-
3 bers";
4 (II) by adding "and" at the end
5 of paragraph (5); and
6 (III) by striking paragraph (6)
7 and redesignating paragraph (7) as
8 paragraph (6); and
9 (ii) in subsection (a–1)(1), by striking
10 subparagraph (H).
11 (B) AUTHORIZATION OF APPROPRIA-
12 TIONS.—Section 8 of such Initiative (sec. 1–
13 127, D.C. Official Code) is amended by striking
14 "and House".
15 (C) APPLICATION OF HONORARIA LIMITA-
16 TIONS.—Section 4 of D.C. Law 8–135 (sec. 1–
17 131, D.C. Official Code) is amended by striking
18 "or Representative" each place it appears.
19 (D) APPLICATION OF CAMPAIGN FINANCE
20 LAWS.—Section 3 of the Statehood Convention
21 Procedural Amendments Act of 1982 (sec. 1–
22 135, D.C. Official Code) is amended by striking
23 "and United States Representative".

1 (E) DISTRICT OF COLUMBIA ELECTIONS
2 CODE OF 1955.—The District of Columbia Elec-
3 tions Code of 1955 is amended—
4 (i) in section 2(13) (sec. 1–
5 1001.02(13), D.C. Official Code), by strik-
6 ing "United States Senator and Represent-
7 ative," and inserting "United States Sen-
8 ator,"; and
9 (ii) in section 10(d) (sec. 1–
10 1001.10(d)(3), D.C. Official Code), by
11 striking "United States Representative
12 or".
13 (3) EFFECTIVE DATE.—The amendments made
14 by this subsection shall take effect on the date on
15 which a Representative from the District of Colum-
16 bia takes office for the 111th Congress.
17 (c) CONFORMING AMENDMENTS REGARDING AP-
18 POINTMENTS TO SERVICE ACADEMIES.—
19 (1) UNITED STATES MILITARY ACADEMY.—Sec-
20 tion 4342 of title 10, United States Code, is amend-
21 ed—
22 (A) in subsection (a), by striking para-
23 graph (5); and
24 (B) in subsection (f), by striking "the Dis-
25 trict of Columbia,".

(2) UNITED STATES NAVAL ACADEMY.—Such title is amended—

(A) in section 6954(a), by striking paragraph (5); and

(B) in section 6958(b), by striking "the District of Columbia,".

(3) UNITED STATES AIR FORCE ACADEMY.—Section 9342 of title 10, United States Code, is amended—

(A) in subsection (a), by striking paragraph (5); and

(B) in subsection (f), by striking "the District of Columbia,".

(4) EFFECTIVE DATE.—This subsection and the amendments made by this subsection shall take effect on the date on which a Representative from the District of Columbia takes office for the 111th Congress.

SEC. 6. NONSEVERABILITY OF PROVISIONS.

If any provision of this Act or any amendment made by this Act is declared or held invalid or unenforceable, the remaining provisions of this Act or any amendment made by this Act shall be treated and deemed invalid and shall have no force or effect of law.

○

Order Code RL33830

CRS Report for Congress

District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals

Updated April 23, 2007

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District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals

Summary

This report provides a summary and analysis of legislative proposals that would provide voting representation in Congress to residents of the District of Columbia. Since the issue of voting representation for District residents was first broached in 1801, Congress has considered five legislative options: (1) seek voting rights in Congress by constitutional amendment, (2) retrocede the District to Maryland (retrocession), (3) allow District residents to vote in Maryland for their representatives to the House and Senate (semi-retrocession), (4) grant the District statehood, and (5) define the District as a state for the purpose of voting for federal office (virtual statehood).

On March 22, 2007, the House began floor consideration of H.R. 1433, the District of Columbia House Voting Rights Act of 2007, but postponed a vote after Representative Smith of Texas sought to add an amendment that would have repealed the city's gun control legislation. The bill would increase the size of the House from 435 to 437 Members and provide voting representation to the District and the state most likely to gain an additional representative. In addition to the question of its constitutionality, it includes a controversial provision — namely, the temporary creation of an at-large congressional district for the state most likely to gain an additional representative — that will most likely face a court challenge. On January 16, 2007, Representative Dana Rohrabacher introduced H.R. 492, a bill that would retrocede the District of Columbia to Maryland. These proposals would grant voting representation by statute, eschewing the constitutional amendment process and statehood option. Any proposal considered by Congress faces three distinct challenges. It must (1) address issues raised by Article 1, Sec. 2 of the Constitution, which limits voting representation to states; (2) provide for the continued existence of the District of Columbia as the "Seat of Government of the United States" (Article 1, Sec. 8); and (3) consider its impact on the 23rd Amendment to the Constitution, which grants three electoral votes to the District of Columbia. For a discussion of constitutional issues of proposed legislation, see CRS Report RL33824, *The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole,* by Kenneth R. Thomas.

During the 109th Congress, several bills were introduced to provide voting representation in Congress for District residents, but none passed. The bills were of the following three types: (1) measures providing a single vote for the District in the House by increasing the number of House seats by two, H.R. 2043 and H.R. 5388; (2) a measure allowing District residents to vote in Maryland for their representatives to the House and Senate, H.R. 190 (semi-retrocession); and (3) measures granting the District full voting rights in Congress (one Representative and two Senators), H.R. 398 and S. 195. For information on the impact of the 2000 Population Census on the apportionment process, see CRS Report RS20768, *House Apportionment 2000: States Gaining, Losing, and on the Margin*; and CRS Report RS22579, *District of Columbia Representation: Effect on House Apportionment*, both by Royce Crocker.) This report will be updated as events warrant.

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District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals

Introduction

The Constitution, ratified in 1789, provided for the creation and governance of a permanent home for the national government. Article I, Section 8, Clause 17, called for the creation of a *federal district* to serve as the permanent seat of the new national government[1] and granted Congress the power

> To exercise exclusive Legislation, in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress become the Seat of the Government of the United States....[2]

Proponents of voting representation contend that the District's unique governmental status resulted in its citizens' equally unique and arguably undemocratic political status. Citizens residing in the District have no vote in their national legislature, although they pay federal taxes and may vote in presidential elections. Opponents often note that the Constitution grants only states voting representation in Congress. They argue that, given the District's unique status and a strict reading of the Constitution, no avenue exists to provide District residents voting rights in the national legislature other than a constitutional amendment or the statehood process, which could be achieve by statute.

Issues central to the District of Columbia voting representation debate arguably revolve around two principles of our republican form of government: (1) the consent of the governed and (2) no taxation in the absence of representation. The debate has

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[1] Historians often point to the forced adjournment of the Continental Congress while meeting in Philadelphia on June 21, 1783, as the impetus for the creation of a federal district. Congress was forced to adjourn after being menaced for four days by a mob of former soldiers demanding back pay and debt relief. Although the Congress sought assistance and protection from the Governor of Pennsylvania and the state militia, none was forthcoming. When the Congress reconvened in Princeton, New Jersey, much was made of the need for a federal territory whose protection was not dependent on any state. U.S. Congress, Senate, *A Manual on the Origin and Development of Washington*, S. Doc. 178, 75th Cong., 3rd sess., prepared by H. Paul Caemmerer (Washington: GPO, 1939) pp. 2-3.

[2] In 1788, Maryland approved legislation ceding land to Congress for the creation of a federal district. One year later, Virginia passed a similar act. On July 16, 1790, Congress approved the Residence Act, "an act establishing the temporary (Philadelphia) and permanent seat of the Government of the United States" along the Potomac.

also involved questions about how to reconcile two constitutional provisions: one creating the District and giving Congress exclusive legislative power over the District (Article I, Section 8); the other providing that only citizens of *states* shall have voting representation in the House and Senate (Article 1, Section 2 and Section 3).

Over the years, proposals to give the District voting representation in Congress have sought to achieve their purpose through

- constitutional amendment to give District residents voting representation in Congress, but not granting statehood;
- retrocession of the District of Columbia to Maryland;
- semi-retrocession, i.e., allowing qualified District residents to vote in Maryland in federal elections for the Maryland congressional delegation to the House and Senate;
- statehood for the District of Columbia; and
- other statutory means such as virtual-statehood, i.e., designating the District a state for the purpose of voting representation.

In the recent past, Congress has restricted the ability of the District government to advocate for voting representation. Several provisions have been routinely included in District of Columbia appropriation acts prohibiting or restricting the District's ability to advocate for congressional representation.[3]

A Summary History of Legislative Options

During the 10-year period between 1790 to 1800, Virginia and Maryland residents that ceded land that would become the permanent "Seat of the Government of the United States" were subject to the laws for the state — including the right to continue to vote in local, state, and national elections in their respective states — until the national government began operations in December 1800. One year after establishing the District of Columbia as the national capital, District residents began seeking representation in the national legislature. As early as 1801, citizens of what was then called the Territory of Columbia voiced concern about their political disenfranchisement. A pamphlet published by Augustus Woodward, reportedly a protégé of Thomas Jefferson, captured their concern:

> This body of people is as much entitled to the enjoyment of the rights of citizenship as any other part of the people of the United States. There can exist no necessity for their disenfranchisement, no necessity for them to repose on the mere generosity of their countrymen to be protected from tyranny, to mere spontaneous attention for the regulation of their interests. They are entitled to participation in the general councils on the principles of equity and reciprocity.[4]

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[3] Congresses have prohibited the D.C. government from using federal or District funds to support lobbying for such representation. The prohibition is discussed in Appendix B of this report.

[4] Augustus Brevoort Woodward, *Considerations on the Government of the Territory of*

(continued...)

Congress has on numerous occasions considered legislation granting voting representation in the national legislature to District residents, but these attempts have failed to provide permanent voting representation for District residents.[5] During the 103rd Congress (1993-1994), the District's delegate along with delegates from the territories of the Virgin Islands, Guam, and American Samoa, and the resident commissioner from Puerto Rico were allowed to vote in the Committee of the Whole under amended House rules. Although the change was challenged in court as unconstitutional, it was upheld by the U.S. District Court in *Michel v. Anderson,* and affirmed by the Court of Appeals.[6] Nevertheless, the new House Republican majority repealed the rule early in the 104th Congress. On January 24, 2007, the new Democratic majority of the House passed a rules change (H.Res. 78) allowing resident commissioners and delegates to vote in the Committee of the Whole, during the 110th Congress.

Over the years, proposals to give the District voting representation in Congress have sought to achieve their purpose through a constitutional amendment, retrocession of part of the District back to Maryland, semi-retrocession allowing District residents to be treated like citizens of Maryland for the purpose of voting representation in Congress, statehood and virtual statehood that allow Congress to define the District as a state for the purpose of voting representation in Congress. Each is discussed below.

Constitutional Amendment

The most often-introduced proposal for voting rights has taken the form of a constitutional amendment. Since the 1888 and 1889 resolutions, more than 150 proposals have been introduced that would have used a constitutional amendment to settle the question of voting representation for citizens of the District. The proposals can be grouped into six general categories:

- measures directing Congress to provide for the election of two Senators and the number of Representatives the District would be entitled to if it were a state;

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[4] (...continued)
Columbia [Paper No. I of 1801]. Quoted in Theodore Noyes, *Our National Capital and Its Un-Americanized Americans* (Washington, DC: Press of Judd & Detweiler, Inc., 1951) p. 60. Hereafter cited as Woodward, quoted in Noyes.

[5] Congress twice approved legislation allowing the District of Columbia to elect a non-voting Delegate to Congress. From 1871 to 1874, Congress established a territorial form of government for the District with the passage of 16 Stat.419. The new government authorized the election of a non-voting delegate to represent the District in the House. Congress abolished this arrangement in the aftermath of a fiscal crisis. In 1970, Congress enacted P.L. 91-405 (H.R. 18725, 91st Congress) creating the position of Delegate to the House.

[6] Michel v. Anderson, 817 F. Supp. 126 (D.D.C. 1993), *affirmed*, 14 F.3d 623 (D.C. Cir. 1994).

- measures directing Congress to provide for the election of one Senator and the number of Representatives the District would be entitled to if it were a state;
- measures directing Congress to provide for the election of at least one Representative to the House, and, as may be provided by law, one or more additional Representatives or Senators, or both, up to the number the District would be entitled to if it were a state;
- measures directing Congress to provide for the election of one voting Representative or delegate in Congress;
- measures directing Congress to provide for voting representation in Congress without specifying the number of Representatives or Senators; and
- measures directing Congress to provide for voting representation in Congress for the District apportioned as if it were a state.

Initial Efforts. The idea of a constitutional amendment was first suggested in 1801, by Augustus Brevoort Woodward, in a pamphlet entitled "Considerations on the Government of the Territory of Columbia."[7] Although not a Member of Congress, Mr. Woodward, a landowner in the city of Washington, served as a member of the city council of Washington. His proposal to amend the Constitution would have entitled the District to one Senator and to a number of members in the House of Representative proportionate to the city's population. The proposal, which was never formally introduced, may be found in Appendix A.

Woodward's pamphlets, which were published between 1801 and 1803, provided a rationale for his proposal arguing that

> the people of the Territory of Columbia do not cease to be a part of the people of the United States and as such are entitled to the enjoyment of the same rights with the rest of the people of the United States .... It is contrary to the genius of our constitution, it is violating an original principal of republicanism, to deny that all who are governed by laws ought to participation in the formulation of them.[8]

Woodward noted that the Senate represented the interest of sovereign states and that no state was disadvantaged due to its population because the Constitution granted each state an equal number of Senate votes. He acknowledged the distinction between the Territory of Columbia and states and argued that the Territory, whose residents were citizens of the United States, should be considered half a state and thus entitled to one vote in the Senate. With respect to the House of Representatives, Woodward simply contended that House Members were representatives of the people, and that the citizens of the Territory of Columbia were therefore entitled to representation in the House equivalent to their population and consistent with the democratic principal of "consent of the governed."

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[7] Woodward, quoted in Noyes, *passim*.

[8] Woodward, quoted in Noyes, p. 195.

It took another eighty-seven years before the first proposed constitutional amendment providing for voting representation in Congress for the District of Columbia was formally introduced by Senator Henry Blair of New Hampshire. During the 50th Congress, on April 3, 1888, Senator Blair introduced a resolution identical in its intent to that of the Woodward proposal of 1801. The Blair proposal was submitted on behalf of Appleton P. Clark and was accompanied by a letter which was printed in the *Congressional Record*.[9] On April 5, 1888, the Senate Judiciary Committee was discharged from considering the resolution. Senator Blair reintroduced a modified version of the proposed amendment, S.J.Res. 82, on May 15, 1888.

During the 51st Congress, Senator Blair reintroduced both proposals as S.J.Res. 11 and S.J.Res. 18. The Senate Committee on Privileges and Elections responded to both bills adversely. On September 17, 1890, Senator Blair addressed the Senate on the subject of the District of Columbia representation in Congress. His statement referred to many of the arguments in support of voting representation in Congress. It admonished the Senate for what the Senator characterized as the hasty disposition of the amendments he introduced, noting that

> This [the lack of voting representation in Congress for citizens of the District] is no trifling matter, and I verily believe that it constitutes a drop of poison in the heart of the Republic, which, if left without its antidote, will spread virus through that circulation which is the life of our liberties.[10]

In the years between 1902 and 1917, several bills proposed constitutional amendments entitling the District to two Senators and representation in the House in accordance with its population. Although the Senate District Committee held a hearing on S. J. Res. 32, in 1916, the Senate took no further action on the resolution.

On January 27, 1917, Senator Chamberlain introduced S.J.Res. 196 in the 64th Congress. The bill empowered Congress to recognize the citizens of the District as citizens of a state for the purpose of congressional representation. The resolution gave Congress the power to determine the structure and qualifications of the District's delegation, essentially allowing Congress to act as a state legislature in conformance with Article I, Sec. 4, Clause 1 of the Constitution. Congress would have been empowered to provide the District with one or two votes in the Senate and such votes in the House that it would be entitled based on its population. The resolution was noteworthy because it was the first resolution to be introduced that would have permitted, rather than mandated that Congress grant District residents voting representation in Congress. Between 1917 and 1931, at least 15 resolutions of this type were introduced.[11]

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[9] Senator Henry Blair, Remarks in the Senate, *Congressional Record*, vol. XIX, April 3, 1888, p. 2637.

[10] Senator Henry Blair, Remarks in the Senate, *Congressional Record*, vol XXI, September 17, 1890, p. 10122.

[11] Noyes, p. 207.

Continued Efforts. In March 1967, Representative Emanuel Celler, chair of the House Judiciary Committee, introduced a legislative proposal on behalf of President Lyndon Johnson granting District residents voting representation in Congress. The proposal — H.J.Res. 396 — sought to authorize one voting Representative and granted Congress the authority to provide, through legislation, additional representation in the House and Senate, up to the number the District would be entitled were it a state. The House Committee on the Judiciary held hearings on the Johnson proposal, as well as others, in July and August 1967. On October 24, 1967, the Committee reported an amended version of the resolution to allow full voting representation for the District of Columbia: two Senators and the number of Representatives it would be entitled if it were a state. No other action was taken on the resolution during the 90th Congress.

In 1970, the Senate Judiciary Subcommittee on Constitutional Amendments held hearings on two constitutional amendments (S.J.Res. 52 and S.J.Res. 56) granting voting representation in Congress to District residents, but did not vote on the measures. Instead, Congress passed H.R. 18725, which became P.L. 91-405, creating the position of nonvoting Delegate to Congress for the District in the House of Representatives.

States Fail to Ratify Constitutional Amendment. In 1972 and 1976 constitutional amendments (H.J.Res. 253, 92nd Congress and H.J.Res. 280, 94th Congress), introduced by the District's Delegate to Congress, Walter Fauntroy, granting voting representation to citizens of the District were reported to the House Judiciary Committee. Only the 1976 proposal reached the House floor where it was defeated by a vote 229-181. Representative Don Edwards reintroduced the proposed constitutional amendment as H.J.Res. 554 in the 95th Congress on July 25, 1977. It passed the House on March 2, 1978, by a 289-127 margin. On August 22, 1978, the Senate approved the resolution by a vote of 67-32. The proposed amendment, having been passed by at least two-thirds of each house, was sent to the states. The amendment provided that — for the purposes of electing members of the U.S. Senate and House of Representatives and presidential electors, and for ratifying amendments to the U.S. Constitution — the District of Columbia would be considered as if it were a state. Under the Constitution, a proposed amendment requires ratification by three-fourths of the states to take effect. In addition, Congress required state legislatures to act on ratification within seven-year of its passage.[12] The D.C. Voting Rights Amendment was ratified by 16 states, but expired in 1985 without winning the support of the requisite 38 states.

Renewed Efforts. On June 3, 1992, during the 102nd Congress, Representative James Moran introduced H.J.Res. 501, a proposed constitutional amendment declaring that the District, which constitutes the seat of government of the United States, be treated as a state for purposes of representation in Congress, election of the President and Vice President, and Article V of the Constitution, which delineates the process for amending the Constitution. The resolution was referred to the House Judiciary Committee, where no action was taken.

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[12] The seven-year period does not appear in the Constitution, but it has become customary over time.

Retrocession

Retrocession as a remedy for achieving voting representation for District residents was debated by Congress during the first years following the establishment of the federal capital. Retrocession proposals typically would relinquish all but a portion of the city of Washington to Maryland, providing voting representation for the city residents located outside the designated federal enclave. Retrocession could increase Maryland's congressional delegation by at least one additional seat in the House of Representatives and provide District residents in the newly retroceded area with voting representation in the Senate. According to proponents, retrocession and the concurrent creation of a federal enclave may address the constitutional provision regarding Congress' authority to exercise exclusive legislative control over the federal district. If past history is a guide, retrocession would probably be contingent upon acceptance by the state of Maryland. Although, parts of the District was retroceded to Virginia in 1846, modern retrocession is a judicially and politically untested proposition. (See discussion of Virginia retrocession later in this report.)

Opponents of retrocession note that the adoption of such a measure could force Congress to consider the repeal of the 23rd Amendment to the Constitution, which grants District residents representation in the electoral college equivalent to the number of Senators and Representatives in Congress it would be entitled to if it were a state. If the amendment were not repealed, the net effect would be to grant a disproportionately large role in presidential elections to a relative small population residing in the federal enclave.

Early Debates. On February 8, 1803, Representative John Bacon of Massachusetts introduced a motion seeking "to retrocede that part of the Territory of Columbia that was ceded by the states of Maryland and Virginia." The motion made retrocession contingent on the state legislatures agreeing to the retrocession.[13] During the debate on the motion supporters of retrocession asserted that

- exclusive jurisdiction over the District was not necessary or useful to the national government;
- exclusive control of the District deprived the citizens of the District of their political rights;
- too much of Congress' time would be consumed in legislating for the District, and that governing the District was too expensive;
- Congress lacked the competency to legislate for the District because it lacked sensitivity to local concerns; and
- the District was not a representative form of government as structured, and thus denies citizens of the nation's capital the right of suffrage.

On the other hand, opponents of Bacon's retrocession proposal argued that

- the national government needed a place unencumbered by state laws;

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[13] *Annals of Congress*, 7th Cong., 2nd sess., December 6, 1803 to March 3, 1803 and Appendix. (Washington, 1803) p. 486-491 and 494-510.

- District residents had not complained or petitioned the Congress on the question of retrocession; and that Congress could not retrocede the land without the consent of the citizens;
- the District might be granted representation in Congress when it achieved sufficient population;
- the expense of administering the District would decrease over time;
- retroceding the land removed the national government of any obligation to remain in place; and
- the cession of land and Congress's acceptance constituted a contract that could only be dissolved by all parties involved including the states of Maryland and Virginia, Congress, and the people of the District.

The Bacon motion was defeated by a vote of 66 to 26.

A year later, on March 17, 1804, Representative John Dawson introduced a similar provision that would have retroceded all of the Virginia portion of the Territory of Columbia to Virginia, and all but the city of Washington to Maryland. The House postponed a vote on the resolution until December 1804. On December 31, 1804, Representative Andrew Gregg called up the motion seeking retrocession of the District of Columbia to Virginia and Maryland. The House elected to postpone consideration of the resolution until January 7, 1805. During three days, from January 7 to 10, the House debated the merits of retroceding the District of Columbia to Virginia and Maryland, excluding the city of Washington. During the debate, concerns about the disenfranchisement of District residents and the democratic principle of no taxation without representation clashed with efforts to create an independent and freestanding federal territory as the seat of the national government. The House again rejected a resolution allowing for the retroceding of Maryland and Virginia lands.

Virginia Retrocession. In 1840 and 1841, the citizens of Alexandria sought congressional action that would retrocede the area to Virginia. Five years later, on July 9, 1846, the District territory that lay west of the Potomac River was retroceded to Virginia by an act of Congress. The retroceded area represented about two-fifths of the area originally designated as the District.

Largely because Virginia agreed to the retrocession, there was no immediate constitutional challenge to the change. During the debate on retrocession, issues of the constitutionality of the Virginia Retrocession Act were raised. Opponents argued that the retrocession required the approval of a constitutional amendment. In 1869, Representative Halbert E. Paine submitted a resolution that was referred to the Committee on Elections and that challenged the seating of Virginia's 7th Congressional District's representative, Representative Lewis McKenzie. Representative Paine asserted that the retrocession of Alexandria was unconstitutional and requested a review by the Committee on the Judiciary. No action was taken.[14]

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[14] U.S. Congress, Journal of the House of Representative, 41st Cong., 2nd sess. (Washington (continued...)

Constitutional Challenge to Virginia Retrocession. The constitutional question concerning retrocession to Virginia was not reviewed by the Supreme Court until 1875. In 1875, the Supreme Court in *Phillips v. Payne*,[15] rendered a decision that allowed the retrocession to stand, but did not rule on the constitutionality of the Virginia retrocession. The Court noted that since the parties to the retrocession (the federal government and the state of Virginia) were satisfied with its outcome, no third party posed sufficient standing to bring suit. In essence, retrocession was an accepted fact, a *fait accompli*. On December 17, 1896, the Senate adopted a resolution introduced by Senator James McMillan directing the Department of Justice to determine what portion of Virginia was originally ceded to the United States for the creation of the District of Columbia, under what legislative authority was the Virginia portion of the District retroceded, whether the constitutionality of such action had been judicially determined, and to render an opinion on what steps must be taken for the District to regain the area retroceded to Virginia.[16]

The Attorney General of the United States, although offering no opinion on the constitutionality of the retrocession, noted that Congress could only gain control of the retroceded area if territory was again ceded by Virginia and accepted by Congress.[17] On February 5, 1902, a joint resolution introduced in the House and Senate (S.Res. 50) again raised the question of the constitutionality of the retrocession of land to Virginia and directed the Attorney General of the United States to seek legal action to determine the constitutionality of the retrocession and to restore to the United States that portion of Virginia that was retroceded should the retrocession be judged unconstitutional.[18] On April 11, 1902, Senator George F. Hoar, Chairman of the Senate Judiciary Committee, submitted a report to the Senate (S.Rept. 1078) which concluded that the question of retrocession was a political one, and not one for judicial consideration. The Committee report recommended that the resolution be adversely reported and indefinitely postponed.[19]

Maryland Retrocession. From 1838 to the Civil War, a number of bills and resolutions were introduced to retrocede part or all of the Maryland side of the District. Some of these linked retrocession to the abolition of slavery in the Nation's capital. All failed to win passage. In both 1838 and 1856, Georgetown unsuccessfully sought retrocession to the state of Maryland. On July 3, 1838, the

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[14] (...continued)
December 13, 1969) pp. 57-58.

[15] 92 U.S. 130 (1875).

[16] Sen. James McMillan, "*Original District of Columbia Territory*," remarks in the Senate, Congressional Record , vol. XXIX, December 17, 1896, p. 232.

[17] Amos B. Casselman, The Virginia Portion of the District of Columbia, Records of the Columbia Historical Society, vol. 12. (Washington, read before the Society, December 6, 1909) pp. 133-135.

[18] Sen. James McMillan. "Introduction of Resolution (SR 50) Regarding Constitutionality of Virginia Retrocession," remarks in the Senate, Congressional Record, vol. XXXV, February 5, 1902, p. 1319.

[19] U.S. Congress, Senate. "*Retrocession of a Portion of the District of Columbia to Virginia*," Congressional Record, vol. XXXV. p. 3973.

Senate also considered and tabled a motion that prevented consideration of a petition by the citizens of Georgetown to retrocede that part of Washington County west of Rock Creek to Maryland.[20]

In 1848, Senator Stephen Douglas of Illinois submitted a resolution directing the District of Columbia Committee to inquire into the propriety of retroceding the District of Columbia to Maryland. The motion was agreed to by unanimous consent. Again, it was only a motion to study the question of retrocession. On January 22, 1849, Representative Thomas Flournoy introduced a motion that called for the suspension of the rules to enable him to introduce a bill that would retrocede to Maryland all of the District not occupied by public buildings or public grounds. The motion failed. On July 16, 1856, a bill (S. 382) was introduced by Senator Albert G. Brown directing the Committee on the District of Columbia to determine the sentiments of the citizens of the city of Georgetown on the question of retrocession to Maryland. The following year, on January 24, 1857, the Senate postponed further consideration of the measure after a brief debate concerning the language of the bill and its impact on consideration of any measure receding Georgetown to Maryland.

Modern Era. Since the 88th Congress, a number of bills have been introduced that would retrocede all or part of the District to Maryland; none were successful. Most involved the creation of a federal enclave, the National Capital Service Area, comprising federal buildings and grounds under control of the federal government. In 1963, Representative Kyl, introduced H.R. 5564 in the 88th Congress, which was referred to the House District of Columbia Committee, but was not reported by the Committee. The measure would have retroceded 96% of the District to Maryland and created a federal enclave.

On August 4, 1965, Representative Joel Broyhill of Virginia introduced a measure (H.R. 10264 in the 89th Congress) creating a federal enclave and retroceding a portion of the District to Maryland. Also, in 1965, the House District of Columbia Committee reported H.R. 10115, a bill combining the creation of a federal enclave, the retrocession of part of the District to Maryland, and home rule provisions. The bill was reported by the House District of Columbia Committee (H.Rept. 89-957) on September 3, 1965. It would have allowed the creation of a federal enclave, and retrocession of the remaining part of the city not included in the federal enclave, contingent on the state of Maryland's acceptance. If the Maryland legislature failed to pass legislation accepting the retroceded area within one year, the District Board of Election would be empowered to conduct a referendum aimed at gauging support for the creation of a charter board or commission to determine the form of government for the outer city. The bill provided for congressional approval of any measure approved by the citizens of the affected area.

On October 2, 1973, H.R. 10693, introduced by Representative Edith Green, included provisions retroceding the portion of the District ceded to the United States by Maryland. The bill would have retained congressional control over the federal enclave. If the retrocession provisions of the bill had been approved, Maryland

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[20] U.S. Congress, *Congressional Globe, Sketches of Debates and Proceedings*, 25th Cong., 2nd sess, (Washington: 1838) pp. 297, 493.

would have been entitled to two additional United States Representatives for the area retroceded until the next congressional reapportionment. The bill also provided nine years of federal payments after retrocession to Maryland to defray expenses of supporting a newly established local government for the retroceded area. It was referred to the House District of Columbia Committee on October 2, 1973, but no further action was taken.

Since the 101st Congress, eight bills have been introduced to retrocede some part of the District to Maryland.[21] The bills would have maintained exclusive legislative authority and control by Congress over the National Capital Service Area (federal enclave) in the District of Columbia. Like their earlier counterparts no hearings or votes were held on these bills.

Retrocession as a strategy for achieving voting representation in Congress for District residents arguably should address both political and constitutional issues and obstacles. The process would require not only the approval of Congress and the President, but also the approval of the State of Maryland and, perhaps, the voters of the retroceded area. Although the Supreme Court reviewed the question of retrocession in *Phillips v. Payne,*[22] in 1875, it did not rule on its constitutionality.

Semi-Retrocession: District Residents Voting in Maryland

Short of retroceding all or a portion of the District to Maryland, a second option would allow District residents to be treated as citizens of Maryland for the purpose of voting in federal elections. Such an arrangement would allow District residents to vote as residents of Maryland in elections for the House of Representatives, and to have their vote counted in the election of the two Senators from Maryland This semi-retrocession arrangement would allow District residents to be considered inhabitants of Maryland for the purpose of determining eligibility to serve as a member of the House of Representatives or the Senate, but would not change their status regarding Congress' exclusive legislative authority over the affairs of the District.

The idea of semi-retrocession is reminiscent of the arrangement that existed between 1790 to 1800, the ten-year period between the creation and occupation of the District as the national capital. During this period residents of District residing on the respective Maryland and Virginia sides of the territory were allowed to vote in national elections as citizens of their respective states and in fact voted in the 1800 presidential election.

Initial Efforts. Several bills have been introduced since 1970 to allow District residents to vote in Maryland's congressional and presidential elections without retroceding the area to Maryland. During the 93rd Congress, on January 30, 1973,

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[21] Rep. Regula has introduced a retrocession bill in every Congress since the 101st Congress. These include H.R. 4195 (101st Congress); H.R. 1204 (102nd Congress); H.R. 1205 (103rd Congress); H.R. 1028 (104th Congress); H.R. 831 (105th Congress); H.R. 558 (106th Congress); H.R. 810 (107th Congress); and H.R. 381 (108th Congress).

[22] 92 U.S. 130 (1875).

Representative Charles Wiggins introduced H.J.Res. 263, a proposed constitutional amendment would have considered the District a part of Maryland for the purpose of congressional apportionment and representation. Under this bill, District residents would have been subject to all the requirements of the laws of Maryland relating to the conduct of elections and voter qualification. The bill was referred to the House Committee on the Judiciary where no further action was taken.

On March 6, 1990, Representative Stanford Parris introduced H.R. 4193, the National Capital Civil Rights Restoration Act of 1990. The bill would have given District residents the right to cast ballots in congressional elections as if they were residents of Maryland. It also would have maintained the District's governmental structure, and was offered "as a workable way to change the [status quo] which represents taxation without representation" and as an alternative to a statehood measure, H.R. 51, introduced by Delegate Walter E. Fauntroy of the District of Columbia.[23] District officials and some members of the House, most notably Representatives Constance Morella and Steny Hoyer, who represented the two Maryland congressional districts adjacent to the District of Columbia, opposed the bill. Opponents of H.R. 4193 argued that it was not a practical means of addressing the District's lack of voting representation in Congress and that it could further cloud the District's status. Both bills were referred to the House District of Columbia Committee, but received no further action.

In defending the proposal, Representative Parris noted his opposition to statehood for the District and offered this explanation of his proposal in a letter published in the *Washington Post* on March 18, 1990.

> This approach would allow the government of the District to remain autonomous from the Maryland state government. D.C. residents would continue to vote for a mayor and a city council, and would not participate in Maryland elections for state positions such as delegate, state senator and governor. The reason for this is the constitutional mandate that the nation's capital remain under the exclusive legislative jurisdiction of Congress.
>
> There is an important distinction between this action and the Voting Rights Constitutional Amendment proposed in 1978. That action, rejected by the states, called for the election of members of Congress from the District. It did not, as my proposal does, elect those members as part of the Maryland delegation. There is also a distinction between this and proposals simply to turn the District over to Maryland [retrocession]. With my proposal, there is no need to delineate the federal enclave, and there would not be a requirement to obtain the approval of the Maryland legislature.
>
> I do not propose this because the push for statehood might pass; on the contrary, I am certain that given the political and practical problems facing the District, the unconstitutionality of statehood, and the positions taken by members of Congress during the most recent statehood debate, that statehood would not pass.

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[23] H.R. 51 had 61 cosponsors in the House. A companion bill was introduced in the Senate, S. 2647 by Sen. Kennedy with five cosponsors. H.R. 4193 had three cosponsors in the House, but no companion bill in the Senate.

> Rather, I take this action because the current injustice should be corrected, and this proposal is the only one that takes into account the constitutional limitations on statehood and the compelling case to restore voting rights in national elections to District residents.[24]

Representative Parris contended that the proposal did not require the approval of the Maryland legislature or a referendum vote by District citizens. The proposal did raise questions of constitutional law, apportionment, and House procedure. It would have provided Maryland one additional seat in the House of Representatives, increased the size of the House temporarily until the 2000 reapportionment and allowed the District's Delegate to Congress to serve as a member of the House of Representatives from Maryland until the date of the first general election occurring after the effective date of the act.

Recent Efforts. This approach had not been reintroduced in succeeding Congresses until the 108th Congress when Representative Dana Rohrabacher introduced the District of Columbia Voting Rights Restoration Act of 2004, H.R. 3709. The bill was referred to the House Administration Committee, the House Judiciary Committee, and House Committee on Government Reform, which held a hearing on June 23, 2004. When introducing his bill, Representative Rohrabacher, noted the purpose of this bill was to restore voting rights to District residents that Congress severed with the passage of the Organic Act of 1801. Representative Rohrabacher introduced a similar measure, H.R. 190, during the 109th Congress. The bill was referred to the House Administration Committee, the Government Reform Committee, and the House Judiciary Committee's Subcommittee on the Constitution. A similar measure has been introduced in the 110th Congress (H.R. 492). It would:

- treat District residents as Maryland voters for the purpose of federal elections, thus allowing District voters to participate in the election of Maryland's delegation to the House and Senate;
- allow District residents to run for congressional and senatorial seats in Maryland; increased the size of the House by two additional members until reapportionment following the 2010 decennial census;
- classify the District as a unit of local government for the purpose of federal elections and subject to Maryland election laws;
- give one House seat to Maryland and require most, if not all, of the city to be designated a single congressional district, as population permits;
- direct the clerk of the House to notify the governor of the other state, mostly likely Utah, that it is entitled to a seat based on the apportionment report submitted to the Congress by the President in 2001;
- repeal the 23rd Amendment, which allows the District to cast three electoral votes in presidential elections; and

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[24] Rep. Stanford Parris. "Voting Rights, Yes, A New Status, No." *The Washington Post* March 18, 1980. p. b8.

- allow citizens in the District to vote as Maryland residents in elections for President and Vice President.

The bill raises several policy questions relating to state sovereignty and the imposition of federal mandates:

- Can Congress, without the consent of the state, require the state of Maryland to administer or supervise federal elections in the District?
- Does transferring administrative authority and associated costs for federal elections in the District to the state of Maryland constitute an unfunded mandate?
- Who should bear the additional cost of conducting federal elections in the District?
- Is the proposal constitutional?
- Does the measure require an affirmative vote of the citizens of Maryland or the Maryland legislature?

Semi-retrocession arguably rests on uncertain ground. The constitutionality of the concept has not been tested in the courts. Semi-retrocession raises questions relating to state sovereignty and the power of Congress to define state residency for the purpose of voting representation in the national legislature. Further, since the proposal does not make the District a state, it might violate Article 1, Section 2 of the Constitution and the 14th Amendment to the Constitution. Article 1, Section 2 requires Representatives to be chosen from the states. The 14th Amendment is the basis for the "one-person, one-vote" rule for defining and apportioning congressional districts in the states.

Statehood

In the past, statehood has been granted by a simple majority vote in the House and the Senate and the approval of the President. However, according to some scholars, the District's unique status raises constitutional questions about the use of this statutory method to achieve statehood. Article IV, Section 3, of the Constitution identifies certain requirements for admission to the Union as a state. The Article states that

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or Parts of the States, without the consent of the legislatures of the States concerned as well as of the Congress.

Some opponents of statehood contend that this article implies that the consent of Maryland would be necessary to create a new state out of its former territory. They note that Maryland ceded the land for the creation of a national capital. This could raise a constitutional question concerning whether Maryland could object to the creation of another state out of territory ceded to the Untied States for the creation

of the national seat of government, the District of Columbia. In addition, it could be argued that the granting of statehood for the District would violate Article I, Section 8, Clause 17, which gives Congress exclusive legislative control of the District. Because of these constitutional issues, most statehood proposals for the District have sought to achieve statehood through the constitutional amendment process.

Granting statehood to the District of Columbia would settle the question of congressional representation for District residents. A ratified constitutional amendment granting statehood to the District would entitle the District to full voting representation in Congress. As citizens of a state, District residents would elect two Senators and at least one Representative, depending on population.

Modern History. In 1983, when it became evident that H.J.Res. 554 — a proposed constitutional amendment granting voting rights to District residents — would fail to win the 38 state votes needed for ratification, District leaders embraced the concept of statehood for the District of Columbia. The statehood effort, however, can be traced back to1921.[25] Statehood legislation in Congress has centered around making the non-federal land in the District the nation's 51st state. Several supporters of voting representation in Congress for District residents believe that statehood is the only way for citizens of the District to achieve full congressional representation.

Since 1983, there has been a continuing effort to bring statehood to the District — an effort that was most intense from 1987 through 1993. Since the 98th Congress, 13 statehood bills have been introduced.[26] On two occasions, House bills were reported out of the committee of jurisdiction, resulting in one floor vote. D.C. Delegate Walter E. Fauntroy introduced H.R. 51, 100th Congress, in 1987 to create a state that would have encompassed only the non-federal land in the District of Columbia. While the bill was reported out of the House District of Columbia Committee, no vote was taken on the House floor. On a second statehood bill, H.R. 51, introduced by Delegate Eleanor Holmes Norton in the 103rd Congress, in 1993, the measure was reported from the Committee on the District of Columbia, and a vote was taken on the House floor on November 21, 1993, with a tally of 277-153 against passage.

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[25] In November and December 1921, and January 1922, during the 67th Congress, the Senate held hearings on S.J.Res. 133, which would have granted statehood to the District.

[26] In the 98th Congress, Del. Fauntroy introduced H.R. 3861 on September 12, 1983, and Sen. Kennedy introduced S. 2672 on May 15, 1984. In the 99th Congress, Del. Fauntroy introduced H.R. 325 on January 3, 1985; Sen. Kennedy introduced S. 293 on January 24, 1985. In the 100th Congress, Del. Fauntroy introduced H.R. 51 on January 6, 1987; Sen. Kennedy introduced S. 863 on March 26, 1987. In the 101st Congress, Del. Fauntroy introduced H.R. 51 on January 3, 1989; Sen. Kennedy introduced S. 2647 on May 17, 1990. In the 102nd Congress, Del. Norton introduced H.R. 2482 on May 29, 1991; Sen. Kennedy introduced S. 2023 on November 22, 1991. In the 103rd Congress, Del. Norton introduced H.R. 51 on January 5, 1993; Sen. Kennedy introduced S. 898 on May 5, 1993. In the 104th Congress, Del. Norton introduced H.R. 51 on January 4, 1995.

Other Statutory Means

On July 14, 1998, during the 105th Congress, Delegate Eleanor Holmes Norton introduced H.R. 4208, a bill providing full voting representation in Congress for the District of Columbia. The bill was referred to the Committee on Judiciary, Subcommittee on the Constitution, where no action was taken. The bill was noteworthy in that it did not prescribe methods by which voting representation was to be obtained such as a constitutional amendment. Nor did the Norton bill include language typically found in other measures that defined or declared the District a state for the purpose of voting representation in Congress. The measure suggested that Congress might provide voting representation by statute, a constitutionally untested proposition.

During the 109th Congress two bills were introduced that sought to provide voting representation to the citizens of the District of Columbia by eschewing methods used in the past such as a constitutional amendment, retrocession, semi-retrocession and statehood. The bills would have provided District citizens with voting rights in Congress by designating the District as a state (virtual statehood) or by designating the District as a congressional district.

Virtual Statehood. Much of the latest thinking on securing voting rights for citizen's of the District centers on the premise that Congress has the power to define the District as a state for the purpose of granting voting representation. Proponents of virtual statehood note that the District is routinely identified as a state for the purpose of intergovernmental grant transfers, that Congress' authority to define the District as a state under other provisions of the Constitution has withstood Court challenges,[27] and that Congress has passed legislation allowing citizens of the United States residing outside the country to vote in congressional elections in their last state of residence.[28] They also note that the Constitution gives Congress exclusive legislative control over the affairs of the District and thus the power to define the District as a state. Opponents argue that the District lacks the essential elements of statehood, principally an autonomous state legislature, charged with setting the time, place and manner for holding congressional elections.

During the 109th Congress Delegate Eleanor Holmes Norton and Senator Joseph Lieberman introduced identical bills in the House and Senate (H.R. 398/S. 195: No Taxation Without Representation Act of 2005) that would have treated the District as a state for the purpose of congressional representation. In addition, the bill would have

- given the District one Representative with full voting rights until the next reapportionment;
- granted full voting representation to District citizens, allowing them the right to elect two Senators, and as many Representatives as the

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[27] See *Stoutenburg v. Hennick*, 129 U.S. 141 (1889) (Art. 1, Sec. 8, Clause 3 — Commerce Clause); *Callan v. Wilson*, 127 U.S. 540, 548 (1988) (Sixth Amendment — District residents are entitled to trial by jury).

[28] The Uniform and Overseas Citizens Absentee Voting Act, 100 Stat. 924.

District would be entitled to based on its population following reapportionment;
- permanently increased the size of the House from 435 to 436 for the purpose of future reapportionment.

The proposal raised several questions, chief among them, whether Congress has the legal authority to give voting representation to District residents. The bill differed significantly from the other measures introduced in during the 109th Congress. H.R. 398 would have provided citizens of the District with voting representation in both the House and the Senate, unlike the other measures which would provide representation only in the House.

Congressional District (H.R 1433). On March 13, 2007, the House Government Oversight and Reform Committee ordered reported H.R. 1433, the District of Columbia House Voting Rights Act of 2007. The measure supersedes H.R. 328, which was introduced earlier in the 110th Congress. The bill includes a controversial provision that was not included in H.R. 328, namely, the temporary creation of an at-large congressional district for the state most likely to gain an additional representative. That state, Utah, approved a fourth congressional district in December 2006. H.R. 1433 would

- designate the District of Columbia as a congressional district for the purpose of granting the city voting representation in the House of Representative; and
- permanently increased the number of members of the House of Representative from 435 to 437. One of the two additional seats would be occupied by a Representative of the District of Columbia; the other would be elected at-large from the state of Utah based on 2000 decennial census of the population and apportionment calculations which placed Utah in the 436 position. This is one seat short of the 435 seats maximum size of the House. (For information on the impact of the 2000 Population Census on the apportionment process, see CRS Report RS20768, *House Apportionment 2000: States Gaining, Losing, and on the Margin*; and CRS Report RS22579, *District of Columbia Representation: Effect on House Apportionment*, both by Royce Crocker.)

The House Government Reform and Oversight Committee, which approved the bill by a vote of 24-5, considered several amendments, but adopted only one. The amendment, which was sponsored by Representative Westmoreland and approved by voice vote, would prohibit the District from being considered as a state for the purpose of representation in the Senate. Other amendments that were offered or ruled non-germane by the chair included measures that would have ceded the District back to Maryland, required the ratification of a constitutional amendment giving Congress the power to grant the District voting rights in the House, and nullified the bill if there was not partisan balance in the added representation.

On March 15, 2007, the bill was also marked up and ordered reported by a vote of 21-13 by the House Judiciary Committee, which held a hearing on the

constitutionality of the bill a day earlier. The committee considered and rejected a number of amendments to the measure, including the following:

- a provision calling for expedited judicial review in the likely event of a court challenge to the bill's constitutionality,
- a provision allowing Utah's state legislature to decide if the state's additional representative would be elected at-large or by congressional district, and
- a provision allowing for congressional representation of all military bases with populations of 10,000 or more.

H.R. 1433 is the most recent in a long series of efforts aimed at giving District residents voting representation in Congress, a series that extends back to 1801. During the 109th Congress, when a similar measure (H.R. 5388) was being considered by the House Subcommittee on the Constitution, the creation of an at-large congressional district for Utah was cited as a hurdle to the bill being reported out of the subcommittee. These concerns were raised anew during the House Judiciary Committee hearing on March 14, 2007, and during the markup of the bill the following day. The proposed creation of an at-large congressional district for Utah is not without precedent. According to the *Historical Atlas of United States Congressional Districts* the use of at-large congressional districts lasted from the 33rd Congress (1853-1855) to the 89th Congress (1965-1967). Such districts were used for one of several reasons. The state legislature

- could not convene in time to redistrict,
- could not agree upon a new redistricting plan,
- decided not to redistrict, or
- decided to use this method as a part of its new redistricting plan.[29]

The idea of an at-large District raised questions about the measure's constitutionality. In response, on December 4, 2006, the Utah legislature approved by a vote of 23 to 4 in the Senate and 51 to 9 in the House, a redistricting map creating a 4th congressional district for the state. The move was seen by supporters of voting rights for the District as removing a significant impediment to the bill's consideration by the full House of Representatives during the 109th Congress. However, a floor vote on the measure was not possible before the 109th Congress adjourned following the 2006 congressional elections.

H.R. 1433, House Floor Action. On March 22, 2007, the House began consideration of H.R. 1433. A House vote on the bill was postponed after Representative Smith of Texas offered a motion to recommit the bill to the House Oversight and Government Reform Committee for consideration of an amendment that would have repealed substantial portions of the city's gun control law, the

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[29] Kenneth C. Martis. *Congressional Districts* in The Historical Atlas of United States Congressional Districts: 1789-1993 (New York, NY, The Free Press, 1982) p. 5.

Firearms Control Regulation Act of 1975.[30] The act requires all firearms within the District be registered and all owners be licensed, and it prohibits the registration of handguns after September 24, 1976. The proposed amendment to H.R. 1433 would

- limit the Council's authority to regulate firearms;
- define machine guns to include any firearm that can shoot more than one shot by a single function of the trigger;
- amend the gun registration requirements so that they do not apply to handguns, but only to sawed-off shotguns, machine guns, and short-barreled rifles;
- remove restrictions on ammunition possession;
- repeal requirements that DC residents keep firearms in their possession unloaded and disassembled, or bound by a trigger lock;
- repeal firearm registration requirements generally; and
- repeal certain criminal penalties for possessing unregistered firearms or carrying unlicensed handguns.[31]

The proposed repeal of the District's gun control law is seen by city leaders as an attack on the city's home rule prerogatives. Supporters of the provision frame it as a Second Amendment issue arguing that the District's Firearms Control Regulation Act infringes on the constitutional guarantee to gun ownership. This position was bolstered by a recent decision by the United States Court of Appeals for the District of Columbia Circuit (DC Court of Appeals). On March 9, 2007, in *Parker v District of Columbia*[32] the DC Court of Appeals, in a 2-1 decision, reversed a D.C. District Court decision[33] upholding the District's gun control ban. The Court of Appeals' decision, which the District plans to appeal, struck down the District's 32-year-old gun control act, declaring it unconstitutional.

H.R. 1905. On April 19, 2007, nearly a month after H.R. 1433 was withdrawn from floor consideration, a new bill, H.R. 1905, granting voting rights to the District was brought to the floor under a closed rule (H.Res. 317). The rule restricted the ability of Members to offer amendments and tied passage of the bill to another bill, H.R. 1906, that would provide a $3 million revenue tax offset to cover the cost of adding the two additional seats to the House as contemplated by H.R. 1905. Passage of H.R. 1906 is intended to honor the PAYGO requirements put in place by the House. During floor consideration of the bill, Representative English termed the measure, H.R. 1906, a tax gimmick that does not not honor the PAYGO pledge.[34] Congress approved H.R. 1905 by a vote of 241 to 177 (Roll vote 231), and H.R. 1906

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[30] D.C. Code § 7-2501.01

[31] The proposed amendment includes the identical language as that of H.R. 1399, the District of Columbia Personal Protection Act. Similar legislation was introduced in the 109th Congress (H.R. 1288 and S. 1082) and the 108th Congress (H.R. 3193).

[32] *Parker v. District of Columbia,* 04-7041 (2007)

[33] 300 F. Supp. 2d 103 (D.D.C. 2004).

[34] Rep. Phil English, remarks in the House, *Congressional Record*, daily edition, vol. 153, April 19, 2007, p. H3594.

by a vote of 216 to 203 (Roll vote 232). Consistent with H.Res. 317, the language of H.R. 1906 was included in H.R. 1905.

H.R. 1905, which is a shortened version of H.R. 1433, does not include several provisions included in H.R. 1433. Most notably, the bill does not include language that would

- prohibit the District from being considered a state for the purpose of Senate representation;
- require the two new representatives to be seated on the same date; and
- repeal provisions of the District of Columbia Delegate Act of 1970, P.L. 91-405, relating to the election, privileges, and qualifications of the Delegate to the House of Representatives from the District of Columbia.

These provisions were not included in H.R. 1905 in order to limit the scope of the bill. The provisions could be added during Senate or conference committee consideration of the bill.

Statement of Administration Policy. On March 20, 2007, the Bush Administration announced its opposition to H.R. 1433. The statement noted that the President may veto the bill should it reach his desk. The Administration's statement outlined its constitutional objections to the bill noting that (1) the bill violates Article 1, Section 2 of the Constitution, which limits representation in the House to representatives of states; (2) the District Clause is qualified by other provisions of the Constitution, including the Article I requirement that representatives of the House are to be elected by the people of the several states; and (3) it believes that voting representation for the District can only be achieved by constitutional amendment.

Analysis

Over the two hundred year history of the Republic, citizens of the District of Columbia have sought political and judicial redress in their efforts to secure voting representation in Congress. In 2000, the Supreme Court affirmed a decision by a three-judge panel of the United States District Court of the District of Columbia in the case of *Adams v. Clinton,*[35] which rejected a petition from District residents seeking judicial redress in their effort to secure voting representation in the national legislature. The Court ruled that District residents did not have a constitutional right to voting representation in Congress, but Congress has the power to grant voting rights to District residents through the political process including options outlined in this report.

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[35] 90 F. Supp. 2d 35 (D.D.C.2000), *affirmed sub nom.* Alexander v. Mineta, 531 U.S. 940 (2000)(cites to later proceedings omitted).

Any of the options outlined in this report must be able to withstand political and constitutional challenges. Some, such as a constitutional amendment or retrocession are more problematic than others. Others such as statehood, which can be achieved by statute, may trigger other constitutional issues. All must overcome what some observers consider conflicting provisions of the Constitution. Namely, Art. 1, Sec. 2, of the Constitution which states that the House of Representative shall be composed of members chosen every two years by the people of the several states and Art. 1, Sec. 8, Clause 17 which conveys exclusive legislative authority in all cases whatsoever over the affairs of the District of Columbia.

It can be argued that, given the District's unique status as the seat of the national government and a strict reading of the Constitution, the only fail-safe avenues that exist to provide District residents voting rights in the national legislature are a constitutional amendment or statehood, which could be achieved by statute. The former — a constitutional amendment — offers a degree of finality and permanence in settling the question of District voting representation in the national legislature, but the process of winning approval of such an amendment is by no means easy. To be successful, proponents of a constitutional amendment in support of District voting rights must win the support of

- two-thirds majority in both Houses of Congress. The amendment must then be ratified by three-fourths of the states (38 states) in a state convention or by a vote of the state legislatures; or
- two-thirds of the state legislatures may call for a Constitutional Convention for the consideration of one or more amendments to the Constitution. If approved, the amendments must be ratified by three-fourths of the states (38 states) in a state convention or by a vote of the state legislatures.

The amendment process could take years and prove unsuccessful, as was the case with the D.C. Voting Rights Amendment of 1978, which was ratified by 16 states, but expired in 1985 without winning the support of the requisite 38 states.

Retrocession, the ceding of part of the District back to Maryland, has not been fully tested in the courts. Retrocession as a strategy for achieving voting representation in Congress for District residents arguably should address both political and constitutional issues and obstacles. Given the Virginia experience, the process would require not only the approval of Congress and the President, but also the approval of the State of Maryland and, perhaps, the voters of the retroceded area. Although the Supreme Court reviewed the question of retrocession in *Phillips v. Payne,*[36] in 1876, it did not rule on its constitutionality. Moreover, retrocession would require some portion of the District to remain a federal enclave in conformance with Article 1, Sec. 8, Clause 17 of the Constitution, which requires Congress to exercise exclusive legislative control over the "Seat of the Government of the United States."

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[36] 92 U.S. 130 (1875).

Semi-retrocession bills would result in a unique arrangement between citizens of the District of Columbia and Maryland. Such bills would allow District residents to vote in Maryland congressional elections based in part on the theory of residual citizenship, that is the idea that District residents retained residual rights as citizens of Maryland, including voting rights after the land creating District was ceded to the federal government. The theory was rejected by the Supreme Court. In *Albaugh v. Tawes,*[37] the Supreme Court rejected the contention that District residents retained residual rights as citizens of Maryland, specifically, the right to vote in Maryland. The case involved a Republican candidate who lost the nomination election for the United States Senate. The candidate, William Albaugh, filed suit seeking a judgment declaring the District a part of Maryland and ordering Maryland state officials (the Governor and the Secretary of State) to declare the primary and any future elections voided because District residents did not vote. The Court held that District residents had no right to vote in Maryland elections.

Statehood is a much simpler process, but it is no less politically sensitive. Article IV of the Constitution gives Congress the power to admit new states into the Union. The Article does not prescribe the method, and the process has varied over time. Congress could by statute, convey statehood to some portion of the District. It must be noted that if Congress conveyed statehood on what is now the District, a portion of the District would have to remain a federal enclave since Article I, Sec. 8, Clause 17, of the Constitution requires a portion of the District, not exceeding ten square miles, to be maintained as the "Seat of Government of the United States." The statehood option should include Congress introducing a constitutional amendment repealing the 23rd Amendment granting District residents three votes in the Electoral College. Observers argue that if the amendment is not repealed it could result in conveying significant political power in presidential elections to the few District residents remaining in the federal enclave.

Bills that would convey voting rights to the District Delegate to Congress by defining the District as a state (virtual- statehood and other means) may conflict with Article I, Sec. 2, of the Constitution which conveys voting rights to representatives of the several states. Despite the constraints of Article 1, Sec. 2, advocates of voting rights for District residents contend that the District Clause (Art. 1, Sec. 8) gives Congress the power to define the District as a state. As Congress has never granted the Delegate from the District of Columbia a vote in the full House or Senate, the constitutionality of such legislation has not been before the courts. In general however, courts such as the three-judge panel in *Adams v. Clinton*[38] have not looked favorably upon the argument that the District of Columbia should be considered a state for purposes of representation in the Congress. Some commentators have suggested that Congress, acting under its authority over the District, has the power to confer such representation.[39] Other commentators, however, have disputed this

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[37] 379 U.S. 27 (1964).

[38] 90 F. Supp. 2d 35 (D.D.C.2000), *affirmed sub nom.* Alexander v. Mineta, 531 U.S. 940 (2000).

[39] *See, e.g.,* Viet Dinh and Adam H. Charnes, The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of

(continued...)

argument.[40] In addition, District voting rights proponents can point to the Uniform and Overseas Citizens Absentees Voting Act, as an example of Congress' authority to provide voting rights to citizens who are not residents of a state. A full analysis of these legal arguments can be found at CRS Report RL33824, *The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole,* by Kenneth R. Thomas.

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[39] (...continued)
Representatives 9 (2004) [report submitted to the House Committee on Government Reform)available at D.C. Vote Website at [http://www.dcvote.org/pdfs/congress/vietdinh 112004.pdf.]

[40] *See, e.g., District of Columbia Fair and Equal House Voting Rights Act of 2006, before the Subcommittee on the Constitution, H.R. 5388*, 109th Cong., 2nd sess. 61 (testimony of Professor Jonathon Turley).

Appendix A: Woodward Proposal

Resolved that the following be recommended to the Legislatures of the several states as an Article in addition to, and amendment of the constitution of the United States.

ARTICLE

The Territory of Columbia shall be entitled to one Senator in the Senate of the United States; and to a number of members in the House of Representatives proportionate to its population. Before it shall have attained a population sufficient to entitle it to one representative it shall be entitled to a member, who shall have the right to deliberate and receive pay, but not to vote. It shall also be entitled to one elector for a President and Vice President of the United States, until it shall have attained a sufficient population to entitle it to one representative, and then it shall be entitled to an additional elector for every representative.[41]

[41] Woodward, Proposed Constitutional Amendment of 1801, quoted in Noyes, p. 204.

Appendix B: Anti-Lobbying Provisions in D.C. Appropriations Acts

Congress has restricted the ability of the Government of the District of Columbia to lobby for voting representation. For several years, the general provisions of annual appropriation acts for the District have prohibited D.C. Government from using federal or District funds to lobby for voting representation, including statehood. Most recently, P.L. 109-115 — the Departments of Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, the Office of President, and Independent Agencies Appropriations Act of 2006 — prohibits the use of District and federal funds to support lobbying activities aimed at securing statehood or voting representation for citizens of the District. In addition, the act specifically prohibits the District of Columbia Corporation Counsel or any other officer or entity of the District government from providing assistance for any petition drive or civil action seeking to require Congress provide for voting representation in Congress for the District of Columbia. The act also prohibits the use of District and federal funds to finance the salaries, expenses, or other costs associated with the offices of Statehood Representative for District of Columbia and Statehood Senator.[42]

In 2005, the District passed legislation that some analysts consider a circumvention of Congress' prohibition on the use of District funds to advocate for voting representation in Congress for citizens of the District of Columbia. On July 6, 2005, the Council of the District of Columbia unanimously approved the "Fiscal Year 2006 Budget Support Emergency Act of 2005" (A16-0168). The act included as subtitle F of Title I, the "Support for Voting Rights Educational-Informational

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[42] P.L. 109-115 include three specific provisions prohibiting or restricting the District's ability to lobby for voting representation in Congress. They are as follows: "Sec. 104. (a) Except as provided in subsection (b), no part of this appropriation shall be used for publicity or propaganda purposes or implementation of any policy including boycott designed to support or defeat legislation pending before Congress or any State legislature. (b) The District of Columbia may use local funds provided in this title to carry out lobbying activities on any matter other than — (1) the promotion or support of any boycott; or (2) statehood for the District of Columbia or voting representation in Congress for the District of Columbia. (c) Nothing in this section may be construed to prohibit any elected official from advocating with respect to any of the issues referred to in subsection (b)."

"Sec. 110. None of the Federal funds provided in this act may be used by the District of Columbia to provide for salaries, expenses, or other costs associated with the offices of United States Senator or United States Representative under section 4(d) of the District of Columbia Statehood Constitutional Convention Initiatives of 1979 (D.C. Law 3 — 171; D.C. Official Code, section 1 — 123)."

"Sec. 115. (a) None of the funds contained in this act may be used by the District of Columbia Corporation Counsel or any other officer or entity of the District government to provide assistance for any petition drive or civil action which seeks to require Congress to provide for voting representation in Congress for the District of Columbia. (b) Nothing in this section bars the District of Columbia Corporation Counsel from reviewing or commenting on briefs in private lawsuits, or from consulting with officials of the District government regarding such lawsuits."

Activities Emergency Act of 2005," which appropriated $1 million in local funds to the Executive Office of the Mayor to support "educational and informational activities to apprise the general pubic of the lack of voting rights in the United Sates Congress for District residents."[43] Language of the act aimed at drawing a distinction between "educational and informational activities" and advocacy activities in support voting rights for District residents. In fact, Section 1026(b) of the act prohibits funds from being used to support lobbying activities in support of voting rights for District residents. On April 5, 2006, the Mayor identified three entities who received a share of the $1 million to be used to conduct voter education activities. They included DC Vote ($500,000), The League of Women Voters of the District of Columbia ($200,00) and Our Nation's Capital ($300,000).

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[43] Section 1026, Subtitle F, Title I of A16-0168. Text available at [http://www.dccouncil.washington.dc.us/images/00001/20050726174031.pdf].

Order Code RL33824

CRS Report for Congress

The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole

Updated May 7, 2007

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Prepared for Members and Committees of Congress

The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole

Summary

A variety of proposals have been made in the 110th Congress regarding granting the Delegate of the District of Columbia voting rights in the House. On January 24, the House approved H.Res. 78, which changed the House Rules to allow the D.C. delegate (in addition to the Resident Commissioner of Puerto Rico and the delegates from American Samoa, Guam, and the Virgin Islands) to vote in the Committee of the Whole, subject to a revote in the full House if such votes proved decisive. A bill introduced by Delegate Eleanor Holmes Norton, H.R. 1905, the District of Columbia House Voting Rights Act of 2007, would give the District of Columbia Delegate a vote in the Full House. On April 19, 2007, H.R. 1905 passed the House by a vote of 216 to 203.

These two approaches appear to raise separate, but related, constitutional issues. As to H.R. 1905, it is difficult to identify either constitutional text or existing case law that would directly support the allocation by statute of the power to vote in the full House to the District of Columbia Delegate. Further, that case law that does exist would seem to indicate that not only is the District of Columbia not a "state" for purposes of representation, but that congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation.

In particular, at least six of the Justices who participated in what appears to be the most relevant Supreme Court case on this issue, *National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co.*, authored opinions rejecting the proposition that Congress's power under the District Clause was sufficient to effectuate structural changes to the federal government. Further, the remaining three Justices, who found that the Congress could grant diversity jurisdiction to District of Columbia citizens despite the lack of such jurisdiction in Article III, specifically limited their opinion to instances where the legislation in question did not involve the extension of fundamental rights or substantially disturb the political balance between the federal government and the states. To the extent that H.R. 1905 would be found to meet these distinguishing criteria, all nine Justices in *Tidewater Transfer Co.* would arguably have found the instant proposal to be unconstitutional.

H.Res. 78, on the other hand, is similar to amendments to the House Rules that were adopted during the 103rd Congress. These rule changes survived judicial scrutiny at both the District Court and the Court of Appeals level. It would appear, however, that these amendments were upheld primarily because of the provision calling for a revote by the full House when the vote of the delegates was decisive in the Committee of the Whole. In conclusion, although not beyond question, it would appear likely that the Congress does not have authority to grant voting representation in the House of Representatives to the Delegate from the District of Columbia as contemplated under H.R. 1905. As the revote provisions provided for in H.Res. 78 would render the Delegate's vote in the Committee of the Whole largely symbolic, however, the amendments to the House Rules would be likely to pass constitutional muster.

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The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or in the Committee of the Whole

Proposed Legislation and Rule Change

A variety of proposals have been made in the 110th Congress regarding granting the Delegate of the District of Columbia voting rights in the House. On January 19, Representative Hoyer introduced H.Res. 78,[1] which proposed House Rule changes allowing the District of Columbia delegate (in addition to the Resident Commissioner of Puerto Rico[2] and the delegates from American Samoa, Guam, and the Virgin Islands) to vote in the Committee of the Whole, subject to a revote in the full House if such votes proved decisive. H.Res. 78 was approved by the House on January 24, 2007.[3] Then, on April 19, 2007, Congress passed a bill introduced by Delegate Eleanor Holmes Norton, H.R. 1905,[4] the District of Columbia House Voting Rights Act of 2007, which would grant the District a voting representative in the full House.[5]

Under H.R. 1905, the House would be expanded by two Members to a total of 437 Members, and the first of these two positions would be allocated to create a voting Member representing the District of Columbia.[6] Although it is generally

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[1] 110th Cong, 1st Sess.

[2] Although Puerto Rico is represented by a "Resident Commissioner," for purposes of this report, such representative will be referred to as a delegate.

[3] Congressional Record, daily edition, vol. 153, January 24, 2007, p. H912.

[4] 110th Cong, 1st Sess.

[5] Congressional Record, daily edition, vol. 153, April 19, 2007, pp. H3577-78. The bill passed by a vote of 216 to 203. A predecessor of this bill, H.R. 1433, was reported out of the House Oversight and Government Reform Committee on March 13, 2007, by a vote of 24-5, and two days later was reported out of the House Judiciary Committee by a vote of 21-13. On March 22, 2007, the House began floor consideration of the bill, but postponed a vote after an amendment was proposed that would have repealed the city's gun control legislation.

[6] The second position would be allocated in accordance with the 2000 census data and existing federal law. H.R. 1905, § 3(b). It would appear that, if the bill was passed today, that the state of Utah would receive the second seat. Mary Beth Sheridan, *House Panel Endorses D.C. Vote: Bill Needs Approval From Judiciary Committee,* WASH. POST., May

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accepted that the Delegate for the District of Columbia could be given a vote in the House of Representatives by constitutional amendment, questions have been raised whether such a result can be achieved by statute.

H.R. 1905 provides the following: "Notwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives."[7] The proposal also provides that regardless of existing federal law regarding apportionment,[8] "the District of Columbia may not receive more than one member under any reapportionment of members."[9] The proposal also contains a non-severability clause, so that if a provision of the Act is held unconstitutional, the remaining provisions of H.R. 1905 would be treated as invalid.[10]

In contrast, H.Res. 78 only grants the District of Columbia delegate a vote in the Committee of the Whole, a procedural posture of the full House which is invoked to speed up floor action. Specifically, the resolution amends House Rule III, cl. 3(a) to provide that "in a Committee of the Whole House on the state of the Union, the Resident Commissioner to the United States from Puerto Rico and each Delegate to the House shall possess the same powers and privileges as Members of the House."

An additional change to the House Rules, however, limits the effect of this voting power when it would be decisive. H.Res. 78 also amended House Rule XVIII, cl. 6 to provide that "whenever a recorded vote on any question has been decided by a margin within which the votes cast by the Delegates and the Resident Commissioner have been decisive, the Committee of the Whole shall automatically rise and the Speaker shall put that question de novo without intervening debate or other business. Upon the announcement of the vote on that question, the Committee of the Whole shall resume its sitting without intervening motion." Both of these provisions of H.Res. 78 are similar to amendments to the House Rules that were in effect during the 103rd Congress.

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[6] (...continued)
19, 2006 at B1. *See, e.g., District of Columbia Fair and Equal House Voting Rights Act of 2006, before the Subcommittee on the Constitution, H.R. 5388,* 109th Cong., 2nd Sess. 2 (statement of Rep. Chabot). A similar bill introduced in the 109th Congress would have provided that the second representative position be allocated as an at-large seat. Representative Sensenbrenner, then-Chairman of the House Judiciary Committee, objected to this provision, suggesting that Utah pass a redistricting plan to accommodate the added seat. Utah has passed a law for this purpose, and the most recent version of the bill does not contemplate an at-large seat. Elizabeth Brotherton, *Norton Prepping to Cast D.C.'s First House Vote,* ROLL CALL (January 11, 2007).

[7] H.R. 1905, § 2(a).

[8] *See* 2 U.S.C. §2a.

[9] H.R. 1905, § 2(b).

[10] H.R. 1905, § 4.

Background

Residents of the District of Columbia have never had more than limited representation in Congress.[11] Over the years, however, efforts have been made to amend the Constitution so that the District would be treated as a state for purposes of voting representation. For instance, in 1978, H.J.Res. 554 was approved by two-thirds of both the House and the Senate, and was sent to the states. The text of the proposed constitutional amendment provided, in part, that "[f]or purposes of representation in the Congress, election of the President and Vice President, and Article V of this Constitution,[12] the District constituting the seat of government of the United States shall be treated as though it were a State."[13] The Amendment was ratified by 16 states, but expired in 1985 without winning the support of the requisite 38 states.[14]

Since the expiration of this proposed Amendment, a variety of other proposals have been made to give the District of Columbia representation in the full House. In general, these proposals would avoid the more procedurally difficult route of amending the Constitution, but would be implemented by statute. Thus, for instance, bills were introduced and considered which would have: (1) granted statehood to the non-federal portion of the District; (2) retroceded the non-federal portion of the District to the State of Maryland; and (3) allowed District residents to vote in Maryland for their representatives to the Senate and House.[15] Efforts to pass these bills have been unsuccessful, with some arguing that these approaches raise constitutional and/or policy concerns.[16]

Unlike the proposals cited above, H.R. 1905 uses language similar to that found in the proposed constitutional amendment, but would instead grant the District of Columbia a voting member in the House by statute. As noted above, H.J Res. 554 would have provided by constitutional amendment that the District of Columbia be treated as a state for purposes of representation in the House and Senate, the election

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[11] The District has never had any directly elected representation in the Senate, and has been represented by a nonvoting Delegate in the House of Representatives for only a short portion of its over 200-year existence. *See* CRS Report RL33830, *District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals*, by Eugene Boyd.

[12] U.S. CONST. Article V provides that:

> The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof . . . .

[13] *See* Johnny Killian, George Costello, Kenneth Thomas, *United States Constitution: Analysis and Interpretation* 49 (2002 ed.).

[14] CRS Report RL33830, *supra* note 11, at 6.

[15] Id. at 6-12.

[16] Id. at 8-12. D.C. Hearing, *supra* note 6 at 78 (Testimony of Hon. Kenneth W. Starr).

of the President and Vice President, and ratification of amendments of the Constitution. H.R. 1905, is more limited, in that it would only provide that the District of Columbia be treated as a state for purposes of representation in the House. Nonetheless, the question is raised as to whether such representation can be achieved without a constitutional amendment.

As noted previously, a resolution similar to the H.Res. 78 was adopted in the 103rd Congress. It was soon challenged, but it was upheld at both the District Court[17] and the Court of Appeals[18] level. It would appear, however, that the proposal was upheld primarily because of the provision calling for a revote when the vote of the delegates or residents was decisive in the Committee of the Whole.

The Meaning of the Term "State" in the House Representation Clause

As Congress has never granted the Delegate from the District of Columbia a vote in the full House or Senate, the constitutionality of such legislation has not been before the courts. The question of whether the District of Columbia should be considered a state for purposes of having a vote in the House of Representatives, however, was considered by a three-judge panel of the United States District Court of the District of Columbia in the case of *Adams v. Clinton.*[19] In *Adams*, the panel examined the issue of whether failure to provide congressional representation for the District of Columbia violated the Equal Protection Clause. In doing so, it discussed extensively whether the Constitution, as it stands today, allows such representation.

The court began with a textual analysis of the Constitution. Article I, § 2, clause 1 of the Constitution, the "House Representation Clause," provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

The court noted that, while the phrase "people of the several States" could be read as meaning all the people of the "United States," that the use of the phrase later in the clause and throughout the Article[20] makes clear that the right to representation

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[17] Michel v. Anderson, 817 F. Supp. 126 (D.D.C. 1993), *affirmed*, Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994).

[18] Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994).

[19] 90 F. Supp. 2d 35 (D.D.C.2000), *affirmed sub nom.* Alexander v. Mineta, 531 U.S. 940 (2000).

[20] *See, e.g.*, U.S. Const. Art. I, § 2, cl. 2 (each representative shall "be an Inhabitant of that State" in which he or she is chosen); *id.* at Art. I, § 2, cl. 3 (representatives shall be "apportioned among the several States which may be included within this Union"); *id.* ("each State shall have at Least one Representative"); *id.* at art. I, § 2, cl. 4 (the Executive

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in Congress is limited to states. This conclusion has been consistently reached by a variety of other courts,[21] and is supported by most, though not all, commentators.[22] The plaintiffs in *Adams v. Clinton*, however, suggested that even if the District of Columbia is not strictly a "state" under Article I, § 2, clause 1, that the citizens of the United States could still have representation in Congress.

The plaintiffs in *Adams* made two arguments: (1) that the District of Columbia, although not technically a state under the Constitution, should be treated as one for voting purposes or (2) that District citizens should be allowed to vote in the State of Maryland, based on their "residual" citizenship in that state. The first argument was based primarily on cases where the Supreme Court has found that the District of Columbia was subject to various constitutional provisions despite the fact that such provisions were textually limited to "states."[23] The second argument is primarily based on the fact that residents of the land ceded by Maryland continued to vote in Maryland elections during the period between the Act of July 16, 1790, by which Virginia and Maryland ceded lands to Congress for formation of the District, and the Organic Act of 1801,[24] under which Congress assumed jurisdiction and provided for the government of the District.

Whether the District of Columbia can be considered a "state" within the meaning of a particular constitutional or statutory provision appears to depend upon the character and aim of the specific provision involved.[25] Accordingly, the court in *Adams* examined the Constitution's language, history, and relevant judicial

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[20] (...continued)
Authority of the "State" shall fill vacancies); *id.* at art. I, § 4, cl. 1 (the legislature of "each State" shall prescribe times, places, and manner of holding elections for representatives).

[21] *See* Igartua de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994) (holding that United States citizens in Puerto Rico are not entitled to vote in presidential elections); Attorney Gen. of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984) (holding that United States citizens in Guam are not entitled to vote in presidential and vice-presidential elections).

[22] *See, e.g.,* Jon M. Van Dyke, The Evolving Legal Relationships Between the United States and Its U.S. Flag Islands, U. HAW. L. REV. 445, 512 (1992). Even some proponents of D.C. voting rights generally assume the District of Columbia is not currently a state for purposes of Article I, § 2, cl. 1. *See, e.g.,* Viet Dinh and Adam H. Charnes, *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives* 9 (2004) (report submitted to the House Committee on Government Reform) available at D.C. Vote Website at [http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf]. *But see* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis,* 12 Harv. J. on Legis. 167, 168 (1975); Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. Pa. L. Rev. 1659, 1661 (1991).

[23] *See, e.g.,* Loughran v. Loughran, 292 U.S. 216, 228 (1934) (holding that Full Faith and Credit clause binds "courts of the District . . . equally with courts of the States"); Callan v. Wilson, 127 U.S. 540, 550 (1888) (holding that the right to trial by jury extends to residents of District).

[24] 2 Stat. 103 (1801).

[25] District of Columbia v. Carter, 409 U.S. 418, 420 (1973) (application of 42 U.S.C. § 1983).

precedents to determine whether the Constitution allowed for areas which were not states to have representatives in the House. The court determined that a finding that the District of Columbia was a state for purposes of congressional representation was not consistent with any of these criteria.

First, the court indicated that construing the term "state" to include the "District of Columbia" for purposes of representation would lead to many incongruities in other parts of the Constitution. One of several examples that the court noted was that Article I requires that voters in House elections "have the Qualifications requisite for the Electors of the most numerous branch of the State Legislature."[26] The District, as pointed out by the court, did not have a legislature until home rule was passed in 1973, so this rule would have been ineffectual for most of the District's history.[27] This same point can be made regarding the clause providing that the "Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof...."[28] Similar issues arise where the Constitution refers to the Executive Branch of a state.[29]

The court went on to examine the debates of the Founding Fathers to determine the understanding of the issue at the time of ratification. The court concluded that such evidence as exists seems to indicate an understanding that the District would not have a vote in the Congress.[30] Later, when Congress was taking jurisdiction over land ceded by Maryland and Virginia to form the District, the issue arose again, and concerns were apparently raised precisely because District residents would lose their ability to vote.[31] Finally, the court noted that other courts which had considered the question had concluded in *dicta* or in their holdings that residents of the District do not have the right to vote for Members of Congress.[32]

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[26] U.S. CONST. art. I, § 2, cl. 1.

[27] *See* District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198 (1973).

[28] U.S. CONST. art. I, § 4, cl. 1.

[29] "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." U.S. CONST. Art. I, § 2, cl. 4.

[30] For instance, at the New York ratifying convention, Thomas Tredwell argued that "[t]he plan of the federal city, sir, departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote...." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 402 (Jonathan Elliot ed., 2d ed. 1888), *reprinted* in 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987).

[31] *See, e.g.,* 10 ANNALS OF CONG. 992 (1801) (remarks of Rep. Smilie) (arguing that upon assumption of congressional jurisdiction, "the people of the District would be reduced to the state of subjects, and deprived of their political rights").

[32] Hepburn & Dundas, 6 U.S. (2 Cranch) 445, 452 (1805) (District of Columbia is not a state for purposes of diversity jurisdiction); Heald v. District of Columbia, 259 U.S. 114, 124 (1922) (stating in *dicta* that "residents of the district lack the suffrage and have

(continued...)

The second argument considered by the court was whether residents of the District should be permitted to vote in congressional elections through Maryland, based on a theory of "residual" citizenship in that state. As noted above, this argument relied on the fact that residents of the land ceded by Maryland apparently continued to vote in Maryland elections for a time period after land had been ceded to Congress. The court noted, however, that essentially the same argument had been rejected by a previous three-court panel decision of the District of Columbia Court of Appeals,[33] and the Supreme Court had also concluded that former residents of Maryland had lost their state citizenship upon the separation of the District of Columbia from the State of Maryland.[34]

The court continued by setting forth the history of the transfer of lands from Maryland and Virginia to the federal government under the Act of July 16, 1790. While conceding that residents of the ceded lands continued to vote in their respective states, the court suggested that this did not imply that there was an understanding that they would continue to do so after the District became the seat of government; it reflected the fact that during this period the seat of government was still in Philadelphia. Thus, upon the passage of the Organic Act of 1801, Maryland citizenship of the inhabitants of these lands was extinguished, effectively ending their rights to vote.

The Power of Congress To Provide Representation to Political Entities That Are Not States

The argument has been made, however, that the *Adams* case, which dealt with whether the Equal Protection Clause compels the granting of a vote to the District of Columbia, can be distinguished from the instant question — whether Congress has power to grant the District a voting representative in Congress. Under this argument, the plenary authority that the Congress has over the District of Columbia under Article I, section 8, clause 17 (the "District Clause") represents an independent source of legislative authority under which Congress can grant the District a voting Representative.[35]

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[32] (...continued)
politically no voice in the expenditure of the money raised by taxation."); Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 324 (1820) (stating in *dicta* that the District "relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government.")

[33] Albaugh v. Tawes, 233 F. Supp. 576, 576 (D. Md. 1964), *affirmed* 379 U.S. 27 (1964) (per curiam)(residents of D.C. have no right to vote in Maryland).

[34] Reily v. Lamar, 6 U.S. (2 Cranch) 344, 356-57 (1805).

[35] *See* Viet Dinh and Adam H. Charnes, *supra* note 22, at 12-13; D.C. Hearing, *supra* note 6, at 83 (testimony of Hon. Kenneth W. Starr); Rick Bress and Kristen E. Murray, Latham & Watkins LLP, *Analysis of Congress's Authority By Statute To Provide D.C. Residents Voting Representation in the United States House of Representatives and Senate* at 7-12 (February 3, 2003)(analysis prepared for Walter Smith, Executive Director of DC Appleseed
(continued...)

Although the question of whether Congress has such power under the District Clause has not been directly addressed by the courts, the question of whether Congress can grant the District of Columbia representation under a different congressional power was also addressed by the United States Court of Appeals for the District of Columbia. In the case of *Michel v. Anderson*,[36] the court considered whether the Delegate for the District of Columbia could, by House Rules, be given a vote in the Committee of the Whole of the House of Representatives.

The primary objection to the rule in question was that, while Delegates have long been able to vote in Committee, only a Member can vote on the floor of the House. The district court below had agreed with this argument, stating that:

> One principle is basic and beyond dispute. Since the Delegates do not represent States but only various territorial entities, they may not, consistently with the Constitution, exercise legislative power (in tandem with the United States Senate), for such power is constitutionally limited to "Members chosen ... by the People of the several States." U.S. Const. art. I, § 8, cl. 1.[37]

The Court of Appeals also agreed,[38] stating that:

> [The language of] Article I, § 2 ... precludes the House from bestowing the characteristics of membership on someone other than those "chosen every second Year by the People of the several States."

Based on these statements, it is unlikely that these courts would have seen merit in an argument that the Congress could grant the Delegate a vote in the House.

An argument might be made, however, that the decision in *Michel v. Anderson* can be distinguished from the instant proposal, because *Michel* concerned a House Rule, not a statute. Under this argument, the House in *Michel* was acting alone under its power to "Determine the Rules of its Proceedings" pursuant to Article I, section 5.[39] Arguably, the court did not consider the issue of whether the Congress as a whole would have had the authority to provide for representation for the District of Columbia under the District Clause. Under this line of reasoning, the power of the Congress over the District represents a broader power than the power of the House to set its own rules.

At first examination, it is not clear on what basis such a distinction would be made. The power of the House to determine the Rules of its Proceedings is in and

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[35] (...continued)
Center for Law and Justice).

[36] 14 F.3d 623 (D.C. Cir. 1994).

[37] Michel v. Anderson, 817 F. Supp. 126, 141 (D.D.C. 1993), *aff'd* 14 F.3d 623 (D.C. Cir. 1994).

[38] While accepting the premise that Membership in the House is restricted to representatives of states, the court found that the Delegate's vote in the Committee of the Whole was subject to a revote procedure which made the vote only "symbolic." 14 F.3d at 632.

[39] U.S. CONST., Article I, § 5.

of itself a very broad power. While the House may not "ignore constitutional restraints or violate fundamental rights ... within these limitations all matters of method are open to the determination of the House.... The power to make rules, ... [w]ithin the limitations suggested, [is] absolute and beyond the challenge of any other body or tribunal." In fact, the Supreme Court has found that in some cases, the constitutionality of a House Rule is not subject to review by courts because the question is a "political," and not appropriate for judicial review.[40]

It is true that the power of the Congress over the District of Columbia has been described as "plenary." To a large extent, this is because the power of the Congress over the District blends the limited powers of a national legislature with the broader powers associated with a local legislature.[41] Thus, some constitutional restrictions that might bind Congress in the exercise of its national power would not apply to legislation which is limited to the District of Columbia. For example, when Congress created local courts for the District of Columbia, it acted pursuant to its power under the District Clause and thus was not bound by to comply with Article III requirements which generally apply to federal courts.[42] Or, while there are limits to Congress's ability to delegate its legislative authorities, such limitations do not apply when Congress delegates its local political authority over the District to District residents.[43]

It is not clear, however, that the power of Congress at issue in H.R. 1905 would be easily characterized as falling within Congress's power to legislate under the District Clause. While the existing practice of allowing District of Columbia residents to vote for a non-voting Delegate would appear to fall comfortably within its authority under the District Clause, giving such Delegate a vote in the House would arguably have an effect that went beyond the District of Columbia. Such a change would not just affect the residents of the District of Columbia, but would also directly affect the structure of and the exercise of power by Congress. More significantly, if the Delegate were to cast the decisive vote on an issue of national import, then the instant legislation could have a significant effect nationwide.

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[40] *Compare* Nixon v. United States, 506 U.S. 224, 237 (1993) (issue of whether Senate could delegate to a committee the task of taking testimony in an impeachment case presented political question in light of constitutional provision giving Senate "sole power to try impeachments") *with* Powell v. McCormack, 395 U.S. 486, 518-49 (1969) (Court reached merits after finding that power of House to judge elections, returns, and qualifications of its Members restricts House to qualifications specified in Constitution).

[41] National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co., 337 U.S. 582, 604 (Justices Rutledge and Murphy); District of Columbia v. Thompson, 346 U.S. 100, 108-110 (1953).

[42] In the District of Columbia Court Reform and Criminal Procedure Act of 1970, P.L. 91-358, 111, 84 Stat. 475, Congress specifically declared it was acting pursuant to Article I in creating the Superior Court and the District of Columbia Court of Appeals and pursuant to Article III in continuing the United States District Court and the United States Court of Appeals for the District of Columbia. The status of the Article I courts were sustained in *Palmore v. United States*, 411 U.S. 389 (1973).

[43] District of Columbia v. Thompson, 346 U.S. 100, 106-09 (1953).

The Supreme Court has directly addressed the issue of whether the District Clause can be used to legislate in a way that has effects outside of the District of Columbia. In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[44] the Court considered whether Congress could by statute require that federal courts across the country consider cases brought by District of Columbia residents under federal diversity jurisdiction. This case has been heavily relied upon by various commentators as supporting the proposed legislation.[45]

The Significance of the Case of *National Mutual Insurance Co. v. Tidewater Transfer Co.*

The *Tidewater Transfer Co.* case appears to provide a highly relevant comparison to the instant proposal. As with the instant proposal, the congressional statute in question was intended to extend a right to District of Columbia residents that was only provided to citizens of "states." In 1805, Chief Justice John Marshall, in the case of *Hepburn v. Ellzey*,[46] had authored a unanimous opinion holding that federal diversity jurisdiction, which exists "between citizens of different states," did not include suits where one of the parties was from the District of Columbia.[47] Despite this ruling, Congress enacted a statute extending federal diversity jurisdiction to cases where a party was from the District.[48] The Court in *Tidewater Transfer Co.* upheld this statute against a constitutional challenge, with a three-judge plurality holding that Congress, acting pursuant to the District Clause, could lawfully expand federal jurisdiction beyond the bounds of Article III.[49]

On closer examination, however, the *Tidewater Transfer Co.* case may not support the constitutionality of the instant proposal. Of primary concern is that this was a decision where no one opinion commanded a majority of the Justices. Justice Jackson's opinion (the Jackson plurality), joined by Justices Black and Burton, held that District of Columbia residents could seek diversity jurisdiction based on Congress exercising power under the District Clause. Justice Rutledge's opinion (the Rutledge concurrence) joined by Justice Murphy, argued that the provision of Article III that provides for judicial authority over cases between citizens of different states,

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[44] 337 U.S. 582 (1949).

[45] *See, e.g.,* Viet Dinh and Adam H. Charnes, *supra* note 22, at 11-13; Rick Bress and Kristen E. Murray, *supra* note 35, at 9-12. *But see*, D.C. Hearing, *supra* note 6, at 61 (statement of Professor Jonathan Turley).

[46] 6 U.S. (2 Cranch) 445 (1805).

[47] Id. at 452. Although, strictly speaking, the opinion was addressing statutory language in Act of 1789, the language was so was so similar to the language of the Constitution that it was an interpretation of the latter which was essential to the Court's reasoning. *See Tidewater Transfer Co.*, 337 U.S. at 586.

[48] Act of April 20, 1940, c. 117, 54 Stat. 143.

[49] *See Tidewater Transfer Co.*, 337 U.S. at 600 (plurality opinion of Jackson, J.).

the "Diversity Clause,"[50] permits such law suits, even absent congressional authorization. Justice Vinson's opinion (the Vinson dissent), joined by Justice Douglas, and Justice Frankfurter's opinion (the Frankfurter dissent), joined by Justice Reed, would have found that neither the Diversity Clause nor the District Clause provided the basis for such jurisdiction.

Of further concern is that those concurring Justices who did not join in the three-judge plurality opinion were not silent on the issue of Congress's power under the District Clause. Consequently, it is possible that a majority of the Justices would have reached a differing result on the breadth of Congress's power. In addition, it would appear that even the three-judge plurality might have distinguished the instant proposal from the legislation which was at issue in the *Tidewater Transfer Co.*

Thus, a closer analysis of this case should consider the different opinions, how the Justices framed the questions before them, and then the reasoning they used to resolve the issue. To help understand the issues raised by this case and by the instant bill, this analysis should focus on four different issues: (1) whether the District of Columbia is a "state" for purposes of diversity jurisdiction; (2) whether the District of Columbia is a "state" for purposes of voting representation; (3) whether Congress can grant diversity jurisdiction under the District Clause; and (4) whether Congress can provide for a voting Delegate under the District Clause.

Whether the District of Columbia is a "State" for Purposes of Diversity Jurisdiction

As noted, the Court has held since the 1805 case of *Hepburn v. Ellzey*[51] that federal diversity jurisdiction under Article III does not include suits where one of the parties was from the District of Columbia.[52] Presaging the *Adams v. Clinton*[53] case by nearly two centuries, this unanimous decision briefly considered the use of the term "state" throughout the Constitution. The Chief Justice noted that the plain meaning of the term "state" in the Constitution did not include the District of Columbia, and further noted that this was the term used to determine representation in the Senate, the House, and the number of Presidential Electors. As there was little doubt that state did not include the District of Columbia in those instances, the Court found no reason that the term should take on a different meaning for purposes of diversity.

In the *Tidewater Transfer Co.* case, however, the Rutledge concurrence took issue with *Hepburn.* Justice Rutledge noted that the term "state" had been found in some cases to include the District of Columbia. The main thrust of the opinion was that the use of the term state in the Constitution occurred in two different contexts:

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[50] U.S. Const., Art. III, § 2, cl. 1 provides that "The Judicial Power shall extend to... Controversies between two or more States...."

[51] 6 U.S. (2 Cranch) 445 (1805).

[52] Id. at 452.

[53] 90 F. Supp. 2d 35 (D.D.C.2000), *affirmed sub nom.*, Alexander v. Mineta, 531 U.S. 940 (2000).

(1) in provisions relating to the organization and structure of the political departments of the government, and (2) where it was used regarding the civil rights of citizens.[54] The Rutledge concurrence argued that the latter uses of the term should be considered more expansively in the latter case than the former. For instance, the Court noted that the Sixth Amendment, which provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State ... wherein the crime shall have been committed ...," had been held to apply to the citizens of the District of Columbia.[55]

Next, the Rutledge concurrence sought to establish that of these two categories, access to the federal courts under diversity jurisdiction fell into the latter. The opinion suggested that the exclusion of the District of Columbia from diversity jurisdiction served no historical purpose, and that the inclusion of the District would be consistent with the purposes of the provision. The opinion essentially rested on the premise that such a distinction between the citizens of the District of Columbia and the states made no sense: "I cannot believe that the Framers intended to impose so purposeless and indefensible a discrimination, although they may have been guilty of understandable oversight in not providing explicitly against it."[56]

The opinion of the these two Justices, however, was not shared by any of the other seven Justices of the Court.[57] The Jackson plurality opinion, for instance, specifically rejected such an interpretation. That opinion noted that while one word may be capable of different meanings, that such "such inconsistency in a single instrument is to be implied only where the context clearly requires it."[58] The Jackson plurality found no evidence that the Founding Fathers gave any thought to the issue of the District of Columbia and diversity jurisdiction, and that if they had that they would not have included the District by use of the term "state." Nor did the Court find this oversight particularly surprising, as the District of Columbia was still a theoretical political entity when the Constitution was ratified, and its nature and organization had not yet been established.

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[54] 337 U.S. at 619 (Rutledge, J, concurring).

[55] The *Rutledge* opinion conceded that Court's initial determination that District residents were entitled to a jury trial in criminal cases in *Callan v. Wilson*, 127 U.S. 540 (1888) rested in large measure on the more inclusive language of Article III, § 2: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." But the Court noted that cases relied upon by *Callan* were based at least in part on the Sixth Amendment. "In Reynolds v. United States, 98 U.S. 145, 154, it was taken for granted that the Sixth Amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions...." *Callan*, 127 U.S. at 550.

[56] 337. at 625.

[57] Although not addressed by the any opinion of the Court, a separate argument has been made that the extension of diversity jurisdiction to the District of Columbia could also have been made under the Privileges and Immunities Clause. *See* James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 Notre Dame L. Rev. 1925 (2004).

[58] Id. at 587.

The Vinson dissent summarily dismissed the argument that the *Hepburn v. Ellzey* decision be overruled.[59] The Frankfurter dissent argued vehemently that the use of the term "state" in the clause at issue was one of the terms in the Constitution least amenable to ambiguous interpretation. "The precision which characterizes these portions of Article III is in striking contrast to the imprecision of so many other provisions of the Constitution dealing with other very vital aspects of government."[60] This, combined with knowledge of the distrust that the Founding Fathers had towards the federal judiciary, left Justice Frankfurter with little interest in entertaining arguments to the contrary.

Whether the District of Columbia is a "State" for Purposes of Representation

While there has been some academic commentary suggesting that the term "state" could be construed more broadly for purposes of representation than is currently the case,[61] there is little support for this proposition in case law. Starting with Chief Justice Marshall in the *Hepburn* case, and as recently as *Adams v. Clinton* and *Michel v. Anderson*, the Supreme Court and lower courts have generally started with the basic presumption that the use of the term "state" for purposes of representation in the House did not include the District of Columbia. In fact, in *Hepburn*, Chief Justice Marshall had referred to the "plain use" of the term "state" in the clauses regarding representation as the benchmark to interpret other clauses using the phrase.[62]

The opinions of the Justices in *Tidewater Transfer Co.* appear to be no different. As noted above, seven of the nine Justices in that case accepted the reasoning of the *Hepburn* case as regards diversity jurisdiction, and would certainly have been even less likely to accept the argument that the District of Columbia should be considered a state for purposes of the House of Representatives. It also seems likely that the Justices associated with the Rutledge concurrence would have similarly rejected such

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[59] "That it was not the specific intent of the framers to extend diversity jurisdiction to suits between citizens of the District of Columbia and the States seems to be conceded. One well versed in that subject, writing for the Court within a few years of adoption of the Constitution, so held. The question is, then, whether this is one of those sections of the Constitution to which time and experience were intended to give content, or a provision concerned solely with the mechanics of government. I think there can be little doubt but that it was the latter. That we would now write the section differently seems hardly a sufficient justification for an interpretation admittedly inconsonant with the intent of the framers. Ours is not an amendatory function." Id. at 645 (Vinson, J., dissenting).

[60] Id. at 646 (Frankfurter, J., dissenting).

[61] *See* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. on Legis. 167, 168 (1975); Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. Pa. L. Rev. 1659, 1661 (1991).

[62] 6 U.S. at 452 ("When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it").

an interpretation. As noted, that opinion suggested that the error in *Hepburn* was the failure to distinguish between how the term "state" should be interpreted when used in the context of the distribution of power among political structures and how it should be interpreted when it is used in relation to the civil rights of citizens.[63] Although Justice Rutledge found that a restrictive interpretation of the term state was unnecessarily narrow in the context of diversity jurisdiction, there is no indication that the Justice would have disputed the "plain use" of the term "state" in the context of representation for the District in Congress.

Whether Congress Has the Authority Under the District Clause To Extend Diversity Jurisdiction to the District of Columbia

The Jackson plurality opinion considered whether, despite the Court's holding in *Hepburn*, Congress, by utilizing its power under the District Clause, could evade the apparent limitations of Article III on diversity jurisdiction. The plurality noted that the District Clause had not been addressed in Chief Justice Marshall's opinion, and that the Chief Justice had ended his opinion by noting that the matter was a subject for "legislative not for judicial consideration."[64] While admitting that it would be "speculation" to suggest that this quote established that Congress could use its statutory authority rather than proceed by constitutional amendment, the Court next considered whether such power did in fact exist.

As noted previously, the power of Congress over the District includes the power to create local courts not subject to Article III restrictions. The plurality suggested that there would be little objection to establishing a federal court in the District of Columbia to hear diversity jurisdiction. Instead, the concerns arose because the statute in question would operate outside of the geographical confines of the District. Further, the statute would require that Article III courts be tasked with functions associated with an Article I court.[65]

The Jackson plurality had little trouble assigning the tasks of an Article I court to an Article III court, suggesting that such assignments had been approved in the past, including in the District of Columbia.[66] A more difficult question was the exercise of diversity jurisdiction by federal courts outside of the geographical confines of the District. While noting that the Congress's power over the District was not strictly limited by territory, it admitted that the power could not be used to gain

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[63] The two judges noted a distinction to be made between constitutional clauses "affecting civil rights of citizens," such as the right to a jury trial, and "the purely political clauses," such as "the requirements that Members of the House of Representatives be chosen by the people of the several states." Id. at 619-623 (Rutledge, J., concurring). *See* Adams v. Clinton, 90 F. Supp. 2nd at 55.

[64] *Hepburn*, 6 U.S. at 453.

[65] 337 U.S. at 509.

[66] *See* O'Donoghue v. United States, 289 U.S. 516 (1933) (holding that Article III District of Columbia courts can exercise judicial power conferred by Congress pursuant to Art. I).

control over subjects over which there had been no separate delegation of power.[67] Thus, the question arose as to whether a separate power beyond the District Clause was needed here.

Essentially, the Court held that the end that the Congress sought (establishing a court to hear diversity cases involving District of Columbia citizens) was permissible under the District Clause, and that the choice of means that the Congress employed (authorizing such hearings in federal courts outside of the District) was not explicitly forbidden. As a result, the Court held that it should defer to the opinions of Congress when Congress was deciding how to perform a function that is within its power.[68]

It should be noted that even the plurality opinion felt it necessary to place this extension in a larger context, emphasizing the relative insignificance of allowing diversity cases to be heard in federal courts outside of the District. The Court noted that the issue did not affect "the mechanics of administering justice" or involve the "extension or a denial of any fundamental right or immunity which goes to make up our freedoms," nor did the legislation "substantially disturb the balance between the Union and its component states." Rather, the issue involved only whether a plaintiff who sued a party from another state could require that the case be decided in a convenient forum.[69]

The Rutledge concurrence, on the other hand, explicitly rejected the reasoning of the plurality, finding that the Congress clearly did not have the authority to authorize even this relatively modest authority to District of Columbia citizens.[70] In fact, the concurring opinion rejected the entire approach of the plurality as unworkable, arguing that it would allow any limitations on Article III courts to be disregarded if Congress purported to be acting under the authorization of some other constitutional power.[71]

The Vinson dissent and the Frankfurter dissent also rejected the reasoning of the plurality as regards Congress power to grant diversity to the District, citing both Article III limitations on federal court and separation of powers. The Vinson dissent argued that the question as to whether Congress could use its legislative authority to evade the limitations of Article III had already been reached in cases regarding whether the Congress could require federal courts to hear cases where there was no

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[67] 337 U.S. at 602.

[68] Id. at 602-03.

[69] Id. at 585.

[70] Id. at 604-606 (Rutledge, J., concurring)("strongly" dissenting from the suggestion that Congress could use Article I powers to expand the limitations of Article III jurisdiction).

[71] "The Constitution is not so self-contradictory. Nor are its limitations to be so easily evaded. The very essence of the problem is whether the Constitution meant to cut out from the diversity jurisdiction of courts created under Article III suits brought by or against citizens of the District of Columbia. That question is not answered by saying in one breath that it did and in the next that it did not." Id. at 605 (Rutledge, J, concurring).

case or controversy.[72] The Frankfurter dissent made similar points, and also noted the reluctance by which the states had even agreed to the establishment of diversity jurisdiction.[73] Thus, considering both the dissents and the concurrence, six Justices rejected the plurality's expansive interpretation of the District Clause.

Whether Congress Has the Authority Under the District Clause To Extend House Representation to the District of Columbia

The positions of the various Justices on the question of whether Congress can grant diversity jurisdiction for District of Columbia residents would seem to also inform the question as to whether such Justices would have supported the granting of House representation to District citizens. As noted, six Justices explicitly rejected the extension of diversity jurisdiction using Congress's power under the District Clause. It is unlikely that the Justices in question would have rejected diversity jurisdiction for District of Columbia residents, but would then approve voting representation for those same residents. The recurring theme of both the *Hepburn* and *Tidewater Transfer Co.* decisions was that the limitation of House representation to the states was the least controversial aspect of the Constitution, and that the plain meaning of the term "state" in regards to the organization of the federal political structures was essentially unquestioned.

Consequently, only the three Justices of the plurality in *Tidewater Transfer Co.* might arguably have supported the doctrine that the Congress's power over the District of Columbia would allow extension of House representation to its citizens. However, even this conclusion is suspect. As noted, the plurality opinion took pains to note the limited impact of its holding — parties in diversity suits with residents of the District of Columbia would have a more convenient forum to bring a law suit. As noted, the plurality specifically limited the scope of its decision to legislation that neither involved an "extension or a denial of any fundamental right" nor substantially disturbed "the balance between the Union and its component states."[74] Arguably, granting the Delegate a vote in the House involves an extension of a fundamental right. Further, the possibility that a non-state political entity could cast a deciding vote on an issue of national significance could well be seen as a substantial disturbance to the existing federalism structure. Thus, even the Justices in the Jackson plurality might distinguish the instant proposal from their holding in *Tidewater Transfer Co.*

These three Justices might also have had other concerns that would weigh against such an extension of their holding. The Act before the Justices in that case did not affect just the District of Columbia, but also extended diversity jurisdiction to the territories of the United States, including the then-territories of Hawaii and

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[72] Id. at 628-31 (Vinson, J., dissenting). *See, e.g.*, Keller v. Potomac Electric Co., 261 U.S. 428 (1923).

[73] Id. at 646-55 (Frankfurter, J., dissenting).

[74] Id.. at 585.

Alaska.[75] Although the question of diversity jurisdiction over residents of the territories was not directly before the Court, subsequent lower court decisions[76] have found that the reasoning of the *Tidewater Transfer Co.* case supported the extension of diversity jurisdiction to the territories, albeit under the "Territory Clause."[77]

Thus, a concern that the plurality Justices might have had about the instant proposal would be whether its approval would also validate an extension of House representation to other political entities, such as the territories. While the extension of diversity jurisdiction to residents of territories has been relatively uncontroversial, a decision to grant a voting Delegate to the territories might not. Under the Territory Clause, the Congress has plenary power over the territories of American Samoa, Guam, the Virgin Islands, Puerto Rico, and the Commonwealth of the Northern Marianas Islands. Thus, extending the reasoning of the *Tidewater Transfer Co.* case to voting representation might arguably allow each of these territories to seek representation in the House.[78]

Although an analysis of the constitutionality of such an extension goes beyond the scope of this report, providing House representation to the territories would clearly represent a significant change to the national political structure. Of particular note would be the relatively small number of voters in some of these territories. For instance, granting House representation to American Samoa, with a population of about 58,000,[79] most of whom are not citizens of the United States,[80] would appear to depart significantly from the existing make-up of the House.

Similarly, a holding that the District could be treated as a state for purposes of representation would arguably also support a finding that the District could be treated as a state for the places in the Constitution which deal with other aspects of the national political structure. Under this reasoning, Congress could arguably authorize

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[75] Id. at 584-585.

[76] *See, e.g.*, Detrea v. Lions Building Corporation, 234 F.2d 596 (1956).

[77] U.S. Const. Art. IV, § 3, cl. 2 provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

[78] *But see Tidewater Transfer Co.*, 337 U.S. at 639 (Vinson, J., dissenting)(noting differences between Congressional regulation of local courts under the District Clause and the Territorial Clause.)

[79] *See* CIA World Fact book, [https://www.cia.gov/cia/publications/factbook/index.html].

[80] *See* Arnold Leibowitz, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS (1989) at 41.

the District of Columbia to have Senators, Presidential Electors,[81] and perhaps even the power to ratify Amendments to the Constitution.[82]

The Significance of Limiting Delegate Voting to the Committee of the Whole

As the above discussion is directed at the full House, the question can be raised as to whether it should also apply to the Committee of the Whole. The Committee of the Whole is not provided for in the Constitution, and the nature of the Committee of the Whole appears to have changed over time. Established in 1789, the Committee of the Whole appears to be derived from English Parliamentary practices. It was originally intended as a procedural device to exclude the Speaker of the House of Commons, an ally of the King, from observing the proceedings of the House.[83] Since that time, the Committee has evolved into a forum where debate and discussion can occur under procedures more flexible than those otherwise utilized by the House.

At present, the Committee of the Whole is simply the Full House in another form.[84] Every legislator is a member of the Committee, with full authority to debate and vote on all issues.[85] By resolving into the Committee of the Whole, the House invokes a variety of procedural devices which speed up floor action. Instead of the normal quorum of one-half of the legislators in the House, which is generally more than 200 legislators, the Committee of the Whole only requires a quorum of 100 members. In addition, amendments to bills are debated under a five-minute rule rather than the one hour rule. Finally, it is in order to close debate on sections of bills by unanimous consent or a majority of members present.[86]

Assuming that the Delegate for the District of Columbia could not cast a vote in the full House, a separate question arises as to whether, as provided for by the House Rules amended by H.Res. 78, the Delegate (along with the territorial delegates) could cast a vote in the Committee of the Whole, subject to a revote when such a vote is determinative. Under Article I of the Constitution, all legislative authority for the United States is to be vested in the Senate and the House of Representatives,[87] and under §2 of that Article, the House of Representatives shall be composed of "Members" chosen in conformity with the qualifications and requirements of the Constitution. As the Delegate for the District of Columbia is not

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[81] This authority, it should be noted, has already been granted, but it was done by Constitutional Amendment. *See* U.S. CONST. Amend. XXIII.

[82] U.S. CONST. Art. V.

[83] Alexander, De Alva Stanwood, HISTORY AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES 257 (1916).

[84] W. Oleszak, Congressional Procedures and the Policy Process 128 (1984).

[85] Id.

[86] Id. at 129.

[87] U.S. Const. Art. I, § 1.

a Member for purposes of Article § 2,[88] the question arises as to the basis on which delegate could vote in the Committee of the Whole.

The Constitution does not provide for representatives of the District of Columbia or the territories such as the delegate for the District of Columbia or the resident commissioners or delegates for the territories; nor does it appear that these delegates and resident commissioners are required to meet the qualifications or electoral requirements required of Members of Congress.[89] Consequently, the Constitution does not appear to provide the basis for a delegate to exercise the power of Members under the Constitution.[90] However, the Constitution does not specify whether or not all legislative activities which a Member might engage in are restricted to those Members, thus leaving open the possibility that a delegate may engage in some legislative activities which are not limited to Members.

Historically, delegates have engaged in a number of legislative activities which, although preliminary to final passage of legislation and thus arguably advisory, appear to involve the exercise of some modicum of legislative authority. These activities have included introducing legislation,[91] serving on standing congressional committees, voting on these committees,[92] and debating on the floor of the house. The line between what legislative activities are limited to Members of Congress and those which are not, however, is not well developed.[93]

As noted previously, the question of whether a vote in the Committee of the Whole, subject to a revote, is advisory in nature was addressed by the United States Court of Appeals in *Michel v. Anderson*.[94] In *Michel,* the court noted the long-standing traditions of allowing territorial delegates to vote in standing committees.[95]

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[88] Michel v. Anderson, 14 F.3d 623, 630 (D.C. Cir. 1994).

[89] For example, the number of persons who may be represented by each Member must be approximately equal with the number represented by other Members. Wesberry v. Sanders, 376 U.S. 1 (1962). The number of persons represented by the District of Columbia delegate is not established in relationship to this number; rather, the delegate represents the entire population of the District of Columbia.

[90] Michel v. Anderson, 14 F.3d 623, 630 (D.C. Cir. 1994).

[91] See, e.g., H.R. 4718, 102d Cong., 2nd Sess. (a bill submitted by Delegate Eleanor Holmes Norton to provide for admission of the State of New Columbia into the Union). Cosponsors are apparently not required. See id.

[92] Rule XII, Rules of the House of Representatives.

[93] Although a delegate may currently introduce legislation on the House floor, and may engage in floor debate which could ultimately influence how courts interpret a piece of legislation, there appears to have been no clear constitutional basis distinguishing these particular powers from others not granted. For instance, "preliminary" votes in the House, such as on the adoption of Rules or voting to advice conferees, have historically been denied delegates, although these votes are not directly related to the passage of final legislation.

[94] 14 F.3d 623 (D.C. Cir. 1994).

[95] Id. at 631.

However, despite a variety of arguments that the procedures of Committee of the Whole made it constitutionally distinct, the court also found that the operational similarities between the Committee and the whole House were significant enough to raise constitutional issues.[96] Nonetheless, because the revote provision rendered the vote largely "symbolic," the court held that "we do not think this minor addition to the office of delegates has constitutional significance."[97]

Conclusion

In sum, it is difficult to identify either constitutional text or existing case law which would directly support the allocation by Congress of the power to vote in the full House on the District of Columbia Delegate. Further, that case law which does exist would seem to indicate that not only is the District of Columbia not a "state" for purposes of representation, but that congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation.

In particular, at least six of the Justices who participated in what appears to be the most relevant Supreme Court case, *National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co.*, authored opinions rejecting the proposition that Congress's power under the District Clause was sufficient to effectuate structural changes to the political structures of the federal government. Further, the remaining three Justices, who found that the Congress could grant diversity jurisdiction to District of Columbia citizens despite the lack of such jurisdiction under Article III, specifically limited their opinion to instances where there was no extension of any fundamental right nor substantial disturbance of the existing federalism structure. To the extent that providing District residents with House representation could be so characterized, then one could argue that all nine Justices would have found the instant proposal to be unconstitutional.

Although not beyond question, it would appear likely that the Congress does not have authority to grant voting representation in the House of Representatives to the District of Columbia as contemplated by H.R. 1905. On the other hand, because the provisions of H.Res. 78 allowing Delegates a vote in the Committee of the Whole would be largely symbolic, these amendments to the House Rules are likely to pass constitutional muster.

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[96] Id. at 632.

[97] Id.

Department of Justice

STATEMENT

OF

JOHN P. ELWOOD
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS,
AND PROPERTY RIGHTS
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"ENDING TAXATION WITHOUT REPRESENTATION: THE CONSTITUTIONALITY OF S. 1257, THE DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2007"

PRESENTED ON

MAY 23, 2007

STATEMENT
OF
JOHN P. ELWOOD
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND PROPERTY RIGHTS
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CONCERNING
"ENDING TAXATION WITHOUT REPRESENTATION: THE CONSTITUTIONALITY OF S. 1257, THE DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2007"

PRESENTED ON
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Thank you for the opportunity to discuss the Department's views on S. 1257, a bill to grant the District of Columbia representation in the House of Representatives as well as to provide an additional House seat for Utah. For the same reasons stated in the Statement of Administration Policy on the House version of this legislation, the Administration concludes that S. 1257 violates the Constitution's provisions governing the composition and election of the United States Congress. Accordingly, if S. 1257 were presented to the President, his senior advisors would recommend that he veto the bill. I will confine my testimony to the constitutional issues posed by the legislation.

The Department's constitutional position on the legislation is straightforward and is dictated by the unambiguous text of the Constitution as understood and applied for over 200 years. Article I, section 2 of the Constitution provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of *the several States*, and the Electors *in each State* shall have the Qualifications requisite for Electors of the most numerous branch of the *State Legislature*.

This language, together with the language of eleven other explicit constitutional provisions, including the Twenty-Third Amendment ratified in 1961,[1] "makes clear just how

[1] *E.g.*, U.S. Const. art. I, §§ 2-4; art. II, § 1, cl. 2; amend. XIV, § 2; amend. XVII; amend. XXIII, § 1.

deeply Congressional representation is tied to the structure of statehood."[2] The District of Columbia is not a State. In the absence of a constitutional amendment, therefore, the explicit provisions of the Constitution do not permit Congress to grant congressional representation to the District through legislation.

Shortly after the Constitution was ratified, the District of Columbia was established as the Seat of Government of the United States in accordance with Article I, section 8, clause 17 of the Constitution. The Framers deliberately placed the capital in a federal enclave that was not itself a State to ensure that the federal Government had the ability to protect itself from potentially hostile state forces. The Framers also gave Congress "exclusive" authority to enact legislation for the internal governance of the enclave chosen as the Seat of Government—the same authority Congress wields over the many other federal enclaves ceded by the States, such as military bases and federal park lands.

Beginning even before the District of Columbia was established as the Seat of Government, and continuing to today, there have been determined efforts to obtain congressional representation for the District. Apart from the various unsuccessful litigants attempting to secure representation through litigation, such efforts have consistently recognized that, because the District is not a State, a constitutional amendment is necessary for it to obtain congressional representation. S. 1257 represents a departure from that settled constitutional and historical understanding, which has long been recognized and accepted by even ardent proponents of District representation.

One of the earliest attempts to secure congressional representation for the Seat of Government was made by no less a constitutional authority than Alexander Hamilton at the pivotal New York ratifying convention. Recognizing that the proposed Constitution did not provide congressional representation for those who would reside in the Seat of Government, Hamilton offered an amendment to the Enclave Clause that would have provided:

> That When the Number of Persons in the District of Territory to be laid out for the Seat of the Government of the United States, shall according to the Rule for the Apportionment of Representatives and Direct Taxes Amount to [left blank] such District shall cease to be parcel of the State granting the Same, *and Provision shall be made by Congress for their having a District Representation in that Body*.[3]

Hamilton's proposed amendment was rejected. Other historical materials confirm the contemporary understanding that the Constitution did not contemplate congressional representation for the District, and that a constitutional amendment would be necessary to make such provision.[4] These materials refute the contention by proponents of S. 1257 that the Framers

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[2] *Adams v. Clinton*, 90 F. Supp. 2d 35, 46-47 (D.D.C.), *aff'd*, 531 U.S. 940, 941 (2000).

[3] 5 *The Papers of Alexander Hamilton* 189-90 (Harold C. Syrett ed., 1962) (emphasis added).

[4] *See* 10 Annals of Congress 991, 998-99 (1801) (remarks of Rep. John Dennis of Maryland) (stating that because of District residents' "contiguity to, and residence among the members of [Congress]," "though they might not be represented in the national body, their voice would be heard. But if it should be necessary [that they be

simply did not consider the District's lack of congressional representation and that, if they had considered it, they would have provided such representation. In fact, Framers and ratifiers *did* consider the question and rejected a proposal for such representation.

In more recent years, major efforts to provide congressional representation for the District were pursued in Congress in the 1960s and 1970s, but on each occasion Congress expressly recognized that obtaining such representation would require either Statehood or a constitutional amendment. For example, when the House Judiciary Committee favorably recommended a constitutional amendment for District representation in 1967, it stated as follows:

> *If the citizens of the District are to have voting representation in the Congress, a constitutional amendment is essential; statutory action alone will not suffice.* This is the case because provisions for elections of Senators and Representatives in the Constitution are stated in terms of the States, and the District of Columbia is not a State.[5]

Congress again considered the District representation issue in 1975, and the House Judiciary Committee again expressly acknowledged that, "[i]f the citizens of the District are to have voting representation in Congress, a constitutional amendment is essential; statutory action will not suffice."[6]

Of course, the courts have not directly reviewed the constitutionality of a statute purporting to grant the District representation because, for the reasons so forcefully articulated by the House Judiciary Committee, Congress has not previously considered such legislation constitutionally permissible. But numerous federal courts *have* emphatically concluded that the existing Constitution does not permit the provision of congressional representation for the District. In *Adams v. Clinton*, a three-judge court stated, in a decision affirmed by the Supreme Court, that "the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representation," and stressed that Article I "makes clear just how deeply Congressional representation is tied to the structure of statehood." 90 F. Supp. 2d 35, 46-47 (D.D.C.), *aff'd*, 531 U.S. 941 (2000); *see generally Southern Ry. Co. v.*

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represented], the Constitution might be so altered as to give them a delegate to the General Legislature when their numbers should become sufficient"); *see also* 5 *The Documentary History of the Ratification of the Constitution* 621 (Merrill Jensen, John P. Kaminski, & Gaspare J. Saladino eds., 1976) (statement by Samuel Osgood, a delegate to the Massachusetts ratifying convention, that he could accept the Seat of Government provision only if it were amended to provide that the District be "represented in the lower House," though no such amendment was ultimately included in the amendments recommended by the Massachusetts convention); Augustus Woodward, *Considerations on the Territory of Columbia* 5-6 (1801) (to ensure that residents of the District "who are governed by the laws ought to participate in the formation of them" "[i]t will require an amendment to the Constitution of the United States") (quoted in *Adams v. Clinton*, 90 F. Supp.2d 35, 53 (D.D.C.), *aff'd*, 531 U.S. 941 (2000)).

[5] *Providing Representation of the District of Columbia in Congress*, H.R. Rep. No. 90-819, at 4 (Oct. 24, 1967) (emphasis added).

[6] *Providing Representation of the District of Columbia in Congress*, H.R. Rep. No. 94-714, at 4 (Dec. 11, 1975).

Seaboard Allied Milling Corp., 442 U.S. 444, 462 (1979) (stating that summary affirmance is a precedential ruling on the merits). In *Banner v. United States*, 428 F.3d 303 (D.C. Cir. 2005) (per curiam), a panel of the D.C. Circuit that included Chief Justice John Roberts flatly concluded: "[t]he Constitution denies District residents voting representation in Congress. . . . Congress *is* the District's Government, *see* U.S. Const. art. I, § 8, cl. 17, and the fact that District residents do not have congressional representation does not alter that constitutional reality." *Id.* at 309.[7] The court added: "[i]t is beyond question that the Constitution grants Congress exclusive authority to govern the District, but does not provide for District representation in Congress." *Id.* at 312. And in explaining why the Constitution does not permit the District's delegate in Congress to have the voting power of a Representative, the District Court for the District of Columbia stressed that the legislative power "is constitutionally limited to 'Members chosen . . . by the People of the several States.' U.S. Const. Art. I, § [2], cl. 1." *Michel v. Anderson*, 817 F. Supp. 126, 140 (D.D.C. 1993).

The numerous explicit provisions of the constitutional text; the consistent construction of those provisions throughout the course of American history by courts, Congress, and the Executive;[8] and the historical evidence of the Framers' and ratifiers' intent in adopting the Constitution conclusively demonstrate that the Constitution does not permit the granting of congressional representation to the District by simple legislation.

We are aware of, and not persuaded by, the recent and novel claim that S. 1257 should be viewed as a constitutional exercise of Congress's authority under the Enclave Clause, U.S. Const. art. I, § 8, cl. 17, to "exercise exclusive legislation" over the Seat of Government and other federal enclaves. That theory is insupportable. First, it is incompatible with the plain language of the many provisions of the Constitution that, unlike the Enclave Clause, are directly and specifically concerned with the composition, election, and very nature of the House of Representatives and the Congress. Those provisions were the very linchpin of the Constitution, because it was only by reconciling the conflicting wishes of the large and small States as to representation in Congress that the Great Compromise that enabled the Constitution's ratification was made possible. Every word of Article I's provisions concerning the composition and election of the House and the Senate—and particularly the words repeatedly linking congressional representation to "each State" or "the People of the several States"—was carefully chosen. In contrast, the Enclave Clause has nothing to do with the composition, qualifications, or election of Members of Congress. Its provision for "exclusive legislation" concerns

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[7] Judge Roberts was a member of the D.C. Circuit when *Banner* was briefed and argued, but was serving as Chief Justice (and Circuit Justice) when the opinion issued. *See Banner*, 428 F.3d at 304-05 n.1.

[8] *See, e.g.*, Letter for Mr. Benjamin Zelenko, Committee on the Judiciary, House of Representatives, from Martin F. Richman, Acting Assistant Attorney General, Office of Legal Counsel (Aug. 11, 1967) (expressing the view that "a constitutional amendment is essential" for the District to obtain voting representation in Congress in the recommendations for the Committee Report on a proposed constitutional amendment); District of Columbia Representation in Congress: *Hearings on S.J. Res. 65 Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 95th Cong. 16-29 (1978) (statement of John M. Harmon, Assistant Attorney General, Office of Legal Counsel) (discussing, in endorsing a constitutional amendment as the means of obtaining congressional representation for the District, the alternative ways of obtaining such representation, particularly the option of statehood legislation; conspicuous by its absence was any suggestion that such representation could be provided through legislation granting the District a seat).

legislation respecting *the internal operation* of "such District" and other enclaves. The Enclave Clause gives Congress extensive legislative authority "over such District," but that authority plainly does not extend to legislation affecting the entire Nation. S. 1257 would do that by altering the very nature of the House of Representatives. By no reasonable construction can the narrowly focused provisions of the Enclave Clause be construed to give Congress such sweeping authority.

Second, whatever power Congress has under the Enclave Clause is limited by the other provisions of the Constitution. As stated by the Supreme Court in *Binns v. United States,* 194 U.S. 486 (1904), the Enclave Clause gives Congress plenary power over the District "save as controlled by the provisions of the Constitution." *Id.* at 491. As the Supreme Court has further explained, the Enclave Clause gives Congress legislative authority over the District and other enclaves "in all cases where legislation is possible."[9] The composition, election, and qualifications of Members of the House are expressly and specifically governed by other provisions of the Constitution that tie congressional representation to Statehood. The Enclave Clause gives Congress no authority to deviate from those core constitutional provisions.

Third, the notion that the Enclave Clause authorized legislation establishing congressional representation for the Seat of Government is contrary to the contemporary understanding of the Framers and the consistent historical practice of Congress. As I mentioned earlier, the amendment unsuccessfully offered by Alexander Hamilton at the New York ratifying convention to authorize such representation when the Seat of Government's population reached a certain level persuasively demonstrates that the Framers did not read the Enclave Clause to authorize or contemplate such representation. Other contemporaneous historical evidence reinforces that understanding. *See* note 4, *supra*. Moreover, Congress's consistent recognition in practice that constitutional amendments were necessary not only to provide congressional representation for the District, but also to grant it electoral votes for President and Vice President under the Twenty-Third Amendment, belies the notion that the Enclave Clause has all along authorized the achievement of such measures through simple legislation. Given the enthusiastic support for such measures by their congressional proponents, it is simply implausible that Congress would not previously have discovered and utilized that legislative authority as a means of avoiding the enormous difficulties of constitutional amendment if such authority existed.

Fourth, the proponents' interpretation of the Enclave Clause proves far too much; the consequences that would necessarily flow from acceptance of that theory demonstrate its implausibility. As the Supreme Court has recognized, "[t]he power of Congress over the federal enclaves that come within the scope of Art. I, § 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia."[10] It follows that if Congress has constitutional authority to provide congressional representation for the District under the Enclave Clause, it has the same authority for the other numerous federal enclaves (such as military bases and various federal lands ceded by the States). But that is not all. The Supreme Court has also recognized that Congress's authority to legislate respecting the U.S. territories under the Territories Clause,

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[9] *O'Donoghue v. United States*, 289 U.S. 516, 539 (1993) (citation omitted).

[10] *Paul v. United States*, 371 U.S. 245, 263 (1963).

U.S. Const., art. IV, § 3, cl. 2, is equivalent to its "exclusive legislation" authority under the Enclave Clause. *E.g.*, *Binns*, 194 U.S. at 488. If the general language of the Enclave Clause provides authority to depart from the congressional representation provisions of Article I, it is not apparent why similar authority does not likewise reside in the Territories Clause, which would enable Congress to enact legislation authorizing congressional representation for Puerto Rico, the Virgin Islands, and other territories. These unavoidable corollaries of the theory underlying S. 1257 demonstrate its invalidity. Given the great care with which the Framers provided for State-based congressional representation in the Composition Clause and related provisions, it is implausible to suggest that they would have simultaneously provided for the subversion of those very provisions by giving Congress *carte blanche* to create an indefinite number of additional seats under the Enclave Clause.

Finally, we note that the bill's proponents conspicuously fail to address another logical consequence that flows from the Enclave Clause theory: If Congress may grant the District representation in the House by virtue of its purportedly expansive authority to legislate to further the District's general welfare, it follows logically that it could use the same authority to grant the District (and other enclaves and territories) two Senators as well.

At bottom, the theory that underlies S.1257 rests on the premise that the Framers drafted a Constitution that left the door open for the creation of an indefinite number of congressional seats that would have fatally undermined the carefully crafted representation provisions that were the linchpin of the Constitution. Such a premise is contradicted by the historical and constitutional record.

The clear and carefully phrased provisions for State-based congressional representation constitute the very bedrock of our Constitution. Those provisions have stood the test of time in providing a strong and stable basis for the preservation of constitutional democracy and the rule of law. If enacted, S. 1257 would undermine the integrity of those critical provisions and open the door to further deviations from the successful framework that is our constitutional heritage. If the District is to be accorded congressional representation without Statehood, it must be accomplished through a process that is consistent with our constitutional scheme, such as amendment as provided by Article V of the Constitution.

Prepared Statement of

Paul Strauss

United States Senator
District of Columbia (Shadow)

before the

United States Senate
Committee on Homeland Security and Governmental Affairs

Regarding

S. 1257

District of Columbia House Voting Rights Act of 2007

10.00 AM – May 15th 2007
Room 342
Dirksen Senate Office Building

Chairman Leiberman and members of the committee, on behalf of the citizens of the District of Columbia, I thank you for allowing me to present this statement as the Senior elected United States Senator for the District of Columbia. This is a historic day for residents of our nation's capital city, who have been disenfranchised for over two hundred years, and whilst I applaud the effort of those who have worked on this bill to give the citizens of the District of Columbia just one vote in Congress, this simply is not sufficient. Some 500,000 citizens are being denied one of their basic rights as American citizens, and essentially as human beings. The United Nations has criticised the United States of America for not providing its citizens with equal representation. Article 21 (1) of the Universal Declaration of Independence states that "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives". It is impossible to dispute that the lack of voting representation of so many people does not violate this in the strongest possible way. This right to representation is deemed a basic human right by the rest of the world, and one that is being denied by the leaders of the "free world". As a country we are proud to export democracy to the rest of the world, but are apparently incapable of providing the same standard of privilege to our own citizens. It would not take a five-year war and billions of dollars to expand democracy here in the District of Columbia, but a simple piece of legislation.

Whilst I do not wish to detract from the bill presently before us, the most significant change to voting rights for the District of Columbia for many years, we must not forget that eventual statehood must be the desired goal, and that anything less than this is an outrage to the citizens of the District. The same citizens who pay their taxes, serve on juries, obey federal laws and fight and die in wars to defend the rights of

other people. The same equal rights should be afforded to everyone, without regard for their place of residence in the United States of America.

The very nature of deliberately disenfranchising nearly 600,000 citizens is undeniably undemocratic. The United States is the only country remaining in the world where residents of the capital city cannot vote for a representative in the federal government. The Founding Fathers would never have deliberately intended this oversight of such a potentially large number of people. After the landmark ruling in *National Mutual Insurance v. Tidewater,* Justice Rutledge said "I cannot believe that the framers intended to impose so purposefully and indefensible a discrimination, although they have been guilty of understandable oversight in not providing explicitly against it". Further, the ruling of Adams v. Clinton did not expressly grant or restrict District voting rights, thus Congress retains the power to legislate as it sees fit.

The District of Columbia was not created until years after the Constitution was written, which leaving this decision to the expertise of a future Congress. The issue of D.C.citizens' voting rights at the time the Constitution was drafted simply was not relevant to the same degree that it is now due to a lack of universal suffrage, and far fewer residents for whom the law would affect. The Constitution was designed to protect the rights of citizens, not to deliberately remove them, and it is illogical to suppose the framers meant this could be any other way. One of today's witnesses, Professor Dihn has referred to this absurd anomaly as a "historic accident" wherein the intentions of the Founders have been imbued with an unintended interpretation. The current Congress has exactly the same power and authority as it did 200 years ago at the first Congress in 1790, when it accepted the land ceded from Maryland and

Virginia, as the federal city as stated in the Constitution. From 1790 to 1800 citizens of the District of Columbia could vote for a member of the House of Representatives as was the simple statute law handed down by Congress. In 1801 the Organic Act was passed and provided no provision for voting rights for residents of the District of Columbia and this simple act of statute law has forever plagued the residents of our capital city. As is stated in the Constitution, Congress has direct authority to provide this voting representation, "to exercise exclusive legislation in all cases whatsoever, over such a District." In fact the District of Columbia Circuit Court has stated that "Congress has extra ordinary and plenary power" over the District. This statute law has been allowed to prevent full voting rights for over half a million people for too long, particularly when it can so easily be overturned as it has no basis in the Constitution. The American Bar Association has gone as far as to say that while Congress has been given this responsibility and power over the District, it also bears a "moral obligation" to provide full voting rights, which it most definitely has the power to do. For Congress to deliberately not act on this when it has a moral obligation to do so is incomprehensible.

The legislation in question has been criticised by some as unconstitutional, however over twenty-five constitutional scholars the ABA, and myself most vehemently disagree. The ABA stated "It is within Congress' power to correct this longstanding inequity, and we urge you to support this legislation". As is shown by Article 1 Section 8 of the Constitution, Congress has the power to pass legislation over the District, as was illustrated by the creation of the Council and the Mayor. While this to some extent grants greater autonomy to the District, the fact remains that those who know the District of Columbia best, its residents, cannot independently decide even

the DC budget. The ability to independently determine the budget for the city in itself would help to better allocate funds to those most in need, and to greatly improve the city in a way we currently are unable to do. Well over half a million citizens are being taxed without any form of representation. Further legislation is needed to allow the residents of the District of Columbia a suitable opportunity to influence the way their home and country is run. To give the District full representation would allow the city to be governed more effectively and in a manner that would greater benefit the citizens of the District, and allow them the basic democratic right of voting. The lack of autonomy also stops the District from retaining complete control over city law. It is deeply demoralizing for the citizens of the District to have Congress able to overturn any law that is passed by the city. Tax paying citizens do not have the final say in any of the laws that directly affect their daily lives, instead these decisions are made by people with little vested interest in the city. While many in Congress may own property and spend a lot of time in the city, this is simply not the same as the empathy and knowledge that is needed to properly govern a city.

Although The 23rd Amendment was introduced in 1961 allowing the citizens of the District of Columbia to vote in Presidential elections for the first time, this alone is not sufficient. The Constitution states that "A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State". This Constitutional amendment now sets a precedent that, combined with Congress's special authority over the District, allows Congress to take further action and grant full voting rights to the District. It is unjust that Congress should only treat the District as a state when it is in line with their own interests. Despite having the power to elect

a President, by not having a vote in Congress, the residents of the District have no power with which to impeach one. This is a grave injustice, which essentially removes any meaningful power of decision over the Presidency of the country.

The fight for equal voting rights is something that we as a nation have frequently struggled with. In a city where a majority of residents are African American, this violates the important principles that were fought so hard for in the civil rights movement. We spend billions of dollars allegedly exporting democracy to other parts of the world, and yet still deny equal representation to over half a million of our own citizens. The bipartisan balance of the bill allows Utah also to receive the seat that they feel they are owed in the same democratic nature as the District of Columbia. While I appreciate that some minority members may resent an additional seat in the house being given to an almost certainly Democrat District, the compromise aspect of the bill takes this into account. Interpretation of sections of the Constitution is something that frequently develops and changes over time, and is seen as a necessary and vital part of its adaptability. The 1954 Supreme Court case of *Brown v Board of Education of Topeka* drastically changed previous precedents on segregation, ones that would not have previously been thought possible. People who were previously denied "equal protection of the laws" finally had these rights granted. Nothing about the situation had changed, simply the interpretation of the constitution. In much the same way, the citizens of D.C. have always deserved the same rights to vote as any other United States citizens.

Whilst I applaud the efforts of this bill and the efforts of those who have produced and supported it, I hope to underline the true necessity of granting full voting rights and

representation to the District of Columbia. Until these rights are granted almost 600,000 American citizens are living in a city where they do not have the same fundamental rights as other citizens, despite paying taxes, obeying the laws of the country, and fighting its wars. While this is a step in the right direction, the true value of statehood and representation, in both the House of Representatives and the Senate, must not be forgotten. Essentially, under the 14th Amendment, every American should have the same protection under the law, and this should come above everything else. As long as the citizens of the District of Columbia do not have full voting representation and the disenfranchisement continues, they do not have the full rights that they are entitled to as citizens. This travesty must not be allowed to continue any longer, and every effort must be made despite the result of this bill to make sure that this happens.

In closing, I would like to thank the committee for holding this hearing this morning. Finally, I would like to thank a member of my legislative staff, Claire Porter, for her help with preparation of this testimony.

STATEMENT FOR THE RECORD
JOHN FORSTER
COMMITTEE FOR THE CAPITAL CITY

EQUAL REPRESENTATION IN CONGRESS:
PROVIDING VOTING RIGHTS TO THE DISTRICT OF COLUMBIA

MAY 15, 2007

COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS
THE UNITED STATES SENATE

Despite bi-partisan support for DC voting-rights in Congress, the proposal (S-1257) by Senators Joseph Lieberman (I-CT) and Orrin Hatch (R-UT) needs revisions to protect against partisan and constitutional objections, filibusters, court challenges, and veto threats. Luckily, the needed modifications already exist.

Under the so-called 'District Clause' of the Constitution, Congress has the undisputed power to control all legislation affecting the District of Columbia and all federally-owned property. Some scholars also refer to this clause of the Constitution as the 'federal-supremacy' clause because the founding fathers wanted to ensure that Congress has control of federal properties without the undue influence of the State in which those properties are located. Today, almost a third of the country is federally owned and under the exclusive legislative control of Congress, even though Congress has chosen to delegate some governmental functions in these areas to the states.

(over)

As Professor Jonathan Turley pointed out in his Congressional testimony of May 15, 2007, the District Clause does not give Congress the power to create non-apportioned congressional districts or to award Senators to these federal enclaves. The Constitution is very clear that members of Congress come from states and that each state is entitled to two Senators and further that each congressional district is to be apportioned equally by population every ten years except that each state is entitled to at least one representative. If Congress thinks it can treat the District as if it is a state for the purposes of House representation, it could later award two senators for the District (hence the filibuster and veto threats) as well as create congressional districts in other federal enclaves and non-states.

Surprisingly, the congressional testimony of both Professors Jonathan Turley and Viet Dinh points to the same fact that District residents voted in Maryland's federal elections for ten years after Maryland ceded land to the federal government to create the current District of Columbia. This right of DC residents to vote in Maryland's federal elections was eliminated by statute in 1801. Since Congress has the power to regulate federal elections, it could restore the right of DC residents to vote as part of Maryland's federal congressional delegation.

The Lieberman-Hatch bill should be modified so that the congressional district it creates is treated as the 9th congressional district from Maryland and is required to be apportioned every ten years. The language to accomplish this change has already been drafted and introduced in Congress (HR 492- The District of Columbia Voting Rights Restoration Act of 2007) by Rep Dana Rohrabacher (R-CA). While the Rohrabacher bill also creates representation in the Senate for DC residents by the two existing Maryland senators, this provision could be debated by a future congress. This approach is the only feasible way for DC residents to ultimately gain representation in the Senate and thus have representation equal to that of all other Americans. After all, even Rep Davis is opposed to two exclusive Senators from the District of Columbia. Sadly, the House failed to debate the Rohrabacher approach and passed the Davis/Norton bill without consideration of other legislative alternatives, even though both Representative Davis and Delegate Norton have expressed a willingness to be flexible in the approach needed to gain the Congressional representation for DC residents that they both desire .

These needed amendments proposed by Rep. Rohrabacher would preserve the vast majority of the support the bill now enjoys, satisfy the concerns of the bill's opponents, as well as gain the support of some DC voting rights advocates who believe the current bill does not go far enough. Congress can now provide the representation that DC residents have sought for over two-hundred years.

# # #

JENNER&BLOCK

May 25, 2007

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VIA FACSIMILE (202) 228-3792

Deborah Parkinson
Senator Joe Lieberman's Office
706 Hart Office Building
Washington, DC 20510

Re: DC Voting Rights Statement

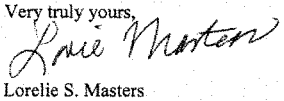
Dear Ms. Parkinson:

Thank you for returning my call. I enclose a copy of the Public Statement issued by the D.C. Affairs Section of the D.C. Bar, supporting DC Voting Rights and passage of the District of Columbia Fairness in Representation Act. This Public Statement is cosponsored by my Section, the Litigation Section, as well as the Courts, Lawyers and Administration of Justice and Antitrust and Consumer Law sections of the D.C. Bar.

Please let me know if you have any questions.

We very much appreciate Senator Lieberman's support of this legislation, and commend him for his principled stand in favor of voting representation for D.C. residents.

Very truly yours,

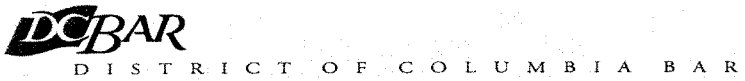


Lorelie S. Masters

LSM:kag

Enclosure

cc: Jon Bouker, Esquire, Co-Chair D.C. Affairs Section
Tonya A. Sapp, Esquire, Co-Chair D.C. Affairs Section
Sondra Mills, Esquire, Co-Chair Antitrust and Consumer Law Section
Maribeth Petrizzi, Esquire, Co-Chair Antitrust and Consumer Law Section
Fritz Mulhauser, Esquire, Co-Chair Courts, Lawyers and Administration of Justice Section
Michael Zoeller, Esquire, Co-Chair Courts, Lawyers and Administration of Justice Section
Ilir Zherka, Executive Director DC Vote



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Board of Governors Liaison:
Nathalie F.P. Gilfoyle

Standing Committees:
Legislative
Litigation
Membership/Community Outreach
Programs

May 18, 2007

The United States Senate
Washington, DC 20001

Re: District of Columbia Voting Rights

Dear Senator:

Please find enclosed the statement of the District of Columbia Affairs Section of the District of Columbia Bar Association in support of the District of Columbia Fairness in Representation Act, which will provide Congressional Voting Rights for the residents of the District of Columbia.

The Section serves all attorneys who live, work, or have interest in the District of Columbia. The Section monitors legislative, judicial, and related legal developments affecting the District of Columbia.

The statement is co-sponsored by the Litigation, Courts, Lawyers and Administration of Justice, and Antitrust and Consumer Law Sections of the District of Columbia Bar.

If we can be of assistance, please let us know.

Sincerely,

Tonya Sapp/km

Tonya A. Sapp
Co-Chair

Jon Bouker/km

Jon Bouker
Co-Chair

Enclosure

The views expressed herein represent only those
of the D.C. Affairs, Litigation, Courts, Lawyers and Administration of Justice,
and Antitrust and Consumer Law Sections of the District of Columbia Bar
and not those of the D.C. Bar or of its Board of Governors.

Statement of the District of Columbia Affairs Section of the District of Columbia Bar Regarding Congressional Voting Rights for the Residents of the District of Columbia

The District of Columbia Affairs Section of the District of Columbia Bar is concerned with issues relating to the laws and government of the District of Columbia, with a particular emphasis on the complex legal relationship between the Nation's capital and the federal government that resides within its borders. The Section has consistently adopted District autonomy and congressional voting rights as themes governing its work. In furtherance of these important themes, the Section adopts the following statement regarding congressional voting rights for the residents of the District of Columbia.[1] The Litigation, Courts, Lawyers and Administration of Justice, and Antitrust and Consumer Law Sections all have endorsed this statement.

The D.C. Bar Section Guidelines and Procedures allow a Section to present Section views on proposed legislation that: "come[s] within a Section's special expertise and jurisdiction" and "relate[s] closely and directly to the administration of justice."[2] The D.C. Affairs Section ("the Section") is the Bar's Section of jurisdiction on matters affecting the governance of the District of Columbia and its residents. In addition, no matter is more intricately intertwined with the administration of justice in the District of Columbia than the denial of congressional voting rights. Residents of the District have no vote in Congress on federal measures that would overturn laws duly enacted by the Council of the District of Columbia; and the District's local

[1] The views expressed in the statement are only those of the D.C. Affairs, Litigation, Courts, Lawyers and Administration of Justice, and Antitrust and Consumer Law Sections and not those of the D.C. Bar or its Board of Governors.
[2] D.C. Bar Section Guidelines and Procedures Section A, paragraph 1.

budget containing its own taxpayer-raised revenue cannot become law until the Congress affirms it. District residents have no vote on riders that Congress proposes to add to the District budget, even if those riders would undo decisions made by local legislators accountable to District residents. The District also has no vote when Congress makes key decisions affecting both the District and the Nation – such as going to war, preparing for national emergencies, choosing federal judges, setting national priorities, imposing federal taxes, and enacting federal laws affecting District residents. These undemocratic constraints on the District and its autonomy (and many others) negatively impact upon the administration of justice in the Nation's capital.

The Section is pleased that there is more interest in congressional voting rights for the District among federal lawmakers than at any time in a generation. There currently are four pending bills that would afford District of Columbia residents varying degrees of voting rights. It is important to note that three of those bills have been introduced by Republicans. A recent survey shows that 82% of Americans, regardless of race, gender or ethnicity, support congressional voting rights for the District of Columbia. The polls show that super majorities of members of both major political parties across the country support D.C. voting rights. The Section hopes that members of Congress will listen to their constituents and adopt D.C. voting rights legislation during this session of Congress.

Because the Section has adopted autonomy and D.C. voting rights as its themes, it has supported the bill that provides maximum autonomy and voting rights. Congresswoman Eleanor Holmes Norton and Senator Joe Lieberman have introduced the "No Taxation Without Representation Act," which would grant the District voting representation in Congress equal to that of states

with similar populations. Currently, the bill would afford District residents one Representative in the House and two Senators. The bill is constitutional and Congress has the power under the District Clause and the 14th Amendment to enact it. This bill would put District residents on an even playing field with other Americans and is the most complete remedy to the denial of D.C. voting rights contained in any of the four introduced bills. Therefore, the "No Taxation Without Representation Act" is the bill that the Section would most like to see adopted.

However, the Section recognizes that the "District of Columbia Fairness in Representation Act," a bill introduced by Representative Tom Davis (R-VA) and now co-sponsored by Congresswoman Norton, appears ripe for passage in the House and Senate. This legislation would afford District residents a vote in the House, but not the Senate, while simultaneously granting an additional seat in the House to the state of Utah, which narrowly missed gaining a seat in the last apportionment. This innovative approach is just the kind of fresh thinking that the D.C. voting rights movement needs, and would help to move the issue of D.C. voting rights forward. The Section now wishes to support Representative Davis' legislation as a first step toward full voting rights for District residents and urges its swift passage. The Section commends Representative Davis and Congresswoman Norton and supports their continued fight in favor of equal rights for those who live in the Nation's capital.

Particularly when the Nation is at war, it is unconscionable that D.C. residents, who have fought and died in every war since the Revolution, do not possess the right to vote on whether the Nation goes to war. As the United States continues to bring democratic values and ideals to nations once governed by tyrants, the Section urges Congress to correct a lingering injustice in its own shadow, the denial of congressional voting rights for the 500,000 Americans who live in the Nation's capital.

P.O. Box 65691
Washington, DC 20035-5691

May 15, 2007

The Honorable Joseph I. Lieberman
Chair, Senate Committee on Homeland Security
and Government Affairs
United States Senate
Washington, DC 20510

RE: S. 1257, the D.C. House Voting Rights Act of 2007

Dear Chairman Lieberman:

On behalf of DC For Democracy (DCFD), the largest non-affiliated, grassroots political organization in the District of Columbia, we thank you for your leadership in support of the DC House Voting Rights Act of 2007 (S. 1257).

The bill, which received bi-partisan support in the House as H.R. 1905, is now before the Senate. As you know, your newly introduced Senate companion bill replaces the at-large fourth seat to Utah, as provided for in the House-passed bill (H.R. 1905), with a new proportionate seat similar to that which the House considered under H.R. 5388 of the 109th Congress. Like the House-passed bill, S. 1257 also continues to pair voting representation in the House of Representatives for citizens living in the District of Columbia with the additional Utah seat by expanding the size of the House to 437 members. This approach is vote-neutral and balances the seat for traditionally Democratic District of Columbia with an additional seat for Republican-leaning Utah. Both DCFD and our national Democracy For America (DFA) strongly support this bipartisan approach to expanding democratic rights to all under- and unrepresented American citizens, as embodied in S. 1257.

We commend you for your leadership in introducing the bipartisan Senate bill, and appreciate your scheduling today's hearing before the full Homeland Security and Government Affairs Committee. We would also like to urge you to mark up the bill as soon as possible as the citizens of the District of Columbia are eager to enjoy full House voting rights for the first time in our nation's history. With your continued leadership and the necessary bipartisan support of the Senate, we can end 206 years of taxation without representation for the citizen's of our national capital.

Again, thank you for your consideration and your support.

May 14, 2007

Sincerely,

Karen Rose, Chair
Voting Rights & Democracy
DC For Democracy

Keshini Ladduwahetty
Chair
DC For Democracy

Cc: The Honorable Orrin Harch
The Honorable Robert Bennett

DCFD/kdr

Testimony of Robert J. Kabel

Chairman, District of Columbia Republican Committee

On S. 1257, The District of Columbia House Voting Rights Act of 2007

Senate Committee on Homeland Security and Government Affairs

May 15, 2007

The District of Columbia Republican Committee supports DC voting rights in the House of Representatives, and specifically supports S. 1257, the District of Columbia House Voting Rights Act of 2007.

We do so in the tradition in which the Republican Party was created. In 1861 the first Republican President, Abraham Lincoln, sent to the first Republican Congress his first legislative message, calling for the emancipation of slaves in the District of Columbia. The Congress, acting under Article I, Section 8, Clause 17 of the Constitution, which gave the Congress "exclusive legislation in all cases whatsoever" over the federal seat of government, enacted the bill, the first act of Congress emancipating slaves anywhere, effective April 16, 1862, which the District celebrates as DC Emancipation Day.

Over the years the Republican Party has played an important role in the affairs of the District. In the late 50s President Eisenhower, together with a Democratic Congress, pushed for the 23rd amendment to the Constitution, which gave DC three electoral votes in the Presidential elections, beginning in 1964. In the early 70s President Nixon worked with a Democratic Congress to create the Home Rule Charter under which a popularly elected Mayor and Council run the District's local government, subject to congressional review and oversight. In 1978 many Republicans in the Congress joined with Democrats to pass a constitutional amendment that would have given DC votes in the House and Senate as if it were a state, though the amendment failed of ratification. In the mid-90s a Republican Congress, working with a Democratic President, legislated to put the financial affairs of the District in order, which has led to 10 consecutive balanced budgets and clean audits in the District. That Congress and President also enacted legislation establishing charter schools in the District, offering school choice to District parents.

We support DC voting rights in the House of Representatives because more than half a million US citizens resident here, paying federal taxes and fulfilling the other obligations of US citizenship, deserve a vote in the Congress which is ultimately responsible for our governance. Of course, most DC voters register as Democrats and vote for Democratic Party candidates. But it would be wrong, beyond the limits of partisanship, to deny US citizens in DC voting representation because of their partisan leanings.

Some have told us that if we want voting rights in the Congress, we should move to the suburbs. The Census Bureau says that more than 400,000 people live outside the District

but are here during the day, giving us long commutes and air pollution. Perhaps many of these people have already decided to outside DC because of, among other things, the lack of voting representation here. And we know that the Congress allows US citizens overseas to vote in federal elections in the state they used to live in, even if they have no intention to return to that state. Why should US citizens in DC have to move to exercise their full political rights?

The DCRC supports DC voting rights in the Congress for partisan as well as public policy reasons. It is hard to persuade US citizens in DC to register Republican and vote for Republican candidates when the national Republican Party is opposed to DC voting rights in the Congress. A recent Washington Post nationwide poll indicated a 61%-28% majority for DC voting rights in the House of Representatives, including 57%-33% among Republicans.

Inevitably, our stand on this issue has placed us in conflict with some of our own party leaders. Last December 5 the House Republican leadership decided not to allow a DC house voting rights bill to come to the floor in the lame duck phase of the Republican 109th Congress, missing an opportunity to place a Republican stamp on the expansion of DC voting rights. The DCRC issued a press release taking issue with this decision.

Again on March 14 of this year, the White House issued a Statement of Administration Policy disagreeing with a DC voting rights bill then before the House of Representatives, and warning that the President's men would advise him to veto the bill. Such a decision would be inconsistent with the President's efforts to promote democracy around the world, as well as his outreach to African-American voters here at home. So on March 20 the DCRC issued a press release reaffirming our support for the legislation and our belief that it is constitutional.

We believe that the District clause of the Constitution, the same one under which the first Republican President and Congress emancipated slaves in DC, empowers the Congress to give DC voting representation in the Congress. In this belief we join distinguished conservative and Republican constitutional scholars like Viet Dinh and Ken Starr, as well as Republican lawmakers like Tom Davis, Phil Burton and Mike Pence, and Orrin Hatch. Any constitutional challenge to this bill could be resolved by the federal courts before it takes effect.

The DCRC strongly urges Senators, and in particular Republican Senators, to support S 1257 to give US citizens in DC voting representation in the House of Representatives.

March 12, 2007

25 Legal Scholars Support Constitutionality of DC Voting Rights

Dear Representative:

DC residents pay federal income taxes, serve on juries and die in wars to defend American democracy, but they do not have voting representation in the Congress.

This lack of representation is inconsistent with our nation's core democratic principles. Justice Hugo Black put it well in *Wesberry v. Sanders* in 1964:

> *No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.*

Congress is currently considering granting voting rights to Americans living in Washington, DC. Lawmakers have been faced with questions about the constitutionality of extending the right to vote to residents of a "non-state."

As law professors and scholars, we would like to address these questions and put to rest any concerns about the constitutionality of extending the right of representation to residents of the District.

While the language of the Constitution *literally* requires that House members be elected "by the People of the Several states," Congress has not always applied this language so literally. For example, the Uniformed and Overseas Citizens Absentee Voting Act allows U.S. citizens living abroad to vote in congressional elections in their last state of residence – *even if* they are no longer citizens there, pay any taxes there, or have any intent to return.

To fully protect the interests of people living in the capital, the Framers gave Congress extremely broad authority over all matters relating to the federal district under Article I, § 8, clause 17 (the "District Clause"). Courts have ruled that this clause gives Congress "extraordinary and plenary power" over DC and have upheld congressional treatment of DC as a "state" for purposes of diversity jurisdiction and interstate commerce, among other things. Article III provides that courts may hear cases "between citizens of different states" (diversity jurisdiction). The Supreme Court initially ruled that under this language, DC residents could not sue residents of other states. But in 1940, Congress began treating DC as a state for this purpose – a law upheld in *D.C. v. Tidewater Transfer Co.* (1949).

The Constitution also allows Congress to regulate commerce "among the several states," which, literally, would exclude DC. But Congress' authority to treat DC as a "state" for Commerce Clause purposes was upheld in *Stoughtenburg v. Hennick* (1889).

(*over, please*)

We believe, under the same analysis of the Constitution, that Congress has the power through "simple" legislation to provide voting representation in Congress for DC residents.

Sincerely,

Sheryll D. Cashin
Georgetown University Law Center

Viet D. Dinh
Georgetown University Law Center

Charles J. Ogletree
Harvard Law School

Jamin Raskin
American University Washington College of Law

Samuel R. Bagenstos
Washington University Law School

Brian L. Baker
San Joaquin College of Law

William W. Bratton
Georgetown University Law Center

Richard Pierre Claude
University of Maryland

Sherman Cohn
Georgetown University Law Center

Peter Edelman
Georgetown University Law Center

James Forman Jr.
Georgetown University Law Center

David A. Gantz
The University of Arizona James E. Rogers College of Law

Michael Gottesman
Georgetown University Law Center

Michael Greenberger
University of Maryland

Pat King
Georgetown University Law Center

Charles R. Lawrence III
Georgetown University Law Center

Paul Steven Miller
University of Washington School of Law

James Oldham
Georgetown University Law Center

Christopher L. Peterson
University of Florida, Levin College of Law

Robert Pitofsky
Georgetown University Law Center

David Schultz
University of Minnesota

Girardeau A. Spann
Georgetown University Law Center

Ronald S. Sullivan Jr.
Yale Law School

Roger Wilkins
George Mason University

Wendy Williams
Georgetown University Law Center

May 15, 2007

The Honorable Joseph I. Lieberman
Chair, Senate Committee on Homeland Security
and Government Affairs
United States Senate
Washington, DC 20510

RE: S. 1257, the D.C. House Voting Rights Act of 2007

Dear Chairman Lieberman:

On behalf of Democracy for Utah (D4U), a statewide grassroots political organization dedicated to promoting American values such as civic participation, good government, and social responsibility in Utah, we thank you for your leadership in support of the DC House Voting Rights Act of 2007 (S. 1257).

The bill, which received bi-partisan support in the House as H.R. 1905, is now before the Senate. As you know, your newly introduced Senate bill replaces the at-large fourth seat to Utah, as provided for in the House-passed bill (H.R. 1905), with a new proportionate seat similar to that which the House considered under H.R. 5388 of the 109th Congress. Like the House-passed bill, S. 1257 also continues to pair voting representation in the House of Representatives for citizens living in the District of Columbia with the additional Utah seat by expanding the size of the House to 437 members. This approach is vote-neutral and balances the seat for traditionally Democratic DC with an additional seat for Republican-leaning Utah. Both D4U and our national DFA strongly support this bipartisan approach to expanding democratic rights to all under- and unrepresented American citizens, as embodied in S. 1257.

We commend you for your leadership in introducing the Senate bill with the support of cosponsoring Utah Senators Orrin Hatch and Robert Bennett, and very much appreciate your scheduling today's hearing before the full Homeland Security and Government Affairs Committee. We would also like to urge you to mark up the bill as soon as possible. With your guidance and continued support for this legislation, we believe now is the time for Utah to receive its historic fourth congressional seat that we so narrowly missed gaining after the last national reapportionment. With the bipartisan support of the Senate, we can expand Utah's rightful voice in Congress while ending 206 years of taxation without representation for the citizens of our nation's capital.

May15, 2007

Again, thank you for your consideration and your support.

Sincerely,

Carrie Ulrich

Carrie Ulrich, President
Democracy for Utah

Kristine Griggs

Kristine Griggs, Vice President
Democracy For Utah

Cc: The Honorable Orrin Hatch
The Honorable Robert Bennett

Written Testimony of Utah Governor
Jon M. Huntsman, Jr.
May 15, 2007
Senate Hearing on S.1257

Chairman Lieberman and distinguished members of this committee. It is an honor to be able to submit this written testimony.

I will confine my testimony to a brief discussion of why I believe this legislation will not only benefit the state of Utah, but will simultaneously promote democratic values inherent in our constitutional system.

As I understand, S.1257 takes a unique approach to a problem that has remained unresolved for most of our nation's history. If enacted, this legislation would increase the size of the House by two votes, giving one to the District, the other to Utah, the state that should have received an additional set in the wake of the 2000 census.

When I say that Utah should have received the additional seat following the 2000 census, I am referring to two separate errors committed by the Census Bureau in 2000, each of which improperly deprived our state of a fourth seat.

The first such error involved the Census Bureau's use of a statistical procedure known as hot deck imputation, which I believe violated the spirit, if not the letter, of the Census Act.

The second error involved the Census Bureau's decision to count federal employees residing temporarily overseas, while arbitrarily refusing to count other similarly situated Americans living outside the United States.

Although this bill does not address either of those errors directly, it addresses both of them indirectly by awarding Utah the seat that it should have received in 2002. The loss of that seat has cost Utah in many ways over the last 6 years.

In spite of the fact that we are large enough to merit a fourth member of Congress, the state has been spread thin, with only three members to represent the state's ever-growing population. That extra member would have been able to serve on other House committees and begin the process of gaining seniority and influence within the House.

Following 2000, the Census Bureau certified our state's apportionment population to be roughly 2.2 million, which today has grown well beyond 2.5 million. Obviously, the citizens of the state would be better served if each member only had to serve 559,000 as opposed to 850,000.

Last December, the Census Bureau reported that Utah was the fifth fastest growing state in the union. The estimate stated that Utah grew by 2 percent from July of 2004 to July of 2005.

This sort of continued growth presents a state with a very challenging matrix of problems. Schools, transportation infrastructure, social services, and emergency services can become a stress on a very rapidly growing state. In each of these areas, having a fourth member of Congress would greatly aid the state in delivering its message to the federal government here in Washington.

In short, H.R.5388 rights the wrongs that were committed in the 2000 census, benefits those who suffered most as a result of those wrongs, and does so in a way that makes sense.

I also want to add this point. I have not extensively studied the constitutionality of the D.C. House Voting Rights Act, but I am impressed and persuaded by the scholarship represented in this legislation.

The people of Utah have expressed outrage over the loss of one congressional seat for the last 6 years. I share their outrage. I can't imagine what it must be like for American citizens to have no representation at all for over 200 years.

As a former trade negotiator, and as an elected official, I recognize a finely balanced deal when I see one. Congress should try to address this problem in a fair and reasonable way. It is just the right thing to do.

And in conclusion, let me thank all of you on both sides of the aisle who have worked so diligently to bring us to where we are today.

Thank you, Mr. Chairman.

WARE, FRESSOLA, VAN DER SLUYS & ADOLPHSON LLP

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ANDREW T. HYMAN
KEITH R. OBERT
ROBERT H. WARE, OF COUNSEL

†MA and NY BAR

PETER C. VAN DER SLUYS
(1939-1991)

KENNETH Q. LAO, PH.D.
PATENT AGENT

ANATOLY Z. FRENKEL, PH.D.
PATENT AGENT

SHIMING WU, PH.D.
PATENT AGENT

8 May 2007

Senator Joseph Lieberman, Chairman
Senator Susan Collins, Ranking Member
Committee on Homeland Security and Governmental Affairs
340 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Letter for the Record, 15 May 2007 Hearing on "*Equal Representation in Congress: Providing Voting Rights to the District of Columbia*," S1257

Dear Chairman Lieberman and Ranking Member Collins:

This is a brief letter that I would very much appreciate having entered in the hearing record for your 15 May 2007 hearing on "Equal Representation in Congress: Providing Voting Rights to the District of Columbia." I am writing only as a concerned citizen and legal scholar who has studied these issues in depth, and not on behalf of my law firm.

The proposed legislation is very clearly unconstitutional, and I support achieving equivalent goals by alternative means, such as by constitutional amendment or by legislation to form a smaller federal district. I will first briefly explain why the primary objection to a smaller federal district is apparently not well-founded.

Congress could form a smaller federal district, and then either retrocede the remaining land to Maryland, or grant statehood for the remaining land. The primary objection to forming a smaller federal district seems to be that residents of the remaining "rump" federal district would each have tremendous voting power under the Twenty-Third Amendment, in presidential elections.[1] That objection seems to me to be incorrect. The Twenty-Third Amendment says that the electors from the federal district shall be appointed "in such manner as the Congress may

[1] See, e.g., Matthew Franck, "Hammering to Fit," *National Review* (September 18, 2006).

direct." For example, the Twenty-Third Amendment would allow Congress to choose the electors from the District based upon the national popular vote (which of course would include the votes of citizens of the federal district). Thus, the citizens of the smaller federal district would not have inordinate voting power in federal elections.

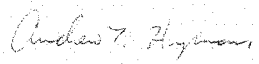
Regarding the unconstitutionality of SB1257, I fully concur with the conclusion of the *Congressional Research Service*: "it would appear likely that the Congress does not have authority to grant voting representation in the House of Representatives to the District."[2] I will not repeat here the arguments made by the CRS, and will instead briefly add a few remarks.

It is true that, in some respects, Congress has treated the District of Columbia like a state for many decades. However, that did not involve the particular constitutional language at issue here. Your Committee may not be aware that the framers of the Constitution were emphatic about this particular constitutional language. For example, on 6 October 1787, one of the framers said the following in a public speech at Independence Hall in Philadelphia:

> "The House of Representatives is to be composed of members chosen every second year by the people of the several States, and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature; unless, therefore, there is a State Legislature, that qualification cannot be ascertained, and the popular branch of the federal constitution must be extinct."[3]

It is thus unmistakably clear that the framers viewed the second sentence of the Constitution (after the Preamble) as an exclusive catalogue of the membership of the House of Representatives, which after all is just what the second sentence of the Constitution says. This is very different from Article III, Section 2 of the Constitution (regarding jurisdiction of the federal courts), which was held to be non-exclusive by a plurality of the U.S. Supreme Court in 1949.[4]

Sincerely,



Andrew T. Hyman

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[2] Kenneth Thomas, "*CRS Report for Congress: The Constitutionality of Awarding the delegate for the District of Columbia a Vote in the House of Representatives of the Committee of the Whole*" (January 24, 2007).

[3] Speech of James Wilson (October 6, 1787), *reprinted in* Ralph Ketcham, *The Anti-Federalist Papers and the Constitutional Convention Debates* (2003).

[4] *National Mutual Insurance v. Tidewater*, 337 U.S. 582 (1949): "We ... decline to overrule the opinion of Chief Justice Marshall, and we hold that the District of Columbia is not a state within Article III of the Constitution." Likewise, the Supreme Court has affirmed that the District is not a state within the meaning of Article I. *Adams v. Clinton*, 90 F. Supp. 2d 35 (2000), aff'd 531 U.S. 941 (2000).

Post-Hearing Questions for the Record
Submitted to Wade J. Henderson
From Senator Susan M. Collins

"Equal Representation in Congress: Providing Voting Rights to the District of Columbia"
May 15, 2007

1. *There are differences in opinion on whether legislatively granting District residents full voting representation in Congress is constitutional. The most certain way to grant voting rights constitutionally is through the constitutional amendment process. Please explain why you would or would not support pursuing a constitutional amendment rather than a legislative remedy that may be deemed unconstitutional.*

While I believe S. 1257 passes constitutional muster, I would certainly support an effort to amend the Constitution – *if* it is ultimately deemed necessary. Our nation has an extensive tradition of amending the Constitution, our nation's most precious document, only as a last resort – that is, only when other efforts to address the problem at hand have been tried and have failed. Because the Supreme Court has yet to rule on Congress' authority to provide representation, and given the strength of the arguments in favor of this authority, I do not believe we are at that point yet.

2. *Professor Jonathan Turley has proposed an alternative remedy for the District's lack of full congressional representation -- retrocession to Maryland. Please explain why you would or would not support this proposal as a path to representation.*

Retrocession is not without its merits. Because Congress returned another portion of the original District of Columbia to Virginia in 1846, there is certainly a clear legislative precedent for such an approach. However, retrocession would require the consent of Maryland, and achieving the political consensus necessary to return the District to Maryland could be all but impossible. Furthermore, the political and economic consequences of the move would likely be dramatic and far-reaching for the populations of both DC and Maryland, and they need to be fully assessed. Finally, it could not be undertaken through legislation alone: Congress and the states would still need to amend the Constitution in order to repeal the 23rd Amendment. Given the drastic nature of the approach, I believe that retrocession is premature, and that it would require far more extensive study before it could be discussed as a viable option.

3. *The argument has been made that Congress should pass D.C. voting rights legislation and let the Supreme Court decide on its constitutionality. Are you concerned that judicial precedent on standing may preclude a federal court from reaching the merits of such a challenge?*

(See below).

3a. Can you recommend an approach for Congress to ensure that judicial review would occur.

The issue of standing to sue is ultimately a matter for Article III courts to resolve on a case-by-case basis, and various different plaintiffs might assert standing to sue, including voters and States from outside the District of Columbia, as well as members of Congress. All of these plaintiffs could allege that the addition of two new House members dilutes their existing voting power. Congress could, if it wishes, explicitly provide for standing for Members of Congress. It would not be binding on the courts, because courts alone decide who has standing to sue, but it could carry some weight with the courts and express the intent of Congress to have the DC VRA subjected to prompt judicial review.

3b. If Congress does pass D.C. voting rights legislation, would you advise including language for expedited judicial review? If so, how?

I believe that 28 U.S.C. 2284 would already provide expedited review of the law. Some opponents of the DC VRA have argued that 28 U.S.C. 2284 is not directly applicable to a case in which voting representatives have been allocated to the District of Columbia, however, and I see no harm in expressly providing for such jurisdiction. While I believe it is unnecessary, the Senate could adopt language similar to what was offered as a motion to recommit during the April 19 House of Representatives debate on H.R. 1905.

Responses of Professor Viet D. Dinh

to

Ranking Member Susan Collins

United States Senate

Committee on Homeland Security and Governmental Affairs

on

S. 1257, the District of Columbia House Voting Rights Act of 2007

1. *There are differences in opinion on whether legislatively granting District residents full voting representation in Congress is constitutional. The most certain way to grant voting rights constitutionally is through the constitutional amendment process. Please explain why you would or would not support pursuing a constitutional amendment rather than a legislative remedy that may be deemed unconstitutional.*

A Constitutional amendment is a measure of last resort and should only be utilized if absolutely necessary. Where, as here, there is a good faith argument that the enactment of the legislation is constitutional, the conscientious legislator should seek the less drastic course of action.

2. *Professor Jonathan Turley has proposed an alternative remedy for the District's lack of full congressional representation -- retrocession to Maryland. Please explain why you would or would not support this proposal as a path to representation.*

Both the District and Maryland would have to agree to any such proposal. Whether such an option is politically or practically feasible I would leave to individuals more familiar with the situation to assess.

3. *The argument has been made that Congress should pass D.C. voting rights legislation and let the Supreme Court decide on its constitutionality. Are you concerned that judicial precedent on standing may preclude a federal court from reaching the merits of such a challenge?*

I will not opine on standing jurisprudence, but it is clear that Congress cannot grant Constitutional, as opposed to statutory, standing.[1]

3a. *Can you recommend an approach for Congress to ensure that judicial review would occur.*

It is impossible to guarantee judicial review of any issue, but expedited review provisions analogous to those found in McCain-Feingold could help in that regard.

3b. *If Congress does pass D.C. voting rights legislation, would you advise including language for expedited judicial review? If so, how?*

Whether Congress includes language for expedited judicial review is a policy question for the legislators to answer; however it may be advisable to include such language given (a) the controversy surrounding this issue, and (b) the conflicting constitutional assessments.

4. *When the House Committee on Oversight and Government Reform reported H.R.1433, the District of Columbia House Voting Rights Act of 2007, it included an amendment offered by Representative Lynn Westmoreland and passed by voice vote, to clarify that the District of Columbia shall not be considered a state for purposes of representation in the Senate. What is your opinion of including such language in S. 1257, the District of Columbia House Voting Rights Act of 2007?*

Such language is not necessary. While Congressional authority to provide the

[1] *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

District with Senate representation is outside the scope of my original analysis, the House and Senate were created for distinct purposes and represent separate entities. Because of these differences, Congressional authority to provide the District with a House representative does not imply there is Congressional authority to provide the District with Senate representation. James Madison explained the distinction between the two bodies of Congress in Federalist No. 39: "The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State.... The Senate on the other hand, will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress."[2]

Whether Congress can provide Senate representation for the District also depends on an interpretation of the text, history, and structure of Article I, section 3, and the 17th Amendment to the U.S. Constitution, subjects outside the scope of my analysis of Congressional authority to provide House representation for the District. Article I, section 3 and the 17th Amendment, like Article I, section 2, specify the qualification of the electors.[3] However, quite unlike the treatment of the House of Representatives, the constitutional provisions relating to composition of the Senate additionally specify that there shall be two senators "from each State," thereby arguably giving rise to interests of states *qua* states not present in Article I, section 2.[4]

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[2] THE FEDERALIST No. 39, *available at* http://www.constitution.org/fed/federa39.htm.
[3] *Compare* U.S. CONST. art. I, § 2 ("chosen every second year by the People of the several States"), *with id.* at § 3 ("chosen by the Legislature thereof") amended by U.S. CONST. amend. XVII ("elected by the people thereof").
[4] U.S. CONST. art. I, § 3; *id.* amend. XVII.

Responses of Professor Viet D. Dinh

to

the Hon. Tom Coburn

United States Senate

Committee on Homeland Security and Governmental Affairs

on

S. 1257, the District of Columbia House Voting Rights Act of 2007

1. *According to arguments by supporters of this legislation, Congress has broad plenary power over DC including the power to give DC representation in the House. Would that power also extend to a scenario where Congress decided that for any legislation regarding DC, the DC City Council would have the authority to revise legislative language before the legislation's transmission to the President?*

To the extent this question contemplates post-passage revisions, the answer is no.

2. *The District Clause is part of the Federal Enclave Clause at Article 1, Section 8, Clause 17. According to the Federal Enclave Clause, Congress has "like authority" over federal enclaves as it does over the District. Doesn't reading the District Clause in full context of the Federal Enclave Clause suggest the Framers were giving Congress a custodial, administrative and operational power over federal enclaves, including the District, and not the power to statutorily change the voting makeup of Congress to grant representation for the "forts, magazines, arsenals, dockyards, and other needful buildings" and the District?*

Congress' broad authority under the District Clause is clear from the provision's text, history, and case law. Under Article I, Section 8, Congress' authority is "exclusive" and "in all cases whatsoever." These are clearly broad, not limited powers. Since the Framers granted District residents the right to vote in 1790, just three years after the

Constitution's ratification, it follows that they believed they had the authority to do so under the Constitution.

Additionally, courts have rejected the limited powers argument. In *Tidewater,* Justice Jackson wrote, "Chief Justice Marshall, answering the argument that Congress, when legislating for the District, 'was reduced to a mere local legislature, whose laws could possess no obligation out of the ten miles square,' said 'Congress is not a local legislature, but exercises this particular power, like all its other powers, in its high character, as the legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit.'"[1]

Congress has also acted pursuant to its broad authority under the District Clause, in ways that are not purely custodial, administrative, or operational. Such examples include giving District residents access to federal courts, the issue in *Tidewater*, and applying the Commerce Clause to the District. In holding that Congress could apply the Commerce Clause to the District, the Court stated, "It falls, therefore, within the domain of the great, distinct, substantive power to regulate commerce, the exercise of which cannot be treated as a matter of local concern, and committed to those immediately interested in the affairs of a particular locality."[2]

3. *Is there any historical evidence showing that Congress introduced, debated or advanced any similar legislation like S. 1257, that statutorily grants House Representation to the District or other federal enclaves, especially in the post-Ratification era, post-Organic Act era, or post-Virginia Retrocession era?*

Yes. In the Act of July 16, 1790, ch. 28, § 6, 1 Stat. 130 (also referred to as the "Residence Act"), Congress granted District residents the right to vote by providing for the residual operation of Virginia and Maryland laws in the District after the cession was complete.

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[1] *N'tl Mut. Ins. Co. of the Dist. of Columbia v. Tidewater Transfer Co.*, 337 U.S. 582, 600-601 (1949) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 425, 429 (1821)).
[2] *Stoutenburgh v. Hennick*, 129 U.S. 141, 148 (1889).

4. *Since the House Composition Clause in Article I, Section 2 has no apparent ambiguity regarding House representation being connected to 'states', why would the Federal Enclave Clause be able to shape the meaning of the House Composition Clause under rules of statutory construction?*

The District of Columbia is not a State. The Supreme Court said so in *Hepburn v. Ellzey*,[3] with respect to Article III diversity jurisdiction, and I agree with the D.C. Circuit decision in *Adams v. Clinton*,[4] which concluded that District residents, not being citizens of a state, do not have a constitutional right to House representation. I agree with *Adams* because Article I, Section 2 says that representatives in the House are to be chosen "by the people of the several states."[5] Yet Article I, Section 2 does not say "states and only states" or "states and nothing else." So the argument in opposition is one of negative inference and not one of clear and authoritative text. Moreover, it is a negative inference that must be reconciled with the affirmative grant of plenary and exclusive power "in all Cases whatsoever" to Congress under the District Clause. A perfectly logical and textually consistent way to reconcile these provisions is that, even though the District is not a State under the Constitution, the Constitution grants Congress the power to treat the District like a State and to give District residents rights similar to those of state citizens.

This reading is consistent with how the Supreme Court has addressed the question of diversity jurisdiction. In *Hepburn*, for example, even as he decided that the District is not a State for purposes of diversity jurisdiction over disputes "between Citizens of different States," Chief Justice Marshall noted that this "is a subject for legislative not for judicial consideration."[6] Congress later enacted a statute bestowing jurisdiction on federal courts in actions "between citizens of different States, or citizens of the District of

[3] 6 U.S. (2 Cranch) 445, 453 (1805).
[4] 90 F. Supp. 2d 35, 72 (D.D.C. 2000).
[5] U.S. CONST. art. I, § 2.
[6] *Hepburn*, 6 U.S. at 453.

Columbia . . . and any State or Territory,"[7] and the Court upheld that law in *Tidewater*, with a plurality relying explicitly on the text of the District Clause.

In addition, the courts employed similar reasoning to uphold Congressional treatment of the District as a State under constitutional provisions for tax apportionment,[8] international treaties,[9] the commerce clause,[10] the Sixth Amendment right to jury trial,[11] and state sovereign immunity under the Eleventh Amendment[12]—even though each and every one of these provisions refers only to States.

5. *In John Elwood's (representing the US Department of Justice Office of Legal Counsel) Senate Judiciary Committee hearing written testimony, he cites to Banner v. U.S., 428 F.3d 303 (D.C. Cir. 2005) (per curiam) as follows:*
'In Banner v. United States, 428 F.3d 303 (D.C. Cir. 2005) (per curiam), a panel of the D.C. Circuit that included Chief Justice John Roberts flatly concluded: "[t]he Constitution denies District residents voting representation in Congress. . . . Congress is the District's Government, see U.S. Const. art. I, § 8, cl. 17, and the fact that District residents do not have congressional representation does not alter that constitutional reality." Id. at 309. The court added: "[i]t is beyond question that the Constitution grants Congress exclusive authority to govern the District, but does not provide for District representation in Congress." Id. at 312.' Please comment on what precedential value this case should have on the constitutionality of S. 1257.

At issue in *Banner* was whether the DC legislature had the authority to lay taxes on individuals working but not residing in the District. The relevant quotations cite to

[7] Act of Apr. 20, 1940, ch. 117, 54 Stat. 143.
[8] *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 319-20 (1820). The clause at issue has since been amended by the 14th and 16th Amendments.
[9] *Geofroy v. Riggs*, 133 U.S. 258 (1890).
[10] *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889).
[11] *Callan v. Wilson*, 127 U.S. 540, 548 (1888); *see also Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899) ("It is beyond doubt, at the present day, that the provisions of the Constitution of the United States securing the right of trial by jury, whether in civil or in criminal cases, are applicable to the District of Columbia.").
[12] *Clarke v. Wash. Metro. Area Transit Auth.*, 654 F. Supp. 712, 714 n.1 (D.D.C. 1985), *aff'd*, 808 F.2d 137 (D.C. Cir. 1987).

Adams v. Clinton, in which the Court examined whether District residents, not being citizens of a state, have a constitutional right to House representation. I agree with the D.C. Circuit decision in *Adams*, which only serves as a red herring when it is cited in opposition to congressional authority to enact S. 1257.

The Court in *Adams* did not address the issue of whether Congress could affirmatively grant the District representation in the House, and, in fact, explicitly left open that possibility: "Like our predecessors, we are not blind to the inequity of the situation plaintiffs seek to change. But longstanding judicial precedent, as well as the Constitution's text and history, persuade us that this court lacks authority to grant plaintiffs the relief they seek. If they are to obtain it, they must plead their cause in other venues."[13]

Granting House representation is analogous to granting diversity jurisdiction to the District. Chief Justice Marshall noted in *Hepburn*, "it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon, them. -- But this is a subject for legislative not for judicial consideration."[14] Heeding the call, Congress passed such legislation in 1940[15] and the Court subsequently held that District residents could be treated as though they were citizens of states for purposes of diversity jurisdiction.[16] Relying on Marshall's statement that "the matter is a subject for 'legislative not for judicial consideration,'" the *Tidewater* plurality held that the conclusion that the District was not a "state" as the term is used in Article III did not deny Congress the power under other provisions of the Constitution to treat the District as a state for purposes of diversity jurisdiction. The plurality specifically noted that the District Clause authorizes Congress "to exercise exclusive Legislation in all Cases whatsoever, over such District," and concluded that Chief Justice Marshall was referring to this provision when he stated in *Hepburn* that the matter was

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[13] *Adams*, 90 F. Supp. at 72.
[14] *Hepburn*, 6 U.S. at 453.
[15] Act of Apr. 20, 1940, ch. 117, 54 Stat. 143.
[16] *N'tl Mut. Ins. Co. of the Dist. of Columbia*, 19 U.S. at 600-601 (quoting *Cohens*, 19 U.S. (6 Wheat.) at 425, 429 (1821)).

more appropriate for legislative attention.[17]

6. *If Congress has the authority under the Federal Enclaves Clause to give the District one seat in the House of Representatives, can Congress also give the District a second, third, fourth seat and/or first or second senator?*

Additional representation in the House is governed by population. While Congressional authority to provide the District with Senate representation is outside the scope of my original analysis, the House and Senate were created for distinct purposes and represent separate entities. Because of these differences, Congressional authority to provide the District with a House representative does not imply there is Congressional authority to provide the District with Senate representation. James Madison explained the distinction between the two bodies of Congress in Federalist No. 39: "The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion, and on the same principle, as they are in the legislature of a particular State. . . . The Senate on the other hand, will derive its powers from the States, as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress."[18]

Whether Congress can provide Senate representation for the District also depends on an interpretation of the text, history, and structure of Article I, Section 3, and the 17th Amendment to the Constitution. Article I, Section 3 and the 17th Amendment, like Article I, Section 2, specify the qualification of the electors.[19] However, quite unlike the treatment of the House of Representatives, the constitutional provisions relating to composition of the Senate additionally specify that there shall be two senators "from each State," thereby arguably giving rise to interests of states *qua* states not present in Article I, Section 2.[20]

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[17] *Id.*, at 587-89 (quoting *Hepburn*, 6 U.S. at 453).
[18] THE FEDERALIST No. 39, *available at* http://www.constitution.org/fed/federa39.htm.
[19] *Compare* U.S. CONST. art. I, § 2 ("chosen every second year by the People of the several States"), *with id.* at § 3 ("chosen by the Legislature thereof") *amended by* U.S. CONST. amend. XVII ("elected by the people thereof").
[20] U.S. CONST. art. I, § 3; *id.* amend. XVII.

Post-Hearing Questions for the Record
Submitted to Jonathan Turley
From Senator Susan M. Collins

"Equal Representation in Congress:
Providing Voting Rights to the District of Columbia"
May 15, 2007

1. **There are differences in opinion on whether legislatively granting District residents full voting representation in Congress is constitutional. The most certain way to grant voting rights constitutionally is through the constitutional amendment process. Please explain why you would or would not support pursuing a constitutional amendment rather than a legislative remedy that may be deemed unconstitutional.**

Answer from Professor Turley:

Article V of the Constitution requires a very specific process for the amendment of the Constitution – a process that was key to the very ratification of the Constitution. When our constitution was sent to the states for ratification, there was significant opposition to some of its provisions, particularly from the Anti-Federalists. Ultimately, many of these critics were convinced to vote for ratification by a number of guarantees and assurances, such as James Madison's assurance that a Bill of Rights would be created. The most important procedural guarantee was that the powers and prerogatives of the Constitution could not be changed except by constitutional amendment. This was particularly important because the federal government and Congress were viewed suspiciously by many leaders

at the time.

The amendment process reflects the fact that the Constitution is a type of covenant or contract between citizens. We agreed to these conditions on the understanding that any changes could only occur with the formal approval of the citizens. The District Clause was one of those original conditions. The Framers expressly established a federal enclave that would be represented by Congress as a whole and would be a non-state entity. This was part of the original vision embodied by the Constitution. If that vision is now to change, it should be done in the way envisioned by the Framers and not through ad hoc or creative legislative alternatives.

To its credit, Congress previously acknowledged that a constitutional amendment was the appropriate course of action when it sought state status for the District. This effort in 1978 failed with only 16 states, but advocates were principled in their acceptance of the defeat. I believe that it would have outraged many of the Framers to see an effort to circumvent the constitutional process after such a failure. While there are many things that divide us as a people, we have always been united in our commitment to the constitutional system and process. The current bill would shatter that long tradition. As noted in my prior testimony, the only other way to change the status of the District is to reverse the specific land transfer from Maryland through retrocession – an approach that can be done legislatively.

2. **You have proposed an alternative remedy for the District's lack of full congressional representation -- retrocession to Maryland. Please elaborate on this proposal, in particular addressing why you believe retrocession presents a better path to representation than the path presented in S. 1257-- treating the District as a state for purposes of representation in the House.**

Answer from Professor Turley:

Retrocession is the only way to achieve the goal of full representation of District residents absent a constitutional amendment. It is also an approach that has been previously used to return full rights to residents of the original district – with the retrocession of Virginia section in the nineteenth century.

At the outset, it is particularly important to emphasize three differences between the modified retrocession plan and the current bill. First, unlike the current bill, retrocession would give residents full representation in both houses. Residents would be able to vote for representatives and Senators -- as voters in Maryland. Second, District residents after retrocession would not be confined to a single representative. Like all other citizens, if the District grew significantly, it would be entitled to two or more representatives. Under the current bill, the District would be the confined to a single representative no matter how large its population. Finally, under retrocession, the voting rights of residents could never be taken away at the whim of Congress. The current bill allows the District to vote in Congress

only so long as Congress chooses to extend that privilege. It can be taken away in a month, a year, or a decade. Given the fundamental constitutional problems associated with this legislation, members would continue to have a principled reason to rescind this ad hoc measure.

Under my proposal, nothing would change in the District immediately beyond the resumption of full voting rights for its residents. The first phase of the plan would be the political reabsorbing of the District back into Maryland. I have proposed the creation of the same three-commissioner body for the second and third phases – a commission structured like the one that worked with George Washington in the design of the original district. The degree to which services and revenue systems are incorporated into Maryland will depend entirely on the Commission and the respective jurisdictions. Maryland could preserve the District's historical independence and leave much of its independent government in place. In the second phase, any incorporation of public services from education to prisons to law enforcement would occur. In the third phase, any tax and revenue incorporation would occur. Once again, there is no absolute necessity for the incorporation of services or revenues. The Commission would be able to study these options and propose levels of incorporation or continued

independence. In the meantime, residents would enjoy full representation in both houses of Congress.

Under this plan, the actual federal enclave would be reduced to the land containing Congress, the Supreme Court and the White House – running down the Mall to the Lincoln Memorial. There would be no residents in this enclave beyond the First Family. Due to the Twenty-Third Amendment, legislation would be needed to guarantee that the first family would vote in their home states. Frankly, this is a much better design to achieve the stated purposes of the Framers. The seat of government would remain free from any state. Obviously, federal agencies would now be located in Maryland. However, since the founding, courts have recognized that federal lands remain independent from state control. The federal government is no longer dependent on state militias for protection.

The main barrier to this proposal is symbolic. Some residents in Washington simply do not want MD to follow Washington rather than DC. Yet, Washington would remain unique in the nation. It would not be our seat of government but it would remain our Capitol City. In my view, both Washington and Maryland would benefit greatly from incorporation beyond the political component of retrocession. Remarkably, the actual logistics and

revenues of full incorporation have not been fully explored. Washington could benefit from incorporation in Maryland's respected educational system and environmental regulations. Maryland could benefit from the institutions of higher learning in Washington and the addition of one of the World's great capitols. Federal subsidies would continue for Washington since it is required to shoulder burdens associated with the federal government. The main issue remains political. Obviously, the political incorporation of Washington into Maryland would shift the center of gravity from Baltimore and would make Maryland the bluest of blue states. However, Washington would not dominate the state. Maryland remains one of the most populous states and there would be a majority of citizens outside of Washington. Much like the role of Chicago in Illinois, the existence of such a large metropolitan center would be counterbalanced by other cities and rural interests. Nevertheless, it would take current leaders to look beyond narrow and insular interests to embrace a new and exciting prospect for both jurisdictions.

3. **The argument has been made that Congress should pass D.C. voting rights legislation and let the Supreme Court decide on its constitutionality. Are you concerned that judicial precedent on standing may preclude a federal court from reaching the merits of such a challenge?**

   3a. Can you recommend an approach for Congress to ensure that judicial review would occur.

   3b. If Congress does pass D.C. voting rights legislation, would you advise including language for expedited judicial review? If so, how?

Answer from Professor Turley:

While I believe that standing can be established, past cases certainly make it challenging. Indeed, I have been told that some advocates have stated that, whatever the merits of the constitutional arguments, the legislation cannot be struck down because no one will be able to get into court to challenge it. In the last few decades, the Supreme Court has rolled back considerably on standing -- making it difficult for citizens to challenge the actions of their own government. This legislation demonstrates how extreme and dangerous this trend has become where there is doubt whether a court could even rule on a fundamental change in the structure and composition of Congress. This, I hope, is an object lesson for Congress as a whole and will encourage members to look comprehensively at the loss of access to the courts for citizens and citizen groups. We cannot long remain a

nation of laws if those laws are protected against challenge by our citizens.

On the issue of expedited review, it is certainly a good idea given the potential disruption that may be caused by court striking down the law – months after the District's representative has been casting votes on legislation. The more important measure, however, is to reinforce the right to challenge the bill, including the standing of members of Congress. Of course, even if Congress includes such amendments, there remain no guarantees of judicial review since the Supreme Court has acted under its own narrow interpretation of a "case or controversy" under Article III. This could trigger another fight reminiscent of the one in *Raines v. Byrd* and the effort to statutorily create standing in the Line Item Veto legislation. The Court stressed the absence of personal injury by members in that case (with the exception of Adam Clayton Powell who had lost his seat). Thus, Senators cannot simply rely on the assurance of judicial review in this matter. The only certain way to address the unconstitutionality of bill is to reject it on the Senate floor.

None of this means that standing is certain to fail or that Congress should not work to strengthen claims statutorily for judicial review. If advocates for this legislation are as confident as they have claimed about its

constitutionality, they have nothing to fear from judicial review. I have already discussed this issue with congressional staff and I would be happy to assist further in the drafting of language for an amendment. While I still hope that the Senate will reject this facially unconstitutional measure, I hope that members on both sides will recognize the importance of guaranteeing judicial review.

4. **When the House Committee on Oversight and Government Reform reported H.R.1433, the District of Columbia House Voting Rights Act of 2007, it included an amendment offered by Representative Lynn Westmoreland and passed by voice vote, to clarify that the District of Columbia shall not be considered a state for purposes of representation in the Senate. What is your opinion of including such language in S. 1257, the District of Columbia House Voting Rights Act of 2007?**

Answer from Professor Turley:

Since the representation of the District would be the creation of Congress, Congress can clearly restrict that representation or rescind it. Thus, the District could only gain a Senate seat with the approval of Congress – though it would ultimately fail under the same constitutional analysis as the house seat. It would be as unconstitutional to add a Senate seat as it is to add a House seat legislatively.

One other point is worth making with regard to the Senate seat. No matter what members may express as their intentions on S. 1257, these statements would have no bearing on a future Congress. This Congress or a future Congress could add two Senators for the District by the same means that it has embraced for changing the composition of the House. Advocates have already testified in Congress that they would seek such full representation, as I noted in my prior written testimony. With a sharply divided Senate and control of Congress at stake, it is doubtful that members

would show any more restraint in adding Senate seats than they have in adding a House seat. Once politics trump principle on constitutional questions, members will find themselves on the slippery slope of political convenience. For over two hundred years, Congress has respected the limitations imposed by the Framers on the composition of Congress and the constitutional amendment process. This bill would cross the constitutional Rubicon and leave the composition of Congress as matter for future manipulation by whatever majority holds sway in Washington.

5. **In Senator Hatch's opening statement, he asks two important questions, "If the word 'states' did not prevent Congress from imposing taxes on District residents then, how can it prevent Congress from granting representation to District residents now?" and "If the word 'states' did not prevent Congress from granting access to the judicial branch then, how can it prevent Congress from granting representation to District residents now?" How do you respond to these questions?**

Answer from Professor Turley:

This commonly stated view reflects a fundamental misunderstanding of past cases by some advocates of this legislation. The point of the District Clause is that Congress has plenary authority *inside* its borders. It can impose taxes or not impose taxes. It can impose conscription or not impose conscription. The point is that the conditions within the District are subject to the demands and designs of Congress. This authority is at its apex within the District borders and at its lowest ebb outside of its borders. This point was made by various people before ratification, including Edmund Pendleton, the President of the Virginia Ratification Convention. Pendleton assured his colleagues that Congress could not use the District Clause to affect states because the powers given to Congress only affected District residents and not states or state residents:

> Why oppose this power? Suppose it was contrary to the sense of their constituents to grant exclusive privileges to citizens residing within that place; the effect would be directly in opposition to what he says. It could have *no operation without the limits* of that district. Were Congress to make a law granting them an exclusive privilege of trading to the East Indies, it

> could have no effect the moment it would go without that place; for their exclusive power is confined to that district. . . . This exclusive power is limited to that place solely for their own preservation, which all gentlemen allow to be necessary ...

Thus, the issue is not whether Congress can impose obligations or rights within the District but whether, as in the instant legislation, it can use this authority to affect the status or interests of citizens (and states) outside of the district.

As I pointed out in my testimony, the cases cited by the other side do not stand for the proposition that the District is treated as the equivalent to a state. To the contrary, these cases often have express statements rejecting that claim. For example, advocates like Professor Dinh repeatedly cite the case of *Geofroy v. Riggs*. However, when one actually reads the full opinion, it is clear that it rejected the idea that states under the Constitution is ambiguous. Rather, the court found that the meaning of the term under international law as more fluid:

> It leaves in doubt what is meant by "States of the Union." *Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia.* And yet separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government.

As for access to the courts, this appears to be a reference to diversity jurisdiction,

which I addressed at length in my testimony regarding the *Tidewater* decision – as did the Congressional Research Service. This highly fractured decision did not embrace the interpretation put forward by Professor Dinh and others. In *Tidewater*, six of nine justices appear to reject the argument that the clause could be used to extend diversity jurisdiction to the District, a far more modest proposal than creating a voting non-state entity.

Finally, it is important to note that none of this has any bearing on the primary constitutional clause at issue: the Composition Clause. No one has suggested a single case or even line from a case that suggests that Congress can ignore the express limitation to the representatives of the several states and manipulate the voting rolls of Congress. Indeed, advocates studiously avoid the history and text of the Composition Clause in an effort to focus on the District Clause. This would be equivalent to arguing that Congress can limit the independence of newspapers in Washington under the District Clause without consideration to the First Amendment. Even if Congress had the authority under the District Clause to change the status of its residents, it does not have the authority under the Composition Clause to change the status of members of Congress.

Post-Hearing Questions for the Record
Submitted to Jonathan Turley
From Senator Tom Coburn

"Equal Representation in Congress:
Providing Voting Rights to the District of Columbia"
May 15, 2007

1. According to arguments by supporters of this legislation, Congress has broad plenary power over DC including the power to give DC representation in the House. Would that power also extend to a scenario where Congress decided that for any legislation regarding DC, the DC City Council would have the authority to revise legislative language before the legislation's transmission to the President?
Answer from Professor Turley:

This is another example of the obvious flaws in the constitutional arguments made by advocates on the other side of this debate. Regardless of the fact that Congress has plenary authority of the treatment of residents *inside* the District, it does not have the authority to constructively amend other provisions of the Constitution such as a Composition Clause. Article I, Section 7 mandates that legislation passed by Congress must be submitted to the President for signature or veto. Congress cannot transfer this authority to another body without violating Article I.

The effort to avoid discussion of the history and text of the Composition Clause and Qualification Clause reflects this obvious flaw. Whatever authority Congress has over residents within the District Clause, it cannot use that authority to affect the right of citizens (or states) outside of

the District or to contradict another provision of the Constitution. This point was made in *Palmore v. United States*, 411 U.S. 389, 397-398 (1973):

> Congress may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, *so long as it does not contravene any provision of the Constitution of the United States.*

Sponsors seem to be laboring under the misconception that plenary authority within the District means that they can give residents any new status or benefit. The incomprehensible result is that the District Clause (which advocates insist was something of an afterthought) would devour fundamental structural provisions like the Composition Clause.

2. The District Clause is part of the Federal Enclave Clause at Article 1, Section 8, Clause 17. According to the Federal Enclave Clause, Congress has "like authority" over federal enclaves as it does over the District. Doesn't reading the District Clause in full context of the Federal Enclave Clause suggest the Framers were giving Congress a custodial, administrative and operational power over federal enclaves, including the District, and not the power to statutorily change the voting makeup of Congress to grant representation for the "forts, magazines, arsenals, dockyards, and other needful buildings" and the District?
Answer from Professor Turley:

Advocates often cite the District Clause without including the later words from the same section in which Congress is expressly allowed "to exercise like Authority [as over the District] over all Places purchased . . . for

the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings." It is obvious that the Framers viewed the authority over the federal enclave and federal territories to be similar: a view later repeatedly noted by the Supreme Court. The Supreme Court has repeatedly stated that the congressional authority over other federal enclaves derives from the same basic source:

> This brings us to the question whether Congress has power to exercise 'exclusive legislation' over these enclaves within the meaning of Art. I, § 8, cl. 17, of the Constitution, which reads in relevant part: 'The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever' over the District of Columbia and 'to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.' *The power of Congress over federal enclaves that comes within the scope of Art. I, § 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia.* The cases make clear that the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action.

Paul v. United States, 371 U.S. 245, 263-64 (1963). The plain and obvious meaning of this language is that Congress would be given administrative and operational control over such areas – not the power to fashion those areas into new forms of voting members in Congress. Indeed, if Congress could use this authority to award seats to a federal enclave, it could presumably do

the same thing for other federal enclaves and territories. After all, the way that the District received its own government in the 1960s was when Lyndon Johnson treated the District as a type of federal agency. Under that precedent and the current interpretative theory, Congress could award voting seats to the Department of Defense to cover tax-paying citizens in military reservations.

3. **Is there any historical evidence showing that Congress introduced, debated or advanced any similar legislation like S. 1257, that statutorily grants House Representation to the District or other federal enclaves, especially in the post-Ratification era, post-Organic Act era, or post-Virginia Retrocession era?**

Answer from Professor Turley:

There is a long and entirely consistent historical record running from the Constitutional Convention to the Ratification Conventions to the early Congresses to the Retrocession period on this question. The statements and actions during the late eighteenth and early nineteenth centuries reflect an understanding of the plain meaning of both the District and Composition Clauses. I have already cited the statements and amendments recorded in the Constitutional and Ratification Conventions. The most interesting are the amendments offered by Alexander Hamilton and Samuel Osgood. On July 22, 1788, Hamilton asked that the District Clause be amended to mandate that "the Inhabitants of the said District shall be entitled to the like essential

Rights as the other inhabitants of the United States in general." Hamilton wanted the District to be given the same proportional representation in Congress and recognize that, unless changed, the federal enclave would not be entitled to such representation:

> That When the Number of Persons in the District of Territory to be laid out for the Seat of Government of the United States, shall, according to the Rule for the Apportionment of Representatives and Direct Taxes Amount to [blank] such District shall cease to be parcel to the State granting the Same, and Provision shall be made by Congress for their having a District Representation in that Body. Among the other amendments offered to change the District Clause, Samuel Osgood in Massachusetts sought to amend the provision to allow the residents to be "represented in the lower House." These efforts failed. Once again, no one has suggested that the status of the District was a focus of the debates. However, the statements and amendments offered during this period show a consistent recognition of the obvious meaning of the clause.

Likewise, in Massachusetts, Samuel Osgood sought to amend the provision to allow the residents to be "represented in the lower House."

After ratification, the District and Composition Clauses continued to generate interest. One interesting example was the effort to add a non-voting member from the territory of Ohio. Connecticut Rep. Zephaniah Swift objected to the admission of anyone who is not a representative of a state. Although non-voting members would ultimately be allowed, the members on both sides agreed that the Constitution restricted voting members to

representatives of actual states. This debate, occurring only a few years after the ratification (and with both drafters and ratifiers) serving in Congress reinforces the clear understanding of the meaning and purpose of the language.

Early controversies also focused on the use of Congress' plenary authority under the District Clause to create national policies or affect states. The consistent view was that the plenary authority over the District was confined to its internal operations and would not extend beyond its borders to affect the states. For example, in 1814, the use of this authority was successfully challenged when used to create a second national bank. Senator John Calhoun and Rep. Robert Wright joined together to use the District Clause as a way of avoiding constitutional questions. It was defeated in part by arguments that the District Clause could not be used to circumvent national legislation or impose policies on the rest of the nation. In 1813, the proposed National Vaccine Institution was defeated after sponsors sought to use the District Clause to establish it under Congress' plenary authority. Again, it was viewed as an effort to use the District Clause to impose policies outside of its borders. Likewise, in 1823, an effort to create a fraternal association for the relief of families of dead naval officers was rejected.

Opponents objected to the use of the District Clause to create an institution with national purposes.

The retrocession movement began almost immediately after the District was formed. This early debate (occurring only a few years after ratification) reflect the same meaning of the District Clause. I have detailed those statements in my prior written testimony. However, during this period, it was proposed that the District should return to Maryland to afford its residents full voting rights. It was roundly rejected by District residents who accepted their status in exchange for being residents of the Capitol City. As I noted earlier, in one recorded vote taken within Georgetown, the Board of Common Council voted overwhelmingly (549 to 139) to accept these limitations in favor of staying with the federal district.

After the retrocession period, the debate over the status of the District uniformly acknowledged the need for a constitutional amendment unless retrocession occurred. This was the impetus of the constitutional amendment in 1978, which failed. Members in support of that amendment accepted the defeat and did not try to achieve the same result by legislative means.

4. **Since the House Composition Clause in Article I, Section 2 has no apparent ambiguity regarding House representation being connected to 'states', why would the Federal Enclave Clause be able to shape**

the meaning of the House Composition Clause under rules of statutory construction?

Answer from Professor Turley:

This is perhaps the single most important fact that is routinely ignored in this debate. Whatever the District Clause means, it cannot be interpreted to violated the express and plain meaning of the Composition Clause. In all of the effort to spin the historical record of the District Clause, sponsors have avoided any mention of the clear language and history of the Composition Clause.

In what was billed as the first public defense of the Constitution by one of its framers, in an October 6, 1787 speech, James Wilson cited the Composition Clause as the guarantee that Congress would be tethered closely to the states and that only states could elect members: "The house of representatives, is to be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature,--*unless therefore, there is a state legislature, that qualification cannot be ascertained*, and the popular branch of the foederal constitution must likewise be extinct." As I noted earlier, this principle was defended in Third Congress when there was an effort to add a representative from a

federal territory.

Given the expressed concerns over the composition of Congress during the constitutional debates and the fixation on the rights of states, it is perfectly ludicrous to suggest that the Framers would have left open the possibility that Congress could use its plenary authority over federal enclaves and territories to create to forms of voting members. The protection of state authority was a paramount concern and even the Senate was the product of the voting of state legislatures. It would make little sense for the Framers to work out the delicate balancing of state interests in the composition of Congress only to reserve the right of Congress to add non-state voting members at its discretion.

Equally evident in today's debate is the reluctance of advocates to recognize the conflict with the Qualifications Clause. By claiming the right to create new forms of voting members, Congress would negate the purpose of the Qualifications Clause since it could dictate the qualifications for anyone representing a federal enclave or territory. As Alexander Hamilton noted "[t]he qualifications of the persons who may choose or be chosen . . . are *defined and fixed* in the Constitution, and are *unalterable* by the legislature." As noted in my written testimony, the Supreme Court has been adamant in

preventing manipulation of the rolls of Congress through the creation of new qualifications or disqualifications.

5. In John Elwood's (representing the US Department of Justice Office of Legal Counsel) Senate Judiciary Committee hearing written testimony, he cites to *Banner v. U.S.,* 428 F.3d 303 (D.C. Cir. 2005) (per curiam) as follows: 'In *Banner v. United States*, 428 F.3d 303 (D.C. Cir. 2005) (per curiam), a panel of the D.C. Circuit that included Chief Justice John Roberts flatly concluded: "[t]he Constitution denies District residents voting representation in Congress. . . . Congress *is* the District's Government, *see* U.S. Const. art. I, § 8, cl. 17, and the fact that District residents do not have congressional representation does not alter that constitutional reality." *Id.* at 309. The court added: "[i]t is beyond question that the Constitution grants Congress exclusive authority to govern the District, but does not provide for District representation in Congress." *Id.* at 312.'
Please comment on what precedential value this case should have on the constitutionality of S. 1257.

Answer from Professor Turley:

Banner is only one of the latest in a long line of cases that affirm the plain meaning of the District Clause. Only a few years after ratification, the Supreme Court itself stressed this point in *Hepburn v. Ellzey,* rejecting the notion that "Columbia is a distinct political society; and is therefore 'a state' . . . the members of the American confederacy only are the states contemplated in the constitution." This view was reaffirmed by the D.C. Circuit just recently in *Parker v. District of Columbia* where both the majority and dissenting opinions stress that the word "states" refers to actual state entities.

6. If Congress has the authority under the Federal Enclaves Clause to give the District one seat in the House of Representatives, can Congress also give the District a second, third, fourth seat and/or first or second senator?
Answer from Professor Turley:

As noted above (and in my written testimony), there is no textual or interpretive limitation to the new authority claimed by some in Congress to create new forms of members. The District Clause is immediately followed by a clause referencing other federal territories. Section 17 states that Congress is expressly allowed "to exercise like Authority [as over the District] over all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings." Just as the District has tax-paying, military serving citizens, so do many other federal enclaves and territories. Congress could award voting representatives to military families living on military reservations or residents in Puerto Rico. With tens of millions of people living in such areas, dozens of new members could be created under proportional claims.

Likewise, the advocates have yet to offer a plausible basis for barring the same use of authority to create two new senators for the District. The most that they can offer are assurances that they do not intend to claim such authority – an assurance lacking in any legally binding effect. If Congress can use the District Clause to reform the composition of the House, it can use

the same authority to reform the composition of the Senate. The problem with discarding principle for political convenience is that one cannot predict what changes politics will demand in the future. Advocates have already stated that they believe that the District should receive such representation in the Senate and, as I note in my written testimony, advocates have already suggested using the same authority to demand multiple seats for Puerto Rico. If Congress yields to this temptation, it will allow the future manipulation of its rolls by any majority in Congress. It is precisely the type of fluidity and uncertainty that the Framers sought to avoid in our government.

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