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DISTRICT OF COLUMBIA FAIR AND EQUAL HOUSE VOTING RIGHTS ACT OF 2006

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

SECOND SESSION

ON

H.R. 5388

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DISTRICT OF COLUMBIA FAIR AND EQUAL HOUSE VOTING RIGHTS ACT OF 2006

THURSDAY, SEPTEMBER 14, 2006

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:12 p.m., in Room 2141, Rayburn House Office Building, the Honorable Steve Chabot (Chairman of the Subcommittee) presiding.

Mr. CHABOT. The Committee will come to order.

This is the Constitution Subcommittee. I am Steve Chabot, the Chairman of the Committee. We wish everybody a good afternoon, and we welcome you to the House Subcommittee on the Constitution's legislative hearing on H.R. 5388, the "District of Columbia Fair and Equal House Voting Rights Act of 2006."

The District of Columbia was created by article I, section 8, clause 17 of the United States Constitution, which provides that "Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district, as may, by cession of particular states and the acceptance of Congress, become the seat of the government of the United States."

The rationale for this provision was set forth by James Madison in Federalist Paper No. 43, in which he wrote, "The indispensable necessity of complete authority at the seat of Government carries its own evidence with it. It is a power exercised by every legislature of the union, I might say of the world, by virtue of its general supremacy. Without it, the public authority might be insulted and its proceedings interrupted with impunity."

The emphasis for creating a capital city separate from the control of any State occurred in 1783, when a crowd of Revolutionary War soldiers protested outside the building in Philadelphia in which the Continental Congress was meeting. The Continental Congress requested assistance from the State of Pennsylvania, but that State's government refused to send the militia, forcing the Congress to retreat to New Jersey.

The actual creation of the District of Columbia occurred during the first Congress, when that body accepted the cessions, land, of Maryland and Virginia. From 1780 until the capital officially moved to the District of Columbia in 1800, the residents of the District were able to vote for the representatives and senators of the States from which they had been seated.

Once the District was formally adopted as the seat of Government, however, the residents of the District ceased to have voting

representation in Congress. Evidence of the Founders' intent with respect to representational rights of District residents is sparse. Whatever the intent of the Founders, the residents of the District have sought representation for years.

For example, in 1978, Congress passed an amendment to the Constitution that would have given the District of Columbia voting representation in both the House and the Senate. However, that resolution only received the approval of 16 of the 38 States necessary to ratify an amendment to the Constitution, and it expired in 1985.

District residents also sought to obtain voting representation through the courts. In 2000, the United States District Court for the District of Columbia held that District residents did not have a constitutional right to representation in Congress. The court held that the language of article I, section 2 of the Constitution "makes clear just how deeply congressional representation is tied to the structure of statehood."

While acknowledging that the court could not give relief to District residents, the court did urge a political solution to the problem. H.R. 5388 represents one possible political solution.

Introduced by Representative Tom Davis of Virginia on May 16, 2006, the bill has 40 cosponsors, including Delegate Eleanor Holmes Norton, who is with us today. H.R. 5388 would permanently increase the size of the House of Representatives to 437 Members from 435, which it is now, and would give one additional seat to the District of Columbia.

The bill would give the other seat to Utah, which missed out on an additional representative in the House by approximately 800 residents during the 2000 apportionment. The Utah seat would be at-large, meaning that Utah residents would vote both for their geographic representative and for the statewide at-large representative, until the next apportionment prior to 2012 congressional elections.

The bill also contains a non-severability clause, which ensures that if any section of the bill is struck down as unconstitutional, the whole bill will be rendered ineffective.

Many commentators have noted that H.R. 5388 is a novel solution to what has been a pernicious and vexing problem for Congress for the last 200 years. However, that novelty also leads to new and challenging constitutional questions.

For instance, in granting the District of Columbia a seat in the House of Representatives, the bill potentially puts two sections of the Constitution in conflict. On one hand, supporters of the bill claim that the District Clause gives Congress plenary authority over the District of Columbia, including the power to give it representation in the House of Representatives.

On the other hand, some scholars point to the language of article I, section 2, that the House of Representatives shall be "chosen by the people of the several states," and maintain that the District, as a non-State, cannot be given voting representation merely through exercise of the District Clause.

Similarly, H.R. 5388's grant of an at-large seat to the State of Utah also pits two constitutional principles against each other. Under the Constitution, Congress enjoys wide authority both to ap-

portion the seats of the House of Representatives and to make or alter regulations relating to the times, places and manner of holding elections.

However, the Supreme Court has held that article I, section 2 of the Constitution requires that, "As nearly as practicable, one man's vote in a congressional election is to be worth as much as another's."

The question then arises whether this principle of one person, one vote, is violated by a bill that some might characterize as giving one person two votes, in the State of Utah, for a period of 6 years.

These are complicated and interesting issues, and we are fortunate to have a distinguished panel of experts with us today that can help us to understand the constitutional implications of this legislation.

I also would like to thank the Governor of Utah for appearing before this Subcommittee to explain the importance of the bill to his State, Utah.

Finally, I would note that this legislation is supported by many civil rights groups, including the Leadership Conference on Civil Rights. And we have the distinguished gentleman, Wade Henderson, here with us this afternoon that we worked very closely with during the hearings and legislative consideration of the Voting Rights Act reauthorization, which the President signed into law this July. And Mr. Henderson and many other civil rights leaders were present with us at that ceremony.

And we appreciated your involvement in that, Mr. Henderson.

As always, we look forward to working with our friends in the civil rights community to ensure that all voices are heard in this process.

I also would like to acknowledge the presence of a number of other people. One of those people, who has just entered the room, Mr. Tom Davis, who represents one of the districts in Virginia. And Mr. Davis, as I had mentioned before, is the principal sponsor of this legislation.

We also have Delegate Eleanor Holmes Norton, who represents, obviously, the District of Columbia and has done so so ably for quite a number of years now.

We also have Chris Cannon here, as well.

I mention these particular Members because they are not Members of this Subcommittee, but are—at least Mr. Davis is a Member of the Judiciary Committee. The other two I mentioned are not—the Judiciary Committee, but not the Subcommittee.

I apologize. Mr. Cannon is a Member of the Judiciary Committee, but not this Subcommittee. And, actually, he is the Chairman of one of the Judiciary Subcommittees, as well.

And I want to reiterate the Committee's policy as it relates to non-Member participation, which is as follows. By unanimous consent, non-Judiciary Committee Members may submit statements for the record. They may also participate in the question-and-answer portion of the hearing and in opening statements, as well, but their time must be yielded by a Subcommittee Member.

Judiciary Committee Members who are not Members of the Subcommittee may also participate under these same rules.

Without objection, the non-Members of the Subcommittee will be permitted to submit statements for the record and they may ask questions, subject to being yielded time by another Member of the Subcommittee, as well.

And I want to reiterate that this is generally not the Committee's policy to have non-Members sit on the dais. So the events today don't necessarily bind any future actions of the Committee, but welcome them here to the dais this afternoon.

I would also like to recognize several other Members, distinguished people who are here, and not in any particular order. But I guess it is, since we will acknowledge and thank the Mayor of Washington, D.C., Mayor Anthony Williams, for being with us this afternoon and for his service to the community over these years.

We have Councilmember Carol Schwartz here with us, as well; Councilmember Dave Catania—I hope I am pronouncing that correct; Councilmember Adrian Fenty, who prevailed in the Democratic primary for mayor this year, as well.

And congratulations on that.

And we have Shadow Senator Paul Strauss with us this afternoon. We have Mary Cheh, who won the Democratic primary in Ward 3.

And have I failed to recognize any other members of the council? If so, I apologize. Having been a member of Cincinnati City Council myself, I definitely want to recognize others.

I am sorry. Kwame Brown is also here, another Member of Council.

So we welcome you all here this afternoon and thank you for attending.

At this time, I would recognize the gentleman from New York, Mr. Nadler, who is the Ranking Member, to make an opening statement, if he would like to do so.

Mr. NADLER. Thank you, Mr. Chairman. I am interested to hear that, like the Supreme Court case of *Bush v. Gore*, our proceedings today have no precedental value.

Mr. Chairman, I want to welcome our distinguished witnesses and also welcome our colleagues who have worked so very hard in the cause of equal voting rights for the citizens of the District of Columbia.

The District is ably represented by our colleague, Eleanor Holmes Norton, who has been a tireless advocate for the citizens of our Nation's Capital. The gentleman from Virginia, Mr. Davis, has likewise taken on this cause and deserves great credit for his work to move this effort forward.

We will hear arguments concerning some of the very difficult legal issues surrounding the approach to D.C. voting rights taken in this bill, as well as questions arising from the portions of this bill pertaining to Utah. I look forward to that testimony.

Some of these legal issues are quite challenging, and we owe it to the citizens of the District and of Utah, as well as the rest of the nation, to get it right.

But before we get into the technical questions, I want to just reiterate the basic and most important thing at stake here. It is a disgrace, a blot on our nation, that the citizens of our Capital City do not have a voice in Congress.

Whatever technical issues there may be with respect to rectifying this problem, we must never lose sight of the fact that our democracy is permanently stained by the disenfranchised group of citizens who pay taxes, serve in our wars, work in our Government and bear all the responsibilities of citizenship.

Whether you took a cab to work or rode the Metro or bought a cup of coffee or walked on a sidewalk or were protected by a police officer or got a parking ticket or participated in this hearing, your safety, your livelihood, every aspect of your life, including this hearing, was made possible by people who have no vote in our democracy. There is no excuse for that.

If we are to have the audacity to hold ourselves out to the world as a beacon of freedom and democracy, if we want to lecture other countries about the importance of freedom and democracy, as this Congress and the President regularly like to do, we need to clean up our own House and Senate.

So I thank you, Mr. Chairman. I welcome our witnesses and our colleagues, and I look forward to the testimony.

And I yield the balance of my time to the gentlelady from the District of Columbia.

Ms. NORTON. I thank the gentleman for his kindness in yielding.

I certainly wanted time to thank Chairman Sensenbrenner and Chairman Chabot for their courtesies, especially you, Mr. Chabot, for presiding at this hearing and for your work to prepare us.

I would like to certainly thank all of the witnesses who have come forward. You are going to be very helpful to us.

I want to especially thank Governor Huntsman, who had to come further than most of us, for coming all the way from Utah.

I would be remiss, Mr. Chairman, if I did not thank you for your work on the recently reauthorized Voting Rights Act. And if I didn't tell you how much that work means on its own for the District of Columbia, I need to tell you, sir, that the residents of the District of Columbia identify with your work on the Voting Rights Act and see a direct link between that work and the denial of voting rights for 200 years.

For the people who live here, this is a district that is two-thirds African-American, but of every background, we have been denied the right to vote.

I want to acknowledge the presence of the godmother of the civil rights movement, who, with John Lewis, the only two who are living, and who designed the work that led to march on Washington and the civil rights statutes.

We hope for a bipartisan solution, the same solution that Chairman Davis and I have spent 4 years in crafting.

And I thank you for all your courtesies.

Mr. CHABOT. Does the gentleman yield back? The gentleman actually has a little more time.

Mr. NADLER. Yes, I yield back.

Mr. CHABOT. Okay, the gentleman yields back.

The gentleman from Arizona, a Member of the Committee, Mr. Franks, is recognized for 5 minutes.

Mr. FRANKS. Thank you, Mr. Chairman. I would like to yield 2½ minutes to Mr. Davis, please.

Mr. DAVIS. I thank my friend for yielding.

I think the bill before this Subcommittee is unique and a creative legislative solution, which provides a win-win opportunity to the Congress. I hope the Subcommittee will consider this with an open mind.

For 205 years, the citizens of the District have been denied the right to elect their own fully empowered representative to the nation's legislature. This historical anomaly has happened for a number of reasons: inattention, misunderstanding, a lack of political opportunity, and a lack of will to compromise to achieve the greater good.

I have long stated it is simply wrong for the District to have no directly elected national representation. Let's be real. How can you argue with a straight face that the Nation's Capital shouldn't have some direct congressional representation? For more than two centuries, D.C. residents have fought in 10 wars, have paid billions of dollars in Federal Taxes. They have sacrificed and shed blood to help bring democratic freedoms to people in distant lands.

Today, American men and women are fighting for democracy in Baghdad, and here in the Nation's Capital, residents lack the most basic democratic right of all.

What possible purpose does this denial of rights serve? It doesn't make the Federal district stronger. It doesn't reinforce or reaffirm congressional authority over D.C. affairs. In fact, it undermines it and offers political ammunition to tyrants around the world to fire our way.

In spite of my concerns, I was long frustrated by the lack of any politically acceptable solution to this problem. That all changed after the 2000 census, when Utah missed picking up a new seat by less than a thousand people.

Utah, as you know, contested this apportionment and lost in court. As I looked at the situation, I realized the predominance of Republicans in Utah and Democrats in the District and thought we might be able to fit them together.

The D.C. Fair Act would permanently increase the size of Congress by two Members. The plan is intended to be partisan-neutral. It takes political concerns off the table, or at least it should.

After answering the political question, we moved on to address whether Congress, independent of a constitutional amendment, had the authority to give the District a voting Member. Through hearing testimony and expert opinions, we have established, by clear authority of Congress, to direct the political affairs of the District.

As Ken Starr, a former appeals court judge here in the District, stood before my Committee, the authority of the Congress, he said, is awesome with respect to the District.

We have also received the expert opinion of Viet Dinh, a Georgetown law professor and former Assistant Attorney General, asserting the power of Congress.

Some legal scholars will disagree, but the courts have never struck down a congressional exercise of the District Clause. There is no reason to think the court would act differently in this case.

It is now essentially a matter of political will as to whether D.C. receives a voting Member of Congress or not.

And today I received a letter from our former colleague, J.C. Watts, offering his support. "Your proposed legislation does a great job of balancing the achievable with the desirable," he wrote.

The District is a wholly unique political entity. It isn't a State; it isn't a territory. States and territories have unique constitutional status, but so does the District. The District was formed to create a seat of Government, where the Federal Government could exist without interference from any one State. In a real sense, the District exists to create a safe place for democracy.

I want to thank Eleanor Holmes Norton, Mayor Williams, the council, who have come a long way from the control board days, for their interest in this legislation, and my Ranking Member, Henry Waxman, for bringing this, and to you, Mr. Chairman, and to Chairman Sensenbrenner, for making this hearing possible today.

Mr. CHABOT. Thank you very much. The gentleman yields back to the gentleman from Arizona.

Mr. FRANKS. Mr. Chairman, I would like to yield the remainder of my time to Mr. Cannon, please.

Mr. CANNON. I thank the gentleman from Arizona.

And, Mr. Chairman, thank you for holding this hearing.

I would like to first associate myself with the comments made by the gentleman from Virginia, and also I would very much like to thank him for his leadership and work on this issue.

I would also like to thank the delegate from the District of Columbia, Ms. Holmes Norton, for her work on this issue.

As Mr. Davis said and, by the way, as Mr. Nadler said, as he was making his point—I would associate myself with his comment—that it is unconscionable that we have people who fight and die and live and serve in America without being able to vote.

And so, as Mr. Davis pointed out, it is a matter now of political will. I think, having polled many of my Republican colleagues, that the Republicans have the will to do this. I think, also, the Democrats have the will to do it. And so I think this is a good day for America.

I would also like to thank my governor for taking the time to come here today. This is a mark of how important this issue is Utah. I have literally known the Governor his whole life and almost all of my life. His gray hair notwithstanding, I am a little bit older, but he is a good friend and understands this issue and understands the importance of this issue.

So I appreciate your being here, Mr. Governor.

I have taken the position that this bill is good as it is. It currently contains an at-large provision. That makes my life easier, frankly. That means I don't have to run for re-election, and Rob Bishop's and Jim Matheson's lives, as well.

But I have also said that the important thing here is to actually have a new district in Utah and the voting rights in the District of Columbia. And so I am looking very much forward today to the insights and information we are going to get from this panel as to what is appropriate as we frame this issue for final passage on the floor.

And I would just reiterate again in closing, before I yield back, how pleased I am to see that this issue has come to fruition, that

the political will is here and that people in the District will actually have a vote.

I have always thought this is an abomination that they did not, a historical anomaly that we can correct now. And it is also appropriate for Utah to have, as the next State that would get a seat, to have that additional seat.

So I want to thank you, Mr. Chairman, again, for holding this hearing, and yield back the balance of any time that Mr. Franks has yielded to me.

Mr. CHABOT. The time has long since expired. So thank you very much. The gentleman's time has expired.

We have been joined by several additional persons who we want to recognize this afternoon. We have another Member of Council, Vincent Gray, who just won the Democratic primary for D.C. Council Chairman and is also currently a Member of Council.

We have been joined by Nancy Zirkin, also with the Leadership Conference on Civil Rights; Hilary Shelton, who is the head of the D.C. NAACP chapter.

And we are so pleased to be joined by Ms. Dorothy Hite. For nearly half a century, Dorothy Hite has given leadership to the struggle for equality and human rights for all people. Her life exemplifies her passionate commitment for a just society and her vision of a better world.

And we welcome you here this afternoon, Ms. Hite.

I would, at this time, like to recognize the distinguished gentleman from Michigan, who is the Ranking Member of the Full Judiciary Committee. The gentleman from Michigan, Mr. Conyers, is recognized.

Mr. CONYERS. Thank you so much, Chairman Chabot.

I only wish that we could get the photograph of everybody in this room right now, because this is a most historic and distinguished coming together of experts, Government officials, lovers of democracy, the witnesses, everybody.

And I have got a picture, a jazz picture, where they number everybody in the room and then you identify, "Gosh, I didn't know he was here or she was there," because we are at a historic moment.

And for Chairman Chabot and to Jerry Nadler and Bobby Scott, Mel Watt, all of you here, here we are back in the Subcommittee on the Constitution of the United States House of Representatives Judiciary Committee. This is exactly where we were several months ago when the Voter Rights Act extension of 1965 was taken up and worked on and deliberated.

And there were as many imponderables, as much difficulty, as many constitutional questions as there are surrounding the discussion that will shortly take place here. We are up to it. We can handle it. We have done it before in this Subcommittee, and we will be doing it again, with your help.

I go back a little ways in this, too, because I remember the late Joe Rawl, and what a wonderful spirit it is to have him watching over us. And Walter Fauntroy, for almost 20 years, who worked on this subject before us.

There have been many that have sewn the seeds and laid the path that bring us right here where we are today. The Constitution gives the Congress the authority to rectify the issues.

We will be in the courts, we know, but that doesn't bother anybody that I know within these walls today. But on the heels of the Voting Rights Act reauthorization, we must now address this longstanding voter inequity that we all know too much about already.

The Congress, in a bipartisan spirit, has to work to protect the rights of the citizens of this great Capital City.

And, Congressman, Chairman Chabot, your work on the Voting Rights Act distinguishes and gives you the complete authority to move and lead and guide us to where we have to go from here, from this historic meeting that brings us all here today. And I thank you so much.

Mr. CHABOT. Thank you very much, Mr. Conyers.

The gentleman from Iowa, Mr. King, is recognized.

Mr. KING. Thank you, Mr. Chairman.

And I am looking forward to the testimony on the part of the witnesses, and I am going to keep my remarks very short in order to help expedite this process, because I can see by the crowd here that there is a lot of intensity on this, and I really want to hear from the witnesses.

I will say that I have a perspective that I would like to just inject into the thought process as this discussion moves forward. And that is, I happen to have a profound conviction that American citizens should be represented in the reapportionment process in America.

And as I listened to the injustice described by Mr. Davis, I reflect upon the nine to 11 congressional seats that would be differently distributed across America if we counted citizens for our census as opposed to homosapiens.

In other words, we have millions of illegals that are represented in the United States Congress, whether they can vote or not, because they are counted for redistricting purposes. And I believe that is a consideration we could keep in mind as we correct the injustices.

But I just make that point, and I open my ears and yield back the microphone to hear the testimony of the witnesses.

Thank you.

Mr. CHABOT. Thank you. The gentleman yields back.

The gentleman from Virginia, Mr. Scott, is recognized for 5 minutes.

Mr. SCOTT. Thank you, Mr. Chairman. I, too, would just make a very brief comment so that we can get to the witnesses.

Fighting for freedom abroad, when citizens right here in Washington, D.C., suffer without voting representation in Congress, no reasonable understanding of democracy can tolerate this denial of representation.

So I look forward to working with the Committee Members to remedy this injustice. And we should proceed as expeditiously as we can and not let the details of whatever happens in Utah slow us up. We need to move as expeditiously as we possibly can to remedy this ongoing injustice.

Thank you, Mr. Chairman. I yield back.

Mr. CHABOT. Thank you very much. The gentleman yields back.

The gentleman from Florida, Mr. Feeney, is recognized.

Okay, we are back to the gentleman from North Carolina. Mr. Watt is recognized.

Mr. WATT. Thank you, Mr. Chairman. I thank you for having the hearing, and I will yield back the balance of my time in the interest of hearing the witnesses at some point.

Mr. CHABOT. Thank you very much.

The gentleman from Maryland, Mr. Van Hollen, is recognized.

Mr. VAN HOLLEN. I thank you, Mr. Chairman. Thank you for holding this hearing and moving forward on this legislation.

As the representative of the congressional district that borders right on the District of Columbia, I want to just say how much I hope that we will move this forward so we can get to the entire process quickly.

It is absolutely unfair and unjust that one of my constituents on the Maryland side of the D.C. boundary is able to elect a Representative who can vote in Congress and the person right across the street from my congressional district does not have the ability to elect a Representative who can vote in Congress. That is wrong. We need to correct that.

I want to thank my colleague, Representative Eleanor Holmes Norton, for her long efforts and her long championship of trying to get this through the Congress, not this bill, but other bills that she has pushed forward on this issue. She has been sort of indefatigable and a champion here, and it has been a pleasure to try and work with her on those issues.

I want to congratulate Mayor Williams for his incredible service.

And it is great to see you and all the Members of the Council.

To you, Mr. Fenty, congratulations on your recent victory.

And let me just close with this. I want to congratulate Congressman Tom Davis from Virginia. I also have the privilege of serving on the Government Reform Committee that he chairs. And he has really spent a lot of time and effort to craft this compromise.

My view is that we should have voting rights for the District of Columbia as a matter of principle. And there have been legislations to do it. I mean, as a matter of principle, the residents of this great city should have voting rights. But I understand the art of the possible. And I want to congratulate Congressman Davis for taking the lead on this issue and crafting this piece of legislation.

And I would only say, to all of us on this Committee and the Judiciary Committee, this is a piece of legislation that has been much debated in this Congress. It has been much considered in the Government Reform Committee. It is a very delicate balance and compromise, and I would urge my colleagues to not tamper with what I think is a very well put-together proposal that stands on its own.

I know we are going to hear testimony on various issues today, but I would just stress the fact that Mr. Davis has worked for many years for us to get to this point, and I hope we don't blow it.

Thank you, Mr. Chairman.

Mr. CHABOT. Thank you. The gentleman yields back.

Without objection, all Members will have 5 legislative days to submit additional materials for the hearing record.

Mr. CHABOT. And I would like to now introduce formally our distinguished panel here this afternoon.

Our first witness is Governor Jon M. Huntsman, Jr., of the State of Utah.

Mr. Cannon, was there anything else you wanted to say prior to me introducing the governor here?

Mr. CANNON. Let me just reiterate what a great governor Utah has.

Mr. CHABOT. Okay, thank you, excellent.

Governor Huntsman was elected to his position in 2004, where he represents the 2.5 million residents of Utah that would enjoy a new Representative under H.R. 5388.

As Governor Huntsman will testify, the issue of obtaining an additional Representative has been extremely important to his State, to the point that they litigated the issue all the way up to the United States Supreme Court.

We welcome you here this afternoon, Governor.

Our second witness is Dr. John C. Fortier, who is a research fellow at the American Enterprise Institute, where he focuses his studies on American Government. Dr. Fortier received his bachelor's degree from Georgetown University and earned his doctorate from Boston College.

We welcome you here this afternoon, Doctor.

Our third witness is Adam Charnes, who is a partner at the law firm of Kilpatrick Stockton, LLP, in Winston-Salem, North Carolina. Prior to that, Mr. Charnes served as Deputy Assistant Attorney General in the office of legal policy at the Department of Justice. He received his bachelor's degree from Princeton University and his law degree from Harvard Law School.

We welcome you this afternoon, Mr. Charnes.

Our fourth and final witness is Professor Jonathan Turley, of the George Washington University Law School. Professor Turley is a nationally recognized legal commentator and constitutional scholar. He is a graduate of the University of Chicago and Northwestern University School of Law.

And we welcome you here this afternoon, Dr. Turley.

Before we get started with our testimony this afternoon, I just want to reiterate the rules that we have in the Committee. Most of you are probably familiar with the 5-minute rule.

We have a lighting system on there. Each of you will be given 5 minutes. We would ask you to stay within that time. The green light will be on for 4 minutes. A yellow light will come on to let you know you have a minute to wrap up. And the red light will come on, and we would ask you to please try to complete your testimony by that time or very close to the light coming on.

They are kind of small, so it is a little hard to see them. We used to have big lights. That was old technology. It was real easy to see. And now we have got these modern, small lights that you can't see. What the reasoning for that was is beyond me.

But those are basically the rules within which we would ask you to follow.

It is also the practice of this Committee to swear in all witnesses appearing before us. So if you would, if you would all four please stand and raise your right hand.

[Witnesses sworn.]

Mr. CHABOT. All witnesses have indicated in the affirmative.

We, again, thank you for your attendance and your testimony here this afternoon.

Governor, we will begin with you. And you will need to probably pull the mike a little closer and turn it on there. Thank you.

TESTIMONY OF THE HONORABLE JON M. HUNTSMAN, JR., GOVERNOR OF UTAH

Governor HUNTSMAN. Thank you, Mr. Chairman and distinguished Members of this Committee. It is an honor and privilege to be with you, along with Ms. Dorothy Hite, who I am honored to be with, as well, and want to thank her for her commitment to equality and civil rights during her career.

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, H.R. 5388 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 seat 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 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 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 represents a State with a very challenging matrix of problems. Schools, transportation infrastructure, social services, 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.

Now, I welcome the fact that, if the legislation passes, Utah's new seat would be elected on an at-large basis until 2012, when congressional redistricting would automatically take place based on population figures from the 2010 census.

However, our objective, first and foremost, is to get a fourth district seat, even if that included early redistricting.

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, 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.

[The prepared statement of Governor Huntsman follows:]

PREPARED STATEMENT OF THE HONORABLE JON M. HUNTSMAN, JR.

Good afternoon Mr. Chairman and distinguished Committee members. Thank you for requesting that I testify today on H.R. 5388, the District of Columbia Fair and Equal Voting Rights Act of 2006. I will confine my testimony to a brief discussion of why I believe this legislation would not only benefit the State of Utah, but would simultaneously promote democratic values inherent in our constitutional system. As I understand it, H.R. 5388 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 seats, giving one to D.C. and the other to Utah, the State that should have received an additional seat 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 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. *See* 13 U.S.C. § 195 (prohibiting "the use of the statistical method known as 'sampling' in carrying out the provisions of this title"); *but see Utah v. Evans,* 536 U.S. 452, 473 (2002) (holding that "the statutory phrase 'the statistical method known as sampling' does not cover the [Census] Bureau's use of imputation"); *see also id.* at 480 (O'Connor, J., dissenting) ("I would find that the Bureau's use of imputation constituted a form of sampling and thus was prohibited by § 195 of the Census Act."). The second error involved the Bureau's decision to count federal employees residing temporarily overseas, while arbitrarily refusing to count other, similarly situated Americans living outside the United States.[1]

[1] Had the Bureau treated all temporary expatriates alike by simply (a) not limiting its overseas enumeration to federal employees, or (b) excluding all non-U.S. residents from the census, Utah would have had a fourth seat beginning in 2002.

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.

I welcome the fact that, if the legislation passes, Utah's new seat would be elected on an at-large basis (rather than from a specific district) until 2012, when congressional redistricting will automatically take place based on population figures from the 2010 census. I consider that a significant benefit because redistricting—which is always a difficult, time-consuming, and politically costly process—would be especially undesirable at this point in time, less than four years before the next decennial census.

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.

Thank you for this opportunity to testify. The State of Utah and its 2.5 million residents deserve and welcome the chance to have an additional seat in the House of Representatives.

Mr. CHABOT. Thank you very much, Governor.

Dr. Fortier, you are recognized for 5 minutes.

TESTIMONY OF JOHN FORTIER, RESEARCH FELLOW, AMERICAN ENTERPRISE INSTITUTE

Mr. FORTIER. Thank you, Chairman Chabot and Ranking Member Nadler and Members of the House Judiciary Subcommittee, for inviting me to testify on a very important issue of representation in Congress for the District of Columbia.

In particular, we are discussing the District of Columbia Fair and Equal House Voting Rights Act of 2006, which has been ably described by several Members of the Committee.

I wrote a column in *The Hill* newspaper, my weekly column, on this bill back in the spring, and I called it "Much Needed, Ingenious, and Blatantly Unconstitutional." While I meant that to be provocative, I stand by all three of those statements.

I think, first of all, the bill is much needed. Representation for the District is much needed. It is a great injustice that over half a million citizens living in the shadow of the Capitol are not represented by full voting Representatives and by Senators. So the aim of the bill is just right.

Second, the bill is ingenious or it is politically savvy, in a way that has been described up here. We have political concerns of Republicans and Democrats which have been finely balanced.

And on this score, I don't believe that Congress has overstepped its bounds by expanding the House or by creating the at-large district. I would agree with the remarks of Governor Huntsman.

But at the end of the day, I do not believe that this approach is constitutional. And this, unfortunately, means that we are left with several ways to give representation to the District, but all of them are very difficult, difficult to achieve.

Congress could admit the District as a State. Congress could, with the consent of Maryland and the District, retrocede the District to Maryland, as was done in Virginia in the 19th century, or we could amend the Constitution. Difficult options, all of them, but I believe the only three alternatives to get to a just end.

So why do I believe that H.R. 5388 is unconstitutional? For one simple reason: Congress does not get to decide what bodies are represented in the House and the Senate. It is the Constitution that decides that, and the Constitution has decided that.

Over and over in the Constitution, it is clear that only States may have Representatives in the House and the Senate. The textual references are many, but the first is the most obvious. The House of Representatives shall be composed of Members chosen every second year by the people of the several States.

Each State is also guaranteed a Representative. The franchise in each State must be equal to that of the State's most popular part of their State legislature.

And even in one instance, the Constitution prescribes that the House should vote by State. That is, in the case of the Electoral College, if there is no majority, a pick of the President of the Electoral College, it goes to the House, and the House votes by State and the quorum is determined by State.

Again, no reference to other bodies being represented in Congress, no territories, no other entities. It is States that are represented and the people of the States in the Constitution.

The proponents of the approach in the bill before us today rely heavily on the Seat of Government Clause, a clause that gives Congress great power of the District. But, in fact, this provision should best be understood as the power to govern the District, as a State would govern its own territory.

What is being done to it is it is being stretched to override other constitutional provisions in the name of the welfare of the District, and here is where I think the interpretation of that clause goes wrong.

If we were to accept this power, which is broad, but accept it, as the proponents would argue, Congress could give representation to the Senate by simple legislation. They could have granted voting in the presidential election, as was done in the 23rd amendment, by simple legislation and not by constitutional amendment.

It would not be bound at all by proportionality. It could grant the District two Representatives or 10 or 436 Representatives. And if you doubt that power, you look at the bill itself. As part of the delicate compromise, the bill limits the District to one Representative, no matter what population has. If the District grows substantially, it still only gets one Representative in the bill before us.

And then if Congress can create the Representative, it can also take that Representative away by legislation. Imagine having a Representative for the District of Columbia and a tough votes comes by and then Congress decides to punish the District and the Representative by withdrawing that seat, again, by simple legislation.

For all these reasons, I think the more legitimate methods, the more difficult methods are the way to go in giving representation to the District in Congress.

Finally, I will add that the Territories Clause would be analogous to the Seat of Government Clause that we rely on here. If Congress may do so for the District, they may do so also for the territories, and the territories vary widely in size. We could give a Representative to small islands with a population of a couple hundred people or larger territories with certainly much less than a traditional congressional district.

So the unfortunate conclusion of my testimony is that, while the aim of the legislation is just, we have other courses of action that

we are going to have to take because they are legitimate constitutional options.

Thank you, Mr. Chairman.

[The prepared statement of Dr. Fortier follows:]

PREPARED STATEMENT OF JOHN FORTIER

Thank you Mr. Chairman, Mr. Ranking Member, and members of the subcommittee for inviting me to testify on the important subject of voting rights for residents of the District of Columbia.

The purpose of this hearing is to explore H.R. 5388 the "District of Columbia Fair and Equal House Voting Rights Act of 2006" which creates a House seat for the District of Columbia.

H.R. 5388 would increase the size of the House to 437 members. It treats the District of Columbia as a district that will be represented in the House. It also calls for a second new district to be located in Utah, as Utah narrowly missed out on a seat in the last re-apportionment. That Utah district would be an at-large district, and the three current Utah districts would remain intact. After the next reapportionment, the District of Columbia would still be considered a district with a representative, and the remaining 436 seats would be apportioned among the states based on the current method of apportionment.

I wrote my weekly column in the *Hill* on this bill last spring, which I described somewhat facetiously as "much-needed, ingenious, and blatantly unconstitutional." [1] I say *somewhat* facetiously because even though the sentence had a provocative tone, I believe all three of these descriptions of H.R. 5388 are true. First, a proposal to grant the citizens of the District the right to vote for congressional representatives is much needed. It is an injustice that for over two hundred years District residents have not had congressional representation. Second, H.R. 5388 is ingenious in the way it balances the partisan concerns of Republicans and Democrats that arise over such an issue. Third, as much as I agree with the aim of the legislation and admire the political savvy of its authors, H.R. 5388 is not the answer to the District's problems. The central premise that Congress can by simple legislation create a representative for the District is wrong. The Constitution, not Congress, has determined that the House and Senate will be made up of representatives of states and states alone. Congress can no more change the Constitution on this matter by simple legislation than it could repeal the first amendment or allow sixteen year olds to serve as president.'

The unfortunate conclusion of my remarks is that because H.R. 5388 is not constitutional, the road to representation for DC residents is difficult. There are three legitimate ways to accomplish this end: (1) to admit the District as a state into the United States; (2) to "retrocede" the District to Maryland; (3) to amend the constitution to allow DC to retain its current status but also grant it representation in Congress. All are legitimate means to a just end, but all would face significant political opposition.

IT IS AN INJUSTICE THAT DC RESIDENTS ARE NOT REPRESENTED IN THE HOUSE AND SENATE

The District of Columbia has over 500,000 residents. Only in the past forty years have they been entitled to vote in presidential elections. They have no full voting representatives in either the House or the Senate.

While residents of U.S. territories also have no voting representation in Congress, the case of the District is even more compelling. The seat of government has been here since 1800, but DC has all the while been unrepresented in Congress and has watched as many territories have become states and now enjoy representation in Congress. The District is integrally connected to the U.S., not separated by ocean or language from the fifty states.

One should not quarrel with the message on the District's license plate, "taxation without representation." The message is essentially correct.

THE INGENUITY AND POLITICAL SAVVY OF THE DAVIS/NORTON PROPOSAL (H.R. 5388)

The Davis/Norton proposal tries to address the partisan political concerns of Democrats and Republicans over the issue of DC representation. In all likelihood, the District would elect a Democratic representative. To balance this, the proposal adds an additional representative to Utah, which barely missed out on a fourth rep-

[1] John C. Fortier, "DC Colony," *The Hill,* May 17, 2006.

resentative last re-apportionment. At least until the next apportionment, one of the two new seats created would likely be represented by a Republican and one by a Democrat. The bill also provides that the new Utah representative would be elected at-large and that the existing districts in Utah will remain the same until the next apportionment and redistricting. This was again done to delicately balance political concerns, as Utah Democrats worried that a new redistricting might adversely affect the district lines of Utah's sole Democratic Representative.

While this arrangement is unusual, I see no constitutional objection to it. Congress may increase the size of the House to 437 by simple legislation. The at-large district is temporary. And it is well within Congress's power to regulate the time, place and manner of elections and therefore to prescribe such an at large district. Congress has previously weighed in legislatively to require that states employ single member districts, but it is within Congress's power to alter that judgment overall by allowing or even requiring at large districts. It may also carve out a specific exception to its general rule requiring states to create single member districts as H.R. 5388 proposes to do.

Overall, the provisions of H.R. 5388 that increase the size of the House and the creation of an at-large district are well thought out and constitutionally unobjectionable.

WHY H.R. 5388 IS UNCONSTITUTIONAL

The Constitution clearly indicates that Congress shall be composed of representatives from states and states alone. Congress itself does not determine the makeup of Congress, it is the Constitution that makes that determination. Of course, Congress would play an important role in the admission of states, in the retrocession of the District to the state of Maryland, and in the constitutional amendment process. But through the normal legislative process, Congress cannot get around the Constitution's clear language that both the House and the Senate are composed of representatives from states and states alone.

The textual evidence in the Constitution that the people of states are to be represented in the House and Senate is extensive:

> "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."
>
> "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."
>
> "each **state** shall have at least one Representative"
>
> "When vacancies happen in the Representation from any **state**, the executive authority thereof shall issue writs of election to fill such vacancies." [Article I, Sec.2, (my emphasis)]

There are many similar references to states in Article I, section 3 of the original Constitution which describes how state legislatures were to choose senators. The seventeenth amendment which was ratified in the early twentieth century and which provided for a popular vote for senators also indicates that it is the people in the states who are to be represented in the Senate:

> "The Senate of the United States shall be composed of two Senators from each **state**, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each **state** shall have the qualifications requisite for electors of the most numerous branch of the state legislatures."
>
> "When vacancies happen in the representation of any **state** in the Senate, the executive authority of such **state** shall issue writs of election to fill such vacancies: Provided, that the legislature of any **state** may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct." [Amendment XVII (my emphasis)]

The Constitution also provides that states will have the power to regulate elections, although Congress may alter those regulations:

> "The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each **state** by the legislature thereof." [Article I, section 4 (my emphasis)]

Finally, the Constitution prescribes an instance when the votes in Congress will be counted by state delegation rather than by individual members. If no presidential candidate receives a majority of the votes of the presidential electors, the House is called upon to choose the president from among the top three candidates. Under these circumstances, a quorum shall be representatives from two thirds of the states, not of the members themselves. And the vote to select a president shall require a majority of state delegations:

> "if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by **states**, the representation from each **state** having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the **states**, and a majority of all the **states** shall be necessary to a choice." [Amendment XII (my emphasis)]

The textual evidence that Members of the House and Senators shall be representatives of people in states is overwhelming. It is not described by a throwaway or ambiguous line in the Constitution, but pervades the whole text. The framers of the original Constitution and of later amendments were crystal clear that representation in Congress was for people in states. They knew of the case of territories (The Northwest Territory was in existence prior to the ratification of the Constitution) and made provisions for Congress to administer them. They included constitutional provisions for the creation and governance of a district for the seat of government, but they never provided for representation in Congress for territories or the seat of government.

SELECTED HISTORY OF ATTEMPTS TO GIVE REPRESENTATION TO THE DISTRICT

Numerous efforts have been made to give representation to the District of Columbia.

In two prominent cases, proponents of these efforts sought to amend the constitution, but did not pursue a simple legislative strategy that is urged by H.R. 5388.

The enactment of the 23rd amendment gave District residents the right to participate in presidential election. Using the logic that is behind H.R. 5388, Congress could have achieved the same result by legislation, using the Seat of Government Clause as a justification for passing a simple piece of legislation to grant DC residents the vote in presidential elections. If such an option were legitimate, why would the proponents of the 23rd amendment have spent the significant time and energy needed to secure ⅔ votes in both houses of Congress and spent nearly a year seeking ratification in three quarters of the states?

Similarly, a major effort to grant DC residents the right to vote in congressional elections was proposed in the form of a constitutional amendment that passed both houses of Congress in 1978. Proponents of this measure then pursued the matter in state legislatures but failed to secure ratification in three quarters of the states. After seven years had elapsed, as the amendment prescribed, the ratification failed. Again, why would the proponents of representation for DC have used such a long, arduous, and ultimately unsuccessful process if the whole matter could be resolved by simple legislation?

In addition to these two efforts to amend the Constitution to give representation to the District, consider also the attempt in the 103rd Congress to give delegates from the District and territories the right to vote in committee and in the committee of the whole. The House changed its rules to this effect. Why would the proponents of representation for DC and the territories have sought only these changes? Why would they have not proposed full voting privileges for delegates, making them essentially equal in status to representatives from states?

The answer is given in part by *Michel v. Anderson*.[2] When some members of Congress sued claiming these rules changes went too far, the DC Circuit Court affirmed the change in rules, but noted that it passed constitutional muster because it did not give the essential qualities of representatives to delegates. In a nutshell, it was acceptable to allow delegates to participate in all the deliberations and secondary votes in committees including the committee of the whole as long as their votes would not be decisive on votes on the final passage of bills.

In short, proponents of representation for DC have worked long and hard to pass constitutional amendments or have settled for less than full privileges for delegates because they did not believe that a simple legislative solution was legitimate.

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[2] 41 F.3d 623 No. 93-5109

THE SEAT OF GOVERNMENT CLAUSE

The proponents of granting the District representation by simple legislation rest much of their case on the clause in Article I that grants Congress the power to control the affairs of the District.

> "Congress shall have 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." [Article I, sec. 8]

Clearly, the power granted to Congress over the District is broad in scope. But this power is best understood as the power to govern the affairs of the District as a state government would govern over its territory. Congress has even somewhat greater power over the District than a state government has over its territory, as it is not subject to some of the restrictions the Constitution places on states. For example, Congress could coin money for the District, if it deemed that course of action wise, as the Constitution prevents states from coining money, but does not impose a similar restriction on the governance of the District.

But what cannot be done under the Seat of Government clause is to grant the District powers that override other constitutional language. The Seat of Government Clause cannot be an excuse to use simple legislation to amend the constitution through the back door.

This is, however, what proponents of the Davis/Norton approach propose to do. They describe the Seat of Government Clause as "majestic in scope."[3] It is described in such grandiose terms that Congress might use the Seat of Government Clause for any end as long as it relates o the welfare of the District's residents.

If this power is as broad as proponents suggest, then Congress could have granted District residents the right to participate in the election of a president by simple legislation rather than through the 23rd amendment. Under this broad interpretation Congress could give the District representation in the Senate.

Again under this interpretation of the Seat of Government Clause, there is no reason why Congress would be limited to providing representation to the District that is proportional to its population. While states would be subject to apportionment for their representatives, Congress could give the District two representatives, or ten, or four hundred thirty six. In fact, the H.R. 5388 deviates from proportionality by mandating that the District will never have more than one representative in the House no matter how large its population grows.

Similarly, there is no reason why such a broad power would be limited by constitutional provisions that give two senators to each state; Congress might grant the District as many senators as it saw fit. Congress might eliminate age or citizenship requirements for District representatives.

Under such a broad interpretation almost every constitutional provision would fall if Congress were to act in its capacity to govern the affairs of the District.

In addition to the constitutional problems arising under such a broad interpretation of the Seat of Government Clause, consider a practical one. Since Congress has created the District of Columbia's seat in the House, it could take it away by legislation. Suppose the majority party wanted to punish the District or the particular representative of the District, Congress could pass a law abolishing the office. Congress does not have the power to take away all representation from any state, as the Constitution guarantees each state at least one representative. But the District's seat would rest on the whim of the legislature.

TREATING THE DISTRICT AS A STATE

The fallback position for those advocating the use of the Seat of Government Clause as a basis for giving representation to the District is that Congress has the power to treat District as a state, as it has done in certain pieces of legislation and as courts have held in certain instances, and therefore it may convey upon the District all of the attributes of statehood, including right to be represented in Congress.

But if the Seat of Government clause is broad enough to allow Congress to ignore the many clear textual references that only the people in states are represented in Congress then why would this clause be limited to treating the District as a state and then abiding by other constitutional language?

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[3] Testimony of the Hon. Kenneth W. Starr before the House Government Reform Committee, 2154 Rayburn House Office Building, Washington, D.C., June 23, 2004, p. 4. See also 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." November 2004 found at *http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf*

It is true that in certain contexts Congress and the Courts have treated the District as a state. But variety of circumstances in these cases does not point to a general rule that Congress may treat the District of Columbia as a state. The central case of *National Mutual Insurance Company of the District of Columbia v. Tidewater Transfer Company*[4] illustrates the divisions on this issue rather than the ensus. The case was decided 5-4 and the opinion upheld a law that allowed District residents access to federal courts in diversity suits. However, only two justices held the view that the District should be treated as a state. Three justices in the majority upheld the law, but explicitly refused to consider the District as a state. They instead relied on the Seat of Government Clause, but did not argue that the clause treated the District as a state.

TERRITORIAL JURISDICTION

As the Seat of Government Clause pertains to Congress's power over the District of Columbia, so the Territorial Clause pertains to Congress's similar powers over territories:

> "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." [Article IV, sec. 3]

The language of the Territorial Clause is different than that of the Seat of Government Clause, but it is no less "majestic" in its scope. The logical way to interpret this clause is to read it as Congress having the power to govern the territory as a state government governs its own territory. Even though the language is not identical, in practical effect, Congress under the Territorial Clause should have the same role in governing the territories as it does in governing the District under the Seat of Government Clause.

But if the Seat of Government Cause is to be read so broadly as to allow Congress to provide representation for the District in Congress, then surely Congress could provide the same representation for the territories under a similarly broad reading of the Territories Cause. This power would not only apply to organized territories or territories that currently have delegates in Congress, but would apply to all territories. And the territories vary widely in population. Puerto Rico has nearly 4 million people and would qualify for five or six representatives in the House if it were a state, but most of the territories are significantly smaller. The population of the Northern Mariana Islands, for example, is approximately 80,000. Wake Island is inhabited by approximately 200 civilian contractors. Does Congress have the power to grant these territories representation in Congress by a simple act of legislation under the guise of governing the territories?

CONCLUSION

The residents of the District of Columbia deserve congressional representation. Unfortunately, the legitimate means for granting that representation are very difficult to pursue. There does not seem to be strong political sentiment in favor of statehood for the District, retrocession of the District to Maryland or a constitutional amendment granting DC congressional representation. Nevertheless, they are the only legitimate alternatives to get congressional representation for District residents.

The "District of Columbia Fair and Equal House Voting Rights Act of 2006" has its heart in the right place, but it will not pass constitutional muster. It too easily glosses over the numerous textual references in the Constitution that grant representation only to the people of states. And it builds on a foundation of a much too expansive view of the Seat of Government Clause which might have many adverse consequences if applied in different contexts.

Mr. CHABOT. Thank you very much, Doctor.

Mr. Charnes, you are recognized for 5 minutes.

TESTIMONY OF ADAM H. CHARNES, ATTORNEY, KILPATRICK STOCKTON LLP

Mr. CHARNES. Thank you. Good afternoon, Mr. Chairman, Ranking Member Nadler and other Members of the Subcommittee. I appreciate very much the opportunity to discuss the constitutionality

[4] 337 U.S. 582 (1949).

of H.R. 5388, the "District of Columbia Fair and Equal House Voting Rights Act of 2006."

I believe that it is likely that the courts would hold the Congress indeed possesses the constitutional authority to enact legislation, providing that the District of Columbia be considered a congressional district for purposes of representation in the House of Representatives.

The source of this authority is the Constitution's District Clause, which is article I, section 8, clause 17. The District Clause authorizes Congress to establish the District as the seat of Government, and it empowers Congress to "exercise exclusive legislation in all cases whatsoever over such district."

The courts repeatedly have held that the District Clause gives Congress extraordinary and plenary power of the District. Indeed, as one court explained, Congress has "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."

In short, Congress's authority under the District Clause is so expansive that it encompasses the power to provide D.C. residents with a Representative in the House.

While downplaying the District Clause, those who take the position that this bill is unconstitutional principally rely on article I, section 2, clause 1 of the Constitution. As was just noted, that provision states that the Members of the House shall be "chosen every second year by the people of the several states."

Critics of the bill claim that the use of the word "state" in this provision means that only citizens in the 50 States can be represented by a voting Member of the House.

While this argument has superficial appeal, upon close inspection, I believe that it overlooks history, it overlooks prior judicial interpretations of the word "states" as used in other provisions of the Constitution, and it overlooks other legislation that prevents disenfranchisement from congressional representation of U.S. citizens.

In my remaining time, I will briefly summarize the basis for these conclusions.

First, as to history, in 1790, Congress accepted the cessions of land by Maryland and Virginia to create the District. Thus, as of 1790, residents within the District were no longer citizens of those States.

Nonetheless, by statute, Congress provided that the laws of Maryland and Virginia would continue to apply. Thus, from 1790 to 1800, residents within the District voted in congressional elections in Maryland and Virginia; not because they were citizens of those States, for they were not, but because Congress, acting under the District Clause, legislated that those States' laws would apply, pending further congressional legislation. It is that precedent which I think this bill relies on.

Second, critics of the bill ignore numerous instances in which the courts have upheld laws that treat the District as if it were a State for purposes of the Constitution. The most prominent example is the Supreme Court's *Tidewater* case.

The Constitution provides, of course, that Congress may grant Federal courts jurisdiction over lawsuits "between citizens of different states." Despite this language, the *Tidewater* plurality held that the District Clause permitted Congress to expand the Federal courts' diversity of citizenship jurisdiction to include disputes between citizens of a State and citizens of D.C.

Third and finally, H.R. 5388 is directly analogous to the Uniformed and Overseas Citizens Absentee Voting Act. Some U.S. citizens living abroad are not citizens of any State under State law and, therefore, would not be permitted to vote in Federal elections. In order to prevent the disenfranchisement of such overseas citizens, Congress authorized them to vote in Federal elections in the last State in which they lived.

Thus, Congress has already taken the step of giving the vote for House Members to U.S. citizens who do not fall within a hyper-literal interpretation of the phrase "people of the several states" in article I, section 2, clause 1.

Again, Mr. Chairman, thank you very much for the opportunity to share these views with the Committee, and I look forward to answering your questions.

[The prepared statement of Mr. Charnes follows:]

PREPARED STATEMENT OF ADAM H. CHARNES

TESTIMONY OF ADAM H. CHARNES

Before the Subcommittee of the Constitution of the Committee on the Judiciary of the United States House of Representatives

Concerning

H.R. 5388, the "District of Columbia Fair and Equal House Voting Rights Act of 2006."

Good afternoon, Mr. Chairman, Ranking Member Nadler, and other Members of the Subcommittee. My name is Adam H. Charnes, and I am a partner in the law firm of Kilpatrick Stockton LLP. I appreciate very much the opportunity to present my views on the question whether the Constitution permits Congress to grant residents of the District of Columbia Congressional representation. Specifically, the question I will address is whether Congress may constitutionally enact a statute providing that the District be considered a Congressional district for purposes of representation in the House of Representatives.

In November 2004, Professor Viet D. Dinh of the Georgetown University Law Center and I submitted a legal opinion on this question to the House Committee on Government Reform. That opinion is attached hereto and incorporated herein. *See also* H.R. Rep. No. 109-593, at 41-64 (2006) (reproducing the opinion letter).* In that opinion letter, Professor Dinh and I reviewed the text of the Constitution (and, in particular, the District Clause, U.S. Const., art. I, § 8, cl. 17, as well as the provision of Article I that states that the members of the House are chosen "by the people of the several states," U.S. Const., art. I, § 2, cl. 1), the

* The opinion letter is also available on the Internet at http://reform.house.gov/UploadedFiles/111904DinhOpinionDC.pdf and http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf.

historical treatment of residents of the District of Columbia with respect to Congressional representation, other provisions of the Constitution in which the courts have held that the term "States" can or does include the District, and other legislation that allows United States citizens who are not residents of a State to vote in national elections. Based on this detailed review, Professor Dinh and I concluded that Congress has ample constitutional authority to enact legislation pursuant to the District Clause providing that the District be treated as a state for purposes of representation in the House. I respectfully refer the Subcommittee to that opinion letter, which contains a complete exposition of my views.

Again, thank you very much for the opportunity to share these view with the Subcommittee. I would be pleased to answer any questions the Subcommittee might have.

The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives

submitted to

Committee on Government Reform
U.S. House of Representatives

by

Viet D. Dinh
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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,

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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.), *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

> 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 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 Fairness in Representation Act, H.R. 4640 (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 109th Congress.[6] To accommodate the new representative from the District, membership in the House would be increased by two members from the 109th Congress until the first reapportionment occurring

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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)).

[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] H.R. 4640, 108th Cong. § 3(a) (2004).

after the 2010 census.[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.[8] After the 2010 census, membership in the House would revert to 435 and the seats would be allotted pursuant to 2 U.S.C. § 2a, with the District retaining its single representative.[9]

We conclude that Congress has ample constitutional authority to enact the District of Columbia Fairness in Representation Act. 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 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."[10] 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

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[7] *See id.*, § 4(a)(1).

[8] *See id.*, § 4(a)(3).

[9] *See id.*, § 4(c).

[10] U.S. CONST. art. III, § 2.

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

> [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,"[11] gives Congress plenary and exclusive power to legislate for the District.[12] Courts have held that the District Clause is "sweeping and inclusive in character"[13] and gives Congress "extraordinary and plenary power"

[11] *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).

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

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

over the District.[14] It allows Congress to legislate within the District for "every proper purpose of government."[15] 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.[16]

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,"[17] 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 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.[18] 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,

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

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

[16] *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.

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

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

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."[19] 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.[20] The purpose for establishing a federal district was to ensure that the national capital would not be subject to the influences of any state.[21] 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.[22]

Indeed, so long as the exact location of the seat of government was undecided, representation for the District's residents seemed unimportant.[23] It was assumed that the states

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

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

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

[22] 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.

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

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.[24] 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?[25]

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."[26] 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.[27] Virginia did so in 1789.[28] The cessions of land by Maryland and Virginia were accepted

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[24] *Id.*

[25] 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).

[26] 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)).

[27] 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").

[28] 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").

by Act of Congress in 1790.[29] This Act also established the first Monday in December 1800 as the official date of federal assumption of control over the District.[30] 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.[31] During that time, District residents voted in Congressional elections in their respective ceding state.[32]

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.[33] 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."[34] 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.[35]

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

[30] *See id.* § 6.

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

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

[33] Maryland Cession, *supra* note 30; Virginia Cession, *supra* note 31.

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

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

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.[36] Rather, their voting rights derived from *Congressional action under the District Clause* recognizing and ratifying the ceding states' law as the applicable law for the now-federal territory until further legislation.[37] 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.

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[36] *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).

[37] 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.

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.

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*,[38] residents of the District attempted to file suit in the Circuit Court of Virginia based on diversity jurisdiction.[39] However, under Article III, section 2, of the Constitution, diversity jurisdiction only exists "between citizens of different States."[40] Plaintiffs argued that the District was a state for purposes of Article III's Diversity Clause.[41] Chief Justice Marshall, writing for the Court, held that "members of the American confederacy" are the only "states" contemplated in the Constitution.[42] Provisions such as Article I, section 2, use the word

[38] 6 U.S. (2 Cranch) 445 (1805).

[39] *Id.* at 452.

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

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

[42] *Id.*

"state" as designating a member of the Union, the Court observed, and the same meaning must therefore apply to provisions relating to the judiciary.[43] 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]."[44] But, he explained, "this is a subject for legislative, not for judicial consideration."[45] 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 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.'"[46] This statute was challenged in *National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co.*[47] 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

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

[44] *Id.* at 453.

[45] *Id.*

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

[47] 337 U.S. 582 (1949).

Constitution.[48] Relying on Marshall's statement that "the matter is a subject for 'legislative not for judicial consideration,'"[49] 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.[50]

Specifically, the plurality noted that the District Clause authorizes Congress "to exercise exclusive Legislation in all Cases whatsoever, over such District,"[51] 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.[52] 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.[53] Therefore, according to the plurality, Congress can utilize its power under the District Clause to impose "the judicial function of adjudicating justiciable controversies on the regular federal

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

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

[50] *Id.* at 588.

[51] *Id.* at 589.

[52] *Id.*

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

courts . . . ."[54] 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.[55]

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."[56] 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.[57]

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[54] *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.

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

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

[57] 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

Adams v. Clinton[58] 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.[59] 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.[60] 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*."[61] 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

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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.

[58] 90 F. Supp. 2d 35 (D.D.C.), *aff'd*, 531 U.S. 940 (2000).

[59] *Id.* at 37.

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

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

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."[62] In *Milton S. Kronheim & Co. Inc. v. District of Columbia*,[63] Congress treated the District as a state for purposes of alcohol regulation under the Alcoholic Beverage Control Act.[64] 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.'"[65] In *Palmore v. United States*,[66] 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."[67] 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.[68] Even *District of*

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

[63] 91 F.3d 193 (D.C. Cir. 1996).

[64] *Id.* at 201.

[65] *Id.*

[66] 411 U.S. 389 (1973).

[67] *Id.* at 394.

[68] *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).

Columbia v. Carter,[69] which found that the District was not a state for purposes of 42 U.S.C. § 1983,[70] 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,[71] and this enactment has never successfully been challenged. Numerous other examples abound of statutes that treat the District like a state.[72]

The District may also be considered a state pursuant to an international treaty. In *de Geofroy v. Riggs*,[73] 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.[74]

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.'"[75]

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[69] 409 U.S. 418 (1973).

[70] *Id.* at 419.

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

[72] *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).

[73] 133 U.S. 258 (1890).

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

[75] *Id.* at 271.

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[76] authorizes Congress to regulate commerce across the District's borders, even though that Clause only refers to commerce "among the several States."[77] 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.[78] The Court also found that the Sixth Amendment right to trial by jury extends to the people of the District,[79] 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 shall have been committed . . . ."[80] And the District of Columbia Circuit held that the District is a state under the Twenty-First Amendment,[81] 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 . . . ."[82] If the

[76] U.S. CONST. art. I, § 8, cl. 3.

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

[78] *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.

[79] *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.").

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

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

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

District can be treated as a "state" under the Constitution for these and other purposes,[83] it follows that Congress can legislate to treat the District as a state for purposes of Article I representation.[84]

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[85] 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."[86] 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, pay taxes in that state, or even intend to return to that state.[87] Thus, the Act permits voting in federal elections by persons who

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[83] *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).

[84] 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).

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

[86] 42 U.S.C. § 1973ff-6(5)(B) (2003); *Att'y Gen. v. United States*, 738 F.2d 1017, 1020 (9th Cir. 1984).

[87] *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).

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."[88] If there is no constitutional bar prohibiting Congress from permitting overseas voters who are not citizens of a state to vote in federal elections,[89] 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*[90] 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."[91] 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."[92]

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 is undermined. Our Constitution leaves

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[88] U.S. CONST. art. I, § 2, cl. 1.

[89] 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).

[90] 514 U.S. 779 (1995).

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

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

> no room for classification of people in a way that unnecessarily abridges this right.[93]

The right to vote is regarded as "a fundamental political right, because preservative of all rights."[94] Such a right "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[95] 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.[96] 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.[97]

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:

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

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

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

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

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

> 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 election of President and Vice President, to be electors appointed by a State . . . .[98]

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.[99] 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.[100] Congressional authority under Article II is very circumscribed[101]--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

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[98] U.S. CONST. amend. XXIII, § 1.

[99] U.S. CONST. art. I, § 8, cl. 18.

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

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

of necessity had to be achieved via constitutional amendment.[102] By contrast, providing the 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.[103]

* * *

Although we have limited our opinion to analyzing the legal basis of Congressional authority to enact the District of Columbia Fairness in Representation Act and have not ventured a view on its policy merits, we note that 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." Our conclusion that Congress has the authority to grant Congressional representation to the District is

[102] 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 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.

[103] 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").

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."[104]

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

Mr. CHABOT. Thank you very much.

Professor Turley, you are recognized for 5 minutes.

TESTIMONY OF JONATHAN TURLEY, J.B. & MAURICE C. SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW, THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. TURLEY. Thank you, Mr. Chairman, Ranking Member Nadler, Chairman Conyers, distinguished Members of the Committee. It is a great honor to come and testify before you today on such an important subject and to join such a distinguished panel.

My whole life, I have gone to countless weddings, and I have always wondered whether anybody ever stood up at a wedding, when they invited anyone who would object to this marriage to come forward, and now I know.

It is a very regrettable position to be in, because I have, as everyone, I believe, at this table has done, stated strong views that the current status of the District is nothing short of an outrage. It is a gross embarrassment to any democracy to have so many of our citizens without a vote in Congress.

But this has long been a debate about means, not end. I have never met anyone who is comfortable with the status of the District. And I have concluded that H.R. 5388 is the wrong means. I believe that it is fundamentally flawed on a constitutional level.

As hard as I have tried to come to an opposing position and to stay quiet as this marriage occurs, I have to respectfully but strongly disagree with the analysis put forward by Professor Dinh, Adam Charnes and Ken Starr.

I also believe that the second part of this legislation involving the at-large district for Utah also raises some very difficult questions, legally. I am going to focus on the issue of the D.C. district in my oral testimony, but I have laid out both these positions in detail in my written testimony.

The current position of the District is something of an historical anomaly, and with the passage of time, the original purposes of the District have receded. As you know, in 1783, the Congress was interrupted in its meeting in Philadelphia, as the chairman ably described.

People like James Madison wanted to create a situation where Congress would no longer be "interrupted with impunity," as he said. This was, indeed, one of the guiding purposes of the creation of the Federal enclave. It was not the only purpose.

There was considerable debate about the Federal enclave and various reasons held forth for creating a non-State entity. To me, that legislative history is perfectly clear. The intention of the Framers was to create a non-State entity, and the non-voting status was part of that intent.

So while the purposes have receded, in terms of why we went in this direction originally, the intent to create a non-State entity is quite clear. Moreover, I do not believe that simply because we have the symbolic purpose left—that is, the desire to have neutral ground for the seat of the Government—that it should be dismissed.

I actually think that is an important reason and that the seat of Government should remain on neutral ground, should remain on

a non-State entity. And, for that reason, I have advocated for what I have called a modified retrocession plan, where the District would be shrunk to a very small size, to the seat of Government, and the remainder receded to Maryland.

I won't go through the textual analysis, which is laid out in my testimony, but I do believe that article I is clear when it refers to people of the several States. I think it is clear on its face, and I think it is clear from the legislative history.

I have gone through that history in my testimony to show that the non-voting status of the District was discussed regularly by the framers. It was viewed back then as an abomination.

This is not a new thing. When it was first proposed, there were objections that a non-voting populous was an affront toward democratic traditions, and there were proposals back then to avoid that status which were rejected.

Alexander Hamilton noted that eventually this District would grow to a size when we would have to inevitably give it a seat in Congress. He made a proposal to allow that to happen. That was also rejected.

So you have text and you have legislative history, in my view, that is quite clear as to the intention behind these constitutional provisions.

I also believe, however, that this is the wrong way to go. I have laid out various policy implications that I submit to you, but I will simply note that what Congress giveth Congress can taketh away.

You are about to take one, frankly, grotesque curiosity of the District's current status and replace it with another. You are going to create some type of half-formed citizen that can vote in the House for a non-State entity. I think it is a mistake.

It will also be the only district that does not grow with the size of its populace. It also puts you on a very slippery slope in terms of what can happen in the future. It is not that I do not trust all of the Members in this room, but we all know that mischievous times lead to mischievous acts, and a future Congress may not be as restrained as you are.

Once you cross this Rubicon, you will lay open, in my view, what was a very stable aspect of the Constitution and give it a fluid and, frankly, dangerous meaning.

Unfortunately, my time has expired, and so I thank you again for allowing me to appear to today.

[The prepared statement of Mr. Turley follows:]

PREPARED STATEMENT OF JONATHAN TURLEY

STATEMENT FOR THE RECORD
JONATHAN TURLEY
SHAPIRO PROFESSOR OF PUBLIC INTEREST LAW
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

LEGISLATIVE HEARING ON H.R. 5388,
THE "DISTRICT OF COLUMBIA FAIR AND EQUAL HOUSE VOTING RIGHTS ACT OF 2006"

SEPTEMBER 14, 2006

SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
THE UNITED STATES HOUSE OF REPRESENTATIVES

I.
INTRODUCTION

Chairman Chabot, Ranking Member Nadler, members of the Subcommittee, 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. 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. 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 believe that H.R. 5388 is the wrong means.[2] 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. 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. 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.[3]

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

[2] *See* Jonathan Turley, *Right Goal, Wrong Means*, Wash. Post, Dec. 12, 2004, at 8.

[3] While I am a former resident of Washington, I come to this debate with primarily academic and litigation perspectives. 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

I must respectfully but strongly disagree with the constitutional analysis offered to Congress by Professor Viet Dinh[4] and the Hon. Kenneth Starr.[5] Frankly, these interpretations are based on uncharacteristically liberal interpretations of the text of Article I, which clearly limits voting members in Congress to representatives of the various "states." I also believe that the concurrent awarding of an at-large congressional seat to Utah raises difficult legal questions, including 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 AND DIMINISHING NECESSITY 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 members of Congress and all citizens. Indeed, with the passage of time, there remains little necessity for a separate enclave beyond the symbolic value of

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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.

[4] 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," Nov. 2004 found at http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf. This analysis was also supported recently by the American Bar Association in a June 16, 2006 letter to Chairman James Sensenbrenner.

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

"belonging" to no individual state. To understand Article I, Section 8, one has to consider the events that led to the first call for a separate federal district.

A. The Original Purposes Behind the Establishment of a Federal Enclave.

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. Congress was forced to flee, first to Princeton, N.J., then to Annapolis and ultimately to New York City.[6]

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."[7] 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?"[8] James Iredell raised the same point in the North Carolina ratification convention when he asked "Do we not all remember

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

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

[8] 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).

that, in the year 1783, a band of soldiers went and insulted Congress?"[9] 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."[10]

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.[11] 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."[12] 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."[13] 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."[14]

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

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[9] 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).

[10] *Id.*

[11] 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.

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

[13] *Id.*

[14] *Id.*

the federal district. Indeed, Charles Pinckney wanted that District Clause to read that Congress could "fix and *permanently* establish the seat of the Government . . ."[15] 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 is 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*, 426 U.S. 167, 179 (1976), "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.'"[16] 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 real motivating purposes of the creation of the federal enclave, therefore, no longer exist. What remains is the symbolic question of having the seat of the federal government on neutral ground. It is a question that should not be dismissed as insignificant. I personally believe that the seat of

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[15] *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)).

[16] *See also Hancock v. Train*, 426 U.S. 167, 179 (1976); *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).

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 actual 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.[17] Those remain the only two clear options today, though retrocession itself can take any 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. H.R. 5388 Violates Article I of the Constitution in Awarding Voting Rights to the District of Columbia.

As noted above, I believe that the Dinh/Starr analysis is fundamentally flawed and that H.R. 5388 would violate the clear language and meaning of Article I. To evaluate the constitutionality of the legislation, it is useful to follow a classic constitutional interpretation that begins with the text, explores the original meaning of the language, and then considers the implications of the rivaling interpretations for the Constitution system. I believe that 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 components of the Madisonian democracy: the voting rules for the legislative branch.

1. *Textual Analysis.*

Any constitutional analysis necessarily begins with the text of the relevant provision or provisions. In this case, there are two such provisions. The most important textual statement relevant to this debate is found in Article I, Section 2, that

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

> 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.[18]

As with the Seventeenth Amendment election of the composition of the Senate,[19] the text clearly limits the House to the membership of representatives of the several states. 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."

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 each state 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."

The plain meaning of this section is evidenced in 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. Thus, in *Loughborough v. Blake*,[20] 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*, 733 F.2d 128, 140 (D.C. Cir. 1984): 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."

It has been argued by both Dinh and Starr that the textual clarity in referring to states is immaterial because other provisions with such

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

[19] While not directly relevant to H.R. 5388, 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."

[20] 18 U.S. (5 Wheat.) 317, 324 (1820).

references have been interpreted as nevertheless encompassing District residents. This argument is illusory. The major cases extending the meaning of states to the District 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 remains U.S. citizens, even though they are not state citizens. The creation of the federal district removed one right of citizens – 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.[21]

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. 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 that it excludes the District as a non-state.[22] 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.

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21 *O'Donoghue v. United States*, 289 U.S. 516, 540-541 (1933).

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

None of these cases means that the term "states" must now be treated as having an entirely fluid and malleable meaning. The courts merely adopted a traditional approach of interpreting these terms in a way to minimize the conflict between provisions and to reflect the clear intent between the various provisions.[23] 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 is directly related and partially 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*.[24]

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 is two parties from different jurisdictions. District residents are from a different jurisdiction and the diversity conflict is equally real.

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[23] *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.").

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

The decision in *National Mutual Ins. Co. v. Tidewater Transfer Co., Inc*,[25] is expressly relied upon in the Dinh/Starr analysis. However, the import of 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 interpreted as being at state under Article III. This point was clearly established in 1805 in *Hepburn v. Ellzey*[26] and was reaffirmed 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.[27]

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 "jurisdictions 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 that one party is a District citizen."[28] 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.

The citation of *Geofroy v. Riggs*,[29] 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

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25 337 U.S. 582 (1948)
26 6 U.S. (2 Cranch) 445 (1805).
27 *National Mutual Ins.*, 337 U.S. at 588.
28 *Id.* at 592.
29 133 U.S. 258 (1890).

was not based on the U.S. Constitution and its meaning. Rather, the Court relied on meaning commonly given this term under international law:

> 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.[30]

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 interpretation 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).[31] 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.[32] In the overseas legislation, Congress made a logical choice in treating citizens as continuing to be citizens of the last state in which they resided. This same suggested by Dinh and Charnes was used

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[30] *Id.* at 268.

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

[32] *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).

and rejected in *Attorney General of the Territory of Guam v. United States*.[33] In this case, citizens of Guam argued (as to 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."[34] 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.[35]

Given this logical and limited rationale, the Court held that "[t]he OCVRA does not evidence Congress's ability or intent to permit all voters in Guam elections to vote in presidential elections."[36]

Granting a vote in Congress is not some tinkering of "the mechanics of administering justice in our federation."[37] This would touch upon the constitutionally sacred rules of who can create laws that bind the nation.[38] 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 have the District 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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[33] 738 F.2d 1017 (9th Cir. 1984).

[34] *Id.* at 1020.

[35] *Id.* (citing H.R. Rep. No. 649, 94th Cong., 1st Sess. 7, reprinted in 1975 U.S. Code Cong. & Ad. News 2358, 2364).

[36] *Id.*

[37] *National Mutual Ins.* at 585.

[38] In the past, the District and various territories have been given 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.

2. *Original and Historical Meaning.*

Despite some suggestions to the contrary, the absence of a vote in Congress was clearly understood as a prominent characteristic of a federal district. During ratification, various leaders objected to the disenfranchisement of the citizens in the district and 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.[39] Neither this nor other such amendments offered in states like North Carolina and Pennsylvania were adopted.

This is not to say that the precise conditions of the cessation were clear. Indeed, some states passed Amendments that qualified their votes – amendments which appear to have been simply ignored. Thus, Virginia ratified the Constitution but specifically indicated that some state authority 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"[40] in the District – suggesting that, unless repealed or amended, Maryland continues to have jurisdictional claims in the District.

Whatever ambiguity existed over continuing authority of Maryland or Virginia, the disenfranchisement of citizens from votes in Congress was clearly understood. Indeed, not long after the cessation, a retrocession movement began. Members questioned the need to "keep the people in this degraded situation" and objected to subjecting of American citizens to "laws not made with their own consent." At the time of the ratification, leaders knew and openly discussed the non-voting status of the District in the clearest and strongest possible language:

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[39] 5 The papers of Alexander Hamilton 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

[40] Act of Feb. 27, 1801, ch. 15, § 1, 2 stat. 103.

> 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.[41]

This debate in 1804 leaves no question as to the original understanding of the status of the District as a non-state without representational status. 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." 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 had special status and influence as residents of the Capitol City. 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. 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."[42]

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

[42] *Id.*

Thus, during this 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. The result was that Northern Virginia was retroceded, changing the shape of the District from the original diamond shape created by George Washington.[43] The Virginia land was retroceded back to Virginia in 1846. The District residents remained as part of the federal seat of government – independent from participation or representation in any state.

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. This, however, was simply a transition period before the District became the federal enclave. It was clearly not the intention of the drafters nor indicative of the status of residents post-federalization. Rather, the exclusion of residents from voting

> was the consequence of the completion of the cessation transaction – which transformed the territory from being part of a state, whose residents were entitled to vote under Article I, to being part of 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.[44]

3. *Policy Implications.*

There are considerable risks and problems with this approach to securing a vote in Congress for the District. First, 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

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[43] 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 to developed municipalities (Georgetown and Alexandria) and to undeveloped municipalities (Hamburg – later known as Funkstown—and Carrollsburg).

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

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 a dangerous instability and uncertainty to the system. The rigidity of the interpretation of states serves to prevent legislative measures to create new forms of voting representatives or shifting voters among states.[45] 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.

Second, 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. 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.[46] The Supreme Court has repeatedly stated that the congressional authority over other federal enclaves derives from the same basic source:[47]

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[45] 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.

[46] *See* http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/GSAFullPAR_111505_Final_R2F-aAB_0Z5RDZ-i34K-pR.pdf

[47] 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."

> This brings us to the question whether Congress has power to exercise 'exclusive legislation' over these enclaves within the meaning of Art. I, s 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 come within the scope of Art. I, s 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, s 8, cl. 17, by its own weight, bars state regulation without specific congressional action.[48]

Congress could use the same claimed authority to award seats of other federal enclaves. Indeed, since these enclaves were not established with the intention of being a special non-state entity, they could claim to be free of some of these countervailing arguments. There are literally millions of people living in these areas, including Puerto Rico (with a population of roughly eight times the size of the District) and the implications for Congress would be considerable.

Third, while the issue of Senate representation is left largely untouched in the Dinh/Starr analysis,[49] there is no obvious principle that

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[48] *Paul v. United States*, 371 U.S. 245, 263-64 (1963).

[49] In a footnote, 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. The interpretation tries too hard to achieve a limiting outcome, particularly after endorsing an uncharacteristically 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

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.

Finally, H.R. 5388 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 AN AT-LARGE SEAT IN UTAH

While most of my attention has been directed at the addition of a voting seat for the District, I would like to briefly address the second seat that would be added to the House. The proposal of awarding an at-large seat to Utah is an admittedly novel question that would raise issues of first impression for the courts. However, I am highly skeptical of the legality of this approach, particularly under the "one-man, one-vote" doctrine established in *Wesberry v. Sanders*.[50]

This is a question that leads to some fairly metaphysical notions of overlapping representation and citizens with 1.4 representational status. 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*, 503 U.S. 442 (1992), the Court upheld the method of apportionment that yielded a 40% differential off of the "ideal." Thus, a good-faith effort of

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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."

[50] 376 U.S. 1 (1964).

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 H.R. 5388. 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."[51] 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."[52]

This massive size and duplicative character of the Utah district draws obvious points of challenge.[53]

First, 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.[54] 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

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[51] *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.").

[52] *See Wesberry,* 376 U.S. at 7-8.

[53] *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).

[54] *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.").

Utah and other states, this could be challenged as diluting the power of minority groups in Congress.

Second, 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. 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 characteristics.[55] 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.

Third, this approach would be used by a future majority of Congress to manipulate voting in Congress and to reduce representation for insular groups.[56] 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. Moreover, Congress could create new forms of represented districts for overseas Americans or for federal enclaves.[57] The result would be to place Congress on a slippery slope where endangered majorities tweak representational divisions for their own advantage.

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[55] *See Davis v. Bandemer*, 478 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.").

[56] At one time, at-large district existed but this practice largely ended after the Supreme Court handed down *Wesberry*. Federal law also contains barriers to such at large districts. 2 U.S.C. § 2c.

[57] 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.

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 they 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.[58]

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[58] Mark Richards, Presentation before the Arlington Historical Society, May 9, 2002 (citing Congressional Record, 1805: 979-980) (quoting Rep. James Holland of North Carolina).

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. 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 rather 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.[59]

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.

However, 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

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[59] 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).

tax or governing zone until incorporation is completed. Indeed, Maryland may chose 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, it could also benefit from incorporation into Maryland's respected educational system and other statewide programs related to prisons and other public needs.

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.[60]

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 preferrred.[61] Another approach would be to leave the amendment as constructively repealed. Most presidents vote in their home states. A

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[60] U.S. Const. amend. XXIII.

[61] Frankly, 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.

federal law 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."[62] The only concern is that a future majority could do mischief by directing an appointment when electoral votes are close.

VI.
CONCLUSION

In closing, I wish to commend this Subcommittee for agreeing to hear from both advocates and opponents to this bill. Regardless of what proposal is adopted, I strongly encourage you not to move forward with H.R. 5388. It is an approach that achieves less representation than is deserved for the District by means that asserts more power than is held by the Congress. Moreover, the outcome of this legislation, even if sustained on appeal, would not be cause for celebration. Indeed, H.R. 5388 would replace one grotesque constitutional curiosity in the current status of the District with another new curiosity. The creation a single vote in the House (with no representation in the Senate) would form 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 these considerable energies 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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[62] *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).

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Mr. CHABOT. Thank you very much, Professor.

We will now move to the questioning portion by the panel up here, and the Chair will yield himself 5 minutes for that purpose.

And I will begin with you, Professor, if I can. Would you please elaborate on the alternative proposal for representation for D.C. that you have referred to and why you feel that it would be superior to H.R. 5388?

Mr. TURLEY. Well, thank you, sir.

There has always been a statement from the original act of ceding the land from framers and from courts that the District had two options available to it, Statehood or retrocession, and that appears regularly in history behind these provisions.

In my view, retrocession is the most obvious way of dealing with this, and I also do not believe that it is such a horrible option. What I have suggested in the proposal I have laid out in the testimony is to restrict the District to the actual seat of Government, extending from Capitol Hill down to the Lincoln Memorial. The remainder would be retroceded to Maryland.

But I have suggested a three-phase process in which the political retrocession would occur immediately, so that the District would immediately be able to vote with Maryland.

You would then establish a commission, probably a three-person commission, much like the one that assisted George Washington, for the next two stages.

The second phase would be to incorporate those aspects of law enforcement and public services that are necessary into Maryland. And the third stage would be the incorporation of any tax and revenue issues.

When we have looked at this in my office, it does not seem insurmountable. And, indeed, Maryland could grant the District special status. It has that authority. It can grant the District special tax status.

So the District can remain unique. But there remains this conceptual problem with replacing that D.C. with an MD, and that is, frankly, what we are dealing with here.

But I don't believe that symbolic barrier is enough to take this more risky course, because I believe if you take this course, it will be challenged and the District will not be able to gain from reform. It will be frozen in political amber until this is resolved, and I believe it could very well be struck down.

Mr. CHABOT. Thank you very much, Professor.

Dr. Fortier, I would like to turn to you, if I can. In your written testimony, you set forth a number of alternative proposals for achieving representation, also, for the District of Columbia. If you were a Member of Congress, which of the proposals set forth would you champion, and why?

Mr. FORTIER. Well, the three proposals are to adopt the District as a State, to have some sort of retrocession, like Professor Turley mentioned, or to amend the Constitution. They all have variations in how you would do it. So I guess there are pluses and minuses.

I do think the retrocession has the advantage of politically balancing the concerns that would come up better than the others in that the State of Maryland would still have two Senators, it would not change the balance in the Senate, and it would also, I suppose,

not so quickly change the balance in the House, with a district that would have to be part of the District and part of Maryland.

I think all of these are possibilities. They are all difficult. They are difficult to achieve. A constitutional amendment would be the cleanest one. The constitutional amendment would eliminate many of the problems with the other areas.

I think Professor Turley, I am not sure how he would deal with this, but one of the difficulties with retrocession is what is left of the District, this small part of the District. We have the 23rd Amendment; the 23rd Amendment gives the District the right to vote in presidential elections. Some scholars have suggested that the President of the United States and the First Lady would be the two voters in that district and then get three votes in the Electoral College.

Mr. TURLEY. And the twins.

Mr. FORTIER. Those who lived at home, maybe the headmaster of the page dorms. You have a small number of people who live in the very small area.

But I think these are technical questions that could be dealt with. I think we could not have a District. I think there are reasons for it, but I think that we could give up the idea of having the District.

While I think it is symbolically beneficial to have the seat of Government or the small area that Professor Turley would recommend, I think it is not necessary to have that. If either the District became a State or if it were given back to Maryland, we could sort of abolish the smaller part.

Mr. CHABOT. Thank you. I have only got about 20 seconds left, so rather than ask another question, which wouldn't really have time to be answered, just let me explain what is going on, the bells and everything.

We have a series of votes on the floor of the House now. There is going to be, we believe, three votes. The first one is a 15-minute vote, then two 5-minute votes after that. So it will be approximately a half-hour.

Now, Mr. Nadler has indicated that he will, unfortunately, be unable to come back, but what he is going to do is yield his time to Ms. Eleanor Holmes Norton, so she will have that 5 minutes in order to ask questions in his place.

So we will, at this time, be in recess. We will be back in approximately a half-hour. And I would encourage all Members to come back immediately after the third vote, if it all possible.

We are in recess.

[Recess.]

Mr. CHABOT. The Committee will come back to order. Take a seat, please.

I have been informed that Governor Huntsman and Professor Turley have to catch a 4:15 flight, both back to Utah. So I know your time is somewhat limited at this point.

So I assume that all the witnesses would be agreeable to taking written questions, if all Members haven't had time to ask.

All four witnesses have indicated in the affirmative.

Mr. Scott, you are recognized for 5 minutes.

Mr. SCOTT. Thank you. Thank you, Mr. Chairman.

Mr. Chairman, I just have a couple of concerns. First of all, when you have the Capital without voting representation, that makes no more sense than Richmond, Virginia, not having representation in the Virginia General Assembly. So I would hope that we can fix this glitch as soon as possible. We have a number of concerns.

And since the gentlelady from Washington, D.C., is here, I would like to yield her the balance of my time, so that she can begin questions.

Mr. CHABOT. The gentleman yields to the gentlelady from Washington, D.C. The gentlelady is recognized.

Ms. NORTON. The gentleman from Virginia is very kind.

I do want the Governor, before he leaves—I understand Mr. Charnes has agreed to stay. I think it is important for us to be able to have an exchange on this constitutional questions.

But I do want to ask the Governor a question. A central feature of assuring what has always been the case whenever Congress has considered adding seats, which is that there be no advantage to one party or another, in order to follow that pattern that has taken us through the Civil War, free States, slave States, a pattern that has always been here.

Chairman Davis and I have spent four hard years to, in fact, achieve absolute and total parity. We were informed yesterday for the first time that there may be an amendment that would take the basis for that bipartisanship away, it is one of the bases, but it was an important basis, by taking away the at-large seat. We, of course, have thoroughly vetted that.

My question goes to your role as Governor. You have testified, without any prompting from us, we got this testimony just yesterday, where you testified that you understood that the seat would be on an at-large basis until 2012 and that you considered it—and here I am going to quote you, Governor—"a significant benefit, because redistricting, which is always a difficult, time-consuming and politically costly process, would be especially undesirable at this point in time, less than 4 years before the next decennial census."

Could I ask you to tell us something about the redistricting process in Utah? If you could take us through what it would take. Understand, for the benefit of my colleagues on the panel, you go back after these 4 years to four seats, if you got the fourth seat.

Governor?

Governor HUNTSMAN. Thank you very much for the question.

And I appreciate your earlier comments about this being truly a bipartisan undertaking. And I thought Representative Conyers described it quite well during his remarks, in terms of the construct of the room in which we find ourselves today and the many people who are interested in seeing this happen, both for the District and for the State of Utah.

As I mentioned in my testimony, the at-large status is something that would be my preference, but I must tell you that I am the chief executive of a State that is growing very, very quickly and experiencing enormous change. So, therefore, I am here to argue that which is in the best interest of the people of Utah, and that is getting an extra seat for people today who are underrepresented in this body.

Ms. NORTON. Just to intervene for a second. Neither Utah nor the District would get a seat if we do not have a bipartisan——

Governor HUNTSMAN. That is correct. Thank you for that, and I am glad that we are having this conversation, because we remind each other of that which one might forget.

Just to get to your specific question, we have maps that are left over from the last decennial census of 2000, done, I think, 2001. I believe that there is one that even reflects a fourth district.

And I think it would be important to look at that option, if, in fact, the requirement for getting a fourth district was that we had a district in place sooner rather than later, instead of waiting until 2010 for the decennial numbers and then 2012 for the election.

Ms. NORTON. And then redistricting would occur or not occur?

Governor HUNTSMAN. The redistricting might occur. And I am here not to speak for my legislature, but rather those things that I think are in the best interest of our State—that is, getting a fourth district and moving quickly and fairly and objectively toward the creation of a fourth seat, even if we had to do it soon. And that would be convening a commission on redistricting, like the one that met in 2001, to, once again, create a new district.

So one of two things: We could look at the old district that was created in 2001 for the fourth seat that never occurred. Or we could fairly rapidly convene another meeting of this commission in short order and, based upon the principles of fairness and objectivity, create a new fourth district.

That would be my hope. Again, I can't speak for the legislature, but I can give you my word that that is what I would hope for.

Ms. NORTON. When that fourth district was created, was it as it is in many States, agreement by Democrats and Republicans for the way in which the districts were allocated? Did the Democrats, in other words, support——

Mr. CHABOT. The time has expired, but the Governor can answer briefly the question.

Governor HUNTSMAN. It was a group made up of the legislature, representing the distribution politically of the Members.

Ms. NORTON. Did it have bipartisan support?

Governor HUNTSMAN. It was a bipartisan group that created the district.

Ms. NORTON. Was there a vote on it?

Governor HUNTSMAN. I believe that with the legislature being involved, that there was a vote, although I wasn't there at the time, so I can't speak definitively to that point.

Mr. CHABOT. The time has expired.

The gentleman from Michigan, the Ranking Member, Mr. Conyers, is recognized.

Mr. CONYERS. Thank you, Mr. Chairman.

Witnesses, I have never been so eager to come to a hearing and so disappointed to hear what at least half of you had to say about the subject matter. This has not been a good afternoon for me.

Let me just ask Mr. Fortier. Am I correct that you have no objection to an at-large seat? You have no constitutional objection?

Mr. FORTIER. No, I have no constitutional objection. The Congress would mandate that all States have at-large seats, as they now mandate that they have single-Member districts and they can

make exceptions to that. So it would also be a relatively temporary matter, so no objection.

Mr. CONYERS. Well, I feel just a little bit better, turning the dial.

But, Mr. Charnes, what do you make of this afternoon? How do you make people like me, who walked in here in a totally positive mood, begin to say, "Wait a minute, what is going on here?"

Now, we know that there will be constitutional objections. We know that there will be lawsuits. We know all that. But how can we get this thing back on track and let's start moving down the road?

Mr. CHARNES. Well, I think that these are difficult constitutional questions, but the courts—in some areas of the structural Constitution, the Supreme Court is very formalistic. In other areas, the Court has approached things more flexibly.

And I think with respect to interpretation of the word "state" in various parts of the Constitution, as is laid out in my written testimony, the courts have been much more flexible. So I think that I am comfortable that there is a very good chance, and I think it is likely that the courts would uphold the treatment of the District as a district for the purposes of representation in the House of Representatives.

And as you say, there is likely to be litigation, but there is litigation about a lot of things the Congress does. And that is sort of taking that in stride as part of the business of Congress. I don't see any undue risk here that should give the Subcommittee pause in moving forward.

Mr. CONYERS. Well, I don't think so either, but that is my complaint. I mean, for goodness' sakes, I guess we could have another hearing and pull together another set of witnesses.

We have all practiced law or been lawyers or assumed to be constitutional experts. We have got to solve a historical, two-century problem. And the Governor comes out here all the way, and we are sitting around saying, "I am sorry, guys, I know you want to do the right thing, but it is just insuperable, it can't be done. It won't work."

Well, look, I am the most senior Member on this Committee, and I can tell you that we can find ways. That is our job, to find ways to make it work. That is what we are here for.

And those of the people to whom I have to affix my attention at this moment in time, because I don't want this hearing to go down as one that they started off, everybody agreed what ought to happen, and then they realized that this can't happen, "There is no way, Congressman. We love your intentions. We know your heart is in the right place, but." Well, I am one Member that cannot accept that. And I guess I am going to have to go back to my deep list of constitutional expertise and find ways to overcome it.

Do you have any way of making me feel better, Governor, since you have come the furthest?

Governor HUNTSMAN. I will be very short and to the point, Representative Conyers, because there is a plane waiting. I want it to be understood that this Governor is leaving this hearing room with a desire for real flexibility in terms of how we proceed as a State, so that the District is successful.

We have all heard the arguments why the District should be successful—I think most in this room agree—and so that Utah is successful, as well. I don't want it thought that we are going to be obstructionists. We are going to work with you and remain flexible in the days to come, so that we can get this done.

And if it is any consolation, I just came in late last night, and I sense a real can-do attitude on the part of people who are in this room and beyond, along with the bipartisan group that has been put together in this Committee. And for me, Representative Conyers, that would give me a great sense of hope.

Mr. CHABOT. The gentleman's time has expired.

Mr. CONYERS. That is wonderful. And I am so glad that you were able to join the panel today, and we will be looking forward to continuing working with you.

Mr. CHABOT. Thank you. The gentleman's time has expired.

The Chair would note that we are going to go into a second round, but we will—if Members would like to talk for longer in the first, we can do that. But I want to accommodate the sponsor of the bill, Mr. Davis, so he has a chance to ask some questions.

So I am going to recognize myself, and I am yielding my 5 minutes.

Mr. DAVIS. Thank you.

Governor, let me just ask you this question. As you know, our bill reported out an at-large. We think this works very well. That is the preferred mode.

If somehow redistricting were put back in the lap of Utah, are you telling me that you would work to make sure that incumbent Members were involved and there would be no effort to gerrymander anyone's partisan advantage?

Governor HUNTSMAN. Fair and objective, that would be our approach.

Mr. DAVIS. And you would work with the delegation, as well——

Governor HUNTSMAN. Yes, sir.

Mr. DAVIS. —to make sure they were included in those discussions?

I think that is important, should this go a direction that we don't want it to go, and I just wanted to get that on the record. Thank you.

Let me ask if anyone up here can give me an example where a Federal court has limited the authority of Congress under the District Clause.

Mr. TURLEY. Well, not in the sense of striking down the law, but starting in 1805, with *Hepburn,* the court made clear where the Congress could not go, and the Congress did not go there. The court made clear in 1805 that this was created to be a non-State entity. And the court has repeatedly referred to the non-voting status of the District. So Congress hasn't really pushed that envelope in the past.

Mr. DAVIS. But there is no specific incident where Congress has acceded that and where the court has struck it down?

Mr. TURLEY. Not until now, no.

Mr. CHARNES. But, in fact, I think there are examples where Congress has regulated, for example, in the Commerce Clause. The Commerce Clause gives Congress authority to regulate commerce

among the several States. And Congress has exercised that authority with respect to commerce across the district lines, and the court has upheld that.

So I think there is authority to the contrary, as well.

Mr. DAVIS. And there is a State Clause in the Constitution, right? So that is why they are interpreting constitutional terms.

Mr. TURLEY. That is right.

Mr. DAVIS. Let me ask you. Everyone here believes the city should get a vote in Congress, is that fair to say? We are just disagreeing as to the means. Is that a fair comment?

Mr. TURLEY. It is for me.

Mr. DAVIS. I would just note that all four witnesses indicated in the affirmative.

And let me ask, one of the difficulties of retrocession—because we looked at this, it is an easy solution, but you are still stuck, as Chairman Chabot pointed out, with three electoral votes for whatever is left, whether it is the page dormitory, whether it is the White House, and it would take a constitutional amendment to change that.

There is no other way around that, is there?

Mr. TURLEY. I actually, in my testimony, deal with that and suggest that, indeed, there are.

There is no question it would create another anomaly, but in my view, if you are not willing to repeal the amendment, then you can constructively repeal it.

For example, under the proposal I suggested of creating that very small District of Columbia, just the seat of Government, the only residents it would contain would be the White House, which could be dealt with legislatively.

But the amendment refers to Congress saying how the electoral votes will be established. And so Congress can simply not do that. It can go dormant, and I think that is achievable. There are other dormant aspects.

Mr. DAVIS. But a lot of court cases have talked about ability of homeless people to move in and be registered and everything else. So it does open a can of worms.

Mr. TURLEY. Well, actually, Congress can establish that there will be no residents, and, in fact, there cannot be. If you look at my proposal, it would just be actual Federal buildings. Homeless people cannot live in Federal buildings. It is already Federal jurisdictional land. So I think that you actually could force it into a dormancy even without a repeal.

Mr. FORTIER. One could also simply not have a seat of Government. As much as there were original reasons for it, the retrocession could go back to Maryland. There could be no seat of Government.

The 23rd Amendment would exist, saying that the District would get these votes, but there would be no District, essentially. So I think that would work.

Mr. DAVIS. In *Federalist Paper 43,* James Madison specifically states about the District, "The state will no doubt provide in the compact for the rights and the consent of the citizens inhabiting the Federal district."

So the Government would provide for the compact for the rights and the consent of the citizens in having a Federal district. That doesn't sound to me like Madison thought the resident of a Federal district should have no Federal representation.

And, in fact, when it was originally created, from 1790 to 1800, they were citizens among the several States, and they did vote. They voted with Maryland, and they voted with Virginia.

Why wouldn't Congress have that same authority to change it?

Mr. TURLEY. Actually, I believe what Madison was saying is that when the land was ceded, there would be a negotiation with the affected States.

In fact, Alexander Hamilton anticipated this, to put in a provision that said that the District residents could ultimately get a vote. But if you look at the Constitutional Convention, the ratification convention, it is perfectly clear in there that the understanding was they would not have a vote once the land was formally ceded.

I think what Madison was saying is that the States themselves could negotiate this point as part of it. But repeatedly, as you see in my testimony, you have people that objected strenuously to the creation of this non-State entity without a vote in Congress.

Mr. DAVIS. But there was no specific understanding that Congress couldn't revisit this later, was there?

Mr. CHABOT. The gentleman's time has expired, but you can respond to the question.

Mr. DAVIS. Any of you?

Mr. TURLEY. In terms of that they could return to it, the answer is yes, in one sense, because there was an effort to put the word "permanently" into the District Clause. That would have essentially forced the borders to remain rigid, and that was removed to give the Congress the ability.

But I would suggest that that gave them the ability to relocate the Capital. That was the main concern. But it also gave them the ability to retrocede.

Mr. CHABOT. The gentleman's time has expired.

The gentleman from North Carolina, Mr. Watt, is recognized.

Mr. WATT. Thank you, Mr. Chairman.

It looks like the Governor left, and that keeps me from being tempted to pick a fight with him. The fight was between Utah and North Carolina about this extra seat. [Laughter.]

So I definitely wanted to go back at him about some of those things. So it is probably a good thing.

Mr. CHABOT. Would the gentleman yield for a moment?

Mr. WATT. That would be a side issue.

Yes, sir.

Mr. CHABOT. Yes, we did already get their okay to give them written questions. So you can make those questions as scathing as you would like. [Laughter.]

Mr. WATT. Actually, I think it is an irrelevancy at this point, if Utah was next, which we concede. We don't concede it should have been in front of North Carolina, but we do concede that it would have been the next in line after North Carolina, and I believe in representation.

So it doesn't hurt my feelings for Utah to get another Representative in Congress, just like it doesn't hurt my feelings for the Dis-

trict of Columbia to get representation in Congress, because I think that is what our democracy is about.

Now, I understand Mr. Turley is leaving soon, too, and there are people here who—I am still studying this issue, but there are people who have a lot more knowledge about it, so I am going to yield.

How much time do I have?

Mr. CHABOT. You have got 3 minutes and 40 seconds left.

Mr. WATT. But you all passed over me in the first round, even though——

Mr. CHABOT. Plus you get another 5 minutes.

Mr. WATT. Okay, so I will yield as much time, 6 minutes maybe—3 minutes to the gentlelady from the District and maybe the rest of my time to the gentlelady from Texas, who is not on the Subcommittee.

Mr. CHABOT. The gentleman yields.

Ms. NORTON. Thank the gentleman for yielding.

I hope Mr. Turley won't leave before I have a question for him, but I must ask this question first, because we learned yesterday, indirectly, that there may be an amendment that wipes away the at-large agreement that Republicans and Democrats have worked to achieve and that the basis for that amendment is that the people of Utah would have two votes.

And I would like you to comment on the notion that somehow Utah—Utah, with an at-large Member, you get two votes and your vote is somehow expanded rather than diminished.

Mr. TURLEY. I would be happy to.

Ms. NORTON. I want all of you all to, but I certainly would like you to.

Mr. TURLEY. The Utah portion of the bill is actually, in my view, a closer question, a very, very difficult one. And, as you know—you are an accomplished former academic and constitutional expert—I think you can recognize that this is an issue that has not gone before the Supreme Court.

In the Supreme Court language, when it comes to one person, one vote, has always been pretty ambiguous. Now, in favor of what you are doing, quite frankly, the Supreme Court has accepted that there could be a 40 percent differential from a perfect district under one person, one vote. And I think that helps, because there is language there to say that they are not going to require the impossible of you.

The concern I have about this, though, is that this is something we have never seen before. This district would be about 250 times the size of that perfect district mean, and in terms of population it would be about 2.2 million as opposed to about 640,000.

But the other problem is that the court has said that they want to make sure that there is not a preferred class of voters, and, indeed, these voters would have two Representatives in Congress.

Then my final concern is that people in Utah could object, because if they were to get their own district, it is very likely that Member would be different. For example, if this fourth district was coming out of Salt Lake City, my guess is that they would have a different type of Member representing different interests than an at-large seat.

And so, all those issues go into the mix, and what it leaves me with, quite frankly, is great skepticism.

Ms. NORTON. Skepticism.

Mr. Charnes, would you respond to that?

Mr. CHARNES. Sure. I think there is very little precedent on this point. The fact of the matter is the Supreme Court has not talked about State-by-State comparisons and one person, one vote. They have looked at districts within a State and have struck down some districts that are malapportioned.

But here, I think there is very little precedent. As a practical matter, there are several States that only have one Representative, and the ratios will never work for those States, because you can't adjust those. You can't have a fraction of a Congressperson.

So I don't think there is a sufficient precedent for the Subcommittee or the Congress to be terribly concerned about the at-large seat. There is great historical precedent for at-large seats.

The first 50 years or so after the founding, there was almost a presumption that States would be represented with at-large Members of the House. Of course, there is no precedent for having a combination of the two, but as Dr. Fortier has mentioned, this is a transitional thing that will just be present for a few years.

It is reasonable and Congress, under the Constitution, actually, has pretty broad authority to intervene in State districting matters under article I, section 4.

Mr. CHABOT. The gentlelady's time has expired.

The gentleman had given the rest of his time, I believe, to Ms. Jackson Lee.

Is that correct, Mr. Watt?

Mr. WATT. Yes.

Mr. CHABOT. We want to thank Professor Turley for his tremendous testimony this afternoon.

Mr. WATT. Before the professor leaves, could I just clarify one thing? There is nothing constitutional about single-Member congressional districts. That is statutory, isn't that right?

Mr. TURLEY. The constitutional problem comes in the one person, one vote aspect, yes.

Mr. WATT. So, theoretically, we could make a multi-Member district statewide, two Members, for this transition period, if this got cumbersome.

Mr. TURLEY. I am not too sure I would subscribe to that. I would have to look at it.

Mr. WATT. But there is certainly nothing in the Constitution. There is a statute that requires single-Member districts at the congressional level. It is statutory; it is not constitutional.

In fact, I introduced a bill several years ago to give that discretion back to the States to terminate the statutory provision. So if we terminated that statutory provision, you could create a multi-Member district for Utah.

Mr. TURLEY. I would have to look at that, but the gravitational pull on that question is the Equal Protection Clause, and I am not too sure I would subscribe to it, but I would have to look at it.

Thank you again for allowing me to appear.

Mr. CHABOT. Thank you very much, Professor.

Mr. WATT. I will get to you on the next round. I think you have probably a different opinion, maybe.

Ms. NORTON. Mr. Turley, could you possibly stay for a moment?

Mr. TURLEY. As long as you can order Delta not to——

Mr. WATT. We are on my second round. You all don't squander my time now.

Mr. TURLEY. I am afraid I have got a flight to Utah.

Ms. NORTON. Mr. Turley, I have been yielded time just for this question, because your testimony said that Congress understood, as a defining element of the Federal district, that there would be no vote for the people who lived here, and you said, in return, they somehow get to live here and they ought to be grateful for it.

In Mr. Charnes's testimony, he seems to find a different intent and a different power that—and, here, I am going now to Mr. Charnes's testimony.

In effect, what you are saying is that Maryland and Virginia, in ceding land, understood that they would, in fact—the citizens, their citizens might lose the vote they had.

Congress, in fact, passed legislation, according to Mr. Charnes, and then the States passed legislation guaranteeing that those voters in Maryland and Virginia would still have the vote.

Do you really concede that the State of Virginia and the State of Maryland would have ceded land to the District of Columbia if they felt their residents would, as soon as it became the Nation's Capital, lose their voting representation in Congress?

Mr. TURLEY. I do, in the sense that, if you look at my testimony, you will see repeated statements by individuals at that time objecting to the status. In fact, right after the land was——

Ms. NORTON. You know they didn't have to do it, that they were not compelled to cede the land.

Mr. TURLEY. But right after they ceded the land, a retrocession movement began in Virginia, and, in fact, the issue of non-voting was the most recurrent theme there. People were objecting that this was despotism, that this was wrong.

In fact, the debate that occurred back in the early 1800's is the exact same debate we are having now. And I happen to just disagree with my learned colleague, because I don't see how you read those debates, particularly when people are trying to suggest amendments that would allow the residents to vote and those amendments are not being taken up.

And so this was an issue that was not just passed over. It was debated and rejected.

But I have to beg your forgiveness. If I miss this flight, I will turn into a pumpkin.

Mr. WATT. I am going to reclaim my time for the purpose of allowing you to go.

Mr. TURLEY. Thank you very much.

Ms. NORTON. Mr. Charnes, would you respond?

Mr. WATT. Wait a minute. I have got to yield to Ms. Jackson Lee, because I am going to run out of time.

Ms. JACKSON LEE. Let me go quickly, so my colleague can continue. Thank you.

In the absence of the Governor, in the absence of Mr. Turley, let me, frankly, be very succinct in where I am going.

I think Professor Turley was grounded on constitutional history and premise and the original desires of the Founding Fathers.

Mr. CHABOT. The gentlelady's time has expired. I am going to ask unanimous consent that the gentlelady be given 1 minute to at least make a statement.

Ms. JACKSON LEE. In any event, the idea is that there is a necessity for one vote, one person. The District of Columbia does not have that. That is a crisis, a constitutional crisis in and of itself.

My question to you: Congress can do what it wants to do, is that not correct? Mr. Charnes, Congress can craft this legislation. Obviously, it may be subjected to constitutional muster, but they can write this legislation as a compromise and pass it, is that not correct?

Mr. CHARNES. That is correct.

Ms. JACKSON LEE. It would not be subject to constitutional question in the midst of Congress's work.

And my last point is, then, my last point is, if there was the question of where you put the District of Columbia, we know, with no disrespect to Virginia, the referendum would not pass for it to go to Virginia. The referendum would not pass for it to go to Maryland. So, in essence, you box the District of Columbia in.

There is no value to saying, "Don't do anything," because then you, again, ignore the rights of people to have one vote, one person. Is that not fairly—I mean, I know you can't predict political votes, but there is no value to talking about inclusion into another State. I don't see the constitutional vision for inclusion in other States.

There is a constitutional provision for making another State. Is that not correct?

Mr. CHABOT. The gentlelady's time has expired.

Ms. JACKSON LEE. Can he just answer that?

Mr. CHABOT. Yes, the witness can respond.

Mr. CHARNES. Well, I think that is right. I think the point you are getting to is you have got some alternatives that are very speculative that present varying degrees of political problems that suggest that they may never happen.

And there is a proposal here on the table that seems a perfect storm, in a good sense. It has partisan balance. It rights historical wrongs. And it would seem a shame to pass up some benefit for residents of D.C. in order—sort of, almost letting the perfect be the enemy of the good.

Mr. CHABOT. The gentlelady's time has expired.

Ms. JACKSON LEE. I am willing to take my chances. Thank you.

Mr. CHABOT. The gentleman from Arizona is recognized for 5 minutes.

Mr. FRANKS. Thank you, Mr. Chairman. I just had a thought. If every voting mechanism in this country is one person, one vote, then, of necessity, we have to abolish the U.S. Senate—which may be a really great idea, I am not sure.

With that, I would like to yield my time to Mr. Cannon.

Mr. CANNON. I thank the gentleman from Arizona.

Mr. Charnes, in the testimony of both Mr. Turley and Mr. Fortier, they explicitly referenced the potential problems of giving D.C. a vote because of article I, section 2, referring to the people of the several States.

Can you talk a little bit about the District Clause, how it works in conjunction with this section, and why it is not in contravention of that?

Mr. CHARNES. Sure. Well, the courts have uniformly explained that the District Clause gives Congress extraordinary authority legislating for the District. When Congress acts under its other authority, it is constrained by principles of federalism.

And, likewise, when the States legislate, they are constrained not only by federalism principles, but various specific constitutional restrictions. The Commerce Clause I have referred to restricts what they can do, the Equal Protection Clause and so forth.

The Congress, when it legislates for the District, basically has none of those constraints. And I think that it is that power that allows the Congress to conclude or to provide that the District of Columbia be treated as a district for purposes of representation in the House.

If article I, section 2, clause 1 were perfectly clear, the Framers said it explicitly, "D.C. residents shall not have a vote in the House, period," the District Clause, obviously, could not override that.

But it doesn't say that. And, as I indicated before, the courts have not interpreted the phrase "states" so categorically to exclude Congress's authority under the District Clause.

Mr. CANNON. I think diversity of jurisdiction is another example of that. We deal with diversity of jurisdiction in the District, do we not?

Mr. CHARNES. That is right. There are a number of examples. The Diversity Clause, Commerce Clause, article I, section 2, clause 3 refers to apportionment of taxes among the States, and the Supreme Court has said that that includes the District of Columbia.

The sixth amendment, the right to a jury trial, refers to the partial jury of the State and district where the defendant lives, and the courts have said that that includes the District of Columbia.

So there hasn't been sort of a categorical rigid interpretation of "state" in various provisions of the Constitution.

Mr. CANNON. One of the more technical questions, for either of you, if you feel comfortable: If this legislation passes, Utah is the State that is likely to get the new seat. If that is certified based upon the last census, is redistricting done based upon the last census or upon the statistical updates to the last census or is that a choice by the State legislature?

Mr. FORTIER. I believe it is done on the last census numbers. We have the example in Texas and we also have numbers of court-ordered mid-decade redistricting, where it relies on the initial last census numbers.

Mr. CANNON. Let me suggest that Utah has grown very rapidly in the last 6 years. My district has had most of that growth, just as an aside.

And if the legislature chose to use statistical updates for redistricting, what effect would that have, do you think?

Mr. FORTIER. I mean, certainly, it would change the shapes of the districts and change what one could do.

I guess the question is, do you rely on numbers that are officially sanctioned by the census, which is the baseline for what we tend to use, or do we feel comfortable with updating lines?

I am not sure that the courts would absolutely forbid that, but my sense is that the census numbers are the most legally binding in that regard and you would have to——

Mr. CANNON. Clearly, as of a point in time, they represent an enumeration. But all you have to do is drive around on new roads, new streets, and see new houses.

Mr. FORTIER. But that happens to almost—many States, as we get closer to the end of the district, the districts are of varying sizes. And there has to be some sort of line drawing as to 10 years, "Why 10 years, not 5 years?"

Mr. CANNON. I guess the real question is, if somebody sues, how do the courts rule on that?

Mr. FORTIER. I believe that they would require the use of the old census numbers.

Mr. CANNON. Mr. Charnes, do you have a different view?

Mr. CHARNES. No, I actually don't have an opinion about that. But Congress has great authority under article I, section 4 to intervene and to direct Utah how to create an at-large seat or how to draw the——

Mr. CANNON. So you believe the at-large seat is okay.

Mr. CHARNES. Yes.

Mr. CANNON. So in the contingency that the at-large seat does not happen—obviously, I am a supporter of the at-large seat, but if that happens, does the State legislature have latitude to use real numbers versus way out-of-whack numbers?

Mr. CHABOT. The gentleman's time has expired, but you can answer the question.

Mr. CHARNES. That is a very good question. It is sort of a little bit beyond my area of competence.

Mr. CANNON. I would just like to say, Mr. Chairman, that Mr. Turley pointed out that he was going to Utah. I think this is a coincidence. He is certainly not in the pay of the State, as evidenced by his testimony.

Mr. CHABOT. Duly noted. The gentleman's time has expired.

I would just make one point. Mr. Nadler had 5 minutes, and we had indicated that would allow him to yield that to Ms. Norton. So you are welcome to take that 5 minutes, if you would like to do that.

Ms. NORTON. Thank you very much, Mr. Chairman.

We have heard two extraordinary propositions here: that the Framers intended to disenfranchise U.S. citizens, people who created this democratic public—that was Mr. Turley's testimony; and, secondly, that Maryland and Virginia ceded land without getting assurances that their people would not be permanently disenfranchised.

I think in your testimony, Mr. Charnes, you describe how each of them passed their bills. They didn't have to cede a thing.

Mr. CHARNES. That is right.

Ms. NORTON. Talk about States' rights, this is the early Constitution, where States' rights were all—then the Congress passed legis-

lation recognizing the right of Maryland and Virginia residents to vote.

My question goes to when the Congress assumed full control. You said the United States firmly assumed full control of the District. Congress, by omission, withdrew the grant.

There was no affirmative act of the Congress of the United States withdrawing the vote from these citizens of Maryland and Virginia. Did it simply lapse through inaction, not through any affirmative action indicating the intention of the first Congress?

Mr. CHARNES. I think that is absolutely right, Congresswoman. And I think that there was certainly debate and proposed amendments to fix the problem, but that all happened, I believe, after 1800.

But I think the historical evidence suggests that no one really thought about this issue until the problem was presented in 1800, and then there were proposals and there was debate. And they, unfortunately, the proposed amendments, never went anywhere.

But I think that reviewing the history suggests that no one really recognized the problem that would be created by the establishment of a district from land that was ceded by the States.

Ms. NORTON. It is very important, when we talk about the intent of the Framers and the intent of the good of the first Congress, because, to understand originalism, we look to those Framers, those first people, who wrote the Constitution.

Another question, the-sky-is-falling notion from Mr. Turley, that once you use the at-large, and quoting from his testimony, "Congress, by a future majority, could manipulate voting in Congress and reduce representation for insular groups."

He suggests that once an at-large remedy is granted for 4 years, temporarily, Utah going back to four seats thereafter, what we can expect is Congress will reduce the rights of others not in the same position.

I wish you would respond to that.

Mr. CHARNES. Sure. Well, Congress, in exercising its authority under article I, section 4, is bound, for example, by the Equal Protection Clause. So Congress could not pass a bill with the intent and effect of disenfranchising racial minorities and so forth.

And I think the slippery-slope argument is one that you hear often, but I don't think there is any evidence here that—there is no reason a court could not say that this transitional effort of giving an at-large seat to Utah was reasonable under the circumstances and commensurate with Congress's authority under article I, when other efforts that were plainly meant at disenfranchising people and had an adverse effect on their voting rights would fall outside Congress's authority.

It strikes me that that is a somewhat speculative hypothetical. It is important to legislate understanding the slippery slope, but it is also important not to be paralyzed by slippery slopes.

Mr. FORTIER. Can I add that we have many cases of temporary things happening in the middle of the districts, States coming into the union, court cases where there have been temporary solutions, as well.

The case where, early on, we had many, many multi-Member districts, we had—I think to answer Mr. Watt's question, we also had

some mixed districts. Maryland, I think, actually had districts for the Electoral College, where western Maryland had a few, and it was different in the rest of the State.

So I think there is a lot of flexibility and the mid-district question we deal with all the time because of States having come in. And this will disappear in 4 years if that is what comes out of it.

Ms. NORTON. I would finally like to clear up the reputation of the Framers, this notion that they intended, as the price of living in the District of Columbia, that people would give up their voting representation in Congress, notwithstanding the efforts that were taken.

I would like you to discuss the quid pro quo notion, especially in light of the concern that we all learned about of the local jurisdiction having control over the seat of Government.

Now, which was their concern, and was there any discussion of any kind that what you should be glad of is somehow you are living in the District of Columbia? Living there gives you some power that others have through congressional representation, and that is the price you are going to pay?

Mr. CHABOT. The gentlelady's time has expired, but the witness or witnesses are free to answer the question.

Mr. CHARNES. I am not aware of any discussion along those lines, quid pro quo, and, therefore, the people who lived in the District should be glad to give up their voting rights in order for the privilege of living in the District.

In fact, it has been alluded to, it was Madison that expressly said that Maryland and Virginia, the ceding States, would protect their own residents that they were losing through—before ceding the land, would ensure that their residents were taken care of.

Of course, that apparently didn't happen, but I don't think there is any evidence before the cessions that there was sort of a quid pro quo along the lines you are talking about.

Mr. CHABOT. Mr. Fortier, anything?

All time has expired. I want to thank the panel here, both those present and those that had to leave to catch flights, for their testimony this afternoon.

I want to thank all the panel members who attended here this afternoon, both those on the Committee and those not. All the folks in the audience who came who have a particular interest in this issue.

It is a very important issue. This is part of the process going through, and it is impossible to say at this point in time whether this change will occur or not. We will, obviously, confer with our colleagues about this.

The record here is open and available to all Members of Congress, both on this Committee and those not on the Committee. And so, this is an important part of the process in deciding whether this change will be made ultimately or not.

So I want to thank all for attending.

If there is no further business to come before the Committee, we are adjourned. Thank you.

[Whereupon, at 4:40 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

THE HONORABLE STEVE CHABOT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO, AND CHAIRMAN, SUBCOMMITTEE ON THE CONSTITUTION

Hearing Statement of Chairman Steve Chabot
House Constitution Subcommittee

Thursday, September 14, 2006

2:00 p.m.; 2141 Rayburn House Office Building

Good afternoon, and welcome to the House Subcommittee on the Constitution's legislative hearing on H.R. 5388, the "District of Columbia Fair and Equal House Voting Rights Act of 2006."

The District of Columbia was created by Article I, section 8, Clause 17 of the Constitution, which provides that "Congress shall have Power ... To exercise exclusive Legislation in all Cases whatsoever, over such District ... as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States... ." The rationale for this provision was set forth by James Madison in Federalist Paper No.43, in which he wrote, "The indispensable necessity of complete authority at the seat of government carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general

supremacy. Without it ... the public authority might be insulted and its proceedings interrupted with impunity... ."

The impetus for creating a capital city separate from the control of any state occurred in 1783, when a crowd of Revolutionary War soldiers protested outside the building in Philadelphia in which the Continental Congress was meeting. The Continental Congress requested assistance from the State of Pennsylvania, but that state's government refused to send the militia, forcing the Congress to retreat to New Jersey.

The actual creation of the District of Columbia occurred during the First Congress, when that body accepted the cessions of Maryland and Virginia. From 1780 until the capital officially moved to the District of Columbia in December 1800, the residents of the District were able to vote for the representatives and senators of the states from which they had been ceded. Once the District was formally adopted as the seat of government, however, the residents of the District ceased to have voting

representation in Congress.

Evidence of the Founders' intent with respect to the representational rights of District residents is sparse. Whatever the intent of the Founders, the residents of the District have sought representation for years. For example, in 1978, Congress passed an amendment to the Constitution that would have given the District of Columbia voting representation in both the House and Senate. However, that resolution only received the approval of 16 of the 38 states necessary to ratify an amendment to the Constitution, and it expired in 1985.

District residents also sought to obtain voting representation through the courts. In 2000, the United States District Court for the District of Columbia held that District residents did not have a constitutional right to representation in Congress. The Court held that the language of Article I, Section 2 of the Constitution – quote – "makes clear just how deeply Congressional representation is tied to the

structure of statehood." While acknowledging that the court could not give relief to District residents, the court did urge a political solution to the problem.

H.R. 5388 represents one possible political solution. Introduced by Representative Tom Davis of Virginia on May 16, 2006, the bill has 40 co-sponsors, including Delegate Eleanor Holmes Norton. H.R. 5388 would permanently increase the size of the House of Representatives to 437 members, and would give one of the additional seats to the District of Columbia. The bill would give the other seat to Utah, which missed out on an additional representative in the House by approximately 800 residents during the 2000 apportionment. The Utah seat would be at-large, meaning that Utah residents would vote both for their geographic representative and for the statewide, at large representative until the next apportionment prior to the 2012 congressional elections. The bill also contains a nonseverability clause, which ensures that if any section of the bill is struck down as unconstitutional, the whole bill will be

rendered ineffective.

Many commentators have noted that H.R. 5388 is a novel solution to what has been a pernicious and vexing problem for Congress for the last 200 years. However, that novelty also leads to new and challenging constitutional questions.

For instance, in granting the District of Columbia a seat in the House of Representatives, the bill potentially puts two sections of the Constitution in conflict. On the one hand, supporters of the bill claim that the District Clause gives Congress plenary authority over the District of Columbia, including the power to give it representation in the House of Representatives. On the other hand, some scholars point to the language of Article I, Section 2, that the House of Representatives shall be "chosen ... by the People of the several States" and maintain that the District, as a non-state, cannot be given voting representation merely through exercise of the District Clause.

Similarly, H.R. 5388's grant of an at large seat to the State of Utah also pits two constitutional principles against each other. Under the Constitution, Congress enjoys wide authority both to apportion the seats of the House of Representatives and "to make or alter ... Regulations [relating to] The Times Places and Manner of holding Elections." However, the Supreme Court has held that Article I, Section 2 of the Constitution requires that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." The question then arises whether this principle of "one person, one vote" is violated by a bill that some might characterize as giving "one person, two votes" to the State of Utah for a period of six years.

These are complicated and interesting issues, and we are fortunate to have a distinguished panel of experts with us today that can help us to understand the constitutional implications of this legislation. I would also like to thank the Governor of Utah for appearing before this Subcommittee to explain the importance of this bill to his state.

Finally, I would note that this legislation is supported by many of the civil rights groups, including the Leadership Conference on Civil Rights, that I worked so closely with during the hearings and legislative consideration of the Voting Rights Act Reauthorization, which the President signed into law this July. As always, I look forward to working with my friends in the civil rights community to ensure that their voice is heard.

I look forward to the testimony of all of our witnesses today.

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

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ECONOMIC SECURITY, INFRASTRUCTURE PROTECTION, AND CYBERSECURITY
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CHAIR:
CONGRESSIONAL CHILDREN'S CAUCUS

CONGRESSWOMAN SHEILA JACKSON LEE, OF TEXAS

STATEMENT

BEFORE THE

JUDICIARY SUBCOMMITTEE ON THE CONSTITUTION

LEGISLATIVE HEARING: H.R. 5388 "DISTRICT OF COLUMBIA FAIR AND EQUAL HOUSE VOTING RIGHTS ACT OF 2006"

SEPTEMBER 14, 2006

I thank the Chairman and Ranking Member for the opportunity to participate in this important hearing today. I am looking forward to hearing from the witnesses about the legislation under consideration. I am confident that the insights of Gov. Jon Huntsman, Jr., of Utah, American Enterprise

Institute (AEI) Research Fellow John C. Fortier, and George Washington University Law School Professor Jonathan Turley, and Adam Charnes, Esq. of Kilpatrick Stockton will make this a very informative hearing.

As Section 2 of H.R. 5388 finds, over half a million people living in the District of Columbia lack direct voting representation in the House of Representatives and Senate. Residents of the District of Columbia serve in the military, pay billions of dollars in federal taxes each year, and assume other responsibilities of U.S. citizenship. For over 200 years, the District has been denied voting representation in Congress – the entity that has ultimate authority over all aspects of the city's legislative, executive, and judicial functions.

H.R. 5388 would permanently expand the U.S. House of Representatives from 435 to 437 seats, providing a vote to the District of Columbia and a new, at-large seat to Utah. Based on the 2000 Census, Utah is the state next in line to enlarge its Congressional delegation. This bill does not give the District statehood, nor does it give the District representation in the Senate. Rather, H.R. 5388 treats the District as a Congressional district for the purposes of granting full House representation.

H.R. 5388, the "District of Columbia Fair and Equal House Voting Rights Act of 2006" was introduced by Representative Tom Davis,

Chairman of the Committee on Government Reform and Delegate Eleanor Holmes Norton. H.R. 5388 was introduced on May 16, 2006, and serves as compromise legislation for Representative Davis and Delegate Norton, both of whom have long been advocates for a District of Columbia House vote. Most recently, during the 109th Congress, Delegate Norton introduced H.R. 398, the "No Taxation Without Representation Act of 2005" on January 26, 2005, and Representative Davis introduced H.R. 2043, the "District of Columbia Fairness in Representation Act" on May 3, 2005.

Previous Congressional efforts to secure voting representation for the District of Columbia include a proposed 1978 Constitutional amendment, a 1993 statehood bill, and a 2002 voting representation bill. On August 22, 1978, a two-thirds majority in each Chamber of Congress passed the DC Voting Rights Constitutional Amendment, which would have provided District residents voting representation in the House and Senate. The required 38 states did not ratify the amendment within the seven-year time limit. On November 21, 1993, the New Columbia Admission Act, H.R. 51, a statehood bill for the District of Columbia, was defeated in the House by a vote of 277-153. Most recently, on October 9, 2002, then Senate Governmental Affairs Committee Chairman, Joseph Lieberman, marked-up his legislation providing Senate and House representation for the District.

The Committee reported the bill favorably with a vote of 9-0. However, the Senate did not take up this legislation.

Mr. Chairman, the key provision of H.R. 5388 is section 4, which permanently Increases the Membership of the House of Representatives from 435 to 437. One seat would be designated for the District of Columbia and the other seat would go to Utah, the state next in line under the 2000 Census apportionment formula. Section 4 also provides that the new seat established in Utah shall be an at-large seat. This at-large seat shall exist until all congressional seats are reapportioned for the 2012 election.

It seems to me that there are critically important issues regarding H.R. 5388. First, whether Congress' Constitutional Authority to Provide Congressional Representation to the District Second, whether the Constitution authorizes the Congress to establish the at-large seat for the state of Utah provided for in the bill. I am looking forward to discussing these issues with the witnesses.

Thank you for convening this hearing Mr. Chairman and permitting me to participate. Again, welcome to the witnesses.

I yield back the remainder of my time.

LETTER FROM GREG J. CURTIS, SPEAKER OF THE HOUSE, AND JOSH L. VALENTINE, PRESIDENT OF THE SENATE, UTAH LEGISLATURE, TO CHAIRMAN F. JAMES SENSENBRENNER, JR. IN SUPPORT OF H.R. 5388, SEPTEMBER 13, 2006

Utah State Legislature

Senate • W115 State Capitol Complex • PO Box 145115
Salt Lake City, Utah 84114 • (801) 538-1035
House of Representatives • W030 State Capitol Complex • PO BOX 145030
Salt Lake City, Utah 84114 • (801) 538-1029

September 13, 2006

The Honorable James Sensenbrenner
Chairman
House Judiciary Committee
2141 Rayburn HOB
Washington, DC 20515

Dear Mr. Chairman:

We are writing you in support of H.R. 5388, The District of Columbia Fair and Equal House Voting Rights Act. This legislation is an important step to creatively and admirably alleviating the wrong perpetrated on the state of Utah after the last census. We applaud you for consideration of this legislation and hope it will be considered for full committee action in the near future.

Utah has undergone tremendous growth and will most likely receive at least one additional seat after 2010, but this legislation will address an issue in the interim that has plagued Utah and its role in the federal decision-making process. Although we do not intend to revisit the court cases that denied Utah its representation, we still believe the Census Bureau made errors resulting in a direct and negative impact on the citizens of Utah.

When the Founding Fathers created our democracy they ensured the right to vote was essential so that citizens of the United States had representation in their government. Under this legislation, the Congress can exercise its Constitutional authority to provide the citizens of Utah and the citizens of the District of Columbia their right to federal representation. This approach is a non-political and fair approach to correcting errors that have resulted in disenfranchisement for Utah.

We thank you again for your consideration and leadership on this legislation. We optimistically anticipate that the people of Utah will soon see fair and appropriate representation in the United States House of Representatives.

Sincerely,

Greg J. Curtis
Speaker of the House

John L. Valentine
President of the Senate

TESTIMONY OF ANTHONY A. WILLIAMS, MAYOR, DISTRICT OF COLUMBIA

Government of the District of Columbia

Executive Office of the Mayor

Committee on the Judiciary
Subcommittee on the Constitution
United States House of Representatives

The Honorable Steve Chabot, Chairman

District of Columbia Fair and Equal House Voting Rights Act of 2006

Testimony of
Anthony A. Williams
Mayor
District of Columbia

Thursday, September 14, 2006

Chairman Chabot, Ranking Member Nadler, and other members of the subcommittee, I thank you for the opportunity to provide testimony in support of H.R. 5388, The "District of Columbia Fair and Equal House Voting Rights Act of 2006" is a bill that would provide a critical first step toward full representation for the citizens of the District of Columbia. I would like to start by thanking Congressman Tom Davis and Congresswoman Eleanor Holmes Norton for their continuing leadership and for acting as primary sponsors of this legislation. In 2004, Congressman Davis held a hearing on an earlier version of this bill and several other pieces of legislation that advanced proposals to remedy the disenfranchisement of the residents of the District of Columbia. Proposed legislation authored by Congresswoman Norton was considered that advanced the idea of full voting rights in both houses of Congress. The fact that the hearing occurred was a true milestone in this effort. The healthy discussion on this issue today is due in large part to the determination of Congressman Tom Davis and Congresswoman Eleanor Holmes Norton, and I appreciate their continued efforts.

Without question, the District of Columbia stands unrivaled as a shining symbol of democracy throughout the world. Millions are drawn to our city annually to stand among the monuments of this age's greatest example of the republican form of government. Among the masses of visitors, the majority would be shocked to learn that citizens living in the shadows of democracy's greatest landmarks and memorials are disenfranchised from democracy's promises. Over a half a million citizens here in the District of Columbia are denied the fundamental voting rights that citizens resident elsewhere throughout the country take for granted. Thousands of District of Columbia

residents have gone to war to safeguard those rights for others, both in America and abroad.

Additionally, residents of the District of Columbia pay in excess of $3 billion in federal taxes, yet they lack representation in Congress. The impetus for the founding of this country was to escape an entrenched system of taxation without representation.

As Mayor of the District of Columbia and the duly elected leader of a disenfranchised populace, I must not stop short by merely celebrating the problem; I must champion with unflagging zeal steps for a just remedy. I strongly support the approach of granting District of Columbia residents voting representation that is contained in H.R. 5388, the "District of Columbia Fair and Equal House Voting Rights Act of 2006." The measures contemplated in the bill offer a politically neutral approach to ending this historic injustice. The careful consideration given to granting the District of Columbia a seat and adding an additional seat for Utah is critical for the sake of balance. Because Utah is the next state slated to gain an additional representative on the basis of population, this proposal fits naturally with the likely outcome of the next census. Increasing the current number of members of the House of Representatives by two to 437 will not cause any shift in the current balance between the two political parties. Presumably a Republican seat would be added to Utah's delegation and a Democratic seat from the District of Columbia, maintaining the existing partisan balance in the House of Representatives. Realization of full voting rights in the House for District of Columbia residents without upsetting the current balance reflects careful consideration. That consideration brings the country as a whole closer to providing all citizens the full range of rights safeguarded and preserved by its social compact and embodied in the

Constitution. Finally, while establishing the District of Columbia as a congressional district for the purpose of representation in the House, the bill does nothing to modify the District of Columbia's electoral votes or to preempt any efforts for statehood. I reiterate that upon adoption, these measures comprise an important and decisive first step on the journey to full representation for District of Columbia residents.

Much of the discussion surrounding this bill centers on considering the proposal in light of Constitutional scrutiny and Congress' jurisdiction over the District of Columbia. I refrain from delving into the particulars associated with that area and note that reputable scholars have supported the constitutionality of the proposed legislative remedy.

One related area I would like to highlight is the historic treatment of the District of Columbia by Congress both in voting and other instances. According to a study conducted by a former Justice Department official, from 1790, when Maryland and Virginia ceded their territories and citizens to the federal government, to 1800, when the District of Columbia was formally established, persons resident in the enclave continued to vote in the elections of their former states even though they were no longer citizens of those states. The legal basis was Congress' overriding authority under the District of Columbia clause of the Constitution to exercise plenary legislative power with respect to the ceded territory. In that instance, Congress used its power to allow residents of the federal enclave to retain the representation they enjoyed as citizens of their respective former states. Also of note is that Congress can treat the District of Columbia legislatively as a state, in instances where the Constitution itself requires Statehood – for example, the so-called diversity jurisdiction, in which the citizen of one state can sue the

citizen of another in federal court, which Congress extended to citizens of the District of Columbia by legislation. In light of both of these examples, Congress should invoke both its legislative and inherent plenary power over the federal city to provide relief, in the form of voting rights in the House of Representatives to citizens of the District of Columbia.

In closing, I urge the Congress to enact this legislation and, in doing so, to take this essential step to extend this country's most basic promise – the right to a meaningful vote – to all its citizens. Again, I thank Congressman Tom Davis and Congresswoman Eleanor Holmes Norton for their continuing leadership and their dedication in pressing this critical issue. In addition, I thank the Chairman of the Judiciary Committee's Subcommittee on the Constitution, Congressman Steve Chabot for holding a hearing on H.R. 5388, the "District of Columbia Fair and Equal House Voting Rights Act of 2006." Not only does this allow an opportunity for the legislation to move, but it also provides another valuable forum to educate our fellow Americans concerning the plight of District of Columbia residents. Every positive step that this honorable body takes provides more hope to the residents of the federal city. That hope will be realized once the shackles of disenfranchisement are permanently thrown off and each resident of the District of Columbia is confident that his or her interests, needs and ideas are fully represented in the People's House of the Congress.

STATEMENT OF THE DISTRICT OF COLUMBIA AFFAIRS SECTION OF THE DISTRICT OF COLUMBIA BAR

DISTRICT OF COLUMBIA BAR
Sections

July 25, 2006

The United States House of Representatives
Committee on the Judiciary
Washington, DC 20515

Re: District of Columbia Congressional Voting Rights

Dear Members of Congress:

Please find enclosed the statement, written by, among others, the District of Columbia Affairs Section of the District of Columbia Bar, and sponsored by among others, the Litigation Section of the District of Columbia Bar, in support of Congressional Voting Rights for the residents of the District of Columbia. This statement, originally issued earlier this year, takes on additional significance in light of your Committee's consideration of H.R. 5388, the DC Fair and Equal House Voting Rights Act. We urge you to mark up H.R. 5388 immediately.

The D.C. Affairs and Litigation Sections serve all attorneys who live, work, or have interest in the District of Columbia and monitor legislative, judicial, and related legal developments affecting the District of Columbia.

In addition to the Litigation Section, the Courts, Lawyers and Administration of Justice and Antitrust and Consumer Law Sections of the District of Columbia Bar also co-sponsored this Statement.

If we can be of assistance, please let us know.

Sincerely yours,

Lorelie S. Masters

Lorelie S. Masters
Member and Immediate Past Chair Litigation Section

Enclosures

cc: Charlotte Brookins-Hudson, Esquire
James S. Bubar, Esquire
Co-Chairs, D.C. Affairs Section
District of Columbia Bar Association

1250 H Street NW, Sixth Floor, Washington DC 20005-5937 ▪ 202-626-3463, FAX 202-626-3453
EventLine 202-626-3455, www.dcbar.org

Summary of 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 has adopted a statement regarding congressional voting rights for the residents of the District of Columbia.[1] 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. The Statement discusses the legislation pending before the US Congress, supports the "No Taxation Without Representation Act," and commends Representative Tom Davis (R-VA) for his bill. The Statement, which was unanimously approved by the Steering Committee of the District of Columbia Affairs Section, is also supported by the Steering Committees of the Litigation Section, and the Courts, Lawyers and Administration of Justice Section. If you need any further information, please contact the Co-Chairs of the District of Columbia Affairs Section, James S. Bubar, and Charlotte Brookins-Hudson.

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[1] The views expressed in the statement are only those of the D.C. Affairs Section and not those of the D.C. Bar or its Board of Governors. The Litigation; Courts, Lawyers and Administration of Justice; and Antitrust and Consumer Law Sections join in the statement.
[2] D.C. Bar Section Guidelines and Procedures Section A, paragraph 1.

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 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 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,

[1] The views expressed in this statement are only those of the D.C. Affairs Section and not those of the D.C. Bar or its Board of Governors. The Litigation; Courts, Lawyers and Administration of Justice; and Antitrust and Consumer Law Sections join in this Statement.
[2] D.C. Bar Section Guidelines and Procedures Section A, paragraph 1.

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 the majority party. 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 must support 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 would also like to commend Representative Tom Davis (R-VA) for his introduction of D.C. voting rights legislation that would afford District residents a vote in the House, but not Senators, 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 helps to move the issue of D.C. voting rights forward. The Section wishes to encourage Representative Davis and the other members of the majority party who have introduced D.C. voting rights bills. The Section 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.

STATEMENT OF CHARLES ORNDORFF OF

THE CONSERVATIVE CAUCUS, INC.

TO THE SUBCOMMITTEE ON THE CONSTITUTION

OF THE HOUSE COMMITTEE ON THE JUDICIARY

REGARDING HR 5388

SEPTEMBER 14, 2006

Congressional Representation for The District of Columbia Is Unconstitutional

The United States Constitution is entirely plain and direct in declaring that states are the political units to be represented in the U.S. House of Representatives.

Article I, Section 2 states that "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . . ." It also says that "No person shall be a Representative who shall not . . be an Inhabitant of that state in which he shall be chosen" and that "Representatives and direct Taxes shall be apportioned among the several states which may be included within this union . . . ." The same section guarantees that ". . . each State shall have at least one Representative . . ." and provides that "When vacancies happen in the representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies."

Article I, Section 4 also recognizes only states when it says that "The Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature . . . ."

The Fourteenth Amendment continues in this vein, establishing that "Representatives shall be apportioned among the several States according to their respective numbers . . . ."

The District of Columbia is not a state, and cannot be granted representation as if it were a state by any authority in the Constitution. Congress recognized this in regard to the electoral college when it used a constitutional amendment (the Twenty-third) to grant the District electoral votes equal to those of the smallest state.

HR 5388 must, on constitutional grounds, be rejected. The actual merits of representation for the District may be debated if a constitutional amendment is offered, but the unconstitutionality of this bill requires a negative vote by those who have sworn "to support this Constitution" (Article VI, paragraph 3).

Rebuttal of Arguments for the Constitutionality of Representation

I. EXCLUSIVE LEGISLATION

Advocates of representation argue that Congress can find constitutional authority in Article I, Section 8, which grants Congress the power "To exercise exclusive Legislation in all Cases whatsoever, over such District . . . ." This has been cited by Kenneth Starr[1] and by Viet Dinh and Adam Charnes,[2] and is interpreted by them as allowing Congress to enact any legislation regarding the District, "subject, of course, to the negative prohibitions of the Constitution".[3]

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[1]Testimony of the Hon. Kenneth Starr Before the House Government Reform Committee, June 23, 2004, pgs. 2-3.

The plain language of the Constitution, granting representation to states and not to any other political unit, constitutes the very prohibition which blocks any attempt to use Section 8 as a justification for representation. An understanding of the origins of Section 8 also shows that the intent behind it can in no way be understood as granting such extraordinarily broad authority.

The creation of the District of Columbia was largely the result of the failure of the government of Pennsylvania to respond to repeated Congressional requests to call out the militia when armed Continental soldiers, demanding back pay, surrounded the building in which both Congress and the Pennsylvania Executive Council were meeting on June 21, 1783. According to James Madison, the soldiers were "drawn up in the street before the State House . . . uttering offensive words and wantonly pointing their muskets to the Windows of the Hall of Congress." It was reported that the soldiers were discussing "the seizure of the Members of Congress with whom they imagined an indemnity for their offense might be stipulated."4 When the Pennsylvania Council failed to call out the militia to restore order, Congress left Philadelphia and took up residence in Princeton.5

The incident forced Congress to consider the best means by which to protect the integrity of its deliberations, instead of being dependent on another governmental body for their own safety. As the Virginia Delegates put it in their report to Governor Benjamin Harrison, ". . . what pernicious instruments Congress might have been made in the hands of a Lawless band of Armed Desperado's, and what fatal consequences might have ensued to the Union in General, had they [Congress] remained impotent and Passive Spectators of the most outrageous Insult to the Government . . . ."6 Congress established a committee to deal with the question of the proper degree of congressional jurisdiction over a future national capital.7

The committee rejected the idea of shared jurisdiction, recommending in September 1783 that Congress "ought to enjoy an exclusive jurisdiction over the district which may be ceded . . . ."8 Congress agreed, voting that "the right of soil and an exclusive jurisdiction or such other as Congress may direct shall be vested in the United states; . . . ."9 Although the Confederation

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[2]Dinh, Viet D. and Charnes, Adam H., *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives,* submitted to the Committee on Government Reform, U.S. House of Representatives, November, 2004, pgs. 5-6.

[3]Dinh and Charnes, pg. 5.

[4]Hutchinson, William T. and Rachel, William E., eds., *The Papers of James Madison, Volume 7, 1783-1784*, The University of Chicago Press, 1971, pgs. 176-78.

[5]Bowling, Kenneth R., *The Creation of Washington, D.C.: The Ideas and Location of the American Capital*, George Mason University Press, 1991, pgs. 33-34.

[6]*Madison Papers*, Vol. 7, pgs. 211-12.

[7]*Madison Papers*, Vol. 7, pgs. 254, 357.

[8]*Madison Papers*, Vol. 7, pg. 358 (note 1).

[9]*Journals of the Continental Congress, 1774-1789*, Vol. 25, Government Printing Office, 1922, pg. 714.

Congress never followed through on the actual creation of a national capital, the lessons of 1783 were remembered in 1787, and exclusive jurisdiction granted to Congress.

Thus the clear intent of the "exclusive Legislation" clause was to grant Congress, unhindered by any other government, full control of the United States capital city. As James Madison stated in *Federalist 43*, it was "complete authority at the seat of government" to avoid "dependence . . . on the State comprehending the seat of government for protection . . . ." It was not a general grant of power to pass legislation of any sort relating to the District.10 Edmund Pendleton, who chaired Virginia's ratification convention, told the delegates 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. But it gives them power over the local police of the place, so as to be secured from any interruption in their proceedings."11

Advocates of representation have been unable to find any statement from the founding era to support their interpretation, but they claim this silence as proof of their view.12 A far more rational understanding would be that it was never discussed because no one at the time ever dreamed that the jurisdiction clause would be construed to overrule the plain language of Article I, Section 2 regarding the representation of states, and only states, in Congress.

However, the debates over the Constitution are not, in fact, silent on the matter. In the New York ratifying convention, Thomas Tredwell objected that under the Constitution "The plan of the federal city departs from every principle of freedom, as far as the distance of the 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 of vote . . . ."13 Later in the convention, amendments were twice offered that would have guaranteed the District voting representation once its population was as large as the smallest state, and both were rejected.14 Samuel Osgood, a delegate to the Massachusetts ratifying convention, told John Adams that he could accept the District provision only if amended to reflect "proper Principles", one of which was being "represented in the lower House." However, this was not included in the amendments recommended by the Massachusetts convention.15 A Virginia Antifederalist warned that the

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[10]Caleb Strong, in the Massachusetts ratifying convention, described the power as necessary "to prevent or punish insults." (Kaminski, John P., and Saladino, Gaspare J., eds., *The Documentary History of the Ratification of the Constitution, Vol. VI, Ratification by Massachusetts*, pg. 1341.)

[11]*Documentary History of Ratification*, Vol. X, pg. 1324.

[12]Dinh & Charnes, pgs. 6-7.

[13]Elliot, Jonathan, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, Washington, 1836, Vol. II, pg. 402.

[14]Elliot, Jonathan, ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787*, Washington, 1836, Vol. II, pg. 411, and Syrett, Harold C., ed., *The Papers of Alexander Hamilton*, Vol. V, Columbia University Press, 1962, pgs. 167-70, 189-90.

[15]*Documentary History of Ratification*, Vol. V, pg. 621 and Vol. VI, pgs. 1469-70.

residents of the "district cannot have the shadow of representation in the government to which they are to be subjected."16

In addition, there is one genuine silence which speaks strongly against the possibility of representation. In the winter of 1800-01 the House of Representatives debated legislation to assume Congressional jurisdiction over the District, and opposition arose from members whose concerns included the fact that this would end the District's representation in Congress. As John Nicholas (Republican from Virginia) put it, the bill would bring about "the deprivation of the inhabitants of all participation either in Federal or State legislation. . . . Could any man desire to place the citizens of the District in such a state? To deprive them of the common right of participating in the passage of laws which all the citizens enjoyed?"17 However, not one of the opponents proposed giving the District its own representative in Congress. Instead, they suggested delaying congressional jurisdiction as long as possible, waiting, in the words of Congressman Otis of Massachusetts, until such time as circumstances demonstrated that "Congress must go into the subject in detail, and make those provisions that were necessary for a great city."18 This failure to press for representation is a strong indication that the members understood that only states may be represented, and that the cessation of state jurisdiction irrevocably ended representation. This understanding is reinforced by the statement of Rep. Dennis that "if it should be necessary, the Constitution might be so altered as to give them a delegate to the General Legislature when their numbers should become sufficient."19

Further confirmation of this interpretation came in 1803, when the House took up resolutions for retrocession of the District to Virginia and Maryland. Rep. Smilie of Pennsylvania declared that it was necessary to end the exclusive jurisdiction of Congress because "we cannot possess this authority without depriving the citizens of rights which were the most dear to them. . . . Under our exercise of exclusive jurisdiction the citizens here are deprived of all political rights, *nor can we confer them*." (Emphasis added)20 One could not ask for a more unequivocal statement that the District established by Article I, Section 8, cannot be granted representation. Likewise, Rep. Dennis stated that "By exclusive legislation, he understood the exclusion to the States of all participation in legislation."21 Not one member recommended

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[16] *Documentary History of Ratification*, Vol. IX, pg. 782.

[17] *Annals of the Congress of the United States, Sixth Congress,* Gales and Seaton, 1851, 2nd Session, pg. 868-874. The statement by Rep. Nicholas is on pg. 869.

[18] *Annals,* Sixth Congress, 2nd Session, pg. 870.

[19] *Annals,* Sixth Congress, 2nd Session, pg. 998-99.

[20] *Annals,* Seventh Congress, pg. 487.

[21] *Annals,* Seventh Congress, pg. 490.

granting representation as an alternative to the existing choices of retrocession and no representation.22

II. TREATING THE DISTRICT AS A STATE

It is also claimed as a recognized principle that Congress has unlimited power to treat the District as a state. Advocates argue that the Supreme Court's acceptance of a congressional act allowing citizens of the District to sue in Federal courts, despite the Article III language limiting this to citizens of states, justifies an expansive view of congressional power sufficient to grant the District representation. However, the *Tidewater* decision is a weak reed on which to rest such an argument. The fact that only two other justices accepted the reasoning of Justice Jackson's decision should make us cautious about taking it as the basis for further constitutional extension. Furthermore, a close look at *Tidewater* demonstrates that even Jackson's reasoning does not support the conclusions being drawn by Starr, Dinh, and Charnes. Jackson was careful to say that the Court would have to read the Constitution more "strictly" if the act reached "for powers that would substantially disturb the balance between the Union and its component states . . .", which congressional representation for the District certainly would do.23 He also rested his conclusion on the necessity of access to the Federal courts in order to carry out such Article I congressional powers as bankruptcy laws and paying the debts of the United States.24 Never asserting unlimited congressional power relating to the District, Jackson merely saw the legislation as a way "to exercise part of the judicial functions incidental to exertion of sovereignty over the District and its citizens."25

We must also note that, if we accept a broader reading of *Tidewater*, and the "exclusive Legislation" clause itself, it proves too much. Such a reading would authorize Congress to provide voting representation to the territories and to Federal enclaves within the states. The law which granted citizens of the District access to Federal courts granted the same to citizens of territories.26 Article IV, Section 3 declares that Congress has the power to "make all needful rules and regulations" concerning the territories, language which may be read in a fashion every bit as sweeping and open-ended as the District clause if we are to ignore intent. Also, that portion of Article I, Section 8 which grants Congress "exclusive Legislation" over the District grants "like authority" over all territory, within the states, which has been purchased by the Federal government and over which the states have ceded jurisdiction. If Congress can grant representation to the District, it can also grant representation to the National Institutes for Health, military bases, etc.

Furthermore, it must be noted that a more direct and recent judgement on this question is to be found in the 1998 decision in *Adams v. Clinton*. Following a 19-page discussion of the

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[22]The entire debate covers pages 486-506 in the *Annals*. When Rep. Huger suggested eventual statehood for the District, he found not one supporter (pg 488), and was rebuked by Rep. John Randolph (pg. 499).

[23]*National Mutual Insurance Company V. Tidewater Transfer Co.*, 337 U.S. 528 (1949), pg. 4.

[24]*Tidewater*, pg. 8.

[25]*Tidwater*, pg. 7.

[26]*Tidewater*, pg. 3.

historical record on the intent of the Framers, the court rejected representation for the district with the unequivocal comment that "constitutional text, history and judicial precedent bar us from accepting plaintiff's contention that the District of Columbia may be considered a state for purposes of congressional representation under Article I."27

Finally, it must be noted that HR 5388 cannot be defended on the grounds that Congress is treating the District as a state, because the bill does no such thing. The District would receive only one representative, no matter how large its population. It would not be represented by two senators. It would play no role in ratifying constitutional amendments, even though its representative would be allowed to vote on whether to send them to the states. Rather than treating the District as a state, HR 5388 treats it in a completely unique manner.

III. CONGRESSIONAL REPRESENTATION OF THE DISTRICT, 1790-1801

Congressional representation of the residents of the District in Congress during the period 1790-1801 has also been cited, but without the crucial historical context showing this to be purely a transitional matter, and not repeatable.28 Shortly before House approval of a 1789 bill that would have established the capital near Philadelphia, Rep. James Madison pointed out that Congress was on the verge of creating a lawless territory, no longer subject to the laws of Pennsylvania and lacking any legal code from Congress. The House therefore approved Madison's amendment that Pennsylvania's laws should continue in operation "until Congress shall otherwise provide by law."29

This same necessity was recognized when Congress enacted the Potomac Residence Act in 1790, providing "that 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 by law otherwise provide."30 During this interim period, when Congress had accepted cession of the territory but not yet assumed jurisdiction, Virginia and Maryland continued to enforce within the district their own laws *in their own courts*, which ceased only when Congress finally assumed jurisdiction in 1801 and created courts for the District.31 Because the ceded area was still under the jurisdiction of those states, its residents continued to vote in their congressional districts and state legislative districts.32 There was never any separate congressional legislation to grant them representation apart from continuing state jurisdiction. As discussed above, members of Congress acknowledged that such voting rights ended along with state jurisdiction.

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[27] *Adams v. Clinton*, et. al, pg. 19-37.

[28] Dinh and Charnes, pgs. 8-9.

[29] *Documentary History of the First Federal Congress,* The Johns Hopkins University press, 1992, Vol. XI, pg. 1513.

[30] *DHFFC*, Vol. VI, pg. 1767.

[31] *The Public Statutes at Large of the United States of American from the Organization of the Government in 1789, to March 3,1845*, Vol. II, Charles C. Little and James Brown, 1845, pgs. 103-08.

[32] *Annals, Sixth Congress*, 2nd Session, pg. 869.

STATEMENT OF THE AMERICAN BAR ASSOCIATION

Statement of the American Bar Association
submitted to the
Subcommittee on the Constitution
Committee on the Judiciary, U.S. House of Representatives
on the subject of
H.R. 5388, the District of Columbia Fair and Equal House Voting Rights Act
September 14, 2006

The American Bar Association appreciates the opportunity to submit this statement in support of legislation to provide voting representation in the House of Representatives to the citizens of the District of Columbia.

With more than 413,000 members, the American Bar Association is the largest voluntary professional membership organization in the world. As the national voice of the legal profession, the ABA works to improve the administration of justice, promotes programs that assist lawyers and judges in their work, accredits law schools, provides continuing legal education, and works to build public understanding around the world of the importance of the rule of law in a democratic society.

Understanding that the success of any democracy depends in large part on the integrity of its electoral process and its governing bodies, the ABA has a long history of involvement with issues related to ensuring the free and fair exercise of the fundamental voting rights guaranteed by our Constitution. In pursuit of this goal, the ABA has adopted policies and undertaken efforts in areas such as election reform, voter participation, voting rights, and campaign financing. In 1999, the ABA adopted a resolution supporting the principle that citizens of the District of Columbia should no longer be denied the fundamental right belonging to other American citizens to elect voting members of the Congress that governs them.

H.R. 5388, the District of Columbia Fair and Equal House Voting Rights Act, would establish the District of Columbia as a Congressional district for purposes of representation in the House of Representatives. This bill is a product of years of cooperative effort and carefully considered compromise to ensure that the goal of giving D.C. residents their right to voting representation in the House is accomplished by a mechanism fully consistent with our Constitution and is implemented in a manner that does not disadvantage any citizen or state. H.R. 5388 has broad, bipartisan support, as evidenced by 40 co-sponsors representing both sides of the aisle and its approval by the House Government Reform Committee by a bipartisan vote of 29-4 on May 18, 2006. Most importantly, as recent polls have shown, a majority of Americans throughout the country support congressional voting rights for D.C. residents. The ABA, which supports full voting representation in the House and the Senate for the District of Columbia, believes that H.R. 5388 will achieve an important part of that goal.

As we have previously stated in a June 16, 2006 letter to House Judiciary Committee members, the American Bar Association concurs in the conclusion reached both by the House Government Reform Committee's consultants, Professor Viet D. Dinh and his co-author Adam H. Charnes, and by the former Solicitor General of the United States, Kenneth W. Starr: that Congress has the constitutional authority to provide voting representation in the House of Representatives to residents of the District of Columbia. Such authority is granted by the "District Clause" of the Constitution, Article I, Section 8, Clause 17, which confers upon the Congress the power "To exercise exclusive Legislation in all

Cases whatsoever, over such District. . . ." Enactment of the proposed District of Columbia Fair and Equal House Voting Rights Act would be an exercise of this constitutional authority conferred by the "District Clause." (See Dinh and Charnes, Memorandum submitted to Committee on Government Reform, November 2004, entitled "The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives"; testimony of the Hon. Kenneth W. Starr before the House Government Reform Committee, June 23, 2004).

The same constitutional authority was exercised by the very first Congress, in 1790, when Congress accepted the cession by Maryland and Virginia of the ten-mile-square area constituting the District and provided by statute that its residents would continue to enjoy the same legal rights - - including rights to vote in federal and state elections - - which they had possessed under Maryland and Virginia laws prior to acceptance by Congress of the cession (Act of July 16, 1790, chapter 28, section 1, 1 Stat. 130). Under this federal legislation, residents of the District were able to vote, from 1790 through 1800, for members of the United States House of Representatives (and for members of the Maryland and Virginia Legislatures, which then elected United States Senators).

Voting representation in Congress for District residents ceased in 1801, when the District of Columbia became the Seat of Government, and Congress enacted the Organic Act of 1801, which provided for governance of the nation's capital but which contained no provision for District residents to vote in elections for the Congress that had the "exclusive" power to enact the laws which would govern them. Since the 1801 Organic Act also had the effect of terminating District residents' right to vote in any elections held in Maryland and Virginia, they were left disenfranchised from voting for Members of Congress.

In a memorandum submitted to the Government Reform Committee in 2004, Professor Dinh and Mr. Charnes rightly described this loss of national voting rights as a "historical accident" in which "Congress by omission withdrew the grant of voting rights to District residents." (See Dinh and Charnes Memorandum, pp. 8, 19).

It falls to this Congress to restore the voting rights lost by a previous Congress' omission more than 200 years ago. Not only is there a moral obligation for Congress to restore such rights, there is also a constitutional obligation for Congress to ensure the right of D.C. residents to the equal protection of the laws, as that concept has come to be understood in modern times, long after the deprivation of D.C. voting rights through the Organic Act of 1801.

The Bill of Rights, ratified in 1791, includes the Fifth Amendment guarantee against deprivation of "due process of law." But not until the D.C. school desegregation case of Bolling v. Sharpe, 347 U.S. 497, decided in 1954 as a companion case to Brown v. Board of Education, 347 U.S. 483 (1954), was the Fifth Amendment "due process" clause held to apply to federal legislation the same guarantee of "equal protection of the laws" which the Fourteenth Amendment had adopted as to the States. Bolling invalidated (under the due process clause of the Fifth Amendment) the Congressional legislation which had imposed segregation upon the D.C public schools, just as Brown v. Board of Education invalidated (under the equal protection clause of the Fourteenth Amendment) the State legislation which had imposed segregation upon the public schools in numerous states. Subsequent Supreme Court decisions have made clear that the guarantees of equal protection in the Fifth and Fourteenth Amendments are co-extensive. Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975) ("The Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment"); Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the

Fourteenth Amendment"). Under Fourteenth Amendment standards, if a State legislature were to deny to residents of the state's capital city the right to vote for members of the Legislature, it would be depriving those residents of the equal protection of the laws which is guaranteed to them by the Fourteenth Amendment. Similarly, Congress' elimination of D.C. residents' voting representation in the Congress by its adoption of the Organic Act of 1801, may be seen in retrospect as having deprived D.C. residents of the equal protection of the laws guaranteed to them by the Fifth Amendment due process clause.

Congress is expressly empowered by Section 5 of the Fourteenth Amendment to enact legislation enforcing equal protection guarantees of the Fourteenth Amendment. Congress' plenary Power under the District Clause of Article I, Section 8, should likewise empower this Congress to enact legislation to secure to D.C. residents the equal protection of the laws guaranteed by the Fifth Amendment, by adopting the proposed District of Columbia Fair and Equal House Voting Rights Act.

Some opponents of the bill might contend that the plenary power of Congress to enact such legislation under Article I, Section 8, Clause 17, is limited by the provision of Article I, Section 2, Clause 1, that House members be chosen "by the People of the several States." Professor Dinh's and Charnes' memorandum to the Government Reform Committee shows at length that "the terms of Article 1, Section 2 do not conflict with the authority of Congress in this area." (Dinh and Charnes Memorandum, p. 5, n. 16, pp. 10-19).

We would only add that, even if there were such an arguable conflict between interpretations of Article I, Section 2 and the District Clause of Article I, Section 8, the equal protection guarantee of the Fifth Amendment's due process clause would require that such a conflict be resolved by construing the District Clause to authorize enactment of a statute which ends the denial to District residents of equal protection in regard to voting representation in the House. As part of the Bill of Rights, ratified in 1791, the Fifth Amendment due process guarantee post-dates the adoption of Article I of the Constitution in 1787, and would therefore supersede any conflicting provision or interpretation derived from Article I. To avoid the constitutional issue that would be presented by an interpretation of Article I that conflicted with a provision of the Bill of Rights, the provisions of Article I, Section 2, should not be construed to limit the plenary power conferred upon Congress by Article I, Section 8, Clause 17, to adopt the District of Columbia Fair and Equal House Voting Rights Act.

As Representative Davis has stated, "The Courts have never struck down a Congressional exercise of the District Clause, and there is no reason to think they would act differently in this case. It is now a matter of political will." It is time for Congress to exercise its will and its constitutional authority to correct this longstanding inequity.

LETTER FROM LAWRENCE H. MIREL, WILEY REIN AND FIELDING LLP, TO CHAIRMAN CHABOT AND RANKING MEMBER NADLER, SEPTEMBER 20, 2006

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The Honorable Steve Chabot, Chairman
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United States House of Representatives
129 Cannon House Office Building
Washington, D.C. 20515

The Honorable Jerrold Nadler, Ranking Member
Subcommittee on the Constitution
Committee on the Judiciary
United States House of Representatives
2334 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Chabot and Ranking Member Nadler:

Thank you for holding a hearing on the important subject of Congressional voting representation for District of Columbia residents. There is wide-spread agreement in the Congress, and across the country, that in the world's greatest democratic nation the people of the District of Columbia should not continue to be disenfranchised. The problem, as your hearing pointed up, is how to achieve the desired objective without violating the Constitution.

Two of the witnesses before your Committee pointed out the Constitutional infirmity of the bill introduced by Mr. Davis, H.R. 5388. Mr. Davis's bill would have the residents of a non-state—the District of Columbia—be represented in the House (although not in the Senate). But the Constitution clearly states that only states shall be represented in the Congress.

There is another way, consistent with the Constitution, to provide voting representation in Congress for District residents: treat them as if they are Maryland residents. The Constitution gives the Congress the right of "exclusive legislation" for the District of Columbia, and the Maryland state legislature has no authority to enact laws affecting the District of Columbia. But Congress also has the same exclusive legislative authority over many other territories—military bases, national parks, Indian reservations, etc.—that have likewise been carved out of states. The people in each of these territories vote for, and are represented by, the Representatives and Senators elected from the states in which the territory is

located. The fact that the state legislatures have no authority, except that granted by Congress, to pass laws affecting those territories does not mean that they lose their right of voting representation in the Congress.

The U.S. Supreme Court was clear about this point when it ruled 9 to 0 in 1970 that people living on the campus of the National Institutes of Health in Bethesda, MD., could not be deprived of their right to vote simply because NIH was subject to the exclusive legislative authority of Congress. Evans v. Cornman, 398 U.S. 419 (1970).

There is a bill currently pending before the Judiciary Committee that would provide full voting representation for the people of the District of Columbia—in both the House and the Senate—as citizens of Maryland. That is H.R. 190, introduced by Rep. Dana Rohrabacher, which was not explicitly part of the hearing and the implications of which were not explored by the witnesses. For that reason I would like to ask that this letter, and the attached legal memorandum, be included as part of the record of the hearing. As our legal memorandum points out, the Rohrabacher bill is fully consistent with the Congressional requirement that only states be represented in the Congress. There is ample legal and legislative precedent that Congress, by ordinary legislation, can give people who live on land under the exclusive legislation of Congress voting representation in Congress as residents of the states from which these "federal enclaves" have been carved. By enacting H.R. 190 Congress would resolve the long-standing dispute over not allowing the residents of the District of Columbia voting representation in Congress, without the need to amend the Constitution and without creating either a new state or new voting rights for people who do not live in a state. We hope that your subcommittee will give HR 190 full consideration as you search for a way to provide voting representation in the Congress for the too long disenfranchised people of the District of Columbia.

Sincerely yours,

Lawrence H. Mirel

cc:

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STATEMENT OF LAWRENCE H. MIREL, WILEY REIN AND FIELDING LLP

STATEMENT FOR THE RECORD
LAWRENCE H. MIREL
Wiley Rein & Fielding LLP

For the Committee for the Capital City

LEGISLATIVE HEARING ON H.R. 5388,
THE "DISTRICT OF COLUMBIA FAIR AND EQUAL HOUSE VOTING RIGHTS ACT OF 2006

SEPTEMBER 20, 2006

SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY
THE UNITED STATES HOUSE OF REPRESENTATIVES

Introduction

Chairman Chabot, Ranking Member Nadler, members of the Subcommittee, I am pleased to present the following testimony on the need to restore voting to the District of Columbia and the proper and constitutionally sound way to do so. My name is Lawrence H. Mirel. I am an attorney with the Washington law firm of Wiley Rein & Fielding, and a long time citizen of the District of Columbia. Until about a year ago I served for more than six years as the Commissioner of Insurance, Securities and Banking for the District of Columbia. I am pleased to present the following testimony on behalf of the Committee for the Capital City, a non-profit citizens group dedicated to providing full voting representation in the Congress of the United States to the people of the District of Columbia.. I want to thank the Subcommittee for addressing one of the most pressing issues for residents of the District of Columbia, the need to be treated as full citizens of the United States, which necessarily includes full voting representation in Congress. This testimony explores at length the need to restore voting rights to the District, a position that has garnered almost universal agreement. It then recommends that the Subcommittee endorse H.R. 190, the "District of Columbia Voting Rights Restoration Act of 2005," introduced by Representative Dana Rohrabacher, which we believe provides a Constitutional way of providing full voting representation to the people of the District of Columbia by treating them—for purposes of federal elections only—as citizens of Maryland

There is widespread agreement that the people of the District of Columbia should have voting representation in the Congress of the United States. After all, they are citizens of the United States, subject to the laws enacted by Congress, including federal tax laws, just like other citizens. The reason why the people of the District of Columbia are not represented in their

national legislature, uniquely among the people of capital cities throughout the democratic world, is primarily due to disagreement about how best to include them in the franchise.

The Constitution of the United States provides that the people of the several states elect representatives to the Congress. Unless the people of the District of Columbia can be considered citizens of a state—or unless the Constitution is amended to allow them to vote even though they are not citizens of a state—they will remain disenfranchised.

But the territory of the current District of Columbia was once part of the state of Maryland, and the people who lived there were citizens of Maryland. Although the Constitution gives Congress full legislative authority over the District of Columbia, it does not by its terms deprive the people living in the District of their citizenship in Maryland. H.R. 190, by declaring that the people of the District of Columbia are entitled to vote in federal elections as citizens of Maryland, restores voting rights to people who formerly had those rights as Maryland citizens, without doing violence to the Constitutional structure of a Congress comprised of representatives of states, and therefore without the need for a Constitutional amendment.

H.R. 190 is superior to other bills pending before Congress to provide voting representation to the people of the District of Columbia because it would confer *full* citizenship to District citizens, with voting representation in the House of Representatives and also in the Senate. Yet it would not increase the number of Senators, nor would it grant separate statehood to the District of Columbia. Voting representation in the House only, as would be provided by H.R. 5388, would still leave the residents of the District second class citizens, lacking representation in the upper chamber of the Congress.

For the reasons shown in the analysis below, H.R. 190 is the most rational and feasible way to provide the people of the District of Columbia of their full federal voting rights as U.S.

citizens without amending the U.S. Constitution. This bill offers the Subcommittee an opportunity to give District residents the right they deserve, while avoiding the constitutional issues presented by alternative proposals.

Analysis

When the Founders provided for an autonomous district to be the seat of the national government, their choice was colored by the reality of the times. Congress had before it two options: (1) place the seat of government in an established city; or (2) create a seat of government separate and distinct from the states as they now were. Those who argued for a unique and independent seat of government cited the value of a national capital detached from the existing political structure of the young nation.[1] The other option, a national capital in an established city, it was feared could lead to the downfall of the nation. "How could the general government be guarded from the undue influence of particular states . . . 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?"[2]

Out of this fear for the security and independence of the nation's new national government the District of Columbia was created. The Constitution provides that the seat of government was to be no more than 10 miles square, with Congress granted "exclusive legislation in all cases whatsoever" within that territory.[3] The District came into being in 1790,[4]

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[1] *See Adams v. Clinton*, 90 F. Supp. 2d 35, 50 n.25 (D.D.C.), *aff'd*, 531 U.S. 940 (2000).

[2] Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 HARV. J. ON LEGIS. 167, 171 (1975) (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)).

[3] U.S. CONST. art. I, § 8, cl. 17.

[4] *See* Act of July 16, 1790, 1 Stat. 130.

and the federal government assumed its exclusive legislation over the District 10 years later.[5] Since 1800, the people of the District of Columbia have not had voting representation in Congress, the body that passes all its laws and its budget. It is a supreme irony that the people of the capital city of the world's greatest democracy do not vote for the people who govern them.

H.R. 5388, the "District of Columbia Fair and Equal House Voting Rights Act of 2006," would allow residents of the District to be represented in the House of Representatives.[6] The bill would make the District the equivalent of a House Congressional district, with the right to elect one Representative, but would not provide District residents with representation in the Senate.[7] While H.R. 5388 is the subject of today's hearing, it is not the only alternative available.

Another bill pending before Congress seeks to provide full representation for the District's citizens, in both houses of Congress, without conferring full statehood on the District (with the constitutional issues that such a move would raise). H.R. 190, the "District of Columbia Voting Rights Restoration Act of 2005," recognizes that the District of Columbia is an enclave of the federal government.[8] Therefore, Congress has the power, through its grant of exclusive legislation, to restore the national voting rights of District residents by allowing them to vote in federal elections as citizens of Maryland.[9]

Under H.R. 190, the District would be treated as a Maryland Congressional district, with its own Representative in Congress.[10] District residents would be entitled to vote for the two

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[5] *See id.* § 6.

[6] *See* District of Columbia Fair and Equal House Voting Rights Act of 2006, H.R. 5388, 109th Cong. (2005).

[7] *See id.*

[8] *See* District of Columbia Voting Rights Restoration Act of 2005, H.R. 190, 109th Cong. (2005).

[9] *See id.* § 3.

[10] *See id.* § 6.

Senators from Maryland and would be allowed to run for either the House or Senate in Maryland.[11] The District would be entitled to a new Representative upon enactment, so the bill provides that two Representatives would be added to the current Congress. One would be from the District, and the other would be from whichever state, according to the 2000 census, would be next eligible for an additional Representative.[12] After the 2010 census, the current number of members of the House of Representatives would be restored, with Congressional districts reapportioned accordingly.[13]

H.R. 190 is the most appropriate and constitutionally sound approach to restoring the federal franchise to those persons living in the District. The bill recognizes the right of persons living in the District to vote for Congressional representation as Maryland citizens, which they arguably have been throughout the District's existence. This right to participate in federal elections is already available to persons living in other federal enclaves over which Congress has "exclusive legislation." Finally, the bill avoids many thorny constitutional issues that plague other pending proposals.

I. Congressional Power Over the District of Columbia Includes the Power to Grant Citizens of the District Federal Voting Rights

There is general recognition that the power of "exclusive legislation" granted to Congress by the District Clause is a broad grant of power.[14] Courts have held that power to contain within it "full and unlimited jurisdiction to provide for the general welfare of the citizens within the

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[11] *See id.* § 3.

[12] *See id.* § 6. Note that H.R. 190 does not provide for an at-large representative, but rather utilizes the district map that would have been used had the state in question received an additional representative after the 2000 census.

[13] *See id.*

[14] *See, e.g., Simms v. Rives*, 84 F.2d 871, 877 (D.C. App. 1936).

District of Columbia by any and every act of legislation which it may deem conducive to that end."[15] Congress has the power, as a result, to restore to District residents rights that they ought to have as U.S. citizens. Congress has already recognized that the residents of the District hold residual rights stemming from their status as Maryland citizens before the territory that makes up the District was ceded to the national government. H.R. 190 reaffirms that one of those basic rights was to vote in Maryland elections for Congressional representatives, a statutory recognition well within the power of the federal government.

A. Congressional Power Over the District

The power Congress holds over the District is nearly absolute.[16] Congress has been granted "complete legislative control [over the District] 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."[17] The grant of power contained in

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[15] *Neild v. District of Columbia*, 110 F.2d 246, 249 (D.C. App. 1940); *see also Nat'l Mut. Ins. Co. of the Dist. of Columbia v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

[16] Nearly is the operative term. *See infra* Part I.B. for a discussion of the residual rights of residents of the District, voting being one. It is important to remember that the District was not created by the Constitution as an independent entity. It is made up of territory that was once part of two sovereign states of the nation. The current District contains land that was once part of the State of Maryland and was subject to the dominion and control of that State.

The principles of sovereignty hold that an entity with jurisdiction over certain territory has the power to rule that territory as it wishes, subject to any applicable constraints. The entity has the power to exercise dominion over its territory, passing rules and regulations necessary for expedient control. Thus, prior to the District's creation, the land, then part of Maryland, was subject to the laws of Maryland, including laws governing voting rights and procedures.

Transfer of control, or in the case of the District a grant to Congress of "exclusive legislation," grants the new sovereign the power to change any laws then applicable to the relevant territory. A transfer of legislative authority over a parcel of land does not negate the laws of the previous sovereign. Rather, those laws continue to apply until changed, an expedient adopted to preserve the legal rights and entitlements of the persons living in the territory that has changed hands. See, for instance, 11 D.C. Code Ann. 75 (2001) for a list of the laws of England and Maryland that are still applicable to the District based on the control that England and Maryland exercised over the land that today makes up the District.

[17] *Nield*, 110 F.2d at 250.

the District Clause has been interpreted to give Congress "extraordinary and plenary power"[18] to pass laws covering "every proper purpose of government."[19]

Under the District Clause, then, Congress can exercise any and all affirmative powers that are necessary for the operation of the District. That power, for instance, included the power to grant the District a home rule charter for self governance.[20] But does that same power include the right to declare that persons living in the District are Maryland citizens for federal voting purposes? Congress surely had the constitutional power to declare that the part of the original District, which came from the state of Virginia, could be returned to that state, which restored the right of persons living in that territory to vote in Virginia elections.[21] And at least one federal court has indicated that Congress may elect to return some rights it holds over the District to the states that ceded the land covering the District.[22]

It is true that the Supreme Court in 1964 summarily affirmed a federal district court opinion that held, among other things, that residents of the District are not citizens of Maryland and have no inherent right to vote in Maryland.[23] But that opinion does not mean that Congress lacks the legislative authority to restore the right to vote to the people of the District. Congress was permitted to constitutionally revoke its power over the part of the District that lay in

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

[19] *Nield*, 110 F.2d at 249.

[20] *See* The District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774 (1973), *reprinted in* 1 D.C. Code Ann. 173 (2001).

[21] *See* Act of Retrocession of the County of Alexandria, 9 Stat. 35 (1846), *reprinted in* 1 D.C. Code Ann. 72 (2001).

[22] *Adams v. Clinton*, 90 F. Supp. 2d 35, 44 n.46 (D.D.C.), *aff'd*, 531 U.S. 940 (2000) ("It is thus unnecessary for us to consider whether District residents would be able to vote had Congress never exercised its authority, *or had it subsequently ceded partial authority back to the state*." (emphasis added)). *Adams* determined that district court lacked the authority to restore voting rights to people living in the District. *See id.* at 50 n.25. This determination has no effect on the authority of Congress to act in this sphere.

[23] *See Albaugh v. Tawes*, 233 F. Supp. 576, 578 (D. Md.), *aff'd*, 379 U.S. 27 (1964).

Virginia, and it could constitutionally choose to use its exclusive legislation to restore the right of District residents to vote in federal elections by recognizing that District residents are citizens of Maryland for voting purposes. Moreover, that Supreme Court ruling provides dubious authority for denying the people of the District their right to vote in national elections as citizens of Maryland.[24] History suggests that the persons on the Maryland land that was ceded to the "exclusive legislation" of Congress to become the District of Columbia could have been able to vote as citizens of Maryland all along.

B. The Remnants of a Right All But Discarded

Although the grant of power to the Congress in the District Clause is broad, it is important to note that it is not total. Merely because Congress was granted the power of "exclusive legislation" over the District, that power does not automatically take away rights that residents of the District formerly had under Maryland law.[25] It is true that Congress enacted a law that accepted cession of the right to legislate for the territory ceded by Maryland and

[24] *See infra* Part I.B for a discussion of the history of the federal franchise for persons living in the District. The facts of *Albaugh* also raise questions as to the validity of the holding in the case. William Albaugh was a resident of Maryland who brought a challenge to the Republican primary election for U.S. Senator in Maryland that he lost to a challenger. *See Albaugh*, 233 F. Supp. at 576. He brought a *pro se* complaint in federal court alleging that the results of the election should be nullified because residents of the District had not voted in the election. *See id.* at 576-77. He was not a resident of the District and in all likelihood lacked standing to challenge the election. *See id.* Thus, the facts of the case argue against an expansive interpretation of the holding that District residents were stripped of all vestiges of their rights as Maryland residents. District residents were not even parties in the case.

[25] There is nothing contained in the Constitutional grant of power to Congress over the District that would lead one to conclude that the Framers intended the District to be a fiefdom of Congress negating its former identity as part of Maryland and Virginia. Instead, one must believe that the choice to create a seat for the national government out of voluntary cessions from a state or states was an attempt to create an independent seat of government that preserved some vestiges of its former state identity.

Viewed in this light, the provision in the Constitution granting Congress control over the District is oriented toward administrative or functional control over the seat of government. To avoid the security issues at the forefront of the minds of the Framers, it was important that the administrative control of the District be separate from any single individual state. But the grant of power in the Constitution does not, by its own language, mean that the territory used for the District was to be stripped of its historical and jurisdictional ties to Maryland or Virginia.

Virginia that became the District.[26] But Congress explicitly recognized, in its assumption of legislative authority over the District, that "the laws of the state within [the District] shall not be affected by acceptance . . . until the Congress shall otherwise by law provide."[27] Presumably, those laws "not affected by acceptance" include laws related to voting, as the residents of the District, in their capacity as Maryland citizens and domiciliaries, were entitled to vote in Maryland elections and did so before the District was formed.[28]

The documents that consummated the cession of territory from Virginia and Maryland to the federal government for the establishment of a national capital make it clear that the cession was not meant to strip persons living in those areas of their rights. The framers believed that it was well within the power of Virginia and Maryland to guarantee the rights of those people who would be living in the District.[29] Each state expressly preserved the power and operation of its laws until such time as the Congress provided otherwise.[30] In fact, the Maryland act ratifying the cession of territory expressly reserved the individual rights of the Maryland residents who would

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[26] *See* An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, § 1, 1 Stat. 139, ch. 28 (1790).

[27] *Id.* This proposition was reaffirmed by the Act of Congress establishing the government of the District. "[T]he laws of the state of Maryland, as they now exist, shall be and continue in force in that part of the said district, which was ceded by that state to the United States . . . ." Act of February 27, 1801, §1, 2 Stat. 103, *reprinted in* 1 D.C. Code Ann. 46 (2001).

[28] "It is important to bear constantly in mind that the District was made up of portions of two original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all rights, guarantees, and immunities of the Constitution." *O'Donoghue v. United States*, 289 U.S. 516, 540 (1933).

[29] *See* 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) ("[T]here must be a cession, by particular states, of the district to Congress, and . . . the states may settle the terms of the cession. The states may make what stipulation they please in it."); *see also* The Federalist No. 43 (James Madison) ("[T]he state will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it . . . .").

[30] *See* An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Acts. Ch. 45, *reprinted in* 1 D.C. Code Ann. 35 (2001); 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).

live in the new territory. "[N]othing herein contained shall be so construed to vest in the United States any right of property in the soil as to affect the rights of individuals therein, otherwise than the same shall or may be transferred by such individuals to the United States."[31] There is little doubt that the right to vote is a right close to the hearts of all Americans. No affirmative action or statement by the persons living in the District has ever ceded to the federal government the right to remove their ability to vote. Nor has the Congress ever enacted a law stripping them of that right.[32]

Thus, for Congress to recognize that the people of the District still have rights they had as Maryland citizens—rights that were never taken from them by law—is not a radical step. The Constitution and the cession statutes alike presume that residents of the District are permitted to have and hold the rights of citizens of the nation. Before the District was formed, Maryland residents had the right to vote for members of Congress representing that state and exercised that right frequently. The acts that assumed federal jurisdiction over the District preserved that right, unless altered or removed by the Congress of the United States. Adoption of H.R. 190 merely restores a right and status that District residents once had.

C. Federal Legislation is the Most Appropriate Means to Resurrect These Voting Rights

H.R. 190 does not operate in a vacuum. It is not creating a right that residents of the District are not already entitled to. As revealed in the history of the creation of the District, residents of the land that was ceded to the federal government were entitled to maintain their

[31] An Act Concerning the Territory of Columbia and the City of Washington, 1791 Md. Acts. Ch. 45, § 2, *reprinted in* 1 D.C. Code Ann. 35 (2001).

[32] In fact, it can be logically argued that residents of the District lost their status as voters due to nothing more than a quirk of fate that led to an act of omission. Voting registration in Maryland occurs on a county-by-county basis. When the District of Columbia was created, the counties from which it was carved could no longer register voters as county residents for voting purposes. District residents were now Maryland itinerant residents for voting purposes, lacking a tie to a county government empowered to complete the procedural requirements necessary to qualify to vote in Maryland.

Maryland or Virginia citizenship, respectively, for voting purposes until Congress stated otherwise. No action has been taken by Congress to date to remove that right. H.R. 190 merely restores what already exists.

The power of Congress to act to remedy the wrongs done to the residents of the District is also affirmed by the power Congress has exercised over voting rights for persons not mentioned in the Constitution. The Constitution limits the voting franchise for Representatives and Senators to those persons who are citizens of a state.[33] It might be argued that this "citizenship" required by the Constitution means that a state must exercise dominion and control over persons who vote in federal elections in that state. Congress, however, has determined the contours of this citizenship requirement, and Congress has determined that a state need not have control over a voter for that person to be entitled to vote for Congressional representatives.

By statute, Congress granted Indians the status as full citizens of the United States.[34] That citizenship carried with it the right to vote in federal elections, although Indian reservations, in their status as sovereign lands, are not subject to state power or control.[35] The status of Indian reservations as sovereign land, however, left the newly-minted American citizens without a jurisdiction to vote in. Congress resolved that dilemma by declaring Indians citizens of the state in which the reservation resides.[36] Congress has also extended by statute the federal franchise to

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[33] *See* U.S. CONST. art. I, § 2 ("[T]he Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); U.S. Const. amend. XVII ("The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.").

[34] *See* 8 U.S.C. § 1401.

[35] *See, e.g.*, U.S. CONST. art. I, § 8, cl. 3 (granting Congress the exclusive power to regulate commerce with Indian tribes, thereby recognizing their sovereign status).

[36] *See* 8 U.S.C. § 1401(a)(2). Note that Congressional power to pass such a statute would extend from the control given to Congress over Indian reservations in Article I, section 8, clause 3 of the Constitution, the same section addressing federal power over the District and enclaves. *See* U.S. CONST. art I, § 8. Note also that this right was given in express disregard to the fact that Indians cannot be taxed by state governments and are not subject to

persons in the military or living overseas, even though they may have no American residence.[37] The statute grants these individual the right to vote even though they may not be subject to any state power of any kind and may have no desire to ever return to the United States. It does so by declaring them "citizens" of the state where they were domiciled before leaving the country, allowing military and overseas voters to vote for Representatives and Senators from that state.

It is true that Maryland has no power over the persons who now reside in the District. It gave up that power when it ceded to Congress the land for the District, making it subject to the "exclusive legislation" of Congress. But state power over certain territory has nothing to do with the right of the persons in that territory to exercise their federal franchise. The Supreme Court has reiterated that "it is not reasonable to assume that the cession stripped [persons living in that territory] of [their] rights."[38] Passage of H.R. 190 follows in the steps of the acts granting voting rights to Indians and overseas Americans. It reaffirms that the District never lost its status as Maryland territory and implements a process for restoration of the federal franchise for District residents, a right that has lain dormant for too long.[39]

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legislative apportionment according to the 14th Amendment. *Goodluck v. Apache County*, 417 F. Supp. 13 (D. Ariz. 1975), *aff'd*, 429 U.S. 876 (1976).

[37] *See* Uniformed and Overseas Citizen Absentee Voting Act, Pub. L. No. 99-4100, 100 Stat. 924 (1986) (codified at 42 U.S.C. §§ 1973ff et seq.).

[38] *O'Donoghue v. United States*, 289 U.S. 516, 540 (1933).

[39] Mere lapse of time does not lessen the force of this argument. A right duly granted cannot be removed by time alone. *See, e.g.*, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 244-45 & n.16 (1984) (allowing an Indian land claim to proceed more than 200 years after the suit ripened, even though the suit might upset the property rights of current New York residents). As eloquently stated by the Supreme Court:

> [The District] had been a part of the states of Maryland and Virginia. It had been subject to the Constitution, and was a part of the United States. The Constitution had attached to it irrevocably. There are steps which can never be taken backward. The tie that bound the States of Maryland and Virginia to the Constitution could not be dissolved, without at least the consent of the Federal and state governments to a formal separation. 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.

The core to a democracy is the right of the citizens of the nation to make their voices heard and participate in electing those whose decisions affect their lives. The right to vote "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[40] The Supreme Court has long recognized that the right to vote is inherent in the relationship between a citizen and the national government. The federal franchise "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."[41] "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."[42]

H.R. 190 restores the right of persons living in the District to be participating members of our federal democracy. It does this through a means that recognizes that persons living in the District never abandoned their status as residents of Maryland. Maryland residents, at the time of cession, held the power to elect persons to the federal government. They held that power by virtue of their status as members of the American democracy under the auspices of the

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O'Donoghue, 289 U.S. at 541 (quoting *Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901)).

It is important, once again, to reiterate that the creation of the District did not cut off the ties the territory used for the District had with Maryland. As explained in this memorandum, Maryland did not fully cede the territory for the District of Columbia, electing instead to reserve some minor level of jurisdiction over that land. *See, supra*, footnote 32. It is true that this reserved jurisdiction merely ensured that the residents of the District did not lose any rights formerly provided unless and until the Congress provided otherwise. *See id.* But that small reservation indicates that Maryland believed that it was ceding administrative and functional control over the District. The purpose of the cession, therefore, was to ensure that a single state, or coalition of states, could not usurp the federal government's control of the seat of power. The purpose of the cession was not to strip residents of the land of every vestige of their former Maryland selves. H.R. 190 recognizes the historical anomaly caused by the cession and restores the federal franchise to District residents in a constitutional and logical manner.

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

[41] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 844 (1995) (Kennedy, J., concurring).

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

Constitution.[43] The residents of the District were never stripped of that right by the cession of land to make the District or by an act of Congress to affirmatively deny them the right to vote. H.R. 190 recognizes what should be the state of affairs now by declaring that persons living in the District are Maryland residents for federal voting purposes. And the Supreme Court has already held, in an analogous situation, that an extension of rights in this manner is appropriate under the Constitution.[44]

II. The Congressional Power Over Federal Enclaves Reaffirms the Right of District Citizens to be Treated as Maryland Citizens for Purposes of Federal Voting

Article I, § 8, clause 17 of the Constitution contains not only the grant of federal legislative authority over the District of Columbia, but also a grant of federal power over federal enclaves. Congress is empowered "to exercise *like authority*[45] 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, dockyards, and other needful buildings."[46] Federal enclaves are lands controlled by the statutes and regulations of the Congress. And yet persons living on those

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[43] *See, e.g.*, *O'Donoghue v. United States*, 289 U.S. 516, 541 (1933) ("This District has been a part of the States of Maryland and Virginia. . . . The Constitution has attached to it irrevocably." (quoting *Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901)); *id.* at 540 ("It is important to bear constantly in mind that the District was made up of portions of two original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all rights, guarantees, and immunities of the Constitution.").

[44] *See Evans v. Cornman*, 398 U.S. 419 (1970), explained in detail *infra* Part II.

[45] That is, exactly the same authority that it exercises over the District of Columbia. The clause in its entirety reads:

> The Congress shall have 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, 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;"

U.S. CONST. art. I, § 8, cl. 17.

[46] U.S. CONST. art. I, § 8, cl. 17 (emphasis added).

enclaves have been granted the right to vote in state elections through a recognition that persons living in an enclave effectively reside in the state from which the federal enclave was carved.

The seminal case addressing the state voting rights of those living on federal enclaves is *Evans v. Cornman*.[47] There, the Supreme Court determined that residents of the campus of the National Institutes of Health (NIH), located in Bethesda, Maryland, were entitled to vote in Maryland state elections.[48] As recognized by the Court, the NIH campus was, and continues to be, a federal enclave subject to the "exclusive legislation" of the Congress of the United States.[49] But in so exercising its "exclusive legislation," Congress had permitted the State of Maryland to regulate many facets of life on the NIH campus, including criminal laws, taxes, spending decisions, unemployment laws, and workers compensation laws.[50] Because the interests of NIH's residents were so bound up in the actions of Maryland, the Court held that it violated the 14th Amendment to deny those persons living at NIH to vote in Maryland state elections.[51]

It is true that the situation of District residents does not precisely mirror that of the persons living on the NIH campus. Maryland does not exercise authority over the people living in the District. But H.R. 190 seeks to restore *federal* voting rights to the persons living in the District, not state voting rights. Thus, under the analysis in *Evans*, the question is whether the interests of those living in the District are affected by a government that regulates their lives. In *Evans*, it was the conclusion of the Court that residents of the NIH campus "have a stake [in

[47] *Evans v. Cornman*, 398 U.S. 419 (1970).

[48] *Id.* at 426.

[49] *See id.* at 419.

[50] *Id.* at 424.

[51] *Id.* at 425-26.

actions taken by the State of Maryland] equal to that of other Maryland residents."[52] That stake, according to the court, entitled the NIH residents to vote for those who had direct control over their lives. Residents of the District are affected by every decision made by the Congress, which holds final authority over the District's budget and legislation.[53] They have a stake in actions taken by federal elected officials, and they should therefore have the right to vote for persons who make decisions that affect their lives, under the reasoning of *Evans*.

H.R. 190 simply seeks to restore to those persons living in the District the same right to vote in federal elections that they held when the District was a part of Maryland. The Court, in *Evans*, determined that even without affirmative Congressional action, it was a denial of federal constitutional rights to deny persons living on the NIH campus the right to vote in state elections, when the state held sway over their lives.[54] Thus, the principle underlying *Evans* is one that recognizes that people should have the right to elect those who have control over them. District residents deserve no less when it comes to federal elections. Permitting them to vote in Maryland, by recognizing that they never lost certain rights of their Maryland citizenship when the District was formed, is the most appropriate way to ensure that District residents participate in choosing those who shape the policies guiding life in the District.

III. Nothing in Article I, Section II & Section III Regarding Qualifications and Inhabitation Requirements Affect the Constitutionality of H.R. 190

The proposed legislation also fits squarely under the election and eligibility of Representatives and Senators clauses of the Constitution. Congress clearly has the ability, and

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[52] *Id.* at 426.

[53] *See, e.g.*, *O'Donoghue v. United* States, 289 U.S. 516, 539 (1933) ("Over this District Congress possesses 'the combined powers of a general and of a state government in all cases where legislation is possible.'" (quoting *Stoutenburgh v. Hennick*, 129 U.S. 141, 147 (1889)); *see also* Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 CATH. U.L. REV. 311 (1990).

[54] *Evans v. Cornman*, 398 U.S. 419, 425-26 (1970).

has used that power, to adjust the residency and inhabitance requirements set forth in the Constitution.

The first clause of Article I, Section 2 (for election of Representatives) and Section 3 (for election of Senators), requires that "the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." US. Const., Art I, § 2. Despite the explicit tie to those qualified to vote in state legislative elections, Congress has, on numerous occasions, provided people who are not allowed to vote in state elections the opportunity to vote in federal elections.

The most explicit example of this is the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA").[55] This law requires that each state allow military and overseas voters who do not reside in the state for purposes of state elections vote via absentee ballot for all federal elections.[56] Therefore, while Maryland requires residency to register to vote in state,[57] UOCAVA overrides that qualification for federal elections.[58]

Another example is found in *Oregon v. Mitchell*, where the Supreme Court upheld Title II of the Voting Rights Act, which barred durational residence requirements for presidential and

[55] 42 U.S.C. 1973ff.

[56] 42 U.S.C. 1973ff-1(a) (2005).

[57] MD. CODE ANN., ELECT. LAW § 3-102(a)(3).

[58] The question of the constitutionality of UOCAVA in allowing non-residents to vote in federal elections has never been reached by the Supreme Court. In *Romeu v. Cohen*, the Second Circuit held that UOCAVA was not unconstitutional even though it failed to provide the same absentee voting rights to citizens who had moved to Puerto Rico as it did to military and overseas voters who had moved to other countries. 265 F.3d 118 (2nd Cir. 2001). While Judge Walker, in a footnote to his concurrence, questioned the Constitutionality of UOCAVA as it related to overseas voters as overreaching Spending Clause and Necessary and Proper Clause authority, *id.* at 137 n.7, the author of the majority opinion, Judge Leval, in dicta, cited *Oregon v. Mitchell* for support, just as is done *infra*, for the proposition that UOCAVA clearly falls under Congress's power to require that states accept the votes of certain non-resident voters. *Id.* at 130 n.9 (citing *Oregon v. Mitchell*, 400 U.S. 112, 134 (1970)). In *De La Rosa v. United States*, a federal district judge reviewed UOCAVA under rational basis review and determined that the statue had a legitimate governmental purpose, "namely "to facilitate absentee voting by United States citizens, both military and civilian, who are overseas." 842 F. Supp. 607, 611 (D. P.R. 1994) (citing H.R. Rep. No. 99-765, 1986 U.S.C.C.A.N. at 2009).

vice-presidential elections.[59] The Court also partially upheld Title III, which had lowered the national voting age to eighteen, holding that Congress could set a national voting age for federal elections, but could not for state elections.[60] While the 26th Amendment rendered the later ruling moot for purposes of the specific issue that had been before the Court, *Oregon v. Mitchell* does provide generally that the constitutional ability of Congress to "make or alter" the "time, place, and manner" regulations set forth by the states[61] can be extended to allow Congress to set different qualifications for federal voters than exist in a particular state for that state's local elections.[62] Therefore, since Congress has the power to override residency qualifications for overseas voters in federal elections through UOCAVA and override durational residency requirements and age restrictions in federal elections through the Voting Rights Act, Congress must have the power to extend the privilege of voting in federal elections to people in the District as citizens of Maryland.

Likewise, Congress's ability to adjust residency requirements plays a large role in the requirements for those elected to serve as a representative or Senator. Each person who serves as a Representative or a Senator must be, among other things, "an Inhabitant of that State in which he shall be chosen" US. Const., Art. I, § 2, & § 3. The clear purpose of this phrase was to

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[59] 400 U.S. 112, 134 (1970).

[60] *Id.* at 119.

[61] The U.S. Constitution provides that

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

Art. I, § 4.

[62] *Mitchell*, 400 U.S. at 124-25.

ensure that the representative live among the people he represents.[63] Nothing in H.R. 190 frustrates that purpose. Further, nothing in the Constitution would frustrate the ability of Congress to determine who is and who is not an inhabitant of a particular state.[64]

In fact, Congress, on numerous occasions, has determined who is and who is not an inhabitant of a particular area for federal elections.[65] For example, as noted above, UOCAVA specifically grants residency, for the purpose of elections, to oversees citizens.[66] In addition, the creation of new states out of old ones, like Kentucky in 1792, Maine in 1820, and West Virginia in 1863, necessarily moved the inhabitancy of former Massachusetts and Virginia residents to their new states without the need for any person to physically move.[67] Inhabitancy ran with Congress's classification. Clearly those "new" inhabitants of Maine and West Virginia could

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[63] See *Adams v. Clinton*, 90 F. Supp. 2d 35, 90 (D. D.C. 1998). (Oberdorfer, dissenting). The Constitutional Convention spent part of one day debating over the language of this Section, resulting in the change from "resident" to "inhabitant," which, according to James Madison, "would not exclude persons absent occasionally for considerable time on public or private business." George Mason specifically feared that "[i]f residence be not required, Rich men of neighbouring States, may employ with success the means of corruption in some particular district and thereby get into the public Councils after having failed in their own State. This is the practice in the boroughs of England." James Madison, August 8 Notes From the Constitutional Convention, *reprinted in* 2 MAX FARRAND,. THE RECORDS OF THE FEDERAL CONVENTION OF 1787 216 (Yale University Press, 1937).

[64] As noted in Section II *infra*, the courts have determined that residents of federal enclaves can also be considered residents of a state for state voting purposes. Congress has also extended voting rights to persons overseas and living on Indian reservations, clothing them with "residency" for voting purposes. Congress would be well within its rights to declare, as provided in H.R. 190, that residents of the District could be considered residents of Maryland for federal voting purposes. Therefore, the inhabitants of the District may properly vote in Maryland. The situation here is slightly different – a determination whether such inhabitants may serve as representatives for Maryland, as occurred prior to 1800.

[65] It also has given itself the power to determine who is and who is not an inhabitant as defined by other clauses of the Constitution. The Twelfth Amendment includes the prohibition against an elector voting for a President and a Vice President who are both "inhabitants" of the same state as the elector. U.S. Const. Amend. XII. Congress, via 3 U.S.C. § 15, has the power to determine the validity of objections to the electoral college, including the inhabitants prohibition. *See* Christopher Maravilla, *That Dog Don't Hunt: The Twelfth Amendment After* Jones v. Bush, 23 PACE L.REV 213, 257-58 (2002).

[66] 42 U.S.C. 1973ff-1(a) (2005).

[67] While arguments that the creation of these states could have been unconstitutional have been made, they are not taken seriously today and the "inhabitancy" of these citizens has never been questioned. *See* Vasan Kesavan and Michael Stokes Paulsen, *Is West Virginia Unconstitutional?* 90 CAL. L.REV. 291 (2002). "[R]ealistically, West Virginia is not, regardless of anyone's constitutional argument, going to be absorbed back into old Virginia." *Id.* at 395.

serve in Congress, for by writ of Congress, their inhabitancy had transferred to their new state home.

In general, the power to alter congressional district lines, removing from the states the ability to create "rotten boroughs," a fear of the Founders,[68] or to provide for the election of Congressmen at large,[69] always has existed in the Constitution. The Federal government has used such a power through Section Five of the Voting Rights Act, granting administrative and judicial review over any voting changes within certain states, counties, even townships.

Therefore, "moving" the inhabitancy of DC residents to Maryland, for the purposes of federal elections, surely is possible, just as the "movement" of inhabitancy is possible for oversees voters, or voters in newly created states, or even through new congressional districts arising from the decennial census and redistribution of Congressional seats that are under Federal review.

IV. The 23rd Amendment Does Not Stand As An Impediment to H.R. 190; To Hold Otherwise Would Undermine the Spirit of Representation for District Citizens Embodied Within The Amendment

The final hurdle that H.R. 190 must overcome is that of the 23rd Amendment. Section 4 of the proposed law directs first that the "people of the District of Columbia" are hereby eligible to participate in the election of electors from the state of Maryland, and, therefore, that Congress appoint no presidential electors for the District of Columbia. On its face, this presents a problem that is inherent in the structure of the Constitution itself – namely, can a Constitutional amendment be "repealed" as a matter of fact, rather than by law?

This situation is different from that of the 19th Amendment, which outlawed the sale of alcohol and was repealed by the 21st Amendment. While the text of the 19th Amendment still is

[68] *Mitchell*, 400 U.S. at 122 (citing *Wesberry v. Sanders*, 376 U.S. 1, 14-16 (1964)).

[69] *Id.* (citing Act of Aug. 8, 1911, 37 Stat. 13).

printed as part of the Constitution, it no longer has any force. This impotence results from Congress and the states taking away a power in exactly the same manner that it had previously provided it. To let Congress, by a simple majority, and the President, by mere signature, take away a power granted by the Constitution, on the other hand, would, on its face, seem to undermine the whole American Constitutional experiment.

What H.R. 190 proposes, however, does not strike at the heart of the federal structure. Rather, it merely exercises the powers that the Amendment grants to Congress in a way that eliminates the absurd result of three "extra" electors following the residents of the District where ever they go, potentially giving them two bites at the presidential apple, while providing those residents more representation than they receive under the current regime. The objective of Section 4 of H.R. 190, therefore, is not to grant the 23rd Amendment power through Maryland, but simply to decline to use the congressional power to appoint electors for the District, so that those residents can receive the full breadth of representation they can receive under the rubric of H.R. 190's statutory scheme.

The 23rd Amendment provides that

> Section 1. 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.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Note, first, that the Amendment does not require that these electors be elected.[70] Merely because Congress chose election as the means by which appointment would occur does not mandate that election is the course that was required. The language of the 23rd Amendment, therefore, parallels that of Article II, Section 1: "Each state shall appoint, in such manner as the Legislature thereof may direct. … " This, in effect, places Congress in the role of state legislature for the District's electors. Within the Congressional records of the debates regarding passage of the 23rd Amendment, legislators believed that Congress's power under this Amendment would mirror that of a state legislature over the direction of appointment of presidential electors.[71]

In this context, it is constitutionally permissible for a state to refrain from appointing presidential electors.[72] In the presidential election of 1789, for example, New York did not produce any such electors.[73] While such an action is by no means a regular occurrence, neither

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[70] A Congressional committee rejected an earlier draft of the amendment, which provided election of those electors by the people of the District of Columbia, in the manner provided later by Congress. *See* Philip Schrag, *The Future of District of Columbia Home Rule*, 39 Cath. U.L. Rev. 311, 349 n.186 (1990). In fact, throughout the first years of the Union, it was the practice that state legislatures appointed electors, rather than direct election of presidential electors.

[71] *See, e.g.*, 106 Cong. Rec. 12,560 (1960) ("CONGRESSMAN MEADER: … I am assuming, however, that this resolution will give Congress the same authority with respect to the appointment of electors that the State legislatures have under article II, section I."); H.R. Rep. No. 1698, 86th Cong. 2d Sess. (1960), *reprinted in* 1960 U.S.C.C.A.N. 1462 ("It should be noted that this language follows closely, insofar as it is applicable, the language of article II of the Constitution.").

[72] Professor Adam Kirkland states that "[U]nder no circumstances , however, can a state or Congress deny electoral votes all together." *Partisan Rhetoric, Constitutional Reality, and Political Responsibility: The Troubling Constitutional Consequences of Achieving D.C. Statehood by Simple Legislation.*, 60 GEO. WASH. L. REV. 475, 495 (1991). He, however, cites to neither case nor Constitutional treatise to support such a blanket statement; rather he cites to an Attorney General's statement, provided by Robert Kennedy soon after ratification of the 23rd Amendment. One must not overlook the self-serving nature of Kennedy's comments. Not only was this amendment passed during his watch, his own brother was elected President by a very slim margin in 1960. The legal opinion of his Attorney General and brother regarding three electoral votes and the ability of Congress to refrain from appointing electors that most assuredly would have voted for President Kennedy in 1964 must be viewed quite critically and certainly cannot be the only brick on which to build a case that the denial of electoral votes is forbidden.

[73] Professor Kirkland dismisses this election for a number of reasons. *See id* at 495-96. None of those reasons, however, determine whether or not New York's action (or inaction) were unconstitutional. He does go on to argue

is it necessarily constitutionally impermissible. Article II, Section 1 is clear in allowing appointment of electors in the manner that the state's legislature sees fit. One can easily argue, and the Constitution does not prohibit such an argument, that the power to appoint also includes the power to refrain from appointing. Since the language of the 23rd Amendment tracks that of Article II, Section 1, Congress, then, would, in theory, have the power to refrain from appointing electors by either failing to enact or repealing a previous enactment of the power granted to Congress by the 23rd Amendment.[74]

To try to determine whether the 23rd Amendment is self-executing[75] or can be "repealed" legislatively, then, misses the point, since Congress, under this amendment, merely is acting via the same powers that a state legislature already possesses. Further, the language providing that Congress *may* direct is not an absolute requirement. Other Amendments also provide Congress with the power to do something without requiring it be done.[76] Finally, this amendment is

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that "modern notions of equal protection and the privileges and immunities of U.S. citizenship; the guarantee of a republican form of government; and the structure of federalism implicit in the constitutional order" mandate that such an action would be unconstitutional today. *Id.* at 496. Whether or not Professor Kirkland is correct, though, is ultimately irrelevant, since, as noted *supra*, H.R. 190 merely shifts the District's presidential electorate into Maryland. Therefore, none of his "modern notions" would be altered.

[74] As Professor Peter Raven-Hansen noted, this power is stated expressly within the language of the Amendment and the legislative history, for Congress changed the original language of the Amendment from "in such manner and under such regulations as the Congress *shall* provide" to "as the Congress *may* direct," tracking the language, as noted above, from Article II, section 1. *See The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 187-88 (1991).

[75] Note that Congress did take six months to enact the enabling legislation once the Amendment was passed. *See id.* at 188. The Supreme Court has held that the Fifteenth Amendment is "self-executing" despite having language identical to Section II of the 23rd Amendment. *See Guinn v. U.S.*, 238 U.S. 347, 363 (1915). In no way, however, does that case automatically confer self-execution to all similar language. Rather, *Guinn* focused on the prohibitive nature of the Fifteenth Amendment – no additional legislation was necessary to void state law that was contrary to the language of the Amendment. The 23rd Amendment, on the other hand, grants solely a positive power; it prohibits nothing. Such a power cannot, by nature of the grant, be self-executing because of its positive nature. Unlike a prohibition, a grant of power requires language stating exactly the limits of the power and the means by which the power will be imposed.

[76] The Twentieth Amendment provides some examples of this – Congress "may provide by law for the case wherein neither a President elect not a Vice President elect shall have qualified," and "may provide for the case of the death of any of the person from whom the House of Representatives may choose a President … ." In contrast, it also

unique in that Congress specifically chose to mirror the language used within Article I that provided the powers in question to the states. Given the analogous relationship between the District and Congress, this situation surely is different from that which exists behind other constitutional amendments.

Most importantly, though, the people of the District, unlike the citizens of 1789 New York, will be represented in the electoral college, and the aims of the 23rd Amendment will be reached; in fact, they will be exceeded. H.R.190 expressly provides that District residents will have a say in the election of Maryland's electoral votes by voting as those equivalent to Maryland residents, just as those persons covered by UOCAVA. Therefore, no Fourteenth Amendment concerns exist since no rights that the people possess would be abrogated.[77] In fact, HR 190 increases those rights from only allowing District citizens to vote in Presidential elections, as the 23rd Amendment provides, to granting them full federal voting powers as part of Maryland.[78]

The overriding concern of those who advocated for, and ultimately passed, the 23rd amendment was to provide the people of the District of Columbia some semblance of representation in the election of those with power over the District. Nothing in H.R. 190 is contrary to that concern. Truly it would be ironic in the darkest sense of the term for the desire

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provides that Congress "shall assemble at least once in every year ..." Drafters of amendment language clearly have the ability to impose requirements or provide flexibility, which ever is desired.

[77] *See* Hansen, *supra* note 75 at 188.

[78] Note that every single person within the District would have the right to vote for Maryland electors. No separate voting enclave is created. This is completely different from attempts made in the 1990's to provide statehood for the District by reducing the size of the federal enclave such that, for all intents and purposes, all or virtually all (other than the President's family and any homeless persons) residents of the District would be citizens of the "new" state without repealing the 23rd Amendment by a subsequent constitutional amendment. Therefore, arguments against H.R. 190 that flow from disagreements related to statehood plans have no bearing on this analysis. The spirit of the 23rd Amendment would still exist – rather the manner by which electoral college representation for the District is legislatively determined such that representation exists as part of Maryland. As noted above, H.R. 190 does not abrogate any person's substantive right to representation in the electoral college.

of the 89th Congress to provide a small amount of representation to the people of the District ultimately to thwart the ability of the 109th Congress to provide a much larger voice in federal elections to those same disenfranchised people.

TESTIMONY OF THE DC STATEHOOD GREEN PARTY

TESTIMONY

House of Representatives Bill 5388, The D.C. Fair and Equal House Voting Rights Act

From the DC Statehood Green Party http://www.dcstatehoodgreen.org

Judiciary Committee Hearing
Thursday, September 14, 2006

Contact: Scott McLarty, DC Statehood Green Party Media Coordinator, 202-518-5624, mclarty@greens.org

We in the DC Statehood Green Party applaud the dedication of Congress members to the democratic rights of the people of the District of Columbia.

However, we encourage the Judiciary Committee and Congress to reconsider "The D.C. Fair and Equal House Voting Rights Act" (H.R. 5388), which would grant the District a single voting seat in the House of Representatives. Instead, we urge Congress to pass legislation making it possible for the people of the District of Columbia to choose statehood.

We offer ten reasons why Congress should either replace H.R. 5388 with a bill allowing D.C. statehood, or should follow passage of H.R. 5388 quickly with such a bill that grants D.C. the option of real democracy.

Democracy for D.C., with its African American majority population, remains one of the last major legal civil rights hurdles. The DC Statehood Green Party itself is the result of a merger in 1999 between the DC Green Party and the DC Statehood Party, which was founded in 1970 as part of the Civil Rights Movement and whose banner demand has been statehood for the District. We urge Congress members and the public to join us as we work for this goal.

Ten reasons to support statehood instead of a single voting seat in the House:

(1) H.R. 5388, by giving voting rights to a single D.C. Representative without conferring other democratic rights on the people of D.C., grants full constitutional rights to a single District resident.

We ask the Judiciary Committee to imagine if the outcome of the Montgomery bus boycott were that Dr. Martin Luther King alone was given the right to sit in front of the bus, while all other black citizens of Montgomery still had to sit in the back. This is comparable to what H.R. 5388 would enact.

(2) H.R. 5388, which gives D.C. a single voting seat in the House, still leaves D.C. residents with less congressional representation than all other Americans, who get to elect two Senators as well as a Representative. Under statehood, D.C. will gain two Senators and a Representative.

In effect, H.R. 5388 makes D.C. residents "one-third citizens."

(3) Representation in a national legislature is not democracy. Throughout history, colonies have enjoyed voting seats in the legislatures of nations that conquered them, even while they suffered exploitation and suppression.

Our own Founding Fathers and Mothers fought for democracy and independence, not 'voting rights.' Patrick Henry never said 'Give me a seat in Parliament or give me death.' The only real democracy is political self-determination and self-governance for the people of D.C.

(4) The voting seat afforded by the H.R. 5388 will not block Congress from imposing its will and veto power on D.C. In 1998, Congress overturned a ballot measure that passed with a 69% majority in D.C. (Initiative 59 for medical marijuana). Congress has also forced D.C. to adopt 'zero tolerance' laws; ordered Mayor Williams (through the appointed Financial Control Board) to dismantle D.C. General Hospital, the District's only full-service public health facility, imposed a charter school system; and outlawed needle exchange to prevent HIV transmission.

Members of Congress who represent suburban districts in Virginia and Maryland have exploited D.C. for the benefit of their constituents, prohibiting D.C. from taxing commuters (every other city in the U.S. relies on commuter taxes) and pushing for a new convention center in 1999 to be paid for by a D.C. business surtax for the profit of suburban businesses. Congress members have sought to overturn local gun control laws, enact the death penalty, impose a school voucher program, and prohibit benefits for same-sex couples.

Congress's imposition of laws, policies, and finances on the District is an injustice and an affront to the rights of D.C. citizens. Only full self-government -- statehood -- will stop Congress from forcing unwanted laws, policies, and budgets on D.C. and overturning the decisions of District voters and City Council. H.R. 5388 does nearly nothing to increase the political power of D.C. citizens, because the new voting seat would be only one of 437, according to provisions of the bill that would also grant Utah a new seat.

(5) The lack of statehood has made D.C. residents second-class U.S. citizens, denying them rights that all other U.S. citizens enjoy -- contrary to the 14th Amendment to the Constitution, which ensures equal protection under the law.

Ever since thousands of African Americans moved to D.C. in the 1950s to take federal jobs but had no control over local laws, one of the nicknames of the District has been 'The Last Plantation.' H.R. 5388 bill will not change the District's colonial status.

We remind the Judiciary Committee that President Bush is sending young men and women from D.C. to face injury and death fighting for the democratic rights of Iraqis -- rights they don't enjoy at home.

(6) If H.R. 5388 passes, Congress will still hold the power to revoke D.C.'s lone voting seat and repeal D.C.'s limited democratic powers. Under statehood, Congress would not have the power to revoke D.C. democracy. Except for the Southern states after they rebelled in the Civil War, Congress has never rescinded any state's right to govern itself.

(7) H.R. 5388 will set back the movement for full constitutional rights for District residents for decades, because Congress will consider democracy for D.C. a fait accompli.

(8) Since the decisions of D.C. elected officials are all subject to Congressional approval and veto power, and the elected Representative would be the District's sole voting representative in Congress, the bill will give this representative sole and discretionary 'gatekeeper' power over all D.C. laws, policies, and budgets -- contrary to the principle of self-determination, which is the basis of democracy.

Under H.R. 5388, leverage over all D.C. political agenda will be invested in a one individual -- D.C.'s lone voting representative in Congress. This is the exact opposite of democracy.

(9) If the bill passes and is challenged in a law suit, it's very possible that the Supreme Court will overturn it, since the U.S. Constitution (Article I, Section 2) grants voting representation in Congress solely to states.

A decision by the U.S. District Court for D.C. in 2000 (Daley v. Alexander) upheld this restriction: "We conclude from our analysis of the text that the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representatives." The ruling went unchallenged by the Supreme Court.

The Court will not overturn an Act of Congress that allows D.C. to become a state.

(10) If a court overturns the bill and requires a constitutional amendment, then, procedurally, full democracy will be easier to achieve than mere voting rights in Congress, since a vote for statehood would not require the 2/3 majority necessary to pass a constitutional amendment.

In 1846, an Act of Congress removed Alexandria and parts of Arlington from the District and gave it to the state of Virginia. This precedent proves that Congress, through

legislation requiring a simple majority, can change the District's borders and reduce the constitutionally mandated federal enclave to include only the federal properties (White House, Capitol, Mall, etc.), thus freeing the rest of D.C. to choose statehood by a plebescite vote.

For more information about the movement for D.C. statehood and the history of this movement, we encourage you to visit the following web sites:

The DC Statehood Green Party http://www.dcstatehoodgreen.org

Stand Up! for Democracy in D.C. Coalition http://www.standupfordemocracy.org

The D.C. Statehood Papers: Writings on D.C. Statehood & self-government by Sam Smith http://prorev.com/dcsthdintro.htm

Twenty D.C. Citizens Lawsuit: The case for full democracy and equality http://www.dccitizensfordemocracy.org

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MEMORANDUM
December 6, 2005

To: Walter Smith
From: Richard P. Bress
Jonathan C. Su
File no: 501340-0002
Copies to: Gary Epstein, Jim Rogers
Subject: Supplemental Analysis Regarding Possible D.C. Voting Legislation by Rep. Thomas M. Davis, III (R-Va.)

I. ISSUE

This memo supplements our January 28, 2005 memo to you in which we analyzed legislation proposed in 2004 by Rep. Thomas M. Davis, III (R-Va.) that would add two seats to the U.S. House of Representatives (the "House"), one going to the District of Columbia and one going to the State of Utah. In that memo we concluded that, in providing Utah an additional seat in the House pending the 2010 census and subsequent reapportionment, Congress could: (1) direct Utah to adopt and maintain the four-Congressional-district plan its legislature created in 2001; or (2) direct that the new seat be elected "at large" by the entire state.

You have since asked us to research whether the second alternative (i.e., the "at large" districting plan) would violate the "one person, one vote" principle articulated by the Supreme Court in *Wesberry v. Sanders*, 376 U.S. 1 (1964). For the reasons set forth below, we conclude that the "at large" districting plan would not violate the "one person, one vote" principle.

II. ANALYSIS

In *Sanders*, the Court held that "the command of Article I, Section 2 [of the Constitution], that Representatives be chosen 'by the People of the Several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Sanders*, 376 U.S. at 7-8. Striking down a Georgia apportionment statute that created a congressional district that had two-to-three times as many residents as Georgia's nine other congressional districts, the Court explained that

> [a] single Congressman represents from two to three times as many Fifth District voters as are represented by each of the Congressmen from the other Georgia congressional districts. The apportionment

> statute thus contracts the value of some votes and expands that of others. If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand.

Id. at 7. The Court further counseled that an apportionment plan triggers "one person, one vote" concerns when congressional districts within a state contain different numbers of residents, diluting the voting power of residents in the district with more residents.[1]

Applying those principles, we do not believe that the proposed temporary "at large" district in Utah would violate the "one person, one vote" requirement, because each Utah voter would be eligible both to vote for a candidate in her district *and* for a candidate in the "at large" district. Although the proposed state-wide "at large" district would necessarily contain more residents than the other districts, the establishment of that "at large" district would create no constitutional dilution concerns: Each person's vote in the "at large" district would have equal influence, and the opportunity to cast that vote would not alter in any way the value of that person's vote in her own smaller district. Any comparison between the voting power of residents in the smaller districts and the "at large" district would be obviated by the fact that all Utah residents would be eligible to vote in their own districts and the "at large" district. As a result, all Utah residents' votes would have equal weight.

You have also asked, however, whether the proposed "at large" district could be challenged on "one person, one vote" grounds because the plan might be construed as giving each Utah resident two representatives, whereas residents of other states each have one representative. We believe such a challenge would be without merit for two reasons. First, although the Supreme Court has left open the possibility that the "one person, one vote" principle could be applied to the apportionment process, the Court has held that Congress is entitled to substantial deference in its apportionment decisions. *Dep't of Commerce v. Montana*, 503 U.S. 442, 464 (1992). In *Montana*, the Court explained that

> [t]he constitutional framework that generated the need for compromise in the apportionment process must also delegate to Congress a measure of discretion that is broader than that accorded to the States in the much easier task of determining district sizes within state borders. Article I, 8, cl. 18, expressly authorizes Congress to enact legislation that "shall be necessary and proper" to carry out its delegated responsibilities. Its apparently good faith choice of a method of apportionment of Representatives among the several States "according to their respective Numbers" commands

---

[1] *See also Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State"); *Vieth v. Jubelirer*, 541 U.S. 267, 343 (2004) ("For 40 years, we have recognized that lines dividing a State into voting districts must produce divisions with equal populations: one person, one vote. Otherwise, a vote in a less populous district than others carries more clout.") (Souter, J., dissenting) (internal citation omitted).

> far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard.

Id. In a later case, the Court revisited its decision in *Montana* and noted that "the Constitution itself, by guaranteeing a minimum of one representative for each State, made it virtually impossible in interstate apportionment to achieve the standard imposed by *Wesberry*." *Wisconsin v. City of New York*, 517 U.S. 1, 14-15 (1996). Accordingly, the one person one vote principle is essentially inapplicable to interstate voting comparisons.

Second, and in any case, even on an interstate comparison basis the "one person, one vote" principle is served by the proposed addition of an at-large seat in Utah. A simplified example will show why. Take two hypothetical states that have sufficient population for four representatives. One state has four "at large" voting representatives while the other divides its representatives and voters into four districts. The "at large" voter in the first state does not have any more clout than the single-district voter in the second state; she just has 1/4 of an interest in four representatives instead of a whole interest in one. The same is true of Utah voters after addition of the proposed "at large" voting district for that state. Compared to the situation where a comparable state is divided into four districts, under the proposed plan the voters in Utah's three districts would each have proportionately less say in the election of the representative from their own district (because the district would be more populous) but would gain a fractional interest in the state's at-large representative. Under either scenario, each voter's total clout remains the same. And because that is true both within the state of Utah and compared to other states, the proposed at-large seat does not violate the principle of one person, one vote.

Please let us know if you have any further questions.

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MEMORANDUM
October 13, 2006

To: Walter Smith
From: Rick Bress
Jonathan Su
File no: 501340-0002
Copies to: Gary Epstein, Jim Rogers
Subject: Analysis Regarding Possible D.C. Voting Legislation by Representative Thomas M. Davis III (R-Va.)

I. ISSUE

In 2004, Rep. Thomas M. Davis III (R-Va.) proposed legislation that would add two seats to the U.S. House of Representatives ("the House"), with one seat going to the District of Columbia, and one seat going to the State next in line for representation in the House according to the 2000 census (Utah). The proposed legislation would have increased the membership of the House to 437 seats until the apportionment process after the 2010 census, whereupon the House membership would revert to 435 seats.

You asked us to research: (1) whether Congress, in providing Utah a temporary, additional seat in the House, may direct Utah to adopt and maintain a particular four-Congressional-district plan (the plan created by the Utah legislature in 2001[1]) until the 2010 census and subsequent reapportionment and redistricting process; and (2) whether Congress may instead direct that the new seat be elected "at large" by the entire state until the 2010 census and subsequent reapportionment and redistricting process.

For the reasons stated below, we conclude that Congress has the authority to enact either alternative and that there are historical precedents for Congress doing so.

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[1] The Utah legislature had drawn the four-district plan in the event that Utah prevailed in lawsuits contending that Utah should have been awarded the House seat given to North Carolina because the Census Bureau's method of calculating population violated the Constitution. Utah lost those lawsuits, however, and thus reverted to the three-district plan also adopted by its legislature.

II. ANALYSIS

A. The Constitution vests in Congress broad authority to regulate national elections.

The Constitution provides that "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." U.S. Const. art. I, § 2, cl. 1. The Constitution then states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." *Id.* at art. I, § 4, cl. 1.

The Supreme Court, in interpreting these provisions, has concluded that the Constitution gives Congress broad authority to regulate national elections. In *Oregon v. Mitchell*, 400 U.S. 112, 119 (1970), Justice Black wrote: "In the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations, if it deemed advisable to do so." Justice Black explained further:

> The breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to *grant to Congress the power to lay out or alter the boundaries of the congressional districts . . . .* Surely no voter qualification was more important to the Framers than the geographical qualification embodied in the concept of congressional districts . . . .

Mitchell, 400 U.S. at 121-22 (emphasis supplied).

The Court articulated a similar principle in *Ex parte Siebold*, 100 U.S. 371, 383-84 (1879), when it held that "the power of Congress over [the election of senators and representatives] is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the State, necessarily supersedes them."

In 2004, the Supreme Court noted Congress's authority to regulate elections when the Court addressed a case involving gerrymandering. In *Vieth v. Jubelirer*, 124 S. Ct. 1769, 1775 (2004), the Court observed that Congress has the authority to "make or alter" districts for federal elections. As Justice Scalia wrote in his plurality opinion, "[i]t is significant that the Framers provided a remedy for [gerrymandering] in the Constitution. Article 1, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, *permitted Congress to 'make or alter' those districts if it wished.*" *Id.* (quoting U.S. Const. art. I, § 4) (emphasis supplied).

B. Congress has the authority to direct Utah to adopt the four-district plan.

Based on the broad authority that the Constitution vests in Congress to regulate national elections, it is our view that Congress has the authority to direct Utah to adopt the four-district plan that was approved by the Utah legislature in 2001. In directing Utah to adopt a specific districting plan, Congress would be, in effect, temporarily drawing Utah's Congressional districts – even though it would be based on a plan Utah itself drew.

There is, in addition, historical precedent for such a Congressional action. In the Oklahoma Enabling Act, Congress admitted Oklahoma into the Union, allocated Oklahoma five representatives to the House, and drew the boundaries of the five districts from which those representatives were to be elected:

> That until the next general census, or until otherwise provided by law, the said State of Oklahoma shall be entitled to five Representatives in the House of Representatives of the United States, to be elected from the following-described districts, the boundaries of which shall remain the same until the next general census:
>
> That district numbered one shall comprise the counties of Grant, Kay, Garfield, Noble, Pawnee, Kingfisher, Logan, Payne, Lincoln, and the territory comprising the Osage and Kansas Indian reservations.
>
> That district numbered two shall comprise the counties of Oklahoma, Canadian, Blaine, Caddo, Custer, Dewey, Day, Woods, Woodward, and Beaver.
>
> That district numbered three shall (with the exception of that part of recording district numbered twelve, which is in the Cherokee and Creek nations) comprise all the territory now constituting the Cherokee, Creek, and Seminole nations, and the Indian reservations lying northeast of the Cherokee Nation, within said State.
>
> That district numbered four shall comprise all that territory now constituting the Choctaw Nation, that part of recording district numbered twelve which is in the Cherokee and Creek nations, that part of recording district numbered twenty-five which is in the Chickasaw Nation, and the territory comprising recording districts numbered sixteen, twenty-one, twenty-two, and twenty-six, in the Indian Territory.
>
> That district numbered five shall comprise the counties of Greer, Roger Mills, Kiowa, Washita, Comanche, Cleveland, and Pottawatomie, and the territory comprising recording districts

> numbered seventeen, eighteen, nineteen, and twenty, in the Chickasaw Nation, Indian Territory.

Oklahoma Enabling Act, Pub. L. No. 59-234, § 6, 34 Stat. 267, 271-72 (1906) (attached to this memorandum as Exhibit A). In this instance, Congress itself drew Oklahoma's five congressional districts. The Oklahoma Enabling Act is analogous to a Congressional action that would direct Utah to adopt the four-district plan, as already approved by the Utah legislature.

C. Congress has the authority to direct Utah to adopt an "at large" Congressional district for a new House seat, effective until the next census.

The second proposed alternative for the Davis legislation would direct Utah to temporarily elect its new House seat in an "at large" capacity until the next census and subsequent reapportionment. For the same reasons that we have already concluded Congress has the authority to direct Utah to adopt a particular four-Congressional-district plan, we are confident that Congress would also have the authority to permit Utah to retain its current three-Congressional-district plan and temporarily require an "at large" election for the fourth seat. In either event, Congress could rely on its broad authority to regulate national elections (as discussed in Section II.A of this memorandum).

Although there is no direct precedent for such an action, under current federal law—2 U.S.C. § 2a(c) — Congress has already directed the States to use "at large" voting in certain circumstances:

> Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner . . . . if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State . . . .

To be sure, another federal statute—2 U.S.C. § 2c—requires that Congressional districts be single-member 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 . . . .

In *Branch v. Smith*, the Supreme Court noted the apparent conflict between these statutes. 538 U.S. 254, 267-78 (2003) ("The tension between these two provisions is apparent: Section 2c requires States entitled to more than one Representative to elect their Representatives

from single-member districts, rather than from multimember districts or the State at large. Section 2a(c), however, requires multimember districts or at-large elections in certain situations.") The Court resolved the conflict by holding that Section 2a(c) is inapplicable "*unless* the state legislature, and state and federal courts, have all failed to redistrict pursuant to Section 2c." *Branch*, 538 U.S. 274.

For present purposes, for two reasons there is no conflict between the two provisions. First, as already noted, Congress has already in certain circumstances directed the use of "at large" voting for a State's additional seat, and the Supreme Court expressed no reservations about Congress's authority to do so when interpreting the statute. Congress's determination in Section 2c generally to forbid the States from adopting "at large" voting in no way questions Congress' underlying Constitutional authority to authorize such districts in special circumstances where Congress finds it appropriate.

Second, we think it unlikely that the single-member district requirement of Section 2c would apply to the proposed Davis legislation. Whereas Section 2c addresses the election of House members resulting from an apportionment, in this case the addition of a House seat to Utah would occur by statute. Section 2c begins with the clause "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 . . . ." 2 U.S.C. § 2a(c) (emphasis added). To prevent any confusion on this point, however, we would suggest use of a specific carve-out of Section 2c in any legislation directing the use of "at large" voting

In sum, we conclude that, under the broad authority to regulate national elections granted to Congress by the Constitution, Congress may direct Utah to elect a new House member "at large" until the next census and subsequent redistricting.

III. CONCLUSION

Based on the plain language of the Constitution as interpreted by the Supreme Court, we are confident that either of the two districting alternatives for the proposed Davis legislation are permissible exercises of Congressional authority. Though Congress has used this power sparingly, it has in the past taken similar steps. The proposed districting alternatives for the Davis legislation would be similarly limited exercises of Congressional authority, effective only until the next census and reapportionment. Both alternatives fall comfortably within existing Congressional precedent.

Please let us know if you have any further questions.

MEMORANDUM FROM CONGRESSIONAL RESEARCH SERVICE, "CONSTITUTIONALITY OF CONGRESS CREATING AN AT-LARGE SEAT FOR A MEMBER OF CONGRESS"

Memorandum June 5, 2006

TO: House Judiciary Committee
Attention: Kanya Bennett

FROM: L. Paige Whitaker
Kenneth R. Thomas
Legislative Attorneys
American Law Division

SUBJECT: Constitutionality of Congress Creating an At-Large Seat for a Member of Congress

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This memorandum responds to your request for an evaluation of the constitutionality of H.R. 5388, the "District of Columbia Fair and Equal House Voting Rights Act of 2006." Specifically, you requested an analysis as to whether Congress has the authority to dictate that a congressional seat be created where a Member is not elected from an electoral district, but is elected "at-large"[1] by all qualified voters in a state. This memorandum is limited to considering only this aspect of the bill.

Under the proposed bill, the House would be expanded by two Members to a total of 437 Members. The first of these two positions would be allocated to create a voting Member representing the District of Columbia. The second position would be allocated in accordance with the 2000 census data and existing federal law, although such Member would not represent a specific district, but would temporarily be elected at-large, until the next apportionment following the decennial census.[2] If the bill was passed today, it would appear that the state of Utah would receive the second seat.[3]

The Constitution places primary authority over procedures for congressional elections with the states, but gives Congress ultimate authority over most aspects of the congressional election process. This congressional power is at its most broad in the case of House

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[1] "At-large" representation means that Representatives run statewide (as Senators do), instead of representing districts.

[2] H.R. 5388 (109th Cong.), § 4(c)(3)(A).

[3] *See* Mary Beth Sheridan, *House Panel Endorses D.C. Vote: Bill Needs Approval From Judiciary Committee*, WASH. POST., May 19, 2006 at B1. *Common Sense Justice for the Nation's Capital: An Examination of Proposals to Give D.C. Residents Direct Representation Before the House Committee on Government Reform*, 108th Cong., 2nd Sess. at 18 (hereinafter D.C. Hearing).

elections, which have historically always been decided by a system of popular voting.[4] Article I, § 4, cl. 1 provides that:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

The Supreme Court and lower courts have interpreted the above language to mean that Congress has extensive power to regulate most elements of congressional elections,[5] including a broad authority to protect the integrity of those elections.[6]

The Constitution does not specify how the Members of the House are to be elected once they are apportioned to a state. Originally, most states having more than one Representative divided their territory into geographic districts, permitting only one Member of Congress to be elected from each district. Other states, however, allowed House candidates to run at-large or from multi-member districts or from some combination of the two. In those states employing single-member districts, however, the problem of gerrymandering, the practice of drawing district lines in order to maximize political party advantage, quickly arose. These concerns, in turn, attracted the attention of Congress.

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[4] U.S. Const. Art. I, §2, cl. 1 states "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States."

[5] 285 U.S. at 366. *See* United States v. Gradwell, 243 U.S. 476, 483 (1917)(full authority over federal election process, from registration to certification of results); United States v. Mosley, 238 U.S. 383, 386 (1915)(authority to enforce the right to cast ballot and have ballot counted); In re Coy, 127 U.S. 731, 752 (1888)(authority to regulate conduct at any election coinciding with federal contest); Ex parte Yarbrough, 110 U.S. 651, 662 (1884)(authority to make additional laws for free, pure, and safe exercise of right to vote). *See also* United States v. Simms, 508 F.Supp. 1179, 1183-85 (W.D. La.1979)(criminalizing payments in reference to registration or voting does not offend Tenth Amendment); Prigmore v. Renfro, 356 F.Supp. 427, 430 (N.D. Ala.1972)(absentee ballot program upheld as applied to federal elections), *aff'd*, 410 U.S. 919 (1973); Fowler v. Adams, 315 F.Supp. 592, 594 (M.D. Fla.1970), appeal dismissed, 400 U.S. 986 (1971)(authority to exact 5 percent filing fee for congressional elections).

[6] For instance, the Supreme Court has noted that the right to vote for Members of Congress is derived from the Constitution and that Congress therefore may legislate broadly under this provision to protect the integrity of this right. Smiley v. Holm, 285 U.S. 355 (1932)(Congress may delegate authority to draw member districts to state legislatures, exclusive of governor's veto). For a history of Congressional regulation of federal elections, see Congressional Research Service, Constitution of the United States, Analysis and Interpretation 119 (1992)(available at [http://www.loc.gov/crs/conan/art01/42.htm]). The Court has stated that the authority to regulate the "times, places and manner" of federal elections:

> embrace[s] [the] authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved . . . . [Congress] has a general supervisory power over the whole subject. Smiley v. Holm, 285 U.S. at 366.

Congressional efforts to establish standards for House districts have a long history. Congress first passed federal redistricting standards in 1842, when it added a requirement to the apportionment act of that year that Representatives "should be elected by districts composed of contiguous territory equal in number to the number of Representatives to which each said state shall be entitled, no one district electing more than one Representative." (5 Stat. 491.)[7] The Apportionment Act of 1872 added another requirement to those first set out in 1842, stating that districts should contain "as nearly as practicable an equal number of inhabitants." (17 Stat. 492.)[8] A further requirement of "compact territory" was added when the Apportionment Act of 1901 was adopted stating that districts must be made up of "contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants." (26 Stat. 736.)[9] After 1929, there were no congressionally imposed standards governing congressional districting; in 1941, however, Congress enacted a law providing for various districting contingencies if states failed to redistrict after a census — including at-large representation. (55 Stat 761.) In 1967, Congress reimposed the requirement that Representatives must run from single-member districts, rather than running at-large. (81 Stat. 581.)

Both the 1941 and 1967 laws are still in effect, codified at 2 U.S.C. §§ 2a and 2c. In *Branch v. Smith*,[10] the Supreme Court considered the operation of these two provisions.[11] The question of whether Congress had the authority was apparently not in serious dispute in this litigation. Rather, the Court noted in passing that the current statutory scheme governing apportionment of the House of Representatives was enacted in 1929 pursuant to the authority

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[7] In 1843, three states elected their delegations at large. At the beginning of the 28th Congress, the Clerk of the House declined to entertain a motion to exclude them and the Representatives were sworn in. After the delegations were seated, the House directed the Committee of Elections "to examine and report upon the certificates of elections, or the credentials of the Members returned to serve in this House." The committee's report found the 1842 law "not a law made in pursuance of the Constitution of the United States, and valid, operative, and [therefore not] binding on the states." Later the House adopted a resolution declaring the Representatives of the four states "duly elected," but omitted any mention of the apportionment law. *See* Asher C. Hinds, *Hinds' Precedents of the House of Representatives of the United States* (Washington: GPO, 1907), pp. 170-173. In 1861, California elected three Representatives at large, and they too were seated. *Hinds*, p. 182.

[8] Section 6 of 17 Stat. 28 provided for a reduction of Representatives to states that "deny or abridge the right of any male inhabitants" granted the right to vote by the 14th Amendment. This provision of the law has never been enforced.

[9] Although these standards were never enforced if the states failed to meet them, this language was repeated in the 1911 Apportionment Act and remained in effect until 1929, with the adoption of the Permanent Apportionment Act, which did not include any districting standards. (46 Stat. 21.)

[10] 538 U.S. 254 (2003).

[11] The 1967 law, codified at 2 U.S.C. § 2c, requiring single-member districts, appears to conflict with the 1941 law, codified a 2 U.S.C § 2a(c), which provides options for at-large representation if a state fails to create new districts after the reapportionment of seats following a census The apparent contradictions may be explained by the somewhat confusing legislative history of P.L. 90-196 (2 U.S.C. § 2c), prohibiting at-large elections. In 1941 and 1967, Congress enacted modifications to the apportionment statute at 2 U.S.C. §§ 2a(c) and 2c, respectively. The Branch Court reconciled the inherent tension between the two provisions by holding that the provision requiring at-large elections under § 2a(c) was subject to the requirement under § 2c that single-member districts must be drawn whenever possible. *Id.* at 266-71. For further discussion, *see* CRS Report RS21585, *Congressional Redistricting: Is At-Large Representation Permitted in the House of Representatives?* by David C. Huckabee and L. Paige Whitaker.

of Congress to establish the "Times, Places and Manner" provision of the Constitution. Consequently, it seems likely that Congress has broad authority, within constitutional limits, to establish how Members' districts will be established.

It might be suggested that creating an at-large congressional district in a state could violate the "one person, one vote" standard established by the Supreme Court in *Wesberry v. Sanders*.[12] In *Wesberry,* the Supreme Court first applied the one person, one vote standard in the context of evaluating the constitutionality of a Georgia congressional redistricting statute that created a district with two to three times as many residents as the state's other nine districts. In striking down the statute, the Court held that Article I, section 2, clause 1, providing that Representatives be chosen "by the People of the several States" and be "apportioned among the several States ... according to their respective Numbers," requires that "as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's."[13]

It does not appear, however, that the creation of an at-large district under the circumstances outlined in H.R. 5388 would create a conflict with the "one person, one vote" standard. Under H.R. 5388, each Utah voter would have the opportunity to vote both for a candidate to represent his or her congressional district *as well as* for a candidate to represent the state at-large. Each person's vote for an at-large candidate would be of equal worth. Further, each person's vote for an at-large candidate would not affect the value of his or her vote for a candidate representing a congressional district. Accordingly, all Utah residents' votes would have equal value, thereby comporting with the one person, one vote principle.

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[12] 376 U.S. 1 (1964).

[13] *Id.* at 7-8. Therefore, the Court held that, due to such substantial population deviations among the congressional districts, the statute "grossly" discriminated against certain voters by contracting the value of some votes and expanding that of others. *Id.* at 7. While it may be impossible to draw congressional district lines with precise mathematical equality, the Court determined that a maximum variance of 30.26% is unconstitutional. Under Article I, section 2, the Court announced, congressional districts must be "equal in population as nearly as practicable." *Id.* at 18.

LETTER IN SUPPORT OF H.R. 5388 FROM ROBERT C. KEITHAN, DIRECTOR, UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS, TO REPRESENTATIVE TOM DAVIS, MAY 18, 2006

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Rob Keithan
Director

May 18, 2006

The Honorable Tom Davis
Via fax 202-225-3974

Dear Rep. Davis,

On behalf of the more than 1,000 congregations in the Unitarian Universalist Association, I thank you for your leadership in the struggle to bring voting representation to the District of Columbia. The Unitarian Universalist Association of Congregations has supported "Representation in Congress and Self-Government for the District of Columbia" since our highest policy-making body approved a resolution of that title in 1970 (which I have included).

The DC Fair and Equal House Voting Rights Act is a creative, effective solution to one of the most overlooked but none-the-less shameful flaws in our system of governance—that the residents of our nation's capitol have no voting representation in Congress. Indeed, it is particularly appalling that thousands of Congressional employees—people who are serving their country as public servants—must choose between having voting representation in Congress or living in the District of Columbia. Nor is it ethical to disenfranchise the hundreds of thousands of DC residents who, in addition to deserving representation simply as US citizens, are particularly deserving because it is their lives and work that make it possible for Congress to function here.

Two of the fundamental principles of the Unitarian Universalist Association of Congregations are respect for the worth and dignity of every person and the use of the democratic process. By denying one of the most basic elements of democratic governance, Congress devalues the worth and dignity of all DC residents. The lack of DC voting representation in Congress is unfair, unethical, and wrong.

The Unitarian Universalist Association of Congregations is pleased to endorse the Fair and Equal House Voting Rights Act. Again, thank your for your leadership on this important issue.

In Faith,

Robert C. Keithan, Director

LETTER IN SUPPORT OF H.R. 5388 FROM KAY J. MAXWELL, PRESIDENT, LEAGUE OF WOMEN VOTERS, TO MEMBERS OF THE HOUSE JUDICIARY COMMITTEE, MAY 31, 2006

May 31, 2006

TO: Members of the House Judiciary Committee
FROM: Kay J. Maxwell, President
RE: H.R. 5388, the D.C. Fair and Equal House Voting Rights Act of 2006

The League of Women Voters urges you to support H.R. 5388, the D.C. Fair and Equal House Voting Rights Act of 2006, introduced by Representative Davis (R VA) and Delegate Norton (D DC) and recently reported by the Government Reform Committee.

The legislation provides voting representation in the House of Representatives for citizens living in the District of Columbia by expanding the size of the House to 437 members, with the state of Utah gaining the other additional seat until reapportionment after 2010. This balanced approach provides voting rights for District citizens without upsetting the partisan balance of the House and without jeopardizing seats from other states. It also addresses the concern that Utah was not fairly treated in the 2000 reapportionment process.

The citizens of Washington, D.C. have always fulfilled the obligations of American citizenship by paying federal taxes, serving in the military, and contributing leaders in nearly every field of human endeavor. Yet American citizens who live in the District of Columbia are denied voting representation in the U.S. Congress, the very body that has ultimate authority over every aspect of the city's judicial, executive and legislative functions.

Over the last 200 years, the principle that all citizens are entitled to a voice and a vote in their national government has emerged as a cornerstone of American democracy and a fundamental tenet of our Constitution. Although relatively few Americans were entitled to vote when the Constitution was adopted in 1788, virtually all restrictions on the franchise have since been eliminated, including those based on race, sex, wealth, property ownership, marital status and place of residence. Disenfranchisement of American citizens living in the District of Columbia is the last great exception to the constitutional principle of "one person, one vote."

Americans living in the nation's capital deserve to have voting representation in the body that makes their laws, taxes them and can call them to war. Only Congress can ensure that the democracy Americans have espoused and fought for across the globe becomes a reality in the nation's capital.

We ask that you help fulfill the promise of American democracy by supporting the D.C. Fair and Equal House Voting Rights Act of 2006.

LETTER IN SUPPORT OF H.R. 5388 FROM MARC H. MORIAL, PRESIDENT AND CEO, NATIONAL URBAN LEAGUE, JUNE 12, 2006

National
Urban League

Empowering Communities.
Changing Lives.

June 12, 2006

Dear House Judiciary Committee Member:

On behalf of the National Urban League, I am writing to express our strong support for the *DC Fair and Equal House Voting Rights Act of 2006 (H.R. 5388)*, and urge you to vote for its passage when it comes before your committee.

As you may know, H.R. 5388 passed the House Government Reform Committee by an overwhelming bipartisan vote of 29-4 on May 18, 2006.

The DC Voting Rights Act is a crucial step towards bringing full voting representation in Congress to the nearly 600,000 people who reside in the District of Columbia -- a right enjoyed by all other Americans but long overdue for citizens who reside in our nation's capital. DC residents pay taxes, serve on juries, and put their lives on the line by defending our nation during times of war. We can no longer tolerate being the only democratic country in the world that denies voting representation to citizens of the nation's capital. Democracy begins at home!

Support for DC residents' voting rights runs throughout the country as evidenced by a national poll conducted by KRC Research last year. The poll showed that 82 percent of Americans believe that DC residents deserve full voting representation in Congress.

In my Keynote Address during the National Urban League's annual conference in 2005, I stated that we should make it clear that the right to vote shouldn't depend on where you live – and that's why it's finally time that DC had a voting member in the House, two voting members in the Senate, and full voting rights for every single citizen in the District of Columbia. Let's free DC and unshackle this last colony.

Sincerely,

Marc H. Morial
President and CEO
National Urban League

LETTER IN SUPPORT OF H.R. 5388 FROM ROBERT D. EVANS, DIRECTOR, AMERICAN BAR ASSOCIATION, TO CHAIRMAN F. JAMES SENSENBRENNER, JR., JUNE 16, 2006

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June 16, 2006

The Honorable James Sensenbrenner
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

On behalf of the American Bar Association, I write to urge your support for legislation to correct a longstanding inequity for the residents of our nation's capital – their lack of voting representation in Congress.

The ABA supports the principle that citizens of the District of Columbia should no longer be denied the fundament right belonging to other American citizens to elect voting members of the Congress that governs them. We note that H.R. 5388, the District of Columbia Fair and Equal House Voting Rights Act, would establish the District of Columbia as a Congressional district for purposes of representation in the House of Representatives. H.R. 5388 was approved by the House Government Reform Committee by a bipartisan vote of 29-4 on May 18, 2006. The ABA, which supports full voting representation in the House and the Senate for the District of Columbia, believes that H.R. 5388 takes an important step toward achieving that goal, and urges the House to pass it as soon as possible.

For over two hundred years, residents of our nation's capital have been disenfranchised. Residents of the District of Columbia pay taxes, are subject to the military draft and the laws of our nation. Yet they are not allowed to select voting members of Congress to represent their views in determining the formulation, implementation and enforcement of those laws. This violates a central premise of representative democracy and the ideal, voiced by Thomas Jefferson, that governments "derive their just powers from the consent of the governed."

This not only is contrary to our own system of representative government, it also undermines our leadership in promoting the international rule of law and democratization. The United States is the world's only democratic nation that does not grant citizens of its capital voting representation in the national legislature. Our nation is devoting significant resources to promoting representative democracy abroad, and yet we have more than 500,000 American citizens residing in the District of Columbia who are not afforded that right at home. It is particularly ironic

that American troops, some of whom are residents of the District of Columbia, have been fighting in Baghdad to give its citizens the right to vote in national legislative elections, when similar rights are denied to citizens in our own capital. Depriving a sizeable segment of our own population of the fundamental right to voting representation undermines the U.S. message of equality under the law. As shown below, Congress has the constitutional power to end this inequity.

Congress' Constitutional Authority to Enact this Legislation under Article I, Section 8, Clause 17

There has been an ongoing debate regarding the appropriate mechanism by which voting representation in Congress for the District of Columbia may be established. The American Bar Association concurs in the conclusion reached both by the House Government Reform Committee's consultant, Professor Viet D. Dinh, and by the former Solicitor General of the United States, Kenneth W. Starr: that Congress has the constitutional authority to provide voting representation in the House of Representatives to residents of the District of Columbia. Such authority is granted by the "District Clause" of the Constitution, Article I, Section 8, Clause 17, which confers upon the Congress the power "To exercise exclusive Legislation in all Cases whatsoever, over such District. . . ." Enactment of the proposed District of Columbia Fair and Equal House Voting Rights Act would be an exercise of this constitutional authority conferred by the "District Clause." (See Dinh and Charnes, Memorandum submitted to Committee on Government Reform, November 2004, entitled "The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives"; testimony of the Hon. Kenneth W. Starr before the House Government Reform Committee, June 23, 2004).

The same constitutional authority was exercised by the very first Congress, in 1790, when Congress accepted the cession by Maryland and Virginia of the ten-mile-square area constituting the District and provided by statute that its residents would continue to enjoy the same legal rights - - including rights to vote in federal and state elections - - which they had possessed under Maryland and Virginia laws prior to acceptance by Congress of the Cession. Act of July 16, 1790, chapter 28, section 1, 1 Stat. 130. Under this federal legislation, residents of the District were able to vote, from 1790 through 1800, for members of the United States House of Representatives (and for members of the Maryland and Virginia Legislatures, which then elected United States Senators).

Voting representation in Congress for District residents ceased in 1801, when the District of Columbia became the Seat of Government, and Congress enacted the Organic Act of 1801, which provided for governance of the nation's capital but which contained no provision for District residents to vote in elections for the Congress that had the "exclusive" power to enact the laws which would govern them. Since the 1801 Organic Act also had the effect of terminating District residents' right to vote in any elections held in Maryland and Virginia, they were left disenfranchised from voting for Members of Congress.

In a memorandum submitted to the Government Reform Committee in 2004, Professor Dinh rightly described this loss of national voting rights as a "historical accident" in which "Congress by omission withdrew the grant of voting rights to District residents." (See Dinh Memorandum, pp. 8, 19).

It falls to this Congress to restore the voting rights lost by a previous Congress' omission more than 200 years ago. Not only is there a moral obligation for Congress to restore such rights, there is also a constitutional obligation for Congress to ensure the right of D.C. residents to the equal protection of the laws, as that concept has come to be understood in modern times, long after the loss of D.C. voting rights through the Organic Act of 1801.

The Bill of Rights, ratified in 1791, includes the Fifth Amendment guarantee against deprivation of "due process of law." But not until the D.C. school desegregation case of Bolling v. Sharpe, 347 U.S. 497, decided in 1954 as a companion case to Brown v. Board of Education, 347 U.S. 483 (1954), was the Fifth Amendment "due process" clause held to apply to federal legislation the same guarantee of "equal protection of the laws" which the Fourteenth Amendment had adopted as to the States. Bolling invalidated (under the due process clause of the Fifth Amendment) the Congressional legislation which had imposed segregation upon the D.C. public schools, just as Brown v. Board of Education invalidated (under the equal protection clause of the Fourteenth Amendment) the State legislation which had imposed segregation upon the public schools in numerous states. Subsequent Supreme Court decisions have made clear that the guarantees of equal protection in the Fifth and Fourteenth Amendments are co-extensive. Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975) ("The Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment"); Buckley v. Valeo, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"). Under Fourteenth Amendment standards, if a State legislature were to deny to residents of its capital city the right to vote for members of the Legislature, it would be depriving those residents of the equal protection of the laws guaranteed by the Fourteenth Amendment. Similarly, Congress' elimination of D.C. residents' voting representation in the Congress by adopting the Organic Act of 1801, may be seen in retrospect as having deprived D.C. residents of the equal protection of the laws guaranteed to them by the Fifth Amendment due process clause.

Congress is expressly empowered by Section 5 of the Fourteenth Amendment to enact legislation enforcing equal protection guarantees of the Fourteenth Amendment. Congress' plenary Power under the District Clause of Article I, Section 8, should likewise empower it to enact legislation to secure to D.C. residents the equal protection guaranteed by the Fifth Amendment, through adoption of the proposed District of Columbia Fair and Equal House Voting Rights Act.

Some opponents of the bill might contend that the plenary power of Congress to enact such legislation under Article I, Section 8, Clause 17, is limited by the provision of Article I, Section 2, Clause 1, that House members be chosen "by the People of the several States." Professor

The Honorable James Sensenbrenner
Page Four
June 16, 2006

Dinh's memorandum to the Government Reform Committee shows at length that "the terms of Article 1, Section 2 do not conflict with the authority of Congress in this area." (Dinh Memorandum, p. 5, n. 16, pp. 10-19).

We would only add that, even if there were such an arguable conflict between interpretations of Article I, Section 2 and the District Clause of Article I, Section 8, the equal protection guarantee of the Fifth Amendment's due process clause would require that such a conflict be resolved by construing the District Clause to authorize enactment of a statute which ends the denial to District residents of equal protection in regard to voting representation in the House. As part of the Bill of Rights, ratified in 1791, the Fifth Amendment due process guarantee post-dates the adoption of Article I of the Constitution in 1787, and would therefore supersede any conflicting provision or interpretation derived from Article I. To avoid the constitutional issue that would be presented by an interpretation of Article I that conflicted with a provision of the Bill of Rights, the provisions of Article I, Section 2, should not be construed to limit the plenary power conferred upon Congress by Article I, Section 8, Clause 17, to adopt the District of Columbia Fair and Equal House Voting Rights Act.

It is long past time for our nation to provide the citizens residing in our capital the fundamental right to representation in Congress. It is within Congress' power to correct this longstanding inequity, and we urge you to support this legislation to establish voting representation in Congress for citizens residing in the District of Columbia.

Sincerely,

Robert D. Evans

Robert D. Evans

cc: Members of the House Judiciary Committee

LETTER IN SUPPORT OF H.R. 5388 FROM DR. CLARK LOBENSTEIN, EXECUTIVE DIRECTOR, THE INTERFAITH CONFERENCE OF METROPOLITAN WASHINGTON, TO CHAIRMAN F. JAMES SENSENBRENNER, JR., JUNE 21, 2006

The InterFaith Conference of Metropolitan Washington (IFC)

"Promoting Mutual Respect and Social Justice"

June 21, 2006

The Honorable F. James Sensenbrenner, Jr.
2138 Rayburn House Office Building
Washington, DC 20515

Dear Rep. Sensenbrenner:

On behalf of eleven different historic faith communities in the metropolitan Washington region—*Baha'i, Buddhist (Observer), Hindu, Islamic, Jain, Jewish, Latter-day Saints, Protestant, Roman Catholic, Sikh, and Zoroastrian*—the InterFaith Conference of Metropolitan Washington (IFC) asks you to defend a fundamental American value: voting rights. We urge you to support H.R. 5388, the "DC Fair and Equal House Voting Rights Act," in order to provide Americans living in Washington, D.C. with representation in Congress.

This bill is a just solution to a patently unjust circumstance. The residents of Washington, D.C. have served on juries, paid federal income taxes, and fought for freedom in wars on foreign soil. Indeed, residents of our nation's capital have served and died in Iraq so that the residents of the Iraqi capital and nation can vote for representatives in their own legislature. Yet, U.S. citizens are denied that very same privilege! H.R. 5388 will right this wrong.

The strength of H.R. 5388 is substantiated by its strong bipartisan co-sponsorship, its support by the District's City Council and Mayor, and its overwhelming approval by the House Committee on Government Reform (29-4 vote on May 18, 2006). This impressive momentum underscores the significance of granting, for the first time in history, the residents of Washington, D.C. a voting member in the House of Representatives. Furthermore, in the interest of fairness, this bill will provide Utah with an additional, temporary "at-large" House seat, one that will not require mid-decade redistricting.

For twenty-eight years, the IFC and its religiously diverse members have worked to promote social justice in the metropolitan Washington region. During that time, we have been struck by the manifest injustice of denying voting representation in Congress to the residents of Washington, D.C. Unfortunately, this state of affairs has obscured our nation's commitment to social justice on its own soil.

Please help bring American democracy to people living in America's capital by supporting H.R. 5388. Thank you for your consideration.

Sincerely,

Rev. Dr. Clark Lobenstine, Executive Director

Executive Director: Rev. Clark Lobenstine, D.Min.
1426 Ninth Street, NW, Second Floor (at P Street), Washington, DC 20001-3330
Tel: (202) 234-6300 • Fax (202) 234-6303 • Email: ifc@ifcmw.org • Website: www.ifcmw.org

The InterFaith Conference (IFC) brings together the Baha'i, Hindu, Islamic, Jain, Jewish, Latter - day Saints, Protestant, Roman Catholic, Sikh and Zoroastrian faith communities in this region to promote dialogue, understanding and a sense of community among persons of different faiths and to work cooperatively for social and economic justice in metropolitan Washington.

LETTER IN SUPPORT OF H.R. 5388 FROM JOSLYN N. WILLIAMS, PRESIDENT, METROPOLITAN WASHINGTON COUNCIL, AFL-CIO, JUNE 27, 2006

Metropolitan Washington Council, AFL-CIO
1925 K Street NW, Suite 410 • Washington, DC 20006 • (202) 756-4150 • Fax (202) 756-4151
An AFL-CIO "Union City"

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27 June 2006

TO: All Affiliates

FROM: Joslyn N. Williams, President

RE: DC Voting Rights

Residents of the District of Columbia are moving closer to having a permanent seat in Congress than we have been in decades. Now is the time for all affiliates of the Metropolitan Washington Council to take action to make the possibility a reality.

The House Government Reform Committee on May 18 passed by a 29-4 vote the DC Fair and Equal House Voting Rights Act (H.R. 5388). That bill was introduced jointly by DC Delegate Eleanor Holmes Norton, Northern Virginia Congressman and Committee Chair Tom Davis, Ranking Member Henry Waxman and Congressman Chris Shays, two Democrats and two Republicans. The bill provides that, from now on, the District of Columbia shall be considered a Congressional District. In order to secure bipartisan support, the bill increases the size of the House of Representatives to 437. Between now and 2012, the additional seat will be an at-large district in Utah.

The new DC voting rights act has the strong support of DC Vote, the premiere voting rights organization in the District. In addition, the Leadership Conference on Civil Rights, Common Cause, the Religious Action Center and numerous other organizations are actively promoting the bill. While it does not provide everything that DC residents want and deserve, it represents the first permanent voting representation in Congress for those who live in our nation's capital in our 215-year history.

In support of the strong position Metro Council has already taken in support of DC voting rights, I would urge you immediately to do the following:

1. Write to your International President and executive leadership asking them to endorse and work to pass the DC Fair and Equal House Voting Rights Act (H.R. 5388).

2. Contact Congressmen Al Wynn, Steny Hoyer and Chris Van Hollen and our endorsed candidate for the Senate, Congressman Cardin, and ask them to support H.R. 5388.

3. Let your membership know about the bill, and get them to email their Representatives through the DC Vote web site (www.dcvote.org).

4. If your local is not already part of the DC Vote coalition, consider joining.

We will be planning Streetheat activities and other joint efforts as the bill moves along. As an individual with taxation without representation and as your President, I ask for your support in this important effort.

LETTER IN SUPPORT OF H.R. 5388 FROM MELVIN S. LIPMAN, PRESIDENT, AMERICAN HUMANIST ASSOCIATION, JULY 14, 2006

AMERICAN HUMANIST ASSOCIATION

July 14, 2006

Support H.R. 5388, the DC Fair and Equal House Voting Rights Act (DC Voting Rights Act)

Dear Representative,

The American Humanist Association (AHA) urges you to support H.R. 5388, the "DC Voting Rights Act," which would provide Americans living in Washington, DC with representation in Congress. We urge you to vote in support of the 600,000 U.S. citizens living in the District by cosponsoring and working to enact the bill.

DC residents deserve the same voting rights as every other American citizen. They pay federal income taxes, serve on juries, and die in wars in defense of our country, but they do not have voting representation in Congress. The time has come to confront the unfair denial of representation in our nation's capital and extend democracy to the citizens living within the heart of our government.

As you may know, the DC Voting Rights Act passed the House Committee on Government Reform on May 18, 2006, with overwhelming bipartisan support and a vote of 29-4. The bill, introduced by Representative Tom Davis and Delegate Eleanor Holmes Norton, would provide Washingtonians with a voting member of the House of Representatives for the first time ever.

Members of Congress are tapping into a strong sentiment throughout the country. A national poll conducted by KRC Research last year showed that 82 percent of Americans – a consistent percentage across age, region, and party lines - believe that DC residents deserve full voting representation in Congress. Legal scholars, too, agree that the DC Voting Rights Act is solidly constitutional; Judge Kenneth Starr, Georgetown Law Professor Viet Dinh, and attorneys from Latham & Watkins LLP, the DC Appleseed Center, and Swidler Berlin Shereff Friedman, LLP have all written analyses supporting DC representation.

As Corliss Lamont states, "Since Humanism as a functioning credo is so closely bound up with the methods of reason and science, plainly free speech and democracy are its very lifeblood." The AHA, on behalf of its over 7,800 members, believes that extending voting rights to DC residents is absolutely essential to our nation's democratic ideals. Furthermore, we are concerned about the potential to ignore the concerns of DC's urban population; extending the same basic privileges afforded to the rest of the country to residents of the District will enable their voices to be heard.

The AHA urges you to consider the democratic principles of representation for all and vote in support of the DC Voting Rights Act.

Sincerely,

Melvin S. Lipman

Melvin S. Lipman
President

1777 T Street, NW • Washington, DC 20009 • 800-837-3792 • Fax 202-238-9003 • WWW.AMERICANHUMANIST.ORG

LETTER REGARDING H.R. 5388 FROM RONALD JACKSON, EXECUTIVE DIRECTOR OF D.C. CATHOLIC CONFERENCE, AND MICHAEL SCOTT, COORDINATOR OF D.C. LEGISLATIVE NETWORK, THE ARCHDIOCESE OF WASHINGTON, JULY 20, 2006

ARCHDIOCESE OF WASHINGTON

Archdiocesan Pastoral Center: 5001 Eastern Avenue, Hyattsville, MD 20782-3447
Mailing Address: Post Office Box 29260, Washington, DC 20017-0260
301-853-4500 TDD 301-853-5300

July 20, 2006

Dear Pastor,

As you know, city residents pay federal taxes and are accountable to all federal laws, but they do not have voting representation in the U.S Senate or the U.S House of Representatives particularly on matters that concern them.

The D.C. Fair and Equal House Voting Rights Act of 2006 (H.R. 5388) is a federal bill that would give the District of Columbia's non-voting delegate a vote in the Committee of Whole within the U.S. House of Representatives.

H.R. 5388 would not only give a vote to the Democratic District of Columbia, but would also grant an additional representative to Republican Utah based on population growth in that state according to the U.S. Census in 2000. As you might imagine, the bill redresses a serious problem while striking a balance that satisfies both political parties.

The Archdiocese of Washington has not taken an official position on the bill, but it has been generally supportive of voter representation for city residents as a matter of fairness. To that end, we give our general but limited support to organizations that raise this issue within the city.

D.C. Vote, founded in 1988, is an educational and advocacy organization that seeks voting representation in the U.S. Congress. It is currently distributing literature and materials about the overall issue and the bill under discussion. As such, you may place materials in your parish bulletins or within your parish vestibule or other locations. For more information, please call us.

Sincerely In Christ,

Ronald Jackson
Executive Director
D.C. Catholic Conference
301-853-5342

Michael Scott

Michael Scott
Coordinator
D.C. Legislative Network
301-853-5308

LETTER IN SUPPORT IF H.R. 5388 FROM PATRICIA M. WALD TO CHAIRMAN F. JAMES SENSENBRENNER, JR., JULY 25. 2006

PATRICIA M. WALD
2101 Connecticut Avenue, N.W.
Washington, D.C. 20008

July 25, 2006

The Honorable James Sensenbrenner
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC

Dear Chairman Sensenbrenner,

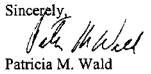
I am writing in support of H.R. 5388, the District of Columbia Fair and Equal House Voting Rights Act, and to express my view that Congress has the constitutional authority to pass that bill and thereby confer voting representation on citizens of the District of Columbia through simple legislation. As a resident of the District of Columbia and a former Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, I have a strong interest in this bill and a long history of support for voting representation for District residents. Indeed, as you may know, on behalf of the Carter Administration and in my capacity as Assistant Attorney general of the United States (Office of Legislative Affairs), I supported the proposed constitutional amendment in 1977 that would have conferred full voting representation on District residents.

Even though I supported the earlier constitutional amendment, and would like to have seen that amendment adopted, it is my strong opinion that Congress has authority under its broad District Clause powers (Article I, Section 8, and Clause 17) to treat the District as if it were a state for the limited purpose of conferring the vote. In this connection, I have carefully considered the memos on this issue written by my former colleague Judge Kenneth Starr, Professor Viet Dinh, and the law firm of Latham & Watkins (on behalf of DC Appleseed). As those memos explain, while the governing legal precedents make clear that the Constitution as written does not require that the District be given the vote, nevertheless those precedents also make clear that Congress may choose to confer that vote, and to do so without constitutional amendment.

I strongly urge you to make that choice now. The residents of the District have been without voting representation in Congress since 1801. It is time, through this bill, to begin to restore democracy in the Nation's Capital.

Thank you for your consideration.

Sincerely,



Patricia M. Wald

"JEWISH ORGANIZATIONS SUPPORT H.R. 5388," LETTER IN SUPPORT OF H.R. 5388, JULY 25, 2006

Contact: Brooke Menschel (AJC)
202-785-4200 x30 or menschelb@ajc.org

American Jewish Committee • Anti-Defamation League • Jewish Council of Public Affairs • Jewish Women International • National Council of Jewish Women • Union for Reform Judaism • Women of Reform Judaism

Re: Jewish Organizations Support H.R. 5388

July 25, 2006

Dear Representative,

On behalf of a wide variety of Jewish organizations, we strongly urge you to promote democracy in our nation's capital by supporting the D.C. Fair and Equal House Voting Rights Act (DC VRA) of 2006 (H.R. 5388). As Jews, who have experienced disenfranchisement throughout history, we value civic participation and the right of every citizen to have a voice in governmental affairs. Residents of the District of Columbia are not afforded these basic rights because they do not have voting representation in Congress. D.C. residents serve as members of the armed forces, sit on juries, and pay federal income taxes, yet may not vote for those who create our nation's laws. Washington D.C. is the only jurisdiction in the United States where Americans fulfill all of the responsibilities of citizenship but are denied the most basic right of Congressional representation. This is an injustice not only to D.C. residents, but to all American citizens.

H.R.5388 would end this injustice by granting the District of Columbia one permanent voting member in the House of Representatives. The bipartisan D.C. VRA, introduced by Congressman Tom Davis (R-VA) and Delegate Eleanor Holmes Norton (D-DC), has strong bipartisan support and is endorsed by the Washington, D.C. City Council and Mayor Anthony Williams. In addition to providing D.C. residents with a permanent seat in the House, the bill would also grant an additional, temporary seat to Utah, which just fell short of gaining an extra seat in the 2000 reapportionment. This extra seat will remain permanent, but will be allotted to the next eligible state after the 2010 reapportionment.

We are well aware of the importance of democratic representation. In the Book of Numbers, we learn of God's instructions to Moses to gather 70 elders of Israel to serve as representatives of the people (Numbers 11:16–25). Rabbi Yitzhak taught, "A ruler is not to be appointed until the community is first consulted" (Babylonian Talmud, *B'rachot* 55a). Government officials must be accountable to the citizens they represent. We therefore urge you to support the D.C. Fair and Equal House Voting Rights Act of 2006. Thank you very much for your consideration.

Respectfully,

American Jewish Committee
Anti-Defamation League
Jewish Council of Public Affairs
Jewish Women International
National Council of Jewish Women
Union for Reform Judaism
Women of Reform Judaism

LETTER IN SUPPORT OF H.R. 5388 FROM THE LEADERSHIP CONFERENCE OF CIVIL RIGHTS, SEPTEMBER 13, 2006

Leadership Conference on Civil Rights

1629 K Street, NW
10th Floor
Washington, D.C. 20006

Phone: 202-466-3311
Fax: 202-466-3435
www.civilrights.org

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Arnold Aronson*
A. Philip Randolph*
Roy Wilkins*

OFFICERS

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Dorothy I. Height
National Council of Negro Women

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Caroline Fredrickson
American Civil Liberties Union

Kim Gandy
National Organization for Women

Ron Gettelfinger
International Union, United Automobile Workers of America

Bruce S. Gordon
NAACP

Marcia Greenberger
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American Association of People with Disabilities

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National Congress of American Indians

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League of Women Voters of the United States

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Marc H. Morial
National Urban League

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National Council of La Raza

Ralph G. Neas
People For the American Way

Debra Ness
National Partnership for Women and Families

Anthony D. Romero
American Civil Liberties Union

David Saperstein
Union for Reform Judaism

Ruth Sweetser
American Association of University Women

Theodore M. Shaw
NAACP Legal Defense & Educational Fund, Inc.

Shanna L. Smith
National Fair Housing Alliance

Joe Solmonese
Human Rights Campaign

Andrew L. Stern
Service Employees International Union

John Trasvina
Mexican American Legal Defense and Educational Fund

Reg Weaver
National Education Association

Richard Womack
AFL-CIO

Patricia Wright
Disability Rights Education and Defense Fund, Inc.

COMPLIANCE/ENFORCEMENT COMMITTEE CHAIRPERSON
Karen K. Narasaki
Asian American Justice Center

EXECUTIVE DIRECTOR
Wade J. Henderson
(*Deceased)

GIVE VOTING RIGHTS TO DC RESIDENTS – SUPPORT H.R. 5388

September 13, 2006

Dear House Judiciary Committee Member:

On behalf of the Leadership Conference on Civil Rights (LCCR), the nation's oldest, largest and most diverse civil and human rights coalition, we urge you to help provide Americans living in Washington, DC with representation in Congress by supporting H.R. 5388, the "DC Fair and Equal House Voting Rights Act."

Washington, 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 U.S. House of Representatives or the Senate. As we work to extend democracy around the world, we can no longer ignore the need to extend democracy to Americans living in our nation's capital as well.

Chairman Tom Davis (R-VA) and Delegate Eleanor Holmes Norton (D-DC) introduced H.R. 5388 with strong bipartisan cosponsorship and with the support of the Washington, DC City Council and Mayor. It provides Washington, DC residents with a voting member of the House of Representatives for the first time ever, and provides Utah with an additional, temporary House seat. The bill passed the House Committee on Government Reform overwhelmingly by a vote of 29-4 on May 18, 2006.

Chairman Davis, Delegate Norton, and others are tapping into a strong sentiment throughout the country. A recent national poll conducted by KRC Research showed that 82 percent of Americans support full DC representation in Congress.

Some have voiced concern that the bill would force mid-decade redistricting in Utah. However, Utah's congressional delegation and Utah Governor Jon Huntsman, Jr. have recently embraced making the fourth seat temporarily "at-large," thereby eliminating the need for redistricting.

Please help bring American democracy to people living in America's capital by supporting H.R. 5388. Thank you for your consideration. If you have any questions, please contact Rob Randhava, LCCR Counsel, at 202-466-6058.

Sincerely,

Leadership Conference on Civil Rights

AARP
American Association of People with Disabilities
American Association of University Women
American Foreign Service Association
American Jewish Committee
Americans for Democratic Action
Anti-Defamation League
Asian and Pacific Islander American Vote (APIAVote)
Coalition to Stop Gun Violence
Common Cause
DC Fiscal Policy Institute
DC Vote
FairVote
Federally Employed Women
Foundry United Methodist Church
Kappa Alpha Psi Fraternity, Inc.
League of Women Voters of the United States
International Brotherhood of Teamsters
International Union, United Automobile, Aerospace & Agricultural Workers of America (UAW)
Mexican American Legal Defense and Educational Fund
National Alliance of Postal and Federal Employees
National Association for the Advancement of Colored People (NAACP)
National Council of Churches USA
National Council of Jewish Women
National Fair Housing Alliance
National Korean American Service & Education Consortium
National Urban League
People For the American Way
Planned Parenthood of Metropolitan Washington DC
Presbyterian Church (USA), Washington Office
Service Employees International Union (SEIU)
Social Justice Council, River Road Unitarian Church, Bethesda MD
Union for Reform Judaism
Unitarian Universalist Association of Congregations
United Auto Workers
United Food and Commercial Workers International Union
United Methodist Church, General Board of Church and Society
Women of Reform Judaism

MEMO IN SUPPORT OF H.R. 5388 FROM THE LEADERSHIP CONFERENCE ON CIVIL RIGHTS

Leadership Conference on Civil Rights

1629 K Street, NW
10th Floor
Washington, D.C. 20006

Phone: 202-466-3311
Fax: 202-466-3435
www.civilrights.org

Support H.R. 5388, "The District of Columbia Fair and Equal Voting Rights Act of 2006"

What H.R. 5388 Does

H.R. 5388 would permanently increase the membership of the U.S. House of Representatives from the current 435 to 437. One of these additional members would represent the nearly 600,000 residents of the District of Columbia, who currently do not have any voting Congressional representation. The other member would represent the state of Utah, in an at-large capacity, until the next Congressional reapportionment after the 2010 census.

After the 2010 census, all 437 House seats would be reapportioned among the fifty states and D.C. based on population, with D.C. remaining eligible for no more than one seat.

Why H.R. 5388 – And The Right to Vote – Is So Important

The right to vote for those who make and enforce laws – the antidote to the evil of "taxation without representation" – is the most important right that citizens have in any democracy. As the Supreme Court noted in the landmark voting rights case of *Wesberry v. Sanders* (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 we, as good citizens, must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges this right.*

Since 1801, D.C. residents have been deprived of this right. U.S. citizens living in D.C. must pay federal income taxes, register for selective service, and serve on federal juries. Yet they have no voice in the laws that govern these matters, or over any other federal legislation.

Since 2001, Utah residents have also had their right to vote undermined. Because thousands of Utah citizens living abroad were not counted in the 2000 census, Utah was given only three Congressional districts instead of the four that it deserved. As a result, the votes of all U.S. citizens from Utah have been diluted.

Why H.R. 5388 Is Constitutional

Because D.C. is not a state, some have questioned whether Congress has the authority to provide D.C. residents with Congressional representation. But nothing in the language of the Constitution prohibits Congress from enacting such a law – and as legal scholars point out, there is ample reason to believe that H.R. 5388 would have been perfectly acceptable to the Framers:

> Why the District was Created: The Constitution created a separate district in order to keep any state from unfairly influencing the federal government. But there is no evidence that the Framers thought it was necessary to keep residents in this district from *being represented in the federal government*, only to keep them from *forming a separate one*. In fact, given the principles on which the recent American Revolution had been based, it is inconceivable that the Framers meant to impose "taxation without representation" on citizens all over again.

Congress' Broad Authority Over D.C.: To fully protect the interests of the federal government, the Framers gave Congress extremely broad authority over all matters relating to the new federal district under Article I, § 8, clause 17 (the "District Clause"). Courts have ruled that this clause gives Congress "extraordinary and plenary power" over D.C., with "full and unlimited jurisdiction . . . by any and every act of legislation which it may deem conducive to that end," subject only to the express prohibitions in the Constitution. Any legislation affecting D.C. – including H.R. 5388 – must be understood in this context.

Congress has let Citizens Vote for Congress Even When They Aren't State Residents: 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:

- After Virginia and Maryland gave up lands in 1790 that later became the District of Columbia, Congress let residents keep voting in federal elections in those original states through 1800 – even though, legally, they were no longer residents.
- 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 no longer are citizens there, pay any taxes there, or have any intent to return.

Congress has Treated D.C. as a "State" in Other Contexts: While many provisions in the Constitution refer only to "states," Congress has validly treated D.C. as if it were a state in a number of cases, and could likely do the same for purposes of representation. For example:

- Article III provides that courts may hear cases "between citizens of different states" (diversity jurisdiction). The Supreme Court initially ruled that under this language, D.C. residents could not sue residents of other states. But in 1940, Congress began treating D.C. as a state for this purpose – a law upheld in *D.C. v. Tidewater Transfer Co.* (1949).
- The Constitution allows Congress to regulate commerce "among the several states," which, literally, would exclude D.C. But Congress' authority to treat D.C. as a "state" for Commerce Clause purposes was upheld in *Stoughtenburg v. Hennick* (1889).

The 23rd Amendment Doesn't Suggest Otherwise: The fact that it took a constitutional amendment to give D.C. residents a role in Presidential elections does not mean that one is required to provide Congressional representation. The 23rd Amendment affected Article II of the Constitution, an article in which Congress' authority is greatly limited – unlike its broad powers, including the "District Clause," under Article I.

Why H.R. 5388 Has Bipartisan Support

H.R. 5388 was cleared by the Government Reform Committee on May 18 by a historic 29-4 vote. Majorities in both parties recognized that while H.R. 5388 is a major advance in equal voting rights, its political impact is neutral. Under current demographics, each party would likely gain one additional House seat, canceling out any partisan advantage. And because the increase in House seats is permanent, no state would lose a seat by giving one to D.C.

H.R. 5388's impact on the 2008 presidential election would also be neutral. It would not affect the three Electoral College votes that D.C. residents already have. While Utah would gain one additional Electoral College vote in the 2008 election, a candidate would still need 270 votes – the same as before – to win the Presidency.

LETTER IN SUPPORT OF H.R. 5388 FROM RALPH G. NEAS, PRESIDENT, AND TANYA CLAY HOUSE, DIRECTOR OF PUBLIC POLICY, PEOPLE FOR THE AMERICAN WAY, SEPTEMBER 13, 2006

September 13, 2006

United States House of Representatives
Washington, DC 20515

Dear Committee Member:

On behalf of the more than 900,000 members and activists of People For the American Way, we urge you to support H.R. 5388, the District of Columbia Fair and Equal House Voting Rights Act of 2006. As the Voting Rights Act reauthorization evidenced, ensuring equal access to the ballot box for all citizens is of paramount importance. We hope that we can count on your support to protect the rights of residents of the District of Columbia, and allow H.R. 5388 to move out of the Judiciary Committee.

Forty years ago, thousands of Americans risked their lives to challenge systems that prevented millions of Americans from exercising their right to vote. After continued protests by civil rights activists and everyday citizens over the gross disenfranchisement of African Americans – culminating in a violent confrontation in 1965 during an Alabama protest for voting rights – President Johnson signed the Voting Rights Act (VRA) into law. Thanks to the recent reauthorization, the VRA will continue to ensure that all racial minorities in America have equal access to the ballot box for many years to come.

Sadly, this is a goal not yet realized for the half million people living in our nation's capital. Washington, DC residents contribute to America like residents in other cities and states. Yet, even though they pay taxes and serve in the military, they do not have a voice when tax policy is crafted on Capitol Hill, nor do they have voting representation when you and your colleagues consider sending them into war or approving the Defense budget.

H.R. 5388 would give them this voice and voting representation and balance the respective politics on both sides of the aisle. The bill would turn the DC delegate into a full Representative and give that person voting power. In return, the Utah delegation would be joined by a 4th member, at-large. Utah's voice would thus get its own due consideration, with the state avoiding mid-decade redistricting.

The Judiciary Committee and its House colleagues recently celebrated the reauthorization of the Voting Rights Act. In the spirit of protecting citizens' voting rights, we ask that you not stop there. Please support H.R. 5388, including supporting scheduling a mark-up, and voting in favor of the bill during any Committee votes.

Sincerely,

Ralph G. Neas
President

Tanya Clay House
Director, Public Policy

2000 M Street, NW ♦ Suite 400 ♦ Washington, DC 20036
Telephone 202.467.4999 ♦ Fax 202.293.2672 ♦ E-mail pfaw@pfaw.org ♦ Web site http://www.pfaw.org

"REFORM JEWISH LEADER URGES COMMITTEE TO SUPPORT CONGRESSIONAL REPRESENTATION FOR WASHINGTON, D.C. RESIDENTS

URL: http://rac.org/PrintItem/index.cfm?id=1645&type=Articles

Reform Jewish Leader Urges Committee to Support Congressional Representation for Washington, D.C. Residents

Saperstein: As our nation seeks to extend democracy around the world, we can no longer ignore the need to extend that democracy to Americans living in Washington, D.C.

Contact: Emily Kane, 202.387.2800, news@rac.org

WASHINGTON, D.C., May 17, 2006 – In a letter today, Rabbi David Saperstein, Director of the Religious Action Center of Reform Judaism, urged members of the Committee on Government Reform to pass legislation that would give Congressional representation to residents of Washington, D.C. The committee is set to mark-up the bill tomorrow. The full text of the letter is as follows:

Dear Representative:

On behalf of the Union for Reform Judaism, whose 900 congregations across North America encompass 1.5 million Reform Jews and 1800 Rabbis, we write to urge you to support H.R. 5388, the DC Fair and Equal House Voting Rights Act, which would provide Congressional representation to Americans living in Washington, D.C.

In the Book of Numbers, we learn of God's instructions to Moses to gather 70 elders of Israel to serve as representatives of the people (Numbers 11:16–25). So too, Rabbi Yitzhak taught, "A ruler is not to be appointed until the community is first consulted" (Babylonian Talmud, B'rachot 55a). More, throughout history Jews too often represented disenfranchised members of their respective societies. Both through biblical and historical lessons, the Jewish community knows well the importance of democratic representation, and upholds that government officials must be accountable to the citizens they represent.

As such, we believe it is necessary that residents of Washington, D.C. have Congressional representation. Currently, those who reside in our nation's capital fight to defend the principles of freedom and democracy abroad, pay federal income taxes, and serve on juries, but have no voting member to represent their views in Congress. As our nation seeks to extend democracy around the world, we can no longer ignore the need to extend that democracy to Americans living in Washington, D.C.

The DC Fair and Equal House Voting Rights Act, introduced by Chairman Tom Davis (R-VA) and Delegate Eleanor Holmes Norton (D-DC) has strong bipartisan support and is supported by Mayor Anthony Williams as well as the Washington, D.C. City Council. By supporting H.R. 5388 and voting it out of committee, you can help support the principles of democracy for residents of our nation's capital.

Sincerely,

Rabbi David Saperstein

LETTER IN SUPPORT OF H.R. 5388 FROM RABBI DAVID SAPERSTEIN, DIRECTOR AND COUNSEL, RELIGIOUS ACTION CENTER OF REFORM JUDAISM, SEPTEMBER 13, 2006

Religious Action Center
of Reform Judaism

The Religious Action Center pursues social justice and religious liberty by mobilizing the American Jewish community and serving as its advocate in the nation's capital.

Rabbi David Saperstein
Director and Counsel

Mark J. Pelavin
Associate Director

Jane Wishner
Chair
Commission on Social Action of Reform Judaism

Rabbi Marla J. Feldman
Director
Commission on Social Action of Reform Judaism

The Religious Action Center operates under the auspicies of the Commission on Social Action of Reform Judaism, a joint instrumentality of the Central Conference of American Rabbis and the Union for Reform Judaism with its affiliates:

American Conference of Cantors

Association of Reform Zionists of America

Canadian Association of Reform Zionists

Early Childhood Educators of Reform Judaism

National Association of Temple Administrators

National Association of Temple Educators

North American Federation of Temple Brotherhoods

North American Federation of Temple Youth

Program Directors of Reform Judaism

Women of Reform Judaism

Arthur and Sara Jo Kobacker Building
2027 Massachusetts Avenue, NW
at Kivie Kaplan Way
Washington, DC 20036
202.387.2800
Fax: 202.667.9070
E-mail: rac@urj.org
Visit our website at www.rac.org

September 13, 2006

Dear Representative,

On behalf of the Union for Reform Judaism, whose 900 congregations across North America encompass 1.5 million Reform Jews and 1800 Rabbis, we write to urge you to support H.R. 5388, the DC Fair and Equal House Voting Rights Act, which would provide Congressional representation to Americans living in Washington, DC.

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Respectfully,

David Saperstein

LETTER IN SUPPORT OF H.R. 5388 FROM HILARY O. SHELTON, DIRECTOR, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP) TO MEMBERS OF THE HOUSE COMMITEE ON THE JUDICIARY, SEPTEMBER 13, 2006

WASHINGTON BUREAU · NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
1156 15TH STREET, NW SUITE 915 · WASHINGTON, DC 20005 · P (202) 463-2940 · F (202) 463-2953
E-MAIL: WASHINGTONBUREAU@NAACPNET.ORG · WEB ADDRESS WWW.NAACP.ORG

September 13, 2006

Members
House Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

via fax

RE: H.R. 5388, THE DISTRICT OF COLUMBIA FAIR AND EQUAL VOTING RIGHTS ACT OF 2006

Dear Judiciary Committee member;

On behalf of the National Association for the Advancement of Colored People (NAACP), our nation's oldest, largest and most widely recognized grass roots civil rights organization, I would like to express our strong support for H.R. 5388, the District of Columbia Fair and Equal Voting Rights Act of 2006. This legislation would take an important first step in providing the more than 600,000 residents of the District of Columbia a voice that has heretofore been missing in the "democracy" in which we live. H.R. 5388 is scheduled to be the subject of a hearing in the Judiciary Committee Subcommittee on the Constitution tomorrow, September 14, 2006 at 2:00 pm.

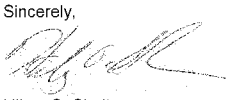
For too long the men, women and children who live in the District of Columbia, the heart of our Nation and to many people across the globe the very soul of democracy, have not been allowed to participate in the most basic democratic right; they have been denied a voice in the election of those who make the laws under which they, as citizens, must abide. The residents of the District of Columbia have been paying taxes determined by a code in which they have no say. They are asked to serve on federal juries and to interpret and implement laws that they are ineligible to help craft. They are also fighting, and dying, in wars and conflicts whose course they are voiceless in determining. This issue is especially important to the NAACP in light of the additional fact that almost 60% of the residents are African American.

Thus the NAACP, long a champion of the rights of all Americans to fully participate in our democracy, joins the bi-partisan Congressional support for H.R. 5388. This legislation is a balanced, constitutionally-sound proposal that addresses not only the inequity that has plagued our nation since 1801, but has also bedeviled the people of Utah since 2001. We therefore urge you to support

H.R. 5388 and to use the hearing as a means to learn more about the bill and to urge its swift mark-up, House passage and enactment.

Thank you in advance for your attention to this important legislation and to the concerns of the NAACP. Should you have any questions, please feel fre to contact me at (202) 463-2940.

Sincerely,



Hilary O. Shelton
Director

"Interfaith Coalition Supports H.R. 5388," Letter in support of H.R. 5388 from a broad coalition of religious organizations, September 13, 2006

Contact: Brooke Menschel (AJC)
202-785-4200 x30 or menschelb@ajc.org

Interfaith Coalition Supports H.R.5388

African American Ministers in Action • American Jewish Committee • Anti-Defamation League • Faith Action Network of People For the American Way • InterFaith Conference of Metropolitan Washington (With the Baha'i Spiritual Assemblies of Washington abstaining and the Church of Latter Day-Saints urging its members to vote their conscience) • Jewish Council of Public Affairs • Jewish Women International • National Council of Churches • National Council of Jewish Women • Presbyterian Church, (USA), Washington Office • Sikh American Legal Defense and Education Fund (SALDEF) • Union for Reform Judaism • Unitarian Universalist Association of Congregations • United Church of Christ, Justice and Witness Ministries • United Methodist Church, General Board of Church and Society

September 13, 2006

Dear Representative,

On behalf of a broad coalition of religious organizations, we urge you to support the D.C. Fair and Equal House Voting Rights Act of 2006 (H.R.5388). As people of faith, we are strong proponents of social justice and believe that all Americans deserve fair and equal voting rights. The continued disenfranchisement of District of Columbia residents from any voting representation in the national legislature is a blemish on the U.S. civil rights record and is a reminder that our nation has yet to attain full "liberty and justice for all."

H.R.5388 is a sensible, fair resolution to the disenfranchisement of D.C. residents and is supported by hundreds of religious leaders and organizations nationwide. Under this bill, the District of Columbia would be permanently represented by one seat in the House of Representatives. The bill would also temporarily grant an additional seat in the House to Utah, which fell short by some 84 residents from gaining a seat following the 2000 census reapportionment. Utah's at-large seat would be temporary through the 2010 reapportionment, at which time the seat would be allotted to the state next eligible for a Congressional district according to that year's census. A recent poll by KRS research shows that 82 percent of Americans believe that D.C. residents deserve voting representation in Congress.

The urgent need to rectify the disenfranchisement of D.C. residents has unified a diverse coalition across religious lines. Our coalition is committed to achieving social justice for all Americans, and thus we believe D.C. residents must be granted voting representation in the national legislature. We therefore urge you to support the D.C. Fair and Equal House Voting Rights Act of 2006. Thank you for considering our views on this important matter.

Respectfully,

African American Ministers in Action
American Jewish Committee
Anti-Defamation League
Faith Action Network of People For the American Way
InterFaith Conference of Metropolitan Washington
(With the Baha'i Spiritual Assemblies of Washington abstaining and
the Church of Latter Day-Saints urging its members to vote their conscience)
Jewish Council of Public Affairs
Jewish Women International
National Council of Churches
National Council of Jewish Women
Presbyterian Church, (USA), Washington Office
Sikh American Legal Defense and Education Fund (SALDEF)
Union for Reform Judaism
Unitarian Universalist Association of Congregations
United Church of Christ, Justice and Witness Ministries
United Methodist Church, General Board of Church and Society

LETTER IN SUPPORT OF H.R. 5388 FROM RICHARD T. FOLTIN, LEGISLATIVE DIRECTOR AND COUNSEL, AND DAVID BERSTEIN, EXECUTIVE DIRECTOR OF THE WASHINGTON CHAPTER, THE AMERICAN JEWISH COMMITTEE, SEPTEMBER 14, 2006

The American Jewish Committee
Office of Government and International Affairs
1156 Fifteenth Street, N.W., Washington, D.C. 20005 www.ajc.org 202-785-4200 Fax 202-785-4115 E-mail ogia@ajc.org

Re: Judiciary Committee's Consideration of H.R.5388

September 14, 2006

Dear Representative:

On behalf of the American Jewish Committee, the nation's oldest human relations organization with over 150,000 members and supporters represented by 33 regional chapters, I urge you to support the D.C. Fair and Equal House Voting Rights Act of 2006 (H.R.5388), legislation aimed at ending the continued disenfranchisement of District of Columbia's citizens from any voting representation in Congress. While the U.S. government promotes the spread of democracy throughout the world, America remains the only democratic nation where the citizens of the capital lack voting representation in the national legislature. The absence of voting rights for the District of Columbia is yet another reminder that our nation has yet to attain fully "liberty and justice for all," a situation H.R.5388 seeks to correct.

Under H.R.5388, the District of Columbia would be permanently represented by one seat in the House of Representatives. The bill would also temporarily grant an additional House seat to Utah, which fell short by some 84 residents from gaining a seat following the 2000 census reapportionment. Utah's at-large seat would be temporary through the 2010 reapportionment, at which time the seat would be allotted to the state next eligible for a Congressional district according to that year's census.

The lack of D.C. voting representation is a fundamental civil rights measure, and this politically balanced approach pursues a sensible, fair resolution to a centuries-old issue. A recent poll by KRS research shows that 82 percent of Americans believe that D.C. residents deserve voting representation in Congress. Eminent legal scholars, such as Viet D. Dinh of the Georgetown Law Center and the Honorable Kenneth W. Starr, support Congress' authority to grant the District of Columbia a permanent seat in the House of Representatives.

We therefore urge you to support H.R.5388 as it moves through Judiciary Committee in coming weeks. Thank you for considering our views on this matter.

Respectfully,

Richard T. Foltin
Legislative Director and Counsel

David Bernstein
Executive Director, Washington Chapter

The American Jewish Committee
Advancing democracy, pluralism and mutual understanding

LETTER IN SUPPORT OF H.R. 5388 FROM CHELLIE PINGREE, PRESIDENT AND CEO, COMMON CAUSE, SEPTEMBER 20, 2006

1250 Connecticut Ave, NW Suite 600 Washington DC 20036
T 202.833.1200 F 202.659.3716 www.commoncause.org

September 20, 2006

Dear Representative:

Common Cause strongly supports H.R. 5388, DC Voting Rights Act. We are pleased that the Judiciary Subcommittee on the Constitution will be holding an important hearing on the bill on Thursday, and we urge the committee to markup the bill soon after the hearing.

The DC Voting Rights Act will give the citizens of the District of Columbia voting representation in the House. The bill was introduced by Representative Tom Davis (R-VA) and Delegate Eleanor Holmes Norton (D-DC) and has both Republican and Democratic cosponsors. The bill passed the House Government Reform Committee by a vote of 29 to 4 on May 17, 2006.

We believe this bill is a fair and politically viable way to correct an injustice that has existed for over 200 years. The committee has an opportunity to make history by bringing more than a half million Americans fully into our democracy, where they belong.

The citizens of the District of Columbia deserve the same right that all other Americans have to be represented in Congress. DC residents pay federal income taxes, serve on juries, and are currently serving in the armed forces in Iraq, fighting for new democratic rights for Iraqis.

H.R. 5388 is a unique approach to a problem that has remained unresolved for most of our nation's history. The compromise forged by Representative Davis and Delegate Norton recognizes that partisan political considerations have always entered into issues that are fundamentally about fairness and justice.

We urge the committee to markup the bill next week and to vote for final passage without amendment, and give the 600,000 Americans in the District a vote in the House.

Sincerely,

Chellie Pingree

Derek Bok Chairman
Chellie Pingree President and CEO
Archibald Cox Chairman Emeritus
John Gardner Founding Chairman

"SUPPORT DEMOCRACY IN OUR NATION'S CAPITAL," THE COALITION TO STOP GUN VIOLENCE

THE COALITION TO STOP GUN VIOLENCE
THE EDUCATIONAL FUND TO STOP GUN VIOLENCE
Organizing for Progressive Gun Laws Since 1974.

Take Action! Send a Message

Support Democracy in Our Nation's Capital

District of Columbia residents pay federal income taxes, serve on juries and die in wars to defend American democracy, but they still lack voting representation in Congress. This has resulted in constant challenges to DC's gun laws by the National Rifle Association and its allies on Capitol Hill, who are eager to impose their "values" on the people of the District. Until democracy is brought to our nation's capital, their assaults on DC will continue unabated.

H.R. 5388, the "DC Fair and Equal House Voting Rights Act" (DC Voting Rights Act), was introduced by Representative Tom Davis (R-VA) and Delegate Eleanor Holmes Norton (D-DC) and would provide Washingtonians with a voting member in the House of Representatives for the first time ever. Taking a bipartisan approach, the bill would also provide an additional representative to the state next in line for a seat according to the 2000 Census, Utah.

On May 18, 2006, the House Committee on Government Reform approved the DC Voting Rights Act by a historic vote of 29-4. Surveys indicate that Americans support the legislation in similar numbers—a recent national poll showed that 82 percent of Americans believe that DC residents deserve full voting representation on Capitol Hill.

Now, as the DC Voting Rights Act heads to the House Judiciary Committee for consideration, your support is more important than ever. Please take a minute to complete steps 1-3 below to send a message to your representative telling them to co-sponsor and support H.R. 5388.

As we work to extend and secure democracy around the world, the time has come to provide democracy for Americans living in our nation's capital. The DC Voting Rights Act is an excellent first step. Thank you for your support in this critical effort.

Learn More About This Issue

1 Read The Letter

September 14, 2006

Your U.S. representative

Support Democracy for D.C.

Dear Representative,

I urge you to help provide the residents of Washington, DC, with voting representation in Congress by cosponsoring and working to enact H.R. 5388, the "DC Fair and Equal House Voting Rights Act" (DC Voting Rights Act).

DC residents pay federal income taxes, serve on juries and die in wars to defend American democracy, but they still lack a representative with a vote on the floor of the House of Representatives—the "People's House." H.R. 5388, introduced by Representative Tom Davis (R-VA) and Delegate Eleanor Holmes Norton (D-DC), would provide Washingtonians with a voting member in the House for the first time ever. The bill would also provide an additional representative to the state next in line for a seat according to the 2000 Census, Utah.

Sincerely,

Your signature will be added from the information you provide below.

2 Sign The Letter

Already a supporter? All you need to enter is your emai address and send the letter. If not, all fields are required.

Email

Prefix Select:

First Name

Last Name

Address

City

State Select:

Zip Code

Country USA

☑ **Join the CSGV Action Network.**

3 Send The Letter

Send My Letter

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