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DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2007

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

H.R. 1433

MARCH 14, 2007

Serial No. 110–7

Printed for the use of the Committee on the Judiciary

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DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2007

WEDNESDAY, MARCH 14, 2007

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

The Committee met, pursuant to notice, at 10:15 a.m. in Room 2141, Rayburn House Office Building, the Honorable John Conyers, Jr. (Chairman of the Committee) presiding.

Present: Representatives Conyers, Berman, Nadler, Scott, Jackson Lee, Cohen, Johnson, Gutierrez, Ellison, Smith, Sensenbrenner, Coble, Gallegly, Goodlatte, Chabot, Lungren, Cannon, Keller, Issa, Pence, Forbes, King, Feeney, Franks, Gohmert and Jordan.

Staff Present: Perry Apelbaum, Chief Counsel and Staff Director; Kanya Bennett, Counsel; Joseph Gibson, Chief Minority Counsel; and Paul Taylor, Minority Counsel.

[The bill, H.R. 1433, follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 1433

To provide for the treatment of the District of Columbia as a Congressional district for purposes of representation in the House of Representatives, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 9, 2007

Ms. NORTON (for herself, Mr. TOM DAVIS of Virginia, Mr. CONYERS, Mr. PLATTS, Mr. WAXMAN, Mr. SHAYS, Mr. HOYER, Mr. ISSA, Mr. NADLER, Mr. PORTER, and Mr. MATHESON) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Oversight and Government Reform, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To provide for the treatment of the District of Columbia as a Congressional district for purposes of representation in the House of Representatives, and for other purposes.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia House Voting Rights Act of 2007".

SEC. 2. FINDINGS.

Congress finds as follows:

(1) Over half a million people living in the District of Columbia, the capital of our democratic Nation, lack direct voting representation in the United States Senate and House of Representatives.

(2) District of Columbia residents have fought and died to defend our democracy in every war since the War of Independence.

(3) District of Columbia residents pay billions of dollars in Federal taxes each year.

(4) Our Nation is founded on the principles of "one person, one vote" and "government by the consent of the governed".

SEC. 3. TREATMENT OF DISTRICT OF COLUMBIA AS CONGRESSIONAL DISTRICT.

(a) IN GENERAL.—Notwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives.

(b) CONFORMING AMENDMENTS RELATING TO APPORTIONMENT OF MEMBERS OF HOUSE OF REPRESENTATIVES.—

(1) INCLUSION OF SINGLE DISTRICT OF COLUMBIA MEMBER IN REAPPORTIONMENT OF MEMBERS AMONG STATES.—Section 22 of the Act entitled "An Act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress", approved June 28, 1929 (2 U.S.C. 2a), is amended by adding at the end the following new subsection:

"(d) This section shall apply with respect to the District of Columbia in the same manner as this section applies to a State, except that the District of Columbia may not receive more than one Member under any reapportionment of Members.".

(2) CLARIFICATION OF DETERMINATION OF NUMBER OF PRESIDENTIAL ELECTORS ON BASIS OF 23RD AMENDMENT.—Section 3 of title 3, United States Code, is amended by striking "come into office;" and inserting the following: "come into office (subject to the twenty-third article of amendment to the Constitution of the United States in the case of the District of Columbia);".

(c) CONFORMING AMENDMENTS REGARDING APPOINTMENTS TO SERVICE ACADEMIES.—

(1) UNITED STATES MILITARY ACADEMY.—Section 4342 of title 10, United States Code, is amended—

(A) in subsection (a), by striking paragraph (5); and

(B) in subsection (f), by striking "the District of Columbia,".

(2) UNITED STATES NAVAL ACADEMY.—Such title is amended—

(A) in section 6954(a), by striking paragraph (5); and

(B) in section 6958(b), by striking "the District of Columbia,".

(3) UNITED STATES AIR FORCE ACADEMY.—Section 9342 of title 10, United States Code, is amended—

(A) in subsection (a), by striking paragraph (5); and

(B) in subsection (f), by striking "the District of Columbia,".

(4) EFFECTIVE DATE.—This subsection and the amendments made by this subsection shall take effect on the date on which a Representative from the District of Columbia takes office for the One Hundred Tenth Congress.

SEC. 4. INCREASE IN MEMBERSHIP OF HOUSE OF REPRESENTATIVES.

(a) PERMANENT INCREASE IN NUMBER OF MEMBERS.—Effective with respect to the One Hundred Tenth Congress and each succeeding Congress, the House of Representatives shall be composed of 437 Members, including any Members representing the District of Columbia pursuant to section 3(a).

(b) REAPPORTIONMENT OF MEMBERS RESULTING FROM INCREASE.—

(1) IN GENERAL.—Section 22(a) of the Act entitled "An Act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress", approved June 28, 1929 (2 U.S.C. 2a(a)), is amended by striking "the then existing number of Representatives" and inserting "the number of Representatives established with respect to the One Hundred Tenth Congress".

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall apply with respect to the regular decennial census conducted for 2010 and each subsequent regular decennial census.

(c) SPECIAL RULES FOR PERIOD PRIOR TO 2012 REAPPORTIONMENT.—

(1) TRANSMITTAL OF REVISED STATEMENT OF APPORTIONMENT BY PRESIDENT.—Not later than 30 days after the date of the enactment of this Act, the President shall transmit to Congress a revised version of the most recent statement of apportionment submitted under section 22(a) of the Act entitled "An Act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress", approved June 28, 1929 (2 U.S.C. 2a(a)), to take into account this Act and the amendments made by this Act.

(2) REPORT BY CLERK.—Not later than 15 calendar days after receiving the revised version of the statement of apportionment under paragraph (1), the Clerk of the House of Representatives, in accordance with section 22(b) of such Act (2 U.S.C. 2a(b)), shall send to the executive of each State a certificate of the number of Representatives to which such State is entitled under section 22 of such Act, and shall submit a report to the Speaker of the House of Representatives identifying the State (other than the District of Columbia) which is entitled to one additional Representative pursuant to this section.

(3) REQUIREMENTS FOR ELECTION OF ADDITIONAL MEMBER.—During the One Hundred Tenth Congress, the One Hundred Eleventh Congress, and the One Hundred Twelfth Congress—

(A) notwithstanding the Act entitled "An Act for the relief of Doctor Ricardo Vallejo Samala and to provide for congressional redistricting", approved December 14, 1967 (2 U.S.C. 2c), the additional Representative to which the State identified by the Clerk of the House of Representatives in the report submitted under paragraph (2) is entitled shall be elected from the State at large; and

(B) the other Representatives to which such State is entitled shall be elected on the basis of the Congressional districts in effect in the State for the One Hundred Ninth Congress.

(d) SEATING OF NEW MEMBERS.—The first Representative from the District of Columbia and the first additional Representative to which the State identified by the Clerk of the House of Representatives in the report submitted under subsection (c) is entitled shall each be sworn in and seated as Members of the House of Representatives on the same date.

SEC. 5. REPEAL OF OFFICE OF DISTRICT OF COLUMBIA DELEGATE.

(a) REPEAL OF OFFICE.—

(1) IN GENERAL.—Sections 202 and 204 of the District of Columbia Delegate Act (Public Law 91–405; sections 1–401 and 1–402, D.C. Official Code) are repealed, and the provisions of law amended or repealed by such sections are restored or revived as if such sections had not been enacted.

(2) EFFECTIVE DATE.—The amendments made by this subsection shall take effect on the date on which a Representative from the District of Columbia takes office for the One Hundred Tenth Congress.

(b) CONFORMING AMENDMENTS TO DISTRICT OF COLUMBIA ELECTIONS CODE OF 1955.—The District of Columbia Elections Code of 1955 is amended as follows:

(1) In section 1 (sec. 1–1001.01, D.C. Official Code), by striking "the Delegate to the House of Representatives," and inserting "the Representative in the Congress,".

(2) In section 2 (sec. 1–1001.02, D.C. Official Code)—

(A) by striking paragraph (6); and

(B) in paragraph (13), by striking "the Delegate to Congress for the District of Columbia," and inserting "the Representative in the Congress,".

(3) In section 8 (sec. 1–1001.08, D.C. Official Code)—

(A) in the heading, by striking "Delegate" and inserting "Representative"; and

(B) by striking "Delegate," each place it appears in subsections (h)(1)(A), (i)(1), and (j)(1) and inserting "Representative in the Congress,".

(4) In section 10 (sec. 1–1001.10, D.C. Official Code)—

(A) in subsection (a)(3)(A)—

(i) by striking "or section 206(d) of the District of Columbia Delegate Act", and

(ii) by striking "the office of Delegate to the House of Representatives" and inserting "the office of Representative in the Congress";

(B) in subsection (d)(1), by striking "Delegate," each place it appears; and

(C) in subsection (d)(2)—

(i) by striking "(A) In the event" and all that follows through "term of office," and inserting "In the event that a vacancy occurs in the office of Representative in the Congress before May 1 of the last year of the Representative's term of office," and

(ii) by striking subparagraph (B).

(5) In section 11(a)(2) (sec. 1–1001.11(a)(2), D.C. Official Code), by striking "Delegate to the House of Representatives," and inserting "Representative in the Congress,".

(6) In section 15(b) (sec. 1–1001.15(b), D.C. Official Code), by striking "Delegate," and inserting "Representative in the Congress,".

(7) In section 17(a) (sec. 1–1001.17(a), D.C. Official Code), by striking "the Delegate to the Congress from the District of Columbia" and inserting "the Representative in the Congress".

SEC. 6. REPEAL OF OFFICE OF STATEHOOD REPRESENTATIVE.

(a) IN GENERAL.—Section 4 of the District of Columbia Statehood Constitutional Convention Initiative of 1979 (sec. 1–123, D.C. Official Code) is amended as follows:

(1) By striking "offices of Senator and Representative" each place it appears in subsection (d) and inserting "office of Senator".

(2) In subsection (d)(2)—

(A) by striking "a Representative or";

(B) by striking "the Representative or"; and

(C) by striking "Representative shall be elected for a 2-year term and each".

(3) In subsection (d)(3)(A), by striking "and 1 United States Representative".

(4) By striking "Representative or" each place it appears in subsections (e), (f), (g), and (h).

(5) By striking "Representative's or" each place it appears in subsections (g) and (h).

(b) CONFORMING AMENDMENTS.—

(1) STATEHOOD COMMISSION.—Section 6 of such Initiative (sec. 1–125, D.C. Official Code) is amended—

(A) in subsection (a)—

(i) by striking "27 voting members" and inserting "26 voting members";

(ii) by adding "and" at the end of paragraph (5); and

(iii) by striking paragraph (6) and redesignating paragraph (7) as paragraph (6); and

(B) in subsection (a–1)(1), by striking subparagraph (H).

(2) AUTHORIZATION OF APPROPRIATIONS.—Section 8 of such Initiative (sec. 1–127, D.C. Official Code) is amended by striking "and House".

(3) APPLICATION OF HONORARIA LIMITATIONS.—Section 4 of D.C. Law 8–135 (sec. 1–131, D.C. Official Code) is amended by striking "or Representative" each place it appears.

(4) APPLICATION OF CAMPAIGN FINANCE LAWS.—Section 3 of the Statehood Convention Procedural Amendments Act of 1982 (sec. 1–135, D.C. Official Code) is amended by striking "and United States Representative".

(5) DISTRICT OF COLUMBIA ELECTIONS CODE OF 1955.—The District of Columbia Elections Code of 1955 is amended—

(A) in section 2(13) (sec. 1–1001.02(13), D.C. Official Code), by striking "United States Senator and Representative," and inserting "United States Senator,"; and

(B) in section 10(d) (sec. 1–1001.10(d)(3), D.C. Official Code), by striking "United States Representative or".

(c) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date on which a Representative from the District of Columbia takes office for the One Hundred Tenth Congress.

SEC. 7. NONSEVERABILITY OF PROVISIONS.

If any provision of this Act, or any amendment made by this Act, is declared or held invalid or unenforceable, the remaining provisions of this Act and any

amendment made by this Act shall be treated and deemed invalid and shall have no force or effect of law.

○

Mr. CONYERS. The hearing will come to order.

Good morning, ladies and gentlemen, Members of the Judiciary, our honored witnesses, and friends all assembled. This is a great day. We are the only democracy in the world where citizens living in the capital city are denied representation in their legislature, and we are here to see if that can be changed.

It was some 45 years ago that residents of the District finally got home rule. I was a Member of this Committee in 1967 when Chairman Emanuel Celler introduced and reported legislation that would give the District a vote.

I was here in 1978 when this Committee and this Congress passed a constitutional amendment to give the District voting representation.

Last Congress, the 109th, we got even closer to passing legislation, and I thank publicly many Members of this Committee, including the past Chairmen, for their efforts.

We had bipartisan legislation that has now passed out of the Government Reform Committee, a big first step, and now we are about to take in the Committee of the Judiciary a very large second step.

Now the thing we need to examine is the fact that D.C., the District of Columbia and its citizens are treated as a State in so many instances; and it is on the military side, as a Korean veteran, that I remind all of us here that we have D.C. residents serving in Iraq right at this moment. Some have already given their lives in this cause.

They have been in American wars since the first Revolutionary War, and it seems as if this might be a reason for them deserving a vote. In World War I, they were there. In the Vietnam War, they were there. In World War II, they were there. In the Korean War, they were there.

So with 44,000 veterans or more here in the District of Columbia, many who are loyal patriots, billions of dollars being spent in taxes, we are here today to receive testimony concerning the constitutionality of the legislation before us.

In one sense, the overriding question is, can we in the Congress make this a voting State or have the rights of a voting State at all? Can we do this? Can we do what has not been prevented from being done in any capital in the world? And the other question is, does one man, one vote somehow prevent Utah from making the adjustments that are required in this matter?

Now, controlling all of this is article I, section 8, the District clause, which provides Congress with the authority to give the District a vote. The Supreme Court has ruled in this matter. The District is national in the highest sense. The D.C. Circuit Court has ruled. The Court of Appeals in the District has made its understanding of the constitutional questions clear, and there are many

other contexts where Congress has used the District clause to give District rights and privileges reserved for the States.

For diversity jurisdiction, 11th amendment immunity, collection of State taxes, all of these have been upheld; and so it seems not only the balance of commonsense but fairness that we can also grant our citizens here the right to elect a voting representative. Half a million members of this District of Columbia have strong, equitable claims; and we want to hear them.

We have got a very good Committee. We have got a very good panel of witnesses. I want to thank you all so very much, and I would now like to turn the time over to the Ranking Member of the Judiciary Committee from Texas, Mr. Lamar Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Chairman, in my opening statement at the organizational meeting of the Judiciary Committee in January, I commented that what makes this Committee extraordinary to me is that it serves as the guardian of the Constitution. So I am troubled by the legislation we are having a hearing on today, because I believe it exceeds constitutional bounds. Let me summarize some of the constitutional problems legal scholars have with this bill.

Supporters of the bill claim Congress has the authority to enact this bill under the so-called District clause in article I, section 8, which states, quote, the 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. End quote.

However, that very clause would seem to constitutionally doom this legislation, as it clearly implies that D.C. is not a State; and article I, section 2, clearly states that, quote, the House of Representatives shall be composed of Members chosen every second year by the people of the several States.

Since D.C. is not a State, it cannot have a voting Member in the House. That is not even a tough law school exam question.

In 2000, a Federal District Court in D.C. stated, quote, we conclude from the 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, end quote.

Supporters of the bill point for precedent to a case decided by the Supreme Court in 1949 that upheld a Federal law extending the diversity jurisdiction of the Federal courts to hear cases in which D.C. residents were parties.

But as the Congressional Research Service stated in a recent report, the plurality opinion in that case took pains to note the limited impact of their holding. The plurality specifically limited the scope of its decision to cases which did not involve an extension of any fundamental right, end quote. Such, of course, as the right to vote for a Member of Congress.

If that 1949 Supreme Court case does what proponents of the bill says it does, then there was no need for Congress in 1978 to consider a constitutional amendment on the subject. That amendment failed to get the approval of three-quarters of the States over a 7-year period. In fact, only 16 of the 38 States required for its ratification supported the amendment.

What is being attempted by the legislation discussed today is something long recognized as requiring a constitutional amendment that the vast majority of States have already failed to approve. Even conceding for purposes of argument the proponents' interpretation of the vast breadth of the District clause, the bill unfairly subjects many citizens to unequal treatment. H.R. 1433 grants Utah an additional representative that will run at large or statewide, rather than in the individual district provided for in the redistricting plan the Utah legislature went to great effort to pass last year.

The at-large provision creates a situation this country has not seen since the development of the Supreme Court's line of cases affirming the principle of, quote, one man, one vote. Under this provision, voters in Utah would be able to vote for two representatives, their own district representative and their at-large representative, whereas voters in every other State would only be able to vote for their one district representative. The result would be that Utah voters would have disproportionately more voting power compared to the voters of every other State.

Mr. Chairman, with these and other very serious constitutional concerns in mind, I look forward to hearing from our witnesses today. And, Mr. Chairman, let me also say to our witnesses that, unfortunately, I am going to need to leave in a few minutes to go to the House floor to speak, but I hope to be back after a short period of time.

With that, Mr. Chairman, I will yield back my time.

Mr. CONYERS. Thank you.

We will include, without objection, the opening statements of any of our other colleagues.

Our first witness is Viet Dinh, a professor now at Georgetown University but formerly the U.S. Assistant Attorney General for Legal Policy at the Department of Justice. He is a founder of Bancroft Associates.

Our next witness is Bruce Spiva, who is a founding partner of Spiva and Hartnett, previously a partner at Jenner and Block. He is the Chair of the Board of the D.C. Vote, an organization committed to securing congressional rights for District residents.

Next is Jonathan Turley, a professor of law at George Washington University, who joined the faculty in 1990 and in 1998 became the youngest chaired professor in the school's history. He is nationally recognized as a legal commentator and is the second most cited law professor in the country.

The last witness is Rick Bress, a partner at Latham & Watkins. Before joining that firm, Mr. Bress was assistant to the Solicitor General of the United States. Mr. Bress also served as law clerk to Justice Antonin Scalia and to D.C. Circuit Judge Stephen Williams.

We welcome you, gentlemen. Your written statements will be made part of the record in their entirety, and you know the drill from this point on.

So we would invite Mr. Dinh to begin his comments. Welcome.

TESTIMONY OF VIET D. DINH, PROFESSOR OF LAW AND CO-DIRECTOR ASIAN LAW AND POLICY STUDIES, GEORGETOWN UNIVERSITY LAW CENTER

Mr. DINH. Thank you very much, Mr. Chairman. Thank you very much, Ranking Member Smith.

This is a difficult issue that this Committee is facing today and this House is facing in the future. The arguments against the constitutionality of the bill that you are considering are significant, and they are very characteristically, cogently and concisely summarized by Mr. Smith.

The arguments in concert to those—in that summary is presented in my written statement; and it is supported, of course, as you know, by my colleague, Ken Starr, and also the ABA. I would not summarize them here, but I do want to use the opening minutes in order to focus on one period in our Nation's history that is, I think, in my mind the most analogous period to the question that is presented to Congress here.

As you know, Maryland and Virginia ceded land to create the District of Columbia; and Congress accepted that land in 1790. However, the seat of government needed to be established here, as opposed to Philadelphia. So there was a lag of 10 years where there was no seat of government in the 10-mile-square District that we see today.

During that 10-year period, the residents formerly of Virginia and of Maryland continued to exercise their vote. However, the critical point here is that they continued to vote not as the residual right of their citizenship of Maryland and Virginia, because case law is unanimous on this point that the cession and acceptance of Congress had ended the jurisdiction of Maryland and Virginia during that period. Rather, the acceptance of the cession by Congress in 1790 provided that the operation of laws of Maryland and Virginia would continue pending the transitional period. This was a condition upon which Maryland and Virginia ceded their land, and this was accepted by Congress in the Act of 1790 accepting the land.

During this period, it is my contention, although it is not specifically addressed by the court, I acknowledge, that the right of District residents to vote and also all the other residual operational law of Maryland and Virginia operated not as a matter of State law but rather as a matter of Federal law, provided by the Act of 1790. Because, as I said before, the cession and acceptance had completed the transfer of jurisdiction, formal constitutional jurisdiction, of the States pending the creation of the District in 1800, the first Monday in 1800. It is only when Congress replaced the prevailing law of Maryland and Virginia at that time with legislation in 1801 that the right to vote was omitted.

I think this is critical in that it showed that Congress had the power to provide District residents the right to vote even though such right can be seen as residual or transitional. However, if one accepts, as I think one must in the court's unbroken jurisprudence, that the cession and acceptance completed the act of transfer of jurisdiction to the Federal Government and did not persist with the State government, then that source of congressional authority to provide such similar operation of law and similarly, with the rec-

ognition of the right to government notwithstanding, that this no-man's land within that 10-year period was not a State.

The source of that authority is, of course, as Mr. Smith has pointed out, is article I, section 8 the District clause.

I recognize, of course, that article I, section 2 apportions representatives among the people of several States; and this is a very weighty restriction. Just as it is article 3 restricts diversity of jurisdiction to the citizens of several States; just as the treaty clause likewise restricts; such as the tax apportionments clause likewise restricts; just as the commerce clause gives Congress only the power to regulate commerce amongst the several States.

Notwithstanding these express reservations to the citizens or the States themselves referenced to the States, courts have consistently held that the District can be considered a State or the citizen of a District can be treated like citizens of a State for the purpose of all these other provisions.

I understand that courts have not addressed this issue. I also understand that the D.C. Circuit in *Adams v. Clinton* has rejected a sui generis inherent right of District residents to have a right to vote under article I, section 2. But the question before Congress today is not whether District residents have an inherent right to vote under the Constitution, the question addressing *Adams v. Clinton,* but rather whether Congress has the power to so legislate. And I think Chief Justice Marshall's opinion in Hepburn, the plurality opinions in *Tidewater* and also dictum from *Adams v. Clinton* leaves open the question for Congress to so act.

I do think that, given the weight of authority and given the entire structure and history of the Constitution, that this Congress has ample constitutional authority in article I, section 8, the District clause and elsewhere, in order to give the District of Columbia residents the right to elect a representative and be treated as if they were citizens of several States for article I, section 2 purposes.

Thank you very much.

Mr. CONYERS. Thank you so much.

[The prepared statement of Mr. Dinh follows:]

PREPARED STATEMENT OF VIET D. DINH

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

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

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

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

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

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

The *District of Columbia House Voting Rights Act of 2007*, H.R. 1433, (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 110th Congress.[6] To accommodate the new representative from the District, membership in the House would be permanently increased by two members.[7] One newly created seat would go to the representative from the District, and the other would be assigned to the State next eligible for a Congressional district.[8]

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

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

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

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

[6] H.R. 1433, 110th Cong. § 3(a) (2007).

[7] *See id.*, § 4(a).

[8] *See id.*, § 4(c).

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

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

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

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

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

[9] U.S. CONST. art. III, § 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[23] *Id.*

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

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

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

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

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

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

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

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

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[29] *See id.* § 6.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[38] *Id.* at 452.

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

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

[41] *Id.*

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

[43] *Id.* at 453.

[44] *Id.*

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

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

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

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

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

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

[49] *Id.* at 588.

[50] *Id.* at 589.

[51] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

[58] *Id.* at 37.

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

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

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

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

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

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[63] *Id.* at 201.

[64] *Id.*

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

[66] *Id.* at 394.

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

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

[69] *Id.* at 419.

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

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

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

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

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

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

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

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

[74] *Id.* at 271.

[75] U.S. CONST. art. I, § 8, cl. 3.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[87] U.S. CONST. art. I, § 2, cl. 1.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[97] U.S. CONST. amend. XXIII, § 1.

[98] U.S. CONST. art. I, § 8, cl. 18.

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

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

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

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

* * *

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

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

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

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

Mr. CONYERS. The Chairman notes the presence of Delegate Eleanor Holmes Norton and Mayor Adrian Fenty of the District of Columbia.

Mr. Spiva, welcome to the Committee.

TESTIMONY OF BRUCE V. SPIVA, PARTNER, SPIVA AND HARTNETT, LLP

Mr. SPIVA. Thank you, Mr. Chairman. Congressman Smith, Members of the Committee, thank you for this opportunity to testify at this historic hearing.

I dedicate my testimony today to the memory of Darryl T. Dent, Gregory E. MacDonald, Paul W. Kimbrough, and Kevin M. Shea, the four men from the District of Columbia who lost their lives in the service of our country and democracy in Iraq and Afghanistan.

Mr. Chairman, I am proud to chair the Board of Directors of D.C. Vote, an organization whose mission is to secure full voting representation in Congress for Americans living in our Nation's capital.

The people of the District of Columbia, as Mr. Chairman has noted, have fought and died for our country in every war since the founding of our Republic. We fight for democracy abroad, and yet we are denied it here at home. We pay Federal and local taxes, we serve on Federal juries, we have fulfilled every responsibility of American citizenship, and yet we have no say in the passage of our Nation's laws and do not even have ultimate authority over our own local laws and institutions.

That, Mr. Chairman, is a moral disgrace and a shame on this Nation. It is a desecration of our Constitution. It is a denial of our civil and human rights, and it must change now.

In this great city, we have Americans who are teachers, firefighters, veterans and students. Some of these citizens are here with us today. We are disappointed and angered that we have been completely shut out of our Nation's political process. We are, as Martin Luther King once said of African-Americans in this country, exiles in our own land. We are not the constituents of any of you and, therefore, can command the full devotion of none of you.

But, despite all of our frustrations, we want you to know that we love this country, and we want to make it better. We want to make it at least as good as every other democracy in the world, not one of which denies the citizens of her capital the right to vote.

A week ago Sunday, many in this body stood with heroic Congressman John Lewis to celebrate the 42nd anniversary of the march from Selma to Montgomery that led to the passage of the historic Voting Rights Act of 1965. The great promise of the civil rights era, however, has yet to deliver voting rights for the people of the District of Columbia.

As an African American, I find it appalling that a majority Black jurisdiction remains completely disenfranchised this late in our Nation's history. But I would also note that this civil rights violation crosses all racial, economic, political party lines.

The vast majority of Americans agree that this must be changed. In a 2005 KRC research poll, 82 percent of Americans across all party lines said they support full voting representation for D.C. residents.

Mr. Chairman, I ask that the poll results be made a part of the record of this hearing.

The international community——

Mr. CONYERS. Without objection, so ordered.

Mr. SPIVA. Thank you, Mr. Chairman.

Mr. SPIVA. The international community has taken note of our failure to live up to our democratic ideals. In separate opinions, the Organization for American States, the Organization for Security and Cooperation in Europe and the U.N. Committee on Human Rights have all found that the United States is violating international human rights law by denying Washingtonians the right to vote.

Mr. Chairman, I also ask that the reports of those bodies be added to the record of this hearing.

Mr. CONYERS. Without objection.

Mr. SPIVA. Some defenders of the status quo argue that Washington, D.C., is too small to warrant representation or that the people who live here can move out if they wish to vote. Those critics do not understand what this country is all about. Our country was founded on the principle that every American citizen must have an equal right to vote, and a government without the consent of the governed is illegitimate. And this is true no matter where you live or how big your community.

But, frankly, it is not the words of the opponents of D.C. voting rights that cut the deepest. It is the apathy and tepid support of those who feel this cause is not worthy of their energy.

Again, the words of Dr. King speak to us today. We will have to repent in this generation not merely for the hateful words and actions of the bad people but for the appalling silence of the good people.

We have been denied the right to participate in our government for over 200 years. It is time, past time for people of goodwill to work with concerted energy to remedy this injustice immediately.

As the old proverb goes, a journey of a thousand miles begins with a single step. The passage of the D.C. Voting Rights Act would be a significant and historic step toward justice.

Mr. Chairman, Congressman Smith, and Members of the Committee, we are Americans, and we demand the vote. We hope that you will work together to pass the D.C. Voting Rights Act, a bill that provides Washingtonians with representation in the United States House of Representatives.

Thank you once again for this opportunity to testify today.

Mr. CONYERS. Thank you for your comments.

[The prepared statement of Mr. Spiva follows:]

PREPARED STATEMENT OF BRUCE V. SPIVA

TESTIMONY OF BRUCE V. SPIVA, CHAIR OF THE BOARD OF DC VOTE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
HEARING ON H.R. 1433
MARCH 14, 2007

Mr. Chairman, Congressman Smith, members of the Committee, thank you for this opportunity to testify at this historic hearing. I ask that my full statement be made a part of the record. I will summarize my remarks.

I dedicate my testimony today to the memory of Darryl T. Dent, Gregory E. MacDonald, Paul W. Kimbrough, and Kevin M. Shea, the four men from the District of Columbia who lost their lives in the service of our country and democracy in Iraq and Afghanistan, and to all the men and women from the District of Columbia who have served our country in every war since the founding of the Republic.

Mr. Chairman, I am proud to chair the Board of Directors of DC Vote, an organization whose mission is to secure full voting representation in Congress for Americans living in our nation's capital.

The people of the District of Columbia have fought and died for our country in every war. We are fighting and dying now in Iraq and Afghanistan. We fight for democracy abroad and are denied it here at home. We pay federal and local taxes. We serve on federal juries. We have fulfilled *every* responsibility of American citizenship, and yet, we have no say in the passage of our nation's law, and do not even have ultimate authority over our own local laws and institutions. That is a moral disgrace and a shame on this Nation. It is a desecration of our Constitution. It is a denial of our civil and human rights. It is a violation of our country's core principles. And it must change now.

In this great city, we have Americans who are teachers, firefighters, veterans, and students. Some of these citizens are here with us today. We want you to know that we love this country. We are disappointed and angered that we have been completely shut out of our nation's political process, reduced to political bystanders in our own country. We are, as Martin Luther King once said of African Americans in this country, "exiles in our own land." We are not the constituents of any of you, and therefore can command the full devotion of none of you.

We have grown impatient with the glacial pace with which our government has acted to end the denial of our rights. We are frustrated that many in the Congress have tended to view our disenfranchisement as a local issue of only minor significance. But, despite all of our frustrations, we love this country and we want to make it better. We want it to be *at least* as good as every other democracy in the world -- not one of which denies the citizens of her capital the right to vote. This is not a local issue. We are fighting to realize our country's core founding principles: that every American citizen must have an equal right to vote, and that government without the consent of the governed is illegitimate.

The vast majority of Americans – once they know about our disenfranchisement -- agree with us that it is unfair and un-American. In a poll conducted by KRS research in 2005, 82 percent of Americans said they support full voting representation for D.C. residents. That support cuts across all segments of society, all regions of our country, and all political parties. Mr. Chairman, I ask that the poll results be made a part of the record of this hearing.

The international community has taken note of our failure to live up to our democratic ideals, and has increasingly spoken out against the denial of democracy for D.C. residents. In separate opinions, the Organization for American States, the Organization for Security and Cooperation in Europe, and the UN Committee on Human Rights have all found that the United States is violating international human rights law by treating Washingtonians as second-class citizens. Mr. Chairman, I also ask that the full reports of those bodies be added to the record of this hearing.

Some defenders of the status quo argue that the Founders intentionally gave the nation's capital a special status. Others argue that Washington, D.C. is too small to warrant representation in the Congress, or that the people who live here should be denied the right to vote because they have chosen to live here, and they can move out if they wish to vote. We could and do respond that the Constitution neither specifically provides nor denies residents living in the Capital voting representation in the Congress. This anomaly can be changed. Our country has risen to rectify other injustices that some have attributed to our Founders' intent, such as the denial of rights to women, minorities and those having reached the age of eighteen.

We could also respond that Washington, D.C.'s population is larger than or nearly as large as several states. We could say that some people do not have the option to move away.

While we can and do meet these arguments on their own terms, I think there is a more fundamental response to such critics. Their arguments against D.C. voting rights betray a fundamental misunderstanding or willful ignorance of what this country is all about. Our country was founded on the principle, albeit not the reality, of political

equality and the ideal that the governed choose those who will govern them. To this day, our unifying national belief is that participatory democracy not only works better than all other alternatives, but that it is morally and providentially compelled. Denying people the right to vote based on where they live, or the size of their community, is fundamentally inconsistent with these ideals.

But, frankly, it is not the swords of the opponents of D.C. voting rights that cut the deepest. It is the apathy and tepid support of those who bear us no ill, but who also do not feel this cause is worthy of their energy. Again, the words of Dr. King speak to us today: "Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will. We will have to repent in this generation not merely for the hateful words and actions of the bad people but for the appalling silence of the good people."

We have been denied the right to participate in our government for over 200 years. It is time, past time, for people of good will to work with concerted energy to remedy this injustice immediately.

Our nation celebrated in 2005 the 40th anniversary of the Voting Rights Act of 1965. And a week ago Sunday, many in this body stood with heroic Congressman John Lewis to celebrate the 42nd anniversary of the march from Selma to Montgomery that led to the Act's passage. The Act stands as one of the greatest laws passed in the history of this country because it sought to eliminate disenfranchisement on the basis of race. It sought to deliver on a promise that had been made, but not kept, 100 years earlier by the 15th Amendment to the Constitution.

The great promise of the civil rights era, however, has yet to deliver voting rights for the people of the District of Columbia. As an African-American, I find it appalling that a majority-Black jurisdiction remains completely disenfranchised this late in our nation's history. But this civil rights violation crosses all racial and political lines and should be a priority for all members of Congress regardless of their party, race or ethnicity. Residents of the District of Columbia can't vote whether they are Republican, Democrat, or Independent, and whether they are White, African American, Asian or Latino.

While I respect my colleagues who argue that this bill is unconstitutional, I believe that they must bear a heavy burden to justify opposition on those grounds. As my distinguished colleagues on the panel today attest, there are strong arguments in support of Congress' authority to pass this bill. This bill is the only politically viable option on the table. It is the result of years of work by many members of Congress of both parties. It would therefore be inexcusable to reject this bill based on the *possibility* that it may be found unconstitutional.

This is not a mere debating point. The civil and human rights of 600,000 citizens are at stake. And so those who profess support for democracy but find the constitutionality of our means lacking owe a greater duty to constitutional principles than a mere critique of this bill. They must commit their energies to attaining a solution. Calls for solutions that are not presently achievable, such as statehood or a constitutional amendment, amount to no support at all. They are words without action.

Those who say that the DC Voting Rights Act does not go far enough in providing full voting rights to District residents are right. But it is also inexcusable to

resist a significant change for the better on the grounds that it does not provide complete justice. As the old proverb goes, "a journey of a thousand miles begins with a single step." Passage of the DC Voting Rights Act would be a significant and historic step toward justice for the people of the District of Columbia. It is long past time to take this first step. Mr. Chairman, Congressman Smith, and members of the Committee, we are Americans and we demand the vote. We hope that you will work together in a bipartisan fashion to pass the DC House Voting Rights Act this spring, a bill that provides Washingtonians with representation in the U.S. House of Representatives.

Thank you once again for the opportunity to testify today.

Mr. CONYERS. Professor Turley, welcome.

TESTIMONY OF JONATHAN TURLEY, PROFESSOR OF LAW, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

Mr. TURLEY. Thank you, sir. It is a great honor to appear before you, Chairman Conyers, Representative Smith, Members of this Committee.

I would hope that we all agree on one thing, that it is a terrible fact that the people of the District of Columbia do not have a vote in Congress. I have never spoken to anybody who was comfortable with that fact. But, as is often the case in our system of law, we are left with a question not of ends but means; and at times principle takes us or leaves us in a place we don't want to be. This is certainly the place I am sitting right now, is a place I would not want to be if I could avoid it. But I can't.

H.R. 1433 is the wrong means. It is, in my view, fundamentally flawed on a number of constitutional levels. Indeed, to be blunt, I consider this legislation to be the most premeditated unconstitutional act of Congress in decades. Now I say that even though I respect the people on the other side, I respect their motivations, but I cannot square this piece of legislation with either the language or the history of the Constitution.

Congress, as you know, cannot legislatively set aside a constitutional provision, no matter how much we want to do it. You can only do that through a constitutional amendment, and the Framers made that very difficult.

Strikingly, the language of this bill is similar at points to the 1978 constitutional amendment. That was defeated. It is now an effort to achieve part of the result legislatively. In my view, it circumvents article 5 of the Constitution.

I have also in my testimony addressed the Utah district, which I believe now has serious problems with one person, one vote.

I have also included a proposal that I believe would give the District of Columbia not partial representation but full representation in Congress, and it would be unassailable on a constitutional level. I won't address that in my oral comments, but it is laid out in my testimony.

As many of you know, one of the reasons that we have a Federal enclave was that, in 1783, when Congress was meeting in Philadelphia, a mob formed and threatened the Members of that body. They fled. When they met in 1787, that experience was still much on their minds, not surprisingly; and they decided that, for the security of the Nation, it was better to have a seat of government that belonged to no State.

That was not the only reason. Madison, as I lay out in my testimony, stated a number of other reasons why they wanted the seat of government in a non-State; and that historical record establishes that the District was created openly, expressly to be a non-State.

Now, as you know, most of our constitutional analysis begins with the text of the Constitution, and there it should end if the text is clear. With due respect to my esteemed colleagues with me here today, I believe the text is clear that the article I, section 2 language refers to the people of several States, refers to State legislatures as a qualifying reference; and I think that it is perfectly clear

from the face and the plain meaning of that language that means States, just as the drafters indicated.

Indeed, I think it takes an act of willful blindness to ignore the use of State in this article that, as you know, is ubiquitous throughout article I and article 2. That word, "State," is perhaps one of the most important words in the Constitution. You change that word, you change the Constitution.

Indeed, as many of you know, because many of you are constitutional scholars, the role of States within our system was the structure in question for the Constitutional Convention. It was all about States and how they related to each other and how they related to the Federal Government.

If you look at the context of the Constitution, you will see that many of the provisions become unintelligible if you change the meaning of States, that in various clauses States are used in a way that could not possibly include the District of Columbia.

Now if you look also at the later amendments like the 10th amendment, like the 23rd amendment, it is equally clear that the District is not included in that language, that it is incompatible with the interpretation given to it today. Indeed, the 23rd amendment states expressly that the District is to be treated, quote, as if it were a State. So we have had periodically, both in attempted amendments and successful amendments, a recognition by Congress that you have to achieve voting rights for the District either through a constitutional amendment or through retrocession.

I know my time is running out, and so I will simply add this point. It has been stated that this issue was not considered by the drafters, and I want to—if I leave you with one thing today, it is this: That is not true. I have cited repeated references in ratification conventions and the Framers where this very issue was debated, and people like Alexander Hamilton lost that debate. So this was created as a non-State, and the voting issue was considered when that status was created. I submit to this Committee that there are ways to do this that would be constitutionally unassailable, but they are not easy.

In conclusion, I will tell you a story my father always told me when he would correct me on one of the stupider things I would do occasionally. He talks about a guy that was looking for something underneath a street lamp, and another guy comes up to help him. He gets on his knees, and he looks around. An hour later he said, Mister, I can't find it. Are you sure you dropped your ring here? He said, no, no, no, I didn't drop the ring. Here I dropped it down the street, but the light is better here.

The point is, we often go where the light is better. And I have to say it is not difficult where I am suggesting that you have to go, but that is where you will find the answer. Thank you very much.

Mr. CONYERS. You are welcome, and thank you so much.

[The prepared statement of Mr. Turley follows:]

I.
INTRODUCTION

Chairman Conyers, Ranking Member Smith, members of the Committee, it is an honor to appear before you today to discuss the important question of the representational status of the District of Columbia in Congress. 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. 1433 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.[3] Indeed, considerable expense would likely come from an inevitable and likely successful legal challenge -- all for a bill that would ultimately achieve only partial representational status. The effort to fashion this as a civil rights measure ignores the fact that it confers only partial representation without any guarantee that it will continue in the future. It is the equivalent of

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

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

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

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.[4]

As I laid out in detail in my prior testimony on this proposal before the 109th Congress,[5] I must respectfully but strongly disagree with the constitutional analysis offered to Congress by Professor Viet Dinh,[6] and the Hon. Kenneth Starr.[7] Notably, since my last testimony, the independent Congressional Research Service joined those of us who view this legislation as facially unconstitutional.[8] Permit me to be blunt, I consider this Act to be

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[4] 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 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.

[5] *District of Columbia Fair and Equal House Voting Rights Act of 2006, before the Subcommittee on the Constitution, H.R. 5388,* 109th Cong., 2nd Sess. 2 (testimony of Jonathan Turley).

[6] 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.

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

[8] Congressional Research Service, The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives

the most premeditated unconstitutional act by Congress in decades.[9] As shown below, on every level of traditional constitutional analysis (textualist, intentionalist, historical) the unconstitutionality of this legislation is plainly evident. Conversely, the interpretations of Messrs. Dinh and Starr are based on uncharacteristically liberal interpretations of the text of Article I, which ignore the plain meaning of the word "states" and the express intent of the Framers.

The bill's drafters have boldly stated that "[n]otwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives."[10] What this language really means is: "notwithstanding any provision of the Constitution." The problem is that this Congress cannot set aside provisions of the Constitution absent a ratified constitutional amendment. Of course, the language of H.R. 1433 is strikingly similar to a 1978 constitutional amendment that failed after being ratified by only 16 states.[11] Indeed, in both prior successful and unsuccessful amendments[12] (as well as in argument made in court),[13] the Congress has conceded that the

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or the Committee of the Whole, January 24, 2007, at i (Analysis by Mr. Eugene Boyd) (concluding "that case law that does exist would seem to indicate that not only is the District of Columbia not a 'state' for purposes of representation, but that congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation.").

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

[10] H.R. 1433 §5.

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

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

[13] *Michel v. Anderson*, 14 F.3d 623, 630 (D.C. Cir. 1994) ("despite the House's reliance on the revote mechanism to reduce the impact of the rule permitting delegates to vote in the Committee of the Whole, [the

District is not a State for the purposes of voting in Congress. Now, unable to pass a constitutional amendment, sponsors hope to circumvent the process laid out in Article V[14] by claiming the inherent authority to add a non-state voting member to the House of Representatives.

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 citizens. Indeed, with the passage of time, there remains little necessity for a separate enclave beyond the symbolic value of "belonging" to no individual state. To understand the perceived necessity underlying Article I, Section 8, one has to consider the events that led to the first call for a separate federal district.

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

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government] concede[s] that it would be unconstitutional to permit anyone but members of the House to vote in the full House under any circumstances.").

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

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.[15]

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."[16] 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?"[17] James Iredell raised the same point in the North Carolina ratification convention when he asked, "Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress?"[18] 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."[19]

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

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15 Turley, *supra*, at 8.

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

17 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).

18 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).

19 *Id.*

this special enclave.[20] 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."[21] 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."[22] 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."[23]

The District was, therefore, created for the specific purpose of being a non-State without direct representatives in Congress. The security and operations of the federal enclave would remain the collective responsibilities of the entire Congress – of all of the various states. The Framers, however, intentionally preserved the option to change the dimensions or even relocate the federal district. Indeed, Charles Pinckney wanted that District Clause to read that Congress could "fix and *permanently* establish the seat of the Government . . ."[24] However, the framers rejected the inclusion of the word "permanently" to allow for some flexibility.

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[20] 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.

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

[22] *Id.*

[23] *Id.*

[24] *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)).

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*,[25] "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.'"[26] Moreover, the federal government now has a large security force and is not dependent on the states. Finally, the position of the federal government vis-à-vis the states has flipped with the federal government now the dominant party in this relationship. Thus, even though federal buildings or courthouses are located in the various states, they remain legally and practically separate from state jurisdiction – though enforcement of state criminal laws does occur in such buildings. Just as the United Nations has a special status in New York City and does not bend to the pressure of its host country or city, the federal government does not need a special federal enclave to exercise its independence from individual state governments.

The original motivating purposes behind the creation of the federal enclave, therefore, no longer exist. Madison wanted a non-state location for the seat of government because ""if any state had the power of legislation over the place where Congress should fix the general government, this would impair the dignity, and hazard the safety, of Congress."[27] There is no longer a cognizable "hazard [to] safety" but there certainty remains the symbolic question of the impairment to the dignity for the several states of locating the seat of government in a specific state. It is a question that should not be dismissed as insignificant. I personally believe that the seat of the federal government should remain completely federal territory as an important symbol of the equality of all states in the governance of the nation.

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[25] 426 U.S. 167, 179 (1976).

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

[27] 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 89 (Madison, J.) (Jonathan Elliot ed., 2d ed. 1907).

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.[28] 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. 1433 Violates Article I of the Constitution in Awarding Voting Rights to the District of Columbia.

As noted above, I believe that the Dinh and Starr analyses is fundamentally flawed and that H.R. 1433 would violate the clear language and meaning of Article I. To evaluate the constitutionality of the legislation, one begins with the text, explores the original meaning of the language, and then considers the implications of the rivaling interpretations for the Constitution system. 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. *The Text of the Constitutional Provisions.*

Any constitutional analysis necessarily begins with the text of the relevant provision or provisions. To the extent that the language clearly addresses the question, there is obviously no need to proceed further into other interpretative measures that look at the context of the provision, the

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

historical evidence of intent, etc. The instant question could arguably end with this simple threshold inquiry.

In this controversy, there are two primary provisions. The most important provision is found in Article I, Section 2:

> 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.[29]

As with the Seventeenth Amendment election of the composition of the Senate,[30] 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 "states" is repeated in the section when the Framers specified that each representative must "when elected, be an inhabitant of that State in which he shall be chosen." Moreover, the reference to "the most numerous Branch in the States Legislature" clearly distinguishes the state entity from the District. The District had no independent government at the time and currently has only a city council. In reading such constitutional language, the Supreme Court has admonished courts that "every word must have its due force, and appropriate meaning; . . . no word was unnecessarily used or needlessly added."[31] Here the drafters refer repeatedly to states or several states as well as state legislatures in defining the membership of the House of Representatives. Putting aside notions of plain meaning,[32] the structure and

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

[30] 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."

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

[32] It is true that plain meaning at times can be over-emphasized. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 67 (1994) ("Plain meaning as a way to understand language is silly. In interesting cases, meaning is not

language of this provision clearly indicate that the drafters were referencing formal state entities. It takes an act of willful blindness to ignore the obvious meaning of these words.

As will be discussed more fully below, the obvious meaning of this section is supported by a long line of cases that repeatedly deny the District the status of a state and reaffirm the intention to create a non-state entity. This status did not impair the ability of Congress to impose other obligations of citizenship. Thus, in *Loughborough v. Blake*,[33] 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*:[34] the District Clause "enables Congress to do many things in the District of Columbia which it has no authority to do in the 50 states. There has never been any rule of law that Congress must treat people in the District of Columbia exactly as people are treated in the various states."

2. *The Context of the Language.*

In some cases, the language of a constitutional provision can change when considered in a broad context, particularly with similar language in other provisions. The Supreme Court has emphasized in matters of statutory construction (and presumably in constitutional interpretation) that courts should "assume[] that identical words used in different parts of the same act are intended to have the same meaning."[35] This does not mean that there cannot be exceptions[36] but such exceptions must be based on circumstances

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'plain'; it must be imputed; and the choice among meanings must have a footing more solid than a dictionary."). Yet, it should not be ignored when the context of the language makes its meaning plain, as here.

[33] 18 U.S. (5 Wheat.) 317, 324 (1820).

[34] 733 F.2d 128, 140 (D.C. Cir. 1984).

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

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

under which the consistent interpretation would lead to conflicting or clearly unintentional results.[37]

The most relevant language in this controversy is obviously the word "states." A review of the Constitution shows that this term is ubiquitous. Within Article I, the word "states" is central to defining the Article's articulation of various powers and responsibilities. Indeed, if states were intended to have a more fluid meaning to extend to non-states like the District, various provisions become unintelligible. For both the composition of the House and Senate, the defining unit was that of a state with a distinct government, including a legislative branch. For example, under the 17th Amendment in 1913, Article I, Clause 1 read: "The Senate of the United States shall be composed of two Senators from each state, chosen by the Legislature thereof . . ." For much of its history, the District did not have an independent government, let alone a true state legislative branch.

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

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

Indeed, if the Framers believed that the District was a quasi-state under a fluid definition, the District would have presumably had a representative and two Senators from the start. Article I, clause 3 specified that "each state shall have at Least one Representative." Yet, there is no

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[37] *See, e.g., Milton S. Kronheim & Co., v. District of Columbia*, 91 F.3d 193, 198-99 (D.C. Cir. 1996) (holding that the Commerce Clause and the Twenty-First Amendment apply to the District even though "D.C. is not a state.").

reference to the District in any of these provisions. It is relegated to the District Clause, which puts it under the authority of Congress.

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

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

Conversely, when the drafters wanted to refer to citizens without reference to their states, they used fairly consistent language of "citizens of the United States" or "the people." This was demonstrated most vividly in provisions such the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[38] Not only did the drafters refer to the two common constitutional categories for rights and powers (in addition to the federal government), but it would be absurd argue that a federal enclave could be read into the meaning of states in such provisions. The District as a whole was delegated to the United States. As the D.C. Circuit stressed recently in *Parker,* "the authors of the Bill of Rights were perfectly capable of distinguishing between "the people," on the one hand, and "the states," on the other." Likewise, when the drafters of the Constitution wanted to refer to the District, they did so clearly in the text. This was evident not only with the original Constitution and the Bill of

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

Rights, but much later amendments. For example, the Twenty-Third Amendment giving the District the right to have presidential electors expressly distinguishes the District from the States in the Constitution and establishes, for that purpose, the District should be treated like a State: mandating "[a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a State.*"[39] This amendment makes little sense if Congress could simply bestow the voting rights of states on the District. Rather, it reaffirmed that, if the District wishes to vote constitutionally as a State, it requires an amendment formally extending such parity.[40]

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

3. The Original and Historical Meaning.

i. Original Understanding of the District as a Non-State Entity. As noted above, the District was clearly and expressly created as a non-state entity. The Supreme Court has observed that "[t]he object of the grant of exclusive legislation over the district was . . . national in the highest sense, and the city organized under the grant became the city, not of a state, not of

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

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

a district, but of a nation."[41] While Madison conceded that some form of "municipal legislature for local purposes" might be allowed, the district was to be the creation of Congress and maintained at its discretion.[42]

Despite some suggestion 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.[43] 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 that 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"[44] 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. Republican Rep. John Smilie from Pennsylvania objected that "the people of the District would be reduced to the state of subjects, and deprived of their political rights."[45] 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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41 *O'Donoghue*, 289 U.S. at 539-40.

42 The Federalist No. 43, at 280 (J. Madison)

43 5 The papers of Alexander Hamilton 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

44 Act of Feb. 27, 1801, ch. 15, § 1, 2 stat. 103.

45 10 Annals of Cong. 992 (1801); *see also* Congressional Research Service, *supra*, at 6.

> 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.[46]

Similarly, in New York, Thomas Tredwell objected that the non-voting status of the District residents "departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote."[47]

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. 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."[48] 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."[49] 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.[50] Yet, retrocession bills were introduced within a few years of the actual cessation – again prominently citing the lack of any congressional

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

47 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 402 (Jonathan Elliot ed., 1888).

48 Richards, *supra*, at 3

49 *Id.* (quoting Rep. Smilie)

50 *Id.* at 4.

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.[51] 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."[52]

Thus, during the drive for retrocession that began shortly after ratification, District residents appear to have opposed retrocession and accepted the condition as non-voting citizens in Congress for their special status. The result was that Northern Virginia was retroceded, changing the shape of the District from the original diamond shape created by George Washington.[53] The Virginia land was retroceded to Virginia in 1846. The District residents chose to remain as part of the federal seat of government – independent from participation or representation in any state. Just as with the first cessation, it was clear that residents had knowingly "relinquished the right of representation, and . . . adopted the whole body of Congress for its legitimate government."[54]

Finally, much is made of the ten-year period during which District residents voted with their original states – before the federal government formally took over control of the District. As established in *Adams*, this

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51 *Id.*

52 *Id.*

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

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

argument has been raised and rejected by courts as without legal significance.[55] This was simply a transition period before the District became the federal enclave. It was clearly neither the intention of the drafters nor indicative of the post-federalization status of residents. Rather, as indicated by the Supreme Court,[56] 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.[57]

ii. Historical Evolution of the District Government. When one looks at the historical structure and status of the District as a governing unit, it is obvious that neither the drafters nor later legislators would have viewed the District as interchangeable with a state under Article I. When this District was first created, it was barely a city, let alone a substitute for a state: "The capitol city that came into being in 1800 was, in reality, a few federal buildings surrounded by thinly populated swampland, on which a few marginal farms were maintained."[58]

For much of its history, the District was not even properly classified as an independent city. In 1802, the first mayor was a presidential appointee -- as was the council.[59] Congress continued to possess authority over its budget and operations. While elections were allowed until 1871, the city was placed under a territorial government and effectively run by a Board and Commissioner of Public Works – again appointed by the President. After 1874, the city was run through Congress and the Board of Commissioners.[60]

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

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

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

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

59 *Id.* at 826-828.

60 *Id.*

President Lyndon Johnson expressly treated the District as the equivalent of a federal agency when he appointed Walter Washington to be mayor in 1967.[61] Under Johnson's legal interpretation, giving the District a vote in Congress would have been akin to making the Department of Defense a member to represent all of the personnel and families on military bases. Thus, for most of its history, the District was maintained as either a territory or a federal agency. Both of these constructions is totally at odds with the qualification and descriptions of voting members of Congress. The drafters went to great lengths to guarantee independence of members from federal offices or benefits in Article I, Section 6. Likewise, no members are subject to the potential manipulation of their home powers by either the federal government or the other states (through Congress).

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

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

It is true that the District is viewed as "an exceptional community" that is "[u]nlike either the States or Territories,"[62] this does not mean that this unique or "*sui generis*" status empowers Congress to bestow the rights and privileges to the District that are expressly given to the states. To the contrary, Congress has plenary authority in the sense that it holds legislative authority on matters *within* the District.[63] The extent to which the District has and will continue to enjoy its own governmental systems is due entirely to the will of Congress.[64] This authority over the District does not mean that it can increase the power of the District to compete with the states or dilute their constitutionally guaranteed powers under the Constitution. Indeed, as

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61 *Id.* at 829-830.

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

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

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

noted below, the District itself took a similar position in recent litigation when it emphasized that it should not be treated as a state under the Second Amendment and that constitutional limitations are not implicated by laws affecting only the federal enclave with "no possible impact on the states."[65]

Given the foregoing sources, it is hard to see the "ample constitutional authority" alluded to by Dinh and Charnes.[66] To the contrary, the arguments made in their paper strongly contradict suggestions of inherent authority to create de facto state members of Congress. For example, it is certainly true that the Constitution gives Congress "extraordinary and plenary power to legislate with respect to the District."[67] However, this legislation is not simply a District matter. This legislation affects the voting rights of the states by augmenting the voting members of Congress. This is legislation with respect to Congress and its structural make-up. More importantly, Dinh and Charnes go to great lengths to point out how different the District is from the states, noting that the District Clause

> works an exception to the constitutional structure of 'our Federalism," which delineates and delimits the legislative power of Congress and state legislatures. In joining the Union, the states gave up certain of their powers. Most explicitly, Article II, section 10 specifies which are prohibited to the States. None of these prohibitions apply to Congress when it exercises its authority under the District Clause. Conversely, Congress is limited to legislative powers enumerated in the Constitution; such limited enumeration, coupled with the reservation under the Tenth Amendment, serves to check the power of Congress vis-à-vis the states.[68]

This is precisely the point. The significant differences between the District and the states further support the view that they cannot be treated as the same entities for the purposes of voting in Congress. The District is not independent of the federal government but subject to the will of the federal government. Nor is the District independent of the states, which can exercise enormous power over its operations. The drafters wanted members

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

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

[67] *Id.*

[68] *Id.* at 6.

to be independent of any influence exerted through federal offices or the threat of arrest. For that reason, they expressly prohibited members from holding offices with the federal government[69] other than their legislative offices and protected them under the Speech or Debate Clause.[70] The District has different provisions because it was not meant to act as a state. For much of its history, the District was treated like a territory or a federal agency without any of the core independent institutions that define most cities, let alone states. Thus, the District is allowed exceptions because it is not serving the functions of a state in our system.

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

> The District was made up of portions of two of the original states of the Union, and was not taken out of the Union by cessation. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution . . . The Constitution had attached to [the District] irrevocably. There are steps which can never be taken backward . . . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession.[71]

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69 U.S. Const. Art. I, Sec. 6, cl. 1.

70 U.S. Const. Art. I, Sec. 6, cl. 2.

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

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.[72] 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.[73] The reference to several states was to distinguish the regulated activity from intra-state commerce. As a federal enclave, the District was clearly subsumed within the Commerce Clause.

None of these cases means that the term "states" can now be treated as having an entirely fluid and malleable meaning. The courts merely adopted a traditional approach to interpreting these terms as a way to minimize the conflict between provisions and to reflect the clear intent of the various provisions.[74] The District clause was specifically directed at the meaning of a state – it creates a non-state status related to the seat of government and particularly Congress. Non-voting status directly relates and defines that special entity. In provisions dealing with such rights as equal protection, the rights extend to all citizens of the United States. The literal interpretation of states in such contexts would defeat the purpose of the provisions and produce a counterintuitive result. Thus, Congress could govern the District without direct representation but it must do so in such a way as not to violate those rights protected in the Constitution:

> Congress may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before

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

[73] *Stoutenburgh v. Hennick*, 129 U.S. 141 (1888).

[74] *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.").

> them, as it may think fit, *so long as it does not contravene any provision of the Constitution of the United States.*[75]

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

The decision in *National Mutual Ins. Co. v. Tidewater Transfer Co., Inc.*,[76] is heavily relied upon in the Dinh and Starr analyses. However, the actual rulings comprising the decision would appear to contradict their conclusions. Only two justices indicated that they would treat the District as a state in their interpretations of the Constitution. The Court began its analysis by stating categorically that the District was not a state and could not be treated as a state under Article III. This point was clearly established in 1805 in *Hepburn v. Ellzey*,[77] only a few years after the establishment of the District. The Court rejected the notion that "Columbia is a distinct political society; and is therefore "a state" . . . the members of the American confederacy only are the states contemplated in the constitution."[78] This view was reaffirmed again by the Court in 1948:

> In referring to the "States" in the fateful instrument which amalgamated them into the "United States," the Founders obviously were not speaking of states in the abstract. They referred to those concrete organized societies which were thereby contributing to the federation by delegating some part of their sovereign powers and to those that should later be organized and admitted to the partnership in the method prescribed. They obviously did not contemplate unorganized and dependent spaces as states. The District of Columbia

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

76 337 U.S. 582 (1948)

77 6 U.S. (2 Cranch) 445 (1805).

78 *Id.* at 453.

> 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.[79]

However, the Court also ruled that Congress could extend diversity jurisdiction to the District because this was a modest use of Article I authority given the fact that the "jurisdiction conferred is limited to controversies of a justiciable nature, the sole feature distinguishing them from countless other controversies handled by the same courts being the fact that one party is a District citizen."[80] Thus, while residents did not have this inherent right as members of a non-state, Congress could include a federal enclave within the jurisdictional category.

When one looks at the individual opinions of this highly fractured plurality decision, it is hard to see what about *Tidewater* gives advocates so much hope.[81] Dinh and his co-author Charnes state that "[t]he significance of *Tidewater* is that the five justices concurring in the result believed either that the District was a state under the terms of the Constitution or that the District Clause authorized Congress to enact legislation treating the District as a state."[82] Yet, to make this bill work, a majority of the Court would have to recognize that the District clause gives Congress this extraordinary authority to convert the District into an effective state for voting purposes. In *Tidewater*, six of nine justices appear to reject the argument that the clause could be used to extend diversity jurisdiction to the District, a far more modest proposal than creating a voting non-state entity. It was the fact that five justices agreed *in the result* that produced the ruling, a point emphasized by Justice Frankfurter when he noted with considerable irony in his dissent:

> A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected -- but not the same majority. And so,

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79 *National Mutual Ins.*, 337 U.S. at 588.

80 *Id.* at 592.

81 The Congressional Research Service included an exhaustive analysis of the case in its excellent study of this bill and its constitutionality. Congressional Research Service, *supra*, at 16.

82 Dinh & Charnes, *supra*, at 13.

> conflicting minorities in combination bring to pass a result -- paradoxical as it may appear -- which differing majorities of the Court find insupportable.[83]

When one reviews the insular opinions, it is easy to see what Frankfurter meant and why this case is radically overblown in its significance to the immediate controversy. Justices Rutledge and Murphy, in concurring, based their votes on the irrelevance of the distinction between a state citizen and a District citizen for the purposes of diversity. This view, however, was expressly rejected by the Jackson plurality of Jackson, Black, and Burton. The Jackson plurality did not agree with Rutledge that the term "state" had a more fluid meaning – an argument close to the one advanced by Dinh and Starr. Conversely, Rutledge and Murphy strongly dissented from the arguments of the Jackson plurality.[84] Likewise, two dissenting opinions, Justice Frankfurter, Vinson, Douglas and Reed rejected arguments that Congress had such authority under either the District Clause or the Diversity Clause in the case. The Jackson plurality prevailed because Rutledge and Murphy were able to join in the result, not the rationale. Rutledge and Murphy suggested that they had no argument with the narrow reading of the structuring provisions concerning voting members of Congress. Rather, they drew a distinction with other provisions affecting the rights of individuals as potentially more expansive:

> [The] narrow and literal reading was grounded exclusively on three constitutional provisions: the requirements that members of the House of Representatives be chosen by the people of the several states; that the Senate shall be composed of two Senators from each state; and that each state "shall appoint, for the election of the executive," the specified number of electors; all, be it noted, provisions relating to the organization and structure of the political departments of the government, not to the civil rights of citizens as such.

Thus, Rutledge saw that, even allowing for some variation in the interpretation of "states," there was distinction to be drawn when such expansive reading would affect the organization or structure of Congress.

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83 *Tidewater*, 337 U.S. at 654

84 *Id.* at 604 ("But I strongly dissent from the reasons assigned to support it in the opinion of MR. JUSTICE JACKSON.")

This would leave at most three justices who seem to support the interpretation of the District clause advanced in this case.

The citation of *Geofroy v. Riggs*,[85] by Professor Dinh is equally misplaced. It is true that the Court found that a treaty referring to "states of the Union" included the District of Columbia. However, this interpretation was not based on the U.S. Constitution and its meaning. Rather, the Court relied on meaning commonly given this term under international law:

> 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.[86]

This was an interpretation of a treaty based on the most logical meaning that the signatories would have used for its terminology. It was not, as suggested, an interpretation of the meaning of that term in the U.S. Constitution. Indeed, as shown above, the Court begins by recognizing the more narrow meaning under the Constitution before adopting a more generally understood meaning in the context of international and public law for the purpose of interpreting a treaty.

Finally, Professor Dinh and Mr. Charnes place great importance on the fact that citizens overseas are allowed to vote under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[87] 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

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85 133 U.S. 258 (1890).

86 *Id.* at 268.

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

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.[88] In the overseas legislation, Congress made a logical choice in treating citizens abroad as continuing to be citizens of the last state in which they resided. This same argument was used and rejected in *Attorney General of the Territory of Guam v. United States*.[89] In that case, citizens of Guam argued (as do Dinh and Charnes) that the meaning of state has been interpreted liberally and the Overseas Act relieves any necessity for being the resident of a state for voting in the presidential election. The court categorically rejected the argument and noted that the act was "premised constitutionally on prior residence in a state."[90] 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.[91]

Given this logical and limited rationale, the Court held that UOCAVA "does not evidence Congress's ability or intent to permit all voters in Guam elections to vote in presidential elections."[92]

Granting a vote in Congress is not some tinkering of "the mechanics of administering justice in our federation."[93] This would touch upon the constitutionally sacred rules of who can create laws that bind the nation.[94]

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88 *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).

89 738 F.2d 1017 (9th Cir. 1984).

90 *Id.* at 1020.

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

92 *Id.*

93 *National Mutual Ins.* at 585.

94 In the past, the District and various territories were afforded the right to vote in Committee. However, such committees are merely preparatory to

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 members of the United States Senate, it did not extend the language to include the District. Rather, it reaffirmed that the voting membership was composed of representatives of the states. These cases and enactments reflect that voting was a defining characteristic of the District and not a matter that can be awarded (or removed) by a simple vote of Congress.

The overwhelming case precedent refutes the arguments of Messrs. Dinh and Starr. Indeed, just last week in *Parker v. District of Columbia*,[95] the United States Court of Appeals for the District of Columbia reaffirmed in both majority and dissenting opinions that the word "states" refers to actual state entities.[96] *Parker* struck down the District's gun control laws as violative of the Second Amendment.[97] That amendment uses the term "a free state" and the parties argued over the proper interpretation of this term. Notably, in its briefs and oral argument, the District appeared to take a different position on the interpretation of the word "state," arguing that the court could dismiss the action because the District is not a state under the Second Amendment—a position later adopted by the dissenting judge. The District argued:

> The federalism concerns embodied in the Amendment have no relevance in a purely federal entity such as the District because there is no danger of federal interference with an effective *state* militia. This places District residents on a par with state residents. . . . The

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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).

[95] *Parker v. District of Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007).

[96] The D.C. Circuit is the most likely forum for a future challenge to this law.

[97] U.S. Const. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.").

> Amendment, concerned with ensuring that the national government not interfere with the "security of a free State," is not implicated by local legislation in a federal district having no possible impact on the states or their militias.[98]

In the opinion striking down the District's laws, the majority noted that the term "free state" was unique in the Constitution and that "[e]lsewhere the Constitution refers to 'the states' or 'each state' when unambiguously denoting the domestic political entities such as Virginia etc." While the dissent would have treated "free state" to mean the same as other state references, it was equally clear about the uniform meaning given the term states:

> The Supreme Court has long held that "State" as used in the Constitution refers to one of the States of the Union. [citing cases] . . . In fact, the Constitution uses "State" or "States" 119 times apart from the Second Amendment and in 116 of the 119, the term unambiguously refers to the States of the Union.[99]

The dissent goes on to specifically cite the fact that the District is not a state for the purposes of voting in Congress.[100] Thus, in the latest decision from the D.C. Circuit, the judges continue the same view of the non-state status of the District as described in earlier decisions of both the Supreme Court and lower courts.

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[98] Brief for the District of Columbia in *Parker v. District Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007), at 38 (emphasis in original). Adding to the irony, the District's insistence that it was a non-state under the Constitution was criticized by the Plaintiffs as "specious" because the Second Amendment uses the unique term of "free states" rather than "the states" or "the several states." This term, they argued, it was intended to mean a "free society," not a state entity. Reply Brief for the Plaintiff-Appellant in *Parker v. District Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007), at 15 n.4

[99] The dissent noted that the three instances involve the use of "foreign state" under Article I, section 9, clause 8; Article III, section 2, clause 1; and the Eleventh Amendment.

[100] *Id.*

B. H.R. 1433 Would Create Both Dangerous Precedent and Serious Policy Challenges for the Legislative Branch.

The current approach to securing partial representation for the District is fraught with danger. 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 membership and division of Congress was carefully defined by the Framers. The legislative branch is the engine of the Madisonian democracy. It is in these two houses that disparate factional disputes are converted into majoritarian compromises – the defining principle of the Madisonian system. By allowing majorities to manipulate the membership rolls, it would add dangerous instability and uncertainty to the system. The rigidity of the interpretation of states serves to prevent legislative measures to create new forms of voting representatives or shifting voters among states.[101] By taking this approach, the current House could award a vote to District residents and a later majority could take it away. The District residents would continue to vote, not as do other citizens, but at the whim and will of the Congress like some party favor that can be withdrawn with the passing fortunes of politics. Moreover, as noted below in the discussion of the Utah seat, the evasion of the 435 membership limitation created in 1911 would encourage additional manipulations of the House rolls in the future.

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. Under Article IV, Section 3, "The Congress shall have Powers to dispose of and make all needful Rules and Regulations

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[101] 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.

respecting the Territory or other Property belonging to the United States . . ." Roughly thirty percent of land in the United States (over 659 million acres) is part of a federal enclave regulated under the same power as the District.[102] The Supreme Court has repeatedly stated that the congressional authority over other federal enclaves derives from the same basic source:[103]

> This brings us to the question whether Congress has power to exercise 'exclusive legislation' over these enclaves within the meaning of Art. I, § 8, cl. 17, of the Constitution, which reads in relevant part: 'The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever' over the District of Columbia and 'to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.' The power of Congress over federal enclaves that comes within the scope of Art. I, § 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia. The cases make clear that the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action.[104]

Congress could use the same claimed authority to award seats to 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. Indeed, they are often treated the same as states for the purposes of federal jurisdiction, taxes, military service etc. There are literally millions of people living in these areas, including Puerto Rico (with a population of 4 million people -- roughly eight times the size of the District). Puerto Rico would warrant as many as six districts.

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[102] *See* http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/FRPR_5-30_updated_R2872-m_0Z5RDZ-i34K-pR.pdf

[103] 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."

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

Third, while the issue of Senate representation is left largely untouched in the Dinh and Starr analyses,[105] there is no obvious principle that would prevent a majority from expanding its ranks with two new Senate seats for the District. Two Senators and a member of the House would be a considerable level of representation for a non-state with a small population. Yet, this analysis would suggest that such a change could take place without a constitutional amendment.

Fourth, this legislation would create a bizarre district that would not be affected by a substantial growth or reduction in population. Whether the District of Columbia grew to 3 million or shrank to 30,000 citizens, it would remain a single congressional district – unlike other districts that must increase or decrease to guarantee such principles as one person/one vote.

Fifth, the inevitable challenge to this bill could produce serious legislative complications. With a relatively close House division, the casting of an invalid vote could throw future legislation into question as to its validity. Moreover, if challenged, the status of the two new members would be in question. This latter problem is not resolved by Section 7's non-severability provision, which states "[i]f any provision of this Act, or any amendment made by this Act, is declared or held invalid or unenforceable, the remaining provisions of this Act and any amendment made by this Act shall be treated and deemed invalid and shall have no force or effect of law." However, if the D.C. vote is subject to a temporary or permanent injunction (or conversely, if the Utah seat is enjoined), a provision of the Act would not be technically "declared or held invalid or unenforceable." Rather, it could

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[105] 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 a wildly liberal interpretation of the language of Article I. Article I, Section 2 refers to members elected "by the People of the several states" while the Seventeenth Amendment refers to two senators "from each State" and "elected by the people thereof." Since the object of the Seventeenth Amendment is to specify the number from each state, it is hard to imagine an alternative to saying "two Senators from each State." It is rather awkward to say "two Senators from each of the several states."

be enjoined for years on appeal, without any declaration or holding of unenforceability. This confusion could even extend to the next presidential election. By adding a district to Utah, that new seat would add another electoral vote for Utah in the presidential election. Given the last two elections, it is possible that we could have another cliffhanger with a tie or one-vote margin between the main candidates. The Utah vote could be determinative. Yet, this is likely to occur in the midst of litigation over the current legislation. My challenge to the Elizabeth Morgan Act took years before it was struck down as an unconstitutional Bill of Attainder. Thus, we could face a constitutional crisis over whether the Congress will accept the results based upon this vote when both the Utah and District seats might be nullified in a final ruling.

Sixth, since delegates are not addressed or defined in Article I, these new members from the District or territories are not technically covered by the qualification provisions for members of Congress. Thus, while authentic members of Congress would be constitutionally defined,[106] these new members would be legislatively defined – allowing Congress to lower or raise such requirements in contradiction to the uniform standard of Article I. Conversely, if Congress treats any district or territory as "a state" and any delegate as a "member of Congress," it would effectively gut the qualification standards in the Constitution by treating the title rather than the definition of "members of Congress" as controlling. Another example of this contradiction can be found in the definition of the districts of members versus delegates. Members of Congress represent districts that are adjusted periodically to achieve a degree of uniformity in the number of constituents represented, including the need to add or eliminate districts for states with falling constituencies. The District member would be locked into a single district that would not change with the population. The result is undermining the uniformity of qualifications and constituency provisions that the Framers painstakingly placed into Article I.

Finally, H.R. 1433 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

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[106] *See* Art. I, Sec. 2 ("No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.")

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 address the second seat that would be added to the House. In my prior testimony, I expressed considerable skepticism over the legality of this approach, particularly under the "one-man, one-vote" doctrine established in *Wesberry v. Sanders*.[107] It was decided after the hearing that Utah would take the extraordinary step of holding a special session to create new congressional districts to avoid the at-large problem. This was a better solution on a constitutional level, but as I argued in a recent article,[108] there appeared to be a misunderstanding as to how those seats could be filled. There appears to be an assumption that both the D.C. and Utah seats could be filled immediately and start to cast votes. However, since the districts would change, these would not constitute ordinary vacancies that could be filled by the same voters in the same district. this would require the three current members to resign to create vacancies. At a minimum, all four members would have to stand for election and, as new districts (like redistricted districts), the four Utah districts arguably should be filled at the next regular election in two years for the 111th Congress. Reportedly, the prospect of a special election led to the abandonment of the new districts and a return to the more questionable use of an at-large seat.[109]

The return to the at-large seat option now guarantees that the Utah portion of the legislation will face a compelling constitutional challenge. Admittedly, tThis is a question that leads to some fairly metaphysical notions of overlapping representation and citizens with 1.4 representational

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[107] 376 U.S. 1 (1964).

[108] Jonathan Turley, *Too Clever By Half: The Unconstitutional D.C. Voting Rights Bill*, Roll Call, Jan. 25, 2007, at 3.

[109] Elizabeth Brotherton, *Utah Section of D.C. Bill to be Reworked*, Roll Call, at Feb. 27, 2007, at 1.

status.[110] 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*,[111] the Court upheld the method of apportionment that yielded a 40% differential off of the "ideal." Thus, a good-faith effort of 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. 1433. 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."[112] 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.'[113]

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[110] There remains obviously considerable debate over such issues as electoral equality (guaranteeing that every vote counts as much as every other) and representational equality (guaranteeing that representatives represent equal numbers of citizens). *See Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part). Of course, when Congress is allowing citizens of one state to have two representatives, this distinction becomes less significant.

[111] 503 U.S. 442 (1992).

[112] *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.").

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

This massive size and duplicative character of the Utah district draws obvious points of challenge.[114] In *Wesberry v. Sanders,*[115] the Court held that when the Framers referred to a government "by the people," it was articulating a principle of "equal representation for equal numbers of people" in Congress.[116] While not requiring "mathematical precision,"[117] significant differences in the level of representation are intolerable in our system. This issue comes full circle for the current controversy: back to Article I and the structural guarantees of the composition and voting of Congress. The Court noted that:

> It would defeat the principle solemnly embodied in the Great Compromise - equal representation in the House for equal numbers of people - for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.[118]

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.[119] The Court has stressed that the debates over the original Constitution reveal that "one principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress."[120] Moreover, the Court has strongly indicated that there is no conceptual barrier to applying the *Wesberry* principles to an interstate rather than an intrastate controversy:

> the same historical insights that informed our construction of Article I,

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114 *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).

115 376 U.S. 1 (1964).

116 *Id.* at 18.

117 *Id.*

118 *Id.* at 14.

119 *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.").

120 *Wesberry*, 376 U.S. at 10.

> 2 ... should apply here as well. As we interpreted the constitutional command that Representatives be chosen "by the People of the several States" to require the States to pursue equality in representation, we might well find that the requirement that Representatives be apportioned among the several States "according to their respective Numbers" would also embody the same principle of equality.[121]

Awarding two representatives to each resident of Utah creates an obvious imbalance vis-à-vis other states. House members are expected to be advocates for this insular constituency. Here, residents of one state could look to two representatives to do their bidding while other citizens would limited to one. Given racial and cultural demographic differences between Utah and other states, this could be challenged as diluting the power of minority groups in Congress.

Moreover, while interstate groups could challenge the disproportionate representation for Utah citizens, the at-large seat could also be challenged by some intrastate groups as diluting their specific voting power as in *City of Mobile v. Bolden.*[122] At-large seats have historically been shown to have disproportionate impact on minority interests. Indeed, in *Connor v. Finch,* the Supreme Court noted at-large voting tends "to submerge electoral minorities and over-represent electoral majorities."[123] Notably, during the heated debates over the redistricting of Utah for the special session, there was much controversy over how to divide the districts affecting the urban areas.[124] The at-large seat means that Utah voters in concentrated areas like Salt Lake City will have their votes heavily diluted in the selection of their additional representative. If Utah simply added an additional congressional district, the ratio of citizens to members would be reduced. The additional member would represent a defined group of people who have unique geographical and potentially racial or political

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[121] *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 461 (1992).

[122] 446 .U.S. 55 (1980) (striking down an at-large system); see also *Rogers v. Lodge,* 458 U.S. 613, (1982).

[123] 431 U.S. 407, 415 (1977).

[124] *See, e.g.,* Bob Bernick Jr., *Why is GOP so Nice about Redistricting?*, Deseret Morning News, Dec. 1, 2006, at 2. Lisa Riley Roche, *Redistricting Narrowed to 3 proposals*, Deseret Morning News, Nov. 22, 2006, at 1.

characteristics.[125] However, by making the seat at large, these citizens would now have to share two members with a much larger and more diffuse group – particularly in the constituency of the at-large member. It is likely that the member who is elected at large would be different from one who would have to run in a particular district from the more liberal and diverse Salt Lake City.

Another concern is that this approach could be used by a future majority of Congress to manipulate voting and to reduce representation for insular groups.[126] Rather than creating a new district that may lean toward one party or have increased representation of one racial or religious group, Congress could use at-large seats under the theory of this legislation. Congress could also create new forms of represented districts for overseas Americans or federal enclaves.[127] The result would be to place Congress on a slippery slope where endangered majorities tweak representational divisions for their own advantage.

The lifting of the 435 limit on membership of the House established in 1911 is also a dangerous departure for this Congress.[128] While membership was once increased on a temporary basis for the admission of Alaska and Hawaii to 437, past members have respected this structural limitation. These members knew instinctively that, while there was always the temptation to tweak the membership rolls, such an act would invite future manipulation and uncertainties. After this casual increase, it will become much easier for future majorities to add members. When presented with a plausible argument that a state was short-changed, a majority could simply add a seat. Use of an at-large seat magnifies this problem by abandoning the principle of

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[125] *See Davis v. Bandemer*, 4328 U.S. 109, 133 (1986) (reviewing claims of vote dilution for equal protection violations "where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively.").

[126] At-large districts have been disfavored since *Wesberry*, a view later codified in federal law. *See* 2 U.S.C. § 2c.

[127] 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.

[128] Act of Aug. 8, 1911, ch. 5 §§ 1-2, 37 Stat. 13, 14.

individual member districts of roughly equal constituencies. By using the at-large option, politicians can simply give a state a new vote without having to redistrict existing districts.

Finally, while it is difficult to predict how this plan would fare under a legal challenge, it is certain to be challenged. This creates the likelihood of Congress having at least one member (or two members if you count the District representative) who would continue to vote under a considerable cloud of questioned legitimacy. In close votes, this could produce great uncertainty as to the finality or legitimacy of federal legislation. This is entirely unnecessary. If a new representative is required, it is better to establish a fourth district not just a fourth at-large representative for legal and policy reasons.

V.
THE MODIFIED RETROCESSION PLAN: A THREE-PHASE ALTERNATIVE FOR THE FULL REPRESENTATION OF CURRENT DISTRICT RESIDENTS IN BOTH THE HOUSE AND THE SENATE

In some ways, it was inevitable (as foreseen by Alexander Hamilton) that the Capitol City would grow to a size and sophistication that representation in Congress became a well-founded demand. Ironically, the complete bar to representation in Congress was viewed as necessary because any half-way measure would only lead to eventual demands for statehood. For example James Holland of North Carolina noted that only retrocession would work since anything short of that would be a flawed territorial form of government:

> If you give them a Territorial government they will be discontented with it, and you cannot take from them the privilege you have given. You must progress. You cannot disenfranchise them. The next step will be a request to be admitted as a member of the Union, and, if you pursue the practice relative to territories, you must, so soon as their numbers will authorize it, admit them into the Union. Is it proper or politic to add to the influence of the people of the seat of Government by giving a representative in this House and a representation in the

> Senate equal to the greatest State in the Union? In my conception it would be unjust and impolitic.[129]

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.[130] Most of the District can be simply returned from whence it came: the state of Maryland. The greatest barrier to retrocession has always been more symbolic than legal. Replacing Washington, DC with Washington, MD is a conceptual leap that many are simply not willing to make. However, it is the most logical resolution of this problem.[131]

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

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

[130] An alternative but analogous retrocession plan has been proposed by Rep. Dana Rohrabacher. For a recent discussion of this proposal, *see* Dana Rohrabacher, *The Fight Over D.C.; Full Representation for Washington – The Constitutional Way*, Roll Call, Jan. 25, 2007, at 3.

[131] 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).

Maryland statewide elections. In the second phase, incorporation of public services from education to prisons to law enforcement would occur. In the third phase, any tax and revenue incorporation would occur.

These phases would occur over many years with only the first phase occurring immediately upon retrocession. Indeed, I recommend the creation of a three-commissioner body like the one that worked with George Washington in the establishment of the original federal district. These commissioners would recommend and oversee the incorporation process. Moreover, Maryland can agree to continue to treat the District as a special tax or governing zone until incorporation is completed. Indeed, Maryland may choose to allow the District to continue in a special status due to its historical position. The fact is that any incorporation is made easier, not more difficult, by the District's historic independence. Like most cities, it would continue to have its own law enforcement and local governing authority. However, the District could also benefit from incorporation into Maryland's respected educational system and other statewide programs related to prisons and other public needs.

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.[132]

Since the only likely residents would be the first family, this presents something of a problem. There are a couple of obvious solutions. One would be to repeal the amendment, which is the most straight-forward and preferred.[133] Another approach would be to leave the amendment as constructively repealed. Most presidents vote in their home states. A federal law can bar residences in the new District of Columbia. A third and related approach would be to allow the clause to remain dormant since it states that electors are to be appointed "as the Congress may direct."[134] Congress can enact a law directing that no such electors may be chosen. The only concern is that a future majority could do mischief by directing an appointment when electoral votes are close.

VI.
CONCLUSION

There is an old story about a man who comes upon another man in the dark on his knees looking for something under a street lamp. "What did you lose?" he asked the stranger. "My wedding ring," he answered. Sympathetic, the man joined the stranger on his knees and looked for almost an hour until he asked if the man was sure that he dropped it here. "Oh, no," the stranger admitted, "I lost it across the street but the light is better here." Like this story, there is a tendency in Congress to look for answers where the political light is better, even when it knows that the solution must be found elsewhere. That is the case with H.R. 1433, which mirrors an earlier failed effort to pass a constitutional amendment. The 1978 amendment was a more difficult course but the answer to the current problems can only be found constitutionally in some from of either an amendment or retrocession.

InsteadCurrently, the drafters of the current bill are looking where the light is better with a simple political trade-off of two seats. It is deceptively

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

[133] I have previously stated that my preference would be to repeal the entire Electoral College as an archaic and unnecessary institution and move to direct election of our president. But that is a debate for another day.

[134] *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).

easy to make such political deals by majority vote. Not only is this approach facially unconstitutional, but the outcome of this legislation, even if sustained on appeal, would not be cause for celebration. Indeed, H.R. 1433 would replace one grotesque constitutional curiosity in the current status of the District with new curiosity. The creation of a single vote in the House (with no representation in the Senate) would form create a type of half-formed citizens with partial representation derived from residence in a non-state. It is an idea that is clearly put forward with the best of motivations but one that is shaped by political convenience rather than constitutional principle.

It is certainly time to right this historical wrong, but, in our constitutional system, it is often more important how we do something than what we do. This is the wrong means to a worthy end. However, it is not the only means and I encourage the Members to direct their considerable efforts toward a more lasting and complete resolution of the status of the District of Columbia in Congress.

Thank you again for the honor of speaking with you today and I would be happy to answer any questions that you might have. I would also be happy to respond to any questions that Members may have after the hearing on the constitutionality of this legislation or the alternatives available in securing full voting rights for District residents.

Jonathan Turley
Shapiro Professor of Public Interest Law
George Washington University Law School
2000 H St., N.W.
Washington, D.C. 20052
(202) 994-7001
jturley@law.gwu.edu

Mr. CONYERS. And now, Mr. Bress.

TESTIMONY OF RICHARD P. BRESS, PARTNER, LATHAM & WATKINS, LLP

Mr. BRESS. Thank you, Mr. Chairman, distinguished Members of the Committee. Thank you for giving me the opportunity to speak with you on this occasion in addressing this historic bill.

I will address both Congress's authority to pass legislation providing voting representation to residents of the District of Columbia and also the constitutionality of the provision in the bill under which additional State representative provided by the Act would be elected at large.

As to the first issue, I would certainly agree with my esteemed colleagues here that the constitutionality of providing the residents the right to vote presents difficult constitutional issues. However, I will differ with my immediately preceding colleague on the results of that analysis.

To me, history, the language of the District clause and Supreme Court precedent suggest that the better understanding is that the power of this Congress under the District clause includes the ability to provide residents of the District with voting representation in the House of Representatives.

Two related Supreme Court cases confirm the breadth of Congress's authority under the District clause. In the first, *Hepburn v. Ellzey*, Chief Justice Marshall construed article 3, section 2 of the U.S. Constitution. That provision provides diversity jurisdiction in suits between citizens of different States, and the court in that case held that that provision excluded citizens of the District of Columbia.

The court found it extraordinary, however, that residents of the District should be denied the same access to Federal courts that is provided to aliens and State residents, and it invited Congress to craft a solution, noting that the matter was a subject for legislative and not judicial consideration.

Nearly 145 years later, Congress accepted that invitation; and, in 1940, it enacted a bill that explicitly granted District residents access to Federal courts on diversity grounds. That legislation was upheld by the Supreme Court in 1949 in a case called *National Mutual Insurance Company v. Tidewater Transfer Company*. It has been spoken of here already this morning as *Tidewater*.

The plurality of the Court led by Justice Jackson held that Congress could for this purpose, for purposes of diversity jurisdiction, treat District residents as though they were State residents pursuant to its authority under the District clause. Two concurring justices would have gone even further. They argued *Hepburn* should be overruled and that the District should be considered a State for purposes of article 3.

In my view, *Tidewater* strongly supports Congress's authority to provide the District a House of Representative via simple legislation. As the plurality explained in that case, Congress unquestionably had the greater power to provide District residents diversity based jurisdiction in special article I courts. The Court concluded from that that the Congress could surely accomplish the more lim-

ited result of granting District residents diversity based access to existing article 3 courts.

Similarly, Congress's authority to grant the District residents full rights of State residents for voting purposes by granting the District statehood or grant its residents voting rights through retrocession can both be accomplished by simple legislation; and that suggests that Congress may, by simple legislation, take the more modest step of providing citizens of the District with a voice in the House of Representatives.

Indeed, Congress has granted voting representation to citizens not actually living in a State on at least two other occasions. In *Evans v. Cordman,* the Supreme Court held that residents of Federal enclaves within States, such as NIH, have a constitutional right to congressional representation. And through the Overseas Voting Act, Congress has provided Americans living abroad the right to vote in Federal elections as though they were present in their last State of residence in the United States.

There is no reason to suppose that Congress has less ability to provide voting representation to residents of the Nation's capital. There is certainly no reason to believe that, by providing voting representation to State residents, the Framers affirmatively intended to deny the vote to residents of the Nation's capital.

I will be happy to address that further, and I have addressed that in my comments. If I may, I would like to go on for a moment, though, and I know my time is running short, and address the one man, one vote provision of the law.

Under the bill, the vote that would go to the State next eligible for a vote would be elected—that seat would be elected at large, rather than by creating an additional single-Member district. Congress plainly, in my view, has the authority to create such an at-large seat. Indeed, history teaches us that, until 1849, at least seven States voted for the representatives at large.

Of course, under 2 U.S.C., Section 2(a), (c), States can still have under that provision an at-large representative sitting alongside single District representatives. Now why is that constitutional? Well, the Constitution requires that, as nearly as practicable, one person's vote in a congressional election must have the same weight as another. That is what the court held in *Westbury v. Sanders.*

An apportionment plan may run afoul of this one person, one vote principle when congressional districts within a State contain different numbers of residents, diluting the voting power of residents in the more populous districts. The proposed at-large election of an additional representative would not trigger that concern, because it would not dilute the relative value of any person's vote in that State.

Suppose, for example, that Utah is the State entitled to an additional seat. Utah currently has three congressional districts. If Utah were to hold an at-large election for a new fourth seat, all Utah voters would have the right to cast a vote in their existing district and a vote in the statewide election for the fourth seat. So residents——

Mr. CONYERS. The time of the gentleman has expired.

Mr. BRESS. Thank you, Mr. Chairman.

Mr. CONYERS. You are welcome.
Mr. BRESS. I would be happy to expound on it.
[The prepared statement of Mr. Bress follows:]

PREPARED STATEMENT OF RICHARD P. BRESS

Statement of Richard P. Bress
Partner, Latham & Watkins LLP

Hearing on the District of Columbia House Voting Rights Act of 2007

U.S. House of Representatives
Committee on the Judiciary

March 14, 2007

Congress has the authority, pursuant to the District Clause of the Constitution, to enact the pending District of Columbia Fair and Equal House Voting Rights Act of 2007, H.R. 328, 110th Cong. (2007) ("DC Voting Rights bill"). I have found no legal, policy, or other reason to deny the nearly 600,000 residents of the District full access to the legislative body that decides issues of both national and local importance to District residents. I also conclude that a proposal to direct the state receiving an additional representative to have that representative elected at-large is well within Congress's authority and would not violate the "one person, one vote" principle.

Analysis

The United States is the only democratic nation that deprives the residents of its capital city of voting representation in the national legislature. American citizens resident in the District of Columbia are represented in Congress only by a non-voting delegate to the House of Representatives. These residents pay federal income taxes, are subject to any military draft, and are required to obey Congress's laws, but they have no say in the enactment of those laws.[1] Furthermore, because Congress also has authority over local District legislation, District residents have no voting representation in the body that controls the local budget they must adhere to and the local laws that they are required to obey. As a result, people who live in California and Maine have a vote regarding the District's local laws, while people who live in the District itself do not.

District residents thus lack what has been recognized by the Supreme Court as perhaps the single most important of constitutional rights. As the Court has stated:

> 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 no room for classification of people in a way that unnecessarily abridges this right.[2]

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[1] Congress also has authority over local District legislation. District residents thus have no voting representation in the body that controls the local budget they must adhere to and the local laws that they are required to obey.

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

Congress's authority to extend the franchise to District residents by statute has been the subject of substantial academic and political debate. Those who argue that Congress lacks this power (and must therefore proceed via constitutional amendment) rely principally on the fact that the Constitution provides voting representation only to citizens of "States". But this argument ignores the fact that Congress has repeatedly treated the District as if it were a state and that treatment has repeatedly been upheld by the courts. Moreover, those who argue that Congress has no authority to confer voting representation on the District are forced to contend that the Framers of our Constitution intended to exclude citizens of the Nation's Capital from participating in the democracy they created. There is no evidence to support such an implausible intention on the part of the founders of our country.

To the contrary, as explained below, the history of and policies behind the Framers' creation of the District, the purpose of the Framers' enumeration of "States" in the Constitution's provisions for congressional representation, and the fundamental importance of the franchise support the view that those who drafted the Constitution did not, by guaranteeing the vote to state residents, intend to withhold the vote from District residents. Moreover, the Framers gave Congress plenary power over the District, including the power, for most purposes, to treat the District as though it were a state and District residents as though they were state residents. History and judicial interpretation suggest that this authority is sufficiently broad to extend to U.S. citizens residing in the District the voting rights taken for granted by U.S. citizens residing elsewhere. For these reasons I conclude that the Constitution permits such representation to be extended through congressional legislation.

I. The Framers Did Not Intend to Deprive District Residents of Voting Representation in the House

The Framers viewed the right to vote as the single most important of the inalienable rights that would be guaranteed to the citizens of their Nation.[3] The right was extended universally, as at the time of the framing every eligible American citizen lived in a state. There is no evidence that the Framers intended that those residents in areas that would later be ceded to form the national capital would forfeit their voting rights—much less that they intended to prohibit Congress from taking steps to ensure that those living in the capital would retain their right to vote.

Article I, § 8, cl. 17 of the Constitution, also known as the "District Clause," gives Congress the power to "exercise exclusive Legislation in all Cases, whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." This clause and its "exclusive legislation" authority were included in the Constitution to ensure that the seat of the federal government would not be beholden to or unduly influenced by the state in which it might be located.[4] The Framers' insistence on a separated and insulated federal district arose from an incident that took place in 1783 while the Continental Congress was in session in

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[3] *Id.* at 9-19.

[4] Kenneth R. Bowling, The Creation of Washington, D.C.: The Idea and Location of the American Capital, at 30-34 (1991).

Philadelphia. When a crowd of Revolutionary War soldiers who had not been paid gathered in protest outside the building, the Congress requested protection from the Pennsylvania militia. The State refused, and the Congress was forced to adjourn and reconvene in New Jersey. This incident convinced the Framers that the seat of the national government should be under exclusive federal control, for its own protection and the integrity of the capital.[5] Thus, the Framers gave Congress broad authority to create and legislate for the protection and administration of a distinctly federal district.

Nothing in this history in any way suggests that the Framers intended to disenfranchise District residents. When the District Clause was drafted, the eligible citizens of every state possessed the same voting rights. The problem of ensuring the continuation of these voting rights for citizens resident in the lands that would be ceded to create the federal district received little attention until after the Constitution was ratified and the District had been established.[6] As one commentator has explained:

> First, given the emphasis on federal police authority at the capital and freedom from dependence on the states, it is unlikely that the representation of future residents in the District occurred to most of the men who considered the "exclusive legislation" power. As long as the geographic location of the District was undecided, representation of the District's residents seemed a trivial question. Second, it was widely assumed that the land-donating states would make appropriate provision in their acts of cession to protect the residents of the ceded land . . . . Finally, it was assumed that the residents of the District would have acquiesced in the cession to federal authority.[7]

Moreover, it is doubtful that many would have adverted to the issue, even at the time of the District's creation, as few could have foreseen that the ten-square-mile home to 10,000 residents would evolve into the vibrant demographic and political entity it is today.[8]

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[5] *See* James Madison, Federalist No. 43 ("Without it, 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.").

[6] Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. on Legis. 167, 172 (1975).

[7] *Id. See also National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 587 (1949) ("There is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia....This is not strange, for the District was then only a contemplated entity.").

[8] It appears that Alexander Hamilton may be a notable exception. During the New York ratifying convention, he proposed an amendment stating that "[w]hen the Number of Persons in the District of Territory to be laid out for the Seat of Government of the United States, shall according to the Rule for the Apportionment of Representatives and direct Taxes amount to ___ such District shall cease to be parcel of the State granting the Same, and Provision shall be made by Congress for their having a

Based on everything we know about the Framers, it is inconceivable that they would have purposefully intended to deprive the residents of their capital city of this most basic right. History suggests that the Constitution's failure to provide explicitly for District residents' voting representation in the House is the result of an inadvertent omission that can be remedied by congressional action. And the relevant legal precedents confirm that Congress may take such action pursuant to its District Clause power.

II. Supreme Court Precedent Confirms the Breadth of Congress's Power Under the District Clause

The District Clause is an extraordinarily broad grant of authority, "majestic in scope."[9] Congress's authority is at its zenith when it legislates for the District, surpassing both the authority a state legislature has over state affairs and Congress's authority to enact legislation affecting the fifty states.[10] Although no case specifically addresses Congress's authority to provide the District voting representation in the House, existing case law confirms the plenary nature of Congress's authority to see to the welfare of the District and its residents.

Two related Supreme Court cases confirm the breadth of Congress's authority under the District Clause. In the first, *Hepburn v. Ellzey*,[11] the Court construed Article III, Section 2 of the U.S. Constitution—providing for diversity jurisdiction "between citizens of different States"—as excluding citizens of the District of Columbia.[12] The Court found it "extraordinary," however, that residents of the District should be denied access to federal courts that were open to aliens and residents in other states,[13] and invited Congress to craft a solution, noting that the matter was "a subject for legislative, not judicial consideration."[14]

Nearly 145 years later, Congress accepted the *Hepburn* Court's invitation, enacting legislation that explicitly granted District residents access to federal courts on diversity grounds. That legislation was upheld by the Court in *National Mutual Insurance Company v. Tidewater Transfer Company*.[15] In *Tidewater*, a plurality held that, although the District is not a "state" for purposes of Article III, Congress could nonetheless provide the same diversity jurisdiction to

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District Representation in the Body." 5 The Papers of Alexander Hamilton 189 (Harold C. Sybett & Jacob E. Cooke eds., Columbia Univ. Press 1962). Although this provision was not adopted, as there is no evidence of any opposition to it, it was likely discarded as unnecessary. Moreover, it suggests that the Framers assumed that persons residing in the District would vote for and be represented by the Representatives of the land-donating state or states. *See also* Raven-Hansen, *supra* note 8, at 172.

[9] Testimony of Hon. Kenneth W. Starr, House Government Reform Committee (Jun. 23, 2004).

[10] *Id*. *See also* Viet Dinh and Adam H. Charnes, *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives* (2004), *available at*: http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf.

[11] 6 U.S. 445 (1805).

[12] *Id.* at 453.

[13] *Id.*

[14] *Id.*

[15] 337 U.S. 582 (1949).

District residents pursuant to its authority under the District Clause.[16] The two concurring justices went even further, arguing that *Hepburn* should be overruled and that the District should be considered a state for purposes of Article III.[17]

A. Significance of *Tidewater*

A recent report from the Congressional Research Service discusses *Tidewater* at length.[18] The CRS Report accurately notes the absence of a majority for the positions advanced by the plurality and concurring opinions. Although the precise legal effect of *Tidewater* may be unclear, its several opinions provide strong support for the position that Congress has authority to pass that bill. In reaching the opposite conclusion, CRS misreads *Tidewater*. For present purposes, the fundamental import of *Tidewater* is that a majority of the Supreme Court found that Congress had the authority to accomplish an outcome that mirrors the goal and effect of the D.C. Voting Rights bill.

1. The *Tidewater* Plurality

CRS notes that although the *Tidewater* plurality approved Congress's authority under the District Clause to extend diversity jurisdiction to residents of the District, it "place[d] this extension in a larger context."[19] In this regard, CRS refers to the *Tidewater* plurality's observation that the case did not involve "an extension or a denial of any fundamental right or immunity."[20] CRS posits that granting voting representation involves "such an extension" and thus suggests that even the Jackson plurality might not have upheld District Clause legislation granting voting representation.

I note that CRS takes contradictory positions as to whether voting representation in the House involves a "fundamental right" to support its thesis that Congress lacks the power to provide District residents voting representation. CRS first asserts that the D.C. Voting Rights bill concerns not the rights of individual citizens, but the "distribution of power among political structures."[21] Based on that characterization, CRS concludes that the concurring justices would not have thought that the district was a "state" for purposes of representation. CRS then argues that the bill does involve a "fundamental right," a characterization that serves its argument that

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[16] *See id.* at 592 (District Clause grants Congress power over the District that is "plenary in every respect"); *id.* at 601-02 ("Congress 'possesses full and unlimited jurisdiction to provide for the general welfare' of District citizens 'by any and every act of legislation which it may deem conducive to that end....'") (quoting *Nield v. Dist. of Columbia*, 110 F.2d 246, 250 (D.C. Cir. 1940)).

[17] *Tidewater*, 337 U.S. at 604-06.

[18] *See* CRS Report for Congress: The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole, dated Jan. 24, 2007, at 1-17.

[19] *Id.* at 15.

[20] *Tidewater*, 337 U.S. at 585.

[21] CRS Report at 13-14.

the *Tidewater* plurality might have thought such legislation to be beyond Congress's authority under the District Clause.

In my view, these characterizations miss the point, as CRS ascribes an unintended meaning to the plurality's passing observation about fundamental rights. Although the plurality noted that the dispute over diversity jurisdiction in *Tidewater* did not "involve" fundamental rights, it explained in the next paragraph that the critical distinction was between congressional enactments that do and do not "*invade* fundamental freedoms or *substantially* disturb the balance between the Union and its component states."[22] The plurality indicated that congressional enactments that invade fundamental freedoms or substantially disturb the federal-state balance of power would not be entitled to judicial deference. As I previously noted, the D.C. Voting Rights bill triggers neither of those concerns. If the grant of voting representation involves a "fundamental right," then the bill would effect an expansion, not an invasion, of that right. And the addition of a single additional seat by the consent of the House and Senate would not "substantially disturb" the relationship between the states and the federal government.

More important, the *Tidewater* plurality's reasoning provides strong support for Congress's authority to grant the District a House Representative via simple legislation. The plurality explained that, because Congress unquestionably had the greater power to provide District residents diversity jurisdiction in new Article I courts, it surely could accomplish the more limited result of granting District citizens diversity-based access to existing Article III courts.[23] Similarly, Congress's authority to grant the District full rights of statehood (or grant its residents voting rights through retrocession) by simple legislation suggests that it may by legislation take the more modest step of providing citizens of the District with a voice in the House of Representatives. Indeed, Congress has granted voting representation to residents of entities less similar to states. In *Evans v. Cornman*, the Supreme Court held that residents of federal enclaves within states have a constitutional right to congressional representation, ruling that Maryland had denied its "citizen[s'] link to his laws and government" by disenfranchising residents on the campus of the National Institutes of Health.[24] And through the Overseas Voting Act, Congress afforded Americans living abroad the right to vote in federal elections as though they were present in their last place of residence in the United States.[25] If residents of federal enclaves and Americans living abroad possess voting representation, Congress should be able to extend the same to District residents.

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[22] *Tidewater*, 337 U.S. at 585-86 (emphasis added).

[23] *Id.* at 597-99.

[24] 398 U.S. 419, 422 (1970).

[25] *See* 42 U.S.C. § 1973ff-1.

2. The *Tidewater* Concurrence

CRS suggests that the justices who concurred in the *Tidewater* judgment would have rejected the notion that Congress has authority to extend voting representation to citizens of the District.[26] That suggestion is unfounded. The two concurring justices in *Tidewater*, who found the District was a "state" for purposes of diversity jurisdiction, would have similarly concluded that the District is a "state" for purposes of voting representation.

Faced with the fact that the Constitution had failed explicitly to accord District residents access to federal courts through diversity jurisdiction, Justice Rutledge remarked: "I cannot believe that the Framers intended to impose so purposeless and indefensible a discrimination, although they may have been guilty of understandable oversight in not providing explicitly against it."[27] Having concluded that the Framers did not intend to deprive District residents of access to the federal courts, Justice Rutledge reasoned that the term "state" should include the District of Columbia where it is used with regard to "the civil rights of citizens."[28] Access to the federal courts via diversity jurisdiction, he concluded, fell within that category of usage. Contrary to CRS's view,[29] the same is of course true with respect to the right conferred by the D.C. Voting Rights bill, as the right to vote is among the most fundamental of civil rights. Based on Justice Rutledge's reasoning, the *Tidewater* concurring justices surely would have upheld Congress's determination to redress the indefensible denial of voting representation to District residents.[30]

3. The *Tidewater* Dissents

The four dissenting justices, although divided between two separate opinions, emphasized the same point as central to their analyses: As Justice Frankfurter put it, "[t]here was a deep distrust of a federal judicial system, as against the State judiciaries, in the Constitutional Convention."[31] It was that distrust of federal power that engendered fierce debates about the scope of the federal judiciary, and resulted in its careful enumeration in Article III. In view of the fact, made clear by the debates, that the Constitution's defenders had to "justify[] every particle of power given to federal courts,"[32] the four dissenting justices thought it inconceivable that the Framers would have bestowed upon Congress in Article I a supplemental

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[26] *See* CRS Report at 16-17.

[27] 398 U.S. at 625.

[28] CRS Report at 11.

[29] *See id.* at 13-14.

[30] Indeed, because interpreting the term "state" to include the District for purposes of *voting representation* would not have required overruling *Hepburn*, Justice Rutledge's opinion might have garnered additional votes if that issue had been presented to the *Tidewater* Court.

[31] *Tidewater*, 337 U.S. at 647 (Frankfurter, J., dissenting).

[32] *Id.* at 635 (Vinson, J., dissenting).

power to expand the federal judiciary "whenever it was thought necessary to effectuate one of [Congress's] powers."[33]

Thus, the driving force behind these justices' conclusion that the District Clause did not permit an expansion of federal jurisdiction thus had little to do with the scope of the District Clause and everything to do with the character of the Article III power at stake. Those concerns are not present in the context of voting representation for citizens of the District. As noted above, voting representation is a right belonging to the individual citizens of the District, not to the District as seat of the federal government. The federalism concerns triggered by congressional expansion of the federal judiciary simply are not implicated by legislation that effects the modest, but important, result of meaningful House representation for the citizens of the United States who reside in the District of Columbia. There is simply no reason to infer that the *Tidewater* dissenters would have rejected Congress's authority to pass the D.C. Voting Rights bill.

B. *Adams v. Clinton*

In 2000, a three-judge panel of the United States District Court for the District of Columbia addressed D.C. voting representation in *Adams v. Clinton*.[34] Although the question was not directly presented in *Adams*, the court suggested that Congress could provide voting representation for District citizens. In *Adams*, the court rejected District residents' claim that the Constitution *requires* that the District be treated as a state for purposes of representation in the House and Senate.[35] In a passage strikingly similar to that in *Hepburn*, however, the *Adams* court invited the plaintiffs to seek congressional representation through "other venues," suggesting (like *Hepburn*) that Congress could provide the right legislatively.[36] Moreover, the *Adams* court expressly noted that counsel for the House of Representatives asserted in the litigation that "only congressional legislation or constitutional amendment can remedy plaintiffs' exclusion from the franchise."[37]

III. The Other Concerns Expressed in the CRS Report Are Unfounded

The CRS Report identifies two concerns unrelated to Congress's constitutional authority to enact the D.C. Voting Rights bill. First, it suggests that granting the District voting representation in the House would open the door to claims by residents of the various federal territories for their own Representatives.[38] It also states that "holding that the District could be treated as a state for purposes of representation would arguably also support a finding that the District could be treated as a state for the places in the Constitution [that] deal with other aspects

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[33] *Id.*

[34] 90 F. Supp. 2d 35 (D.D.C. 2000), *aff'd mem.*, 531 U.S. 941 (2000).

[35] *Id.* at 47.

[36] *Id.* at 72.

[37] *Id.* at 40.

[38] CRS Report at 17.

of the national political structure."[39] These concerns are unfounded. Passage of the D.C. Voting Rights Act would not have any effect on federal territories or their residents. Nor would it necessarily support an argument that the District is a "state" in the context of constitutional provisions governing the national political structure.

A. Granting the District a House Representative Would Not Affect the Territories

As a constitutional and historical matter, territories occupy a position fundamentally different from the District in the overall schema of American Federalism and have long enjoyed disparate rights and privileges. Congress's authority over the territories stems from an entirely different constitutional provision, which empowers Congress to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[40] Although this provision unquestionably grants Congress broad authority to manage and legislate over federal lands, the Framers' use of two different clauses suggests that they intended the District and the various territories to be constitutionally distinct.[41] The Supreme Court has recognized as much, specifically noting that, "[u]nlike either the States or Territories, the District is truly *sui generis* in our governmental structure."[42] Accordingly, the case law I have discussed supporting Congress's power to provide District residents congressional voting representation cannot uncritically be applied to support the same argument for the territories.

Moreover, unlike territorial residents, but like the residents of the several states, District residents bear the full burden of federal taxation and military conscription. Granting the District a House Representative readily flows from these obligations; it is both incongruous and constitutionally significant that District residents lack an equal voice in the legislative body that can spend their tax dollars and send them off to war. Further, while birth in the District accords a person the same right to automatic U.S. citizenship that attaches to birth in the 50 states, those born in some territories are allotted only U.S. *nationality*, requiring only basic fealty to the United States, and not U.S. citizenship.[43] And unlike the territories, the District was part of the original 13 states and until the Capital was established in 1801, residents of what is now the District did enjoy full voting representation in the Congress.

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[39] *Id.*

[40] U.S. Const. art. IV, § 3, cl. 2.

[41] *See* Samuel B. Johnson, The District of Columbia and the Republican Form of Government Guarantee, 37 How. L.J. 333, 349-50 (1994) ("The Territories Clause is minimally relevant to the District. The existence of a separate District Clause strongly suggests that the District is not among the territories covered by the Territories Clause. Moreover, courts generally have agreed that the Territories Clause does not apply to the District.") (citing *O'Donoghue v. United States*, 289 U.S. 516, 543 -51 (1939) and *Dist. of Columbia v. Murphy*, 314 U.S. 441, 452 (1941)). *Cf. Dist. of Columbia v. Carter*, 409 U.S. 418, 430-31 (1973) (comparing Congress's exercise of power over the District and territories, noting federal control of territories was "virtually impossible" and had little practical effect.).

[42] *Carter*, 409 U.S. at 432.

[43] *See* 8 U.S.C. §§ 1102(a)(29) and 1408 (those born in the "outlying territories" of American Samoa and Swain Island are eligible for U.S. nationality but not U.S. citizenship).

Finally, unlike residents of the District, territorial residents do not vote in U.S. Presidential elections. Although I do not believe a constitutional amendment is necessary to secure voting representation for the District in the House, the enactment of the 23rd Amendment demonstrates the several states' clear and unequivocal agreement that they share a historical and cultural identity with residents of the District, which occupies a unique position in the federal system. This is plainly a tradition the states do not share with the territories. Congress's plenary authority to take broad action for the District's welfare, including and up to granting it a seat in the House of Representatives, is part of this shared tradition.

Taken together, these differences between the territories and the District render highly unlikely the suggestion that granting voting rights to District residents would lead, as a legal or policy matter, to granting similar privileges to residents of the U.S. territories.

B. Granting the District a House Representative Would Not Lead to a Grant of Other Privileges Inhering in Statehood

The CRS Report offers in passing another "slippery slope" argument, suggesting that legislative creation of a House Representative for the District would provide support for an argument that "Congress could . . . authorize the District to have Senators, Presidential Electors, and perhaps even the power to ratify [a]mendments to the Constitution." The CRS Report does not dwell on these concerns, with good reason. Regardless of whether Congress could have enacted legislation to provide the District representation in the Electoral College, District residents already have that representation by virtue of the 23rd Amendment.[44] Any impetus to providing the District the power to ratify amendments would face grave constitutional hurdles, as that is a power of the states *qua* states, not a right of their individual citizens.[45] And the question whether Congress might ever choose to afford District residents representation in the Senate is an entirely speculative and political one.

IV. Congress May Direct the Next-Entitled State to Elect Its Additional Representative at Large

The D.C. Voting Rights Act would increase the size of the House by two members: One would go to the District and the other to the state identified as next entitled to an additional Representative. A proposed modification to the existing bill would direct the next-entitled state to elect its additional Representative at large, rather than creating an additional single-member district. Congress plainly has the authority to do so.[46] I understand, however, that a question has

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[44] That the District obtained a vote in the electoral college by way of a constitutional amendment does not demonstrate its inability to provide District residents congressional voting representation by statute. Even if Congress's authority were the same in both contexts (a point that is not at all clear), Congress's determination in 1961 to proceed by constitutional amendment casts no substantial light on the Framers' understanding as to whether an amendment would be necessary to affect such a change.

[45] *See* U.S. Const. art. V.

[46] Indeed, Congress has already provided for at-large elections in some circumstances. Under 2 U.S.C. § 2a(c)(2), a state entitled to an additional representative must, pending redistricting, elect its

been raised as to whether such a provision would violate the "one person, one vote" principle set forth by the Supreme Court in *Wesberry v. Sanders*.[47] In my view, it would not.

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."[48] 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.[49]

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.[50]

Applying those principles, I do not believe that the proposed temporary "at large" district in the next-entitled state would violate the "one person, one vote" requirement. Suppose, for example, that Utah is the state entitled to the additional seat. Utah currently has three congressional districts. If Utah were to hold an at-large election for a new fourth seat, voters could cast a vote in their existing district *and* in the state-wide election for the fourth seat. 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

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additional representative(s) from the state at large. In 2 U.S.C. § 2c, however, Congress directs each state to fashion one single-member district for each representative to which it is entitled. Section 2a(c) is therefore provisional, and applies only if the courts and state legislature have failed to redistrict pursuant to § 2c. *See Branch v. Smith*, 538 U.S. 254, 271 (2003). But there is no bar to Congress providing for at-large election of the next-entitled state's additional representative, in effect carving out an exception to § 2c.

[47] 376 U.S. 1 (1964).

[48] *Id.* at 7-8.

[49] *Id.* at 7.

[50] *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).

the opportunity to cast that vote would not alter in any way the value of that person's vote in her own smaller district.

Nor should it matter, for constitutional purposes, that each Utah resident would vote in two elections, while residents of other states with single-member districts would vote in one. I 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.[51] In *Department of Commerce v. 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 1, 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 far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard.[52]

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*."[53] Accordingly, the one-person-one-vote principle is essentially inapplicable to interstate voting comparisons.

Second, and in any case, the proposed at-large election would not give residents of the state more or less voting power than the residents of states with single-member districts. A simple example illustrates why this is so. Suppose that State A and State B have roughly the same population and are each entitled to four Representatives. State A holds an at-large election for all four of its representatives, while State B divides its Representatives and voters into four districts. State A's state-wide district would have a population four times the size of each district in State B. As compared to the single-district voter in State B, the "at-large" voter in State A has a one-fourth interest in each of four representatives. The single-district voter in State B has a whole interest in one representative. But in both scenarios, each voter has, in the aggregate, one whole voting interest. Similarly, as compared to a state with four single-member districts, the voters in Utah's existing three districts would have proportionately less influence in the election of the representative from their own district, but would gain a fractional interest in the state's at-large representative. In the aggregate, Utah residents would have no more (and no less) voting power than residents of any other state.

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[51] *See Dep't of Commerce v. Montana*, 503 U.S. 442, 464 (1992).

[52] *Id.*

[53] *See Wisconsin v. City of New York*, 517 U.S. 1, 14-15 (1996).

Conclusion

Although I appreciate the concerns expressed in the CRS Report and agree that the questions raised therein are not entirely free from doubt, I do not see any legal, policy, or other reason why Congress should not extend the right to voting representation to citizens of the District. As the Court noted in *Tidewater*, the District was little more than a "contemplated entity" at the time the Constitution was ratified, and "[t]here is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia…."[54] But the District now has a population of nearly 600,000 people—greater than the population of all of the thirteen original states. Congress may and should act to ensure those residents the same substantive representation that the Framers assured their fellow citizens. Congress also has authority to direct the next-entitled state, which would receive an additional seat, to elect that seat at-large until the next census. Far from being prohibited by the Constitution, the D.C. Voting Rights bill is legislative action that the Framers would have expected and embraced as fulfilling their democratic vision for the Nation.

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[54] *Tidewater*, 337 U.S. at 587. *See also* Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. Legis. 167, 172 (1975) (noting that "[t]he question of the representation of the District received little express attention during the course of drafting [the District clause], or in subsequent ratification debates….").

Mr. CONYERS. All right. I will begin the questioning.

Attorney Dinh, how can those of us who would like to claim to be rigorous constitutional scholars sleep more comfortably in our beds tonight after having listened to this testimony and feel that we are not making some violation of the Constitution which we treasure so highly?

Mr. DINH. I think that is a very relevant question. I don't think you would sleep very well if one accepts the characterization of Professor Turley as to what this legislation does. But take faith that is not the only characterization nor even the most plausible characterization.

If one were to try to change the meaning of State within the Constitution, I fully agree that you are just opening up a Pandora's box in constitutional interpretation and inconsistencies. However, the legislation does not purport to change the meaning of the definition of State within the Constitution. Rather, it seeks to grant District residents the same rights as residents of States.

Similarly, as the court has held consistently in diversity jurisdiction, in 11th amendment immunity, sixth amendment right under criminal law, the interstate commerce clause, the international treaty clause, all of which references rights of citizens of States or quasi-States, and yet the court has said that Congress may treat District residents as if they are among several States.

In the question of interstate Congress, for example, the court says, yes, you can regulate commerce within the District just as you would regulate commerce amongst the several States precisely because we are not trying to change the meaning of the word State.

What Mr. Turley is referring to really is Justice Rutledge's two-person plurality, as opposed to Justice Jackson's three-person plurality, which is seen as the controlling plurality of *Tidewater.* In that case, Justice Jackson refused to overrule the *Hepburn* case, of which Mr. Bress had noted, in which Justice Marshall says, State means State and the District ain't a State. Justice Rutledge would overrule that and said District means State.

I think Justice Jackson, like Justice Marshall before him and like dictum in *Adams v. Clinton,* stands on better footing when it says that is a matter for legislative and not judicial consideration, legislative consideration under article I, section 2 authority, which is plenary authority which the court itself does not have as a matter of constitutional interpretation.

Mr. CONYERS. Are you, Mr. Bress, aware of an instance in which the Congress's exercise of its plenary authority over the District was successfully challenged?

Mr. BRESS. No, I am not, Your Honor. There are many instances, and some of them have been mentioned by Mr. Dinh already this morning, where Congress has exercised plenary authority to treat and has treated the District as if it were a State; and in none of those cases, to my knowledge, has that been successfully challenged.

Mr. CONYERS. Mm-hmm. Now, is it possible that the Congress in the 109th session could get this thing so wrong, that the Government Operations Committee—old title—could get it so wrong and that we are about here to step into a huge constitutional problem?

The reason I keep going back to this is it is not clear to me why, with all the democratic improvements in our system of justice, in our government, that now we come, after all this time, to this critical question we now find that we are constitutionally handcuffed.

Mr. Spiva, do you think we are constitutionally—I mean, can we all have goodwill and still not be able to do anything on this? The Constitution has got us tied up in knots?

Mr. SPIVA. No, I don't, Mr. Chairman. I think that, as the statements of my colleagues have indicated, there is room for a difference of opinion. In my view, though, that because there are strong arguments for the constitutionality of this provision based on the arguments Professor Dinh and Mr. Bress have articulated, that those who would say that the potential that this might be held unconstitutional should be a reason for you to reject it, should really come to this Committee with a heavy burden to meet. Because, in every other way, as I tried to indicate in my remarks, this is consistent with the fundamental principles of our Constitution and the democratic traditions of our country.

So I think that you could feel comfortable passing this, that there are strong arguments in favor of its constitutionality. Certainly I am sure that there will be debates later and probably even court challenges, but I think that people of good faith, even though they may disagree, could still support this and feel comfortable that they are upholding their constitutional duty.

Mr. CONYERS. Thank you.

The Chair recognizes our Ranking Member, Lamar Smith.

Mr. SMITH. Thank you, Mr. Chairman.

Mr. Turley, let me ask you to respond to points made by other witnesses.

The first point made by Mr. Dinh, Mr. Dinh has a wonderful appreciation and understanding of American history, and we have a lot to learn from that understanding. One of the points that he made was that he felt that the right of the District to vote continued because it was formerly a part of the State of Maryland and the law continued to be in operation. Why is that not something you agree with?

Mr. TURLEY. Well, the first problem with that argument, it has been rejected. It has been raised in cases like *Adams.* The Supreme Court has addressed that argument. It doesn't have any legal legs thus far every time it is brought up in court. This was a transitional period.

Also, the point that you have this plenary authority over the District, I have to make two points.

First of all, to assist the Chairman on his earlier question, there is a case where the Congress failed in its use of plenary authority. I know because I was the counsel who challenged it, the Elizabeth Morgan act. In fact, I was drafted by one of the sponsors here, which was Representative Tom Davis. That case was found to be a bill of attainder, and the argument made by the Department of Justice was that the District has such huge plenary authority that it is really unchallengeable, and the court said that that is not true.

Also, I want to emphasize that when Professor Dinh says we are not doing anything with States, we just look at section 2, not sec-

tion 8. There is a problem with that. Section 8 is the section that defines who votes in Congress. Section 2 in the District clause says that you have the authority within the District, and the Supreme Court has emphasized that you have the authority that is equivalent to what a State can do within its borders. This isn't something within the District. You are changing the structure of the voting mechanism of Congress.

Mr. SMITH. Okay. Thank you, Mr. Turley.

Let me go to the point made by Mr. Bress a while ago that he did not feel that giving Utah an at-large district was a violation of one man, one vote. You disagree with that. Why?

Mr. TURLEY. Well, in my last testimony on this issue, I addressed the one person, one vote. It is also in my testimony today.

The reason is that you have Utah residents who will now be voting on two representatives, one at large and one for their immediate district. Under *Westbury,* I believe that that raises serious questions. The Supreme Court has shown great skepticism about at-large districts. The United States Congress has taken the position against at-large districts because they are very abusive.

Now, it is true that the Supreme Court has not yet applied *Westbury* and its principles to an interstate conflict where you have one State saying, hold it, Utah residents now have two representatives. But the Supreme Court has said that it doesn't see any reason why it would not apply to an interstate issue.

Mr. SMITH. Okay. Thank you, Mr. Turley.

Mr. Spiva, let me address my next question to you, and it is this, that if we really want to give D.C. residents the right to vote for Members of Congress and even Senators, why would we not support a way that is considered to be not constitutionally suspect, a way that has broad support and a way that, in a practical manner of speaking, would be far more likely to be enacted, and that is the return of the District of Columbia to the State of Maryland with the exception perhaps of the Capitol and the Mall grounds?

That seems logical. The Congress has already ceded back the part of the District that belonged to Virginia. It seems logical to follow that up with ceding back the part of the District that once belonged to Maryland. That would also have the benefit of not only giving the residents of D.C. a vote in the House but a vote in the Senate as well. Why not support that? I just honestly don't understand.

Mr. SPIVA. Well, the only politically viable option on the table at present, Congressman Smith, is this option. There is great resistance from—I don't know if there have been polls taken recently, but the polls taken in the mid-1990's and later in Maryland and in the District—to doing that. And, of course, you know, you would have to get Maryland's permission to permit—to do that. So I think there is actually a pretty high political hurdle to getting that done.

I agree with you that it could also be done by simple legislation, and so you wouldn't have the constitutional amendment hurdle of having to go through the State legislatures, but it is still a pretty high political hurdle.

Mr. SMITH. It would be a hurdle, but I don't think it would be as high as either trying to pass a constitutional amendment or try-

ing to find this piece of legislation constitutional, which I also think is a high hurdle.

I just think that for individuals who want the vote for D.C., and I respect your sincerity, that approach should also be pursued with just as much vigor as you are pursuing this legislation.

Thank you for your comments and thank you, Mr. Chairman.

Mr. CONYERS. Thank you very much.

We now turn to the Chairman of the Subcommittee on the Constitution, Jerry Nadler of New York.

Mr. NADLER. Thank you, Mr. Chairman.

I want to start by commending you for moving this legislation so expeditiously. The injustice that the people of the District have suffered is real, and the time for action has long passed.

It is a tribute to our colleague, the gentlewoman from the District, that she has managed to achieve so much. Every one of us knows how hard it is sometimes just to advocate for our communities, even with a vote in the House and two Senators. Our colleague's test is infinitely more difficult, but she has handled it with skill and intelligence, relying on the force of reason and moral persuasion.

It would be hard for anyone to argue that this cause is anything other than unjust. We are talking about a very modest request, a single vote of the House. That citizens of the District have been denied even that much for so many years is a blot on our national honor, and it raises a real question mark about our expectations for the world that we are the messengers of democracy.

Ultimately, a court will have to decide the constitutional questions we are debating here today. There is a great deal of scholarship arguing in favor of opposing this legislation, but there are also some scholarly voices we have heard today and on other occasions arguing the contrary. I would hope that even if people are uncertain about this legislation, if the District could have a vote, its citizens should at the very least get their day in court. I don't think that is asking too much.

This is an unusual moment in our history, because the Utah situation brushes aside the usual partisan roadblocks to the enfranchisement of the District's citizens. It is a sad commentary in our Nation that only by arranging this trade can Congress be persuaded to act. Nonetheless, the opportunity is here.

I appreciate the testimony, which has been informative. I will not ask the witnesses to hash over their arguments again, but I just want to make sure we are all on the same page on some threshold issues.

Leaving aside any concerns that you may have about the legislation's method of doing so, do any of the witnesses believe there is any moral argument to be made against giving the citizens of the District a vote in the House? Obviously not.

Do any of the witnesses believe that the citizens—or that the residents, I should say, of the District of Columbia are not citizens of the United States? Obviously not.

Do any of you believe that it was the intent of the Framers to deprive the citizens of the District of citizenship rights equal to those of all other citizens of the United States? And, if so, what

rights other than having voting representation in Congress do you think are constitutionally denied to these citizens, if any?

Anyone?

Mr. TURLEY. Well, on that one, I think I get off the train. Besides the voting issue that you point out, there are material differences between citizens. But I take your point that the core constitutional rights are the same between citizens. But they are subject to the whim of Congress, ultimately, as to their affairs.

Mr. NADLER. Wait a minute. Some of the core constitutional rights that we normally assume people have are subject to the will of Congress?

Mr. TURLEY. No, no. I am saying I agree with you in terms of the core constitutional rights, that they are citizens of the United States, they have the full benefits of that. But that does not include voting, and all I am saying is that their status is materially different in other respects.

Mr. NADLER. It would not include diversity jurisdiction if Congress didn't choose to extend it to them?

Mr. TURLEY. That is correct, yes.

Mr. NADLER. Anything else?

Mr. TURLEY. If we go to some of those other issues like diversity jurisdiction, the courts have made some exceptions, but nothing on this order.

Mr. NADLER. Professor Dinh, would you comment on the question, please?

Mr. DINH. Yeah. I don't think it is just a matter of diversity jurisdiction—I don't think it is a matter of just diversity jurisdiction, but, as I noted before, sixth amendment rights, 11th amendment immunity, the right to regulate interstate commerce, the treaty clause and a whole host of other constitutional references to the rights of citizens of several States have been upheld by the court as pertinent to residents of the District as well. As Mr. Bress has so comprehensively opined, there is indeed no contrary judicial opinion at any level with respect to that.

I think that Mr. Turley has conflated the arguments that have been previously made in court with respect to an inherent right of District residents to vote, as opposed to the right of authority of Congress to legislate and give this vote. The opinions rejecting the right of District residents who vote as residents of Maryland or Virginia were rejected as part of that claim. It was never rejected as part of the claim that Congress in the periods of 1790 to 1800 had constitutional authority to recognize those persons' right to vote, which is the relevant issue before this legislation.

Mr. NADLER. Thank you.

Mr. Bress.

Mr. BRESS. Thank you. I just wanted to note for this purpose that among the individual rights that we discussed is the right not to be subject to a bill of attainder. Professor Turley has mentioned that as one that Congress can't overrule using the District clause, and I would certainly agree with that. The District residents have the same right not to be subject to that as anyone.

Mr. NADLER. Ex post facto was other violations of the Bill of Rights.

Mr. BRESS. Precisely. In fact, Justice Jackson wrote in his plurality opinion that Congress can't pass a law treating the District as a State where it would invade fundamental freedoms, and I would put that down in precisely that category.

Mr. NADLER. I see my time has expired, so thank you.

Mr. CONYERS. I thank you very much.

We now turn to the former distinguished Chairman of this Committee, James Sensenbrenner of Wisconsin.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

Let me start off by making a statement. I am concerned that an attempt to grant the representative from the District of Columbia the right to vote in Congress by statute is unconstitutional, and to ignore the constitutional problems—that doing it this way I think is sticking one's head in the sand and not conceding the point that this is, I would say, a 50/50 issue.

I would point out that, traditionally, this Committee and the Congress have expanded the franchise through constitutional amendment rather than through statute. Of the 27 amendments to the Constitution, six of them have expanded the franchise by amendment: 15th, 17th, 19th, 23rd, 24th and 26th. Indeed, 30 years ago, this Committee decided that a constitutional amendment was necessary and proposed an amendment and sent it out to the States for ratification, and only 16 States ratified the amendment, and 38 were necessary. So the constitutional amendment to grant District residents the right to voting rights in Congress has tried and failed.

I am willing to give this type of legislation a chance to be tested in the courts with an expedited review clause similar to the clause that was appended in the McCain-Feingold campaign finance reform bill so that we can find out once and for all whether it is constitutional for Congress to legislate in this area.

However, I am greatly disturbed at the decision that has been made by the sponsors of this legislation to give Utah an at-large seat, rather than to have the citizens of Utah elect four representatives by district. The legislation does give the right of citizens of Utah something that is denied to every other State, and that is the right to vote for two representatives, whereas the citizens of all of the other States can only vote for one.

Most of the people in this room know that I have been a leader in passing the Voting Rights Act extensions both last year and 1982, and one of the things that the Voting Rights Act and its extensions have done is to prevent the dilution of minority voting clout through the creation of at-large districts.

While neither the statute nor the Supreme Court have said that mixed at-large and district elections are per se unconstitutional or a violation of the Voting Rights Act, that issue has never been litigated, and I think that the Court would rule that way if the question phrased that way would come on up to the Court.

Whether it is the law in the Constitution or not, I think at-large elections and district elections mixed are bad policy because they do dilute minority voting rights and their clout; and I am afraid that if a bill that consists of giving the citizens of Utah the right to vote for two representatives, as is currently the case, gets up to the Court you will start seeing jurisdictions that are covered by the

Voting Rights Act use an affirmative finding of constitutionality as precedent to go back to the bad old days.

Having said that, you know, let me say that if there is this mixed representation for Utah, you have lost my support for this legislation.

[11:15 a.m.]

Mr. SENSENBRENNER. Because of the concern that I have, not on the D.C. issue but on the entire issue of the Voting Rights Act, do all four of you think this is an appropriate public policy concern? Starting with you, Mr. Dinh.

Mr. DINH. Yes, sir. I do.

Mr. SPIVA. I think your concern regarding at-large seats is valid. I am a big fan of the Voting Rights Act of 1965. I think this is very different, though, where you have an interstate difference.

Mr. SENSENBRENNER. I am talking about policy. I am not talking about the law or the Constitution. Good policy or bad policy?

Mr. SPIVA. I think, under the circumstances, this actually makes good policy and is distinguishable from the other situation.

Mr. TURLEY. I believe you are actually correct on the policy issue, and there is a subordinate policy as well. On either side of this equation, D.C. or Utah, Congress would be abandoning, at least for now, the 435 limit; and I have to say that, as a policy matter, that is crossing the Rubicon. You have done that before when new States were coming into the Union, but it has been a restraining principle for Members, and it has avoided a lot of mischief. Once you cross that Rubicon, once you start allowing at-large districts be added by Congress and Federal enclaves to give votes, I think you will find yourself on a slippery slope.

Mr. SENSENBRENNER. Mr. Bress.

Mr. BRESS. I think the addition of permanent at-large seats, to me, would raise significant policy issues. I think having a seat be elected at large for an interim period of time, which this Congress has done many times before and which is still in the U.S. statutes, does not offend me in any significant way.

Mr. CONYERS. Thank you very much.

With the permission of senior Members of the Committee, the Chair is going to recognize the gentleman from Tennessee, Mr. Cohen, for 5 minutes.

Mr. COHEN. Thank you, Mr. Chairman and senior Members of the Committee. I hope I don't take 5 minutes.

Mr. Turley and other members of the panel, I was curious. When the Constitution was drawn and they limited representation to the States, did we have territories at the time?

Mr. TURLEY. Yes.

Mr. COHEN. And we also have the District. Are there distinctions in the Constitution or maybe in this clause, in article I, section 2—do you think there were distinctions in mind about territories in the District or the District was dealt with differently in article I, section 8, than the territories were in article IV? Could there be some kind of difference in the way the perspectives were? They didn't say people shall not have a representative if you live in the District or if you live in the territories. They just mention States.

Mr. TURLEY. I guess there are two answers to that, sir. One is that the Supreme Court has actually said the jurisdiction over ter-

ritories and the District, while they are in separate clauses, are fungible in many respects. That is, they often refer to territories in the District in that sense.

But when this was put into the Constitution, the reason there is no express reference to the District is because a minority among the ratification delegates objected and wanted language put in. People like Alexander Hamilton wanted to have language in there to guarantee that residents could have a role in Congress. They lost.

There were amendments proposed along those lines in North Carolina.

So this is not a case where nobody thought about it. There was debate. Some people thought it was appalling. And right after we had the Federal enclave established, not soon thereafter, a retrocession movement began in Virginia, and this was the issue in that retrocession debate, and the District residents were also part of that debate and asked if they wanted to retrocede. Virginia retroceded. The District's residents decided not to; and, in fact, the Supreme Court has said that—it has used references to the relinquishing of this particular right, because it was debated and it was raised not just at ratification but also later in the retrocession debates.

And, ultimately, when D.C. got its government through the work of Lyndon Johnson, he did it by defining the District as a Federal agency. That is how Walter Washington was first put in as mayor, is that he treated the District much like the Department of Defense, where he had the ability to do that.

Mr. COHEN. Thank you, sir.

Mr. Spiva, was there any vote taken on prohibiting the District of Columbia from having representation?

Mr. SPIVA. Not that I am aware, but I would defer to either Professor Dinh or Mr. Bress, who are the true constitutional scholars.

Mr. COHEN. Do you know if there was a specific vote on that? Somebody proposed a proposal that somebody should not have a representative?

Mr. DINH. No, sir. Not either in the Constitutional Convention nor either in the Act of 1801. It was simply by omission that there was no right to vote.

But the key part there was a vote in 1790 with the Acceptance Act by Congress which acceded to the conditions of Virginia and Maryland that all of the laws, including the voting rights of their prior citizens and would-be citizens of the District, to have the vote during the 1790 and 1800 period until such time as Congress passed alternative laws. And when Congress passed alternative laws, it was simply omitted.

Mr. COHEN. Do you have anything to add?

Mr. BRESS. I know it is true that Alexander Hamilton offered at one point language that would have given the District the vote, but there is no record of any debate on that, and I don't know precisely where that language went from—where it went from his pen.

Mr. CONYERS. We now recognize the distinguished gentleman from North Carolina, Mr. Howard Coble.

Mr. COBLE. Thank you, Mr. Chairman. Good to have you all with us.

Mr. Turley, my folks spoke about Utah. When will Utah receive an additional representative, and is that in any way dependent upon the District of Columbia receiving a representative?

Mr. TURLEY. First of all, let my say that I feel that Utah is justifiably aggrieved. I was surprised at the rationale for denying Utah the seat at the last round. But they would have to wait for a new census and division of districts, and presumably they would get a district at that point.

But I have to say that I would be very surprised if the people of Utah ever see this seat. I think there are close constitutional questions. I don't think this bill is one of them.

I think that this bill will either be defeated in fast order or it will very well be enjoined; and, in many ways, you would want it enjoined. Because if it is not enjoined, in our challenge to the Elizabeth Morgan Act, that went on for years. What happens if this goes on for years? What happens if it follows the same trajectory that we had in that case? We got it struck down after years. What happens if you have close votes? What happens about the Presidential elections if Utah exercises its electoral delegate that it gets?

Mr. COBLE. Thank you, sir.

Mr. Dinh, much has been discussed here today about statehood. Again, my friend from Wisconsin mentioned the constitutional amendment that failed, but that was almost three decades ago. I can see where we would be reluctant to revisit that if it were a half a decade ago. But wouldn't it be more efficient to proceed along that courts, i.e., a constitutional amendment conferring statehood, rather than establishing a new preference?

Mr. DINH. Thank you very much.

I think that, on the question of statehood, you can only achieve that through a constitutional amendment, because the question of State is defined by the Constitution. However, as I have said before, the Court has consistently recognized the right of Congress and the authority of Congress to give the District the rights pertinent to States even though it is not considered a State. So this is a much more limited piece of legislation which I think is within the range of options that Congress has in order to deal with the similar problem.

Mr. COBLE. Let me put this question to Mr. Spiva to add to Mr. Bress.

What is the reasoning or the rationale for supporting the addition of one Representative in the House and turning a blind eye to the Senate?

Mr. SPIVA. I don't turn a blind eye to the Senate. My organization is committed to full representation for the people of the District of Columbia. This is a first step; and, if we get this, we are going to continue to work to get representation in the Senate.

The one thing I would disagree with my colleague, Professor Dinh, with some trepidation, is this body could actually make the District of Columbia a State without a constitutional amendment. You could do that through legislation. You could admit us as a State and simply keep the Federal enclave as it is.

Mr. COBLE. Thank you.

Mr. Bress.

Mr. BRESS. I don't have very much to add. I do believe that the decision really is a political one, as opposed to a constitutional question.

Mr. COBLE. Let me conclude. I still have more time.

Professor, let me revisit you. What are some of the unintended consequences, if any, of creating a sole representative for the District of Columbia?

Mr. TURLEY. There are a number that I lay out. One of the most important is that a lot of the things can change in our system, but the Framers and particularly James Madison was very firm on the structuring principles that hold the system together.

You know, all of the branches are considered equal, but it is a bit of an overexaggeration. I think Congress is the heart of Madisonian democracy. It is where everything happened. It is enormously important for the stability of the country, and Madison saw that.

So, in structuring it, this language as to who votes in Congress is enormously important. But once you cross that Rubicon, once you start fiddling with that structural language, then I think you will find that this is going to be a Faustian bargain, and some future majority is going to use the authority that you are now embracing, and particularly when you are lifting the 435 limit, it is an invitation to mischief.

Mr. COBLE. Before that red light illuminates and the Chairman comes after me, I yield back my time.

Mr. CONYERS. You had so much time left.

I am pleased now to recognize the distinguished gentlewoman from Houston, Texas, Sheila Jackson Lee.

Ms. JACKSON LEE. Mr. Chairman, it is an honor to be here. I feel almost a sense of history and certainly a recognition of the moment, the returning of this room and the decisions that are made, to the years of the 1960's and the 1964 Civil Rights Act and 1965 Voting Rights Act and many other historical opportunities of providing equality and justice.

I respect all of the presenters, but I do want to reflect, as I hold the Constitution, on the uniqueness of Washington, D.C., the specialness of America represented by a congresswoman who, in her early legal life, represented segregationists and their right to free speech only in America, and I thank Congresswoman Eleanor Holmes Norton for that kind of history; and a young man, who is a mayor, who comes of Jamaican heritage but yet loves America, is an American and now is able to represent, I know he would claim, the finest city in America. And that is very special.

But the finest people in America who for years have—for decades, for centuries now—have, if you will, obligated themselves to the flag of the United States, shed their blood in many of their wars and continue to do so.

So I want to pose a question to Mr. Dinh, because I am very curious about the constitutional underpinnings of this legislation. I think that this Committee has a duty to the Constitution, and I am cognizant of Professor Turley, who we respect, citing, of course, the provision under article I, section 2, about the representation being from the people of several States.

But I also reflect upon, Mr. Dinh, I think, your argument. So when I ask the question would you counter your argument or your reference to, I believe, is it section 8, and a paragraph within section 8, to make all laws, this Congress, which shall be necessary and proper for carrying into execution the foregoing powers and all of the powers vested by this Constitution and the government of the United States or in the department or office thereof—if that is not the exact frame of reference that you utilize, then, please, if you would, juxtapose the language of several States to your constitutional argument and add in that could Congress treat the District as if it were a State for purposes of representation in the Senate.

I guess I want the larger commentary on this question of the House before we certainly have immediate response to that.

Mr. Bress, if you would explain why a Utah at-large district does not violate the one man, one vote; and I am trying to issue my questions quickly so the Chairman and his gavel—and Mr. Spiva, would you simply tell us how it feels—I will get to you last—to have soldiers on the battlefield that have lost their lives and yet not have the constitutional right to have representation?

I know Mr. Turley will be able to comment on if the *Tidewater* case indicated that one decision in reaffirming what we are trying to do here today. Why do you think the Supreme Court is wrong?

Mr. Dinh, if you will go ahead.

Mr. DINH. Thank you very much.

Of course, the necessary and proper clause was interpreted by the Court in *McCullough v. Maryland* very broadly as it relates to the power of Congress, in that case to create the national bank; and the Court validated the creation of the national bank, even though that had been discussed previously.

But even as I do agree with you, that the message and proper clause does add something to the analysis, especially if one goes as broad as the court has interpreted in *McCullough v. Maryland,* but I would caution in the following: I don't think it is necessary, because the District clause under article I, section 8, stands differently from other clauses in article I, section 8, because there is no countervailing space limitation.

So that is why the Court has said that article I, section 8, which delineates the power of Congress as it relates to the competing powers of State legislators, the District clause then alone—because here you have no competing State legislature, and that is why the court says the power of Congress here is whole, is plenary, is majestic in scope, and explicitly is all of the powers of government.

So you are right to point to the countervailing. The only countervailing argument is article I, section 2, which limits a representative apportionment to the people of several States. Here I think it is a weighty textural argument, but so is the language in article III for the diversity clause jurisdiction, language of amendment 11 for immunity, the sixth amendment. The Court has consistently—and as Mr. Bress has opined, no court has held to the contrary that Congress has the power to treat the District as if it were a State for these purposes.

I would not very lightly counsel this Committee or this Congress to take a leap of faith with the Constitution. I hope you know me

better than that. I think the degree of confidence that comes with me before you recommending this legislation is not coming from my own textural structure and historical reading of the Constitution, even though they are consistent but also on an unending line to the cases and none to the contrary as articulated by the courts of this country.

Ms. JACKSON LEE. Mr. Chairman, if Mr. Bress—could you—do you remember the one question?

Mr. BRESS. I would love to.

There are two points I would like to make. One is that there is an interstate and an intrastate issue here. Certainly from an intrastate standpoint, adding an at-large seat to Utah wouldn't dilute anybody's vote in Utah versus adding another single District representative. Because everyone would have the same weight. Everyone would vote for single District representative, and everyone would vote at large.

You have the intrastate problem, which has been used here. People in Utah would be able to vote twice. But the question the Supreme Court has addressed in *Westbury v. Sanders,* another one of the one-vote cases, it is not how many times you get to vote. The question is what is the weight of your voting power.

So let us take two examples. You have a State that has four single-Member districts and another State that has four people elected at large. Now in the first State, everyone votes just once for a single representative, and the other States everybody votes four times. But the difference is, in the one State, you have got a whole interest in one representative and in the other State you have got four fractionalized interests. But the math works out the same. The people in both States have the exact same weight to their vote, and that is what the Constitution is concerned with.

The point that had been raised earlier that at-large voting has run into other problems, it has. It has run into problems with regards to its effect, its impacts on minority voters. That is a wholly separate issue, and it has nothing to do with one man, one vote.

Mr. CONYERS. We are out of time. Sorry, Mr. Turley.

Ms. JACKSON LEE. Thank you, Mr. Chairman.

Mr. CONYERS. I recognize the gentleman from Virginia, Mr. Goodlatte. He has been a Chairman of Committees and is now still Ranking Member on other Committees of the Congress.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Turley, would you like to respond to the comments made by Mr. Dinh in response to the last question asked by the gentlelady from Texas?

Mr. TURLEY. First of all, we obviously have a fundamentally different view of what the Supreme Court has said and certainly what the Constitution says on this question.

Putting aside the fact that the Framers defined who would vote in Congress and the fact that the issue of whether the District would be included in that language came up—there were votes, by the way, in ratification conventions where amendments were offered, including in places like North Carolina. They were defeated. There was outrage among many people, not just Alexander Hamilton, about this disenfranchisement of the citizens of the District; and that debate continued through retrocession. So this is not some

afterthought, that it is simply not mentioned so we can pretty much read it in there.

Also, what the Supreme Court has said—and, first of all, I want to say, with the Elizabeth Morgan Act, the United States did argue that its plenary authority trumped in that argument. They relied heavily on the District clause, and that is the reason the District of Columbia switched sides and joined us, is precisely because of the plenary arguments made on behalf of the United States Congress.

But putting all of that aside, many of these cases cited do involve individual rights. Nobody has ever doubted that the residents of the District of Columbia are U.S. citizens and they cannot have those rights taken away. That includes, it turns out, the 2nd amendment in the recent case that was just decided by the D.C. Circuit. And in *Parker v. District of Columbia,* I will simply note that the District seems to be taking a different position in that case and was arguing that we shouldn't be considered a State for the purposes of that challenge.

Mr. GOODLATTE. Thank you.

Mr. Dinh, what constitutional principle allows the representation in one Chamber of the Congress but not in the other?

Mr. DINH. That is a great question, Mr. Goodlatte. As I noted in a footnote in my written testimony, my analysis of the bill is limited to its provision, and so I did not have occasion to opine conclusively whether Congress has the same power to grant a one Senator or two Senators. But I do know that the language of article I, section 3, which relates to Senators, and the 17th amendment, which relates to the Senators, while in some respects similar to article I, section 2, relating to the House of Representatives, does differ in one important respect: It says that each State shall have two Senators, as opposed to the Representatives shall be elected by the people of several States.

Mr. GOODLATTE. Let me get to article I, section 2, then. Because I can't square that with your analysis at all. It says, the House of Representatives shall be composed of Members chosen every second year by the people of the several States, but then in the next paragraph going on to state, the qualification States, no person shall be a representative who shall not have attained the age of 25 years and have been 7 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.

Now is the District of Columbia a State?

Mr. DINH. No, sir.

Mr. GOODLATTE. How do you square your analysis with the principle definition of qualification to be a member of this body, which is article I, section 2, not the other articles in the Constitution which you have, in my opinion, to reach the analysis that you have brought to us today.

Mr. DINH. With all due respect, I do not think I have twisted it, and if there is any twisting, it is the Supreme Court.

Mr. GOODLATTE. Square it with the paragraph 2 of section 2.

Mr. DINH. There is no question that the District is not a State for the purposes of this or other provisions of the Constitution. But the question that we are faced here is whether Congress's power

under article I, section 8, Clause 17, extends to giving the citizens of the District the same rights as if they were citizens of the States. And here I think the same kind of argument——

Mr. GOODLATTE. That argument completely conflicts with the definition of who qualifies to be a member of this body.

Mr. Turley.

Mr. TURLEY. I will simply note that the language that is cited in every State having two Senators, there is also a State—it says that each State shall have at least one representative, and so the House has the same language referring to the House.

Mr. GOODLATTE. Let me ask a question of Mr. Spiva.

You cited a poll that the overwhelming majority of Americans support giving voting rights to representation of the District of Columbia; and there are many people here, including Mr. Turley and myself and others, who would describe to you alternative ways to accomplish that. The clearest way to do that would be to have a constitutional amendment. Why not go the route that is absolutely clear, absolutely protects the rights of the citizens not only to have the right for a representative to vote in the House but also to have it clear that what the Congress giveth, the Congress can't take away? Because it is pretty clear if you follow Mr. Dinh's analysis you will have the right of the Congress to take this away in the future. You will have the right of the Congress to take away other rights that have been extended by this authority that Mr. Dinh identifies. Why not go the constitutional amendment route, given the fact that public opinion clearly has changed since 1979 when it was last tried?

Mr. SPIVA. Well, it is unnecessary, even under the statehood scenario, Congressman. This body, as it has done in admitting every other State, could admit the District, other than what would remain of the Mall and the Congress, as a State.

Mr. GOODLATTE. That is certainly one of the alternatives. We would certainly cede the land back to Maryland with a constitutional enclave carved out for the Federal buildings where the Supreme Court and the Capitol and the White House are located. Those would both be superior alternatives. But the cleanest alternative would be to enshrine the right of the people of the District of Columbia to vote in the United States Constitution in clear, unequivocal language. Why not do that?

Mr. SPIVA. Because it is unnecessary, and particularly if you were trying to achieve statehood you could do that with simple legislation. So there is no reason to go through the route of the constitutional amendment, which is the most difficult politically and cumbersome to achieve.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. CONYERS. The Chair recognizes the gentleman from Georgia, Mr. Henry Johnson, Jr.

Mr. JOHNSON. Thank you, Mr. Chairman.

Being from Georgia, I am quite proud of that fact. But I was actually born and raised right here in Washington, D.C., and went to the public schools, and so I am particularly proud to be here this moment when we are considering this legislation.

I must say that in the two and a half months that I have been here I have seen and heard no more eloquent a spokesperson for

the rights of people who live here in Washington, D.C., than Representative Eleanor Holmes Norton, who has kept this matter at the forefront every moment that I have been here.

One of my memories as a child growing up in northeast Washington, D.C., is every—I used to wonder why did my daddy wait until the last minute on April 15th, 11:15 p.m. At night, and with all of these papers scattered all over the kitchen table and he was filling out his—he and my mother's Federal income taxes. And he would leave out and be able to make it down to the post office quicker than I ever thought you could make it from our house. He would have to come all the way downtown right across from the Capitol, not far from where he used to work as a Federal employee for the Bureau of Prisons. Number three man in that bureau, and my mother was a schoolteacher. But yet I didn't realize that they were second-class citizens until much later, because even with all that they attained and all of the responsibilities that they had, they still could not exercise the right to vote.

And I, as a young man, if I had dreamed of ever serving in the hallowed halls of this fine institution, I would not have had the opportunity to do so because of where I was born in the current state of the law which, in my humble opinion, cries out for change for quite a few years in the past as well as right now.

So I would like to ask, there being no prohibition in the United States Constitution of residents of the District of Columbia to vote, then it stands to reason that perhaps it was an oversight that the drawers, the makers of the Constitution failed to take care of their residents in the District of Columbia. Perhaps that might have been the case.

I would like to get each one of you all to comment on that.

I would also like to know if there is any authority, any express authority in the Constitution requiring citizens of the District of Columbia to pay taxes; and I think I would like to get the answer to that question first from Mr. Turley.

Mr. TURLEY. The courts have said, indeed, that the Congress can require that residents pay taxes.

Mr. JOHNSON. District of Columbia residents? What in the Constitution would require District of Columbia residents to pay Federal taxes?

Mr. TURLEY. Well, the District clause gives that plenary authority over taxation, and in *D.C. v. Carter* the Court said that the power of Congress is very simple under the clause. It says it can exercise—this is a quote—the powers which a State may exercise over its affairs.

Mr. JOHNSON. Let me ask you this question. It has been long held, I believe, that the citizens of the District of Columbia are required to pay taxes, and they are treated like any other citizen for that purpose. And there being nothing in the Constitution that would prevent residents of Washington, D.C., from having the right to vote and they having had the right to vote prior to the acceptance of the secession of the lands, why is it not possible—why is it legally irresponsible for this Committee to not tender legislation granting that right to vote to the citizens here which can be taken to the U.S. Supreme Court and settled on that level? What makes

it so premeditated—such a premeditated unconstitutional act as you talked about?

Mr. TURLEY. Well, my response would be, first of all, an omission of language is not a statement of authority. And if that were the case, then any failure to mention another entity could be read into a provision that is ambiguous.

But I don't believe that the House provision is ambiguous. And it was not an omission. We keep on—it is good—it would be good if it was an omission, but it wasn't. It was debated at the time, and it has been debated ever since, that this is a high price for residents to pay.

So, for that reason, no, I can't agree that the omission can be treated as an oversight, because it wasn't. And, also, in terms of the other States, because the District gives you the right to really be the government like a State would be, all of those other powers belonging to the State in the 10th amendment belong to them. But you are changing a relationship with the other States. You are affecting their rights. It is not an intrastate issue.

Mr. JOHNSON. There is nothing in the Constitution that prescribes how many Members there can be in the House of Representatives, is there?

Mr. TURLEY. As long as they are from the several States.

Mr. JOHNSON. There is no prohibition against the United States Congress in the Constitution expanding its membership in the House, nor is there anything that would prevent the Congress from exercising that majestic power under section 8, I believe.

Mr. TURLEY. But under your analysis you could give Puerto Rico four to six seats. They have got 4 million people there. We would find ourselves on the ability——

Mr. JOHNSON. Isn't that a matter of constitutional interpretation?

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

Mr. JOHNSON. Thank you, sir.

Mr. CONYERS. You are welcome.

Dan Lungren, former Attorney General for the State of California, you are recognized.

Mr. LUNGREN. Thank you very much. I appreciate that.

I have some difficulty in dealing with some of these arguments because I was an English major, and I look at words and attach meanings to words. And when something says that the Congress shall be made up of representatives from the States, that usually is my first inquiry, what do they mean there?

So then I go to the question of what is the Constitution. As I understand it, the Constitution was a compact among the States; and, as I look, I recall that to come under the compact it has to be ratified by the States. And there is nothing else that suggests that somebody else ratifies it, whether it is the District of Columbia or somebody else. Maybe that is why the Congress is made up of representatives of the States. It doesn't appear to be entirely illogical to me.

But let me just ask you, first of all, Mr. Dinh, the arguments you have made here today for representation in the House are equally valid for representation in the Senate, correct?

Mr. DINH. Not necessarily, sir. As I answered with Mr. Goodlatte, I reserve judgment on that because of the difference in text between article I, section 3.

Mr. LUNGREN. Okay. So that is more specific than saying that the House of Representatives shall be made up of those from the States.

Mr. DINH. Yes. There is other language in that that I have not considered.

Mr. LUNGREN. Mr. Spiva, would you say that the arguments that you make here and the ones that are supporting this are equally valid for Senate representation?

Mr. SPIVA. Like Professor Dinh, I have not done a full constitutional analysis to see the constitutional——

Mr. LUNGREN. If we pass this legislation, you wouldn't use that as an argument against an effort to try to get Senate representation, would you?

Mr. SPIVA. No, sir.

Mr. LUNGREN. You would probably use it for, wouldn't you.

Mr. SPIVA. I wouldn't take a position on it today.

Mr. LUNGREN. You will come back, I am sure.

Mr. Bress.

Mr. BRESS. I would take the same position on this that Professor Dinh has taken in the sense that I take these duties seriously, And I am not going to——

Mr. LUNGREN. I understand that.

Why would not these arguments be equally valid with respect to Puerto Rico, the Virgin Islands, American Samoa and Guam, Mr. Spiva?

Mr. SPIVA. I don't know that I can give you a full answer on that. I know the territories are covered by different provisions in the Constitution.

Mr. LUNGREN. I know you made the argument with reference to the paragons of human rights in Europe saying that we are violating human rights by not extending full voting rights to the people in D.C. Couldn't that be made to Puerto Rico, the Virgin Islands, American Samoa and Guam?

Mr. SPIVA. It could, with one difference, Congressman. We pay Federal taxes.

Mr. LUNGREN. You made the argument about serving in the military. We have people from Puerto Rico, the Virgin Islands, American Samoa and Guam. You used that as part of your argument. So isn't that also the case?

Mr. SPIVA. That is true, Congress. I am not here today trying to diminish anybody else's potential rights. I am just saying that we pay taxes.

Mr. LUNGREN. That is a major, significant difference.

If, in fact, the argument that you make, Professor Dinh, sort of answers the question, why was it necessary for us to pass a constitutional amendment to give the people in the District of Columbia the right to vote for President? Could that have been done merely by legislation?

Mr. DINH. As I indicated in a major portion of my analysis, I think the 23rd amendment was necessary because of the particular provisions of article I that deal with that and, in particular, the Su-

preme Court opinion that immediately preceded the 1978 constitutional amendment. I do not think that the passage of the 23rd amendment precludes a congressional enactment of this type or is dispositive of it.

Mr. LUNGREN. Why was it necessary in that amendment to say that the District would be entitled if it were a State. If it were a State, is that just unnecessary, superfluous language?

Mr. DINH. There was—the Supreme Court decision to which I refer—and the name escapes me, although it has been famously characterized as the Tower of Babel because there were so many opinions with so many different provisions. But one of the prevailing justifications for that was Justice Black's opinion for Congress's power under section 5 of the 14th amendment that, because that power is not available to Congress with respect to the District, I think the 23rd amendment was necessary.

Again, I would refer you to my formal written statement.

Mr. LUNGREN. I have taken a look at that.

Thank you very much, Mr. Chairman, for this.

Mr. CONYERS. Thank you very much.

The bells indicate we have been summoned to the floor for several votes, and we will resume as soon as those votes have been taken.

The Committee stands in recess.

[Recess.]

[12:50 p.m.]

Mr. CONYERS. Thank you so much for your patience. I apologize for the votes. And the Committee will come to order. And the Chair recognizes the gentleman from Virginia, Randy Forbes.

Mr. FORBES. Thank you, Mr. Chairman, and thank you for holding this hearing. And to all the witnesses, we appreciate your being with us and your patience through the votes.

I have been interested in listening to all the debate, and I just want to capsulize some of it.

Mr. Spiva, first of all, thank you for your presentation, and I want to go back to a couple of things that I heard Mr. Lungren raise to you. Outside of the Federal income tax situation, you listed serving on Federal juries, that the people in D.C. were good people, that they were veterans and service members who had fought and are fighting for our country, that there was a moral outrage that they didn't have the right to vote is a denial of human rights, and they were Americans.

And again, I think his question, of those attributes, all of those would apply equally to Guam or Puerto Rico, for example, if we were to list the attributes of each of those. Is that a fair statement?

Mr. SPIVA. I think it is, Congressman.

Mr. FORBES. So if I were to ask all the good people that you had here, and I know a lot of them had to leave but they were here before, if I would ask them to equally stand up in support of Puerto Rico and Guam based on those same attributes, they would all stand up for them as well, wouldn't they?

Mr. SPIVA. Congressman, I am sure if the people of Puerto Rico, for example, clearly wanted to have the right to vote—I know there have been several polls in Puerto Rico and there have been mixed

results, I believe. I can't speak for everybody here, but a threat to justice here is a threat to justice everywhere.

Mr. FORBES. But the attributes at least would be applicable to the residents of Guam residents, to Puerto Rico, with equal applicability; would that be a fair statement?

Mr. SPIVA. I think it is, Congressman.

Mr. FORBES. The Federal tax situation, I certainly understand and appreciate the representation. Sometimes we need to be careful at what we ask for. I was just looking at what the States were getting back for the Federal dollars that they were paying. Maybe we would all be better off without representation, because the highest State gets back $2 for every $1 they are putting in, and the District of Columbia is getting back $6.64 for each dollar they are representing.

But Mr. Dinh, I would like to ask you a question, too, if I could. I have tried to listen to the options that were here. And first of all, as I understood your testimony, you said there was no constitutional requirement or mandate that is inherent to give this representation to the District of Columbia; was that a fair understanding of your testimony?

Mr. DINH. Yes. I think the Court of Appeals for the District of Columbia addressed this in *Adams v. Clinton,* that there is no constitutional right that is enforceable in the court for such representation, but it leaves open the question whether Congress can grant such a right.

Mr. FORBES. So based on the testimony—and I heard some witnesses ask about the concern that they had with the people of the District of Columbia not having a constitutional right to vote—isn't it true that unless we were to pass a constitutional amendment or unless we were to cede property back to Maryland or declare D.C. a State, unless we use one of those three options, there is nothing that this Committee or the House of Representatives or Congress as a whole could do to give voters in D.C. the constitutional right, mandate to representation?

Mr. DINH. The legislation here would give the right of D.C. residents to have representation in this House. It is not constitutional in nature. I think it is constitutional and permissible as a matter of congressional authority.

Mr. FORBES. Right. But we heard people say constitutional rights. So just to make sure we are comparing apples to apples here, there is nothing we can do here today short of those three options. Those are the only things that would give them constitutionally protected guaranteed vote in D.C.

Mr. DINH. Statutory right rather than constitutional right.

Mr. FORBES. Mr. Spiva, as I understood in your testimony, you said that you would continue to work for full representation in the Senate, and you indicated that polls across the country were overwhelmingly in favor. But I just wanted to clarify because I heard some different things. They are overwhelmingly in favor of giving representation rights, but apparently the polls in Maryland, I take it, are overwhelmingly against having the property go back to Maryland. Would that be fair?

Mr. SPIVA. That would be fair, Congressman. It is a different poll, and I should hasten to add that I think the polls done on

statehood have gone the other way. People believe that we should have the right to vote for representation, but they don't necessarily believe in statehood.

Mr. FORBES. So would it be fair for me to interpret from that testimony—but you correct me if I am wrong—that the polls across the country be overwhelmingly against statehood, overwhelmingly against ceding the property back to Maryland. Fair?

Mr. SPIVA. I don't know that there has been a national poll——

Mr. FORBES. But that would be politically difficult.

Mr. FORBES. Because of the polls in Maryland and because of the polls in the District.

Mr. FORBES. So the constitutional options to give a constitutional right to D.C. representation, the polling seems to be pretty strong against that.

Mr. SPIVA. I don't know if I follow the question. But I think that the option that is on the table——

Mr. FORBES. I don't want to stop you, except my time is running. As I asked Mr. Dinh, the only three things we can really do to give constitutionally protected rights to representation in D.C. would be to cede the property back to Maryland, have a constitutional amendment, or determine statehood or declare statehood.

Mr. SPIVA. To enshrine them in the Constitution, I think that is probably right.

Mr. FORBES. Based on at least your understanding today of the facts you have, the polls would probably be against any of those three options?

Mr. SPIVA. I wouldn't go that far, Congressman.

Mr. FORBES. So you don't know?

Mr. SPIVA. I don't think there has been polling done on that particular question.

Mr. FORBES. But you think there was polling on the statehood issue?

Mr. SPIVA. Yes.

Mr. FORBES. And that polling would be negative?

Mr. SPIVA. It is a different poll than the poll I alluded to in my testimony. But, yes, that is the case.

Mr. FORBES. And the bill that is before us today, Mr. Turley has suggested, has constitutional concerns. I know there is an argument and difference between our witnesses. But you would agree with me that I think you said that that was the politically most feasible option for you at this particular point in time. Was that a fair representation?

Mr. SPIVA. This bill? Yes.

Mr. FORBES. But if that is so, then it would be fair to say that since that would not be constitutionally mandated, that it would be a legislative option that happened to be the most politically feasible option at the time. That would also be something that could be changed based on the change in political climate at any time.

Mr. SPIVA. What is that that could be changed?

Mr. FORBES. The legislation that could be passed here. In other words, the rights that could be given could be pulled back, taken back, changed, modified at any time on a political basis, as political majorities changed or as voting patterns changed or whatever.

Mr. SPIVA. I believe the answer to your question is yes, Congressman. But there is one exception that might apply and I have not looked at this. Sometimes when States or the Federal Government create certain rights, even though they didn't have to to begin with, due process prevents them from taking them away under certain circumstances, and I haven't looked at whether that would apply in this situation. But I think the answer to your question is yes.

Mr. FORBES. Let me take your supposition that you just made that that certain right would be there. You heard Mr. Turley earlier suggest that that was case law that indicated that we should treat the territories and D.C. basically the same. Mr. Turley, was that a fair representation?

Mr. TURLEY. Yeah. The courts have said that if the jurisdiction that Congress actually has over territories is analogous to the District and vice versa.

Mr. FORBES. Okay. Mr. Spiva, if in fact we pass the legislation and it became an inherent right, as you just suggested, and I realize you haven't totally thought that out and researched, would there be any equal protection arguments that Guam or Puerto Rico could raise at that particular point in time that would suggest that we have given an inherent right now that was rising up to a constitutional protection to voters in D.C. and that they should have that same right?

Mr. SPIVA. I doubt it, Congressman. First of all, I would not necessarily agree with the premise. There is a different provision in the Constitution that applies to the territories, and I haven't looked at that.

Mr. FORBES. But you haven't looked at the case that Mr. Turley has——

Mr. SPIVA. I am familiar with the *Alexander v. Daley* case, and the name of the companion case is escaping me. But those cases clearly said this is up to Congress, which is why we are here today.

Mr. FORBES. You don't think the territories and D.C., the courts said they should be treated similarly?

Mr. SPIVA. That I think is true under certain circumstances, but I do not know whether that is true under all circumstances because they are covered by——

Mr. FORBES. You don't think there would be any equal protection argument?

Mr. SPIVA. I do not.

Mr. FORBES. Mr. Chairman, thank you for the time.

Mr. CONYERS. You are more than welcome. We didn't have the clock on. I knew you would agree on what is about 5 minutes.

Mr. FORBES. I hope I was there, close.

Mr. CONYERS. Members of the Committee, we have three guests, shadow Senators and Representatives, and I would like senior Senator Paul Strauss to stand, junior Senator Mike brown to stand, and shadow Representative Mike Panetta to stand. Welcome, gentlemen.

And now we turn to Chris Cannon from the much debated State of Utah.

Mr. CANNON. And the State of Utah doesn't even appear in the legislation, but we are looking forward to being the next in line for

a seat, which—I want to welcome the panelists, especially my dear friend Mr. Turley.

Let me start with you, Mr. Turley. I appreciate the line of questioning Mr. Forbes just went through. It was actually quite interesting. Analogous doesn't mean the same, and the difference is largely how we legislate them. Let me just make that point.

And Mr. Dinh talked about what is constitutionally permissible and what is constitutionally right. And so I ask this question with some trepidation, knowing what I think your answer is going to be, but asking you first so the others can respond as well. It seems to me that if you grant that this is a question that is unclear, then there is some likelihood that the courts will defer to Congress' decision, given the complexity of the problem. In your mind, is there a possibility that this is unclear? Are you absolutely clear that this is an unconstitutional action?

Mr. TURLEY. Well, I would hope that over the course of a few dozen appearances that I have a reputation for not gilding the lily, not exaggerating on authority. But I have to say that there are close questions of constitutional law. I don't consider this to be one of them. It is—with due respect to my colleagues here, I truly believe this is a dead letter as soon as it arrives to the court. I don't think that there is ambiguity here and I think that the review would be quick and decisive.

Mr. CANNON. I am certain that a group of people in Utah are going to take your words to heart when they file a lawsuit on this. But if we go down the panel starting with you Mr. Dinh, is there—clearly your testimony is that we can legislate here, and therefore I assume you would suggest that there would be some deference to Congress. Would you care to elaborate on that?

Mr. DINH. I think you are right that the Court would defer to Congress, especially as it is doing here, consider very weighty constitutional issues in a very deliberate manner and consider contrary testimony and opinions. And also the weight of the evidence with respect to the Court's deference to the Congress legislating under article 1, section 8, clause 17, the District clause is much greater than in other instances in the Constitution. I am not as confident in my analysis as Mr. Turley is in his contrary analysis, but I think that may be a matter of personality rather than constitutional law.

Mr. CANNON. I think it is absolutely clear that Mr. Turley has a great personality, but also I would—let me just say that we have been together on many occasions. You have testified here many times, and the keenness of your intellect has never been challenged nor the clarity of your discussion, Mr. Turley.

Mr. TURLEY. Thank you, sir.

Mr. CANNON. Could we just go down the panel, then, and have other comments on this?

Mr. SPIVA. Thank you, Congressman. I think that although reasonable people can debate the constitutionality and disagree with the constitutionality of the bill, I think the weight of the authority would support a finding of constitutionality. And one thing I should have said in my opening testimony is that 25 legal scholars have actually joined Professor Dinh in signing a letter which I would like to submit for the record, Mr. Chairman.

Mr. CONYERS. Without objection.

Mr. CANNON. Thank you. And Mr. Bress?

Mr. BRESS. I would agree that, as I have said before, there is a question here, and unlike, I guess, Professor Turley, I don't purport to say that there is a slam-dunk in my direction. I just think it is the better reading of the authority. And when I say that, I acknowledge, as has been discussed here all morning, that the Constitution refers to States, and I would not argue that the District is in fact a State.

I think the precedents are quite clear otherwise. But I guess what I would say is that the cases that we have discussed so far that the Supreme Court has addressed, in particular the full faith and credit clause case and the case dealing with the dormant commerce clause as well as *Hepburn,* which deals with diversity, all also dealt with constitutional provisions that used the word State. And yet all found that for their purposes, and particularly when Congress was legislating under the District clause, that the District could be considered a State nonetheless under those clauses. So I do think that it is oversimplifying the debate to look at the word "State" and think you have got the answer, and I think you need to delve into the cases.

Mr. CANNON. It does occur to the mind when you read the phrase that talks about States that that is clear, but if you read the whole paragraph, it is less clear. And if you look at the history, it seems to me that it is much less clear. So with all due respect, we are going to go down as disagreeing on this, Mr. Turley.

And in the environment of what I have said and intend to continue to say, is that in the environment where it is clearly unclear or at least where so many experts can disagree that Congress has the right and, I think here, the obligation to allow a significant chunk of people to have representation in the body that taxes.

Thank you, Mr. Chairman. I yield back.

Mr. CONYERS. Thank you very much. The distinguished gentleman from Cincinnati, Ohio, if he is prepared to take his questions.

Mr. CHABOT. Thank you, Mr. Chairman. I have no questions at this time. I had the honor to Chair the Subcommittee hearing in the last Congress on this, and I had all my questions answered at that time. But thank you.

Mr. CONYERS. You are welcome very much, Mr. Chabot.

I am now pleased to call on the gentleman from Iowa, Mr. Steve King, for 5 minutes.

Mr. KING. Thank you, Mr. Chairman. Appreciate the privilege to be recognized, and the opportunity to look into this a little bit deeper.

And as I have listened to this testimony, and I direct my first question to Mr. Dinh, and I missed a little of this Q&A in the voting process, but as I recall from your testimony, in the original delivery of your testimony as I would boil that down, it would boil down to a precedent that was established in 1790 until about 1800, 207 to 217 years ago, thereabouts, that the residents of the District were allowed to vote as residents of the States of Maryland and Virginia because Congress had granted that authority and they had—well, I will call it a consensual agreement. And so that prece-

dent then would be the core of your argument that that precedent would carry forward and should be applied today with regard to representation for D.C. and the Congress?

Mr. DINH. In addition to my arguments regarding article 1, section 8, obviously, I do think that that precedent is very illuminating, especially since it was done in the first Congress. And as we know, great weight is given, as it should, by courts to the actions of the first Congress.

Mr. KING. Mr. Dinh, I point out also that that appears to be in the history of this—I know only from your testimony and the discussion here, that appears to be a precedent that was established by a majority of the House and the Senate, signed by the President, but one that was untested and unchallenged. And so it wouldn't carry the weight, even if a Supreme Court decision might go back so far as that period of time.

The fact that there was an agreement that was mutually agreed to by the House and the Senate and the President, is there any example in history where that kind of an agreement, untested constitutionally, would have constitutional precedent with regard to any future issue?

Mr. DINH. No. You are absolutely correct and that is a very keen observation. This is not binding precedent on the Supreme Court, as I said before, even though the weight of the authority is in the Court in favor of mine and Mr. Bress' constitutional interpretation, there is no binding precedent. And I think that is precisely why the actions of the first Congress is illuminating but not binding. You are absolutely right.

Mr. KING. And I thank you.

And Mr. Spiva, in your testimony, you talked about and started your testimony, as I recall, about the brave and patriotic Americans who gave their lives fighting in the Middle East for all of our freedom, which we all revere and respect and appreciate that sacrifice.

My question to you would be, were they fighting to uphold the Constitution as soldiers or marines for the United States military?

Mr. SPIVA. Certainly, Congressman.

Mr. KING. And then wouldn't that be the binding principle for all men and women in arms to uphold the Constitution?

Mr. SPIVA. Absolutely.

Mr. KING. And then shouldn't that be our binding principle here as well, since at least the Members of this Congress swear also to uphold the Constitution?

Mr. SPIVA. I certainly would agree with that, Congressman. And I think this bill is constitutional.

Mr. KING. You do. It seems as though in your response to Mr. Smith's questions about why you wouldn't go down the path of asking for D.C. statehood, let's see, that there was a response made—maybe I wrote it down—about you acknowledging the constitutional difficulty of this particular piece of legislation. I recall that concession or that point, and I can't exactly quote it back to you.

Mr. SPIVA. I am sorry. If I made such a concession, I certainly did not intend to. I think that reasonable minds can disagree about the constitutionality of this bill, but I think the clear weight of authority, I think the precedents that my colleagues have cited in

terms of the diversity jurisdiction provision and the interpretation of that of the *Tidewater* case as well as with the 11th amendment, the taxation amendment, all of those hold in favor of finding that this also would be a constitutional exercise of this Committee and this Congress' authority.

Mr. KING. I did happen to find that response in my notes. So this may not be exactly verbatim, but it is close at least in its intent.

On the question of the constitutionality—and your concession was to Mr. Smith when you said you wouldn't have to amend the Constitution if D.C. were ceded back to Maryland in reference to this legislation. So whether it was advertent or inadvertent, I think at least the implication was there. I don't want to belabor that point.

Mr. SPIVA. I don't want to see that as inconsistent, I guess, Congressman. You would not have to amend the Constitution to cede the District back to Maryland. You would need Maryland's permission.

Mr. KING. But the implication was you would have to if we adopted this legislation.

Mr. SPIVA. That was not the implication that I intended.

Mr. KING. Well, it was the one I drew, and I am willing to let the record stand and not challenge it in either way if that is all right with you.

Mr. SPIVA. I would disavow that if that——

Mr. KING. Disavow that. Okay. Then that disavow is in the record then. I am happy to concede that to you as well, because I don't want to try to lead anyone here. But my question then to you is: As I, as a Member of Congress, take an oath to the Constitution, that if I believe that a piece of legislation before me is unconstitutional, as Mr. Turley does, then would your advice to me be if I favored the policy but did not believe in the constitutionality of it, should I vote for the policy or vote for the Constitution?

Mr. SPIVA. Congressman, if you believe that it is clearly unconstitutional, that a provision is clearly unconstitutional, then I think you should follow your conscience and vote against it, even if you believe as a policy matter it is good. I think you then would have the obligation to use all of your legislative energies to find a solution that you did believe was constitutional.

Mr. KING. Thank you. And I will let the record show you are a good fellow who is always willing to do business.

Mr. SPIVA. Thank you.

Mr. CONYERS. Thank you very much. The Chair recognizes the gentleman from California, Darrell Issa.

Mr. ISSA. Thank you, Mr. Chairman. I might note that I am a cosponsor of this bill and voted for it in the last Congress. So I just wanted to get through a couple of things, though, because this bill may or may not become law. If it becomes law, it may or may not become enacted before 2010, or at all.

So first of all, Professor Turley, if this thing were stayed by a series of legal challenges until 2010, do you agree that the Utah provision would be moot?

Mr. TURLEY. You know, that is a wonderful question because when you look at the nonseverability clause, it refers to a finding that one provision is unenforceable, it is kind of a holding or judg-

ment. If it is enjoined, one could certainly make the argument that that provision would not kick in. You could make an argument either way. It is not clear. If it doesn't kick in, then you are going to have a world of trouble.

Mr. ISSA. Okay. Because my time is short and my Chairman is specific on time, would we then be well advised to consider such amendments as would make it clear that if this does not become enacted by 2010, Utah would go away, because it will have gotten its additional seats, if appropriate, and the deal would still go forward if it is enacted before 2010 but, in fact, not made practically—you know, some portion of it not occurring—that we should take provisions to make sure that the rest of it would go forward, forgetting about your objections to the underlying bill? That would be your recommendation?

Mr. TURLEY. I think you probably do have to tweak that provision. And also to look at the implications of an injunction.

Mr. ISSA. Okay. So I suggest that all of us will be looking at it in that term. I have already voted for this in Government Reform, but I am concerned that we not have the Utah compromise if this doesn't go into effect until after 2010, stop it from going into effect.

But now let's assume for a moment this is overturned, because I am not going to have a brain trust like this for quite a while in front of me. And, Professor, because you are the dissenter here, I want to use you for a moment.

If we, in fact, ceded back to Maryland, would we be able to, in your opinion, get an equivalent of the District of Columbia in all other ways; in other words, control over our own National Guard, control over other aspects such that the District of Columbia would continue to exist for purposes of the types of control that were deemed necessary by the Founding Fathers? Do you believe we would be able to achieve that while still having the people of the District become full citizens of Maryland again?

Mr. TURLEY. Yes. Well, it is a terrific question, sir. Under the modified legislation plan that I suggested, I believe that you could create, with agreement with Maryland, a unique status for the District that would include many of these things. They would become part of the political entity of Maryland. The District of Columbia itself would become the true Federal seat of government. It would just be the Federal buildings themselves.

Mr. ISSA. I understand. I understand that alternative that we simply draw a small ellipse, so to speak. But assuming that we were to deal with this in its entirety, do you believe we could have our cake and eat it too? Cede back all of the land, have such compacts and provisions as would allow the major uniqueness of the District of Columbia to continue to exist?

Mr. TURLEY. Yeah. Actually, it is not as difficult as it may seem because of the NIH case. There are various ways you can do this. You can keep a Federal footprint in the District, but it would be part of Maryland. If it is part of Maryland, they vote with Maryland. But also in terms of that type of retro session, I think an agreement can be worked out with Maryland to achieve all of those things.

Mr. ISSA. Okay. Following up then on that same line, assuming all of that for a moment—and this is again, assuming in the alter-

native to what I have already supported as a piece of legislation—do you believe we could do that with no constitutional requirement? We could do it purely legislatively, a normal vote by the House and the Senate and the signature of the President?

Mr. TURLEY. I do. I always prefer constitutional amendments because they are clean, they are what the framers anticipated. But as I mentioned in my testimony, I think it is something you can do through legislation if you are talking retro session options.

Mr. ISSA. Okay. And because I have been unfair to the other three on this line of questioning, is there anyone that believes there is inaccuracy in any of those? Or would you all agree Utah—we should deal with Utah in case this doesn't become law before 2010? And two, do you believe that the answers that Professor Turley gave would be accurate in the alternative if we failed to prevail with the President's signature on this bill?

Mr. DINH. I agree with your comments regarding Utah. I have not looked at the limited or total retro session.

Mr. ISSA. Mr. Chairman, I understand my time is gone, so I would only ask that the rest of them be able to answer for the record.

Mr. CONYERS. That is an excellent idea. I thank you for it.

We may be able to get in two, two more Members to ask questions. And let's try for it, starting with Tom Feeney of Florida. Would you begin? And then we will yield to Judge Gohmert.

Mr. FEENEY. Thank you very much, Mr. Chairman. We appreciate your panelists being patient. We will go off to vote, it looks like you will be able to go on to more pressing business.

But this is a fascinating discussion. Professor Turley, you are awful optimistic about a quick and decisive decision from the Supreme Court on a slam-dunk constitutional issue. But much like I agree with your constitutional analysis, I don't have nearly the confidence. Courts and constitutional law scholars and politicians have engaged in discussions to get the right results in the past and, you know, Mr. Spiva, I was interested, cited as one of the reasons he thought it was a good political idea that we have got this overwhelming majority, not just national but international voices, expressing outrage that D.C. isn't included as the same rights that States have to be represented. And one of the citations that Mr. Spiva gave us, for example, was the United Nations Commission on Human Rights, led and joined by those great democracies and liberal bastions like Cuba, Libya, and then Syria.

So it is sort of interesting that they are lecturing us on our constitutional principles. But regardless of whether the objection is constitutional or political, I am concerned about the rationale that Mr. Dinh and others have given us here, and they don't have an opinion with respect to whether their rationale would lead to the same conclusions with respect to Congress' power because, after all, if Congress has this unlimited power to delegate State status to a non-State with respect to a voting Member of Congress, is there anything that you can discern in their logic that would stop Congress from having the power to provide two Senators to D.C.?

Mr. TURLEY. I must say I find it a little bit disconcerting that we are not going to get to this question and answer it to all of our satisfaction before we enact this legislation. This first report by Mr.

Dinh was put out, I believe, in 2004. At some point we should probably get to the question as to whether what you are doing now could be used as a compelling ground for adding two Senators. And the distinction that Mr. Dinh made was this language about having two Senators for every State.

But there is also in article 1 a reference that is virtually identical, saying each State shall have at least one Representative. If it is compelling as a barrier to adding Senators, one would say the virtual same language would be compelling to adding a Representative. I don't see any distinction that could be possibly drawn that would prevent that argument from being made.

Mr. FEENEY. And why would it have been necessary to pass the 23rd amendment with respect to giving D.C. status with respect to selecting the President? I mean, under the same constitutional theory that we have here, that Congress has the power to endow statehood status for purposes of congressional representation, why would it not be equally true that the 23rd amendment was unnecessary because Congress could have at any time endowed D.C. with the power to help select a President?

Mr. TURLEY. Well, there is a great deal that seems in conflict once you start to tweak the meaning of States for the purposes of House voters. And as you know, the 23rd amendment has very clear language that it was necessary to treat the District as if it were a State. And if you also look back at the 1978 amendment, it was very clear as to Congress' view as to this authority. And this really is an effort to get what is a worthy end with an easier means. But there is nothing particularly easy about the constitutional process, and that is what the framers wanted.

Mr. FEENEY. The 23rd amendment also had to differentiate the way electors were chosen in D.C. Elsewhere they are chosen in a manner that the State legislatures determine. And, of course, it had to discern that same thing with respect to who is qualified to serve. And then—I guess I want to go on to Mr. Gohmert so that nobody has to come back, but I would ask this question, which is related, but not exactly on the subject matter.

Reading the 12th and 23rd amendments together, what happens in the event that no Presidential candidate gets a majority of the Electoral College votes? Currently does D.C.—could they be the tiebreaker with the power of, say, the delegation of California or New York? Is that the——

Mr. TURLEY. It gets very, very dicey on a number of grounds with this bill. The Utah electoral vote is a good example. What is clear is that litigation would likely continue. And I say it is going to be a dead letter, I don't mean litigation is going to be all done. I say that I believe it is going to be a very consistent response of the Court from the very beginning.

And I will also note that my colleagues who say that I seem strangely confident, if you read their testimony, they say there is ample and pretty much uninterrupted authority for their positions as well.

Mr. CONYERS. I thank the gentleman. Let me get quickly to Judge Louie Gohmert of Texas, and excuse me for cutting you off.

Mr. TURLEY. Oh, no, not at all.

Mr. GOHMERT. Thank you, Mr. Chairman. And I will do what is difficult for me, to be brief. But anyway, you know, we have heard a lot of talk about article 1, section 2, article 1, section 8. Of course section 3 deals with the Senate. But 2 does say the House of Representatives shall be composed of Members chosen every second year by the people of the several States. And that is the concern. But does that mean what it says? Now, as I understand, those who believe that allowing D.C. to have a Representative not from a State, you are basing that authority on article 1, section 8; is that correct? If I could get you each to comment quickly.

Mr. DINH. Yes.

Mr. BRESS. Yes.

Mr. SPIVA. Yes.

Mr. GOHMERT. Okay. And obviously article 1, section 8 says that Congress shall have power—and then you get to the important part you are referring to—to exercise exclusive legislation in all cases whatsoever over such District, not exceeding 10 miles square, as may by secession 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, et cetera, and other needful buildings

So it would seem if that is your constitutional basis for doing that, then the nearly 4 years I spent at Fort Benning, Georgia, even though I asked not to go there—boy, and I appreciate so much citizens in D.C. fighting for their country. Everybody at Fort Benning, everybody at military posts all over the United States do that. Since it says here "and to exercise like authority over all places, like for the erection of a fort," it sounds like—and it includes buildings.

Professor Turley, under that reasoning, wouldn't it make sense that I should be able to push for a Representative from the Pentagon and as well as from Fort Benning and other military posts that might like to have a Representative?

Mr. TURLEY. Well, of course, Lyndon Johnson did treat the entire District as an agency under the same logic the Department of Defense could be given a Member of Congress.

Mr. GOHMERT. I would rather not use Johnson as a precedent.

Mr. TURLEY. Well, I will simply point out in *Paul v. The United States,* the Supreme Court said quote, "The power of Congress over Federal enclaves that comes within the scope of article 1, section 8, clause 17 is obviously the same as the power of Congress over the District of Columbia." and so while they are different clauses, the Supreme Court routinely refers to them together. And by the way, the recent D.C. Court of Appeals——

Mr. GOHMERT. Now, this is in the same clause. I mean unless you are distinguish—this is in the same—before the semicolon, this is the indented—this is all part of the same part referred to as the District.

Mr. TURLEY. I also want to note on that issue that the D.C. Circuit in last week's decision on the 2nd amendment, while it was split, they were unified in how they treated the District, even though the District argued in that case they should not be treated as a State for purposes of the 2nd amendment. Both the majority

and the dissenting judge pointed out that this is the clear authority, the clear difference between States and the District and territories.

Mr. GOHMERT. Well, just in closing, thank you all very much for your insights. And it is a good point made by citizens of the District of Columbia. They do not actually get to elect a Representative and that is a valid point.

But my understanding, one of the arguments that was made counter to that, that may have helped carry the day back when the original framers were going through this, was the fact that they felt that as Representatives and Senators came here from all over the country, this would be the only place in the entire United States where every Member of the House of Representatives and every Senator would have a vested interest in seeing that the sewers worked, that the streets were good—and, nowadays, that a subway works. And I mean, I have been open to some bills on subway help here that I would not have been any other place, but we all work here. And many actually live here and close to making it a residence. So as I understand it, I haven't heard anybody mention that, but I understand that was one of the arguments back 200 years ago, that actually Washington has more of a vested interest in it by Representatives and Senators than any other city in the entire Nation.

Mr. CONYERS. Thank you, Judge.

Mr. GOHMERT. Thank you very much.

Mr. CONYERS. Let me recognize for unanimous consent requests Mr. Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman. I would ask the report of this Committee, February 16, 1978, chaired by Chairman Rodino and submitted by Subcommittee Chairman Don Edwards, the majority view——

Mr. CONYERS. Without objection, the document is included in the record.

[Note: The document referred to, Report No. 95-886, is not reprinted in this hearing but is on file with the Committee in the official hearing record.]

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. CONYERS. Ladies and gentlemen, thank you. As witnesses your contributions have been invaluable. We are going to go over them carefully. We received numerous statements, letters and reports. I ask unanimous consent to include in the record.

I close with this observation: that in *Westbury v. Sanders,* the Supreme Court held that 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. The democratic vision of our Nation's founders will, I think, be advanced by finally giving to the District of Columbia's residents congressional representation.

And on that note, I adjourn the hearings and thank you again for your time and contribution.

[Whereupon, at 1:30 p.m., the Committee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

PREPARED STATEMENT OF THE HONORABLE SHEILA JACKSON LEE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS, AND MEMBER, COMMITTEE ON THE JUDICIARY

SHEILA JACKSON LEE
18TH DISTRICT, TEXAS

WASHINGTON OFFICE:
2435 Rayburn House Office Building
Washington, DC 20515
(202) 225-3816

DISTRICT OFFICE:
1919 SMITH STREET, SUITE 1180
THE GEORGE "MICKEY" LELAND FEDERAL BUILDING
HOUSTON, TX 77002
(713) 655-0050

ACRES HOME OFFICE:
6719 WEST MONTGOMERY, SUITE 204
HOUSTON, TX 77019
(713) 691-4882

HEIGHTS OFFICE:
420 WEST 19TH STREET
HOUSTON, TX 77008
(713) 861-4070

FIFTH WARD OFFICE:
3300 LYONS AVENUE, SUITE 301
HOUSTON, TX 77020

Congress of the United States
House of Representatives
Washington, DC 20515

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HOMELAND SECURITY
SUBCOMMITTEES
CHAIR
TRANSPORTATION SECURITY AND INFRASTRUCTURE PROTECTION
BORDER, MARITIME, AND GLOBAL COUNTERTERRORISM
FOREIGN AFFAIRS
SUBCOMMITTEES
AFRICA AND GLOBAL HEALTH
MIDDLE EAST AND SOUTH ASIA
SENIOR WHIP
DEMOCRATIC CAUCUS
WHIP
CONGRESSIONAL BLACK CAUCUS
CHAIR
CONGRESSIONAL CHILDREN'S CAUCUS
CO-CHAIR
PAKISTAN CAUCUS

CONGRESSWOMAN SHEILA JACKSON LEE, OF TEXAS

STATEMENT BEFORE THE

COMMITTEE ON THE JUDICIARY

LEGISLATIVE HEARING: H.R. 1433
"DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2007"

MARCH 14, 2007

I thank the Chairman and Ranking Member for the opportunity to participate in this important hearing today. I look forward to hearing from the witnesses about the legislation under consideration. I am also pleased to welcome our distinguished panel of witnesses:

Viet D. Dinh
Professor of Law and Co-Director

Asian Law & Policy Studies
Georgetown University Law Center

Bruce V. Spiva, Partner
Spiva & Hartnett, LLP

Jonathan Turley
Professor of Law
George Washington University Law School

Richard P. Bress, Partner
Latham & Watkins, LLP

I am confident that their insights will make this a very informative hearing.

As Section 2 of H.R. 1433 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. 1433 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. 1433 treats the District as a Congressional district for the purposes of granting full House representation.

H.R. 1433, the "District of Columbia House Voting Rights Act of 2007" was introduced on March 9, 2007 by Delegate Eleanor Holmes Norton, who has been a tireless advocate for a District of Columbia House vote. 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. Most recently, earlier in this Congress Delegate Norton and Congressman Davis introduced H.R. 328, the "District of Columbia Fair and Equal House Voting Rights Act of 2007," a measure I was pleased to co-sponsor.

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. 1433 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. 1433. 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, Mr. Chairman, for convening this hearing. Again, welcome to the witnesses.

I yield back the remainder of my time.

PREPARED STATEMENT OF THE HONORABLE STEVE COHEN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TENNESSEE, AND MEMBER, COMMITTEE ON THE JUDICIARY

STATEMENT OF REP. STEPHEN I. COHEN
HOUSE JUDICIARY COMMITTEE
HEARING ON H.R. 1433, THE "DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2007"
MARCH 14, 2007

The lack of voting rights for citizens of the District of Columbia is unacceptable. At a time when the United States is preaching the virtues of democracy to the rest of the world, it is more than a little hypocritical that our own capital city's residents do not have voting representation in the national legislature. While there is debate concerning the proper constitutional means for granting voting representation to the District of Columbia's residents, all of the witnesses appear to agree that something must be done to remedy this situation. Whatever means are ultimately chosen, Congress should act soon.

SURVEY ENTITLED, "U.S. PUBLIC OPINION ON DC VOTING RIGHTS," CONDUCTED FOR DC VOTE BY KRC RESEARCH, JANUARY 2005

What's New

- New Information:
  - Support for DC voting rights over time (Oct. 1999, Jan. 2005)
  - Current level of support for DC budget autonomy
  - Compelling messages in support of DC Voting Rights
- More Robust Measures
  - More comprehensive measure of awareness (previous study only measured awareness among college graduate voters 21+)
  - Voting rights question wording test: half sample asked one version (trend question), the other asked a shorter version
  - More demographics: political party, individuals who have visited DC, who know someone who lives in or near DC, military families, religious families, registered voters, election year attentives, and "Influentials."

KRC Research
January 2005

DC Vote
www.dcvote.org

Research Design

- Nationally representative random (RDD) sample of 1,007 U.S. adults, 18 years and older.
- Telephone interviews conducted January 14-16, 2005.
- Margin of error at 95% confidence level is ±3 percentage points.

Definition: "Influentials are individuals who have done three or more of the following activities: attended a public meeting on town or school affairs, written or called any politician, served on a committee for a local organization, served as an officer for an organization, wrote a letter to the editor or called a live radio or TV show to express an opinion, been an active member of any group that tries to influence public policy or government.

DC Vote
www.dcvote.org

KRC Research
January 2005

Sample Characteristics

- **Gender:** 52% women, 48% men
- **Region:** 19% Northeast, 23% Midwest, 36% South, 23% West
- **Age:** 31% 18-34, 38% 35-54, 30% 55 and older
- **Education:** 72% not college graduates, 25% college graduates
- **Ethnic identity:** 68% Caucasian, 12% Black, 12% Latino, 2% Asian, 7% other or unreported
- **Political party:** 29% Republican, 34% Democrat, 23% Independent, 14% other or unreported
- **Registered voters:** 86%
- **Closely followed Presidential election:** 79%
- **Someone in family serves in military:** 51%
- **Attend religious services regularly:** 45%

KRC Research
January 2005

DC Vote
www.dcvote.org

Key Findings

KRC Research
January 2005

DC Vote
www.dcvote.org

Support for DC Political Rights

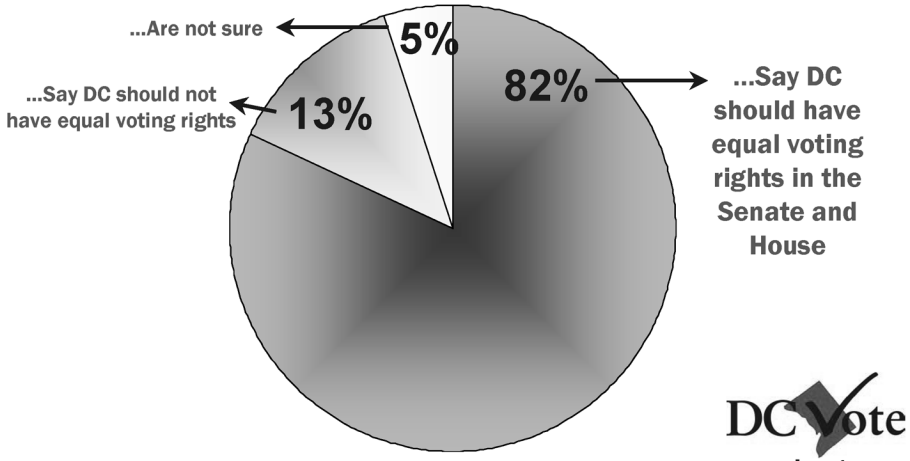
- Support for equal voting rights for DC citizens in the Senate and the House has increased ten percentage points in just over five years: (72% to 82%)
- Support crosses all groups – including political party lines

KRC Research
January 2005

DC Vote
www.dcvote.org

High Level of Support for Letting DC Vote

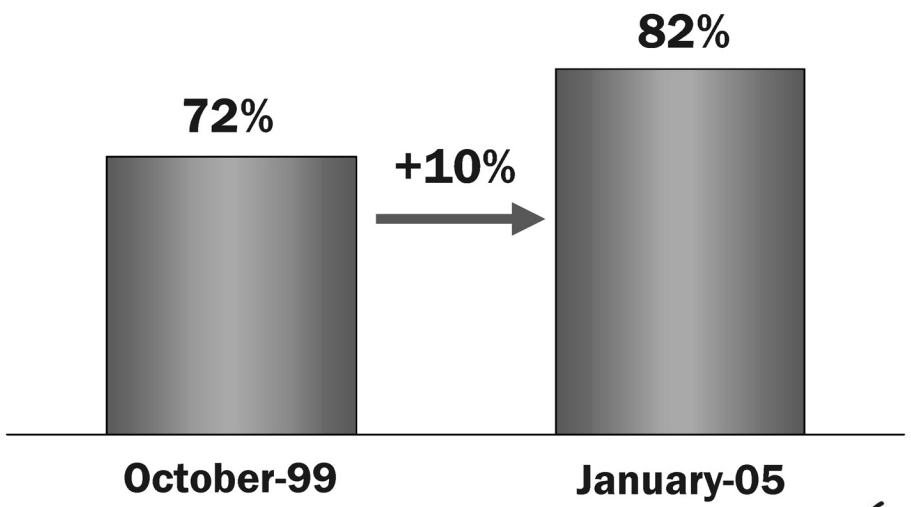
"Nearly six hundred thousand U.S. citizens live in Washington, DC. They pay full federal taxes and fight in every war. But, unlike citizens who live in the 50 states, they do not have voting representation in Congress—neither in the House of Representatives nor in the Senate. **In your opinion, should DC citizens have equal voting rights in the House and the Senate, or not?"**



DC Vote
www.dcvote.org

KRC Research
January 2005

Support for DC Voting Rights is Up

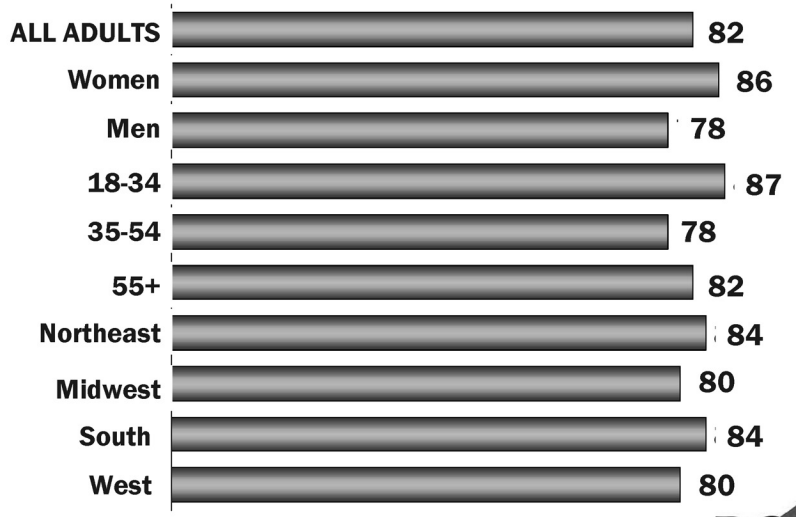


Percent Support Equal Voting Rights

KRC Research
January 2005

DC Vote
www.dcvote.org

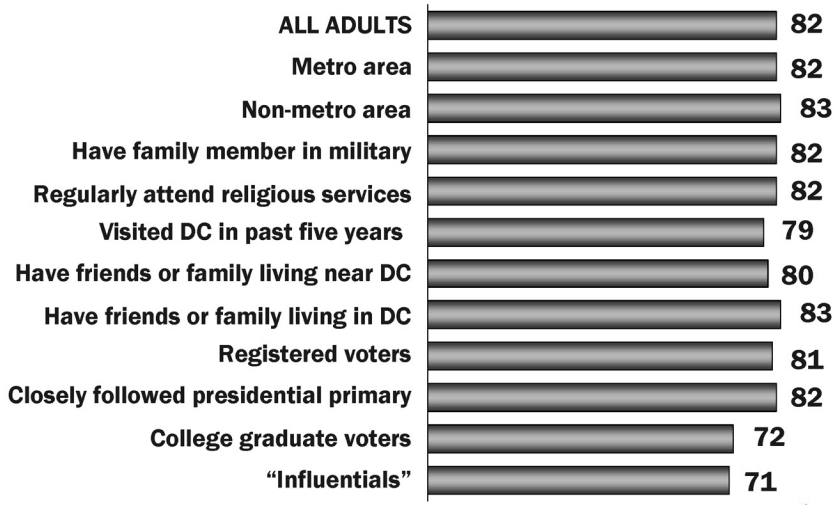
Support Crosses Demographic Groups



KRC Research
January 2005

DC Vote
www.dcvote.org

Support Crosses Demographic Groups



Percent Support Equal Voting Rights

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DC Vote
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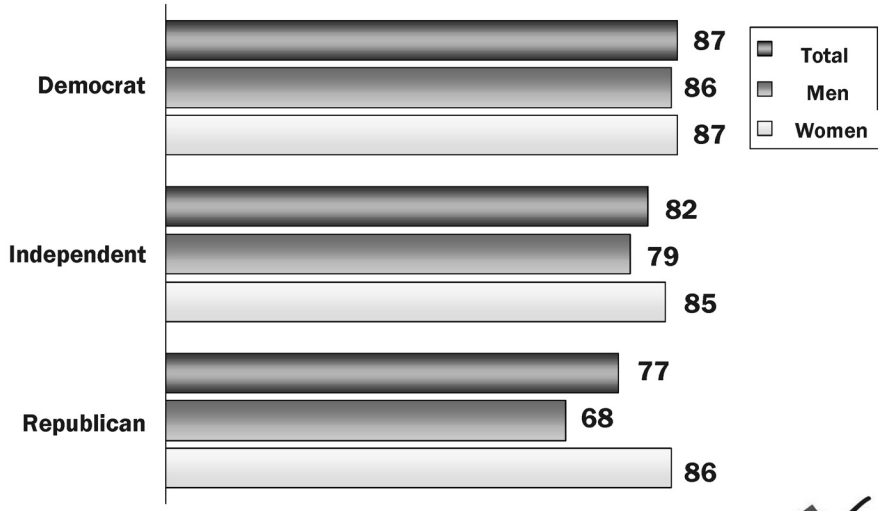
Support Crosses Party Lines



Percent Support Equal Voting Rights

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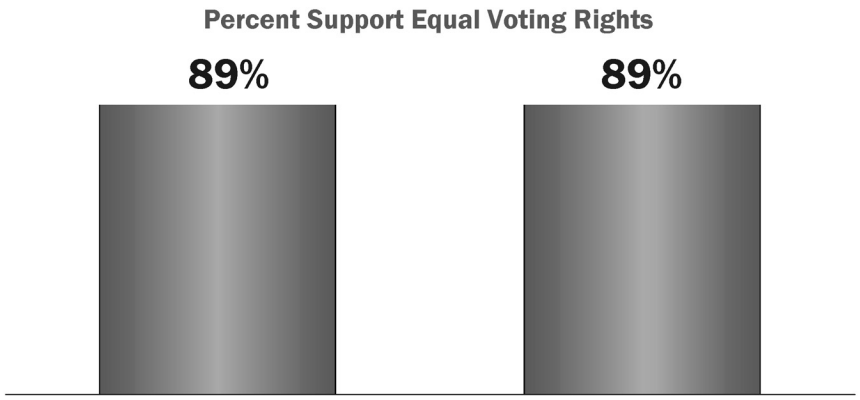
Most Supportive



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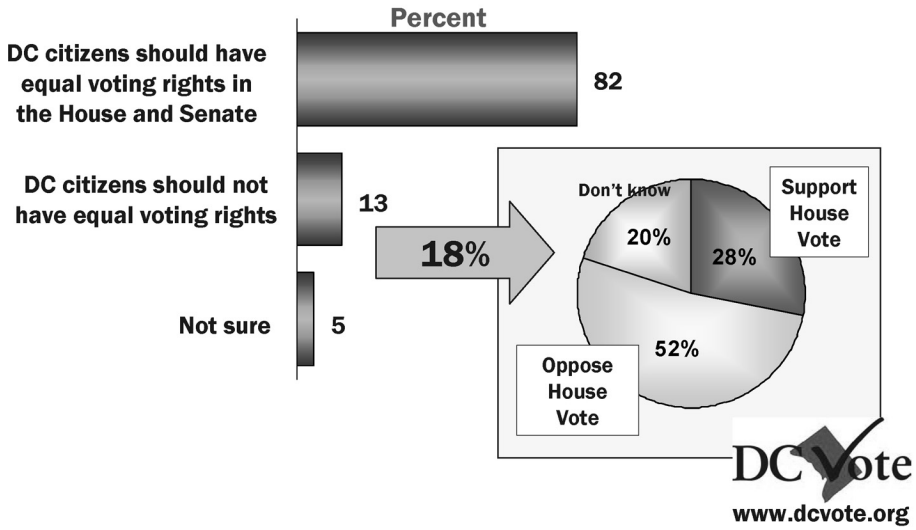
Little Gain for Vote in House Only

IF NO OR DON'T KNOW: "Would you support congressional voting rights for DC citizens in the House of Representatives only?"



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Support for Budget Autonomy

- **Seven in ten Americans** support giving the DC elected government the right to control the local DC budget
- Support for budget autonomy crosses all groups—

  including political party lines

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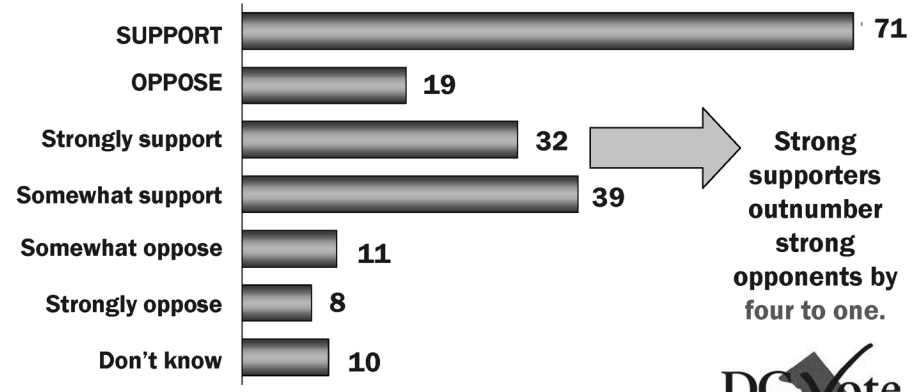
DC Vote
www.dcvote.org

Support for DC Budgetary Control

"Currently DC residents pay for most of the costs of their local government. Unlike other cities and states, DC's local government budget must be approved by the full Congress. Currently, Congress has final say on how the local DC budget is spent. There is a bill that would give the elected DC government the right to control its own local budget. **Would you strongly support, somewhat support, somewhat oppose, or strongly oppose this bill?"**



Percent Support Budget Autonomy

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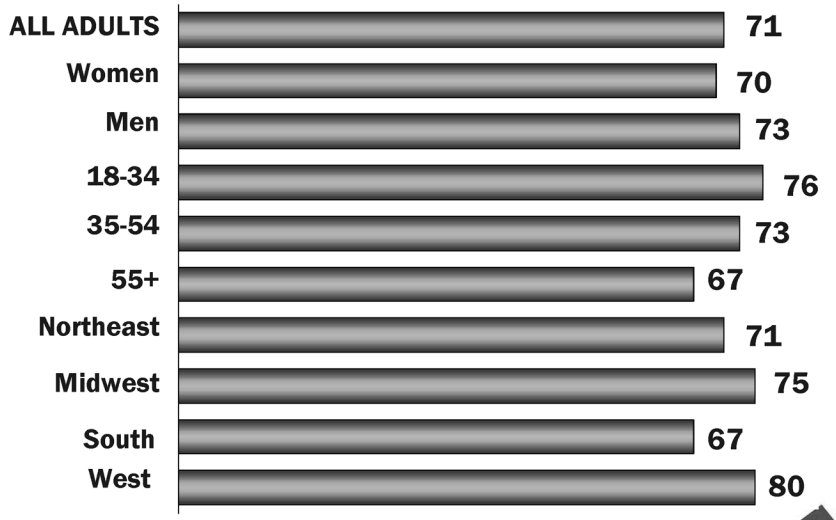
Support Crosses Demographic Groups



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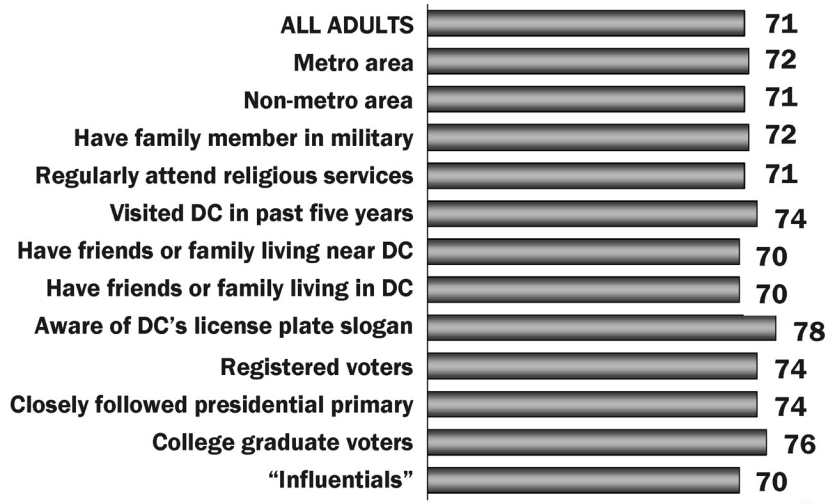
Support Crosses Demographic Groups



Percent Support Budget Autonomy

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DC Vote
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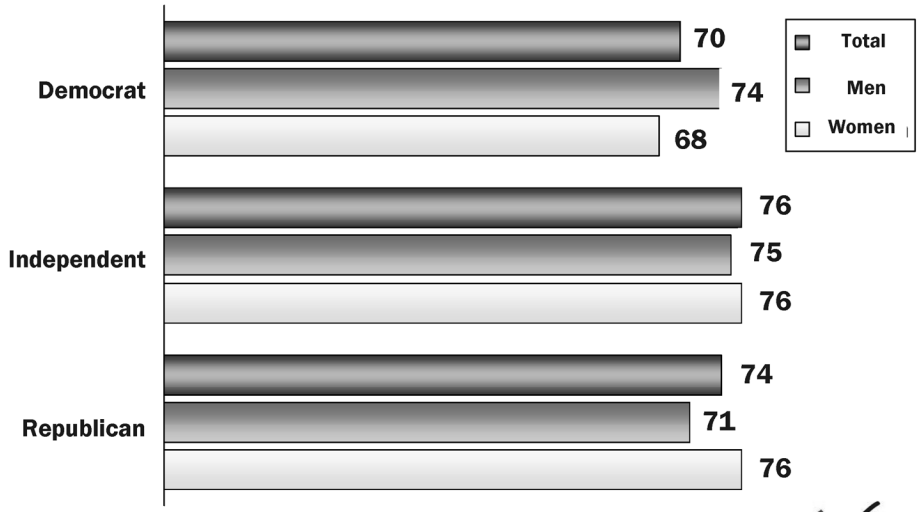
Support Crosses Party Lines



Percent Support Local Budgetary Control

DC Vote
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Low Awareness of the Problem

- Just over 80 percent of American adults are not aware that DC does not have equal Constitutional rights, including voting rights in Congress.
- Those who have visited the District are more informed than others.
- A majority are aware that DC citizens pay federal and state income taxes.

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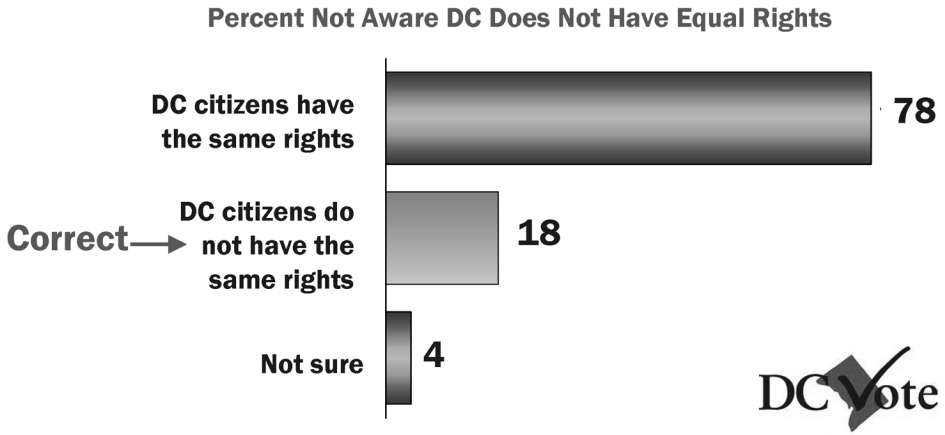
DC Vote
www.dcvote.org

Americans Remain Uninformed about DC's Political Status

"As far as you know, please tell me if each of the following statements is true or false... **Citizens who live in Washington, DC have the same constitutional rights as other U.S. citizens, including equal voting rights in Congress?"**



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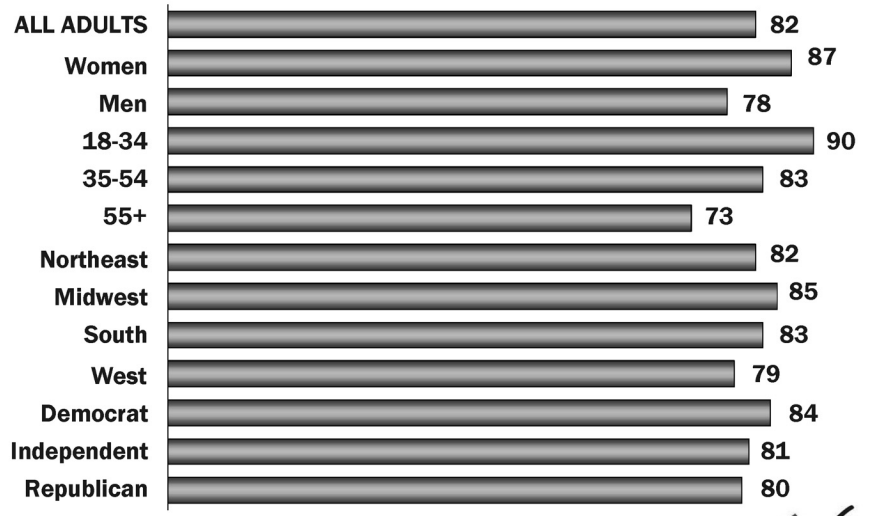
Majority of All Groups are Uninformed



Percent Not Aware DC Does Not Have Equal Rights

DC Vote
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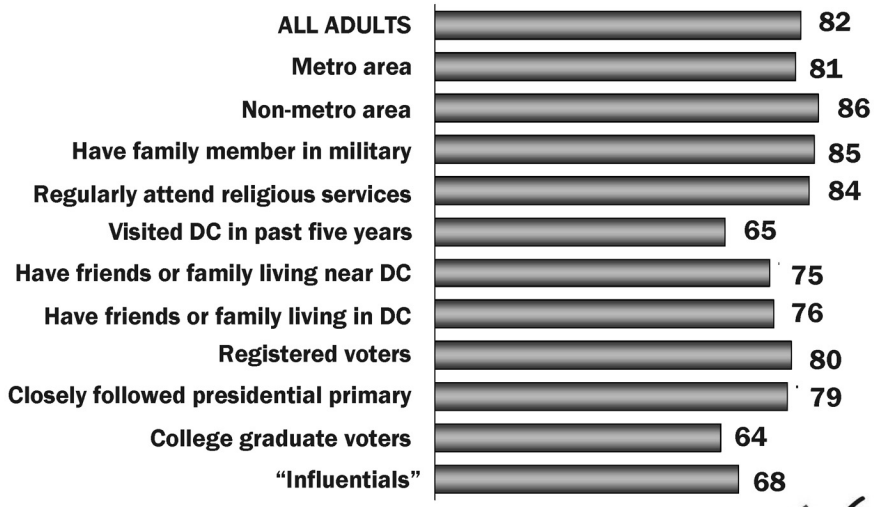
Majority of All Groups are Uninformed



Percent Not Aware DC Does Not Have Equal Rights

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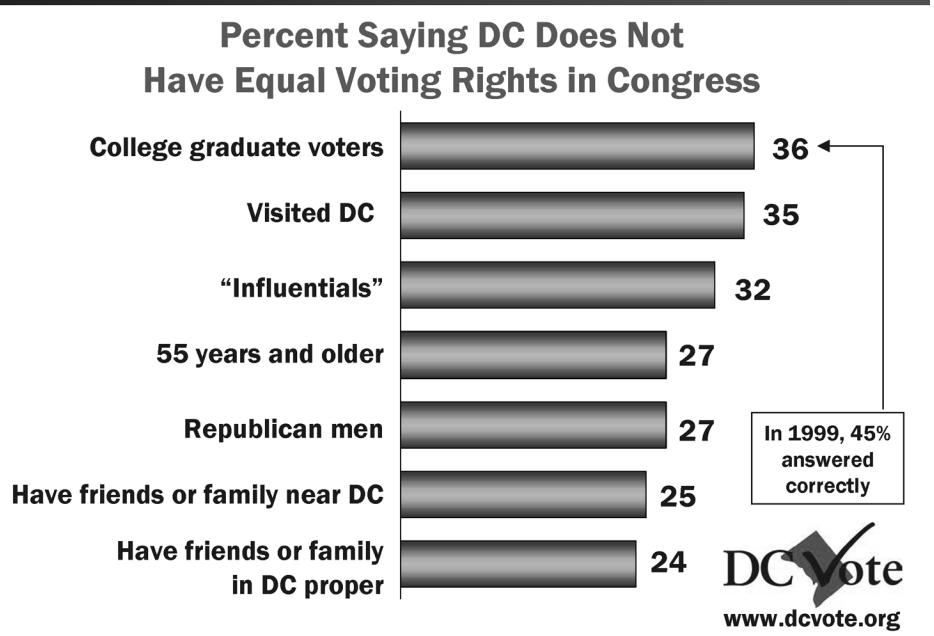
Most Informed Groups



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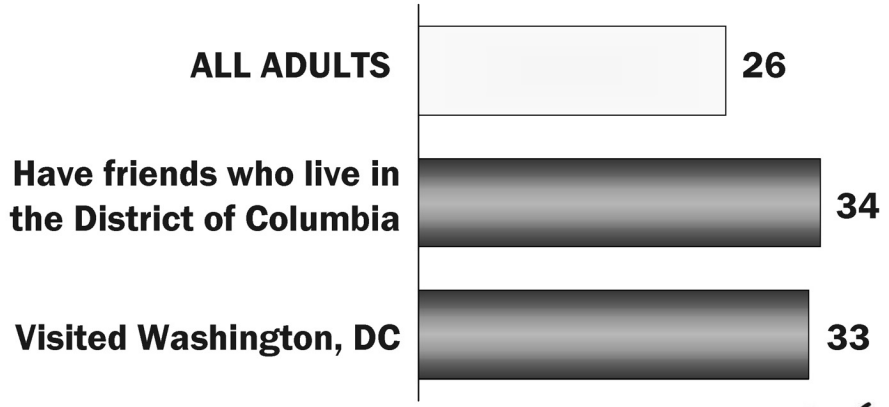
"Taxation without Representation" license plate

"As far as you know, please tell me if each of the following statements is true or false…**The citizens of Washington, DC changed their license plate motto to 'Taxation without Representation' to protest not having Congressional voting rights."**



DC Vote
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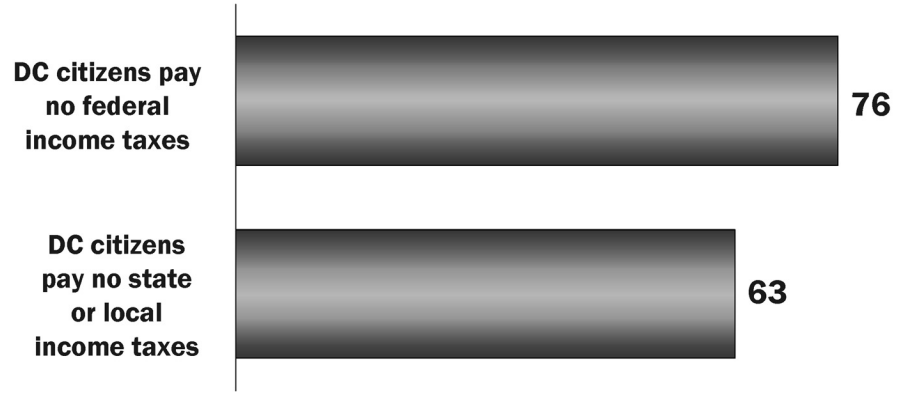
Most Americans Assume DC Pays Federal and State Income taxes

"As far as you know, please tell me if each of the following statements is true or false…"



Percent Saying "False"

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Messages for Communicating About DC Political Rights

- There are compelling reasons for supporting equal Congressional voting rights for DC.

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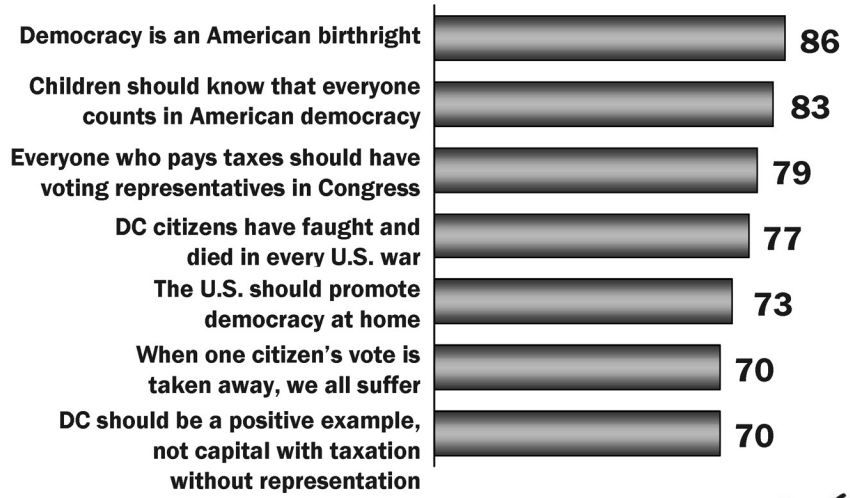
Good Reasons for Supporting Equal DC Voting Rights



Percent Saying "Good" or "Excellent" reason to Support Equal DC Voting Rights

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DC Vote
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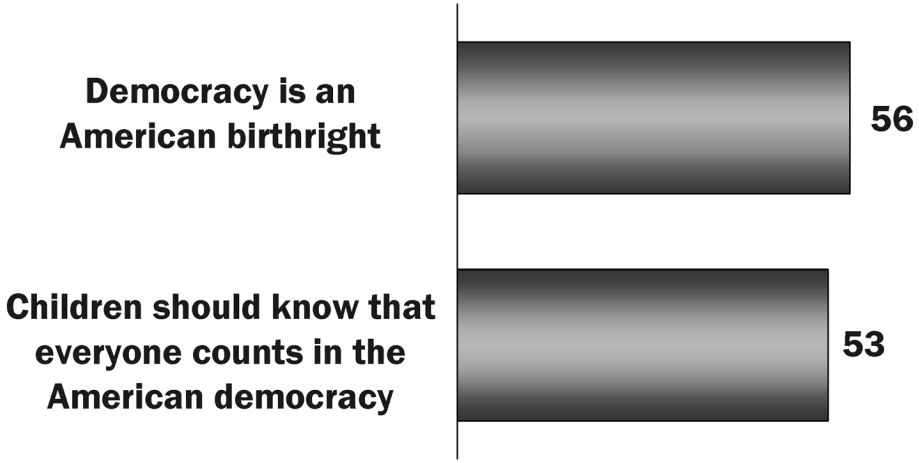
Excellent Reasons for Supporting Equal DC Voting Rights



Percent Saying "Excellent" reason to Support Equal DC Voting Rights

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DC Vote
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Questionnaire

KRC Research
January 2005

DC Vote
www.dcvote.org

Questionnaire

Now I'm going to ask you a few questions about U.S. citizens who live in Washington, DC.

As far as you know, please tell me if each of the following statements is true or false:

		True %	False %	Not Sure %
1.	Citizens who live in Washington, DC have the same constitutional rights as other U.S. citizens, including equal voting rights in Congress.	78	18	4
2.	Washington, DC citizens pay no federal income taxes.	12	76	12
3.	Washington, DC citizens pay no state or local income taxes.	19	63	17

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DC Vote
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Questionnaire

4a. **SPLIT SAMPLE A**: Nearly six hundred thousand U.S. citizens live in Washington, DC. Under the U.S. Constitution, Congress has exclusive legislative authority over the District government. Since 1961, DC citizens have had the right to vote in presidential elections. And since 1974 they have elected a limited home rule government paid for mostly by local taxes. DC citizens also pay full federal taxes and fight in every war. But, unlike citizens who live in the 50 states, they do not have voting representation in Congress—neither in the House of Representatives nor in the Senate. In your opinion, should DC citizens have equal voting rights in the House and the Senate, or not?

4b. **SPLIT SAMPLE B**: Nearly six hundred thousand U.S. citizens live in Washington, DC. They pay full federal taxes and fight in every war. But, unlike citizens who live in the 50 states, they do not have voting representation in Congress—neither in the House of Representatives nor in the Senate. In your opinion, should DC citizens have equal voting rights in the House and the Senate, or not?

	Combined (1,007) %	Version A (515) %	Version B (492) %
Yes, DC residents should have equal voting rights	82	82	83
No, DC residents should NOT have equal voting rights	13	13	13
Don't know	5	5	4

IF NO OR DON'T KNOW: Would you support Congressional voting rights for DC citizens in the House of Representatives only?

	%
Support voting rights in the House only	28
Do not support voting rights in the House	52
Don't know	20

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DC Vote
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Questionnaire

I'm going to read you some statements. For each one, please tell me if that statement is an excellent, a good, a fair, or a poor reason for why American citizens living in Washington, DC should have equal voting rights in the Senate and the House of Representatives. First… (ROTATE LIST)

		Excellent or Good %	Excellent %	Good %	Fair %	Poor %	Don't know %
5.	Democracy is an American birthright—all American citizens should have the right to vote in their national legislature.	86	56	30	7	4	3
6.	Washington, DC citizens should be able to teach their children that everyone counts in American democracy.	83	53	30	9	5	3
7.	Everyone who pays federal taxes should have voting representatives in Congress, where the decisions are made on taxes and spending.	79	49	30	11	6	4
8.	Washington, DC citizens have fought and died proudly for the United States in every war, and they are fighting in Iraq today.	77	47	30	11	8	4

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Questionnaire

		Excellent or Good %	Excellent %	Good %	Fair %	Poor %	Don't know %
9.	The U.S. is promoting democracy in places like Iraq—it should promote democracy here at home in its national capital.	73	43	30	12	10	5
10.	Even though I don't live in Washington DC, when one citizen's vote is taken away, American democracy suffers and it affects us all.	70	41	28	14	11	5
11.	Washington, DC should be a positive example of American democracy in the world, not the only national capital in the world that has taxation without representation.	70	38	32	15	9	5

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Questionnaire

12. Currently DC residents pay for most of the costs of their local government. Unlike other cities and states, DC's local government budget must be approved by the full Congress. Currently, Congress has final say on how the local DC budget is spent. There is a bill that would give the elected DC government the right to control its own local budget. Would you strongly support, somewhat support, somewhat oppose, or strongly oppose this bill?

	%
SUPPORT	**71**
Strongly support	32
Somewhat support	39
OPPOSE	**19**
Somewhat oppose	11
Strongly oppose	8
Don't know	10

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DC Vote
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Questionnaire

As far as you know, please tell me if each of the following statements is true or false:

		True %	False %	Don't know %
13.	The citizens of Washington, DC changed their license plate motto to "Taxation without Representation" to protest not having Congressional voting rights	26	45	29
14.	You have visited Washington, DC in the past five years	22	77	1
15.	You have friends or family who live near Washington, DC	37	61	1
16.	You have friends or family who live in Washington, DC itself	12	87	1
17.	You closely followed the Presidential election during 2004	79	19	1
18.	You or someone in your family serves in the U.S. military	47	51	1
19.	You attend religious services regularly	54	45	1
20.	You are registered to vote	86	13	1

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January 2005

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About KRC Research

• KRC Research is a full service, non-partisan, worldwide opinion research firm with offices in the District of Columbia, New York, Boston, and London. For over 25 years KRC has conducted a full range of custom qualitative and quantitative research projects for Fortune 500 companies, trade associations, governments, non-profit organizations, advertising and public relations agencies.

• KRC Research has worked in most industry and economic sectors including aerospace, agriculture, aviation, banking, biotechnology, development and facility siting, education, energy, entertainment, environment, financial services, government, health care, insurance, litigation support, marketing, regulatory, retail, and sports.

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January 2005

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For More Information

Contact:

Mark David Richards, PhD
Senior Vice President
KRC Research
700 Thirteenth Street NW
Washington, DC 20005
+1 202 585 2023
mrichards@krcresearch.com

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January 2005

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REPORT Nº 98/03*
CASE 11.204
STATEHOOD SOLIDARITY COMMITTEE
UNITED STATES
December 29, 2003

I. SUMMARY

1. On April 1, 1993, the Inter-American Commission on Human Rights (the "Commission") received a petition from Timothy Cooper on behalf of the Statehood Solidarity Committee (the "Petitioners") against the Government of the United States (the "State" or "United States"). The petition indicated that it was presented on behalf of the members of the Statehood Solidarity Committee and all other US citizens resident in the District of Columbia. [1]

2. The petition alleged that all efforts to invoke available internal remedies had failed, that all domestic remedies had been exhausted, and therefore that the petition was admissible. The petition also alleged that the United States was responsible for violations of Articles II (right to equality before law) and XX (right to vote and to participate in government) of the American Declaration of the Rights and Duties of Man in connection with the inability of citizens of the District of Colombia to vote for and elect members of the U.S. Congress.

3. The State has contended that the Petitioners' petition is inadmissible for failure to exhaust domestic remedies before the courts in the United States. It also argues that the complaint fails to state claim under Articles II or XX the American Declaration. According to the State, the special status given to the District of Columbia was based on geography alone rather than any individual characteristics such as race, gender, creed and the like, and therefore does not constitute a human rights violation. The State also contends that the residents of the District of Columbia are not excluded from the political process in the United States, and that the inability of District of Columbia residents to select voting members of Congress involves issues of constitutional law and federal structure that should be left in the realm of political debate and decision-making.

4. As set forth in this report, having examined the information and arguments provided by the parties on the question of admissibility, and without prejudging the merits of the matter, the Commission decided to admit the present petition in respect of Articles II and XX of the American Declaration. In addition, after having examined the merits of the Petitioners' claims, the Commission concluded that the State is responsible for violations of the Petitioners' rights under Articles II and XX of the American Declaration by denying the Petitioners an effective opportunity to participate in their federal legislature.

II. PROCEEDINGS BEFORE THE COMMISSION

5. Following the lodging of the Petitioners' petition on April 1, 1993, the Commission, by communications to the State and to the Petitioners dated May 28, 1993 and September 16, 1993, granted the Petitioners a hearing on their complaint, scheduled to take place on October 4, 1993. In addition, on or about September 1, 1993 the Petitioners delivered to the Commission a document entitled "Communication to the Inter-American Commission on Human Rights from the Petitioner, the Statehood Solidarity

Committee, Concerning the Admissibility of its Petition of April 1, 1993." The Commission subsequently transmitted the pertinent parts of this document to the State by note dated November 14, 1994.

6. The hearing before the Commission was convened on October 4, 1993. During the proceeding, the Petitioners presented oral submissions regarding the admissibility and merits of the complaint, and provided the Commission with documents regarding attempts to exhaust domestic remedies and the exercise of Congressional authority over the District of Columbia. Following the hearing, the Petitioners delivered to the Commission a further document concerning the exhaustion of their complaints dated October 12, 1993 and entitled "Memorandum on Exhaustion."

7. Subsequently, on October 18, 1993 the Commission decided to open Case Nº 11.204 in respect of the Petitioners' complaint and transmitted the pertinent parts of the petition to the State, with a request that the State provide information with respect to the communication within 90 days as established by the Commission's prior Regulations.[2] By note of the same date, the Commission informed the Petitioners that these steps had been taken and that they would be advised of any reply that the State might make.

8. By communication dated January 14, 1994, the State requested an extension of time to February 15, 1994 in order to prepare a response to the Petitioners' petition. Subsequently, by communication dated February 15, 1994, the State requested a further extension of time to March 17, 1994 to review the Petitioners' petition and to prepare a response, and in a further communication dated March 18, 1994, requested an extension of time to April 18, 1994 within which to respond to the Petitioners' petition. By note dated March 29, 1994, the Commission granted the State's request.

9. By note dated April 25, 1994, the State delivered to the Commission observations on the Petitioners' petition. In a note dated May 13, 1994, the Commission transmitted the pertinent parts of the State's observations to the Petitioners, with a response requested within 30 days.

10. In a letter dated June 13, 1994, the Petitioners requested an extension of time of one month within which to respond to the State's April 25, 1994 observations, which the Commission granted by note dated July 14, 2000.

11. The Petitioners subsequently delivered to the Commission by communication dated July 18, 1994 a response to the State's observations on their petition. In a note dated July 21, 1994, the Commission transmitted the pertinent parts of the Petitioners' response to the State, with observations requested within 60 days.

12. In a communication dated September 19, 1994, the State requested that certain discrepancies between the Petitioners' response and documents in the State's possession relating to the case be clarified and that the State be granted an extension of time of 60 days from the date of clarification of those discrepancies within which to reply to the Petitioners' response.

13. By note dated November 14, 1994, the Commission provided the State with responses to its requests for clarification and granted the State an extension of time of 60 days within which to reply to the Petitioners' response. Subsequently, in a communication dated December 23, 1994, the State requested a further extension of time to January 27, 1995 within which to reply to the Petitioners' response.

14. In a letter to the Commission dated December 20, 1994, the Petitioners requested a second hearing in the matter, which the Commission granted by note dated January 20, 1995. This hearing was subsequently held on February 3, 1995 during the Commission's 88th Period of Sessions. Representatives of the Petitioners and the State attended the hearing and made representations to the Commission on the admissibility and merits of the petition. In addition, the Petitioners presented several witnesses in support of their claims, including District of Columbia House of Representatives Delegate Eleanor Holmes Norton, George Washington University Professor Kenneth Bowling and American University Professor Jamin Raskin.

15. By communication dated February 7, 1995, the Petitioners provided the Commission with additional information on domestic proceedings before the U.S. courts concerning Congressional representation of District of Columbia residents, receipt of which the Commission acknowledged by note dated February 23, 1995.

16. By further note to the Petitioners dated February 23, 1995 and as part of its consideration of the case, the Commission requested certain information respecting the exhaustion of domestic remedies in connection with the Petitioners' claims. The Petitioners responded to the Commission's request by communication dated April 18, 1995, the pertinent parts of which the Commission transmitted to the State by note dated April 21, 1995, with a response requested within 30 days. In a note dated May 17, 1995, the Commission reiterated its request for information from the State.

17. In communications dated September 19 and September 20, 1995, receipt of which the Commission acknowledged in a note dated October 11, 1995, the Petitioners delivered to the Commission further information on the merits of their complaint.

18. By letter dated November 7, 1995, the Petitioners delivered to the Commission further observations in the case, the pertinent parts of which the Commission subsequently transmitted to the State by note dated December 14, 1995, with a response requested within 30 days. In a further note dated June 5, 1996, the Petitioners provided the Commission with additional information concerning Congressional authority over the District of Columbia.

19. In a communication dated September 11, 1996, the Commission reiterated its request to the State for information concerning the case, with a response requested within 30 days. By communication dated October 17, 1996, the State informed the Commission that it had nothing further to add to the Petitioners' observations by way of response.

20. By subsequent communications dated September 18, 1996, December 3, 1996 and December 10, 1996, the Petitioners delivered additional observations to the Commission concerning the decisions of domestic courts in the cases of *Darby v. United States* and *Albaugh v. Tawes*. In a further communication dated April 30, 1997, the Petitioners delivered to the Commission additional observations in the case, the pertinent parts of which the Commission subsequently transmitted to the State on September 19, 1997, with a response requested within 30 days.

21. The Petitioners provided the Commission with additional information concerning the exhaustion of domesti remedies in relation to the case of *Frank E. Howard v. State Administration Board of Election Laws et al.* in communication dated January 19, 1998. In a further letter to the Commission dated December 4, 1998, the Petitioners delivered to the Commission a document entitled "Memorandum on Exhaustion," which the Commission subsequently transmitted to the State by note dated August 17, 1999, with a response requested within 30 days. Similarly, by communication dated April 25, 2000, the Petitioners provided the Commission with additional information respecting their petition, which the Commission subsequently transmitted to the State by note dated April 27, 2000, with a response requested within 30 days.

22. In a note dated June 22, 2000, the State responded to the Commission's communication of April 27, 2000, in which it reiterated its position that the situation described in the Petitioners' petition did not involve a human rights violation and was therefore inadmissible under Articles 37 and 41 of the Commission's Regulations, and that the State had nothing further to submit on the case. The Commission transmitted the pertinent parts of the State's response to the Petitioners by note dated June 23, 2000, with a response requested within 30 days.

23. By letter dated October 17, 2000, the Petitioners provided the Commission with additional information respecting their petition. The letter indicated in particular that on October 16, 2000, the U.S. Supreme Court had affirmed a U.S. District three-judge court decision in two related cases, *Adams v. Clinton* and *Alexander et al. v. Daley,* denying D.C. residents full Congressional representation and equal protection

under the law. By communication dated October 23, 2000, the Commission acknowledged receipt of the Petitioners' communication.

24. Subsequently, in a letter dated February 26, 2001, the Petitioners delivered additional observations on the admissibility of the claims in their petition. By note dated May 22, 2001, the Commission transmitted the pertinent parts of the Petitioners' observations to the State, with a response requested within 30 days. In a further letter dated August 15, 2001, the Petitioners delivered to the Commission a memorandum on remedies for the complaints raised in their petition.

25. In notes to the State and the Petitioners dated August 21, 2001, the Commission placed itself at the disposal of the parties pursuant to Article 41 of its Rules of Procedure with a view to reaching a friendly settlement of the complaint. The Commission requested a response to its offer within 10 days, in default of which it would continue with consideration of the matter. By letter dated August 24, 2001, the Petitioners informed the Commission that in light of the past reticence of the United States to engage in any meaningful dialogue with the Statehood Solidarity Committee with regard to their case, they were of the view that accepting the Commission's proposal would only serve to delay the resolution of the matter and therefore that they declined the Commission's offer.

III. POSITIONS OF THE PARTIES

A. Position of the Petitioners

1. Admissibility

26. The Petitioners contend that their case is admissible in accordance with the Commission's Rules of Procedure. With respect to the issue of exhaustion of domestic remedies, the Petitioners claim that all efforts by them to invoke available remedies have failed and therefore that all local remedies have been exhausted.

27. In particular, the Petitioners claim that as early as 1846, the residents of the District of Columbia have attempted to invoke political and judicial mechanisms to remedy their absence of representation in the U.S Congress,[3] and that numerous legislative means and accommodations have since been attempted in ord to address the issue of representation in the District.[4] The Petitioners indicate that more recently, District residents were permitted to elect a non-voting delegate to the House of Representatives in 1970, and in 1973 Congress enacted limited "home rule" for the District, permitting the popular election of a mayor and city council, but retaining the exclusive authority of Congress over the affairs of the District. The Petitioners further note in this regard that an attempt was made in 1992 to provide the District's non-voting delegate i the House of Representatives with the power to vote on all substantive legislation before Congress by enhancing under the House Rules the delegate's voting power in the Committee of the Whole. However, according to the Petitioners this effort failed to afford the delegate with an effective vote, by depriving the delegate of a vote when his or her vote may be "decisive" on a matter.

28. Other political and legislative efforts referred to by the Petitioners to secure Congressional representation for District of Columbia residents include a "Voting Rights Amendment" to the U.S. Constitution proposed in 1978, that sought to provide voting representation to the residents of the District of Columbia, but which failed to achieve the required ratification of 3/4 of State legislatures. Also according to the Petitioners, attempts were made in 1992 and 1993 through bills in the House of Representatives and Senate to creat a state out of the non-federal areas of the District of Columbia, without success.

29. The Petitioners have also provided information with respect to unsuccessful efforts made through the domestic courts to obtain a remedy for their absence of representation in Congress.

30. The Petitioners refer in this regard to decisions of the U.S. Supreme Court that have concluded that the power of Congress over the District of Columbia is expansive.[5] They cite in particular that Court's decision in the case *Binns v. United States*,[6] in which the Supreme Court proclaimed that "Congress, in the government of the territories as well as the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution".[7]

31. The Petitioners have also relied upon cases in which individual claimants have specifically challenged Congressional authority over the District, based upon the absence of effective representation of District residents in the House of Representatives and Senate. In particular, the Petitioners refer to the case of *E. Scott Frison et al. v. U.S. et al.*,[8] in which the claimants charged that the United States had denied the citizens of the District of Columbia the right to vote in elections for Senators and Members of the House of Representatives and sought to preclude Congress from taking any actions that reduced the "status, autonomy, or fiscal support" of the District. In a January 31, 1995 judgment, the Court affirmed that it lacked jurisdiction over the subject matter of the litigation and noted that "under the Constitution the people of the District of Columbia - which is not a State - are not entitled to vote for Senators or Representatives." A motion for reconsideration was denied on May 12, 1995, and the U.S. Court of Appeals for the District of Columbia dismissed the claimants' appeal on October 4, 1995.

32. The Petitioners have also cited the case of *Darby v. U.S.*,[9] in which the claimant, a member of the Statehood Solidarity Committee, argued that courts established by Congress under Article 1, section 8 of the U.S. Constitution were created unconstitutionally, because, *inter alia*, District of Columbia residents were denied the right to representation in Congress in violation of their Fourteenth Amendment[10] rights. According to the Petitioners, the Court rejected the claimant's arguments based upon the fact that the "scope of Congressional power over the District of Columbia is expansive," and also rejected the claim that the residents of the District of Columbia were entitled under the U.S. Constitution to a republican form of government. The Petitioners indicate that the claimant also failed on appeal, and that the U.S. Supreme Court denied certiorari on December 9, 1996. Along a similar line, the Petitioners referred to the cases of *Hobson v. Tobiner*,[11] and *Carlina v. Board of Commissioners of the District of Columbia*,[12] in which residents of the District of Columbia alleged violations of their constitutional rights, including their rights under the Ninth,[13] Tenth,[14] and Fifteenth[15] Amendments to the U.S. Constitution. According to the Petitioners, the courts found these constitutional claims to be insubstantial, in part because they considered questions regarding the republican form of government for the District of Columbia to be political and not judicial in nature and therefore for the consideration of Congress and not the courts.

33. Most recently, the Petitioners have cited the consolidated cases of *Lois E. Adams v. Clinton* and *Clifford Alexander et al. v. Daley*,[16] in which the claimants, 75 residents of the District of Columbia together with th District of Columbia itself, challenged the denial of their right to elect representatives to the Congress of the United States as violating their rights to equal protection of the law and to a republican form of governmen under the provisions of the Fifth[17] and Fourteenth[18] Amendments to the U.S. Constitution. In rejecting th claim, the U.S. District Court for the District of Columbia indicated that it was "not blind to the inequities of the situation the plaintiffs seek to change." It nevertheless held that "long standing judicial precedent, as well as the Constitution's text and history, persuade us that this court lacks authority to grant plaintiffs the relief they seek." According to the Petitioners, the Court also confirmed previous findings that the residents of the District of Columbia do not have the right to vote of Members of Congress, and emphasized that the District was not a state and that Congressional representation was deeply tied to the structure of statehooc Further, the Court observed that "many courts have found a contradiction between the democratic ideals upon which this country was founded and the exclusion of District residents from Congressional representation. All, however, have concluded that it is the Constitution and judicial precedent that create the contradiction." By communication dated October 17, 2000, the Petitioners informed the Commission that on October 16, 2000, the U.S. Supreme Court affirmed the District Court's decision.

34. In addition to the above precedents, the Petitioners have cited cases in which the claimants have argued that the District of Columbia should be considered a part of the State of Maryland for the purpose of electing members of Congress. They refer, for example, to the case of *Albaugh v. Tawes*,[19] in which a resident of the District of Columbia filed a suit claiming that the District was still part of the state of

Maryland for the purpose of electing U.S. Senators. The Court rejected this claim based upon the Congressional power over the District of Columbia under the Organic Act of 1801 and Article 1 of the U.S. Constitution. Similarly, the Petitioners cited the case of *Frank E. Howard v. Maryland Administrative Board of Election Laws et al.*,[20] in which the Court found that the claimant had no right to participate in congressional elections in the State of Maryland.

35. Based upon the above observations, the Petitioners contend that they have satisfied the requirement under Article 37 of the Commission's prior Regulations, now Article 31 of the Commission's current Rules of Procedure, that domestic remedies be exhausted. In particular, they argue that a challenge to the absence of effective legislative representation of residents of the District of Columbia would at base be futile, because it would require a court to find a provision of the U.S. Constitution to be "unconstitutional," which the Petitioners claim is not possible. Accordingly, the Petitioners argue that the domestic legislation of the United States does not afford due process of law for the violations alleged in this case and therefore that the requirement to exhaust domestic remedies does not apply.[21]

36. In addition and in the alternative, the Petitioners claim that they have exhausted any effective remedies that may be considered to exist in the United States. In particular, they claim that the judicial decisions that they have described have confirmed the denial to District of Columbia residents of full Congressional representation and equal protection of the law and illustrate that no case challenging the status of District of Columbia citizens has been successful in achieving an adequate or effective remedy, or indeed any remedy at all. They also contend that these cases demonstrate that any future litigation in U.S. courts on the issues before the Commission would be futile. Accordingly, the Petitioners contend that domestic remedies have been exhausted in respect of the issues in their petition.

37. With respect to the timeliness requirements of Article 32 of the Commission's Rules of Procedure, the Petitioners claim that the violations alleged in their petition are continuing in nature, and therefore that the six-month rule is not applicable.[22]

38. In relation to the provisions on duplication of petitions under Article 39 of the Commission's prior Regulations, now Article 33 of the Commission's Rules of Procedure, the Petitioners have contended that no other petition or complaint raising the allegations in their petition is pending in any other forum, nor have the violations been previously considered by the Commission.

39. Finally, based upon their arguments on the merits of the case as summarized below, the Petitioners contend, contrary to the submissions of the State, that their petition is not manifestly groundless. Rather, they argue that the circumstances in their complaint disclose violations of Articles II and XX of the American Declaration attributable to the United States.

2. Merits of the Petitioners' Claims

40. In their petition and subsequent observations, the Petitioners contend that the State is responsible for violations of the right to equality under Article II of the American Declaration and the right to vote and to participate in government under Article XX of the American Declaration, in respect of the members of their organization and other residents of the District of Columbia.

41. More particularly, the Petitioners allege that as a consequence of Article 1, paragraph 8 of the U.S. Constitution[23] and the Act of Congress that created the District of Columbia in 1801,[24] the citizens of the District of Columbia are without effective representation in the U.S. federal legislature, having no representation in the U.S. Senate and no effective vote in the U.S. House of Representatives. As a consequence, they claim that, unlike citizens in all other states in the United States, the residents of the District of Columbia do not have the right to legislative, budgetary or full judicial autonomy. Rather, the U.S Congress and the U.S. President can overturn and disregard the District's locally-approved legislation or appropriations, without regard to the will of the people of the District, contrary to Article II of the Declaratior

42. Also in relation to Article II of the Declaration, the Petitioners cite statistics indicating that the population of the District of Columbia has evolved to encompass a majority of African-American citizens.[25] The Petitione suggest that these statistics, when viewed in light of historical patterns of Congressional attitudinal behavic toward efforts to provide representation to the District of Columbia, indicate that the District's status may b motivated by an animus against a particular racial group. The Petitioners further submit that, in any event, the appropriate test to determine the existence of discrimination under Article II of the Declaration is whether differential treatment is proved to be "reasonable" and that unreasonableness or injustice does nc depend on the intent or motive of the party charged with discriminatory treatment.[26]

43. In the Petitioners' view, applying this test in the circumstances of the present case leads to the result that the United States Government imposes an unjustified and arbitrary distinction upon the people of the District of Columbia which lacks a legitimate aim and an objective justification, and that this differential treatment bears no relationship of proportionality between the means employed and the aim sought to be realized.[27] To the contrary, the Petitioners claim that the differential treatment is detrimental to the residents of the District of Columbia, and cannot be properly justified by reference to the arguments of the framers of the U.S. Constitution at the time of the forming of the Republic over 200 years ago relating to the physical security of the federal seat of government.[28] The Petitioners note in this regard that according to the Department of Defense, as of February 28, 1994 there were 1,607,844 men and women employed by the Armed Services of the United States of America. In light of the U.S. government's present-day military capabilities, the Petitioners maintain that it is impossible to imagine circumstances under which the men, women and children of the District of Columbia could conceivably pose a viable threat to the seat of government.[29]

44. Further, the Petitioners argue that the members of the Statehood Solidarity Committee and other citizens o the District of Columbia are denied representation in their country's government through freely-elected representatives contrary to Article XX of the Declaration, as they have no meaningful representation in the federal House of Representatives and no representation whatsoever in the Senate. As a result, the Petitioners claim that they are excluded from participating in national and international policy-making decisions and cannot vote through their representatives on issues of national and local concern, such as ta policies, economic plans and health care legislation. In the Petitioners' view, full Congressional representation is a prerequisite for participation in the national government of the United States, and this has been denied to the citizens of the District of Columbia contrary to Article XX of the American Declaratio

45. The Petitioners point out generally in this regard that no other constitution in the Americas that creates a federal district does so without representation in the national legislature, and cite as examples Buenos Aires, Argentina, Brasilia, Brazil, Mexico City, Mexico and Caracas, Venezuela.[30] According to the Petitioners, the constitutions of all of these federal republics provide for full voting representation of residents of these federal districts in the national legislative body. As a consequence, the Petitioners claim that the United States remains the only nation in the hemisphere to deny citizens in a federal capital equal political participation in their national legislatures as well as the right to autonomy at the local level.

46. Similarly, the Petitioners contend that properly guaranteeing the rights protected under Article XX of the American Declaration requires the effective exercise of dynamic political power through representatives in a representative democracy. Accordingly, the Petitioners argue that the interpretation of "participation" provided by the State, which includes, for example, the presence of a shadow delegate for the District in the House of Representatives without full voting rights constitutes less than complete participation and should not be accepted as sufficient to guarantee the rights under Article XX of the Declaration.

47. The Petitioners also suggest that recent Commission jurisprudence supports the merits of their claims. They argue, for example, that their claims are similar to those in the case *Andres Aylwin Azocar et al. v. Chile*,[31] in which the complainants argued that Chile was responsible for violations of the right to participate in government and to equal protection of the law under Articles 23(1)(c) and 24 of the American Convention based upon the senator-for-life provisions of the Chilean Constitution. The Commission ultimately found these complaints to be admissible and, in a majority decision, substantiated on the merits. Moreover, the Petitioners claim that the dissenting opinion in the *Aylwin*

merits decision should not be considered to affect the admissibility of their claims, because, in the Petitioners' view, the claims in the present case satisfy even the more restrictive test articulated by the dissenting member regarding the circumstances under which the Commission may properly interfere in the institutional structures of a state, namely when those structures "impede the effective expression of the will of the citizens in a manifestly arbitrary manner."

48. The Petitioners likewise refer to the Commission's admissibility decisions in the cases of *Rios Montt v. Guatemala*[32] and *Susana Higuchi Miyagawa v. Peru*[33] and the authorities relied upon by the Commission in those decisions, and suggest that the Commission's treatment of the issues in those cases support the admissibility and substance of the claims in their petition. For example, the Petitioners contend that unlike the situation in the *Montt* Case, in which the Commission observed that the institutional structures at issue in that case were not uncommon and could be found elsewhere throughout the Americas, the District of Columbia is the only federal enclave in the Americas in which residents are denied effective representation in the national legislature. In respect of the *Higuchi* Case, in which the petitioner alleged the Peruvian government's responsibility for violations of Article 23 of the Convention for preventing her from standing for election as a candidate for the independent group "Armonía-Frempol" for the Democratic Constituent Congress of her country, the Petitioners emphasize the Commission's reliance in that case upon the principle that states may not invoke domestic law, constitutional or otherwise, to justify nonfulfillment of their international obligations.[34]

49. Based upon the foregoing submissions, the Petitioners argue that their claims are admissible and that they substantiate violations of their rights under Articles II and XX of the American Declaration for which the United States is responsible.

Continued...

B. Position of the State

50. The State argues that the Petitioners' petition should be considered inadmissible based upon two grounds. The State first claims that the petition was brought to the Commission prior to the initiation of any equivalent action in the U.S. courts and therefore that the Petitioners have failed to exhaust domestic remedies. In this regard, in its first response to the Petitioners' petition, the State claimed that the Petitioners "have not cited a single case brought before domestic courts in which it was alleged (much less determined) that the rights of District residents to equal protection under the law or to due process were violated by virtue of lack of representation in the Congress of the United States."[35] In addition, the State specifically rejects the Petitioners' contention that Article I of the U.S. Constitution is somehow exempt from the other provisions of the Constitution. Rather, the State argues that United States court decisions make plain that all other constitutional commands apply as much to the District of Columbia as they do to other areas of the country, and that Congress has the discretion to create institutions of government for the District and to define their responsibilities only so long as it does not contravene any other provision of the Constitution.[36]

51. Accordingly, the State submits that a claim that the treatment of the residents of the District of Columbia has violated the Fifth and Fourteenth Amendments to the U.S. Constitution would present complex issues of constitutional interpretation and, far from being futile, could readily be litigated in domestic courts.

52. As its second ground for the inadmissibility of the Petitioners' petition, the State contends that the complair fails to state a claim under the American Declaration. In this regard, the State argues that the decision of the drafters of the U.S. Constitution to make the District of Columbia a separate enclave rather than a state was not motivated by animus against a group of citizens, nor did it reflect an effort to disenfranchise its residents. Rather, the decision was a consequence of a federal structure of the United States, of the division of responsibilities between the states and the federal government, and, more specifically, of the desire to protect the center of federal authority from undue influence of the various states.[37]

53. According to the State, the decision to provide Congress with control over the federal District was also motivated by concerns that residents of the District might enjoy disproportionate influence on government affairs by virtue of their contiguity to, and residence among, members of the national government.

54. In these respects, therefore, the State contends that the special status given to the District of Columbia was based on geography alone rather than any individual characteristics such as race, gender, creed and the like, and therefore does not constitute a human rights violation. Rather, in the State's view, the District status is a justifiable and important aspect of the federal system of government freely chosen by the citizens of the United States.[38]

55. With regard to Article XX of the Declaration, the State contends that no where in this or any other Article of the Declaration is the modalities of participation in government specified. The Declaration does not, for example, indicate that participation should be effected through states or whether elections should be by legislative majority or proportionate rule, through a parliamentary system, federalism or the like. The State emphasizes in this regard that these are "complex issues over which unanimous agreement hardly can be reached within a single country, let alone in a multi-national setting. Instead, matters relating to the governmental structure ought to be determined by the citizens of each nation."[39] Considered in this light, the State submits that the decision in the United States that only states shall be directly represented in the House of Representatives and Senate, and that the seat of the federal government shall not be a state, is a matter properly within the discretion of nations.

56. Moreover, the State argues that the residents of the District of Columbia are not excluded from the political process in the United States. To the contrary, the State claims that District residents participate in the U.S. political processes through a variety of means, including voting in presidential elections, electing a mayor and city council, choosing a non-voting delegate in the House of Representatives who enjoys such benefits as floor privileges, office space, committee assignments and committee voting rights, and, since 1990, electing two non-voting senators and one non-voting representative whose roles

are to advocate the cause of statehood. Moreover, the State emphasizes that District residents have freely and openly debated issues regarding the District's status in the government, through proposed constitutional amendments and other legislation.[40]

57. Finally, the State claims that it recognizes that the inability of District of Columbia residents to select voting members of Congress is for many a significant political issue. The State considers, however, that the matte involves "delicate issues of constitutional law and federal structure that call into question the very organiza of the United States" and therefore should be left in the realm of political debate and decision-making.

IV. ANALYSIS

A. Competence of the Commission

58. The State is a Member State of the Organization of American States that is not a party to the American Convention on Human Rights, as provided for in Article 20 of the Commission's Statute and Article 23 of the Commission's Rules of Procedure. The United States deposited its instrument of ratification of the OAS Charter on June 19, 1951.[41]

59. While the situation upon which the Petitioners' complaint is based in part upon legislation that was enacted prior to the State's ratification of the OAS Charter, namely the U.S. Constitution of 1789 and the Organic Act of 1801, the violations of the Declaration alleged have continued and remained current after the date of ratification of the OAS Charter by the United States. That alleged violations of this nature fall within the scope of the Commission's competence to apply the American Declaration is consistent with the Commission's practice and that of other international human rights tribunals of applying human rights instruments to alleged violations that arose prior to the ratification of those instruments but which are continuing in nature and whose effects persist after the instruments' entry into force.[42]

60. Finally, the Petitioners are natural persons and the violations are said to have occurred within the territory of the United States. The Commission therefore concludes that it is competent to examine this petition.

B. Admissibility of the Petition

61. The Commission has not previously determined the admissibility of the complaints in the Petitioners' petition. In light of the length of time for which the petition has been outstanding and the numerous opportunities available to the parties to provide observations on the admissibility and merits of the claims raised in the Petitioners' petition, the Commission has decided to consider the admissibility of the Petitioners' claims together with their merits.

1. Duplication of Procedures

62. The Petitioners have claimed that no other petition or complaint raising the allegations in their petition is pending in any other international forum, and that the violations alleged have not been previously considered by the Commission, in accordance with Article 33 of the Commission's Rules of Procedure.[43] The State has not contested the issue of duplication of procedures. The Commission therefore finds no bar to the admissibility of the petition under Article 33 of the Commission's Rules of Procedure.

2. Exhaustion of Domestic Remedies

63. Article 31(1) of the Commission's Rules of Procedure specifies that, in order for a case to be admitted, the Commission must verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law.

64. The record in the present case indicates that certain residents of the District of Columbia including members of the Statehood Solidarity Committee have pursued remedies in the domestic courts of the United States in respect of various aspects of the claims in the Petitioners' petition. In particular, the information provided by the Petitioners indicates that in the consolidated cases of *Adams v. Clinton* and *Alexander et al. v. Daley*, the claimants argued, similar to the matter presently before the Commission, that they as residents of the District of Columbia were entitled to enjoy equal Congressional representation and full self-governance under the provisions of the Fifth[44] and Fourteenth[45] Amendments to the U.S. Constitution protecting the rights to equal protection of the law and to a republican form of government. The record also indicates that in a 68-page majority decision dated March 20, 2000, the U.S. District Court rejected the claimants' claims and that the U.S. Supreme Court affirmed the U.S. District Court's decision in a judgment dated October 16, 2000.

65. In its observations of April 25, 1994, the State made the general allegation that the Petitioners had failed to cite any cases brought before the domestic courts in which the violations alleged in the petition were raised before domestic courts, and suggested that it would be possible for the situation alleged in the Petitioners' petition to be challenged before domestic courts under the Fifth and Fourteenth Amendments to the U.S. Constitution. The State has subsequently made no observations on the issue of exhaustion of domestic remedies in this matter. Rather, the State indicated in its communications of October 17, 1996 and June 2, 2000 with the Commission that it had nothing further to submit in the case.

66. Based upon the information available, the Commission is satisfied that the Petitioners have exhausted domestic remedies. In particular, in the consolidated cases of *Adams v. Clinton* and *Alexander et al. v. Daley*, the absence of Congressional representation for residents of the District of Columbia has been unsuccessfully challenged before the U.S. District Court and the U.S. Supreme Court under the civil rights provisions of the U.S. Constitution, including the right to equal protection of the law and to a republican form of government. The State has failed to establish that additional effective remedies remain for the Petitioners to exhaust. Consequently, the Petitioners' petition is not barred from consideration under Article 31 of the Commission's Rules of Procedure.

3. Timeliness of the Petition

67. In accordance with Article 32(1) of the Commission's Rules of Procedure, the Commission shall consider those petitions that are lodged within a period of six months following the date on which the alleged victim has been notified of the decision that exhausted domestic remedies.

68. In the present case, the Petitioners' petition was not lodged beyond six months from the date on which the Petitioners were notified of the decision that exhausted domestic remedies, namely the October 16, 2000 decision of the U.S. Supreme Court dismissing the appeal in the consolidated cases of *Adams v. Clinton* and *Alexander et al. v. Daley*. The State has not contested the timeliness of the Petitioners' petition. Consequently, the Commission concludes that the Petitioners' petition is not barred from consideration under Article 31 of the Commission's Rules of Procedure.

4. Colorable Claim

69. Articles 34(a) and 34(b) of the Commission's Rules of Procedure require the Commission to declare inadmissible any petition when the complaint does not state facts that tend to establish a violation of the rights under the Convention or other applicable instruments, or where the statements of the petitioner or of the State indicate that the petition is manifestly groundless or out of order.

70. The Commission has outlined in Part III of this Report the substantive allegations of the Petitioners, as well as the State's responses to those allegations to the extent that such responses have been provided. After carefully reviewing the allegations in light of the information provided by both parties, the Commission does not find the Petitioners' complaints to be manifestly groundless or inadmissible. In reaching this conclusion, the Commission has been particularly mindful of the fundamental role that representative democracy has played in the formation and development of the Organization of American States and in securing the protection of human rights in this hemisphere.[46] Accordingly, the

Commission concludes that the Petitioners' petition is not inadmissible under Article 34 of the Commission's Rules of Procedure.

5. Summary

71. In accordance with the foregoing analysis of the requirements of the applicable provisions of the Commission's Rules of Procedure, the Commission decides to declare as admissible the claims presented by the Petitioners with respect to Articles II and XX of the Declaration, and to proceed to examine the merits of the case.

C. Merits

1. The Petitioners and Representation in the U.S. Congress

72. Based upon the observations of the Petitioners and the State in this matter, it is evident that the determination of the Petitioners' complaint requires at the outset a summary of the structure of the U.S. federation and the status of the District of Columbia within that structure.

73. In this regard, the Commission notes that the United States is a federal republic, with governments at the federal and state level. Under the U.S. Constitution and judicial interpretations thereof, exclusive and concurrent jurisdiction over particular areas of governance has fallen to each of the federal and state jurisdictions.[47] The federal government, for example, has specifically enumerated powers under article I, section 8 of the Constitution.[48]These powers include the broad authority under the "necessary and proper" clause of the U.S. Constitution[49]to pass laws implementing its enumerated powers for the full effectuation of national goals, such that any state legislation that might interfere with the exercise of these federal powers is invalid.[50] State legislatures, on the other hand, have residual authority over powers that are not delegated to the United States by the Constitution nor prohibited by it to the States.[51]

74. The U.S. federal government in turn is composed of an executive branch in the form of the President,[52] a legislative branch in the form of the U.S. Congress[53]and a judicial branch composed of one supreme court and such inferior courts as Congress has from time to time established.[54] The U.S. Congress is bicameral, being comprised of a House of Representatives and a Senate. The House of Representatives consists of members elected every second year by people of the States and apportioned on the basis of population.[55]The Senate is composed of two senators from each state elected for six year terms.[56]

75. At issue in the present case is the role of the residents of the District of Columbia in the legislative branch of the federal government. As illuminated by the observations of the parties and domestic judicial decisions relating to this issue, it appears undisputed that individuals who live in the District of Columbia and would otherwise be eligible to vote in U.S. federal elections may cast a vote for the U.S. President[57]but may not vote for or elect full members of the House of Representatives or the Senate. This circumstance stems from the terms of the U.S. Constitution as well as the federal legislation through which the District of Columbia was subsequently created.

76. In particular, the preclusion of the right on the part of residents of the District of Columbia to elect members of the House of Representatives is derived from Article 1, section 2, clause 1 of the U.S. Constitution, which provides:

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

77. Judicial authorities in the United States have interpreted this provision, in light of its text, history and judicial precedent, as only permitting states to elect members of the House of Representatives, and have held that the District of Columbia cannot be considered a "state" within the meaning of the provision.[58]

78. Similarly with respect to the U.S. Senate, as originally provided under Article I, section 3 of the U.S. Constitution the Senate was to be "composed of two Senators from each State," chosen not "by the People of the several States," as in the case of the House, but rather "by the Legislature thereof."[59] In 1913 the Seventeenth Amendment granted to the people of "each State," rather than their legislatures, the right to choose Senators.[60] and after that change the provisions concerning qualifications and vacancies for the Senate have essentially paralleled those for the House.[61] As with the House of Representatives, the U.S. courts have concluded that the framers of the Constitution did not contemplate allocating two Senators to the District of Columbia, as the Senate was expressly viewed as representing the states themselves. Further, the guarantee of two senators for each State was an important element of the "Great Compromise" between the smaller and larger states that ensured ratification of the Constitution, such that the smaller states were guaranteed equal representation notwithstanding their smaller population.[62]

79. The findings of the U.S. judiciary as to the absence of Congressional voting rights for D.C. residents have also been based upon the terms of the so-called "District clause" in the Constitution, as well as by the Organic Act of 1801 by which the District of Columbia was created. According to Article I, section 8, clause 17 of the U.S. Constitution, Congress is expressly granted the power to "exercise exclusive Legislation in all Cases whatsoever" over the district that would become the seat of government.[63] When the District of Columbia was ultimately created from land ceded by Maryland and Virginia through the passage of the Organic Act of 1801,[64] it appears to have been generally accepted that once Congress assumed jurisdiction over the District, individuals residing in the District would lose their right to vote for Congress.[65] Likewise, since February 1801 District residents have been unable to vote in either Maryland or Virginia.[66]

80. As to the purpose underlying the treatment of the District of Columbia, it appears to be generally accepted that the historic rationale for the District Clause was to ensure that Congress would not have to depend upon another sovereign for its protection.[67] In particular, authorities claim that the District Clause was adopted in response to an incident in Philadelphia in 1783 in which a crowd of disbanded Revolutionary War soldiers, angry at not having been paid, gathered to protest in front of the building in which the Continental Congress was meeting under the Articles of Confederation. As described by the U.S. District Court:

> Despite requests from the Congress, the Pennsylvania state government declined to call out its militia to respond to the threat, and the Congress had to adjourn abruptly to New Jersey. The episode, viewed as an affront to the weak national government, led to the widespread belief that exclusive federal control over the national capital was necessary. "Without it," Madison wrote, "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." [68]

81. The record before the Commission indicates that since the inception of the District, numerous initiatives have been attempted to provide residents of the District with representation at the local and federal levels. These have included: a constitutional amendment allowing for participation by residents of the District in Presidential elections in 1960; passage of the District of Columbia Delegate Act [69] in 1970 which provided the District with one non-voting delegate in the House of Representatives who enjoys floor privileges, office space, committee assignments and committee voting rights but was not empowered to vote on legislation brought before the House of Representatives; passage of the District of Columbia Self-Government and Governmental Reorganization Act, or Home Rule Act,[70] in 1973 which led to the election of a city council and mayor; the election by the District since 1990 of "shadow"

representatives, namely two non-voting senators and one non-voting representative whose role is to advocate the cause of statehood;[71] and the granting in 1993 to the District delegate and all territorial non-voting delegates the right to vote in Congress' Committee of the Whole.[72] With respect to this latter development, it is the Commission's understanding based upon the parties' information that the vote of the District's delegate in the Committee of the Whole is subject to a "saving clause" that prevents the District and territorial delegates from casting a deciding vote on the passage of any Congressional legislation in the Committee of the Whole.[73]

82. Based upon the record before it, therefore, the Commission finds that the Petitioners, as residents of the District of Columbia, are not permitted to vote for or elect members of the U.S. Senate. While the Petitioners are permitted to elect a member of the House of Representatives, that member cannot cast a deciding vote in respect of any of the matters coming before the House. This is in contrast to the residents of States in the United States, who have the right under the U.S. Constitution to elect members of both the Senate and the House of Representatives. The Commission also finds that the basis for this distinction lay with the desire of the original framers of the Constitution to protect the center of federal authority from undue influence of the various States, and at the same time avoid the possibility that the residents of the District might enjoy a disproportionate influence on governmental affairs by virtue of their contiguity to, and residence among, members of the federal government.

2. Articles II and XX of the American Declaration – Interpretation and Application of the Right to Equal and Effective Participation in Government

83. As particularized above, the Petitioners have alleged that the United States is responsible for violations of Articles II and XX of the American Declaration in respect of the members of the Statehood Solidarity Committee and other residents of the District of Columbia. This allegation is based on the contention that the Petitioners, unlike residents elsewhere in the United States, have no meaningful representation in the federal House of Representatives and no representation whatsoever in the Senate, and are therefore denied effective participation in the national legislature. They also contend that these limitations are manifestly arbitrary and that the State has failed to provide any adequate justification for them.

84. **Articles II and XX of the American Declaration** provide:

> **Article II.** All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.
>
> **Article XX.** Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

85. The Commission has long recognized the significance of representative democracy and associated political rights to the effective realization and protection of human rights more broadly in the hemisphere. According to the Commission

> [t]he participation of citizens in government, which is protected by Article XX of the Declaration forms the basis and support of democracy, which cannot exist without it; for title to government rests with the people, the only body empowered to decide its own immediate and future destiny and to designate its legitimate representatives.
>
> Neither form of political life, nor institutional change, nor development planning or the control of those who exercise public power can be made without representative government.
>
> [...]

> The right to political participation leaves room for a wide variety of forms of government; there are many constitutional alternatives as regards the degree of centralization of the powers of the state or the election and attributes of the organs responsible for the exercise of those powers. However, a democratic framework is an essential element for establishment of a political society where human values can be fully realized.[74]

86. The central role of representative democracy in the inter-American system is evidenced in the provisions of the system's founding instruments, including Article 3(d) of the Charter of the OAS[75] which confirms that "solidarity of the American states and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy." Resolutions adopted by the Organization's political organs have likewise reflected the indispensability of democratic governance to the stability, peace and development of the region. In OAS General Assembly Resolution 837, for example, OAS member states reaffirmed the "inalienable right of all of the peoples of the Americas freely to determine their political, economic and social system without outside interference, through a genuine democratic process and within a framework of social justice in which all sectors of the population will enjoy the guarantees necessary to participate freely and effectively through the exercise of universal suffrage."[76] Citing these and other similar instruments, the Commission recently reaffirmed that "there is a conception in the inter-American system of the fundamental importance of representative democracy as a legitimate mechanism for achieving the realization of and respect for human rights; and as a human right itself, whose observance and defense was entrusted to the Commission."[77] According to the Commission, this conception implies protecting those civil and political rights in the framework of representative democracy, as well as the existence of institutional control over the acts of the branches of government, and the rule of law.[78]

87. The Commission is therefore of the view that those provisions of the system's human rights instruments that guarantee political rights, including Article XX of the American Declaration, must be interpreted and applied so as to give meaningful effect to exercise of representative democracy in this Hemisphere. The Commission also considers that insights regarding the specific content of Article XX of the Declaration can properly be drawn from Article 23 of the American Convention and the Commission's previous interpretation of that provision,[79] which parallels in several fundamental respects Article XX of the Declaration. **Article 23 provides as follows:**

> **1. Every citizen shall enjoy the following rights and opportunities:**
>
> **a. to take part in the conduct of public affairs, directly or through freely chosen representatives;**
> **b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and**
> **c. to have access, under general conditions of equality, to the public service of his country.**
>
> **2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.**

88. In interpreting Article 23 of the American Convention, the Commission has recognized that a degree of autonomy must be afforded to states in organizing their political institutions so as to give effect to these rights, as the right to political participation leaves room for a wide variety of forms of government.[80] As the Commission has appreciated, its role or objective is not to create a uniform model of representative democracy for all states, but rather is to determine whether a state's laws infringe fundamental human rights.[81] The Commission has similarly recognized that not all differences in treatment are prohibited under international human rights law, and this applies equally to the right to participate in government.[82]

89. This does not mean, however, that the conduct of states in giving effect to the right to representative government, whether by way of their constitutions or otherwise,[83] is immune from review by the Commissi

Rather, certain minimum standards or conditions exist respecting the manner in which this right is given eff which must be shown to have been satisfied. These standards or conditions relate primarily to the nature c permissible limitations that may be imposed on the exercise of such rights. The Commission has noted in t regard that Article 23(2) of the American Convention provides an exhaustive list of grounds upon which sta may properly base limitations of the exercise of the rights and opportunities referred to in Article 23(1) of th Convention, namely on the basis of age, nationality, residence, language, education, civil and mental capac or sentencing by a competent court in criminal proceedings.[84]

90. More generally, the Commission has held that its role in evaluating the right to participate in government is to ensure that any differential treatment in providing for this right lacks any objective and reasonable justification.[85] In this connection, in securing the equal protection of human rights, states may draw distinctions among different situations and establish categories for certain groups of individuals, so long as it pursues a legitimate end, and so long as the classification is reasonably and fairly related to the end pursued by the legal order.[86] And as with other fundamental rights, restrictions or limitations upon the right to participate in government must be justified by the need of them in the framework of a democratic society, as demarcated by the means, their motives, reasonability and proportionality.[87] At the same time, in making these determinations, the Commission must take due account of the State's degree of autonomy in organizing its political institutions and should only interfere where the State has curtailed the very essence and effectiveness of a petitioner's right to participate in his or her government.[88]

91. This approach to the interpretation and application of the right under Article 23 of the American Convention and Article XX of the American Declaration to participate in government is consistent with jurisprudence from other international human rights systems concerning similar treaty protections. The European Court of Human Rights, for example, had occasion to interpreting Article 3 of Protocol I to the European Convention[89] in the context of a complaint challenging Belgian legislation that transitionally demarcated the territory of Dutch-speaking and French-speaking regions of Belgium and placed linguistic restrictions upon representation and membership for minority language groups in the Community and Regional Councils and Executives of those regions.[90] In disposing of the complaint, the European Court indicated that the rights encompassed in Article 3 of Protocol I are not absolute, but rather that there is room for "implied limitations."[91] Moreover, the Court proclaimed that states have a "wide margin of appreciation" in implementing the rights under Article 3 of Protocol I, but that

> [i]t is for the Court to determine in the last resort whether the requirements of Protocol N° 1 (P1) have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate. In particular, such conditions must not thwart 'the free expression of the opinion of the people in the choice of the legislature.'".[92]

92. According to the European Court, any electoral system must also be assessed in the light of the political evolution of the country concerned, for, in its view, "features that would be unacceptable in the context of one system may accordingly be justified in the context of another, at least so long as the chosen system provides for conditions which will ensure the "free expression of the opinion of the people on the choice of the legislature."[93] In ultimately dismissing the applicants' complaint, the Court emphasized that

> [i]n any consideration of the electoral system in issue, its general context must not be forgotten. The system does not appear unreasonable if regard is had to the intentions it reflects and to the respondent State's margin of appreciation within the Belgian parliamentary system – a margin that is all the greater as the system is incomplete and provisional.[94]

93. Similar principles governing the right to political participation have been elucidated in the UN human rights system. Article 25(b) of the International Covenant on Civil and Political Rights provides that "[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: [...] (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." Like the European Court and this Commission, the UN Human Rights Committee has

recognized that the rights protected under Article 25 of the ICCPR are not absolute, but that any conditions that apply to the right to political participation protected by Article 25 should be based on "objective and reasonable criteria."[95] The Committee has also found that in light of the fundamental principle of proportionality, greater restrictions on political rights require a specific justification.[96]

94. The Commission also observes that in affording individuals the rights prescribed under Article XX of the Declaration, they must do so on the basis of equality and without discrimination as mandated by Article II of the Declaration. As with permissible restrictions under Article XX itself, Article II of the Declaration allows for differential treatment but only when that treatment is based upon factual differences and there exists a reasonable relationship of proportionality between these differences and the aims of the legal rule under review, due account being taken of the State's prerogative in choosing its political institutions.[97]

95. In evaluating the circumstances of the present case in light of the above principles, the Commission must first address whether the rights of the Petitioners under Article XX of the American Declaration to participate in their government have, on the evidence, been limited or restricted by the State. In this respect, the State does not contest that the U.S. Constitution, by its terms and as interpreted by the courts in the United States, does not permit the Petitioners and other residents of the District of Columbia to elect representatives to their national legislature.

96. Nevertheless, the United States appears to suggest that District residents are afforded an adequate right to participate in the government of the United States and to take part in popular elections in compliance with Article XX of the Declaration, by reason of other political activities that are open to them. According to the State, these include their ability to vote in Presidential elections, to elect a mayor and city council, and the presence of one non-voting delegate in the House of Representatives and three "shadow" representatives in Congress. The State also points to the fact that the District's status is freely and openly debated in the government through, for example the presentation of statehood bills in Congress. The State therefore contends that by any measure, District residents have been able to take part in "healthy and robust debate" concerning all issues of national concern, including the status of the District itself.

97. Upon consideration of the parties' observations on the record of the case, the Commission must conclude that the Petitioners' rights to participate in the federal legislature of the United States have been limited or restricted both in law and in fact. As noted, it is agreed that as a matter of domestic constitutional law the Petitioners are not afforded the right to elect members of either chamber of Congress. While the State has contended that the District of Columbia elects a delegate to the House of Representatives who has the right to vote upon legislation in the Committee of the Whole,[98] the record indicates that the delegate is prohibited from casting a deciding vote in respect of any legislation that comes before Congress. On this basis, the State's own courts have proclaimed that the vote extended to the District of Columbia delegate in the Committee of the Whole has no chance of affecting the ultimate result of matters coming before the Committee and is therefore "meaningless."[99] Accordingly, the Commission cannot accept this arrangement as providing the Petitioners with effective participation in their legislature. For similar reasons, the ability of the Petitioners to elect representatives to other levels and branches of government and to participate in public debates on the status of the District of Columbia cannot be considered equivalent to the nature of participation contemplated by Article XX of the Declaration, which, in the Commission's view, entitles the Petitioners to a meaningful opportunity, directly or through freely elected representatives, to influence the decisions of government that affect them, including those of the federal legislature.

98. Therefore, to the extent that each of the Petitioners, unlike similarly-situation citizens elsewhere in the United States, does not have the right to vote for a representative in their national legislature who has an effective opportunity to influence legislation considered by Congress, the Commission considers that they have been denied an equal right under law in accordance with Article II of the Declaration to participate in the government of their country by reason of their place of residence, and accordingly that their right under Articles XX of the Declaration to participate in their federal government has been limited or restricted. In this respect, the Commission has noted the Petitioners' allegations regarding the existence of a Congressional intent to discriminate against a particular racial group in light of the

considerable African-American majority that has evolved in the District's population over the past 40 years. The Commission is concerned that these circumstances raise the possibility that the absence of Congressional representation for the District of Columbia has had a disproportionately prejudicial impact upon a particular racial group, namely the African-American community residing in the District. After careful consideration of the record before it, however, the Commission does not find the allegations regarding the existence of a racially discriminatory intent on the part of Congress to have been adequately briefed so as to enable it to make a specific determination on this issue.

99. The Commission must next consider whether this restriction or limitation on the rights under Article XX and II of the Declaration to vote and to participate in government with equality under law is nevertheless justified when analyzed in the general political context of the State concerned and thereby permissible under these articles of the Declaration. As noted above, this entails evaluating whether the restrictions imposed by the State may be considered to curtail the very essence and effectiveness of the Petitioners' right to participate in their government and whether the State has offered a reasonable, objective and proportionate justification for the restrictions.

Continued...

100. In this respect, the State has provided a number of explanations or justifications for the Petitioners' treatment which, in its view, should preclude the Commission from finding any violations of Articles II and XX of the American Declaration. In particular, as noted above, the State argues that the issue raised by the Petitioners relates at base to the federal structure of the United States and the decision by its founders to constitute a union of relatively autonomous states. According to the State, it is the absence of the District's status as a state, and not any conscious decision by the U.S. government, discriminatory or otherwise, to disenfranchise the Petitioners or other residents of the District of Columbia, that has resulted in their status vis a vis the U.S. Congress. The decision of the framers of the U.S. Constitution in turn was, according to the State and the Petitioners alike, based upon the desire to protect the center of federal authority from undue influence of the various States, and at the same time avoid the possibility that the residents of the District might enjoy a disproportionate influence on governmental affairs by virtue of their "contiguity to, and residence among, members of the General government." [1100] As such, the State suggests that these decisions not only justify the limitation on the Petitioners' right to elect members of Congress, but concern the very organization of the United States and therefore should be left to the realm of political debate and decision-making.

101. In entering into this stage of its analysis, the Commission acknowledges the degree of deference that must properly be afforded to states in organizing their political institutions so as to give effect to the right to vote and to participate in government. The Commission should only interfere in cases where the State has curtailed the very essence and effectiveness of an individual's right to participate in his or her government. After considering the information on the record, however, the Commission finds that the restrictions on the Petitioners' rights under Article XX to participate in their national legislature have been curtailed in such a manner as to deprive the Petitioners of the very essence and effectiveness of that right, without adequate justification being shown by the State for this curtailment.

102. The Commission notes in this regard that the political structure of the United States has been developed so as to provide for both state and federal levels of government, each with exclusive areas of jurisdiction under the Constitution. Consistent with this, the U.S. Congress, as the legislative branch of the federal government, has been afforded extensive powers to consider and enact legislation in areas such as taxation, national defense, foreign affairs, immigration and criminal law. It is also clear that these powers and legislative measures are binding upon or otherwise affect residents of the District of Columbia as they do other citizens of the United States. Indeed, as a consequence of Article I, section 8 of the U.S. Constitution and the Organic Act of 1801, Congress has the exceptional authority to exercise all aspects of legislative control over the District, subject to what aspects of that authority Congress may delegate to District authorities through appropriate federal legislation.

103. Despite the existence of this significant and direct legislative authority that Congress exercises over the Petitioners and other residents of the District of Columbia, however, the Petitioners have no effective right to vote upon those legislative measures, directly or through freely chosen representatives, and it is not apparent from the record that Congress is responsible to the Petitioners for those measures by some other means. In this manner, Congress exercises expansive authority over the Petitioners, and yet it is in no way effectively accountable to the Petitioners or other citizens residing in the District of Columbia. This, in the Commission's view, has deprived the Petitioners of the very essence of representative government, namely that title to government rests with the people governed.

104. Both the Petitioners and the State have suggested that the foundation of the denial to the Petitioners of the right to vote for and elect members of Congress lay upon concerns existing at the time the U.S. Constitution was negotiated over 200 years ago that the seat of the federal government may be disproportionately threatened, or the position of a state correspondingly enriched, by placing Congress within a State.

105. The Commission has recognized and given due consideration to the fact that these concerns may have justified depriving residents of the District of elected representation in Congress at the time that the U.S. Constitution was enacted and indeed may have been indispensable to the Constitution's negotiation. However, as with all protections under the American Declaration, the Commission must interpret and apply Articles II and XX in the context of current circumstances and standards. [1101] Not only has the State

failed to offer any present-day justification for the Petitioners' denial of effective representation in Congress, but modern developments within the United States and the Western Hemisphere more broadly indicate that the restrictions imposed by the State on the Petitioners' right to participate in government are no longer reasonably justified.

106. Significantly, the State's judicial branch has specifically concluded that the historical rationale for the District Clause in the U.S. Constitution would not today require the exclusion of District residents from the Congressional franchise and has accepted that denial of the franchise is not necessary for the effective functioning of the seat of government.[102] It is also notable in this regard that domestic courts in the United States have found that the exclusion of District residents from the Congressional franchise does not violate the right to equal protection under the U.S. Constitution, not because the restriction on their right to elect Congressional representatives have been found to be justified, but because the limitation is one drawn by the Constitution itself and accordingly cannot be overcome by the one person, one vote principle.[103] The American Declaration prescribes no similar limits or qualifications upon the guarantee of the rights under Articles II and XX and, as indicated above, establishes standards that apply to all legislative or other enactment by a state, including its constitutional provisions.

107. Numerous political initiatives have been undertaken in the United States in recent years to extend some measure of national representation for D.C. residents, which similarly recognize the present-day inadequacy of the Petitioners' status in the federal system of government. These have included, for example, granting District residents in 1960 the right to vote in Presidential elections through the 23rd amendment to the U.S. Constitution, the passage of the District of Columbia Delegate Act in 1970 which provided the District of Columbia with a non-voting delegate in the House of Representatives, and the extension to the D.C. delegate in 1993 of a limited right to vote in Congress' Committee of the Whole.

108. The Commission also considers it significant that according to the information available, no other federal state in the Western Hemisphere denies the residents of its federal capital the right to vote for representatives in their national legislature. In Canada, for example, the City of Ottawa constitutes a part of the Province of Ontario and accordingly its residents are entitled to elect Members of Parliament in the federal House of Commons on the same basis as residents in other provincial electoral divisions.[104] The City of Buenos Aires, while constituting a separate enclave similar to the District of Columbia, is entitled to elect deputies and senators to Argentina's national legislature.[105] Similarly, the residents of Brasilia, Brazil,[106] Caracas, Venezuela,[107] and Mexico City, Mexico,[108] all of which constitute federal enclaves or districts, have voting representation in their national legislatures.

109. Based upon the foregoing analysis, the Commission concludes that the State has failed to justify the denial to the Petitioners of effective representation in their federal government, and consequently that the Petitioners have been denied an effective right to participate in their government, directly or through freely chosen representatives and in general conditions of equality, contrary to Articles XX and II of the American Declaration.

110. It also follows from the Commission's analysis that securing the Petitioners' rights under Articles II and XX of the Declaration does not necessarily require that they be afforded the same means or degree of participation as residents of states in the United States. What the Declaration and its underlying principles mandate is that the State extend to the Petitioners the opportunity to exercise a meaningful influence on those matters considered by their governing legislature, and that any limitations and restrictions on those rights are justified by the State as reasonable, objective and proportionate, taking due account of the context of its political system. As Article XX of the Declaration suggests, this is generally achieved through the election of representatives to the legislature who may cast a vote on matters before the legislature that has a meaningful possibility of affecting the outcome of those deliberations. Nevertheless, the mechanisms through which the State may afford these opportunities are clearly a matter for the discretion of the State concerned.

V. PROCEEDINGS SUBSEQUENT TO REPORT 115/01

111. On October 15, 2001, the Commission adopted Report 115/01 pursuant to Article 43 of its Rules of Procedure, setting forth its analysis of the record, findings and recommendations in this matter.

112. Report 115/01 was transmitted to the State by note dated October 19, 2001, with a request that the State provide information as to the measures it had taken to comply with the recommendations set forth in the report within a period of two months, in accordance with Article 43(2) of the Commission's Rules.

113. By communication dated December 18, 2001 and received by the Commission on December 19, 2001, th State delivered a response to the Commission's request for information, in which it indicated as follows:

> As the United States has previously indicated, the petition submitted in Case No. 11.204 is inadmissible for the reasons detailed in the numerous submissions to the Commission. The petition in this matter fails to state a claim under the American Declaration on the Rights and Duties of Man ("Declaration"), and on this basis, the United States respectfully requests that the Commission withdraw Report No. 115/01 and order the petition dismissed.
>
> First, petitioners have failed to allege facts that establish a violation of the right to vote as set forth in Article I of the Declaration. The decision to establish the District of Columbia as a federal enclave in which the residents have voting rights that differ from residents of other areas of the United States was not based on any improper grounds as set forth in Article II. Instead, the decision was based on matters of federalism, unrelated to "race, sex, language, creed or any other factor."
>
> Likewise, the petition fails to establish a violation of Article XX of the Declaration. Neither the petition, nor the Commission's Report identifies any standard – either in the Declaration or in international law – that would require participation in government in any particular manner. The framers of the U.S. Constitution, as well as its past and present citizenry, have devised a system of government that affords citizens of the District of Columbia certain rights with regard to participation in governance, both at the district and federal level. This is a matter properly within the discretion of the people of the United States.
>
> Finally, the political system challenged by the petition is simply not appropriate for review, and even less for rejection, by the Commission. These are sensitive issues better left to domestic political processes. There is simply no basis for the Commission to substitute its judgment for the political debate and decision-making of the federal branches of the government of the United States.

114. With respect to the first two observations raised by the State, the Commission considers that these arguments have already been raised before and examined by the Commission during the admissibility and merits phases of the process and the Commission sees no reason to alter its findings in this connection. With respect to the State's third observation, although the Commission agrees that the issues raised by the Petitioners may constitute sensitive matters ordinarily addressed by domestic processes, it is in large part because the domestic political and legal procedures have failed to resolve the complaints raised by the Petitioners that the Commission has exercised its reinforcing and complementary jurisdiction to evaluate their complaints in light of the United States' international human rights obligations.

115. Based upon the response of the United States, the Commission finds that the State has failed to take measures to comply fully with the Commission's recommendations. On this basis, and having considered th State's observations, the Commission has decided to ratify its conclusions and reiterate its recommendations, as set forth below.

VI. CONCLUSIONS

116. The Commission, based upon the foregoing considerations of fact and law, and in light of the response of the State to Report 115/01, hereby ratifies the following conclusions.

117. The Commission hereby concludes that the State is responsible for violations of the Petitioners' rights under Articles II and XX of the American Declaration by denying them an effective opportunity to participate in their federal legislature.

VII. RECOMMENDATIONS

118. In accordance with the analysis and conclusions in the present report,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE FOLLOWING RECOMMENDATIONS TO THE UNITED STATES:

119. Provide the Petitioners with an effective remedy, which includes adopting the legislative or other measures necessary to guarantee to the Petitioners the effective right to participate, directly or through freely chosen representatives and in general conditions of equality, in their national legislature.

VIII.PUBLICATION

120. By communication dated October 29, 2003, the Commission transmitted this report, adopted as Report Nº 54/02 pursuant to Article 45(1) of the Commission's Rules of Procedure, to the State and to the Petitioners in accordance with Rule 45(2) of the Commission's Rules and requested information within 30 days as to measures adopted by the State to implement the Commission's recommendations.

121. By communication dated November 29, 2003 and received by the Commission on December 1, 2003, the Petitioners provided a response to the Commission's October 29, 2003 request for information, in which they indicated that the Government of the United States had failed to comply with the Commission's recommendations.

122. The Commission did not receive a response from the State to its request for information within the time period specified in the Commission's October 29, 2003 note.

123. In light of the information received from the Petitioners, the Commission in conformity with Article 45(3) of its Rules of Procedure decides to ratify the conclusions and reiterate the recommendations in this Report, to make this Report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Commission, according to the norms contained in the instruments which govern its mandate, will continue evaluating the measures adopted by the United States with respect to the above recommendations until they have been complied with by the United States.

Approved on the 29th day of the month of December, 2003.

Clare K. Roberts, First Vice-President;
Susan Villarán, Second Vice-President; and
Julio Prado Vallejo, Commissioner.

President José Zalaquett adopted a dissenting opinion, which was presented on October 24, 2003 and is included immediately after this report.

DISSENTING OPINION OF COMMISSIONER JOSE ZALAQUETT

1. My dissent is based on differences with the explicit position of the majority –or with the conclusions that derive logically from that position – in respect of three types of issues: (i) the assessment of the relevant and substantial facts pertaining to this case, as well as other background materials, of public or general knowledge, which are important to take into account when reasoning by comparison or analogy; (ii) applicable law, in particular Articles II and XX of the American Declaration of the Rights and Duties of Man; (iii) what is this Commission's role in protecting and promoting human rights in the Hemisphere, and in particular the relationship of its role in the examination of communications or complaints that it receives versus its role in promoting human rights; and how it should apply the principle of progressivity in the protection and promotion of human rights.

2. Before expressing my opinion on these three types of issues, I should begin by stating that I fully share the opinion of the majority in this case, as well as that expressed by the Commission in its report on the *Aylwin Azócar et al.* case,[10.9] both by the majority and by Commissioner Robert Goldman, who wrote a dissenting opinion, in that representative democracy is the essential framework for the protection and promotion of human rights in the inter-American system.

3. It also seems appropriate for me to make clear from the outset that, although I shall cite the dissenting opinion of Commissioner Goldman in *Andrés Aylwin Azócar et al.*, my comments should not be construed as a commentary, either positive or negative, on the decision in that case, which involved a petition against my country of nationality, the Republic of Chile. To be sure, I have well-formed opinions on substantial questions relating to the structure of my country's political system – questions like those that were at issue in the *Andrés Aylwin Azócar et al.* case. However, I believe that my views in this regard are better expressed in other venues and forums, as I have done on a number of occasions in the past. By stating this, I do not mean to suggest that the rules prohibiting commissioners from taking part in discussions, deliberations, or decisions regarding matters submitted to the Commission in relation to the State of which they are nationals[11.9] should be interpreted so broadly as to prohibit a commissioner from commenting on decisions involving his country that appear in past Commission reports (decisions in which he has not participated) when ruling on communications or petitions relating to other States. Rather, I think, on the one hand, that the facts in the *Andrés Aylwin Azócar et al.* case are very different from the facts in the present case, and, on the other, that it is important to prevent, insofar as possible, speculative interpretations, in one direction or another, of the present dissenting opinion, whether such speculation is based on the above-mentioned case, on my status as a Chilean, or on the activities that I have carried out in my country in the field of human rights. I cannot, however, fail to make reference to generally applicable principles and standards mentioned by Commissioner Goldman in his dissenting opinion in *Andrés Aylwin Azócar et al.*, since I consider them pertinent in establishing the basis for my position in the present case.

4. Turning to the facts established in the record of the present case, it seems to be generally accepted that the status of the District of Columbia as the seat of government under the jurisdiction of Congress, without being a state of the Union, was originally a product of reasonable–and, in any case, sovereign–political accords, as well as of motivations and considerations based on historical circumstances going back to the founding of the United States of America. It is also clear that, since the establishment of the District of Columbia, constitutional amendments and legislation have allowed its residents to participate in presidential and local elections, as well as to elect two senators and a representative, who are not, however, allowed to vote in committee or in plenary if their vote might be decisive.

5. Despite the changes introduced in the legal status of the District and the political rights of its residents over time, it may be said that in light of the evolution undergone by the United States and its federal government in the course of the country's history, as well as in light of the connotations which at present are attached to the concept of democratic representation, the reasons that, at the time, could have explained the constraints placed on the District of Columbia within the constitutional and legal structure of the United States have now lost validity. Hence, it may be affirmed from the point of view of political theory or political ethics that the corrective measures that have been introduced, gradually and very

slowly, remain insufficient in that the residents of the District continue to be deprived of the right to vote for members of Congress who are members of that body in the full sense. This inequity has been recognized by the Federal Court of the District of Columbia, although it concluded that it lacked the authority to provide a legal remedy.[111]

6. In other words, if the District of Columbia were founded today, it would not appear reasonable or equitable for the rights of its residents to be subject to the political restrictions that currently affect them. Since the District, as is well known, has a history going back more than 200 years, the reproach that could be addressed to the United States from the point of view of democratic theory or ethics would be that it has not adapted its political system to present-day exigencies as regards the rights of the District's residents. What this Commission must decide is whether, in this case, that theoretical or moral reproach can also be formulated as a legal reproach, based on the rules of international law invoked by the petitioner, i.e., Articles II and XX of the American Declaration of the Rights and Duties of Man.

7. Before analyzing the point just mentioned in the preceding paragraph, an examination of further matters of fact is in order. As established in this report,[112] a proposed 1978 amendment to the Constitution of the United States, seeking to broaden the political rights of the residents of the District in the direction called fo by the petitioners in this case, failed to obtain the required ratification of three quarters of the state legislatures. The petitioners cite statistics indicating that the population of the District of Columbia has changed over time, coming to comprise a majority of African-Americans. They suggest that the lack of change in the District's status could be motivated by racial prejudice. The majority vote, although it expresses concern about the possibility that the District's situation may have had a harmful impact that affected the resident African-American community disproportionately, judged that the record did not contai sufficient evidence to justify a finding on the question of racial prejudice.[113] Indeed – one may add - the lack of sufficient ratifications by state legislatures could be attributed to other factors in addition to, or in place of, that mentioned by the petitioners, although that too would entail speculating on the motivations o the voters who rejected the constitutional amendment. One possible motivation could be reluctance to grant the right to elect senators and representatives to a community of residents, the majority of which is known or assumed to favor a particular political party. Another is the reluctance of many voters to grant greater political rights to the residents of the territory that is the seat of the branches of the federal government, or to change the foundations of a federal structure that dates back to the nation's origins.

8. These considerations, though speculative, are reminders of the well-known fact that the majority, if not all, democratic political systems, reveal asymmetries as a result of complex historical developments in which a range of factors play a role. Added to this is the inclination of the majority of citizens in many countries to preserve their basic institutions, especially longstanding ones, frequently out of fear that some changes, though desirable, may alter certain balances and provoke other, less desirable, changes. We may consider these facts good or bad, but in my judgment they constitute one of the ultimate reasons why States, when assuming international obligations, take care to reserve, for their own sovereign decision-making, fundamental aspects of their internal political structure, notwithstanding the political rights they establish or the obligations they undertake.

9. The majority opinion has cited the example of other federal States in the Americas, in all of which the residents of federal districts or enclaves have the right to vote for representatives in the national legislature [114]. I consider that this reference, which appears to advance these States as models in contrast to the situation in the United States, is unfortunate, since it singles out an isolated element of such States' politic systems without considering their political structure as a whole or the manner in which they have guarantee or guarantee the political rights of their citizens. In analyzing this case, it seems to me that it is more relevant to note the variety and complexity of the asymmetries and peculiarities revealed by an examinatio of the most diverse democratic regimes of our region and other parts of the globe. These asymmetries and peculiarities include forms of association among States that contain special agreements on the political rights of their respective residents; special status applying to certain provinces, regions, or territories within a State, including particulars on the political or other rights of the residents, nationals, or members of one another geographical area or community; recognition, within a State, of particular peoples or groups, who are subject to a specific status, legislation or jurisdictions or enjoy specific rights; organs of the State that carry out legislative or quasi-legislative functions although they are not elected by the people, or although

some of their members are not; vast differences in the representation of states in the federal legislature, given their respective populations (for example, the state of California, the most populous in the United States, has approximately 65 times the population of Wyoming, the least populous state, but both, like the rest of the states, elect two senators each); requirements of political party affiliation as a condition for a given type of participation in elections, or requirements for a minimum percentage of votes for a political party to exist as such or to have parliamentary or municipal representation; a variety of electoral systems and diverse configurations of electoral districts or constituencies that, objectively, can favor certain candidates, movements or parties very significantly.

10. Though it seems just and equitable, at least theoretically or morally, for the residents of the District of Columbia to have the right to elect full representatives to the federal legislature, the above factors indicate that any institutional or legal modality that may be used to achieve this objective, insofar as it would involve reform to a particular aspect of a complex institutional arrangement, may entail many other repercussions within the political system of the United States. This supports the conviction (the legal foundation of which is set forth below as a part of this dissent) that the matter before us should remain subject to the internal political process of the United States. This does not mean that there are no questions of political rights that may be the subject of scrutiny by international human rights bodies, but, as I shall argue in the paragraphs below, the issue at stake in this case is not one of them.

11. The standards of international law that, in principle, are applicable to this case are Articles II and XX of the Inter-American Declaration of the Rights and Duties of Man. The majority of the Commission has ruled that the rights of the petitioners established in these articles have been violated by the United States, which has denied them an effective opportunity to play a role in its federal legislature. Other relevant norms of international law that may throw light on the interpretation of the above-mentioned precepts are those embodied in Articles 23 and 24 of the American Convention on Human Rights, those in Articles 2.1 and 25 of the International Covenant on Civil and Political Rights, and those in Article 3 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Also of interest is the jurisprudence of the European Court of Human Rights[115] and the decisions and general observations of the Human Rights Committee established by the International Covenant on Civil and Political Rights.[116]

12. In his dissenting opinion in *Andrés Aylwin Azócar et al.*, Commissioner Goldman has examined a number of the standards and decisions mentioned in the paragraph above, in connection with his analysis of Article 23 of the American Convention on Human Rights, which is applicable to that case because Chile, unlike the United States, has ratified the Convention. His analysis, which I fundamentally agree with, is similarly applicable to Article XX of the American Declaration of the Rights and Duties of Man, which is binding on the United States. A number of ideas from Commissioner Goldman's dissenting opinion are especially relevant here: (i) that the protection of the inter-American system has been conceived as a subsidiary mechanism, while primary responsibility for protecting human rights falls on the States (paragraph 2); (ii) that Article 23 of the American Convention (*additional comment: this is also applicable to Article XX of the American Declaration*) does not establish a model or specific modality for electing the members of the legislature (paragraph 3); (iii) nor does it define a definite model according to which each State should be organized in order to institutionalize representative democracy in an ideal fashion, so that the standard in question and its underlying principles must be analyzed with special deference to the member states (paragraph 4); (iv) that to judge the need, advisability, and purpose of these arrangements is beyond the purview of an international supervisory body, since it involves eminently political considerations (paragraph 8); (v) that the Commission must, to the extent possible, avoid assuming the role of a supra-constituent body of the States with a view to "perfecting" their political structures (paragraph 9); (vi) and that, nevertheless, deference to the States must not acquire an absolute character, and the Commission is authorized to determine whether the mechanism for political representation adopted by a member state is **manifestly arbitrary** (paragraph 10, emphasis added).

13. I interpret applicable international law in a fashion very similar to that of Commissioner Goldman. The standards cited above, in paragraph 11 of the present dissenting opinion, protect the right of all persons to participate in the government of their country, directly or through their representatives, and to take part in popular elections, which must be periodic, held at reasonable intervals, genuine, free, and based on secret ballot. None of them – and certainly not Article XX of the American Declaration – establishes a

model of how a State is to organize itself internally to embody representative democracy in its institutions, nor how political representation is to be assigned among the country's different states, provinces, electoral districts, constituencies, or territories. To be sure, Article 3 of Protocol 1 (cited above) provides that elections must be held under conditions that ensure the free expression of the opinion of the people in the choice of the legislature (emphasis added). Nevertheless, as the European Court of Human Rights has established, citing the *travaux préparatoires* of Protocol 1, the article in question applies only to the election of the "legislature" or, at least, to one of its chambers, if there are two are more, but the word "legislature" does not necessarily refer only to the national parliament. Rather, it must be interpreted in the light of the constitutional structure of the State in question.[117] It must also be recalled that the parliamentary system is prevalent among the European countries that signed Protocol 1, so that national elections are, in fact, as a rule, elections of the legislature. The respective standards of the inter-American system, on the other hand, do not make reference to legislatures. Lastly, the reference to the legislature contained in Article 3 bears on the conditions necessary to ensure that the expression of the people's will be free. No predetermined political-electoral system or model is specified, and the ruling cited reinforces this by accepting that said Article would not be incompatible with a situation in which not all legislative chambers (if there are more than one) are elected by the people.

14. Having clarified the issue of the scope of Article 3 to Protocol 1, we may return to the above affirmation, in paragraph 12, that the deference which international human rights bodies owe the States in this respect is not absolute. Commissioner Goldman believes that the Commission has the authority to determine whether the mechanism for political representation adopted by a State is **manifestly arbitrary** (his own emphasis). The jurisprudence of the European Court of Human Rights has established that the conditions imposed by the State must not be such as to affect the very essence of the right and deprive it of its effectiveness, that they must be imposed in pursuit of a legitimate end, and that the means employed must not be disproportionate.[118] For its part, the Human Rights Committee has established that although the International Covenant does not impose any particular electoral system, these systems should not "discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely."[119]

15. I see no reason not to adopt Commissioner Goldman's formulation, if what it means by "manifestly arbitrary" is a mechanism for political representation that involves arbitrary discrimination in terms of Article II of the American Declaration of the Rights and Duties of Man, interpreted in the light of Articles 1.1 and 23.2 of the American Convention on Human Rights, or a mechanism for political representation that deprives persons or groups of the very essence of political rights or places restrictions on them without a legitimate purpose and in a manner that exceeds all reasonable bounds. It should be pointed out here that Article 21.2 of the American Convention provides that the law may regulate the exercise of the rights and opportunities referred to in its preceding paragraph by reason of residence, among other factors. In other words, a distinction made for reasons of residence is not arbitrary in itself.

16. The majority opinion, in analyzing the competence of the Commission in this case, cites the practice of this body and other human rights tribunals of applying human rights instruments to alleged human rights violations that may have occurred prior to the ratification of the instruments, but that are of a continuing nature so that their effects persist after the instruments enter into force.[120] One may also recall the principle according to which the States may not invoke rules of domestic law to justify the failure to meet their international obligations. Nevertheless, the crucial point does not lie here but rather in determining whether the signatory States of the American Declaration of the Rights and Duties of Man – and in this case, the United States – effectively assumed an obligation that may serve as a basis for establishing a violation in the present case. On this issue, I am of the view that the principle should prevail that States only acquire obligations under international law by their consent (except for norms of customary law). It seems to me that it cannot be concluded, in light of international norms and practices, that the signatory States to the American Declaration consented to obligate themselves in respect of political rights in such a way that it could be determined that they have violated those obligations by failing to reform their political systems, unless that failure to reform was in manifest contradiction with other obligations that they have assumed in connection with political rights.

17. Having asserted the above, I believe it is also pertinent to express my position on the scope of the principle of progressivity, or pro-rights principle, often invoked as a criterion for guiding international rights bodies in their interpretation of human rights standards. In my view, such standards should be interpreted so as to best protect the rights which they enshrine. In cases of doubt or ambiguity, the interpretation should favor the right rather than the restrictions. Finally, it should take into account changes of all types brought about by historical evolution, seeking to understand the content and scope of rights in a living and dynamic way, a way that preserves their essence and even strengthens them. I am not unaware that the interpreter may go so far in this direction as to usurp the role of the legislator, but this is not the place to rehearse an ancient and hard-fought debate of legal theory. Suffice it to say that in my opinion, this interpretive role is a necessary and even inevitable one, but that, in carrying out an interpretation that updates the law or addresses it from a progressive stance, special care must be taken to proceed on a firm basis, advancing only to the very next logical step.

18. It does not seem to me that a violation of the rights of the petitioners can be established today, either under Article II or Article XX of the American Declaration of the Rights and Duties of Man on the basis of an interpretation like the one indicated in the last lines of the paragraph above. Nevertheless, I do not dismiss the possibility that the evolution of international law and political practice in the Hemisphere may advance to a point where, had it had been reached today, it would have permitted us to come to a different conclusion. Thus, I am of the view that the type of issues dealt with in the present case can and should be dealt with by the Commission and other organs of the Organization of American States through their promotional functions rather than by deciding on a claim or communication. I believe such an approach to be more promising and constructive.

Done and signed at the headquarters of the Inter-American Commission on Human Rights in the city of Washington, D.C., on the 24th day of the month of October, 2003.

José Zalaquett (Signed)

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[*] Commission Member Professor Robert K. Goldman did not take part in the discussion and voting on this case, pursuant to Article 17(2) of the Commission's Rules of Procedure.

[1] An appendix to the Petitioners' April 1, 1993 petition named 22 members of the Statehood Solidarity Committee, all of whom were identified as residents of the District of Columbia: Linda Allen, James Stroud, Mark Thompson, Josephine Butler, Christopher Echols, Lorrie Johnson, Mauro Montoya, James Belnap, Nancy Belnap, Michael Bustamonte, Jo Cooper, Carla Darby, Susan Griffin, Charles Mayo, Terrell Jones, Rena Johnson, Bob Artiste, John Capozzi, Pamela Hughes, James Dixon, James Johnson, and Gloria Freeman.

[2] During its 109th special session in December 2000, the Commission approved the Rules of Procedure of the Inter-American Commission on Human Rights, which replaced the Commission's prior Regulations of April 8, 1980. In accordance with Article 78 of the Rules of Procedure, the Rules entered into force on May 1, 2001.

[3] Petitioners' Petition of April 1, 1993, pp. 56 (indicating that in 1846, a petition was presented in Congress on behalf of the retroceding Alexandria city and county of Virginia "decrying" their absence of representation in Congress).

[4] *Id.*, pp. 4-5 (describing numerous political structures developed within the District of Columbia between 1802 and 1973, including a mayor and a twelve member city council appointed by the US President in 1802, the granting to the District by Congress of a non-voting delegate to the House of Representatives in 1971, and a Presidentially-appointed commission in 1874.).

[5] Petitioners' Observations of April 18, 1995, p. 2.

[6] Binns v. U.S., 194 U.S. 486 (1904).

[7] *Id.*, at 491-2. The Petitioners also refer to the U.S. Supreme Court's earlier decision in Loughborough v. Blake, 18 U.S. 317 (1820).

[8] E. Scott Frison *et al.* v. U.S. *et al.*, Civil Action N° 95-0007HGG (U.S.D.C. for D.C., 1995).

[9] Darby v. U.S., Case N° 94-CM-632, August 22, 1996 (U.S.C.A. for D.C.), cert. denied December 9, 1996, Case N° 96-6667 (USSC).

[10] The Fourteenth Amendment to the U.S. Constitution provides: "Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of t

laws. Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting t whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participati on in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number c male citizens twenty-one years of age in such State. Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, c as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection c rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House remove such disability. Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred fo payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void. Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[11] Hobson v. Tobiner, 255 F Sup 295 (1966).

[12] Carlina v. Board of Commissioners of the District of Columbia, 265 F Supp. 736 (1967).

[13] The Ninth Amendment to the U.S. Constitution provides: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people."

[14] The Tenth Amendment to the U.S. Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[15] The Fifteenth Amendment to the U.S. Constitution provides: "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. Section 2. The Congress shall have power to enforce this article by appropriate legislation."

[16] Lois E. Adams v. Clinton, Clifford Alexander *et al*. v. Daley, Case Nos. 98-1665, 98-2187, (U.S. D.C. - D.C.).

[17] The Fifth Amendment to the US Constitutions provides "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

[18] Fourteenth Amendment to the US Constitution, *supra*.

[19] Albaugh v. Tawes, 233 F. Supp. 576 (D. Md.), aff'd 379 U.S. 27 (1964).

[20] Frank E. Howard v. Maryland Administrative Board of Election Laws et al., (D.C. of Maryland) (Case N° 97-937), aff'd U.S.C.A. for the Fifth Circuit September 9, 1997, certiorari denied January 12, 1998 (U.S.S.C.).

[21] Petitioners' Observations dated April 18, 1995, p. 7, citing, *inter alia*, Forest of Central Rhodope case (1933) (Greece v. Bulgaria), 3 U.N.R.I.A.A. at 105, for the proposition that where a national law justifying the violations of which the victims complain will have to applied by the local organs or courts and thereby render recourse to them futile, local remedies need not be exhausted.

[22] Petitioners' Observations, dated September 7, 1993, p. 6, citing De Becker v. Belgium, App. N° 214/56, 1958 Yearbook of the Eur. Conv. H.R., Vol. II, at 236-38, for the proposition that the six-month rule cannot be considered to apply when the complaint concerns a legal provision which involves a permanent state of affairs for which there is no domestic remedy.

[23] Article 1, paragraph 8 of the U.S. Constitution provides in part that the Congress shall have Power "to exercise exclusive Legislation in all Cases whatsoever, over such District [over the District of Columbia]". This provision has been interpreted as providing Congress with governing authority over the District of Columbia. See Adams v. Clinton, *supra*, at 22 (indicating that "it is clear that the ultimate legislature the Constitution envisions for the District is not a city council, but rather Congress itself. The District Clause expressly grants Congress the power to 'exercise exclusive Legislation in all Cases whatsoever' over the district that would become the seat of government."). See also Binns v. U.S., 194 U.S. 486 (1904).

[24] Organic Act of 1801, 2 Stat. 103 (1801).

[25] Petitioners' observations dated July 18, 1994, p. 33 (indicating that by 1959, when Washington, D.C. became the first majority black city in North American, the African-American population was 55 percent, and that as of 1994 the African-American population had grown to 66 percent).

[26] Petitioner's Observations dated July 10, 1994, pp. 10-11, citing South West Africa Case (Second Phase), ICJ Reports (1966), dissenting judgment of Judge Tanaka.

[27] *Id.*, paras. 12-13, citing Belgium Linguistics Case, Judgment, 23 July 1968, The Law, I.B, para. 10, Yearbook of the Eur. Conv. H.R. 1968 (II) at 662.

[28] *Id.*, p. 14, citing, *inter alia*, KENNETH R. BOWLING, CREATING THE FEDERAL CITY 1774-1800: POTOMAC FEVER (the American Institute of Architects Press, 1988), for the proposition that providing the U.S. Congress with control over the federal district was less a question of concern over State pressure and influence and more a question of physical security.

[29] Petitioners' observations dated July 18, 1994, pp. 17-19.

[30] Petitioners' observations dated April 30, 1997, citing CHARLES WESLEY HARRIS, CONGRESS AND THE GOVERNANCE OF THE NATION'S CAPITAL: THE CONFLICT OF FEDERAL AND LOCAL INTERESTS (1995).

[31] Andres Aylwin Azocar *et al.* v. Chile, Report N° 95/98 (Admissibility), Annual Report of the IACHR 1998; Andres Aylwin Azocar et al. v. Chile, Report N° 137/99 (Merits), Annual Report of the IACHR 1999.

[32] Rios Montt v. Guatemala, Report N° 30/93, Annual Report of the IACHR 1993.

[33] Susana Higuchi Miyagawa v. Peru, Report N° 119/99, Annual Report of the IACHR 1999.

[34] Petitioners' Observations dated February 26, 2001, pp. 10-11.

[35] State's observations dated April 25, 1994, p. 1.

[36] State's observations dated April 25, 1994, p. 1, citing Clarke v. U.S., 886 F 2d 404 (D.C. Cir. 1989), Palmore v. U.S., 411 U.S. 389

[37] State's observations dated April 25, 1994, pp. 3-4.

[38] State's observations dated April 25, 1994, pp. 4-5, citing, *inter alia*, Eur. Court. H.R., Belgium Linguistics Case, Ser. A Vol. XIX (23 July 1968), for the "well-established principle" under international human rights law that "objective and reasonable" criteria can justify differential treatment.

[39] State's observations dated April 25, 1994, pp. 5-6.

[40] State's observations dated April 25, 1994, pp. 5-6.

[41] Article 20 of the Statute of the IACHR provides that, in respect of those OAS member states that are not parties to the American Convention on Human Rights, the Commission may examine communications submitted to it and any other available information, to address the government of such states for information deemed pertinent by the Commission, and to make recommendations to such states, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights. *See also* Charter of the Organization of American States, Articles 3, 16, 51, 112, 150; Regulations of the Inter-American Commission on Human Rights, Articles 26, 51-54; I/A. Court H.R., Advisory Opinion OC-10/8 "Interpretation of the Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights," July 14, 1989, Ser. A N° 10 (1989), paras. 35-45; I/A Comm. H.R., James Terry Roach and Jay Pinkerton v. United States, Case 9647, Res. 3/87, 22 September 1987, Annual Report 1986-87, paras. 46-49.

[42] *See e.g.* João Canuto de Oliveira v. Brazil, Report N° 24/98, Annual Report of the IACHR 1997, paras. 13-18; I/A Court H.R., Blake Case, Preliminary Objections, Judgment of July 2, 1996, Ser. C N° 27 (1996). *See similarly* Eur. Court H.R., Papamichalopoulos *et al.* v. Greece, Judgment of June 24, 1993, Series A N° 260-B, paras. 40-46.

[43] Article 33(1) of the Commission's Rules of Procedure provides: "The Commission shall not consider a petition if its subject matter: a) is pending settlement pursuant to another procedure before an international governmental organization of which the State concerned is a member; or b) essentially duplicates a petition pending or already examined and settled by the Commission or by another international governmental organization of which the State concerned is a member."

[44] The Fifth Amendment to the U.S. Constitution, *supra*.

[45] The Fourteenth Amendment to the U.S. Constitution, *supra*.

[46] *See e.g.* Charter of the Organization of American States, Preamble ("Confident that the true significance of American solidarity and good neighborliness can only mean the consolidation on this content, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man..."); Article 2(b) (establishing as an essential purpose of the Organization to "promote and consolidate representative democracy, with due respect for the principle of non-intervention"); OAS General Assembly Resolution 837 (XVI-O/86) (reaffirming the "inalienable right of all the peoples of the Americas freely to determine their political, economic and social system without outside interference, through a genuine democratic process and within a framework of social justice in which all sectors of the population will enjoy the guarantees necessary to participate freely and effectively through the exercise of universal suffrage."); I/A Court H.R., Advisory Opinion OC-6/86 (9 May 1986), "The Word "Laws" in Article 30 of the American Convention on Human Rights), para. 34 (declaring that "[r]epresentative democracy is the determining factor throughout the system of which the [American] Convention is a part.").

[47] *See* U.S. Constitution, art. I, § 8, Amendment X. *See generally* JOHN E. NOWAK, RONALD D. ROTUNDA & J. NELSON YOUNG, CONSTITUTIONAL LAW 121-123 (2d ed., 1983) (noting that it was initially through the post-Declaration of Independence Articles

of Confederation that a national government of very limited powers was established in the United States, and that through a convention beginning in May of 1787, these Articles were amended to enable the national government to deal with certain multi-state problems, which ultimately resulted in the U.S. Constitution and the new federal government).

[48] Article I, § 8 of the U.S. Constitution provides that "Congress shall have power
To lay an collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States;
To borrow money on the credit of the United States;
To regulate commerce with foreign nations, and among the several states, and with the Indian tribes;
To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;
To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;
To provide for the punishment of counterfeiting the securities and current coin of the United States;
To establish post offices and post roads;
To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries;
To constitute tribunals inferior to the supreme court;
To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;
To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;
To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;
To provide and maintain a navy;
To make rules for the government and regulation of the land and naval forces;
To provide for calling forth the militia to execute the laws of the union, suppress insurrections and repel invasions;
To provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;
To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten square miles) 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;-and
To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

[49] U.S. Const., Article I, § 8 ("Congress shall have the Power...To make all laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[50] *See e.g.* McCullough v. Maryland, 17 U.S. (4 Wheat) 316 (1819).

[51] U.S. Const., Amendment X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[52] U.S. Const., Article II.

[53] U.S. Const., Article I.

[54] U.S. Const., Article III.

[55] U.S. Const., Article I, § 2.

[56] U.S. Const., Article I, § 3.

[57] The right to vote in Presidential elections was provided to residents of the District of Columbia by way of the Twenty-Third Amendm the U.S. Constitution, which provides as follows: Section 1. The District constituting the seat of Government of the United States sh appoint in such manner as Congress may direct: A number of electors of President and Vice-President equal to the whole number c Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the le populous State; they shall be in addition to those appointed by the States, but they shall be considered, for the purposes of the ele 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. *See also* H.R. Rep. N° 1698, 86th Cong., 2d Sess. 1, 2 (1960) (clarifying that the 23rd amendment "would change the Constitution only to the minimum extent necessary to give the District appropriate participation in national elections. It would not r the District of Columbia a State. It would not give the District of Columbia any other attributes of a State or change the constitutior powers of the Congress to legislate with respect to the District of Columbia and to prescribe its form of government.").

[58] Adams v. Clinton, *supra*, at 37.

[59] U.S. Const. Article I, § 3, cl. 1.

[60] U.S. Const. Amend. XVII, cl. 1 (providing that "[t]he 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.").

[61] Adams v. Clinton, *supra*, at 26.

[62] Adams v. Clinton, *supra*, at 25-27, citing THE FEDERALIST NOS. 10, 39, 58, 62 (James Madison) (Jacob E. Cooke ed., 1961); Reynolds v. Simms, 377 U.S. 533 (1964).

[63] U.S. Const. Article I, § 8, cl. 17 (granting Congress power to exercise exclusive legislation in all cases whatsoever "over such Distric as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States.").

[64] Organic Act of 1801, 2 Stat. 103 (1801).

[65] Adams v. Clinton, *supra*, at 29-33, citing, inter alia, ENQUIRIES INTO THE NECESSITY OR EXPEDIENCY OF ASSUMING EXCLUSIVE LEGISLATION OVER THE DISTRICT OF COLUMBIA 15 (1800) (complaining that once Congress assumed jurisdiction over the District, its residents would be "reduced to the mortifying situation, of being subject to laws made, or to be made, by we know not whom; by agents, not of our choice, in no degree responsible to us.").

[66] *Id.*, at 43.

[67] KENNETH R. BOWLING, THE CREATION OF WASHINGTON, D.C. 30-34 (1991); THE FEDERALIST N° 43, supra, at 289; JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION §§ 1213 (1833).

[68] Adams v. Clinton, supra, at 27-28, n. 25.

[69] District of Columbia Delegate Act, Pub. L. N° 91-405, sec. 202, 84 Stat. 845, 848 (1970).

[70] District of Columbia Self-Government and Governmental Reorganization Act, Pub L. N° 93-198 Stat. 774 (1973).

[71] According to the Petitioners, these "shadow" representatives are "unpaid lobbyists who are not allowed onto the floor of either the House of Representatives or the Senate," and have no political power to affect any legislation. Petitioners' Observations dated July 18, 1994, pp. 46-47, n. 95.

[72] State's Observations dated April 25, 1994, pp. 5-6; Petitioners' Observations dated July 18, 1994, pp. 26-27.

[73] Petitioners' Observations dated July 18, 1994, p. 27; Petitioners' Observations dated August 28, 1993, pp. 11-15, citing District of Columbia Self-Government and Governmental Reorganization Act, *supra*, House Rule XXIII(2)(d).

[74] IACHR, Doctrine of the Inter-American Commission of Human Rights (1971-1981), in Ten Years of Activities 1971-1981, Washington, D.C., 1982, p. 334.

[75] Charter of the Organization of American States, as amended by the Protocol of Cartagena of 1985, OAS, Treaty Series, Nos. 1-C an

[76] OAS General Assembly Resolution 837 (XVI-O/86).

[77] Aylwin Azocar et al. v. Chile (Merits), Case 11.863, Report N° 137/99, Annual Report of the IACHR 1999, at 536.

[78] *Id.*, para. 56.

[79] The Commission has previously held that in interpreting and applying the Declaration, it is necessary to consider its provisions in lig of developments in the field of international human rights law since the Declaration was first composed. These developments may turn be drawn from the provisions of other prevailing international and regional human rights instruments, including in particular th American Conventi on on Human Rights which, in many instances, may be considered to represent an authoritative expression of th fundamental principles set forth in the American Declaration. See e.g. IACHR, Juan Raul Garza v. United States, Case 12.243, Annu Report of the IACHR 2000, paras. 88, 89; citing I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of July 14, 198 Inter-Am. Ct. H. R. (Ser. A) N° 10 (1989), para. 37. See *also* IACHR, Report on the Situation of Human Rights of Asylum Seekers wit the Canadian Refugee Determination System, OEA/Ser.L/V/II.106, doc. 40 rev. (February 28, 2000), para. 38 (confirming that whi the Commission clearly does not apply the American Convention in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

[80] Doctrine of the Inter-American Commission on Human Rights, *supra*, p. 334. *See also* Aylwin Case, *supra*, para. 99.

[81] Aylwin Case, *supra*, para. 76.

[82] *Id.*, para. 99.

[83] It is well-established that all obligations imposed on a State by international law must be fulfilled in good faith and that domestic law may not be invoked to justify nonfulfillment, even in cases involving constitutional provisions. See I/A Court H/R., Advisory Opinion OC-14/94 of December 9, 1994, Ser. A N° 14 (1994), para. 35.

[84] Aylwin Case, *supra*, para. 101.

[85] *Id.*, para. 99, 101. *See similarly* UNHRC, General Comment 25(57), General Comments under Article 40, paragraph 4 of the Interr Covenant on Civil and Political Rights, adopted by the Committee at its 1510th mtg., U.N. Doc. CCPR/C/Rev.1/Add.7 (1996), para. 4

[86] I/A Court H.R., Advisory Opinion OC-4/84 of January 19, 1984, para. 57.

[87] Aylwin Case, *supra*, para. 102.

[88] *Id.*, para. 103, citing Eur. Court H.R., Case of Mathieu-Mohin and Clerfayt, N° 9/1985/95/143 (28 January 1987).

[89] European Convention for the Protection of Human Rights and Fundamental Freedoms, Protocol 1, Article 3 (providing: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.").

[90] Case of Mathieu-Mohin and Clerfayt, *supra*.

[91] *Id.*, para. 52, citing Eur. Court H.R., Golder Judgment, Series A N° 18 (21 February 1975), pp. 18-19, § 38.

[92] *Id.*

[93] *Id.*, para. 54.

[94] *Id.*

[95] UNHRC, General Comment 25(57), General Comments under Article 40, paragraph 4 of the International Covenant on Civil and Political Rights, adopted by the Committee at its 1510th mtg., U.N. Doc. CCPR/C/Rev.1/Add.7 (1996), para. 4. According to the *travaux préparatoires* to the ICCPR, permissible restrictions under Article 25 would include, for example, prescription of a minimum age for voting. MARC J. BOSSUYT, GUIDE TO THE "TRAVAUX PRÉPARATOIRES" OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 473 (1987), citing Third Committee, 16th Session (1961), A/5000, § 93, referring to A/C.3/SR/1096, §36 (GH), §37 (CL), §46 (GH); A/C.3/SR.1097, §5 (IQ), §9 (TR), §21 (U).

[96] *See* The Pietraroia Case, Communication N° 44/1979, para. 16. *See similarly* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS – CCPR COMMENTARY 444-5 (1993). Nowak notes that universal suffrage in various countries is not an absolute precept but rather only a relative principle molded by the respective understanding of democratic participation. At the same time, he emphasizes that the principle of universal suffrage obligates States Parties not only to extend the circle of persons eligible to vote and to be elected to as many citizens as possible, but also to take positive steps to ensure that these persons are truly able to exercise their right to vote.

[97] *See e.g.* Ferrer-Mazorra *et al.* v. United States, Case 9903, Annual Report of the IACHR 2000, para. 238; I/A Court H.R., Advisory Opinion OC-4/84 of January 19, 1984, paras. 56, 57.

[98] The U.S. District Court for the District of Columbia has described the Committee of the Whole as follows:
The Committee of the Whole is comprised of all the Members of the House of Representatives and convenes on the floor of the Hou with Members serving as the Chair on a rotating basis. It is in this procedural forum that the House considers, debates and votes o amendments to most of the legislation reported out of the standing or select committees. Only after consideration of amendments the Committee of the Whole is legislation reported to the floor of the House for final, usually perfunctory, consideration.
Robert H. Michel *et al.* v. Donald K. Anderson *et al.*, U.S. District Court for the District of Columbia, Civil Action N° 93-0039, March 8, 1993 (Greene J.), at 5; *aff'd* U.S. Court of Appeals for the District of Columbia, Case N° 93-5109 (January 25, 1994)

[99] *Id.* (concluding that "[i]n a democratic system, the right to vote is genuine and effective only when, under the governing rules, there is a chance, large or small, that, sooner or later, the vote will affect the ultimate result. The votes of the Delegates in the Committee of the Whole cannot achieve that; by virtue of Rule XXIII they are meaningless. It follows that the House action had no effect on legislative power and that it did not violate Article I or any other provision of the Constitution.").

[100] State's observations dated April 25, 1994, p. 4, citing 10 Annuals of Congress 991, 998-999 (1801) (Remarks of Rep. Dennis).

[101] See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16 (stating that an "international instrument must be interpreted and applied within the overall framework of the juridical system in force at the time of the interpretation."). *See also* I/A Court H.R., Advisory Opinion OC-10/89, *supra*, para. 37

[102] Adams v. Clinton, *supra*, at 27, 56 (stating that "[i]t is also true, as our dissenting colleague argues, that the historical rationale for the District Clause – ensuring that Congress would not have to depend upon another sovereign for its protection – would not by its require the exclusion of District residents from the congressional franchise", and indicating that the majority of the Court "do not disagree that defendants have failed to offer a compelling justification for denying District residents the right to vote in Congress. the dissent argues, denial of the franchise is not necessary for the effective functioning of the seat of government.").

[103] *Id.*, pp. 56-59 (noting that the Equal Protection Clause (Article 1, § 2) of the U.S. Constitution does not protect the right of all citizens to vote but only the right of all "qualified" citizens to vote and that the right to equal protection cannot overcome the line explicitly drawn by that article. Accordingly, the Court concluded that the doctrine of one person, one vote under U.S. constitutional jurisprudence could not serve as a vehicle for challenging the structure the Constitution itself imposes upon the Congress.).

[104] Constitution Act, 1867 (Canada), Sections 32, 37, 40, First Schedule, Item 38.

[105] CHARLES WESLEY HARRIS, CONGRESS AND THE GOVERNANCE OF THE NATION'S CAPITAL: THE CONFLICT OF FEDERAL AND LOCAL INTERESTS (1995), at 255. *See also* Constitution of the Nation of Argentina (1994), Title II, Sections 125 - 129, Georgetown University, Political Database of the Americas (last modified June 6, 2001) <http: //www. georgetown.edu/LatAmerPolitical/Constitutions/Argentina/argen94.html>.

[106] HARRIS, *supra*, pp. 255. *See also* Constitution of the Federative Republic of Brazil (1999 as am.), Ch. V, Section I, Article 32 (The Federal District Government), Georgetown University, Political Database of the Americas (last modified June 6, 2001), <http: // www.georgetown.edu/LatAmerPolitical/Constitutions/Brazil/brazil99.html>.

[107] HARRIS, *supra*, pp. 245. *See also* Constitution of the Republic of Venezuela (1999), Title II, Arts. 16-18, Title IV, Article 186, Georgetown University, Political Database of the Americas (last modified June 6, 2001), <http: //www . georgetown.edu/LatAmerPolitical/Constitutions/Venezuela/venezuela.htm>; MANUEL ALCÁNTARA, SISTEMAS POLÍTICOS DE AMERÍCA LATINA (1999), at 505.

[108] HARRIS, *supra*, pp. 245. *See also* Political Constitution of the United Mexican States (1917 with reforms to 1998), Title II (Legislative Branch), Articles 53, 54, 56, Title V (States of the Federation and the Federal District), Articles 122-129 (last modified June 6, 2001) <http: //www.georgetown.edu/LatAmerPolitical/Constitutions/Mexico/mexico 1998.html>.

[109] Report No. 137/99, case 11.863. Andrés Aylwin Azócar et al., Chile, December 27, 1999.

[110] Rules of Procedure of the Inter-American Commission on Human Rights, Article 17.2.

[111] See above, paragraph 33.

[112] See above, paragraph 28.

[113] See above, paragraph 98 of this report.

[114] See above, paragraph 108 of this report.

[115] The following cases in particular and the sections mentioned in each of them: Mathieu-Mohin and Clerfayt v. Belgium, No. 9267/81. Judgment (merits) 3/2/1987, paragraphs 52 and 54; Matthews v. The United Kingdom, No. 24833/94. Judgment (merits) 2/18/99, paragraphs 63, 64, and 65; Podkolzina v. Lettonie, No. 46726/99. Judgment (merits) 4/9/2002, paragraph 33; Gitonas and others v. Greece, No. 18747/91. Judgment (merits) 7/1/1997, paragraph 33; Ahmed and others v. The United Kingdom, No. 22954/93. Judgment (merits) 9/2/1998, paragraph 75; Refah Partisi (Welfare Party) and others v. Turkey, No. 41340/98, 41342/98, 41344/98. Judgment (merits), paragraph 43; Selim Sadak and others v. Turkey, No. 25144/95 to 26154/95, 27100/95, 27101/95. Judgment (merits and just satisfaction), paragraph 31.

[116] In particular, General Observation No. 25, adopted at the 57th session (1996) and the following communications: Grand Chief Donald Marshall et al. v. Canada. Communication No. 205/1986. Views of 4th November 1991, paragraphs 5.4 and 5.5; Josef Debrezvy v. The Netherlands. Communication No. 500/1992. Views of 3rd April 1995, paragraph 9.2.; Gillot et al. v. France. Communication No. 932/2000. Views of 15th July 2002, paragraphs 12.2 and 13. 2.

[117] Mathieu-Mohin and Clarfayt v. Belgium, *loc. cit.*, paragraph 53.

[118] *Idem*, paragraph 52.

[119] General Observation no. 25, *loc. cit.*, paragraph 21.

[120] See above, paragraph 59 of this report.

WASHINGTON, DC DECLARATION

OF THE

OSCE PARLIAMENTARY ASSEMBLY

AND

RESOLUTIONS ADOPTED

AT THE FOURTEENTH ANNUAL SESSION

WASHINGTON, DC, 1 to 5 JULY 2005

CHAPTER III

DEMOCRACY, HUMAN RIGHTS AND HUMANITARIAN QUESTIONS

46. Recalling that all human beings are born free and equal in dignity and rights (Article 1 of the Universal Declaration of Human Rights of the United Nations),

47. Further recalling that Article I of the Declaration of the States Parties to the Helsinki Final Act proclaims the equality of the participating states,

48. Reaffirming that peace constitutes a necessary precondition for the protection of human rights and fundamental freedoms,

49. Recalling that unresolved conflicts entailing gross violations of human rights constitute a permanent threat to security and stability in the OSCE area,

50. Recalling the declarations adopted at the Twelfth Annual Session of the Parliamentary Assembly in Rotterdam (9 July 2003), at the Thirteenth Annual Session of the Parliamentary Assembly in Edinburgh (9 July 2004), the 2004 OSCE Action Plan for the Promotion of Gender Equality, and the declarations adopted at all annual sessions of the OSCE PA,

51. Reaffirming that acts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity and security of states and destabilizing legitimately constituted governments, and that the international community should take the necessary steps to enhance cooperation to prevent and combat terrorism,

52. Taking note of the new challenges to the safeguarding of human rights posed by the information society,

53. Considering the great challenges that the OSCE must take up in the area of human rights and fundamental rights, must be considered from an individual perspective, from an international perspective and from a collective perspective,

The OSCE Parliamentary Assembly:

54. Affirms that the principle of gender equality must be reflected at all stages of the decision-making process and be duly reflected in national and international representative institutions, political life and in all aspects of social life;

55. Affirms that some progress has already been made, but that gender equality certainly remains a goal to pursue;

56. Condemns once more all forms of criminal offences, trafficking and practices degrading to human dignity and all forms of trafficking in human beings, and urges participating states to pool their efforts to combat this scourge;

57. Believes that legalized prostitution is a way to encourage trafficking of women and men, and that all those who, directly or indirectly, organize, encourage or profit from trafficking human beings for sexual purposes should receive penalties, with the victims of involuntary prostitution protected;

58. Urges participating states to organize their systems for the recording of civil status and census information, in conformity with international human rights standards so as to move towards an optimal degree of reliability, to guarantee the individual right of vote to all citizens and calls on the Congress of the United States to adopt such legislation as may be necessary to grant the residents of Washington, D.C. equal voting rights in their national legislature in accordance with its human dimension commitments;

59. Believes that the particular dangers to which children are exposed because of their particular vulnerability requires that their physical, moral and sexual integrity be given special protection;

60. Recalls the obligation of the participating states to allow OSCE observers to monitor whether election procedures are honest, free, fair and democratic and to cooperate in ensuring that such independent and impartial monitoring can take place in an unhindered environment;

61. Calls on the OSCE to continue its efforts to ensure the quality, as a priority objective, of election monitoring processes and recommends that participating states monitor the full transparency of the elections organized on their territory and allow effective monitoring of the operations;

62. Asks OSCE, in close cooperation with the Council of Europe, to take a special interest in the effectiveness of judicial remedies and the absolute independence and impartiality of the magistrates charged with ruling on these matters;

63. Recommends that participating states no longer apply a criminal approach to abuse of freedom in the media and, in any case, that they do not make provision for or apply penal sentences when punishing such behaviour.

64. Calls urgently on member states to impede the use of the mass media and especially educational textbooks for the dissemination of nationalist and religious hatred and superiority vis-à-vis other nations;

65. Calls on participating states to intensify their cooperation in combating various forms of discrimination, whether they be based on race, sex, language or political, philosophical or religious convictions, and which may be disseminated by the Internet;

66. Urges participating states to lend the support of their police authorities and international NGOs to international efforts to combat the sale of children, child prostitution and child pornography, to encourage actions to fight child pornography on the Internet and to cooperate completely and fairly in this effort;

67. Condemns all forms of terrorist acts, regardless of the perpetrators, motives or victims;

68. Points to the urgent need for the international community to deal effectively with the root causes of terrorism;

69. Demands that participating states no longer tolerate the issuing of calls for terrorist acts from their territories;

70. Supports participating states in taking all the appropriate measures to intensify their transborder cooperation so as to make it possible for those suspected of terrorist acts and those supporting them through financial, technical, information-related or other means to be brought to justice and tried within a reasonable period of time and reaffirms that it is imperative that all states work to uphold and protect the dignity of individuals and their fundamental freedoms, together with democratic practices and the rule of law, while countering terrorism;

71. Maintains the imperative need for respect of public international law and respect for human rights in the combating of terrorism;

72. Calls upon participating states to respect, in the case of all prisoners of war, the requirements set out in the Geneva Conventions, according them special status for the sake of a fair balance between public security and respect for human rights;

73. Calls urgently on participating states, in accordance with the provisions of the International Covenant on Civil and Political Rights, to guarantee all prisoners, regardless of the offences that may have justified their imprisonment, the right to have examined the legality of their detention by independent and impartial tribunals, ruling in respect of the fundamental procedural guarantees, one of the most important of which is respect for the rights of the defence, and providing for evaluation authority not limited to a purely formal review;

74. Considers it unacceptable that in some member states the category of political prisoner still exists;

75. Reaffirms, in accordance with the Charter of Paris of 21 November 1990, that the protection and promotion of the ethnic, cultural, linguistic and religious identity of persons belonging to national minorities forms an integral part of the requirements posed by the democratic principle;

76. Emphasizes that the introduction of federative and decentralized areas can contribute to the settlement of conflicts when they are of an ethnic or religious nature or when they are linked to minority issues;

77. Recommends that every attempt to bring religions closer together be supported;

78. Further recommends that this protection and the promotion of ethnic identity be incorporated in a dialogue process, as the only way of avoiding the calls for the dividing up of territories and calls on participating states to take particular account of these requirements for protection when organizing the way education is provided on their territory;

79. Pledges to ensure and facilitate the freedom of the individual to profess and practise any religion or belief, alone or in community with others, through transparent and non-discriminatory laws, regulations, practices and policies, and to remove any registration or recognition policies that discriminate against any religious community and hinder its ability to operate freely and equally with other faiths;

80. Takes into account, in that regard, the fundamental nature of the right to education, together with ethnic and cultural diversity, and the need to allow, within the framework of the education system of each state, the coexistence of social, cultural and educational establishments using different languages of instruction;

81. Welcomes the involvement and expertise of the OSCE/ODIHR Panel of Experts on Freedom of Religion or Belief with technical assistance to ensure that current or draft legislation fulfils all OSCE commitments on religious freedom, and encourages all parliaments to utilize the Guidelines for Legislative Reviews of Laws Affecting Religion or Belief drafted by the OSCE/ODIHR Panel when framing laws or regulations pertaining to religious practice;

82. Underlines the important role of political parties in the organization and functioning of a democratic debate and takes into account the institutional function that they perform and the essential link they provide between civil society and state decision-making bodies;

83. Invites participating states to establish such procedures as will enable electoral operations to be conducted efficiently, smoothly and in accordance with international standards;

84. Demands that participating states ensure respect for ideological pluralism in the organization of and access to national, regional and local media;

85. Advises that the diffusion of information reflecting the various views present in the major debates engaging public opinion should be ensured by means of independent monitoring bodies and recommends, in particular, that monitoring be carried out to ensure that there are no obvious discrepancies in the amount of television and radio airtime made available to representatives of different democratic political groups, especially during election campaigns;

86. Encourages participating states to establish parliamentary oversight mechanisms for law enforcement agencies, and believes that in addition participating states could step up the cooperation between their police forces in order to establish common processes in the implementation of preventive policies and social monitoring mechanisms, especially in prisons, and also in the creation of internal and external police oversight mechanisms and encourages the integration of national minorities into police forces;

87. Notes that on 12 and 13 May an armed group attacked a police station and military barracks in Andijan, Uzbekistan. The group then freed prisoners from a high-security prison before seizing the regional administration building. On 13 May Uzbek security and military forces fired on crowds that had gathered on Andijan's main square. Although the Uzbek Government claims 173 people died, eye-witness accounts and human rights groups indicate the number may be 500-1,000, most of whom were civilians. President Karimov has rejected offers by the United Nations Secretary-General and calls by other international organizations to launch an independent, international investigation into these events;

88. Urges the Government of Uzbekistan to take heed of the call by United Nations Secretary-General Kofi Annan to create the conditions for an independent, international and transparent investigation of the Andijan tragedy, to establish justice for the victims and accountability for those found to have used excessive force or committed other abuses during or after the demonstration and considers that, should Tashkent decline to cooperate, it would be appropriate to invoke the Moscow Mechanism;

89. Considers the horrifying massacre ten years ago of approximately 8,000 Bosniaks, mostly men and boys, by Serb forces in Srebrenica, Bosnia and Herzegovina, to have been the greatest single violation of OSCE principles in a participating state since the Helsinki Final Act was signed 30 years ago, and pledges to take every step necessary to ensure that the individuals responsible are brought to justice and that the international community, in responding to other conflict situations around the world, never repeats the tragic mistakes it made that allowed such an atrocity, considered by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia to constitute genocide, to take place in a United Nations-declared "safe area";

90. Recognizes that the status of Kosovo is to be the subject of discussions this year, and emphasizes that any solution should require the mutual agreement of Kosovo, Serbia and Montenegro and the United Nations, and the fulfilment of the eight benchmark standards established by the United Nations, which call for democratic governance, rights for minorities and market economic reform; and

91. Urges, in order to promote peace and stability in Kosovo and the surrounding region of Europe, that greater effort be made to fulfil all eight Standards set by the United Nations Interim Administration in Kosovo (UNMIK) in 2002 and, to that end, recommends in particular that the OSCE Mission in Kosovo monitor and report in a timely, regular, public and unbiased manner on progress achieved and on human rights violations still needing to be addressed, and also that the Mission accelerate existing OSCE programmes relating to achieving fulfilment of the Standards, particularly with regard to creating a sustainable basis for the return, protection and representation in government of minority communities in Kosovo.

UNITED NATIONS

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Eighty-seventh session
10-28 July 2006

CONSIDERATION OF REPORTS SUBMITTED BY STATES PARTIES UNDER ARTICLE 40 OF THE COVENANT

Concluding observations of the Human Rights Committee

UNITED STATES OF AMERICA

1. The Committee considered the second and third periodic reports of the United States of America (CCPR/C/USA/3) at its 2379th, 2380th and 2381st meetings (CCPR/C/SR.2379-2381), held on 17 and 18 July 2006, and adopted the following concluding observations at its 2395th meeting (CCPR/C/SR.2395), held on 27 July 2006.

A. Introduction

2. The Committee notes the submission of the State party's second and third periodic combined report, which was seven years overdue, as well as the written answers provided in advance. It appreciates the attendance of a delegation composed of experts belonging to various agencies responsible for the implementation of the Covenant, and welcomes their efforts to answer to the Committee's written and oral questions.

3. The Committee regrets that the State party has not integrated into its report information on the implementation of the Covenant with respect to individuals under its jurisdiction and outside its territory. The Committee notes however that the State party has provided additional material "out of courtesy". The Committee further regrets that the State party, invoking grounds of non-applicability of the Covenant or intelligence operations, refused to address certain serious allegations of violations of the rights protected under the Covenant.

4. The Committee regrets that only limited information was provided on the implementation of the Covenant at the State level.

B. Positive aspects

5. The Committee welcomes the Supreme Court's decision in *Hamdan v. Rumsfeld* (2006) establishing the applicability of common article 3 of the Geneva Conventions of 12 August 1949, which reflects fundamental rights guaranteed by the Covenant in any armed conflict.

6. The Committee welcomes the Supreme Court's decision in *Roper v. Simmons* (2005), which held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. In this regard, the Committee reiterates the recommendation made in its previous concluding observations, encouraging the State party to withdraw its reservation to article 6 (5) of the Covenant.

7. The Committee welcomes the Supreme Court's decision in *Atkins v. Virginia* (2002), which held that executions of mentally retarded criminals are cruel and unusual punishments, and encourages the State party to ensure that persons suffering from severe forms of mental illness not amounting to mental retardation are equally protected.

8. The Committee welcomes the promulgation of the National Detention Standards in 2000, establishing minimum standards for detention facilities holding Department of Homeland Security detainees, and encourages the State party to adopt all measures necessary for their effective enforcement.

9. The Committee welcomes the Supreme Court's decision in *Lawrence et al. v. Texas* (2003), which declared unconstitutional legislation criminalizing homosexual relations between consenting adults.

C. Principal subjects of concern and recommendations

10. The Committee notes with concern the restrictive interpretation made by the State party of its obligations under the Covenant, as a result in particular of (a) its position that the Covenant does not apply with respect to individuals under its jurisdiction but outside its territory, nor in time of war, despite the contrary opinions and established jurisprudence of the Committee and the International Court of Justice; (b) its failure to take fully into consideration its obligation under the Covenant not only to respect, but also to ensure the rights prescribed by the Covenant; and (c) its restrictive approach to some substantive provisions of the Covenant, which is not in conformity with the interpretation made by the Committee before and after the State party's ratification of the Covenant. (articles 2 and 40)

> **The State party should review its approach and interpret the Covenant in good faith, in accordance with the ordinary meaning to be given to its terms in their context, including subsequent practice, and in the light of its object and purpose. The State party should in particular (a) acknowledge the applicability of the Covenant with respect to individuals under its jurisdiction but outside its territory,**

as well as its applicability in time of war; (b) take positive steps, when necessary, to ensure the full implementation of all rights prescribed by the Covenant; and (c) consider in good faith the interpretation of the Covenant provided by the Committee pursuant to its mandate.

11. The Committee expresses its concern about the potentially overbroad reach of the definitions of terrorism under domestic law, in particular under 8 U.S.C. § 1182 (a) (3) (B) and Executive Order 13224 which seem to extend to conduct, e.g. in the context of political dissent, which, although unlawful, should not be understood as constituting terrorism (articles 17, 19 and 21).

The State party should ensure that its counter-terrorism measures are in full conformity with the Covenant and in particular that the legislation adopted in this context is limited to crimes that would justify being assimilated to terrorism, and the grave consequences associated with it.

12. The Committee is concerned by credible and uncontested information that the State party has seen fit to engage in the practice of detaining people secretly and in secret places for months and years on end, without keeping the International Committee of the Red Cross informed. In such cases, the rights of the families of the detainees are also being violated. The Committee is also concerned that, even when such persons may have their detention acknowledged, they have been held incommunicado for months or years, a practice that violates the rights protected by articles 7 and 9. In general, the Committee is concerned by the fact that people are detained in places where they cannot benefit from the protection of domestic or international law or where that protection is substantially curtailed, a practice that cannot be justified by the stated need to remove them from the battlefield. (articles 7 and 9)

The State party should immediately cease its practice of secret detention and close all secret detention facilities. It should also grant the International Committee of the Red Cross prompt access to any person detained in connection with an armed conflict. The State party should also ensure that detainees, regardless of their place of detention, always benefit from the full protection of the law.

13. The Committee is concerned with the fact that the State party has authorized for some time the use of enhanced interrogation techniques, such as prolonged stress positions and isolation, sensory deprivation, hooding, exposure to cold or heat, sleep and dietary adjustments, 20-hour interrogations, removal of clothing and deprivation of all comfort and religious items, forced grooming, and exploitation of detainees' individual phobias. Although the Committee welcomes the assurance that, according to the Detainee Treatment Act of 2005, such interrogation techniques are prohibited by the present Army Field Manual on Intelligence Interrogation, the Committee remains concerned that (a) the State party refuses to acknowledge that such techniques, several of which were allegedly applied, either individually or in combination, over a protracted period of time, violate the prohibition contained by article 7 of the Covenant; (b) no sentence has been pronounced against an officer, employee, member of the Armed Forces, or other agent of the United States Government for using harsh interrogation techniques that had been approved; (c) these interrogation techniques may still be authorized or used by other agencies, including intelligence agencies and "private contractors"; and (d) the

State party has provided no information to the fact that oversight systems of such agencies have been established to ensure compliance with article 7.

The State party should ensure that any revision of the Army Field Manual only provides for interrogation techniques in conformity with the international understanding of the scope of the prohibition contained in article 7 of the Covenant; the State party should also ensure that the current interrogation techniques or any revised techniques are binding on all agencies of the United States Government and any others acting on its behalf; the State party should ensure that there are effective means to follow suit against abuses committed by agencies operating outside the military structure and that appropriate sanctions be imposed on its personnel who used or approved the use of the now prohibited techniques; the State party should ensure that the right to reparation of the victims of such practices is respected; and it should inform the Committee of any revisions of the interrogation techniques approved by the Army Field Manual.

14. The Committee notes with concern shortcomings concerning the independence, impartiality and effectiveness of investigations into allegations of torture and cruel, inhuman or degrading treatment or punishment inflicted by United States military and non-military personnel or contract employees, in detention facilities in Guantanamo Bay, Afghanistan, Iraq, and other overseas locations, and to alleged cases of suspicious death in custody in any of these locations. The Committee regrets that the State party did not provide sufficient information regarding the prosecutions launched, sentences passed (which appear excessively light for offences of such gravity) and reparation granted to the victims. (articles 6 and 7)

The State party should conduct prompt and independent investigations into all allegations concerning suspicious deaths, torture or cruel, inhuman or degrading treatment or punishment inflicted by its personnel (including commanders) as well as contract employees, in detention facilities in Guantanamo Bay, Afghanistan, Iraq and other overseas locations. The State party should ensure that those responsible are prosecuted and punished in accordance with the gravity of the crime. The State party should adopt all necessary measures to prevent the recurrence of such behaviors, in particular by providing adequate training and clear guidance to its personnel (including commanders) and contract employees, about their respective obligations and responsibilities, in line with articles 7 and 10 of the Covenant. During the course of any legal proceedings, the State party should also refrain from relying on evidence obtained by treatment incompatible with article 7. The Committee wishes to be informed about the measures taken by the State party to ensure the respect of the right to reparation for the victims.

15. The Committee notes with concern that section 1005 (e) of the Detainee Treatment Act bars detainees in Guantanamo Bay from seeking review in case of allegations of ill-treatment or poor conditions of detention. (articles 7 and 10)

The State party should amend section 1005 of the Detainee Treatment Act so as to allow detainees in Guantanamo Bay to seek review of their treatment or conditions of detention before a court.

16. The Committee notes with concern the State party's restrictive interpretation of article 7 of the Covenant according to which it understands (a) that the obligation not to subject anyone to treatment does not include an obligation not to expose anyone to such treatment by means of transfer, rendition, extradition, expulsion or refoulement; (b) that, in any case, it is not under any other obligation not to deport an individual who may undergo cruel, inhumane or degrading treatment or punishment other than torture, as the State party understands the term; and (c) that it is not under any international obligation to respect a non-refoulement rule in relation to persons it detains outside its territory. The Committee also notes with concern the "more likely than not" standard the State party uses in non-refoulement procedures. The Committee is concerned that in practice the State party appears to have adopted a policy to remove, or to assist in removing, either from the United States or other States' territories, suspected terrorists to third countries, for the purpose of detention and interrogation, without the appropriate safeguards to protect them from treatment prohibited by the Covenant. The Committee is also concerned by numerous, well-publicized and documented allegations that persons sent to third countries in this way were indeed detained and interrogated under conditions grossly violating the prohibition contained in article 7, allegations that the State party did not contest. It is deeply concerned with the invocation of State-secrets privilege in cases where the victims of these practices have brought claim before the State party's courts (e.g. the cases of *Maher Arar v. Ashcroft* (2006) and *Khaled Al-Masri v. Tenet* (2006)). (article 7)

The State party should review its position, in accordance with the Committee's general comments No 20 (1992) on Article 7 and No 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant. The State party should take all necessary measures to ensure that detainees, including in facilities outside its own territory, are not removed to another country by way of, *inter alia*, transfer, rendition, extradition, expulsion or refoulement, if there are substantial reasons to believe that they would be in danger of being subjected to torture or cruel, inhuman or degrading treatment or punishment. The State party should conduct thorough and independent investigations into allegations that persons have been removed to third countries where they have been victims of torture or cruel, inhuman or degrading treatment or punishment; modify its legislation and policies to ensure that no such situation will recur; and provide appropriate reparation to the victims. The State party should exercise the utmost care in the use of diplomatic assurances and adopt clear and transparent procedures, with adequate judicial mechanisms for review, prior to removing any detainees to third countries. It should also establish effective mechanisms to monitor scrupulously and vigorously the removal of detainees to third countries. The State party should be aware that in countries where torture or cruel, inhuman or degrading treatment are common practice, it is likely to be used regardless of assurances to the contrary, however stringent any agreed follow-up procedures may be.

17. The Committee is concerned that the Patriot Act and the 2005 REAL ID Act of 2005 may bar from asylum and withholding of removal any person who has provided "material support" to a "terrorist organization", whether voluntarily or under duress. It regrets having received no response on this matter from the State party. (article 7)

The State party should ensure that the "material support to terrorist organisations" bar is not applied to those who acted under duress.

18. The Committee is concerned that, following the Supreme Court ruling in *Rasul v. Bush* (2004), proceedings before Combatant Status Review Tribunals (CSRTs) and Administrative Review Boards (ARBs), mandated respectively to determine and review the status of detainees, may not offer adequate safeguards of due process, in particular due to : (a) their lack of independence from the executive branch and the army, (b) restrictions on the rights of detainees to have access to all proceedings and evidence, (c) the inevitable difficulty CSRTs and ARBs face in summoning witnesses, and (d) the possibility given to CSRTs and ARBs, under Section 1005 of the 2005 Detainee Treatment Act, to weigh evidence obtained by coercion for its probative value. The Committee is further concerned that detention in other locations, such as Afghanistan and Iraq, is reviewed by mechanisms providing even fewer guarantees. (article 9)

The State party should ensure, in accordance with article 9 (4) of the Covenant, that persons detained in Guantanamo Bay are entitled to proceedings before a court to decide, without delay, on the lawfulness of their detention or order their release. Due process, independence of the reviewing courts from the executive branch and the army, access of detainees to counsel of their choice and to all proceedings and evidence, should be guaranteed in this regard.

19. The Committee, having taken into consideration information provided by the State party, is concerned by reports that, following the September 11 attacks, many non-U.S. citizens, suspected to have committed terrorism-related offences have been detained for long periods pursuant to immigration laws with fewer guarantees than in the context of criminal procedures, or on the basis of the Material Witness Statute only. The Committee is also concerned with the compatibility of the Statute with the Covenant since it may be applied for up-coming trials but also to investigations or proposed investigations. (article 9)

The State party should review its practice with a view to ensuring that the Material Witness Statute and immigration laws are not used so as to detain persons suspected of terrorism or any other criminal offences with fewer guarantees than in criminal proceedings. The State party should also ensure that those improperly so detained receive appropriate reparation.

20. The Committee notes that the decision of the Supreme Court in *Hamdan v. Rumsfeld*, according to which Guantanamo Bay detainees accused of terrorism offences are to be judged by a regularly constituted court affording all the judicial guarantees required by common article 3 of the Geneva Conventions of 12 August 1949, remains to be implemented. (article 14)

The State party should provide the Committee with information on its implementation of the decision.

21. The Committee, while noting some positive amendments introduced in 2006, notes that section 213 of the Patriot Act, expanding the possibility of delayed notification of home and office searches; section 215 regarding access to individuals' personal records and belongings; and section 505, relating to the issuance of national security letters, still raise issues of concern in relation to article 17 of the Covenant. In particular, the Committee is concerned about the

restricted possibilities for the concerned persons to be informed about such measures and to effectively challenge them. Furthermore, the Committee is concerned that the State Party, including through the National Security Agency (NSA), has monitored and still monitors phone, email, and fax communications of individuals both within and outside the U.S., without any judicial or other independent oversight. (articles 2(3) and 17)

The State party should review sections 213, 215 and 505 of the Patriot Act to ensure full compatibility with article 17 of the Covenant. The State party should ensure that any infringement on individual's rights to privacy is strictly necessary and duly authorized by law, and that the rights of individuals to follow suit in this regard are respected.

22. The Committee is concerned with reports that some 50 % of homeless people are African American although they constitute only 12 % of the United States population. (articles 2 and 26)

The State party should take measures, including adequate and adequately implemented policies, to bring an end to such de facto and historically generated racial discrimination.

23. The Committee notes with concern reports of de facto racial segregation in public schools, reportedly caused by discrepancies between the racial and ethnic composition of large urban districts and their surrounding suburbs, and the manner in which schools districts are created, funded and regulated. The Committee is concerned that the State party, despite measures adopted, has not succeeded in eliminating racial discrimination such as regarding the wide disparities in the quality of education across school districts in metropolitan areas, to the detriment of minority students. It also notes with concern the State party's position that federal government authorities cannot take legal action if there is no indication of discriminatory intent by state or local authorities. (articles 2 and 26)

The Committee reminds the State party of its obligation under articles 2 and 26 of the Covenant to respect and ensure that all individuals are guaranteed effective protection against practices that have either the purpose or the effect of discrimination on a racial basis. The State party should conduct in-depth investigations into the de facto segregation described above and take remedial steps, in consultation with the affected communities.

24. The Committee, while welcoming the mandate given to the Attorney General to review the use by federal enforcement authorities of race as a factor in conducting stops, searches, and other enforcement procedures, and the prohibition of racial profiling made in guidance to federal law enforcement officials, remains concerned about information that such practices still persist in the State party, in particular at the state level. It also notes with concern information about racial disparities and discrimination in prosecuting and sentencing processes in the criminal justice system. (articles 2 and 26)

The State party should continue and intensify its efforts to put an end to racial profiling used by federal as well as state law enforcement officials. The Committee wishes to receive more detailed information about the extent to which such practices

still persist, as well as statistical data on complaints, prosecutions and sentences in such matters.

25. The Committee notes with concern allegations of widespread incidence of violent crime perpetrated against persons of minority sexual orientation, including by law enforcement officials. It notes with concern the failure to address such crime in the legislation on hate crime adopted at the federal level and in many states. It notes with concern the failure to outlaw employment discrimination on the basis of sexual orientation in many states. (articles 2 and 26)

The State party should acknowledge its legal obligation under articles 2 and 26 to ensure to everyone the rights recognized by the Covenant, as well as equality before the law and equal protection of the law, without discrimination on the basis of sexual orientation. The State party should ensure that its hate crime legislation, both at the federal and state levels, address sexual orientation-related violence and that federal and state employment legislation outlaw discrimination on the basis of sexual orientation.

26. The Committee, while taking note of the various rules and regulations prohibiting discrimination in the provision of disaster relief and emergency assistance, remains concerned about information that the poor, and in particular African-Americans, were disadvantaged by the rescue and evacuation plans implemented when Hurricane Katrina hit the United States, and continue to be disadvantaged under the reconstruction plans. (articles 6 and 26)

The State party should review its practices and policies to ensure the full implementation of its obligation to protect life and of the prohibition of discrimination, whether direct or indirect, as well as of the United Nations Guiding Principles on Internal Displacement, in matters related to disaster prevention and preparedness, emergency assistance and relief measures. In the aftermath of Hurricane Katrina, the State party should increase its efforts to ensure that the rights of the poor, and in particular African-Americans, are fully taken into consideration in the reconstruction plans with regard to access to housing, education and healthcare. The Committee wishes to be informed about the results of the inquiries into the alleged failure to evacuate prisoners at the Parish prison, as well as the allegations that New Orleans residents were not permitted by law enforcement officials to cross the Greater New Orleans Bridge to Gretna, Louisiana.

27. The Committee regrets that it has not received sufficient information on the measures the State party considers adopting in relation to the reportedly nine million undocumented migrants now in the United States. While noting the information provided by the delegation that National Guard troops will not engage in direct law enforcement duties in the apprehension or detention of aliens, the Committee remains concerned about the increased level of militarization on the southwest border with Mexico. (articles 12 and 26)

The State party should provide the Committee with more detailed information on these issues, in particular on the concrete measures adopted to ensure that only agents who have received adequate training on immigration issues enforce

immigration laws, which should be compatible with the rights guaranteed by the Covenant.

28. The Committee regrets that many federal laws which address sex-discrimination are limited in scope and restricted in implementation. The Committee is especially concerned about the reported persistence of employment discrimination against women. (articles 3 and 26)

The State party should take all steps necessary, including at state level, to ensure the equality of women before the law and equal protection of the law, as well as effective protection against discrimination on the ground of sex, in particular in the area of employment.

29. The Committee regrets that the State party does not indicate that it has taken any steps to review federal and state legislation with a view to assessing whether offences carrying the death penalty are restricted to the most serious crimes, and that, despite the Committee's previous concluding observations, the State party has extended the number of offences for which the death penalty is applicable. While taking note of some efforts towards the improvement of the quality of legal representation provided to indigent defendants facing capital punishment, the Committee remains concerned by studies according to which the death penalty may be imposed disproportionately on ethnic minorities as well as on low-income groups, a problem which does not seem to be fully acknowledged by the State party. (articles 6 and 14)

The State party should review federal and state legislation with a view to restricting the number of offences carrying the death penalty. The State party should also assess the extent to which death penalty is disproportionately imposed on ethnic minorities and on low-income population groups, as well as the reasons for this, and adopt all appropriate measures to address the problem. In the meantime, the State party should place a moratorium on capital sentences, bearing in mind the desirability of abolishing death penalty.

30. The Committee reiterates its concern about reports of police brutality and excessive use of force by law enforcement officials. The Committee is concerned in particular by the use of so-called less lethal restraint devices, such as electro-muscular disruption devices (EMDs), in situations where lethal or other serious force would not otherwise have been used. It is concerned about information according to which police have used tasers against unruly schoolchildren; mentally disabled or intoxicated individuals involved in disturbed but non-life-threatening behaviour; elderly people; pregnant women; unarmed suspects fleeing minor crime scenes and people who argue with officers or simply fail to comply with police commands, without in most cases the responsible officers being found to have violated their departments' policies. (articles 6 and 7)

The State party should increase significantly its efforts towards the elimination of police brutality and excessive use of force by law enforcement officials. The State party should ensure that EMDs and other restraint devices are only used in situations where greater or lethal force would otherwise have been justified, and in particular that they are never used against vulnerable persons. The State party

should bring its policies into line with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.

31. The Committee notes that (a) waivers of consent in research regulated by the U.S Department of Health and Human Services and the Food and Drug Administration may be given in case of individual and national emergencies; (b) some research may be conducted on persons vulnerable to coercion or undue influence such as children, prisoners, pregnant women, mentally disabled persons, or economically disadvantaged persons; (c) non-therapeutic research may be conducted on mentally ill persons or persons with impaired decision-making capacity, including minors; and (d) although no waivers have been given so far, domestic law authorizes the President to waive the prior informed-consent requirement for the administration of an investigational new drug to a member of the U.S. Armed Forces, if the President determines that obtaining consent is not feasible, is contrary to the best interests of the military members, or is not in the interests of U.S. national security. (article 7)

The State party should ensure that it meets its obligation under article 7 of the Covenant not to subject anyone without his/her free consent to medical or scientific experimentation. The Committee recalls in this regard the non-derogable character of this obligation under article 4 of the Covenant. When there is doubt as to the ability of a person or a category of persons to give such consent, e.g. prisoners, the only experimental treatment compatible with article 7 would be treatment chosen as the most appropriate to meet the medical needs of the individual.

32. The Committee reiterates its concern that conditions in some maximum security prisons are incompatible with the obligation contained in article 10 (1) of the Covenant to treat detainees with humanity and respect for the inherent dignity of the human person. It is particularly concerned by the practice in some such institutions to hold detainees in prolonged cellular confinement, and to allow them out-of-cell recreation for only five hours per week, in general conditions of strict regimentation in a depersonalized environment. It is also concerned that such treatment cannot be reconciled with the requirement in article 10 (3) that the penitentiary system shall comprise treatment the essential aim of which shall be the reformation and social rehabilitation of prisoners. It also expresses concern about the reported high numbers of severely mentally ill persons in these prisons, as well as in regular in U.S. jails.

The State party should scrutinize conditions of detention in prisons, in particular in maximum security prisons, with a view to guaranteeing that persons deprived of their liberty be treated in accordance with the requirements of article 10 of the Covenant and the United Nations Standard Minimum Rules for the Treatment of Prisoners.

33. The Committee, while welcoming the adoption of the Prison Rape Elimination Act of 2003, regrets that the State party has not implemented its previous recommendation that legislation allowing male officers access to women's quarters should be amended to provide at least that they will always be accompanied by women officers. The Committee also expresses concern about the shackling of detained women during childbirth. (articles 7 and 10)

The Committee reiterates its recommendation that male officers should not be granted access to women's quarters, or at least be accompanied by women officers. The Committee also recommends the State party to prohibit the shackling of detained women during childbirth.

34. The Committee notes with concern reports that forty-two states and the Federal government have laws allowing persons under the age of eighteen at the time the offence was committed, to receive life sentences, without parole, and that about 2,225 youth offenders are currently serving life sentences in United States prisons. The Committee, while noting the State party's reservation to treat juveniles as adults in exceptional circumstances notwithstanding articles 10 (2) (b) and (3) and 14 (4) of the Covenant, remains concerned by information that treatment of children as adults is not only applied in exceptional circumstances. The Committee is of the view that sentencing children to life sentence without parole is of itself not in compliance with article 24 (1) of the Covenant. (articles 7 and 24)

The State party should ensure that no such child offender is sentenced to life imprisonment without parole, and should adopt all appropriate measures to review the situation of persons already serving such sentences.

35. The Committee is concerned that about five million citizens cannot vote due to a felony conviction, and that this practice has significant racial implications. The Committee also notes with concern that the recommendation made in 2001 by the National Commission on Federal Election Reform that all states restore voting rights to citizens who have fully served their sentences has not been endorsed by all states. The Committee is of the view that general deprivation of the right vote for persons who have received a felony conviction, and in particular those who are no longer deprived of liberty, do not meet the requirements of articles 25 of 26 of the Covenant, nor serves the rehabilitation goals of article 10 (3).

The State party should adopt appropriate measures to ensure that states restore voting rights to citizens who have fully served their sentences and those who have been released on parole. The Committee also recommends that the State party review regulations relating to deprivation of votes for felony conviction to ensure that they always meet the reasonableness test of article 25. The State party should also assess the extent to which such regulations disproportionately impact on the rights of minority groups and provide the Committee with detailed information in this regard.

36. The Committee, having taken note of the responses provided by the delegation, remains concerned that residents of the District of Columbia do not enjoy full representation in Congress, a restriction which does not seem to be compatible with article 25 of the Covenant. (articles 2, 25 and 26)

The State party should ensure the right of residents of the District of Columbia to take part in the conduct of public affairs, directly or through freely chosen representatives, in particular with regard to the House of Representatives.

37. The Committee notes with concern that no action has been taken by the State party to address its previous recommendation relating to the extinguishment of aboriginal and indigenous rights. The Committee, while noting that the guarantees provided by the Fifth Amendment apply to the taking of land in situations where treaties concluded between the Federal Government and Indian tribes apply, is concerned that in other situations, in particular where land was assigned by creating a reservation or is held by reason of long possession and use, tribal property rights can be extinguished on the basis of the plenary authority of Congress for conducting Indian affairs without due process and fair compensation. The Committee is also concerned that the concept of permanent trusteeship over the Indian and Alaska native tribes and their land as well as the actual exercise of this trusteeship in managing the so called Individual Indian Money (IIM) accounts may infringe upon the full enjoyment of their rights under the Covenant. Finally, the Committee regrets that it has not received sufficient information on the consequences on the situation of Indigenous Native Hawaiians of Public Law 103-150 apologizing to the Native Hawaiians Peoples for the illegal overthrow of the Kingdom of Hawaii, which resulted in the suppression of the inherent sovereignty of the Hawaiian people. (articles 1, 26 and 27 in conjunction with Article 2, paragraph 3 of the Covenant).

The State party should review its policy towards indigenous peoples as regards the extinguishment of aboriginal rights on the basis of the plenary power of Congress regarding Indian affairs and grant them the same degree of judicial protection that is available to the non-indigenous population. The State party should take further steps to secure the rights of all indigenous peoples, under articles 1 and 27 of the Covenant, so as to give them greater influence in decision-making affecting their natural environment and their means of subsistence as well as their own culture.

38. The Committee sets 1st August 2010 as the date for the submission of the fourth periodic report of the United States of America. It requests that the State party's second and third periodic reports and the present concluding observations be published and widely disseminated in the State party, to the general public as well as to the judicial, legislative and administrative authorities, and that the fourth periodic report be circulated for the attention of the non-governmental organizations operating in the country.

39. In accordance with rule 71, paragraph 5, of the Committee's rules of procedure, the State party should submit within one year information on the follow-up given to the Committee's recommendations in paragraphs 12, 13, 14, 16, 20 and 26 above. The Committee requests the State party to include in its next periodic report information on its remaining recommendations and on the implementation of the Covenant as a whole, as well as about the practical implementation of the Covenant, the difficulties encountered in this regard, and the implementation of the Covenant at state level. The State party is also encouraged to provide more detailed information on the adoption of effective mechanisms to ensure that new and existing legislation, at federal and at state level, is in compliance with the Covenant, and about mechanisms adopted to ensure proper follow-up of the Committee's concluding observations.

LETTER FROM TWENTY-FIVE LEGAL SCHOLARS SUPPORTING THE CONSTITUTIONALITY OF DC VOTING RIGHTS

March 12, 2007

25 Legal Scholars Support Constitutionality of DC Voting Rights

Dear Representative:

DC residents pay federal income taxes, serve on juries and die in wars to defend American democracy, but they do not have voting representation in the Congress.

This lack of representation is inconsistent with our nation's core democratic principles. Justice Hugo Black put it well in *Wesberry v. Sanders* in 1964:

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

Congress is currently considering granting voting rights to Americans living in Washington, DC. Lawmakers have been faced with questions about the constitutionality of extending the right to vote to residents of a "non-state."

As law professors and scholars, we would like to address these questions and put to rest any concerns about the constitutionality of extending the right of representation to residents of the District.

While the language of the Constitution *literally* requires that House members be elected "by the People of the Several states," Congress has not always applied this language so literally. For example, the Uniformed and Overseas Citizens Absentee Voting Act allows U.S. citizens living abroad to vote in congressional elections in their last state of residence – *even if* they are no longer citizens there, pay any taxes there, or have any intent to return.

To fully protect the interests of people living in the capital, the Framers gave Congress extremely broad authority over all matters relating to the federal district under Article I, § 8, clause 17 (the "District Clause"). Courts have ruled that this clause gives Congress "extraordinary and plenary power" over DC and have upheld congressional treatment of DC as a "state" for purposes of diversity jurisdiction and interstate commerce, among other things. Article III provides that courts may hear cases "between citizens of different states" (diversity jurisdiction). The Supreme Court initially ruled that under this language, DC residents could not sue residents of other states. But in 1940, Congress began treating DC as a state for this purpose – a law upheld in *D.C. v. Tidewater Transfer Co.* (1949).

The Constitution also allows Congress to regulate commerce "among the several states," which, literally, would exclude DC. But Congress' authority to treat DC as a "state" for Commerce Clause purposes was upheld in *Stoughtenburg v. Hennick* (1889).

(*over, please*)

We believe, under the same analysis of the Constitution, that Congress has the power through "simple" legislation to provide voting representation in Congress for DC residents.

Sincerely,

Sheryll D. Cashin
Georgetown University Law Center

Viet D. Dinh
Georgetown University Law Center

Charles J. Ogletree
Harvard Law School

Jamin Raskin
American University Washington College of Law

Samuel R. Bagenstos
Washington University Law School

Brian L. Baker
San Joaquin College of Law

William W. Bratton
Georgetown University Law Center

Richard Pierre Claude
University of Maryland

Sherman Cohn
Georgetown University Law Center

Peter Edelman
Georgetown University Law Center

James Forman Jr.
Georgetown University Law Center

David A. Gantz
The University of Arizona James E. Rogers College of Law

Michael Gottesman
Georgetown University Law Center

Michael Greenberger
University of Maryland

Pat King
Georgetown University Law Center

Charles R. Lawrence III
Georgetown University Law Center

Paul Steven Miller
University of Washington School of Law

James Oldham
Georgetown University Law Center

Christopher L. Peterson
University of Florida, Levin College of Law

Robert Pitofsky
Georgetown University Law Center

David Schultz
University of Minnesota

Girardeau A. Spann
Georgetown University Law Center

Ronald S. Sullivan Jr.
Yale Law School

Roger Wilkins
George Mason University

Wendy Williams
Georgetown University Law Center

CONGRESSIONAL RESEARCH SERVICE (CRS) MEMO, SUBJECT: CONSTITIONALITY 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 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

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Karen K. Narasaki
Asian American Justice Center
PRESIDENT & CEO
Wade J. Henderson

Support H.R. 1433:
"The District of Columbia House Voting Rights Act of 2007"

March 14, 2007

Dear 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 vote to support H.R. 1433, the "District of Columbia House Voting Rights Act of 2007" ("DC VRA"), sponsored by Del. Eleanor Holmes Norton (D-DC) and Rep. Tom Davis (R-VA). Enclosed is a brief fact sheet on the bill that we hope you will find useful.

The DC VRA would provide D.C. residents with voting House representation, and it would give Utah a temporary, additional "at-large" House seat. Some have questioned whether Congress has the constitutional authority to provide D.C. with such representation. The Constitution itself is ultimately silent on the question, but as the attached fact sheet explains, there are clear and compelling arguments for such authority.

Given the principles on which the American Revolution was based, it is inconceivable that the authors of the Constitution would seek to impose "taxation without representation" on *any* citizens of the then-new United States – or that they would intend to prohibit Congress from remedying a situation that so blatantly contradicts the entire idea of representative democracy itself. Furthermore, the Framers did give Congress extraordinary, plenary power over all matters relating to the District, and it is also clear that D.C. can be – and frequently has been – treated as a "state" insofar as the powers of Congress and the rights of the people are concerned.

Please support fair and equal representation for both D.C. and Utah. Thank you very much for your consideration. If you have any questions, please feel free to contact Rob Randhava, LCCR Counsel, at 202-466-6058.

Sincerely,

Wade Henderson
President & CEO

Nancy Zirkin
Vice President / Director of Public Policy

encl.

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. 1433, "The District of Columbia House Voting Rights Act of 2007"

What H.R. 1433 Does
H.R. 1433 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. 1433 – 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. 1433 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. 1433 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. 1433 – 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).
- Similarly, a U.S. Court of Appeals recently treated D.C. as a "state" for purposes of the Second Amendment, in *Parker v. District of Columbia* (D.C. Cir. 2007).

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. 1433 Has Bipartisan Support

H.R. 1433 was cleared by the Oversight and Government Reform Committee on March 13 by a 24-5 vote. Majorities in both parties recognized that while H.R. 1433 is a major advance in voting rights, its political impact is neutral. 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.

The bill's impact on the 2008 presidential election would also be neutral. It would not affect the three Electoral College votes that D.C. already has. While Utah would gain one more Electoral College vote in the 2008 election, a candidate would still need 270 votes to win the Presidency.

LETTER FROM THE NATIONAL URBAN LEAGUE

National
Urban League

Empowering Communities.
Changing Lives.

March 13, 2007

Honorable John Conyers, Jr.
Chairman
House Judiciary Committee
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

As President and Chief Executive Officer of the National Urban League, I am writing to express our strong support for the *District of Columbia House Voting Rights Act (H.R.1433)* and urge you to pass it without delay.

The DC Voting Rights Act (DCVRA) is vote-neutral and bipartisan. The bill pairs a seat in the U.S. House of Representatives for traditionally Democratic Washington, DC with an additional seat for Republican-leaning Utah. The DCVRA was re-introduced in the 110th Congress by Delegate Eleanor Holmes Norton (D-DC) and Representative Tom Davis (R-VA), and maintains momentum from strong bipartisan support and two committee hearings in 2006.

The DC Voting Rights Act is a crucial step towards bringing full voting representation in Congress to the nearly 600,000 residents of the District of Columbia – a right enjoyed by all other Americans but long overdue for citizens who reside in our nation's capital. The National Urban League believes that D.C. residents have waited far too long for its first-ever seat in the U.S. House of Representatives.

D.C. residents pay taxes, serve on juries, and place their lives on the line by defending our nation during times of war. Our nation 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.

Let us make our country whole and get this voting rights bill finally signed into law this year. The right to vote must not depend on where you live – and that is why it is finally time that DC had a voting member in the House, and ultimately two voting members in the U.S. Senate. H.R. 1433 represents an important first step towards full voting rights for every single DC citizen. Pass H.R.1433 now.

Sincerely,

Marc H. Morial
President and CEO
National Urban League

LETTER FROM THE LEAGUE OF WOMEN VOTERS

LEAGUE OF WOMEN VOTERS®
OF THE UNITED STATES

President
Mary G. Wilson
Albuquerque, New Mexico

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Boulder, Colorado

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Elisabeth MacNamara
Atlanta, Georgia

Carolie Mullan
Lubbock, Texas

Carol Reimers
New York, New York

Executive Director
Nancy E. Tate

March 12, 2007

TO: Members of the Committee on Oversight and Government Reform

FROM: Mary G. Wilson, President

RE: H.R. 1433, the D.C. House Voting Rights Act of 2007

The League of Women Voters urges you to support H.R. 1433, the District of Columbia House Voting Rights Act of 2007, introduced by Delegate Norton (D DC) and Representative Davis (R VA).

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. House Voting Rights Act of 2007.

1730 M STREET, NW, SUITE 1000, WASHINGTON, DC 20036-4508
202-429-1965 Fax: 202-429-0854
Internet: http://www.lwv.org E-mail: lwv@lwv.org

LETTER FROM PEOPLE FOR THE AMERICAN WAY

PEOPLE FOR THE AMERICAN WAY

March 12, 2007

Committee on Oversight and Government Reform
United States House of Representatives
Washington, DC 20515

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

Dear Committee Member:

On behalf of the more than 1,000,000 members and activists of People For the American Way, we urge you to support H.R. 1433, the District of Columbia House Voting Rights Act of 2007. 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. 1433 to move to the House floor.

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 2006 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. 1433 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.

Last year, the Judiciary Committee and its House colleagues 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. 1433, including voting in favor of the bill during this week's Committee markup.

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

LETTER FROM THE UNITED FOOD & COMMERCIAL WORKERS INTERNATIONAL UNION (UFCW)

LEGISLATIVE AND POLITICAL ACTION DEPARTMENT

Michael J. Wilson, *International Vice President*
Director

Via Facsimile

March 13, 2007

The Honorable John Conyers
U.S. House of Representatives
Washington DC 20515

Dear Representative Conyers:

On behalf of the 1.3 million members of the United Food and Commercial Workers International Union, I would like to thank you for your vote in support of the Employee Free Choice Act.

On March 1, along with a majority of your colleagues across party lines, you stood up to an organized misinformation campaign and hundreds of thousands of dollars of negative advertising to support the rights of millions of hard-working men and women. It is rewarding to see that so many Members are committed to protecting and enforcing workers' right to organize and bargain collectively. Collective bargaining agreements give workers a voice on the job, improve living standards for families and communities, and are the linchpin of a strong and vibrant middle class.

The Employee Free Choice Act ensures workers can make a decision about union representation, without employer coercion, and that once the decision is made, workers will get a contract. Thanks to the tireless efforts of you and your Congressional staff—working families won.

Once again, thank you for your support. This incredible victory is for all of us who care about a more just and fair society. While this battle is not over yet, this vote was an important step in the fight to win back workers' rights.

Sincerely,

International Vice President
Director, Legislative and
Political Action Department

Joseph T. Hansen, *International President*
Anthony M. Perrone, *International Secretary-Treasurer*

United Food & Commercial Workers International Union, CLC
1775 K Street, NW • Washington DC 20006-1598
Office (202) 223-3111 • Fax (202) 728-1836 • www.ufcw.org

LETTER FROM THE AMERICAN JEWISH COMMITTEE (AJC)

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: House of Representatives' consideration of H.R.328

February 6, 2007

Dear Representative:

We write on behalf of the American Jewish Committee to urge you to support the D.C. Fair and Equal House Voting Rights Act of 2007 (H.R.328), which aims to end 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 city lack voting representation in the national legislature. The absence of voting rights for the District of Columbia, a situation H.R.328 seeks to correct, is yet another reminder that our nation has yet to attain fully "liberty and justice for all."

Under H.R.328, the District of Columbia would be permanently represented by one seat in the House of Representatives. To make H.R.328 "vote-neutral," the bill would also grant an additional House seat to Utah, which fell short of gaining an additional seat following the 2000 census reapportionment by a mere 84 residents. On December 4, Utah took a crucial step towards making the D.C. Fair and Equal House Voting Rights Act a reality by adopting a four-seat Congressional map contingent on passage of the bill.

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 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 urge you to guarantee true voting representation in Congress for all Americans by supporting D.C. Fair and Equal House Voting Rights Act (H.R.328) in the 110th Congress. Thank you for considering our views on this matter.

Respectfully,

Richard T. Foltin
Legislative Director and Counsel

Melanie Maron
Executive Director, Washington Chapter

LETTER FROM THE NATIONAL ASSOCIATION OF REALTORS®

NATIONAL ASSOCIATION OF REALTORS®

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www.realtors.org/governmentaffairs

Pat Vredevoogd Combs
ABR, CRS, GRI, PMN
President

Dale A. Stinton
CAE, CPA, CMA, RCE
EVP/CEO

GOVERNMENT AFFAIRS
Jerry Giovaniello, Senior Vice President
Walter J. Witek, Jr., Vice President

March 13, 2007

Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
2138 RHOB
Washington, DC 20515

Dear Chairman Conyers:

The NATIONAL ASSOCIATION OF REALTORS,® with more than 1.3 million members, is one of the largest professional and trade organizations in the country. As such, it is proud to do business in the Nation's capital and to own a flagship building in the District of Columbia, as well.

In our organization's capacity as a District resident and property owner, we urge the Committee to give favorable consideration to HR 1433, the District of Columbia House Voting Rights Act of 2007. This bipartisan legislation would, for the first time in our history, permit representation in Congress for the District of Columbia.

We believe that fundamental fairness justifies this change. It has been more than 125 years since the District was a sleepy city occasionally overrun during short sessions of the legislature. The city has become more than a single-industry town. More importantly, the city has begun to reverse a 40-year population decline. With this population increase, the city has taken on a new vitality as individuals and families from other parts of the metropolitan area and of the nation have returned. Homeownership in the District has increased in recent years.

The District's new residents, as well as long-term and even multi-generation DC residents, have the same concerns as all citizens in any other US city and play the same roles as any other citizens. They deserve representation simply because they are here, this is their home, they pay federal taxes and have local tax burdens similar to or even greater than residents of other major US cities. Quite simply, there is no justification for

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depriving residents of the District of the representation that is afforded all other US citizens and communities.

We urge the Committee to report HR 1433 favorably to the House.

Sincerely,

Pat Vredevoogd Combs

Pat Vredevoogd Combs
2007 President, National Association of REALTORS®

ARTICLE PUBLISHED IN *ROLL CALL* ENTITLED "TOO CLEVER BY HALF: THE UNCONSTITUTIONAL D.C. VOTING RIGHTS BILL," JANUARY 25, 2007, BY JONATHAN TURLEY

ROLL CALL

Too Clever by Half: the Unconstitutional D.C. Voting Rights Bill

January 25, 2007
By Jonathan Turley,
Special to Roll Call

One of the most anticipated pieces of holdover legislation for the 110th Congress is the D.C. Fair and Equal House Voting Rights Act, giving the District of Columbia a single vote in the House of Representatives and balancing that Democratic vote with a fourth district for Utah. While heralded as a historic and long-overdue reform for the District's non-voting citizens, the legislation is a constitutional and practical nightmare. It is an example of being too clever by half — trying to do the right thing without doing it in the right way.

On its face, the bill would create a type of half-formed citizen, residents with a representative in the House but not the Senate. While the same logic could be used to create two Senators for the District, the sponsors insist that one Representative is sufficient. What is particularly annoying is that sponsors are framing this as a civil rights measure — as if allowing Rosa Parks to move to the middle of the bus would have been a civil rights victory.

The problem for the sponsors is the text of the Constitution, which clearly says that only states are allowed to have voting Members in the House. The District of Columbia was created for the express purpose of being a non-state. Indeed, the non-voting status of District residents was openly debated at the time and was repeatedly raised in the early years, particularly when a large amount of the District was retroceded back to Virginia in 1847.

This should be an easy constitutional question with both the constitutional text and history in agreement. That plain meaning, however, is plainly inconvenient for Members who do not want to deal with the difficult process of retroceding the District back to Maryland from whence it came. Instead sponsors have taken unprecedented liberties with one of the most fundamental parts of the Constitution: the rules governing who can vote on national legislation.

There are obvious risks to this gamble. After spending millions to secure each marginal seat in the midterm elections, the Democrats may spontaneously create a new GOP voting Member in a closely divided house while the District vote is struck down in litigation. Worse yet, if any votes turn on a single vote, a latter decision striking down the bill would create uncertainty as to the legitimacy of enacted legislation.

The Utah seat is in a better, but still not unassailable, legal position. In the original bill, the sponsors tried to create a new at-large seat for Utah. This, however, would have violated constitutional guarantees of one person-one vote with Utah citizens who would have not one but two Representatives in the House.

After this flaw was raised at the Judiciary Committee hearing, the sponsors arranged for Utah to create a stand-alone district. Even that change, however, may not end the controversy. The sponsors appear to want to enact the legislation and then fill the fourth seat in the 110th Congress. This would require the three current Members to resign to create vacancies. Yet, these would not be true vacancies because the districts would change. It is not clear how Congress could pretend that residents had voted in the new districts and then fill the vacancies. Technically, as new districts (like redistricted districts), the four Utah districts should be filled at the next

regular election in two years for the 111th Congress.

Yet, the District seat remains the most controversial on a number of different levels — beyond its unconstitutionality. Like those "real gold watches" sold to suckers in New York for $10, this bill is not as good as it appears and could stop ticking in the very next Congress. For example, under this legislation, D.C. always would have one Congressional district regardless if the city grew to 2 million or shrank to 2,000 voters. In the same fashion, what Congress giveth, Congress can taketh away. In a future divided house, a new majority could just as easily return the residents to non-voting citizens. At the same time, the bill effectively would kill any real effort to give residents full representation in Congress.

The dangers of this legislation do not stop at its devastating impact on efforts to secure full representation for District residents. It would create dangerous precedent that a majority in Congress can spontaneously create new voting Members from federal enclaves. Roughly 30 percent of land in the United States (more than 659 million acres) is part of a federal enclave regulated under the same power as the District. The Supreme Court repeatedly has stated that the Congressional authority over other federal enclaves derives from the same basic source. Just consider Puerto Rico with a population of roughly eight times that of the District and one easily can imagine future efforts to create new votes in a closely divided house.

Then, there is the problem with the Senate. If Congress can create a new district in the House by majority will, it presumably could use the same authority in the Senate. In this way, a majority could manipulate voting by creating new voting entities to serve its short-term political interests.

There are alternatives to this ill-conceived plan. Like others, I have proposed one such alternative involving a retrocession to Maryland and a special status for the District. We can debate the merits of these different proposals, but we should commit ourselves to true reform, not impulse-buy legislation designed to satiate residents while denying them full representation.

It certainly is time to right this historical wrong, but, in our constitutional system, it often is more important how we do something than what we do. The enactment of this legislation will only trigger a constitutional challenge and a likely defeat of the District portion of the bill. If Members are truly sympathetic with District residents, they deserve better — they deserve full representation in Congress.

Jonathan Turley is the Shapiro Professor of Public Interest Law at George Washington University Law School.

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ARTICLE PUBLISHED IN *ROLL CALL* ENTITLED "DEMOCRACY FOR D.C.: ALLOW STATEHOD, NOT 'VOTING RIGHTS'" JANUARY 25, 2007, BY SCOTT MCLARTY

ROLL CALL

Democracy for D.C.: Allow Statehood, Not 'Voting Rights'

January 25, 2007
By Scott McLarty ,
Special to Roll Call

Many advocates of voting rights for the District of Columbia are disappointed that Democrats haven't moved faster on a bill that Virginia Rep. Tom Davis (R) and D.C. Del. Eleanor Holmes Norton (D) have proposed to grant Washington a vote in the House.

Perhaps Democratic leaders in Congress realized that the Davis bill is a trap: Since it also gives Utah a new seat, Republicans will gain a new Electoral College vote.

Furthermore, if it faces a lawsuit, the bill may be found unconstitutional. Article I, Section 2 of the Constitution provides voting representation in Congress solely to states. A decision by the U.S. District Court for D.C. in 2000 (Daley v. Alexander) held that "the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of Congressional representatives."

The Davis bill contains a nonseverability clause, but a temporary injunction may allow Utah its new voting seat while Ms. Norton's vote would be blocked until a ruling is issued.

For these reasons and others, many D.C. democracy activists have declined to endorse the Davis bill. Some have noted that, while other Americans enjoy three voting seats (two Senators and one Representative), D.C. residents get a single voting seat, making them "one-third citizens."

It thus recalls the 1787 Three-Fifths Compromise that labeled slaves three-fifths citizens for purposes of voting apportionment in Congress — a stinging insult for a city with an African-American majority.

Nor would the Davis bill give D.C. residents democratic self-governance, because it doesn't affect the power of Congress and the White House to force unwanted laws and policies on D.C. and to veto locally passed legislation.

In 1998, Congress overturned a ballot measure for medical marijuana that had passed with a 69 percent majority. Congress has forced D.C. to adopt "zero tolerance" laws, ordered (through the appointed Financial Control Board) then-Mayor Anthony Williams (D) to dismantle D.C. General Hospital, imposed a charter school system, and outlawed needle exchange to prevent HIV transmission.

Representatives of surrounding districts in Virginia and Maryland have used their power to prohibit D.C. from taxing commuters and to demand a new convention center to be paid for with a D.C. surtax, for the profit of suburban businesses. Members of Congress have sought to overturn gun control laws, enact the death penalty, impose school vouchers and deny benefits for same-sex couples. In 1997, then-Speaker Newt Gingrich (R-Ga.) called D.C. a "laboratory" for Republican policies.

African-Americans who moved to D.C. for federal jobs in the 1950s and discovered their new status called it America's "last plantation."

Without political autonomy, representation in a legislature cannot be called democracy. Throughout history, colonies have enjoyed voting seats in the legislatures of nations that conquered them, even while they suffered exploitation and oppression. Our own Founding Fathers and Mothers fought for democracy and independence, not "voting rights." Patrick Henry never said, "Give me a vote in Parliament or give me death."

At best, the Davis bill is a temporary measure. Congress would retain power to revoke the D.C. vote and repeal the District's limited home rule and may do so if Republicans regain control. If D.C. were a state, Congress would not revoke its autonomy. Except for Southern states after they rebelled, Congress has never rescinded any state's power to govern itself.

D.C. statehood now!

Groups like the Stand Up! for Democracy in D.C. Coalition and the DC Statehood Green Party have argued that only self-determination and self-government — statehood — will end the second-class citizenship of D.C. residents.

If a court rules that a voting seat for D.C. requires a constitutional amendment, then, procedurally, D.C. statehood will be easier to achieve, since statehood would not require ratification by two-thirds of states necessary for an amendment.

In 1846, an act of Congress removed Arlington from the District and ceded it to Virginia, proving that, by simple majority, Congress may alter D.C.'s borders. Congress could therefore reduce the constitutionally mandated federal enclave to encompass only the federal properties (White House, Capitol, Mall, etc.), freeing the rest of D.C. to choose statehood by a plebiscite vote.

D.C. could then be admitted to the union as a state, as were all other states after the initial 13 colonies. D.C. residents would get their two Senators and one Representative. We'd see the first state with an African-American majority; Americans all over the U.S. who live in cities, and who are now underrepresented, would have permanent voices in Congress speaking for their interests.

The Statehood Green Party and Stand Up! coalition recently drafted a petition for D.C. statehood (www.dcstatehoodgreen.org/statehoodnow) to be sent to the U.N. Committee on Human Rights and the U.N. Committee on the Elimination of Racial Discrimination, which monitor compliance with treaties that the U.S. has signed and ratified. In 2006, the Human Rights Committee found that D.C.'s lack of voting representation in Congress violated the International Covenant on Civil and Political Rights. The ruling was the result of a decade of work by democracy advocate Tim Cooper.

Poll after poll has shown that an overwhelming majority of D.C. residents desire statehood. On Jan. 3, they applauded Mayor Adrian Fenty's (D) inaugural speech when he demanded statehood for the nation's capital. (Mayor Fenty undermined his demand a few days later when he said he'd go over the heads of voters and ask Congress to amend the D.C. Charter to strip the board of education of its powers.)

Since the start of the Iraq War, President Bush has sent young men and women from D.C. to face death fighting, allegedly, for the democratic rights of Iraqis — rights they don't enjoy at home in the capital of the free world. America owes these soldiers and their families — and all residents of Washington, D.C. — the same rights, citizenship and democracy all other Americans enjoy.

Scott McLarty is media coordinator for the DC Statehood Green Party and national media coordinator of the Green Party of the United States.

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ROLL CALL

CRS Doubts Constitutionality of D.C. Bill

February 13, 2007
By Elizabeth Brotherton,
Roll Call Staff

Perhaps previewing an expected legal challenge, a newly released Congressional Research Service report argues that current legislation does not give Congress the constitutional authority to grant a House vote to the Delegate from the District of Columbia.

There is very little case law on the issue, but what does exist indicates that Washington, D.C., is not a "state" for the purposes of representation, and the power Congress holds over D.C. is not enough to grant a House vote, the report reads.

The report specifically studies the constitutionality of the D.C. Fair and Equal House Voting Rights Act, which would grant Democratic-leaning D.C. a vote in the House while also giving one to Republican Utah. Introduced by Rep. Tom Davis (R-Va.) and D.C. Del. Eleanor Holmes Norton (D), the bill currently sits in the Judiciary Committee. No hearing on it has been scheduled yet.

Despite the report, Norton remains confident in the measure.

"No similar case has ever been considered by any court," Norton said in a statement. "An unprecedented bill always raises constitutional issues, and we have always indicated that, not surprisingly, constitutional views on a novel bill like H.R. 328 are divided. ... We believe that the weight of constitutional opinion is with the District."

The question of constitutionality is nothing new. When a similar bill appeared before the Judiciary subcommittee on the Constitution in September 2006, scholars who had studied the issue testified that while granting the District a vote in the House is a noble goal, the Norton-Davis bill could violate the Constitution. And if the bill were to become law, it is expected to be challenged immediately in court, although exactly by whom is yet to be determined.

Some observers believe the CRS report is further proof that only a constitutional amendment will permanently bring full Congressional representation to the District, because the Norton-Davis bill is bound to be thrown out.

"What are we doing if, at the end of the day, this is declared unconstitutional and another two and a half years have gone by?" said Timothy Cooper, executive director of Worldrights, a non-governmental organization that specializes in human rights issues in China and the United States.

Cooper, a longtime proponent of D.C. voting rights, said the new Democratic-controlled Congress should have thrown out the current measure — an effort created to make headway when the Republicans were in control — to focus instead on passing a constitutional amendment, similar to the effort that brought presidential electoral votes to the District.

"It's a new day in Congress, and it requires a new strategy," Cooper said. "To carry forward a dusty strategy ... is unsound."

But supporters of the Norton-Davis bill argue bipartisanship remains important in the effort, and they say the Constitution is behind them.

These supporters frequently cite the ruling in National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co., a 1949 decision in which the Supreme Court found that Congress has the right to extend federal diversity jurisdiction to cases with one party from the District.

(Diversity jurisdiction deals with cases in which parties are from different states.)

But the justices' limited focus in their ruling might serve instead to strike down the measure, according to the CRS report.

"The plurality opinion took pains to note the limited impact of their holding — parties in diversity suits with residents of the District of Columbia would have a more convenient forum to bring a law suit," the report reads. "As noted, the plurality specifically limited the scope of its decision to cases which did not involve an extension of any fundamental right. Arguably, granting the Delegate a vote in the House does involve such an extension."

But supporters of the Norton-Davis bill remained confident.

"We don't think the CRS, or the Congress for that matter, is the arbiter of constitutionality," said Ilir Zherka, executive director of DC Vote, adding that only the courts — where very little precedent has been established — are the forum for such debate.

"It's unusual for someone at CRS to take this approach in an area that is completely undecided," Zherka said. "This is not an area where there is case law. There isn't clarity on this."

In the meantime, continued discussion and lobbying for the measure will take place.

Hundreds of supporters, including D.C. Mayor Adrian Fenty (D), are expected to hit Capitol Hill on Thursday to lobby for the measure. That afternoon, the American Constitution Society for Law and Policy will host a forum on the constitutionality of the bill that will be moderated by Gilda Daniels, an assistant professor at the University of Baltimore School of Law.

The CRS report also analyzed the constitutionality of a recent House rules change that granted Norton and the four other Delegates a vote in the Committee of the Whole. Unlike with the Norton-Davis bill, the largely symbolic nature of that vote and past legal precedent likely will serve to uphold the rules change, according to the report.

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September 18, 2006, 0:32 p.m.

Hammering to Fit

A poor argument for squeezing a few more congressmen into the District.

By Matthew J. Franck

Kenneth Starr and Patricia Wald, both former judges on the U.S. Court of Appeals for the D.C. Circuit, collaborated on a surprisingly unpersuasive op-ed in the Sunday *Washington Post*, arguing that it is within Congress's constitutional powers (by mere statute with no need to amend the Constitution) to grant the District of Columbia full voting rights in the Congress as though it were a state — but without *making* it a state. Got that? Me neither.

Starr and Wald have three arguments. The first is that ours is a "republican form of government" based on the "consent of the governed." It sure is. But this is an impulse, not a legal principle that can overcome the plain language of the Constitution, which contemplates that House members will be chosen by "the People of the several States," and that senators shall come "from each State, elected by the people thereof." Starr and Wald add, as though it helped them out here, that "[t]here is nothing in our Constitution's history or its fundamental principles suggesting that the Framers intended to deny the precious right to vote to those who live in the capital of the great democracy they founded." This reverses the burden of proof. It surely could, and probably did, occur to some of the framers that some citizens would reside permanently in the "Seat of the Government" whose location was not yet decided but whose maximum dimensions, "not exceeding ten Miles square," they had already determined. We have no evidence that any of them concerned themselves with the congressional representation of such citizens.

The authors' second argument is that the congressional power to "exercise exclusive Legislation in all Cases whatsoever" over the life of the District is so broad as obviously to include the authority to give D.C. seats in the Congress itself — a move Starr and Wald call extending the "right to vote...to all citizens." But the very clause they are interpreting (Article I, section 8, clause 17) is the same one that refers explicitly to the District's creation "by Cession of particular States," i.e., by the carving out of territory from one or more states, such that the District is separate and apart from any particular state, and thus needs plenary congressional government. I don't see how Starr and Wald can get around the twin facts that the District was intended to stand outside the jurisdiction of any state, and that only the states are or can be represented in the Congress. In truth, they don't really try.

Neither do they deal with the fact that the constitutional power to set the qualifications to vote for members of either house of Congress is left in the hands of the legislatures of the states being represented. Certain of the Constitution's amendments have forbidden some principles of distinguishing voters from non-voters — race in the Fifteenth Amendment, sex in the Nineteenth, and age for anyone over 18 in the Twenty-sixth — but it still remains within the power of a state to set the rules of suffrage in other ways, for the right to vote in congressional elections is determined by whatever right exists to vote in the elections for a state legislature's lower house. A state could thus provide for aliens to vote for members of Congress, or for children under 18 to do so, or forbid felons from voting, as many states do, as long as these were the rules for the lower house of its own legislature. The bill before Congress giving D.C. seats in that body, which Starr and Wald endorse, would for the first time put the complete power over the

suffrage to elect members of Congress in the hands of the Congress, since the bill would not admit the District to statehood and provide it with its own state government.

Starr and Wald save for their third argument the "most analogous legal precedent" that can be brought to bear on this question, *National Mutual Insurance Co.* v. *Tidewater* (1949). In this case, the Supreme Court upheld an act of Congress extending the diversity jurisdiction of federal courts (i.e., the power to hear cases based on the differing citizenship of the parties, not on the presence of an issue in federal law) to cases in which residents of D.C. were parties, notwithstanding the fact that Article III of the Constitution provided jurisdiction only where the parties were from different *states* — and D.C. is not a state. If Congress could so expand the diversity jurisdiction of the federal courts to "address [an] inequity" done *by the Constitution* to citizens of the District, Starr and Wald appear to reason, then here too Congress may legislate to undo the injustice, *again done by the Constitution*, of D.C. citizens having no representation in Congress.

About the *National Mutual* ruling, it might be said that it was a 5-4 ruling with significant differences of opinion among the justices in the majority; that it was almost certainly wrongly decided; that it unnecessarily overruled an undoubtedly correct precedent written by Chief Justice John Marshall himself in 1804; that its logic actually contradicted a key principle of *Marbury* v. *Madison* (1803); and that there were other, constitutional ways for Congress to address the problem of D.C. citizens' access to the federal courts.

But let us take *National Mutual* as given. Is it an apt precedent for the present debate? I don't see how. The question in that 1949 case was the treatment of undoubted "citizens" considered as individuals who have rights they need to vindicate in a court of law. But members of Congress are not elected by "citizens" considered as individuals. As noted above, they are elected by political communities described as *the people of the various states*. The District of Columbia is certainly a political community, but it is not a state. And only a state has a people that can elect members of Congress.

Why don't Starr and Wald simply come out for statehood for D.C.? That would get us past all these problems, right? The fact that they don't recommend this suggests that they either view it as politically hopeless (which it probably is), or they recognize that, if any "seat of government" immediately around the Mall and Pennsylvania Avenue is to be reserved for the federal government's control outside the new state's territory, then giving D.C. statehood would require amending the Constitution to repeal the Twenty-third Amendment.

What's that you say? How does the Twenty-third Amendment stand in the way? That amendment, adopted in 1961, provides that the "District constituting the seat of Government of the United States" is entitled to three electoral votes in presidential elections. (It doesn't help Starr and Wald's argument to note that providing this right of suffrage in presidential elections was understood 45 years ago to require a constitutional amendment, while they are ready to grant seats in Congress to the same constituency without an amendment.) Suppose the bulk of D.C. were made a state, with the remaining "federal district" around the Capitol, White House, and government buildings left outside the new state and under Congress's legislative authority. According to the Twenty-third Amendment, any handful of people residing in that rump federal district — perhaps just a few score voters — would have the votes to determine the casting of three electoral votes in presidential elections, just like Delaware or Montana. Could anyone be happy with that state of affairs?

Alternatively, the whole of D.C. could be made a state without a reserved "federal district," which could be understood to render the Twenty-third Amendment a dead letter. But does anyone think Congress will

relinquish all of its jurisdiction over the "seat of Government of the United States"? It isn't likely.

The best solution — though this too would require the repeal of the Twenty-third Amendment — would be to repeat what was done in 1846. Originally the District was a square, ten miles a side, with a majority on the Maryland side of the Potomac but a good-sized portion on the Virginia side as well (look at the boundaries of Arlington and Alexandria if you want to see the original whole). In 1846 Congress agreed to Virginia's "retrocession" of its portion, leaving the remaining District wholly on the Maryland side of the river.

If the citizens of D.C. are to be considered "disenfranchised" by their lack of representation in Congress, then let there be another retrocession, returning the District to Maryland, while retaining a small, almost wholly non-residential federal district as the capital, but with no say in Congress or in presidential elections. Residents of the current District would once again be Marylanders, probably with a congressional district of their own in the Maryland delegation — and the right to vote for Maryland's senators.

Isn't this a more sensible and elegant solution than pounding the Constitution to produce a favored result? Starr and Wald proceed by a classic anti-constitutional syllogism, reasoning that the Constitution must permit all good things, that representation in Congress (without statehood) for D.C. voters is a good thing, therefore it is constitutional.

But even if you douse this argument in the Potomac River, it won't wash.

— Matthew J. Franck is professor and chairman of political science at Radford University, and a regular contributor to NRO's "Bench Memos" blog.

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http://article.nationalreview.com/?q=YzlmZDJiYzY2MThjZjA3Yzg0YzJlMTUyYmYwYTNlMDA=

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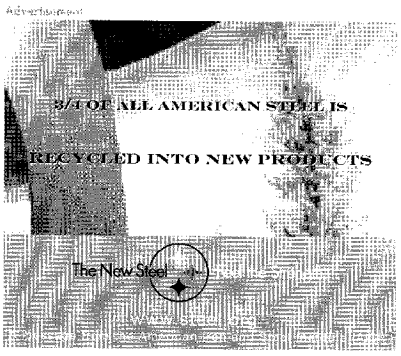
washingtonpost.com

Statehood: The Best Path for D.C.

Halfway Measures Are Unconstitutional

Sunday, February 11, 2007; B08



The Post and some District leaders support a bill co-sponsored by Del. Eleanor Holmes Norton (D-D.C.) and Rep. Thomas M. Davis III (R-Va.) that would replace the District's delegate to the House with a voting representative -- and buy Republican support with an additional seat for Utah.

District residents deserve a vote in the House -- but the bill is misguided. It is based on a novel interpretation of the Constitution. The theory is: Congress has such power concerning the District that it can ignore provisions of the Constitution when legislating regarding the District; in this case the provision that says the House is made up of representatives of the states.

Historical precedent shows that the District cannot properly be given a representative by statute; voting representation must be provided through constitutional means:

? The District was allotted a delegate in 1970 precisely because the Constitution doesn't permit it to be given a representative.

? In 1978, Congress passed a constitutional amendment to grant the District a representative and senators because a statute couldn't grant the representation. The amendment failed when only 16 states ratified it within seven years.

? The District has sought statehood so it could have a representative and senators.

? District residents were granted the right to vote for president by the 23rd Amendment because a statute wouldn't have sufficed.

In 1993, when Puerto Rico's resident commissioner and the delegates from the District, American Samoa, Guam and the U.S. Virgin Islands originally were granted the vote on amendments to bills in the House's Committee of the Whole, a revote was required without the non-state representatives if their votes determined the outcome of an amendment. The reasoning was that only representatives of states can constitutionally determine the passage of legislation. The federal courts ruled then that, without the revote, the proposal "would have been plainly unconstitutional" and that it was constitutional with the revote provision.

The Norton-Davis bill would also have extensive implications beyond just a House vote for the District.

First, if Congress's District power can override the provision of the Constitution that limits

representatives to states, it can also override the provision that says senators must come from states.

Further, the Supreme Court has interpreted Congress's power concerning territories to be as broad as its power regarding the District:

? The delegates from American Samoa, Guam and the U.S. Virgin Islands should be replaced by representatives, and Puerto Rico's resident commissioner should be replaced by six representatives, given that territory's 4 million residents.

? The Northern Mariana Islands should get a representative when the reasons for it not having a delegate are resolved.

? The territories should get senators and electoral votes by statute.

The territories have higher rates of U.S. military service among their residents than many states do. Their residents pay taxes levied by Congress, including income tax in some cases. As is the case with the District, Congress has more power over the territories than it does over the states, but it treats the territories as states in most laws.

Additionally, regarding the Norton-Davis bill, a future Congress would be able to take back the District's House vote -- perhaps leaving the additional representative for Utah -- just as it took back the District's and the territories' vote in the Committee of the Whole in 1995 before restoring it last month.

Two of the three constitutional experts who testified at the House Constitution subcommittee hearing on the Norton-Davis bill last year made many of these points, as has the Congressional Research Service's top constitutional expert.

As difficult as the answers to the problem of the lack of democratic representation for the District may be, the only constitutional answers remain becoming a state, becoming part of Maryland or a constitutional amendment. Congress should grant the District's statehood request.

-- Jeffrey L. Farrow

Chevy Chase

The writer was co-chair of the President's Interagency Group on Puerto Rico from 1994 to 2001 and was staff director of the House subcommittee on territories from 1982 to 1994.

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ARTICLE PUBLISHED IN *ROLL CALL* ENTITLED "FULL REPRESENTATION FOR WASHINGTON—THE CONSTITUTIONAL WAY," JANUARY 25, 2007, BY REP. DANA ROHRABACHER

ROLL CALL

Full Representation for Washington — the Constitutional Way

January 25, 2007
By Rep. Dana Rohrabacher,
Special to Roll Call

The fact that the U.S. citizens who are residents of our nation's capital are not fully represented in Congress has been a blot on our nation's democratic ideals for more than 200 years. Unfortunately, politics from both sides of the aisle has gotten in the way of addressing this issue. Our oath of office demands that the remedy be constitutional. Justice demands that this failure of democracy be remedied.

The anomaly of District of Columbia residents being disenfranchised in the national government that resides in their midst did not arise when the District was formed in 1791 from areas ceded by Maryland and Virginia. The disenfranchisement didn't start until 1800, when Congress cut off the District from future enactments of the Maryland and Virginia legislatures.

Although it's not widely realized, this loss of voting rights was not unique. Residents of several other federal enclaves, such as military bases and veterans' homes, were similarly disenfranchised, and for the same reason: Once the federal government assumed full jurisdiction, the areas no longer were considered parts of the states that ceded them. Since federal representation under the Constitution came exclusively through states, there was no longer a mechanism to provide that representation.

Over the years, Congress addressed various other problems caused by the lack of state law in federal enclaves through partial retrocessions of its exclusive authority, such as the Buck Act of 1940, which permitted states that ceded federal enclaves (other than D.C.) to tax enclave residents. Finally, in 1970, the Supreme Court ruled that state authority in those federal enclaves had become great enough that the states could no longer constitutionally deny enclave residents voting rights, including federal voting rights.

The Norton-Davis bill, H.R. 328, runs afoul of the basic constitutional principle that Congressional representation has to come through states. Although Congress' authority over the District of Columbia, as with other federal enclaves and territories, may be "majestic in scope," Congress must still abide by other parts of the Constitution. Congress can no more constitutionally create voting Representatives or Senators for D.C. or a territory than it could enact a bill of attainder or ex post facto law for D.C. or other federal enclaves or territories.

There is, however, a way to get there from here. My bill, the D.C. Voting Rights Restoration Act (H.R. 492), on the other hand, stays within constitutional bounds by providing federal representation to D.C. residents through Maryland, which ceded the current District of Columbia (the Virginia portion was ceded back in 1846). It is, in effect, a partial retrocession of authority, in this case for purposes of federal elections, like the many partial retrocessions Congress has made with regard to other federal enclaves.

Just as the Uniformed and Overseas Citizens Absentee Voting Act does for U.S. citizens living abroad, H.R. 492 would restore federal (but not state) voting rights for D.C. residents, reversing Congress' 1800 removal of those rights. Like H.R. 328, my bill adds a House seat for Utah and permanently expands the House to 437 Members. But unlike H.R. 328, H.R. 492 remedies the

entire injustice, not just part of it, by permitting D.C. residents to vote for, run for and be elected as Senators, Representatives and presidential electors from Maryland. (To avoid double voting, H.R. 492 provides that Congress use its 23rd Amendment powers to not provide for the appointment of D.C.'s own presidential electors.)

Of course, H.R. 492 is not the only constitutional means of providing Congressional representation for D.C. residents. For example, Congress has the power to admit new states. A bill to admit all but the central federal core of the District of Columbia as the "State of New Columbia" was defeated by a Democrat-controlled House of Representatives in November 1993 by a vote of 153-277. Also, the Constitution can be amended to provide for Congressional representation. In 1978, Congress actually passed a constitutional amendment that would have provided two Senators and a Representative for D.C. However, the proposal failed to become part of the Constitution when it was not ratified by the required three-quarters of the states within seven years.

The problem, as I see it, with any proposal that provides two Senators for one federal city is one of fairness. And the unfairness involved goes beyond mere partisanship. Yes, D.C. still has more people than Wyoming (and no other state), but Wyoming is the most extreme example of overrepresentation in the Senate. When my home county (Orange County) has more people than 21 states, and the other county I represent (Los Angeles County) has more people than 42 states, and both have to share their Senators with the rest of California, I don't think it's too much to ask that Washington, D.C., also share its Senate representation. The idea of two Senators for just one city exacerbates the gross overrepresentation of areas that have less than 2 percent of my state's population.

Understandably, most Members have not paid attention to a debate that all too often seemed to be just theoretical. But now that the House appears poised to act on D.C. voting rights, I hope Members of both chambers of Congress will consider all proposals, including the one that solves the entire problem within constitutional bounds.

Rep. Dana Rohrabacher (R-Calif.) was a member of the District of Columbia Committee from 1989 to 1995.

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CRS Report for Congress

District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals

Updated January 30, 2007

Eugene Boyd
Analyst
Government and Finance Division

Congressional Research Service

Prepared for Members and Committees of Congress

District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals

Summary

This report provides a summary and analysis of legislative proposals that would provide voting representation in Congress to residents of the District of Columbia. Since the issue of voting representation for District residents was first broached in 1801, Congress has considered five legislative options: (1) seek voting rights in Congress by constitutional amendment, (2) retrocede the District to Maryland (retrocession), (3) allow District residents to vote in Maryland for their representatives to the House and Senate (semi-retrocession), (4) grant the District statehood, and (5) define the District as a state for the purpose of voting for federal office (virtual statehood).

During the 109th Congress, several bills were introduced to provide voting representation in Congress for District residents, but none passed. The bills were of the following three types: (1) measures providing a single vote for the District in the House by increasing the number of House seats by two, one for the District and one for Utah, H.R. 2043 and H.R. 5388; (2) a measure allowing District residents to vote in Maryland for their representatives to the House and Senate, H.R. 190 (semi-retrocession); and (3) measures granting the District full voting rights in Congress (one Representative and two Senators), H.R. 398 and S. 195. (Note: based on 2000 Census data Utah is next in line to gain an additional seat if the total number of congressional seats were increased by one to 436. For information on the impact of the 2000 Population Census on the apportionment process, see CRS Report RS20768, *House Apportionment 2000: States Gaining, Losing, and on the Margin*; and CRS Report RS22579, *District of Columbia Representation: Effect on House Apportionment*, both by Royce Crocker.)

Early in the 110th Congress, sponsors of two 109th Congress bills introduced new measures. On January 9, 2007, Delegate Eleanor Holmes Norton and Representative Tom Davis introduced H.R. 328. The bill does not include the most controversial provision included in H.R. 5388, namely, the creation of an at-large congressional district for the state most likely to gain an additional representative. That state, Utah, recently approved a fourth congressional district. On January 16, 2007, Representative Dana Rohrabacher introduced H.R. 492, a bill with many of the same provisions included in H.R. 190 (from the 109th Congress). These proposals would grant voting representation by statute, eschewing the constitutional amendment process and statehood option. Any proposal considered by Congress face three distinct challenges. It must (1) address issues raised by Article 1, Sec. 2 of the Constitution, which limits voting representation to states; (2) provide for the continued existence of the District of Columbia as the "Seat of Government of the United States" (Article 1, Sec. 8); and (3) consider its impact on the 23rd Amendment to the Constitution, which grants three electoral votes to the District of Columbia. For a discussion of constitutional issues of proposed legislation, see CRS Report RL33824, *The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole*, by Kenneth R. Thomas. This report will be updated as events warrant.

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District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals

Introduction

The Constitution, ratified in 1789, provided for the creation and governance of a permanent home for the national government. Article I, Section 8, Clause 17, called for the creation of a *federal district* to serve as the permanent seat of the new national government[1] and granted Congress the power —

> To exercise exclusive Legislation, in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress become the Seat of the Government of the United States....[2]

Proponents of voting representation contend that the District's unique governmental status resulted in its citizens' equally unique and arguably undemocratic political status. Citizens residing in the District have no vote in their national legislature, although they pay federal taxes and may vote in presidential elections. Opponents often note that the Constitution grants only states voting representation in Congress. They argue that, given the District's unique status and a strict reading of the Constitution, no avenue exists to provide District residents voting rights in the national legislature other than a constitutional amendment or the statehood process, which could be achieve by statute.

Issues central to the District of Columbia voting representation debate arguably revolve around two principles of our republican form of government: (1) the consent of the governed and (2) no taxation in the absence of representation. The debate has

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[1] Historians often point to the forced adjournment of the Continental Congress while meeting in Philadelphia on June 21, 1783, as the impetus for the creation of a federal district. Congress was forced to adjourn after being menaced for four days by a mob of former soldiers demanding back pay and debt relief. Although the Congress sought assistance and protection from the Governor of Pennsylvania and the state militia, none was forthcoming. When the Congress reconvened in Princeton, New Jersey, much was made of the need for a federal territory whose protection was not dependent on any state. U.S. Congress, Senate, *A Manual on the Origin and Development of Washington*, S. Doc. 178, 75th Cong., 3rd sess., prepared by H. Paul Caemmerer (Washington. GPO, 1939) pp. 2-3.

[2] In 1788, Maryland approved legislation ceding land to Congress for the creation of a federal district. One year later, Virginia passed a similar act. On July 16, 1790, Congress approved the Residence Act, "an act establishing the temporary (Philadelphia) and permanent seat of the Government of the United States" along the Potomac.

also involved questions about how to reconcile two constitutional provisions: one creating the District and giving Congress exclusive legislative power over the District (Article I, Section 8); the other providing that only citizens of *states* shall have voting representation in the House and Senate (Article 1, Section 2 and Section 3).

Over the years, proposals to give the District voting representation in Congress have sought to achieve their purpose through:

- constitutional amendment to give District residents voting representation in Congress, but not granting statehood;
- retrocession of the District of Columbia to Maryland;
- semi-retrocession, i.e., allowing qualified District residents to vote in Maryland in federal elections for the Maryland congressional delegation to the House and Senate;
- statehood for the District of Columbia; and
- other statutory means such as virtual-statehood, i.e., designating the District a state for the purpose of voting representation.

In the recent past, Congress has restricted the ability of the District government to advocate for voting representation. Several provisions have been routinely included in District of Columbia appropriation acts prohibiting or restricting the District's ability to advocate for congressional representation.[3]

A Summary History of Legislative Options

During the 10-year period between 1790 to 1800, Virginia and Maryland residents that ceded land that would become the permanent "Seat of the Government of the United States" were subject to the laws for the state— including the right to continue to vote in local, state, and national elections in their respective states— until the national government began operations in December 1800. One year after establishing the District of Columbia as the national capital, District residents began seeking representation in the national legislature. As early as 1801, citizens of what was then called the Territory of Columbia voiced concern about their political disenfranchisement. A pamphlet published by Augustus Woodward, reportedly a protégé of Thomas Jefferson, captured their concern:

> This body of people is as much entitled to the enjoyment of the rights of citizenship as any other part of the people of the United States. There can exist no necessity for their disenfranchisement, no necessity for them to repose on the mere generosity of their countrymen to be protected from tyranny, to mere spontaneous attention for the regulation of their interests. They are entitled to participation in the general councils on the principles of equity and reciprocity.[4]

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[3] Congresses have prohibited the D.C. government from using federal or District funds to support lobbying for such representation. The prohibition is discussed in Appendix B of this report.

[4] Augustus Brevoort Woodward, *Considerations on the Government of the Territory of* (continued...)

Congress has on numerous occasions considered legislation granting voting representation in the national legislature to District residents, but these attempts have failed to provide permanent voting representation for District residents.[5] During the 103rd Congress (1993-1994), the District's delegate along with delegates from the territories of the Virgin Islands, Guam, and American Samoa, and the resident commissioner from Puerto Rico were allowed to vote in the Committee of the Whole under amended House rules. Although the change was challenged in court as unconstitutional, it was upheld by the U.S. District Court in *Michel v. Anderson*, and affirmed by the Court of Appeals.[6] Nevertheless, the new House Republican majority repealed the rule early in the 104th Congress. On January 24, 2007, the new Democratic majority of the House passed a rules change (H.Res. 78) allowing resident commissioners and delegates to vote in the Committee of the Whole, during the 110th Congress.

Over the years, proposals to give the District voting representation in Congress have sought to achieve their purpose through a constitutional amendment, retrocession of part of the District back to Maryland, semi-retrocession allowing District residents to be treated like citizens of Maryland for the purpose of voting representation in Congress, statehood and virtual statehood that allow Congress to define the District as a state for the purpose of voting representation in Congress. Each is discussed below.

Constitutional Amendment

The most often-introduced proposal for voting rights has taken the form of a constitutional amendment. Since the 1888 and 1889 resolutions, more than 150 proposals have been introduced that would have used a constitutional amendment to settle the question of voting representation for citizens of the District. The proposals can be grouped into six general categories:

- measures directing Congress to provide for the election of two Senators and the number of Representatives the District would be entitled to if it were a state;

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[4] (...continued)
Columbia [Paper No. I of 1801]. Quoted in Theodore Noyes, *Our National Capital and Its Un-Americanized Americans* (Washington, DC: Press of Judd & Detweiler, Inc., 1951) p. 60. Hereafter cited as Woodward, quoted in Noyes.

[5] Congress twice approved legislation allowing the District of Columbia to elect a non-voting Delegate to Congress. From 1871 to 1874, Congress established a territorial form of government for the District with the passage of 16 Stat.419. The new government authorized the election of a non-voting delegate to represent the District in the House. Congress abolished this arrangement in the aftermath of a fiscal crisis. In 1970, Congress enacted P.L. 91-405 (H.R. 18725, 91st Congress) creating the position of Delegate to the House.

[6] Michel v. Anderson, 817 F. Supp. 126 (D.D.C. 1993), *affirmed*, 14 F.3d 623 (D.C. Cir. 1994).

- measures directing Congress to provide for the election of one Senator and the number of Representatives the District would be entitled to if it were a state;
- measures directing Congress to provide for the election of at least one Representative to the House, and, as may be provided by law, one or more additional Representatives or Senators, or both, up to the number the District would be entitled to if it were a state;
- measures directing Congress to provide for the election of one voting Representative or delegate in Congress;
- measures directing Congress to provide for voting representation in Congress without specifying the number of Representatives or Senators; and
- measures directing Congress to provide for voting representation in Congress for the District apportioned as if it were a state.

Initial Efforts. The idea of a constitutional amendment was first suggested in 1801, by Augustus Brevoort Woodward, in a pamphlet entitled "Considerations on the Government of the Territory of Columbia."[7] Although not a Member of Congress, Mr. Woodward, a landowner in the city of Washington, served as a member of the city council of Washington. His proposal to amend the Constitution would have entitled the District to one Senator and to a number of members in the House of Representative proportionate to the city's population. The proposal, which was never formally introduced, may be found in Appendix A.

Woodward's pamphlets, which were published between 1801 and 1803, provided a rationale for his proposal arguing that—

> .... the people of the Territory of Columbia do not cease to be a part of the people of the United States and as such are entitled to the enjoyment of the same rights with the rest of the people of the United States .... It is contrary to the genius of our constitution, it is violating an original principal of republicanism, to deny that all who are governed by laws ought to participation in the formulation of them.[8]

Woodward noted that the Senate represented the interest of sovereign states and that no state was disadvantaged due to its population because the Constitution granted each state an equal number of Senate votes. He acknowledged the distinction between the Territory of Columbia and states and argued that the Territory, whose residents were citizens of the United States, should be considered half a state and thus entitled to one vote in the Senate. With respect to the House of Representatives, Woodward simply contended that House Members were representatives of the people, and that the citizens of the Territory of Columbia were therefore entitled to representation in the House equivalent to their population and consistent with the democratic principal of "consent of the governed."

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[7] Woodward, quoted in Noyes, *passim*.

[8] Woodward, quoted in Noyes, p. 195.

It took another eighty-seven years before the first proposed constitutional amendment providing for voting representation in Congress for the District of Columbia was formally introduced by Senator Henry Blair of New Hampshire. During the 50th Congress, on April 3, 1888, Senator Blair introduced a resolution identical in its intent to that of the Woodward proposal of 1801. The Blair proposal was submitted on behalf of Appleton P. Clark and was accompanied by a letter which was printed in the *Congressional Record*.[9] On April 5, 1888, the Senate Judiciary Committee was discharged from considering the resolution. Senator Blair reintroduced a modified version of the proposed amendment, S. J. Res. 82, on May 15, 1888.

During the 51st Congress, Senator Blair reintroduced both proposals as S.J.Res. 11 and S.J.Res. 18. The Senate Committee on Privileges and Elections responded to both bills adversely. On September 17, 1890, Senator Blair addressed the Senate on the subject of the District of Columbia representation in Congress. His statement referred to many of the arguments in support of voting representation in Congress. It admonished the Senate for what the Senator characterized as the hasty disposition of the amendments he introduced, noting that

> This [the lack of voting representation in Congress for citizens of the District] is no trifling matter, and I verily believe that it constitutes a drop of poison in the heart of the Republic, which, if left without its antidote, will spread virus through that circulation which is the life of our liberties.[10]

In the years between 1902 and 1917, several bills proposed constitutional amendments entitling the District to two Senators and representation in the House in accordance with its population. Although the Senate District Committee held a hearing on S. J. Res. 32, in 1916, the Senate took no further action on the resolution.

On January 27, 1917, Senator Chamberlain introduced S.J.Res. 196 in the 64th Congress. The bill empowered Congress to recognize the citizens of the District as citizens of a state for the purpose of congressional representation. The resolution gave Congress the power to determine the structure and qualifications of the District's delegation, essentially allowing Congress to act as a state legislature in conformance with Article I, Sec. 4, Clause 1 of the Constitution. Congress would have been empowered to provide the District with one or two votes in the Senate and such votes in the House that it would be entitled based on its population. The resolution was noteworthy because it was the first resolution to be introduced that would have permitted, rather than mandated that Congress grant District residents voting representation in Congress. Between 1917 and 1931, at least 15 resolutions of this type were introduced.[11]

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[9] Senator Henry Blair, Remarks in the Senate, *Congressional Record*, vol. XIX, April 3, 1888, p. 2637.

[10] Senator Henry Blair, Remarks in the Senate, *Congressional Record*, vol XXI, September 17, 1890, p. 10122.

[11] Noyes, p. 207.

Continued Efforts. In March 1967, Representative Emanuel Celler, chair of the House Judiciary Committee, introduced a legislative proposal on behalf of President Lyndon Johnson granting District residents voting representation in Congress. The proposal — H.J.Res. 396 — sought to authorize one voting Representative and granted Congress the authority to provide, through legislation, additional representation in the House and Senate, up to the number the District would be entitled were it a state. The House Committee on the Judiciary held hearings on the Johnson proposal, as well as others, in July and August 1967. On October 24, 1967, the Committee reported an amended version of the resolution to allow full voting representation for the District of Columbia: two Senators and the number of Representatives it would be entitled if it were a state. No other action was taken on the resolution during the 90th Congress.

In 1970, the Senate Judiciary Subcommittee on Constitutional Amendments held hearings on two constitutional amendments (S.J.Res. 52 and S.J.Res. 56) granting voting representation in Congress to District residents, but did not vote on the measures. Instead, Congress passed H.R. 18725, which became P.L. 91-405, creating the position of nonvoting Delegate to Congress for the District in the House of Representatives.

States Fail to Ratify Constitutional Amendment. In 1972 and 1976 constitutional amendments (H.J.Res. 253, 92nd Congress and H.J.Res. 280, 94th Congress), introduced by the District's Delegate to Congress, Walter Fauntroy, granting voting representation to citizens of the District were reported to the House Judiciary Committee. Only the 1976 proposal reached the House floor where it was defeated by a vote 229-181. Representative Don Edwards reintroduced the proposed constitutional amendment as H.J.Res. 554 in the 95th Congress on July 25, 1977. It passed the House on March 2, 1978, by a 289-127 margin. On August 22, 1978, the Senate approved the resolution by a vote of 67-32. The proposed amendment, having been passed by at least two-thirds of each house, was sent to the states. The amendment provided that — for the purposes of electing members of the U.S. Senate and House of Representatives and presidential electors, and for ratifying amendments to the U.S. Constitution — the District of Columbia would be considered as if it were a state. Under the Constitution, a proposed amendment requires ratification by three-fourths of the states to take effect. In addition, Congress required state legislatures to act on ratification within seven-year of its passage.[12] The D.C. Voting Rights Amendment was ratified by 16 states, but expired in 1985 without winning the support of the requisite 38 states.

Renewed Efforts. On June 3, 1992, during the 102nd Congress, Representative James Moran introduced H.J.Res. 501, a proposed constitutional amendment declaring that the District, which constitutes the seat of government of the United States, be treated as a state for purposes of representation in Congress, election of the President and Vice President, and Article V of the Constitution, which delineates the process for amending the Constitution. The resolution was referred to the House Judiciary Committee, where no action was taken.

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[12] The seven-year period does not appear in the Constitution, but it has become customary over time.

Retrocession

Retrocession as a remedy for achieving voting representation for District residents was debated by Congress during the first years following the establishment of the federal capital. Retrocession proposals typically would relinquish all but a portion of the city of Washington to Maryland, providing voting representation for the city residents located outside the designated federal enclave. Retrocession could increase Maryland's congressional delegation by at least one additional seat in the House of Representatives and provide District residents in the newly retroceded area with voting representation in the Senate. According to proponents, retrocession and the concurrent creation of a federal enclave may address the constitutional provision regarding Congress' authority to exercise exclusive legislative control over the federal district. If past history is a guide, retrocession would probably be contingent upon acceptance by the state of Maryland. Although, parts of the District was retroceded to Virginia in 1846, modern retrocession is a judicially and politically untested proposition. (See discussion of Virginia retrocession later in this report.)

Opponents of retrocession note that the adoption of such a measure could force Congress to consider the repeal of the 23rd Amendment to the Constitution, which grants District residents representation in the electoral college equivalent to the number of Senators and Representatives in Congress it would be entitled to if it were a state. If the amendment were not repealed, the net effect would be to grant a disproportionately large role in presidential elections to a relative small population residing in the federal enclave.

Early Debates. On February 8, 1803, Representative John Bacon of Massachusetts introduced a motion seeking "to retrocede that part of the Territory of Columbia that was ceded by the states of Maryland and Virginia." The motion made retrocession contingent on the state legislatures agreeing to the retrocession.[13] During the debate on the motion supporters of retrocession asserted that—

- exclusive jurisdiction over the District was not necessary or useful to the national government;
- exclusive control of the District deprived the citizens of the District of their political rights;
- too much of Congress' time would be consumed in legislating for the District, and that governing the District was too expensive;
- Congress lacked the competency to legislate for the District because it lacked sensitivity to local concerns; and
- the District was not a representative form of government as structured, and thus denies citizens of the nation's capital the right of suffrage.

On the other hand, opponents of Bacon's retrocession proposal argued that—

- the national government needed a place unencumbered by state laws;

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[13] *Annals of Congress*, 7th Congress, 2d Sess., Dec. 6, 1803 to March 3, 1803 and Appendix. (Washington, 1803) p. 486-491 and 494-510.

- District residents had not complained or petitioned the Congress on the question of retrocession; and that Congress could not retrocede the land without the consent of the citizens;
- the District might be granted representation in Congress when it achieved sufficient population;
- the expense of administering the District would decrease over time;
- retroceding the land removed the national government of any obligation to remain in place; and
- the cession of land and Congress's acceptance constituted a contract that could only be dissolved by all parties involved including the states of Maryland and Virginia, Congress, and the people of the District.

The Bacon motion was defeated by a vote of 66 to 26.

A year later, on March 17, 1804, Representative John Dawson introduced a similar provision that would have retroceded all of the Virginia portion of the Territory of Columbia to Virginia, and all but the city of Washington to Maryland. The House postponed a vote on the resolution until December 1804. On December 31, 1804, Representative Andrew Gregg called up the motion seeking retrocession of the District of Columbia to Virginia and Maryland. The House elected to postpone consideration of the resolution until January 7, 1805. During three days, from January 7 to 10, the House debated the merits of retroceding the District of Columbia to Virginia and Maryland, excluding the city of Washington. During the debate, concerns about the disenfranchisement of District residents and the democratic principle of no taxation without representation clashed with efforts to create an independent and freestanding federal territory as the seat of the national government. The House again rejected a resolution allowing for the retroceding of Maryland and Virginia lands.

Virginia Retrocession. In 1840 and 1841, the citizens of Alexandria sought congressional action that would retrocede the area to Virginia. Five years later, on July 9, 1846, the District territory that lay west of the Potomac River was retroceded to Virginia by an act of Congress. The retroceded area represented about two-fifths of the area originally designated as the District.

Largely because Virginia agreed to the retrocession, there was no immediate constitutional challenge to the change. During the debate on retrocession, issues of the constitutionality of the Virginia Retrocession Act were raised. Opponents argued that the retrocession required the approval of a constitutional amendment. In 1869, Representative Halbert E. Paine submitted a resolution that was referred to the Committee on Elections and that challenged the seating of Virginia's 7th Congressional District's representative, Representative Lewis McKenzie. Representative Paine asserted that the retrocession of Alexandria was unconstitutional and requested a review by the Committee on the Judiciary. No action was taken.[14]

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[14] U.S. Congress. Journal of the House of Representative. 41st Cong. 2nd sess. (Washington (continued...)

Constitutional Challenge to Virginia Retrocession. The constitutional question concerning retrocession to Virginia was not reviewed by the Supreme Court until 1875. In 1875, the Supreme Court in *Phillips v. Payne*,[15] rendered a decision that allowed the retrocession to stand, but did not rule on the constitutionality of the Virginia retrocession. The Court noted that since the parties to the retrocession (the federal government and the state of Virginia) were satisfied with its outcome, no third party posed sufficient standing to bring suit. In essence, retrocession was an accepted fact, a *fait accompli*. On December 17, 1896, the Senate adopted a resolution introduced by Senator James McMillan directing the Department of Justice to determine what portion of Virginia was originally ceded to the United States for the creation of the District of Columbia, under what legislative authority was the Virginia portion of the District retroceded, whether the constitutionality of such action had been judicially determined, and to render an opinion on what steps must be taken for the District to regain the area retroceded to Virginia.[16]

The Attorney General of the United States, although offering no opinion on the constitutionality of the retrocession, noted that Congress could only gain control of the retroceded area if territory was again ceded by Virginia and accepted by Congress.[17] On February 5, 1902, a joint resolution introduced in the House and Senate (S.Res. 50) again raised the question of the constitutionality of the retrocession of land to Virginia and directed the Attorney General of the United States to seek legal action to determine the constitutionality of the retrocession and to restore to the United States that portion of Virginia that was retroceded should the retrocession be judged unconstitutional.[18] On April 11, 1902, Senator George F. Hoar, Chairman of the Senate Judiciary Committee, submitted a report to the Senate (Senate Report 1078) which concluded that the question of retrocession was a political one, and not one for judicial consideration. The Committee report recommended that the resolution be adversely reported and indefinitely postponed.[19]

Maryland Retrocession. From 1838 to the Civil War, a number of bills and resolutions were introduced to retrocede part or all of the Maryland side of the District. Some of these linked retrocession to the abolition of slavery in the Nation's capital. All failed to win passage. In both 1838 and 1856, Georgetown unsuccessfully sought retrocession to the state of Maryland. On July 3, 1838, the

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[14] (...continued)
Dec. 13, 1969) pp. 57-58.

[15] 92 U.S. 130 (1875).

[16] Sen. James McMillan, "*Original District of Columbia Territory*," remarks in the Senate, Congressional Record , vol. XXIX, Dec. 17, 1896. p. 232.

[17] Amos B. Casselman, The Virginia Portion of the District of Columbia, Records of the Columbia Historical Society, vol. 12. (Washington, read before the Society, Dec. 6, 1909) pp. 133-135.

[18] Sen. James McMillan. "Introduction of Resolution (SR 50) Regarding Constitutionality of Virginia Retrocession," remarks in the Senate, Congressional Record, vol. XXXV, Feb. 5, 1902, p. 1319.

[19] U.S. Congress, Senate. "*Retrocession of a Portion of the District of Columbia to Virginia*," Congressional Record, vol. XXXV. p. 3973.

Senate also considered and tabled a motion that prevented consideration of a petition by the citizens of Georgetown to retrocede that part of Washington County west of Rock Creek to Maryland.[20]

In 1848, Senator Stephen Douglas of Illinois submitted a resolution directing the District of Columbia Committee to inquire into the propriety of retroceding the District of Columbia to Maryland. The motion was agreed to by unanimous consent. Again, it was only a motion to study the question of retrocession. On January 22, 1849, Representative Thomas Flournoy introduced a motion that called for the suspension of the rules to enable him to introduce a bill that would retrocede to Maryland all of the District not occupied by public buildings or public grounds. The motion failed. On July 16, 1856, a bill (S. No. 382) was introduced by Senator Albert G. Brown directing the Committee on the District of Columbia to determine the sentiments of the citizens of the city of Georgetown on the question of retrocession to Maryland. The following year, on January 24, 1857, the Senate postponed further consideration of the measure after a brief debate concerning the language of the bill and its impact on consideration of any measure receding Georgetown to Maryland.

Modern Era. Since the 88th Congress, a number of bills have been introduced that would retrocede all or part of the District to Maryland; none were successful. Most involved the creation of a federal enclave, the National Capital Service Area, comprising federal buildings and grounds under control of the federal government. In 1963, Representative Kyl, introduced H.R. 5564 in the 88th Congress, which was referred to the House District of Columbia Committee, but was not reported by the Committee. The measure would have retroceded 96% of the District to Maryland and created a federal enclave.

On August 4, 1965, Representative Joel Broyhill of Virginia introduced a measure (H.R. 10264 in the 89th Congress) creating a federal enclave and retroceding a portion of the District to Maryland. Also, in 1965, the House District of Columbia Committee reported H.R. 10115, a bill combining the creation of a federal enclave, the retrocession of part of the District to Maryland, and home rule provisions. The bill was reported by the House District of Columbia Committee (H.Rept. 89-957) on September 3, 1965. It would have allowed the creation of a federal enclave, and retrocession of the remaining part of the city not included in the federal enclave, contingent on the state of Maryland's acceptance. If the Maryland legislature failed to pass legislation accepting the retroceded area within one year, the District Board of Election would be empowered to conduct a referendum aimed at gauging support for the creation of a charter board or commission to determine the form of government for the outer city. The bill provided for congressional approval of any measure approved by the citizens of the affected area.

On October 2, 1973, H.R. 10693, introduced by Representative Edith Green, included provisions retroceding the portion of the District ceded to the United States by Maryland. The bill would have retained congressional control over the federal

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[20] U.S. Congress, *Congressional Globe, Sketches of Debates and Proceedings*, 25th Cong., 2nd sess, (Washington: 1838) pp. 297, 493.

enclave. If the retrocession provisions of the bill had been approved, Maryland would have been entitled to two additional United States Representatives for the area retroceded until the next congressional reapportionment. The bill also provided nine years of federal payments after retrocession to Maryland to defray expenses of supporting a newly established local government for the retroceded area. It was referred to the House District of Columbia Committee on October 2, 1973, but no further action was taken.

Since the 101st Congress, eight bills have been introduced to retrocede some part of the District to Maryland.[21] The bills would have maintained exclusive legislative authority and control by Congress over the National Capital Service Area (federal enclave) in the District of Columbia. Like their earlier counterparts no hearings or votes were held on these bills.

Retrocession as a strategy for achieving voting representation in Congress for District residents arguably should address both political and constitutional issues and obstacles. The process would require not only the approval of Congress and the President, but also the approval of the State of Maryland and, perhaps, the voters of the retroceded area. Although the Supreme Court reviewed the question of retrocession in *Phillips v. Payne,*[22] in 1875, it did not rule on its constitutionality.

Semi-Retrocession: District Residents Voting in Maryland

Short of retroceding all or a portion of the District to Maryland, a second option would allow District residents to be treated as citizens of Maryland for the purpose of voting in federal elections. Such an arrangement would allow District residents to vote as residents of Maryland in elections for the House of Representatives, and to have their vote counted in the election of the two Senators from Maryland This semi-retrocession arrangement would allow District residents to be considered inhabitants of Maryland for the purpose of determining eligibility to serve as a member of the House of Representatives or the Senate, but would not change their status regarding Congress' exclusive legislative authority over the affairs of the District.

The idea of semi-retrocession is reminiscent of the arrangement that existed between 1790 to 1800, the ten-year period between the creation and occupation of the District as the national capital. During this period residents of District residing on the respective Maryland and Virginia sides of the territory were allowed to vote in national elections as citizens of their respective states and in fact voted in the 1800 presidential election.

Initial Efforts. Several bills have been introduced since 1970 to allow District residents to vote in Maryland's congressional and presidential elections without

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[21] Rep. Regula has introduced a retrocession bill in every Congress since the 101st Congress. These include H.R. 4195 (101st Congress); H.R. 1204 (102nd Congress); H.R. 1205 (103rd Congress); H.R. 1028 (104th Congress); H.R. 831 (105th Congress); H.R. 558 (106th Congress); H.R. 810 (107th Congress); and H.R. 381 (108th Congress).

[22] 92 U.S. 130 (1875).

retroceding the area to Maryland. During the 93rd Congress, on January 30, 1973, Representative Charles Wiggins introduced H.J.Res. 263, a proposed constitutional amendment would have considered the District a part of Maryland for the purpose of congressional apportionment and representation. Under this bill, District residents would have been subject to all the requirements of the laws of Maryland relating to the conduct of elections and voter qualification. The bill was referred to the House Committee on the Judiciary where no further action was taken.

On March 6, 1990, Representative Stanford Parris introduced H.R. 4193, the National Capital Civil Rights Restoration Act of 1990. The bill would have given District residents the right to cast ballots in congressional elections as if they were residents of Maryland. It also would have maintained the District's governmental structure, and was offered "as a workable way to change the [status quo] which represents taxation without representation" and as an alternative to a statehood measure, H.R. 51, introduced by Delegate Walter E. Fauntroy of the District of Columbia.[23] District officials and some members of the House, most notably Representatives Constance Morella and Steny Hoyer, who represented the two Maryland congressional districts adjacent to the District of Columbia, opposed the bill. Opponents of H.R. 4193 argued that it was not a practical means of addressing the District's lack of voting representation in Congress and that it could further cloud the District's status. Both bills were referred to the House District of Columbia Committee, but received no further action.

In defending the proposal, Representative Parris noted his opposition to statehood for the District and offered this explanation of his proposal in a letter published in the *Washington Post* on March 18, 1990.

> This approach would allow the government of the District to remain autonomous from the Maryland state government. D.C. residents would continue to vote for a mayor and a city council, and would not participate in Maryland elections for state positions such as delegate, state senator and governor. The reason for this is the constitutional mandate that the nation's capital remain under the exclusive legislative jurisdiction of Congress.
>
> There is an important distinction between this action and the Voting Rights Constitutional Amendment proposed in 1978. That action, rejected by the states, called for the election of members of Congress from the District. It did not, as my proposal does, elect those members as part of the Maryland delegation. There is also a distinction between this and proposals simply to turn the District over to Maryland [retrocession]. With my proposal, there is no need to delineate the federal enclave, and there would not be a requirement to obtain the approval of the Maryland legislature.
>
> I do not propose this because the push for statehood might pass; on the contrary, I am certain that given the political and practical problems facing the District, the unconstitutionality of statehood, and the positions taken by members of Congress during the most recent statehood debate, that statehood would not pass.

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[23] H.R. 51 had 61 cosponsors in the House. A companion bill was introduced in the Senate, S. 2647 by Sen. Kennedy with five cosponsors. H.R. 4193 had three cosponsors in the House, but no companion bill in the Senate.

> Rather, I take this action because the current injustice should be corrected, and this proposal is the only one that takes into account the constitutional limitations on statehood and the compelling case to restore voting rights in national elections to District residents.[24]

Representative Parris contended that the proposal did not require the approval of the Maryland legislature or a referendum vote by District citizens. The proposal did raise questions of constitutional law, apportionment, and House procedure. It would have provided Maryland one additional seat in the House of Representatives, increased the size of the House temporarily until the 2000 reapportionment and allowed the District's Delegate to Congress to serve as a member of the House of Representatives from Maryland until the date of the first general election occurring after the effective date of the act.

Recent Efforts. This approach had not been reintroduced in succeeding Congresses until the 108th Congress when Representative Dana Rohrabacher introduced the District of Columbia Voting Rights Restoration Act of 2004, H.R. 3709. The bill was referred to the House Administration Committee, the House Judiciary Committee, and House Committee on Government Reform, which held a hearing on June 23, 2004. When introducing his bill, Representative Rohrabacher, noted the purpose of this bill was to restore voting rights to District residents that Congress severed with the passage of the Organic Act of 1801. Representative Rohrabacher introduced a similar measure, H.R. 190, during the 109th Congress. The bill was referred to the House Administration Committee, the Government Reform Committee, and the House Judiciary Committee's Subcommittee on the Constitution. A similar measure has been introduced in the 110th Congress (H.R. 492). It would:

- treat District residents as Maryland voters for the purpose of federal elections, thus allowing District voters to participate in the election of Maryland's delegation to the House and Senate;
- allow District residents to run for congressional and senatorial seats in Maryland; increased the size of the House by two additional members until reapportionment following the 2010 decennial census;
- classify the District as a unit of local government for the purpose of federal elections and subject to Maryland election laws;
- give one House seat to Maryland and require most, if not all, of the city to be designated a single congressional district, as population permits;
- direct the clerk of the House to notify the governor of the other state, mostly likely Utah, that it is entitled to a seat based on the apportionment report submitted to the Congress by the President in 2001;
- repeal the 23rd Amendment, which allows the District to cast three electoral votes in presidential elections; and

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[24] Rep. Stanford Parris. "Voting Rights, Yes, A New Status, No." *The Washington Post* March 18, 1980. p. b8.

- allow citizens in the District to vote as Maryland residents in elections for President and Vice President.

The bill raises several policy questions relating to state sovereignty and the imposition of federal mandates—

- Can Congress, without the consent of the state, require the state of Maryland to administer or supervise federal elections in the District?
- Does transferring administrative authority and associated costs for federal elections in the District to the state of Maryland constitute an unfunded mandate?
- Who should bear the additional cost of conducting federal elections in the District?
- Is the proposal constitutional?
- Does the measure require an affirmative vote of the citizens of Maryland or the Maryland legislature?

Semi-retrocession arguably rests on uncertain ground. The constitutionality of the concept has not been tested in the courts. Semi-retrocession raises questions relating to state sovereignty and the power of Congress to define state residency for the purpose of voting representation in the national legislature. Further, since the proposal does not make the District a state, it might violate Article 1, Section 2 of the Constitution and the 14th Amendment to the Constitution. Article 1, Section 2 requires Representatives to be chosen from the states. The 14th Amendment is the basis for the "one-person, one-vote" rule for defining and apportioning congressional districts in the states.

Statehood

In the past, statehood has been granted by a simple majority vote in the House and the Senate and the approval of the President. However, according to some scholars, the District's unique status raises constitutional questions about the use of this statutory method to achieve statehood. Article IV, Section 3, of the Constitution identifies certain requirements for admission to the Union as a state. The Article states that:

> New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or Parts of the States, without the consent of the legislatures of the States concerned as well as of the Congress.

Some opponents of statehood contend that this article implies that the consent of Maryland would be necessary to create a new state out of its former territory. They note that Maryland ceded the land for the creation of a national capital. This could raise a constitutional question concerning whether Maryland could object to

the creation of another state out of territory ceded to the Untied States for the creation of the national seat of government, the District of Columbia. In addition, it could be argued that the granting of statehood for the District would violate Article I, Section 8, Clause 17, which gives Congress exclusive legislative control of the District. Because of these constitutional issues, most statehood proposals for the District have sought to achieve statehood through the constitutional amendment process.

Granting statehood to the District of Columbia would settle the question of congressional representation for District residents. A ratified constitutional amendment granting statehood to the District would entitle the District to full voting representation in Congress. As citizens of a state, District residents would elect two Senators and at least one Representative, depending on population.

Modern History. In 1983, when it became evident that H.J.Res. 554 — a proposed constitutional amendment granting voting rights to District residents — would fail to win the 38 state votes needed for ratification, District leaders embraced the concept of statehood for the District of Columbia. The statehood effort, however, can be traced back to1921.[25] Statehood legislation in Congress has centered around making the non-federal land in the District the nation's 51st state. Several supporters of voting representation in Congress for District residents believe that statehood is the only way for citizens of the District to achieve full congressional representation.

Since 1983, there has been a continuing effort to bring statehood to the District — an effort that was most intense from 1987 through 1993. Since the 98th Congress, 13 statehood bills have been introduced.[26] On two occasions, House bills were reported out of the committee of jurisdiction, resulting in one floor vote. D.C. Delegate Walter E. Fauntroy introduced H.R. 51, 100th Congress, in 1987 to create a state that would have encompassed only the non-federal land in the District of Columbia. While the bill was reported out of the House District of Columbia Committee, no vote was taken on the House floor. On a second statehood bill, H.R. 51, introduced by Delegate Eleanor Holmes Norton in the 103rd Congress, in 1993, the measure was reported from the Committee on the District of Columbia, and a vote was taken on the House floor on November 21, 1993, with a tally of 277-153 against passage.

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[25] In November and December 1921, and January 1922, during the 67th Congress, the Senate held hearings on S.J.Res. 133, which would have granted statehood to the District.

[26] In the 98th Congress, Del. Fauntroy introduced H.R. 3861 on Sept. 12, 1983, and Sen. Kennedy introduced S. 2672 on May 15, 1984. In the 99th Congress, Del. Fauntroy introduced H.R. 325 on Jan. 3, 1985; Sen. Kennedy introduced S. 293 on Jan. 24, 1985. In the 100th Congress, Del. Fauntroy introduced H.R. 51 on Jan. 6, 1987; Sen. Kennedy introduced S. 863 on March 26, 1987. In the 101st Congress, Del. Fauntroy introduced H.R. 51 on Jan. 3, 1989; Sen. Kennedy introduced S. 2647 on May 17, 1990. In the 102nd Congress, Del. Norton introduced H.R. 2482 on May 29, 1991; Sen. Kennedy introduced S. 2023 on Nov. 22, 1991. In the 103rd Congress, Del. Norton introduced H.R. 51 on Jan. 5, 1993; Sen. Kennedy introduced S. 898 on May 5, 1993. In the 104th Congress, Del. Norton introduced H.R. 51 on Jan. 4, 1995.

Other Statutory Means

On July 14, 1998, during the 105th Congress, Delegate Eleanor Holmes Norton introduced H.R. 4208, a bill providing full voting representation in Congress for the District of Columbia. The bill was referred to the Committee on Judiciary, Subcommittee on the Constitution, where no action was taken. The bill was noteworthy in that it did not prescribe methods by which voting representation was to be obtained such as a constitutional amendment. Nor did the Norton bill include language typically found in other measures that defined or declared the District a state for the purpose of voting representation in Congress. The measure suggested that Congress might provide voting representation by statute, a constitutionally untested proposition.

During the 109th Congress two bills were introduced that sought to provide voting representation to the citizens of the District of Columbia by eschewing methods used in the past such as a constitutional amendment, retrocession, semi-retrocession and statehood. The bills would have provided District citizens with voting rights in Congress by designating the District as a state (virtual statehood) or by designating the District as a congressional district.

Virtual Statehood. Much of the latest thinking on securing voting rights for citizen's of the District centers on the premise that Congress has the power to define the District as a state for the purpose of granting voting representation. Proponents of virtual statehood note that the District is routinely identified as a state for the purpose of intergovernmental grant transfers, that Congress' authority to define the District as a state under other provisions of the Constitution has withstood Court challenges,[27] and that Congress has passed legislation allowing citizens of the United States residing outside the country to vote in congressional elections in their last state of residence.[28] They also note that the Constitution gives Congress exclusive legislative control over the affairs of the District and thus the power to define the District as a state. Opponents argue that the District lacks the essential elements of statehood, principally an autonomous state legislature, charged with setting the time, place and manner for holding congressional elections.

During the 109th Congress Delegate Eleanor Holmes Norton and Senator Joseph Lieberman introduced identical bills in the House and Senate (H.R. 398/S. 195: No Taxation Without Representation Act of 2005) that would have treated the District as a state for the purpose of congressional representation. In addition, the bill would have

- given the District one Representative with full voting rights until the next reapportionment;
- granted full voting representation to District citizens, allowing them the right to elect two Senators, and as many Representatives as the

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[27] See *Stoutenburg v. Hennick*, 129 U.S. 141 (1889) (Art. 1, Sec. 8, Clause 3— Commerce Clause); *Callan v. Wilson*, 127 U.S. 540, 548 (1988) (Sixth Amendment— District residents are entitled to trial by jury).

[28] The Uniform and Overseas Citizens Absentee Voting Act, 100 Stat. 924.

District would be entitled to based on its population following reapportionment;
- permanently increased the size of the House from 435 to 436 for the purpose of future reapportionment.

The proposal raised several questions, chief among them, whether Congress has the legal authority to give voting representation to District residents. The bill differed significantly from the other measures introduced in during the 109th Congress. H.R. 398 would have provided citizens of the District with voting representation in both the House and the Senate, unlike the other measures which would provide representation only in the House.

Congressional District. A proposal introduced by Representative Tom Davis, during the 109th Congress (H.R. 5388: District of Columbia Fairness and Equal Representation Act of 2006) would have designated the District of Columbia a congressional district. This bill, which was reported out of the House Government Reform Committee on May 16, 2006, superceded H.R. 2043. H.R. 5388 would have

- designated the District of Columbia as a congressional district for the purpose of granting the city voting representation in the House of Representative; and
- permanently increased the number of members of the House of Representative from 435 to 437. One of the two additional seats would be occupied by a Representative of the District of Columbia; the other would be elected at-large from the state of Utah based on 2000 decennial census of the population and apportionment calculations which placed Utah in the 436 position. This is one seat short of the 435 seats maximum size of the House.

The bill was also referred to the House Judiciary Committee, Subcommittee on the Constitution, which held a hearing on the bill on September 14, 2006, but did not report it out of committee. Under the bill, both new Members would have full voting rights, allowing the Member to vote in committee and on the House floor. H.R. 5388 was among the most recent in a long series of efforts aimed at giving District residents voting representation in Congress, a series that extends back to 1801.

The bill's proposed creation of an at-large congressional district for Utah was cited as a hurdle to it being reported out of the Subcommittee on the Constitution. The proposed creation of an at-large congressional district for Utah is not without precedent. According to the *Historical Atlas of United States Congressional Districts* the use of at-large congressional district lasted from the 33rd Congress (1853-1855) to the 89th Congress (1965-1967). Such districts were used for one of several reasons. The state legislature

- could not convene in time to redistrict;
- could not agree upon a new redistricting plan;
- decided not to redistrict; or

- decided to use this method as a part of its new redistricting plan.[29]

The idea of an at-large District raised questions about the measure's constitutionality. In response, on December 4, 2006, the Utah legislature approved by a vote of 23 to 4 in the Senate and 51 to 9 in the House, a redistricting map creating a 4th congressional district for the state. The move was seen by supporters of voting rights for the District as removing a significant impediment to the bill's consideration by the full House of Representatives during the 109th Congress. However, a floor vote on the measure was not possible before the 109th Congress adjourned following the 2006 congressional elections.

On January 9, 2007, Delegate Eleanor Holmes Norton and Representative Tom Davis introduced H.R. 328, which includes many of the same provisions included in H.R. 5388. The bill does not include the most controversial provision included in H.R. 5388, namely, the creation of an at-large congressional district for Utah. Instead, the bill requires Utah to create a fourth congressional district.

Analysis

Over the two hundred year history of the Republic, citizens of the District of Columbia have sought political and judicial redress in their efforts to secure voting representation in Congress. In 2000, the Supreme Court affirmed a decision by a three-judge panel of the United States District Court of the District of Columbia in the case of *Adams v. Clinton,*[30] which rejected a petition from District residents seeking judicial redress in their effort to secure voting representation in the national legislature. The Court ruled that District residents did not have a constitutional right to voting representation in Congress, but Congress has the power to grant voting rights to District residents through the political process including options outlined in this report.

Any of the options outlined in this report must be able to withstand political and constitutional challenges. Some, such as a constitutional amendment or retrocession are more problematic than others. Others such as statehood, which can be achieved by statute, may trigger other constitutional issues. All must overcome what some observers consider conflicting provisions of the Constitution. Namely, Art. 1, Sec. 2, of the Constitution which states that the House of Representative shall be composed of members chosen every two years by the people of the several states and Art. 1, Sec. 8, Clause 17 which conveys exclusive legislative authority in all cases whatsoever over the affairs of the District of Columbia.

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[29] Kenneth C. Martis. *Congressional Districts* in The Historical Atlas of United States Congressional Districts: 1789-1993 (New York, NY, The Free Press, 1982) p. 5.

[30] 90 F. Supp. 2d 35 (D.D.C.2000), *affirmed sub nom.* Alexander v. Mineta, 531 U.S. 940 (2000)(cites to later proceedings omitted).

It can be argued that, given the District's unique status as the seat of the national government and a strict reading of the Constitution, the only fail-safe avenues that exist to provide District residents voting rights in the national legislature are a constitutional amendment or statehood, which could be achieved by statute. The former — a constitutional amendment — offers a degree of finality and permanence in settling the question of District voting representation in the national legislature, but the process of winning approval of such an amendment is by no means easy. To be successful, proponents of a constitutional amendment in support of District voting rights must win the support of—

- two-thirds majority in both Houses of Congress. The amendment must then be ratified by three-fourths of the states (38 states) in a state convention or by a vote of the state legislatures; or
- two-thirds of the state legislatures may call for a Constitutional Convention for the consideration of one or more amendments to the Constitution. If approved, the amendments must be ratified by three-fourths of the states (38 states) in a state convention or by a vote of the state legislatures.

The amendment process could take years and prove unsuccessful, as was the case with the D.C. Voting Rights Amendment of 1978, which was ratified by 16 states, but expired in 1985 without winning the support of the requisite 38 states.

Retrocession, the ceding of part of the District back to Maryland, has not been fully tested in the courts. Retrocession as a strategy for achieving voting representation in Congress for District residents arguably should address both political and constitutional issues and obstacles. Given the Virginia experience, the process would require not only the approval of Congress and the President, but also the approval of the State of Maryland and, perhaps, the voters of the retroceded area. Although the Supreme Court reviewed the question of retrocession in *Phillips v. Payne,*[31] in 1876, it did not rule on its constitutionality. Moreover, retrocession would require some portion of the District to remain a federal enclave in conformance with Article 1, Sec. 8, Clause 17 of the Constitution, which requires Congress to exercise exclusive legislative control over the "Seat of the Government of the United States."

Semi-retrocession bills would result in a unique arrangement between citizens of the District of Columbia and Maryland. Such bills would allow District residents to vote in Maryland congressional elections based in part on the theory of residual citizenship, that is the idea that District residents retained residual rights as citizens of Maryland, including voting rights after the land creating District was ceded to the federal government. The theory was rejected by the Supreme Court. In *Albaugh v. Tawes,*[32] the Supreme Court rejected the contention that District residents retained residual rights as citizens of Maryland, specifically, the right to vote in Maryland. The case involved a Republican candidate who lost the nomination election for the United States Senate. The candidate, William Albaugh, filed suit seeking a judgment

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[31] 92 U.S. 130 (1875).

[32] 379 U.S. 27 (1964).

declaring the District a part of Maryland and ordering Maryland state officials (the Governor and the Secretary of State) to declare the primary and any future elections voided because District residents did not vote. The Court held that District residents had no right to vote in Maryland elections.

Statehood is a much simpler process, but it is no less politically sensitive. Article IV of the Constitution gives Congress the power to admit new states into the Union. The Article does not prescribe the method, and the process has varied over time. Congress could by statute, convey statehood to some portion of the District. It must be noted that if Congress conveyed statehood on what is now the District, a portion of the District would have to remain a federal enclave since Article I, Sec. 8, Clause 17, of the Constitution requires a portion of the District, not exceeding ten square miles, to be maintained as the "Seat of Government of the United States." The statehood option should include Congress introducing a constitutional amendment repealing the 23rd Amendment granting District residents three votes in the Electoral College. Observers argue that if the amendment is not repealed it could result in conveying significant political power in presidential elections to the few District residents remaining in the federal enclave.

Bills that would convey voting rights to the District Delegate to Congress by defining the District as a state (virtual- statehood and other means) may conflict with Article I, Sec. 2, of the Constitution which conveys voting rights to representatives of the several states. Despite the constraints of Article 1, Sec. 2, advocates of voting rights for District residents contend that the District Clause (Art. 1, Sec. 8) gives Congress the power to define the District as a state. As Congress has never granted the Delegate from the District of Columbia a vote in the full House or Senate, the constitutionality of such legislation has not been before the courts. In general however, courts such as the three-judge panel in *Adams v. Clinton*[33] have not looked favorably upon the argument that the District of Columbia should be considered a state for purposes of representation in the Congress. Some commentators have suggested that Congress, acting under its authority over the District, has the power to confer such representation.[34] Other commentators, however, have disputed this argument.[35] In addition, District voting rights proponents can point to the Uniform and Overseas Citizens Absentees Voting Act, as an example of Congress' authority to provide voting rights to citizens who are not residents of a state. A full analysis of these legal arguments can be found at CRS Report RL33824, *The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole,* by Kenneth R. Thomas.

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[33] 90 F. Supp. 2d 35 (D.D.C.2000), *affirmed sub nom.* Alexander v. Mineta, 531 U.S. 940 (2000).

[34] *See, e.g.,* Viet Dinh and Adam H. Charnes, The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives 9 (2004) [report submitted to the House Committee on Government Reform)available at D.C. Vote Website at [http://www.dcvote.org/pdfs/congress/vietdinh 112004.pdf.]

[35] *See, e.g., District of Columbia Fair and Equal House Voting Rights Act of 2006, before the Subcommittee on the Constitution, H.R. 5388*, 109th Cong., 2nd Sess. 61 (testimony of Professor Jonathon Turley).

Appendix A: Woodward Proposal

Resolved that the following be recommended to the Legislatures of the several states as an Article in addition to, and amendment of the constitution of the United States.

ARTICLE

The Territory of Columbia shall be entitled to one Senator in the Senate of the United States; and to a number of members in the House of Representatives proportionate to its population. Before it shall have attained a population sufficient to entitle it to one representative it shall be entitled to a member, who shall have the right to deliberate and receive pay, but not to vote. It shall also be entitled to one elector for a President and Vice President of the United States, until it shall have attained a sufficient population to entitle it to one representative, and then it shall be entitled to an additional elector for every representative.[36]

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[36] Woodward, Proposed Constitutional Amendment of 1801, quoted in Noyes, p. 204.

Appendix B: Anti-Lobbying Provisions in D.C. Appropriations Acts

Congress has restricted the ability of the Government of the District of Columbia to lobby for voting representation. For several years, the general provisions of annual appropriation acts for the District have prohibited D.C. Government from using federal or District funds to lobby for voting representation, including statehood. Most recently, P.L. 109-115 — the Departments of Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, the Office of President, and Independent Agencies Appropriations Act of 2006 — prohibits the use of District and federal funds to support lobbying activities aimed at securing statehood or voting representation for citizens of the District. In addition, the act specifically prohibits the District of Columbia Corporation Counsel or any other officer or entity of the District government from providing assistance for any petition drive or civil action seeking to require Congress provide for voting representation in Congress for the District of Columbia. The act also prohibits the use of District and federal funds to finance the salaries, expenses, or other costs associated with the offices of Statehood Representative for District of Columbia and Statehood Senator.[37]

In 2005, the District passed legislation that some analysts consider a circumvention of Congress' prohibition on the use of District funds to advocate for voting representation in Congress for citizens of the District of Columbia. On July 6, 2005, the Council of the District of Columbia unanimously approved the "Fiscal Year 2006 Budget Support Emergency Act of 2005" (A16-0168). The act included

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[37] P.L. 109-115 include three specific provisions prohibiting or restricting the District's ability to lobby for voting representation in Congress. They are as follows: "Sec. 104. (a) Except as provided in subsection (b), no part of this appropriation shall be used for publicity or propaganda purposes or implementation of any policy including boycott designed to support or defeat legislation pending before Congress or any State legislature. (b) The District of Columbia may use local funds provided in this title to carry out lobbying activities on any matter other than — (1) the promotion or support of any boycott; or (2) statehood for the District of Columbia or voting representation in Congress for the District of Columbia. (c) Nothing in this section may be construed to prohibit any elected official from advocating with respect to any of the issues referred to in subsection (b)."

"Sec. 110. None of the Federal funds provided in this act may be used by the District of Columbia to provide for salaries, expenses, or other costs associated with the offices of United States Senator or United States Representative under section 4(d) of the District of Columbia Statehood Constitutional Convention Initiatives of 1979 (D.C. Law 3 — 171; D.C. Official Code, section 1 — 123)."

"Sec. 115. (a) None of the funds contained in this act may be used by the District of Columbia Corporation Counsel or any other officer or entity of the District government to provide assistance for any petition drive or civil action which seeks to require Congress to provide for voting representation in Congress for the District of Columbia. (b) Nothing in this section bars the District of Columbia Corporation Counsel from reviewing or commenting on briefs in private lawsuits, or from consulting with officials of the District government regarding such lawsuits."

as subtitle F of Title I, the "Support for Voting Rights Educational-Informational Activities Emergency Act of 2005," which appropriated $1 million in local funds to the Executive Office of the Mayor to support "educational and informational activities to apprise the general pubic of the lack of voting rights in the United Sates Congress for District residents."[38] Language of the act aimed at drawing a distinction between "educational and informational activities" and advocacy activities in support voting rights for District residents. In fact, Section 1026(b) of the act prohibits funds from being used to support lobbying activities in support of voting rights for District residents. On April 5, 2006, the Mayor identified three entities who received a share of the $1 million to be used to conduct voter education activities. They included DC Vote ($500,000), The League of Women Voters of the District of Columbia ($200,00) and Our Nation's Capital ($300,000).

[38] Section 1026, Subtitle F, Title I of A16-0168. Text available at [http://www.dccouncil.washington.dc.us/images/00001/20050726174031.pdf].

CRS REPORT FOR CONGRESS ENTITLED "THE CONSTITUTIONALITY OF AWARDING THE DELEGATE FOR THE DISTRICT OF COLUMBIA A VOTE IN THE HOUSE OF REPRESENTATIVES OR THE COMMITTEE OF THE WHOLE," JANUARY 24, 2007, KENNETH R. THOMAS, LEGISLATIVE ATTORNEY, AMERICAN LAW DIVISION

Order Code RL33824

CRS Report for Congress

The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole

January 24, 2007

Kenneth R. Thomas
Legislative Attorney
American Law Division

Prepared for Members and Committees of Congress

Congressional Research Service

The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole

Summary

Two proposals have been made in the 110th Congress regarding granting the Delegate of the District of Columbia voting rights in the House. On January 9, 2007, Delegate Eleanor Holmes Norton of the District of Columbia introduced H.R. 328, the District of Columbia Fair and Equal House Voting Rights Act of 2007. On January 19, Representative Hoyer introduced H.Res. 78, which proposed House Rule changes allowing the District of Columbia delegate (in addition to the Resident Commissioner of Puerto Rico and the delegates from American Samoa, Guam, and the Virgin Islands) to vote in the Committee of the Whole, subject to a revote in the full House if such votes proved decisive. H.R. 328 has not yet been considered; H.Res. 78 was approved by the House on January 24, 2007, by a vote of 226-91.

These two approaches appear to raise separate, but related, constitutional issues. As to H.R. 328, it is difficult to identify either constitutional text or existing case law that would directly support the allocation by statute of the power to vote in the full House to the District of Columbia Delegate. Further, that case law that does exist would seem to indicate that not only is the District of Columbia not a "state" for purposes of representation, but that congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation.

In particular, at least six of the Justices who participated in what appears to be the most relevant Supreme Court case on this issue, *National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co.*, authored opinions rejecting the proposition that Congress's power under the District Clause was sufficient to effectuate structural changes to the federal government. Further, the remaining three judges, who found that the Congress could grant diversity jurisdiction to District of Columbia citizens despite the lack of such jurisdiction in Article III, specifically limited their opinion to instances where the legislation in question did not involve the extension of fundamental rights. To the extent that the representation in Congress would be seen as such a right, all nine Justices in *Tidewater Transfer Co.* would arguably have found the instant proposal to be unconstitutional.

H.Res. 78, on the other hand, is similar to amendments to the House Rules that were adopted during the 103rd Congress. These rule changes survived judicial scrutiny at both the District Court and the Court of Appeals level. It would appear, however, that these amendments were upheld primarily because of the provision calling for a revote by the full House when the vote of the delegates was decisive in the Committee of the Whole.

Although not beyond question, it would appear likely that the Congress does not have authority to grant voting representation in the House of Representatives to the Delegate from the District of Columbia as contemplated under H.R. 328. As the revote provisions provided for in H.Res. 78 would render the Delegate's vote in the Committee of the Whole largely symbolic, however, the amendments to the House Rules would be likely to pass constitutional muster.

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The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or in the Committee of the Whole

Proposed Legislation and Rule Change

Two proposals have been made in the 110th Congress made regarding granting the Delegate for the District of Columbia voting rights in the House. On January 9, 2007, Delegate Eleanor Holmes Norton of the District of Columbia introduced H.R. 328,[1] the District of Columbia Fair and Equal House Voting Rights Act of 2007, which would give the District of Columbia Delegate a vote in the Full House. On January 19, 2007, Representative Hoyer introduced H.Res. 78,[2] a resolution to amend the House Rules to allow the District of Columbia Delegate (in addition to delegates from Puerto Rico,[3] American Samoa, Guam and the Virgin Islands) to vote in the Committee of the Whole, subject to a revote in the full House if such votes proved decisive. Although H.R. 328 has not yet been considered, H.Res. 78 was approved by the House on January 24, 2007.[4]

Under H.R. 328, the House would be expanded by two Members to a total of 437 Members, and the first of these two positions would be allocated to create a voting Member representing the District of Columbia.[5] Although it is generally

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[1] 110th Cong, 1st Sess.

[2] 110th Cong, 1st Sess.

[3] Although Puerto Rico is represented by a "Resident Commissioner," for purposes of this report, such representative will be referred to as a delegate.

[4] The resolution was passed by a vote of 226-191. *Congressional Record*, daily edition, vol. 153, January 24, 2007, p. H912.

[5] The second position would be allocated in accordance with the 2000 census data and existing federal law. H.R. 328, § 4(b). It would appear that, if the bill was passed today, that the state of Utah would receive the second seat. Mary Beth Sheridan, *House Panel Endorses D.C. Vote: Bill Needs Approval From Judiciary Committee*, WASH. POST., May 19, 2006 at B1. *See, e.g., District of Columbia Fair and Equal House Voting Rights Act of 2006, before the Subcommittee on the Constitution, H.R. 5388*, 109th Cong., 2nd Sess. 2 (statement of Rep. Chabot). A similar bill introduced in the 109th Congress would have provided that the second representative position be allocated as an at-large seat. Representative Sensenbrenner, then-Chairman of the House Judiciary Committee, objected to this provision, suggesting that Utah pass a redistricting plan to accommodate the added seat. Utah has passed a law for this purpose, and the most recent version of the bill does not

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accepted that the Delegate for the District of Columbia could be given a vote in the House of Representatives by constitutional amendment, questions have been raised whether such a result can be achieved by statute.

H.R. 328 provides the following: "Notwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives."[6] The proposal also provides that regardless of existing federal law regarding apportionment,[7] "the District of Columbia may not receive more than one member under any reapportionment of members."[8] The proposal also contains a non-severability clause, so that if a provision of the Act is held unconstitutional, the remaining provisions of H.R. 328 would be treated as invalid.[9]

In contrast, H.Res. 78 only grants the District of Columbia delegate a vote in the Committee of the Whole, a procedural posture of the full House which is invoked to speed up floor action. Specifically, the resolution amends House Rule III, cl. 3(a) to provide that "in a Committee of the Whole House on the state of the Union, the Resident Commissioner to the United States from Puerto Rico and each Delegate to the House shall possess the same powers and privileges as Members of the House."

An additional change to the House Rules, however, limits the effect of this voting power when it would be decisive. H.Res. 78 also amended House Rule XVIII, cl. 6 to provide that "whenever a recorded vote on any question has been decided by a margin within which the votes cast by the Delegates and the Resident Commissioner have been decisive, the Committee of the Whole shall automatically rise and the Speaker shall put that question de novo without intervening debate or other business. Upon the announcement of the vote on that question, the Committee of the Whole shall resume its sitting without intervening motion." Both of these provisions of H.Res. 78 are similar to amendments to the House Rules that were in effect during the 103rd Congress.

Background

Residents of the District of Columbia have never had more than limited representation in Congress.[10] Over the years, however, efforts have been made to

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[5] (...continued)
contemplate an at-large seat. Elizabeth Brotherton, *Norton Prepping to Cast D.C.'s First House Vote,* ROLL CALL (January 11, 2007).

[6] H.R. 328, § 3(a).

[7] *See* 2 U.S.C. §2a.

[8] H.R. 328, § 3(b).

[9] H.R. 328, § 5.

[10] The District has never had any directly elected representation in the Senate, and has been represented by a nonvoting Delegate in the House of Representatives for only a short portion (continued...)

amend the Constitution so that the District would be treated as a state for purposes of voting representation. For instance, in 1978, H.J.Res. 554 was approved by two-thirds of both the House and the Senate, and was sent to the states. The text of the proposed constitutional amendment provided, in part, that "[f]or purposes of representation in the Congress, election of the President and Vice President, and Article V of this Constitution,[11] the District constituting the seat of government of the United States shall be treated as though it were a State."[12] The Amendment was ratified by 16 states, but expired in 1985 without winning the support of the requisite 38 states.[13]

Since the expiration of this proposed Amendment, a variety of other proposals have been made to give the District of Columbia representation in the full House. In general, these proposals would avoid the more procedurally difficult route of amending the Constitution, but would be implemented by statute. Thus, for instance, bills were introduced and considered which would have: (1) granted statehood to the non-federal portion of the District; (2) retroceded the non-federal portion of the District to the State of Maryland; and (3) allowed District residents to vote in Maryland for their representatives to the Senate and House.[14] Efforts to pass these bills have been unsuccessful, with some arguing that these approaches raise constitutional and/or policy concerns.[15]

Unlike the proposals cited above, H.R. 328 uses language similar to that found in the proposed constitutional amendment, but would instead grant the District of Columbia a voting member in the House by statute. As noted above, H.J Res. 554 would have provided by constitutional amendment that the District of Columbia be treated as a state for purposes of representation in the House and Senate, the election of the President and Vice President, and ratification of amendments of the Constitution. H.R. 328, is more limited, in that it would only provide that the District of Columbia be treated as a state for purposes of representation in the House. Nonetheless, the question is raised as to whether such representation can be achieved without a constitutional amendment.

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[10] (...continued)
of its over 200-year existence. *See* CRS Report RL33830, *District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals*, by Eugene Boyd.

[11] U.S. CONST. Article V provides that:

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

[12] *See* Johnny Killian, George Costello, Kenneth Thomas, *United States Constitution: Analysis and Interpretation* 49 (2002 ed.).

[13] CRS Report RL33830, *supra* note 10, at 6.

[14] Id. at 6-12.

[15] Id. at 8-12. D.C. Hearing, *supra* note 5 at 78 (Testimony of Hon. Kenneth W. Starr).

As noted previously, a resolution similar to the H.Res. 78 was adopted in the 103rd Congress. It was soon challenged, but it was upheld at both the District Court[16] and the Court of Appeals[17] level. It would appear, however, that the proposal was upheld primarily because of the provision calling for a revote when the vote of the delegates or residents was decisive in the Committee of the Whole.

The Meaning of the Term "State" in the House Representation Clause

As Congress has never granted the Delegate from the District of Columbia a vote in the full House or Senate, the constitutionality of such legislation has not been before the courts. The question of whether the District of Columbia should be considered a state for purposes of having a vote in the House of Representatives, however, was considered by a three-judge panel of the United States District Court of the District of Columbia in the case of *Adams v. Clinton.*[18] In *Adams*, the panel examined the issue of whether failure to provide congressional representation for the District of Columbia violated the Equal Protection Clause. In doing so, it discussed extensively whether the Constitution, as it stands today, allows such representation.

The court began with a textual analysis of the Constitution. Article I, § 2, clause 1 of the Constitution, the "House Representation Clause," provides:

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

The court noted that, while the phrase "people of the several States" could be read as meaning all the people of the "United States," that the use of the phrase later in the clause and throughout the Article[19] makes clear that the right to representation in Congress is limited to states. This conclusion has been consistently reached by a variety of other courts,[20] and is supported by most, though not all, commentators.[21]

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[16] Michel v. Anderson, 817 F. Supp. 126 (D.D.C. 1993), *affirmed*, Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994).

[17] Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994).

[18] 90 F. Supp. 2d 35 (D.D.C.2000), *affirmed sub nom.* Alexander v. Mineta, 531 U.S. 940 (2000).

[19] *See, e.g.*, U.S. Const. Art. I, § 2, cl. 2 (each representative shall "be an Inhabitant of that State" in which he or she is chosen); *id.* at Art. I, § 2, cl. 3 (representatives shall be "apportioned among the several States which may be included within this Union"); *id.* ("each State shall have at Least one Representative"); *id.* at art. I, § 2, cl. 4 (the Executive Authority of the "State" shall fill vacancies); *id.* at art. I, § 4, cl. 1 (the legislature of "each State" shall prescribe times, places, and manner of holding elections for representatives).

[20] *See* Igartua de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994) (holding that United States citizens in Puerto Rico are not entitled to vote in presidential elections); Attorney

(continued...)

The plaintiffs in *Adams v. Clinton*, however, suggested that even if the District of Columbia is not strictly a "state" under Article I, § 2, clause 1, that the citizens of the United States could still have representation in Congress.

The plaintiffs in *Adams* made two arguments: (1) that the District of Columbia, although not technically a state under the Constitution, should be treated as one for voting purposes or (2) that District citizens should be allowed to vote in the State of Maryland, based on their "residual" citizenship in that state. The first argument was based primarily on cases where the Supreme Court has found that the District of Columbia was subject to various constitutional provisions despite the fact that such provisions were textually limited to "states."[22] The second argument is primarily based on the fact that residents of the land ceded by Maryland continued to vote in Maryland elections during the period between the Act of July 16, 1790, by which Virginia and Maryland ceded lands to Congress for formation of the District, and the Organic Act of 1801,[23] under which Congress assumed jurisdiction and provided for the government of the District.

Whether the District of Columbia can be considered a "state" within the meaning of a particular constitutional or statutory provision appears to depend upon the character and aim of the specific provision involved.[24] Accordingly, the court in *Adams* examined the Constitution's language, history, and relevant judicial precedents to determine whether the Constitution allowed for areas which were not states to have representatives in the House. The court determined that a finding that the District of Columbia was a state for purposes of congressional representation was not consistent with any of these criteria.

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[20] (...continued)

Gen. of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984) (holding that United States citizens in Guam are not entitled to vote in presidential and vice-presidential elections).

[21] *See, e.g.*, Jon M. Van Dyke, The Evolving Legal Relationships Between the United States and Its U.S. Flag Islands, U. HAW. L. REV. 445, 512 (1992). Even some proponents of D.C. voting rights generally assume the District of Columbia is not currently a state for purposes of Article I, § 2, cl. 1. *See, e.g.*, Viet Dinh and Adam H. Charnes, *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives* 9 (2004) (report submitted to the House Committee on Government Reform) available at D.C. Vote Website at [http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf]. *But see* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. on Legis. 167, 168 (1975); Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. Pa. L. Rev. 1659, 1661 (1991).

[22] *See, e.g.*, Loughran v. Loughran, 292 U.S. 216, 228 (1934) (holding that Full Faith and Credit clause binds "courts of the District . . . equally with courts of the States"); Callan v. Wilson, 127 U.S. 540, 550 (1888) (holding that the right to trial by jury extends to residents of District).

[23] 2 Stat. 103 (1801).

[24] District of Columbia v. Carter, 409 U.S. 418, 420 (1973) (application of 42 U.S.C. § 1983).

First, the court indicated that construing the term "state" to include the "District of Columbia" for purposes of representation would lead to many incongruities in other parts of the Constitution. One of several examples that the court noted was that Article I requires that voters in House elections "have the Qualifications requisite for the Electors of the most numerous branch of the State Legislature."[25] The District, as pointed out by the court, did not have a legislature until home rule was passed in 1973, so this rule would have been ineffectual for most of the District's history.[26] This same point can be made regarding the clause providing that the "Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof...."[27] Similar issues arise where the Constitution refers to the Executive Branch of a state.[28]

The court went on to examine the debates of the Founding Fathers to determine the understanding of the issue at the time of ratification. The court concluded that such evidence as exists seems to indicate an understanding that the District would not have a vote in the Congress.[29] Later, when Congress was taking jurisdiction over land ceded by Maryland and Virginia to form the District, the issue arose again, and concerns were apparently raised precisely because District residents would lose their ability to vote.[30] Finally, the court noted that other courts which had considered the question had concluded in *dicta* or in their holdings that residents of the District do not have the right to vote for Members of Congress.[31]

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[25] U.S. CONST. art. I, § 2, cl. 1.

[26] *See* District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198 (1973).

[27] U.S. CONST. art. I, § 4, cl. 1.

[28] "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." U.S. CONST. Art. I, § 2, cl. 4.

[29] For instance, at the New York ratifying convention, Thomas Tredwell argued that "[t]he plan of the federal city, sir, departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote...." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 402 (Jonathan Elliot ed., 2d ed. 1888), *reprinted* in 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987).

[30] *See, e.g.*, 10 ANNALS OF CONG. 992 (1801) (remarks of Rep. Smilie) (arguing that upon assumption of congressional jurisdiction, "the people of the District would be reduced to the state of subjects, and deprived of their political rights").

[31] Hepburn & Dundas, 6 U.S. (2 Cranch) 445, 452 (1805) (District of Columbia is not a state for purposes of diversity jurisdiction); Heald v. District of Columbia, 259 U.S. 114, 124 (1922) (stating in *dicta* that "residents of the district lack the suffrage and have politically no voice in the expenditure of the money raised by taxation."); Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 324 (1820) (stating in *dicta* that the District "relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government.")

The second argument considered by the court was whether residents of the District should be permitted to vote in congressional elections through Maryland, based on a theory of "residual" citizenship in that state. As noted above, this argument relied on the fact that residents of the land ceded by Maryland apparently continued to vote in Maryland elections for a time period after land had been ceded to Congress. The court noted, however, that essentially the same argument had been rejected by a previous three-court panel decision of the District of Columbia Court of Appeals,[32] and the Supreme Court had also concluded that former residents of Maryland had lost their state citizenship upon the separation of the District of Columbia from the State of Maryland.[33]

The court continued by setting forth the history of the transfer of lands from Maryland and Virginia to the federal government under the Act of July 16, 1790. While conceding that residents of the ceded lands continued to vote in their respective states, the court suggested that this did not imply that there was an understanding that they would continue to do so after the District became the seat of government; it reflected the fact that during this period the seat of government was still in Philadelphia. Thus, upon the passage of the Organic Act of 1801, Maryland citizenship of the inhabitants of these lands was extinguished, effectively ending their rights to vote.

The Power of Congress To Provide Representation to Political Entities That Are Not States

The argument has been made, however, that the *Adams* case, which dealt with whether the Equal Protection Clause compels the granting of a vote to the District of Columbia, can be distinguished from the instant question — whether Congress has power to grant the District a voting representative in Congress. Under this argument, the plenary authority that the Congress has over the District of Columbia under Article I, section 8, clause 17 (the "District Clause") represents an independent source of legislative authority under which Congress can grant the District a voting Representative.[34]

Although the question of whether Congress has such power under the District Clause has not been directly addressed by the courts, the question of whether Congress can grant the District of Columbia representation under a different congressional power was also addressed by the United States Court of Appeals for

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[32] Albaugh v. Tawes, 233 F. Supp. 576, 576 (D. Md. 1964), *affirmed* 379 U.S. 27 (1964) (per curiam)(residents of D.C. have no right to vote in Maryland).

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

[34] *See* Viet Dinh and Adam H. Charnes, *supra* note 21, at 12-13; D.C. Hearing, *supra* note 5, at 83 (testimony of Hon. Kenneth W. Starr); Rick Bress and Kristen E. Murray, Latham & Watkins LLP, *Analysis of Congress's Authority By Statute To Provide D.C. Residents Voting Representation in the United States House of Representatives and Senate* at 7-12 (February 3, 2003)(analysis prepared for Walter Smith, Executive Director of DC Appleseed Center for Law and Justice).

the District of Columbia. In the case of *Michel v. Anderson*,[35] the court considered whether the Delegate for the District of Columbia could, by House Rules, be given a vote in the Committee of the Whole of the House of Representatives.

The primary objection to the rule in question was that, while Delegates have long been able to vote in Committee, only a Member can vote on the floor of the House. The district court below had agreed with this argument, stating that:

> One principle is basic and beyond dispute. Since the Delegates do not represent States but only various territorial entities, they may not, consistently with the Constitution, exercise legislative power (in tandem with the United States Senate), for such power is constitutionally limited to "Members chosen ... by the People of the several States." U.S. Const. art. I, § 8, cl. 1.[36]

The Court of Appeals also agreed,[37] stating that:

> [The language of] Article I, § 2 ... precludes the House from bestowing the characteristics of membership on someone other than those "chosen every second Year by the People of the several States."

Based on these statements, it is unlikely that these courts would have seen merit in an argument that the Congress could grant the Delegate a vote in the House.

An argument might be made, however, that the decision in *Michel v. Anderson* can be distinguished from the instant proposal, because *Michel* concerned a House Rule, not a statute. Under this argument, the House in *Michel* was acting alone under its power to "Determine the Rules of its Proceedings" pursuant to Article I, section 5.[38] Arguably, the court did not consider the issue of whether the Congress as a whole would have had the authority to provide for representation for the District of Columbia under the District Clause. Under this line of reasoning, the power of the Congress over the District represents a broader power than the power of the House to set its own rules.

At first examination, it is not clear on what basis such a distinction would be made. The power of the House to determine the Rules of its Proceedings is in and of itself a very broad power. While the House may not "ignore constitutional restraints or violate fundamental rights ... within these limitations all matters of method are open to the determination of the House.... The power to make rules, ... [w]ithin the limitations suggested, [is] absolute and beyond the challenge of any other body or tribunal." In fact, the Supreme Court has found that in some cases, the

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[35] 14 F.3d 623 (D.C. Cir. 1994).

[36] Michel v. Anderson, 817 F. Supp. 126, 141 (D.D.C. 1993), *aff'd* 14 F.3d 623 (D.C. Cir. 1994).

[37] While accepting the premise that Membership in the House is restricted to representatives of states, the court found that the Delegate's vote in the Committee of the Whole was subject to a revote procedure which made the vote only "symbolic." 14 F.3d at 632.

[38] U.S. CONST., Article I, § 5.

constitutionality of a House Rule is not subject to review by courts because the question is a "political," and not appropriate for judicial review.[39]

It is true that the power of the Congress over the District of Columbia has been described as "plenary." To a large extent, this is because the power of the Congress over the District blends the limited powers of a national legislature with the broader powers associated with a local legislature.[40] Thus, for instance, some constitutional restrictions that might bind Congress in the exercise of its national power would not apply to legislation which is limited to the District of Columbia. For example, when Congress created local courts for the District of Columbia, it acted pursuant to its power under the District Clause and thus was not bound by to comply with Article III requirements which generally apply to federal courts.[41] Or, while there are limits to Congress's ability to delegate its legislative authorities, such limitations do not apply when Congress delegates its local political authority over the District to District residents.[42]

It is not clear, however, that the power of Congress at issue in H.R. 328 would be easily characterized as falling within Congress's power to legislate under the District Clause. While the existing practice of allowing District of Columbia residents to vote for a non-voting Delegate would appear to fall comfortably within its authority under the District Clause, giving such Delegate a vote in the House would arguably have an effect that went beyond the District of Columbia. Such a change would not just affect the residents of the District of Columbia, but would also directly affect the structure of and the exercise of power by Congress. More significantly, if the Delegate were to cast the decisive vote on an issue of national import, then the instant legislation could have a significant effect nationwide.

The Supreme Court has directly addressed the issue of whether the District Clause can be used to legislate in a way that has effects outside of the District of Columbia. In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[43] the Court considered whether Congress could by statute require that federal courts across the

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[39] *Compare* Nixon v. United States, 506 U.S. 224, 237 (1993) (issue of whether Senate could delegate to a committee the task of taking testimony in an impeachment case presented political question in light of constitutional provision giving Senate "sole power to try impeachments") *with* Powell v. McCormack, 395 U.S. 486, 518-49 (1969) (Court reached merits after finding that power of House to judge elections, returns, and qualifications of its Members restricts House to qualifications specified in Constitution).

[40] National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co., 337 U.S. 582, 604 (Justices Rutledge and Murphy); District of Columbia v. Thompson, 346 U.S. 100, 108-110 (1953).

[41] In the District of Columbia Court Reform and Criminal Procedure Act of 1970, P.L. 91-358, 111, 84 Stat. 475, Congress specifically declared it was acting pursuant to Article I in creating the Superior Court and the District of Columbia Court of Appeals and pursuant to Article III in continuing the United States District Court and the United States Court of Appeals for the District of Columbia. The status of the Article I courts were sustained in *Palmore v. United States*, 411 U.S. 389 (1973).

[42] District of Columbia v. Thompson, 346 U.S. 100, 106-09 (1953).

[43] 337 U.S. 582 (1949).

country consider cases brought by District of Columbia residents under federal diversity jurisdiction. This case has been heavily relied upon by various commentators as supporting the proposed legislation.[44]

The Significance of the Case of *National Mutual Insurance Co. v. Tidewater Transfer Co.*

The *Tidewater Transfer Co.* case appears to provide a highly relevant comparison to the instant proposal. As with the instant proposal, the congressional statute in question was intended to extend a right to District of Columbia residents that was only provided to citizens of "states." In 1805, Chief Justice John Marshall, in the case of *Hepburn v. Ellzey*,[45] had authored a unanimous opinion holding that federal diversity jurisdiction, which exists "between citizens of different states," did not include suits where one of the parties was from the District of Columbia.[46] Despite this ruling, Congress enacted a statute extending federal diversity jurisdiction to cases where a party was from the District.[47] The Court in *Tidewater Transfer Co.* upheld this statute against a constitutional challenge, with a three-judge plurality holding that Congress, acting pursuant to the District Clause, could lawfully expand federal jurisdiction beyond the bounds of Article III.[48]

On closer examination, however, the *Tidewater Transfer Co.* case may not support the constitutionality of the instant proposal. Of primary concern is that this was a decision where no one opinion commanded a majority of the Justices. Justice Jackson's opinion (the Jackson plurality), joined by Justices Black and Burton, held that District of Columbia residents could seek diversity jurisdiction based on Congress exercising power under the District Clause. Justice Rutledge's opinion (the Rutledge concurrence) joined by Justice Murphy, argued that the provision of Article III that provides for judicial authority over cases between citizens of different states, the "Diversity Clause,"[49] permits such law suits, even absent congressional authorization. Justice Vinson's opinion (the Vinson dissent), joined by Justice Douglas, and Justice Frankfurter's opinion (the Frankfurter dissent), joined by Justice Reed, would have found that neither the Diversity Clause nor the District Clause provided the basis for such jurisdiction.

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[44] *See, e.g.*, Viet Dinh and Adam H. Charnes, *supra* note 21, at 11-13; Rick Bress and Kristen E. Murray, *supra* note 34, at 9-12. *But see*, D.C. Hearing, *supra* note 5, at 61 (statement of Professor Jonathan Turley).

[45] 6 U.S. (2 Cranch) 445 (1805).

[46] Id. at 452. Although, strictly speaking, the opinion was addressing statutory language in Act of 1789, the language was so was so similar to the language of the Constitution that it was an interpretation of the latter which was essential to the Court's reasoning. *See Tidewater Transfer Co.*, 337 U.S. at 586.

[47] Act of April 20, 1940, c. 117, 54 Stat. 143.

[48] *See Tidewater Transfer Co.*, 337 U.S. at 600 (plurality opinion of Jackson, J.).

[49] U.S. Const., Art. III, § 2, cl. 1 provides that "The Judicial Power shall extend to... Controversies between two or more States...."

Of further concern is that those concurring Justices who did not join in the three-judge plurality opinion were not silent on the issue of Congress's power under the District Clause. Consequently, it is possible that a majority of the Justices would have reached a differing result on the breadth of Congress's power. In addition, it would appear that even the three-judge plurality might have distinguished the instant proposal from the legislation which was at issue in the *Tidewater Transfer Co.*

Thus, a closer analysis of this case should consider the different opinions, how the Justices framed the questions before them, and then the reasoning they used to resolve the issue. To help understand the issues raised by this case and by the instant bill, this analysis should focus on four different issues: 1) whether the District of Columbia is a "state" for purposes of diversity jurisdiction; 2) whether the District of Columbia is a "state" for purposes of voting representation; 3) whether Congress can grant diversity jurisdiction under the District Clause; and 4) whether Congress can provide for a voting Delegate under the District Clause.

Whether the District of Columbia is a "State" for Purposes of Diversity Jurisdiction

As noted, the Court has held since the 1805 case of *Hepburn v. Ellzey*[50] that federal diversity jurisdiction under Article III does not include suits where one of the parties was from the District of Columbia.[51] Presaging the *Adams v. Clinton*[52] case by nearly two centuries, this unanimous decision briefly considered the use of the term "state" throughout the Constitution. The Chief Justice noted that the plain meaning of the term "state" in the Constitution did not include the District of Columbia, and further noted that this was the term used to determine representation in the Senate, the House, and the number of Presidential Electors. As there was little doubt that state did not include the District of Columbia in those instances, the Court found no reason that the term should take on a different meaning for purposes of diversity.

In the *Tidewater Transfer Co.* case, however, the Rutledge concurrence took issue with *Hepburn.* Justice Rutledge noted that the term "state" had been found in some cases to include the District of Columbia. The main thrust of the opinion was that the use of the term state in the Constitution occurred in two different contexts: 1) in provisions relating to the organization and structure of the political departments of the government, and 2) where it was used regarding the civil rights of citizens.[53] The Rutledge concurrence argued that the latter uses of the term should be considered more expansively in the latter case than the former. For instance, the Court noted that the Sixth Amendment, which provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State ...

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[50] 6 U.S. (2 Cranch) 445 (1805).

[51] Id. at 452.

[52] 90 F. Supp. 2d 35 (D.D.C.2000), *affirmed sub nom.*, Alexander v. Mineta, 531 U.S. 940 (2000).

[53] 337 U.S. at 619 (Rutledge, J, concurring).

wherein the crime shall have been committed ...," had been held to apply to the citizens of the District of Columbia.[54]

Next, the Rutledge concurrence sought to establish that of these two categories, access to the federal courts under diversity jurisdiction fell into the latter. The opinion suggested that the exclusion of the District of Columbia from diversity jurisdiction served no historical purpose, and that the inclusion of the District would be consistent with the purposes of the provision. The opinion essentially rested on the premise that such a distinction between the citizens of the District of Columbia and the states made no sense: "I cannot believe that the Framers intended to impose so purposeless and indefensible a discrimination, although they may have been guilty of understandable oversight in not providing explicitly against it."[55]

The opinion of the these two Justices, however, was not shared by any of the other seven Justices of the Court.[56] The Jackson plurality opinion, for instance, specifically rejected such an interpretation. That opinion noted that while one word may be capable of different meanings, that such "such inconsistency in a single instrument is to be implied only where the context clearly requires it."[57] The Jackson plurality found no evidence that the Founding Fathers gave any thought to the issue of the District of Columbia and diversity jurisdiction, and that if they had that they would not have included the District by use of the term "state." Nor did the Court find this oversight particularly surprising, as the District of Columbia was still a theoretical political entity when the Constitution was ratified, and its nature and organization had not yet been established.

The Vinson dissent summarily dismissed the argument that the *Hepburn v. Ellzey* decision be overruled.[58] The Frankfurter dissent argued vehemently that the

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[54] The *Rutledge* opinion conceded that Court's initial determination that District residents were entitled to a jury trial in criminal cases in *Callan v. Wilson*, 127 U.S. 540 (1888) rested in large measure on the more inclusive language of Article III, § 2: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed." But the Court noted that cases relied upon by *Callan* were based at least in part on the Sixth Amendment. "In Reynolds v. United States, 98 U.S. 145, 154, it was taken for granted that the Sixth Amendment of the Constitution secured to the people of the Territories the right of trial by jury in criminal prosecutions...." *Callan*, 127 U.S. at 550.

[55] 337. at 625.

[56] Although not addressed by the any opinion of the Court, a separate argument has been made that the extension of diversity jurisdiction to the District of Columbia could also have been made under the Privileges and Immunities Clause. *See* James E. Pfander, *The Tidewater Problem: Article III and Constitutional Change*, 79 Notre Dame L. Rev. 1925 (2004).

[57] Id. at 587.

[58] "That it was not the specific intent of the framers to extend diversity jurisdiction to suits between citizens of the District of Columbia and the States seems to be conceded. One well versed in that subject, writing for the Court within a few years of adoption of the

(continued...)

use of the term "state" in the clause at issue was one of the terms in the Constitution least amenable to ambiguous interpretation. "The precision which characterizes these portions of Article III is in striking contrast to the imprecision of so many other provisions of the Constitution dealing with other very vital aspects of government."[59] This, combined with knowledge of the distrust that the Founding Fathers had towards the federal judiciary, left Justice Frankfurter with little interest in entertaining arguments to the contrary.

Whether the District of Columbia is a "State" for Purposes of Representation

While there has been some academic commentary suggesting that the term "state" could be construed more broadly for purposes of representation than is currently the case,[60] there is little support for this proposition in case law. Starting with Chief Justice Marshall in the *Hepburn* case, and as recently as *Adams v. Clinton* and *Michel v. Anderson*, the Supreme Court and lower courts have generally started with the basic presumption that the use of the term "state" for purposes of representation in the House did not include the District of Columbia. In fact, in *Hepburn*, Chief Justice Marshall had referred to the "plain use" of the term "state" in the clauses regarding representation as the benchmark to interpret other clauses using the phrase.[61]

The opinions of the Justices in *Tidewater Transfer Co.* appear to be no different. As noted above, seven of the nine Justices in that case accepted the reasoning of the *Hepburn* case as regards diversity jurisdiction, and would certainly have been even less likely to accept the argument that the District of Columbia should be considered a state for purposes of the House of Representatives. It also seems likely that the Justices associated with the Rutledge concurrence would have similarly rejected such an interpretation. As noted, that opinion suggested that the error in *Hepburn* was the failure to distinguish between how the term "state" should be interpreted when used in the context of the distribution of power among political structures and how it

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[58] (...continued)
Constitution, so held. The question is, then, whether this is one of those sections of the Constitution to which time and experience were intended to give content, or a provision concerned solely with the mechanics of government. I think there can be little doubt but that it was the latter. That we would now write the section differently seems hardly a sufficient justification for an interpretation admittedly inconsonant with the intent of the framers. Ours is not an amendatory function." Id. at 645 (Vinson, J., dissenting).

[59] Id. at 646 (Frankfurter, J., dissenting).

[60] *See* Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 Harv. J. on Legis. 167, 168 (1975); Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. Pa. L. Rev. 1659, 1661 (1991).

[61] 6 U.S. at 452 ("When the same term which has been used plainly in this limited sense in the articles respecting the legislative and executive departments, is also employed in that which respects the judicial department, it must be understood as retaining the sense originally given to it").

should be interpreted when it is used in relation to the civil rights of citizens.[62] Although Justice Rutledge found that a restrictive interpretation of the term state was unnecessarily narrow in the context of diversity jurisdiction, there is no indication that the Justice would have disputed the "plain use" of the term "state" in the context of representation for the District in Congress.

Whether Congress Has the Authority Under the District Clause To Extend Diversity Jurisdiction to the District of Columbia

The Jackson plurality opinion considered whether, despite the Court's holding in *Hepburn*, Congress, by utilizing its power under the District Clause, could evade the apparent limitations of Article III on diversity jurisdiction. The plurality noted that the District Clause had not been addressed in Chief Justice Marshall's opinion, and that the Chief Justice had ended his opinion by noting that the matter was a subject for "legislative not for judicial consideration."[63] While admitting that it would be "speculation" to suggest that this quote established that Congress could use its statutory authority rather than proceed by constitutional amendment, the Court next considered whether such power did in fact exist.

As noted previously, the power of Congress over the District includes the power to create local courts not subject to Article III restrictions. The plurality suggested that there would be little objection to establishing a federal court in the District of Columbia to hear diversity jurisdiction. Instead, the concerns arose because the statute in question would operate outside of the geographical confines of the District. Further, the statute would require that Article III courts be tasked with functions associated with an Article I court.[64]

The Jackson plurality had little trouble assigning the tasks of an Article I court to an Article III court, suggesting that such assignments had been approved in the past, including in the District of Columbia.[65] A more difficult question was the exercise of diversity jurisdiction by federal courts outside of the geographical confines of the District. While noting that the Congress's power over the District was not strictly limited by territory, it admitted that the power could not be used to gain control over subjects over which there had been no separate delegation of power.[66]

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[62] The two judges noted a distinction to be made between constitutional clauses "affecting civil rights of citizens," such as the right to a jury trial, and "the purely political clauses," such as "the requirements that Members of the House of Representatives be chosen by the people of the several states." Id. at 619-623 (Rutledge, J., concurring). *See* Adams v. Clinton, 90 F. Supp. 2nd at 55.

[63] *Hepburn*, 6 U.S. at 453.

[64] 337 U.S. at 509.

[65] *See* O'Donoghue v. United States, 289 U.S. 516 (1933) (holding that Article III District of Columbia courts can exercise judicial power conferred by Congress pursuant to Art. I).

[66] 337 U.S. at 602.

Thus, the question arose as to whether a separate power beyond the District Clause was needed here.

Essentially, the Court held that the end that the Congress sought (establishing a court to hear diversity cases involving District of Columbia citizens) was permissible under the District Clause, and that the choice of means that the Congress employed (authorizing such hearings in federal courts outside of the District) was not explicitly forbidden. As a result, the Court held that it should defer to the opinions of Congress when Congress was deciding how to perform a function that is within its power.[67]

It should be noted that even the plurality opinion felt it necessary to place this extension in a larger context, emphasizing the relative insignificance of allowing diversity cases to be heard in federal courts outside of the District. The Court noted that the issue did not affect "the mechanics of administering justice," nor the "extension or a denial of any fundamental right or immunity which goes to make up our freedoms." Rather, the issue only involved whether a plaintiff who sued a party from another state could require that the case be decided in a convenient forum.[68]

The Rutledge concurrence, on the other hand, explicitly rejected the reasoning of the plurality, finding that the Congress clearly did not have the authority to authorize even this relatively modest authority to District of Columbia citizens.[69] In fact, the concurring opinion rejected the entire approach of the plurality as unworkable, arguing that it would allow any limitations on Article III courts to be disregarded if Congress purported to be acting under the authorization of some other constitutional power.[70]

The Vinson dissent and the Frankfurter dissent also rejected the reasoning of the plurality as regards Congress power to grant diversity to the District, citing both Article III limitations on federal court and separation of powers. The Vinson dissent argued that the question as to whether Congress could use its legislative authority to evade the limitations of Article III had already been reached in cases regarding whether the Congress could require federal courts to hear cases where there was no case or controversy.[71] The Frankfurter dissent made similar points, and also noted the reluctance by which the states had even agreed to the establishment of diversity

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[67] Id. at 602-03.

[68] Id. at 585.

[69] Id. at 604-606 (Rutledge, J., concurring)("strongly" dissenting from the suggestion that Congress could use Article I powers to expand the limitations of Article III jurisdiction).

[70] "The Constitution is not so self-contradictory. Nor are its limitations to be so easily evaded. The very essence of the problem is whether the Constitution meant to cut out from the diversity jurisdiction of courts created under Article III suits brought by or against citizens of the District of Columbia. That question is not answered by saying in one breath that it did and in the next that it did not." Id. at 605 (Rutledge, J, concurring).

[71] Id. at 628-31 (Vinson, J., dissenting). *See, e.g.*, Keller v. Potomac Electric Co., 261 U.S. 428 (1923).

jurisdiction.[72] Thus, considering both the dissents and the concurrence, six Justices rejected the plurality's expansive interpretation of the District Clause.

Whether Congress Has the Authority Under the District Clause To Extend House Representation to the District of Columbia

The positions of the various Justices on the question of whether Congress can grant diversity jurisdiction for District of Columbia residents would seem to also inform the question as to whether such Justices would have supported the granting of House representation to District citizens. As noted, six Justices explicitly rejected the extension of diversity jurisdiction using Congress's power under the District Clause. It is unlikely that the Justices in question would have rejected diversity jurisdiction for District of Columbia residents, but would then approve voting representation for those same residents. The recurring theme of both the *Hepburn* and *Tidewater* decisions was that the limitation of House representation to the states was the least controversial aspect of the Constitution, and that the plain meaning of the term "state" in regards to the organization of the federal political structures was essentially unquestioned.

Consequently, only three of the Justices in the *Tidewater* might arguably have supported the doctrine that the Congress's power over the District of Columbia would allow extension of representation to its citizens. However, even this conclusion is suspect. As noted, the plurality opinion took pains to note the limited impact of their holding — parties in diversity suits with residents of the District of Columbia would have a more convenient forum to bring a law suit. As noted, the plurality specifically limited the scope of its decision to cases which did not involve an extension of any fundamental right.[73] Arguably, granting the Delegate a vote in the House does involve such an extension, and would thus be distinguished.

These three Justices might also have had other concerns that would weigh against such an extension of the holding in *Tidewater Transfer Co.* The Act before the Justices in that case did not affect just the District of Columbia, but also extended diversity jurisdiction to the territories of the United States, including the then-territories of Hawaii and Alaska.[74] Although the question of diversity jurisdiction over residents of the territories was not directly before the Court, subsequent lower court decisions[75] have found that the reasoning of the *Tidewater Transfer Co.* case supported the extension of diversity jurisdiction to the territories, albeit under the "Territory Clause."[76]

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[72] Id. at 646-55 (Frankfurter, J., dissenting).

[73] Id.. at 585.

[74] Id. at 584-585.

[75] *See, e.g.*, Detrea v. Lions Building Corporation, 234 F.2d 596 (1956).

[76] U.S. Const. Art. IV, § 3, cl. 2 provides:

(continued...)

Thus, a concern that the plurality Justices might have had about the instant proposal would be whether its approval would also validate an extension of House representation to other political entities, such as the territories. While the extension of diversity jurisdiction to residents of territories has been relatively uncontroversial, a decision to grant a voting Delegate to the territories might not. Under the Territory Clause, the Congress has plenary power over the territories of American Samoa, Guam, the Virgin Islands, Puerto Rico, and the Commonwealth of the Northern Marianas Islands. Thus, extending the reasoning of the *Tidewater Transfer Co.* case to voting representation might arguably allow each of these territories to seek representation in the House.[77]

Although an analysis of the constitutionality of such an extension goes beyond the scope of this report, providing House representation to the territories would clearly represent a significant change to the national political structure. Of particular note would be the relatively small number of voters in some of these territories. In particular, granting representation to American Samoa, with a population of about 58,000,[78] most of whom are not citizens of the United States,[79] would appear to depart significantly from the existing make-up of the House.

Similarly, a holding that the District could be treated as a state for purposes of representation would arguably also support a finding that the District could be treated as a state for the places in the Constitution which deal with other aspects of the national political structure. Under this reasoning, Congress could arguably authorize the District of Columbia to have Senators, Presidential Electors,[80] and perhaps even the power to ratify Amendments to the Constitution.[81]

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[76] (...continued)

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

[77] *But see Tidewater Transfer Co.*, 337 U.S. at 639 (Vinson, J., dissenting)(noting differences between Congressional regulation of local courts under the District Clause and the Territorial Clause.)

[78] *See* CIA World Fact book, [https://www.cia.gov/cia/publications/factbook/index.html].

[79] *See* Arnold Leibowitz, DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS (1989) at 41.

[80] This authority, it should be noted, has already been granted, but it was done by Constitutional Amendment. *See* U.S. CONST. Amend. XXIII.

[81] U.S. CONST. Art. V.

The Significance of Limiting Delegate Voting to the Committee of the Whole

As the above discussion is directed at the full House, the question can be raised as to whether it should also apply to the Committee of the Whole. The Committee of the Whole is not provided for in the Constitution, and the nature of the Committee of the Whole appears to have changed over time. Established in 1789, the Committee of the Whole appears to be derived from English Parliamentary practices. It was originally intended as a procedural device to exclude the Speaker of the House of Commons, an ally of the King, from observing the proceedings of the House.[82] Since that time, the Committee has evolved into a forum where debate and discussion can occur under procedures more flexible than those otherwise utilized by the House.

At present, the Committee of the Whole is simply the Full House in another form.[83] Every legislator is a member of the Committee, with full authority to debate and vote on all issues.[84] By resolving into the Committee of the Whole, the House invokes a variety of procedural devices which speed up floor action. Instead of the normal quorum of one-half of the legislators in the House, which is generally more than 200 legislators, the Committee of the Whole only requires a quorum of 100 members. In addition, amendments to bills are debated under a five-minute rule rather than the one hour rule. Finally, it is in order to close debate on sections of bills by unanimous consent or a majority of members present.[85]

Assuming that the Delegate for the District of Columbia could not cast a vote in the full House, a separate question arises as to whether, as provided for by the House Rules amended by H.Res. 78, the Delegate (along with the territorial delegates) could cast a vote in the Committee of the Whole, subject to a revote when such a vote is determinative. Under Article I of the Constitution, all legislative authority for the United States is to be vested in the Senate and the House of Representatives,[86] and under §2 of that Article, the House of Representatives shall be composed of "Members" chosen in conformity with the qualifications and requirements of the Constitution. As the Delegate for the District of Columbia is not a Member for purposes of Article § 2,[87] the question arises as to the basis on which delegate could vote in the Committee of the Whole.

The Constitution does not provide for representatives of the District of Columbia or the territories such as the delegate for the District of Columbia or the resident commissioners or delegates for the territories; nor does it appear that these delegates and resident commissioners are required to meet the qualifications or

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[82] Alexander, De Alva Stanwood, HISTORY AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES 257 (1916).

[83] W. Oleszak, Congressional Procedures and the Policy Process 128 (1984).

[84] Id.

[85] Id. at 129.

[86] U.S. Const. Art. I, § 1.

[87] Michel v. Anderson, 14 F.3d 623, 630 (D.C. Cir. 1994).

electoral requirements required of Members of Congress.[88] Consequently, the Constitution does not appear to provide the basis for a delegate to exercise the power of Members under the Constitution.[89] However, the Constitution does not specify whether or not all legislative activities which a Member might engage in are restricted to those Members, thus leaving open the possibility that a delegate may engage in some legislative activities which are not limited to Members.

Historically, delegates have engaged in a number of legislative activities which, although preliminary to final passage of legislation and thus arguably advisory, appear to involve the exercise of some modicum of legislative authority. These activities have included introducing legislation,[90] serving on standing congressional committees, voting on these committees,[91] and debating on the floor of the house. The line between what legislative activities are limited to Members of Congress and those which are not, however, is not well developed.[92]

As noted previously, the question of whether a vote in the Committee of the Whole, subject to a revote, is advisory in nature was addressed by the United States Court of Appeals in *Michel v. Anderson*.[93] In *Michel,* the court noted the long-standing traditions of allowing territorial delegates to vote in standing committees.[94] However, despite a variety of arguments that the procedures of Committee of the Whole made it constitutionally distinct, the court also found that the operational similarities between the Committee and the whole House were significant enough to raise constitutional issues.[95] Nonetheless, because the revote provision rendered the vote largely "symbolic," the court held that "we do not think this minor addition to the office of delegates has constitutional significance."[96]

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[88] For example, the number of persons who may be represented by each Member must be approximately equal with the number represented by other Members. Wesberry v. Sanders, 376 U.S. 1 (1962). The number of persons represented by the District of Columbia delegate is not established in relationship to this number; rather, the delegate represents the entire population of the District of Columbia.

[89] Michel v. Anderson, 14 F.3d 623, 630 (D.C. Cir. 1994).

[90] See, e.g., H.R. 4718, 102d Cong., 2nd Sess. (a bill submitted by Delegate Eleanor Horton to provide for admission of the State of New Columbia into the Union). Cosponsors are apparently not required. See id.

[91] Rule XII, Rules of the House of Representatives.

[92] Although a delegate may currently introduce legislation on the House floor, and may engage in floor debate which could ultimately influence how courts interpret a piece of legislation, there appears to have been no clear constitutional basis distinguishing these particular powers from others not granted. For instance, "preliminary" votes in the House, such as on the adoption of Rules or voting to advice conferees, have historically been denied delegates, although these votes are not directly related to the passage of final legislation.

[93] 14 F.3d 623 (D.C. Cir. 1994).

[94] Id. at 631.

[95] Id. at 632.

[96] Id.

Conclusion

In sum, it is difficult to identify either constitutional text or existing case law which would directly support the allocation by Congress of the power to vote in the full House on the District of Columbia Delegate. Further, that case law which does exist would seem to indicate that not only is the District of Columbia not a "state" for purposes of representation, but that congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation.

In particular, at least six of the Justices who participated in what appears to be the most relevant Supreme Court case, *National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co.*, authored opinions rejecting the proposition that Congress's power under the District Clause was sufficient to effectuate structural changes to the political structures of the federal government. Further, the remaining three judges, who found that the Congress could grant diversity jurisdiction to District of Columbia citizens despite the lack of such jurisdiction Article III, specifically limited their opinion to instances where there was no extension of any fundamental right. To the extent that providing District residents with House representation could be characterized as such a right, then one could argue that all nine Justices would have found the instant proposal to be unconstitutional.

Although not beyond question, it would appear likely that the Congress does not have authority to grant voting representation in the House of Representatives to the District of Columbia as contemplated by H.R. 328. On the other hand, because the provisions of H.Res. 78 allowing Delegates a vote in the Committee of the Whole would be largely symbolic, these amendments to the House Rules are likely to pass constitutional muster.

LETTER FROM DC FOR DEMOCRACY

P.O. Box 65691
Washington, DC 20035-5691

March 12, 2007

The Honorable John Conyers, Jr., Chair
House Judiciary Committee
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

RE: Prompt Consideration of H.R. 1433, the D.C. House Voting Rights Act of 2007

Dear Chairman Conyers:

On behalf of DC For Democracy, the largest non-affiliated, grassroots political organization in the District of Columbia, we thank you for your leadership in crafting H.R. 1433, the DC House Voting Rights Act of 2007. The bill, which received broad bi-partisan support in the 109th Congress as H.R. 5388, is now scheduled for a hearing and mark up before your full Judiciary Committee next week. We urge you to report the bill out of committee expeditiously so it can be considered on the House floor before the April 2nd break. With your continued leadership and support, we can end 206 years of taxation without representation for the citizens of our nation's capital.

As you know, the newly introduced bill restores the at-large fourth seat to Utah as originally provided for in H.R. 5388 of the 109th Congress. H.R. 1433 continues to pair voting representation in the House of Representatives for citizens living in the District of Columbia with the additional Utah seat by expanding the size of the House to 437 members. This approach is vote-neutral and balances the seat for traditionally Democratic DC with an additional seat for Republican-leaning Utah. DCFD supports this bipartisan approach to expanding democratic rights to all under- and unrepresented American citizens, as is embodied in this bill, and we strongly believe such bipartisanship is needed for this bill to prevail in 2007.

The citizens of the District of Columbia are eager to enjoy full House voting rights for the first time in our collective history; we cannot exercise this right without your continued leadership on our behalf. Thank you for your consideration and your support.

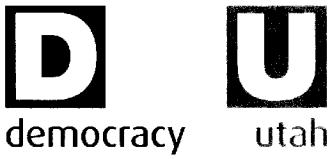
Sincerely,

Karen Rose, Chair
Voting Rights & Democracy
DC For Democracy

Keshini Ladduwahetty
Chair
DC For Democracy

Cc: The Honorable Lamar Smith, Ranking Member
The Honorable Rob Bishop
The Honorable Chris Cannon
The Honorable Jim Matheson
The Honorable Eleanor Holmes Norton
The Honorable Tom Davis

LETTER FROM DEMOCRACY FOR UTAH



March 12, 2007

The Honorable John Conyers, Jr., Chair
House Judiciary Committee
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

RE: Prompt Consideration of the D.C. House Voting Rights Act of 2007

Dear Chairman Conyers:

On behalf of Democracy For Utah (D4U), a state-wide grassroots political organization dedicated to promoting American values such as civic participation, good government, and social responsibility in Utah, we thank you for your leadership in support of the DC House Voting Rights Act of 2007 (H.R.1433).

The bill, which received broad bi-partisan support in the 109th Congress, is now scheduled for consideration before the full Judiciary Committee this week. It is our great hope that the 110th Congress consensus bill will be reported by your committee without delay, and voted on by the full House before the April 2nd break. With your guidance and continued support for this legislation, we believe now is the time for Utah to receive its historic fourth congressional seat that we so narrowly missed gaining after the last national reapportionment.

As you know, the newly introduced bill restores the at-large fourth seat to Utah as originally set forth in H.R. 5388 of the 109th Congress. H.R. 1433, which you helped craft, continues to pair voting representation in the House of Representatives for citizens living in the District of Columbia with the additional Utah seat by expanding the size of the House to 437 members. This approach is vote-neutral and balances the seat for traditionally Democratic DC with an additional seat for Republican-leaning Utah. Both D4U and our national DFA support this bipartisan approach to expanding democratic rights to all under- and unrepresented American citizens, as is embodied in this bill, and we strongly believe such bipartisanship is needed for this bill to prevail in 2007.

With your continued leadership, we can expand Utah's rightful voice in Congress while ending 206 years of taxation without representation for the citizen's of our nation's capital. Thank you for your consideration and your support.

Sincerely,

Carrie Ulrich, President
Democracy for Utah

Kristine Griggs, Vice President
Democracy For Utah

Cc: The Honorable Lamar Smith, Ranking Member
The Honorable Rob Bishop
The Honorable Chris Cannon
The Honorable Jim Matheson
The Honorable Eleanor Holmes Norton, DC Delegate
The Honorable Tom Davis

LETTER FROM THE AMERICAN BAR ASSOCIATION (ABA)

AMERICAN BAR ASSOCIATION
Governmental Affairs Office
740 Fifteenth Street, NW
Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762

March 14, 2007

The Honorable John Conyers
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. 1433, the District of Columbia House Voting Rights Act of 2007, would establish the District of Columbia as a Congressional district for purposes of representation in the House of Representatives. H.R. 1433 was approved by the House Oversight and Government Reform Committee by a bipartisan vote on March 12, 2007. The ABA, which supports full voting representation in the House and the Senate for the District of Columbia, believes that H.R. 1433 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

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,

Denise A. Cardman

Denise A. Cardman
Acting Director

cc: Members of the House Judiciary Committee

ADDITIONAL MATERIAL SUBMITTED BY RICHARD P. BRESS, PARTNER, LATHAM & WATKINS, LLP

LATHAM & WATKINS LLP

555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304
Tel: (202) 637-2200 Fax: (202) 637-2201
www.lw.com

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MEMORANDUM
March 8, 2007

To: Walter Smith
From: Rick Bress
File no: 501340-0002
Copies to: Gary Epstein, Jim Rogers
Subject: Constitutionality of the D.C. Voting Rights Bill

In response to your request, we have examined the most recent report from the Congressional Research Service ("CRS Report") regarding Congress's authority to provide residents of the District of Columbia, by legislation, a voting member in the United States House of Representatives.[1] We have reevaluated the constitutionality of the pending District of Columbia Fair and Equal House Voting Rights Act of 2007, H.R. 328, 110th Cong. (2007) ("DC Voting Rights bill") in view of the concerns raised in that report. We conclude that the CRS Report offers no legal, policy, or other reason to deny the nearly 600,000 residents of the District full access to the legislative body that decides issues of both national and local importance to District residents. We also conclude that a proposal to direct the state receiving an additional representative to have that representative elected at-large is well within Congress's authority and would not violate the "one person, one vote" principle.

Analysis

The United States is the only democratic nation that deprives the residents of its capital city of voting representation in the national legislature. American citizens resident in the District of Columbia are represented in Congress only by a non-voting delegate to the House of Representatives. These residents pay federal income taxes, are subject to any military draft, and are required to obey Congress's laws, but they have no say in the enactment of those laws.[2] Furthermore, because Congress also has authority over local District legislation, District residents have no voting representation in the body that controls the local budget they must

[1] *See* CRS Report for Congress: The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole, dated Jan. 24, 2007.

[2] Congress also has authority over local District legislation. District residents thus have no voting representation in the body that controls the local budget they must adhere to and the local laws that they are required to obey.

adhere to and the local laws that they are required to obey. As a result, people who live in California and Maine have a vote regarding the District's local laws, while people who live in the District itself do not.

District residents thus lack what has been recognized by the Supreme Court as perhaps the single most important of constitutional rights. As the Court has stated:

> 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 no room for classification of people in a way that unnecessarily abridges this right.[3]

Congress's authority to extend the franchise to District residents by statute has been the subject of substantial academic and political debate. Those who argue that Congress lacks this power (and must therefore proceed via constitutional amendment) rely principally on the fact that the Constitution provides voting representation only to citizens of "States". But this argument ignores the fact that Congress has repeatedly treated the District as if it were a state and that treatment has repeatedly been upheld by the courts. Moreover, those who argue that Congress has no authority to confer voting representation on the District are forced to contend that the Framers of our Constitution intended to exclude citizens of the Nation's Capital from participating in the democracy they created. There is no evidence to support such an implausible intention on the part of the founders of our country.

To the contrary, as explained below, the history of and policies behind the Framers' creation of the District, the purpose of the Framers' enumeration of "States" in the Constitution's provisions for congressional representation, and the fundamental importance of the franchise support the view that those who drafted the Constitution did not, by guaranteeing the vote to state residents, intend to withhold the vote from District residents. Moreover, the Framers gave Congress plenary power over the District, including the power, for most purposes, to treat the District as though it were a state and District residents as though they were state residents. History and judicial interpretation suggest that this authority is sufficiently broad to extend to U.S. citizens residing in the District the voting rights taken for granted by U.S. citizens residing elsewhere. For these reasons we conclude that the Constitution permits such representation to be extended through congressional legislation.

I. The Framers Did Not Intend to Deprive District Residents of Voting Representation in the House

The Framers viewed the right to vote as the single most important of the inalienable rights that would be guaranteed to the citizens of their Nation.[4] The right was extended universally, as at the time of the framing every eligible American citizen lived in a state. There is no evidence that the Framers intended that those residents in areas that would later be ceded to form the national capital would forfeit their voting rights—much less that they intended to

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

[4] *Id.* at 9-19.

prohibit Congress from taking steps to ensure that those living in the capital would retain their right to vote.

Article I, § 8, cl. 17 of the Constitution, also known as the "District Clause," gives Congress the power to "exercise exclusive Legislation in all Cases, whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." This clause and its "exclusive legislation" authority were included in the Constitution to ensure that the seat of the federal government would not be beholden to or unduly influenced by the state in which it might be located.[5] The Framers' insistence on a separated and insulated federal district arose from an incident that took place in 1783 while the Continental Congress was in session in Philadelphia. When a crowd of Revolutionary War soldiers who had not been paid gathered in protest outside the building, the Congress requested protection from the Pennsylvania militia. The State refused, and the Congress was forced to adjourn and reconvene in New Jersey. This incident convinced the Framers that the seat of the national government should be under exclusive federal control, for its own protection and the integrity of the capital.[6] Thus, the Framers gave Congress broad authority to create and legislate for the protection and administration of a distinctly federal district.

Nothing in this history in any way suggests that the Framers intended to disenfranchise District residents. When the District Clause was drafted, the eligible citizens of every state possessed the same voting rights. The problem of ensuring the continuation of these voting rights for citizens resident in the lands that would be ceded to create the federal district received little attention until after the Constitution was ratified and the District had been established.[7] As one commentator has explained:

> First, given the emphasis on federal police authority at the capital and freedom from dependence on the states, it is unlikely that the representation of future residents in the District occurred to most of the men who considered the "exclusive legislation" power. As long as the geographic location of the District was undecided, representation of the District's residents seemed a trivial question. Second, it was widely assumed that the land-donating states would make appropriate provision in their acts of cession to protect the residents of the ceded land . . . . Finally, it was assumed that the residents of the District would have

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[5] Kenneth R. Bowling, The Creation of Washington, D.C.: The Idea and Location of the American Capital, at 30-34 (1991).

[6] *See* James Madison, Federalist No. 43 ("Without it, 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.").

[7] Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. on Legis. 167, 172 (1975).

acquiesced in the cession to federal authority.[8]

Moreover, it is doubtful that many would have adverted to the issue, even at the time of the District's creation, as few could have foreseen that the ten-square-mile home to 10,000 residents would evolve into the vibrant demographic and political entity it is today.[9]

Based on everything we know about the Framers, it is inconceivable that they would have purposefully intended to deprive the residents of their capital city of this most basic right. History suggests that the Constitution's failure to provide explicitly for District residents' voting representation in the House is the result of an inadvertent omission that can be remedied by congressional action. And the relevant legal precedents confirm that Congress may take such action pursuant to its District Clause power.

II. Supreme Court Precedent Confirms the Breadth of Congress's Power Under the District Clause

The District Clause is an extraordinarily broad grant of authority, "majestic in scope."[10] Congress's authority is at its zenith when it legislates for the District, surpassing both the authority a state legislature has over state affairs and Congress's authority to enact legislation affecting the fifty states.[11] Although no case specifically addresses Congress's authority to provide the District voting representation in the House, existing case law confirms the plenary nature of Congress's authority to see to the welfare of the District and its residents.

Two related Supreme Court cases confirm the breadth of Congress's authority under the District Clause. In the first, *Hepburn v. Ellzey*,[12] the Court construed Article III, Section 2 of the U.S. Constitution—providing for diversity jurisdiction "between citizens of different

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[8] *Id. See also National Mut. Ins. Co. v. Tidewater Transfer Co* , 337 U.S. 582, 587 (1949) ("There is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia....This is not strange, for the District was then only a contemplated entity.").

[9] It appears that Alexander Hamilton may be a notable exception. During the New York ratifying convention, he proposed an amendment stating that "[w]hen the Number of Persons in the District of Territory to be laid out for the Seat of Government of the United States, shall according to the Rule for the Apportionment of Representatives and direct Taxes amount to ___ such District shall cease to be parcel of the State granting the Same, and Provision shall be made by Congress for their having a District Representation in the Body." 5 The Papers of Alexander Hamilton 189 (Harold C. Sybett & Jacob E. Cooke eds., Columbia Univ. Press 1962). Although this provision was not adopted, as there is no evidence of any opposition to it, it was likely discarded as unnecessary. Moreover, it suggests that the Framers assumed that persons residing in the District would vote for and be represented by the Representatives of the land-donating state or states. *See also* Raven-Hansen, *supra* note 8, at 172.

[10] Testimony of Hon. Kenneth W. Starr, House Government Reform Committee (Jun. 23, 2004).

[11] *Id. See also* Viet Dinh and Adam H. Charnes, *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives* (2004), *available at*: http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf.

[12] 6 U.S. 445 (1805).

States"—as excluding citizens of the District of Columbia.[13] The Court found it "extraordinary," however, that residents of the District should be denied access to federal courts that were open to aliens and residents in other states,[14] and invited Congress to craft a solution, noting that the matter was "a subject for legislative, not judicial consideration."[15]

Nearly 145 years later, Congress accepted the *Hepburn* Court's invitation, enacting legislation that explicitly granted District residents access to federal courts on diversity grounds. That legislation was upheld by the Court in *National Mutual Insurance Company v. Tidewater Transfer Company.*[16] In *Tidewater*, a plurality held that, although the District is not a "state" for purposes of Article III, Congress could nonetheless provide the same diversity jurisdiction to District residents pursuant to its authority under the District Clause.[17] The two concurring justices went even further, arguing that *Hepburn* should be overruled and that the District should be considered a state for purposes of Article III.[18]

A. Significance of *Tidewater*

The CRS Report accurately notes the absence of a majority for the positions advanced by the plurality and concurring opinions.[19] For present purposes, the fundamental import of *Tidewater* is that a majority of the Supreme Court found that Congress had the authority to accomplish an outcome that mirrors the goal and effect of the D.C. Voting Rights bill. Although the precise legal effect of *Tidewater* may be unclear, its several opinions provide strong support for the position that Congress has authority to pass that bill. In reaching the opposite conclusion, CRS misreads *Tidewater*.

1. The *Tidewater* Plurality

CRS notes that although the *Tidewater* plurality approved Congress's authority under the District Clause to extend diversity jurisdiction to residents of the District, it "place[d] this extension in a larger context."[20] In this regard, CRS refers to the *Tidewater* plurality's observation that the case did not involve "an extension or a denial of any fundamental right or immunity."[21] CRS posits that granting voting representation involves "such an extension" and

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[13] *Id.* at 453.

[14] *Id.*

[15] *Id.*

[16] 337 U.S. 582 (1949).

[17] *See id.* at 592 (District Clause grants Congress power over the District that is "plenary in every respect"); *id.* at 601-02 ("Congress 'possesses full and unlimited jurisdiction to provide for the general welfare' of District citizens 'by any and every act of legislation which it may deem conducive to that end....'") (quoting *Nield v. Dist. of Columbia*, 110 F.2d 246, 250 (D.C. Cir. 1940)).

[18] *Tidewater*, 337 U.S. at 604-06.

[19] *See* CRS Report, at 1-17.

[20] *Id.* at 15.

[21] *Tidewater*, 337 U.S. at 585.

thus suggests that even the Jackson plurality might not have upheld District Clause legislation granting voting representation.

We note that CRS takes contradictory positions as to whether voting representation in the House involves a "fundamental right" to support its thesis that Congress lacks the power to provide District residents voting representation. CRS first asserts that the D.C. Voting Rights bill concerns not the rights of individual citizens, but the "distribution of power among political structures."[22] Based on that characterization, CRS concludes that the concurring justices would not have thought that the district was a "state" for purposes of representation. CRS then argues that the bill does involve a "fundamental right," a characterization that serves its argument that the *Tidewater* plurality might have thought such legislation to be beyond Congress's authority under the District Clause.

In our view, these characterizations miss the point, as CRS ascribes an unintended meaning to the plurality's passing observation about fundamental rights. Although the plurality noted that the dispute over diversity jurisdiction in *Tidewater* did not "involve" fundamental rights, it explained in the next paragraph that the critical distinction was between congressional enactments that do and do not "*invade* fundamental freedoms or *substantially* disturb the balance between the Union and its component states."[23] The plurality indicated that congressional enactments that invade fundamental freedoms or substantially disturb the federal-state balance of power would not be entitled to judicial deference. As we previously noted, the D.C. Voting Rights bill triggers neither of those concerns. If the grant of voting representation involves a "fundamental right," then the bill would effect an expansion, not an invasion, of that right. And the addition of a single additional seat by the consent of the House and Senate would not "substantially disturb" the relationship between the states and the federal government.

More important, the *Tidewater* plurality's reasoning provides strong support for Congress's authority to grant the District a House Representative via simple legislation. The plurality explained that, because Congress unquestionably had the greater power to provide District residents diversity jurisdiction in new Article I courts, it surely could accomplish the more limited result of granting District citizens diversity-based access to existing Article III courts.[24] Similarly, Congress's authority to grant the District full rights of statehood (or grant its residents voting rights through retrocession) by simple legislation suggests that it may by legislation take the more modest step of providing citizens of the District with a voice in the House of Representatives. Indeed, Congress has granted voting representation to residents of entities less similar to states. In *Evans v. Cornman*, the Supreme Court held that residents of federal enclaves within states have a constitutional right to congressional representation, ruling that Maryland had denied its "citizen[s'] link to his laws and government" by disenfranchising residents on the campus of the National Institutes of Health.[25] And through the Overseas Voting Act, Congress afforded Americans living abroad the right to vote in federal elections as though

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[22] CRS Report at 13-14.

[23] *Tidewater*, 337 U.S. at 585-86 (emphasis added).

[24] *Id.* at 597-99.

[25] 398 U.S. 419, 422 (1970).

they were present in their last place of residence in the United States.[26] If residents of federal enclaves and Americans living abroad possess voting representation, Congress should be able to extend the same to District residents.

2. The *Tidewater* Concurrence

CRS suggests that the justices who concurred in the *Tidewater* judgment would have rejected the notion that Congress has authority to extend voting representation to citizens of the District.[27] That suggestion is unfounded. The two concurring justices in *Tidewater*, who found the District was a "state" for purposes of diversity jurisdiction, would have similarly concluded that the District is a "state" for purposes of voting representation.

Faced with the fact that the Constitution had failed explicitly to accord District residents access to federal courts through diversity jurisdiction, Justice Rutledge remarked: "I cannot believe that the Framers intended to impose so purposeless and indefensible a discrimination, although they may have been guilty of understandable oversight in not providing explicitly against it."[28] Having concluded that the Framers did not intend to deprive District residents of access to the federal courts, Justice Rutledge reasoned that the term "state" should include the District of Columbia where it is used with regard to "the civil rights of citizens."[29] Access to the federal courts via diversity jurisdiction, he concluded, fell within that category of usage. Contrary to CRS's view,[30] the same is of course true with respect to the right conferred by the D.C. Voting Rights bill, as the right to vote is among the most fundamental of civil rights. Based on Justice Rutledge's reasoning, the *Tidewater* concurring justices surely would have upheld Congress's determination to redress the indefensible denial of voting representation to District residents.[31]

3. The *Tidewater* Dissents

The four dissenting justices, although divided between two separate opinions, emphasized the same point as central to their analyses: As Justice Frankfurter put it, "[t]here was a deep distrust of a federal judicial system, as against the State judiciaries, in the Constitutional Convention."[32] It was that distrust of federal power that engendered fierce debates about the scope of the federal judiciary, and resulted in its careful enumeration in Article III. In view of the fact, made clear by the debates, that the Constitution's defenders had to

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[26] *See* 42 U.S.C. § 1973ff-1.

[27] *See* CRS Report at 16-17.

[28] 398 U.S. at 625.

[29] CRS Report at 11.

[30] *See id.* at 13-14.

[31] Indeed, because interpreting the term "state" to include the District for purposes of *voting representation* would not have required overruling *Hepburn*, Justice Rutledge's opinion might have garnered additional votes if that issue had been presented to the *Tidewater* Court.

[32] *Tidewater*, 337 U.S. at 647 (Frankfurter, J., dissenting).

"justify[] every particle of power given to federal courts,"[33] the four dissenting justices thought it inconceivable that the Framers would have bestowed upon Congress in Article I a supplemental power to expand the federal judiciary "whenever it was thought necessary to effectuate one of [Congress's] powers."[34]

Thus, the driving force behind these justices' conclusion that the District Clause did not permit an expansion of federal jurisdiction thus had little to do with the scope of the District Clause and everything to do with the character of the Article III power at stake. Those concerns are not present in the context of voting representation for citizens of the District. As noted above, voting representation is a right belonging to the individual citizens of the District, not to the District as seat of the federal government. The federalism concerns triggered by congressional expansion of the federal judiciary simply are not implicated by legislation that effects the modest, but important, result of meaningful House representation for the citizens of the United States who reside in the District of Columbia. There is simply no reason to infer that the *Tidewater* dissenters would have rejected Congress's authority to pass the D.C. Voting Rights bill.

B. *Adams v. Clinton*

In 2000, a three-judge panel of the United States District Court for the District of Columbia addressed D.C. voting representation in *Adams v. Clinton*.[35] Although the question was not directly presented in *Adams*, the court suggested that Congress could provide voting representation for District citizens. In *Adams*, the court rejected District residents' claim that the Constitution *requires* that the District be treated as a state for purposes of representation in the House and Senate.[36] In a passage strikingly similar to that in *Hepburn*, however, the *Adams* court invited the plaintiffs to seek congressional representation through "other venues," suggesting (like *Hepburn*) that Congress could provide the right legislatively.[37] Moreover, the *Adams* court expressly noted that counsel for the House of Representatives asserted in the litigation that "only congressional legislation or constitutional amendment can remedy plaintiffs' exclusion from the franchise."[38]

III. The Other Concerns Expressed in the CRS Report Are Unfounded

The CRS Report identifies two concerns unrelated to Congress's constitutional authority to enact the D.C. Voting Rights bill. First, it suggests that granting the District voting representation in the House would open the door to claims by residents of the various federal

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[33] *Id.* at 635 (Vinson, J., dissenting).

[34] *Id.*

[35] 90 F. Supp. 2d 35 (D.D.C. 2000), *aff'd mem.*, 531 U.S. 941 (2000).

[36] *Id.* at 47.

[37] *Id.* at 72.

[38] *Id.* at 40.

territories for their own Representatives.[39] It also states that "holding that the District could be treated as a state for purposes of representation would arguably also support a finding that the District could be treated as a state for the places in the Constitution [that] deal with other aspects of the national political structure."[40] These concerns are unfounded. Passage of the D.C. Voting Rights Act would not have any effect on federal territories or their residents. Nor would it necessarily support an argument that the District is a "state" in the context of constitutional provisions governing the national political structure.

A. Granting the District a House Representative Would Not Affect the Territories

As a constitutional and historical matter, territories occupy a position fundamentally different from the District in the overall schema of American Federalism and have long enjoyed disparate rights and privileges. Congress's authority over the territories stems from an entirely different constitutional provision, which empowers Congress to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[41] Although this provision unquestionably grants Congress broad authority to manage and legislate over federal lands, the Framers' use of two different clauses suggests that they intended the District and the various territories to be constitutionally distinct.[42] The Supreme Court has recognized as much, specifically noting that, "[u]nlike either the States or Territories, the District is truly *sui generis* in our governmental structure."[43] Accordingly, the case law we have discussed supporting Congress's power to provide District residents congressional voting representation cannot uncritically be applied to support the same argument for the territories.

Moreover, unlike territorial residents, but like the residents of the several states, District residents bear the full burden of federal taxation and military conscription. Granting the District a House Representative readily flows from these obligations; it is both incongruous and constitutionally significant that District residents lack an equal voice in the legislative body that can spend their tax dollars and send them off to war. Further, while birth in the District accords a person the same right to automatic U.S. citizenship that attaches to birth in the 50 states, those born in some territories are allotted only U.S. *nationality*, requiring only basic fealty to the

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[39] CRS Report at 17.

[40] *Id.*

[41] U.S. Const. art. IV, § 3, cl. 2.

[42] *See* Samuel B. Johnson, The District of Columbia and the Republican Form of Government Guarantee, 37 How. L.J. 333, 349-50 (1994) ("The Territories Clause is minimally relevant to the District. The existence of a separate District Clause strongly suggests that the District is not among the territories covered by the Territories Clause. Moreover, courts generally have agreed that the Territories Clause does not apply to the District.") (citing *O'Donoghue v. United States*, 289 U.S. 516, 543 -51 (1939) and *Dist. of Columbia v. Murphy*, 314 U.S. 441, 452 (1941)). *Cf. Dist. of Columbia v. Carter*, 409 U.S. 418, 430-31 (1973) (comparing Congress's exercise of power over the District and territories, noting federal control of territories was "virtually impossible" and had little practical effect.).

[43] *Carter*, 409 U.S. at 432.

United States, and not U.S. citizenship.[44] And unlike the territories, the District was part of the original 13 states and until the Capital was established in 1801, residents of what is now the District did enjoy full voting representation in the Congress.

Finally, unlike residents of the District, territorial residents do not vote in U.S. Presidential elections. Although we do not believe a constitutional amendment is necessary to secure voting representation for the District in the House, the enactment of the 23rd Amendment demonstrates the several states' clear and unequivocal agreement that they share a historical and cultural identity with residents of the District, which occupies a unique position in the federal system. This is plainly a tradition the states do not share with the territories. Congress's plenary authority to take broad action for the District's welfare, including and up to granting it a seat in the House of Representatives, is part of this shared tradition.

Taken together, these differences between the territories and the District render highly unlikely the suggestion that granting voting rights to District residents would lead, as a legal or policy matter, to granting similar privileges to residents of the U.S. territories.

B. Granting the District a House Representative Would Not Lead to a Grant of Other Privileges Inhering in Statehood

The CRS Report offers in passing another "slippery slope" argument, suggesting that legislative creation of a House Representative for the District would provide support for an argument that "Congress could . . . authorize the District to have Senators, Presidential Electors, and perhaps even the power to ratify [a]mendments to the Constitution." The CRS Report does not dwell on these concerns, with good reason. Regardless of whether Congress could have enacted legislation to provide the District representation in the Electoral College, District residents already have that representation by virtue of the 23rd Amendment.[45] Any impetus to providing the District the power to ratify amendments would face grave constitutional hurdles, as that is a power of the states *qua* states, not a right of their individual citizens.[46] And the question whether Congress might ever choose to afford District residents representation in the Senate is an entirely speculative and political one.

IV. Congress May Direct the Next-Entitled State to Elect Its Additional Representative at Large

The D.C. Voting Rights Act would increase the size of the House by two members: One would go to the District and the other to the state identified as next entitled to an additional

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[44] *See* 8 U.S.C. §§ 1102(a)(29) and 1408 (those born in the "outlying territories" of American Samoa and Swain Island are eligible for U.S. nationality but not U.S. citizenship).

[45] That the District obtained a vote in the electoral college by way of a constitutional amendment does not demonstrate its inability to provide District residents congressional voting representation by statute. Even if Congress's authority were the same in both contexts (a point that is not at all clear), Congress's determination in 1961 to proceed by constitutional amendment casts no substantial light on the Framers' understanding as to whether an amendment would be necessary to affect such a change.

[46] *See* U.S. Const. art. V.

Representative. A proposed modification to the existing bill would direct the next-entitled state to elect its additional Representative at large, rather than creating an additional single-member district. Congress plainly has the authority to do so.[47] We understand, however, that a question has been raised as to whether such a provision would violate the "one person, one vote" principle set forth by the Supreme Court in *Wesberry v. Sanders*.[48] In our view, it would not.

In *Sanders*, the Court held that "the command of Article 1, 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."[49] 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.[50]

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.[51]

Applying those principles, we do not believe that the proposed temporary "at large" district in the next-entitled state would violate the "one person, one vote" requirement. Suppose, for example, that Utah is the state entitled to the additional seat. Utah currently has three

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[47] Indeed, Congress has already provided for at-large elections in some circumstances. Under 2 U.S.C. § 2a(c)(2), a state entitled to an additional representative must, pending redistricting, elect its additional representative(s) from the state at large. In 2 U.S.C. § 2c, however, Congress directs each state to fashion one single-member district for each representative to which it is entitled. Section 2a(c) is therefore provisional, and applies only if the courts and state legislature have failed to redistrict pursuant to § 2c. *See Branch v. Smith*, 538 U.S. 254, 271 (2003). But there is no bar to Congress providing for at-large election of the next-entitled state's additional representative, in effect carving out an exception to § 2c.

[48] 376 U.S. 1 (1964).

[49] *Id.* at 7-8.

[50] *Id.* at 7.

[51] *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).

congressional districts. If Utah were to hold an at-large election for a new fourth seat, voters could cast a vote in their existing district *and* in the state-wide election for the fourth seat. 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.

You have also asked whether the proposed "at large" district could be challenged on "one person, one vote" grounds because each Utah resident would vote in two elections, while residents of other states with single-member districts would vote only once. 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.[52] In *Department of Commerce v. 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 1, 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 far more deference than a state districting decision that is capable of being reviewed under a relatively rigid mathematical standard.[53]

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*."[54] Accordingly, the one-person-one-vote principle is essentially inapplicable to interstate voting comparisons.

Second, and in any case, the proposed at-large election would not give residents of the state more or less voting power than the residents of states with single-member districts. A simple example illustrates why this is so. Suppose that State A and State B have roughly the same population and are each entitled to four Representatives. State A holds an at-large election for all four of its representatives, while State B divides its Representatives and voters into four districts. State A's state-wide district would have a population four times the size of each district in State B. As compared to the single-district voter in State B, the "at-large" voter in State A has a one-fourth interest in each of four representatives. The single-district voter in State B has a whole interest in one representative. But in both scenarios, each voter has, in the aggregate, one

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[52] *See Dep't of Commerce v. Montana*, 503 U.S. 442, 464 (1992).

[53] *Id.*

[54] *See Wisconsin v. City of New York*, 517 U.S. 1, 14-15 (1996).

whole voting interest. Similarly, as compared to a state with four single-member districts, the voters in Utah's existing three districts would have proportionately less influence in the election of the representative from their own district, but would gain a fractional interest in the state's at-large representative. In the aggregate, Utah residents would have no more (and no less) voting power than residents of any other state.

Conclusion

Although we appreciate the concerns expressed in the CRS Report and agree that the questions raised therein are not entirely free from doubt, we do not see any legal, policy, or other reason why Congress should not extend the right to voting representation to citizens of the District. As the Court noted in *Tidewater*, the District was little more than a "contemplated entity" at the time the Constitution was ratified, and "[t]here is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia...."[55] But the District now has a population of nearly 600,000 people—greater than the population of all of the thirteen original states. Congress may and should act to ensure those residents the same substantive representation that the Framers assured their fellow citizens. Congress also has authority to direct the next-entitled state, which would receive an additional seat, to elect that seat at-large until the next census. Far from being prohibited by the Constitution, the D.C. Voting Rights bill is legislative action that the Framers would have expected and embraced as fulfilling their democratic vision for the Nation.

[55] *Tidewater*, 337 U.S. at 587. *See also* Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. Legis. 167, 172 (1975) (noting that "[t]he question of the representation of the District received little express attention during the course of drafting [the District clause], or in subsequent ratification debates....").