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

JULY 24, 2006.—Ordered to be printed

Mr. TOM DAVIS of Virginia, from the Committee on Government Reform, submitted the following

## R E P O R T

[To accompany H.R. 5388]

[Including cost estimate of the Congressional Budget Office]

The Committee on Government Reform, to whom was referred the bill (H.R. 5388) 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, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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49–006

## COMMITTEE STATEMENT AND VIEWS

### PURPOSE AND SUMMARY

H.R. 5388, the District of Columbia Fair and Equal House Voting Rights Act of 2006, was introduced by Representative Tom Davis and Delegate Eleanor Holmes Norton in a bipartisan effort to give citizens of the District of Columbia direct representation in the House of Representatives. The legislation has two main features. First, it treats the District as a congressional district for the purpose of granting full House representation. Second, it increases the size of the House by two members. In increasing the size of the House, the bill follows the historic House tradition of increasing representation in a non-partisan manner.

### BACKGROUND AND NEED FOR LEGISLATION

Efforts have been made to resolve the historic conundrum of status of the citizens living in the District since the earliest days of the nation's history. The need for a federal district became obvious in 1783 when a group of disbanded soldiers gathered in Philadelphia to protest the Commonwealth's refusal to pay back wages. This event was viewed as a threat to Congressional delegates. Congress called upon the Governor of Pennsylvania for protection from the mob. The Governor refused to act forcing Congress to adjourn and reconvene in New Jersey.[1] The incident underscored the need that "the federal government be independent of the states, and for 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 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 influ-

[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)).

ence, equally dishonorable to the Government and dissatisfactory to the other members of the confederacy.[3]

The Constitution through Article I, Section 8, Clause 17 authorized the creation of an autonomous, permanent federal 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 was vested in the federal government.[5] Since then, District residents have not had direct representation in Congress because the Constitution did not explicitly provide for such representation.

The District was created for the specific purpose of protecting the federal government from interruption by undue influence from or dependence upon any particular State government. Although some in the federal government debated the right to vote for the District residents, no evidence has been found to suggest that the lack of suffrage for citizens living in the federal district was considered an important component of this goal. It was important that the federal district be under the direct control of the federal government with no powers reserved to it as a political jurisdiction.

To find the solution to this challenge, Article I, Section 8, Clause 17 represents one of the most sweeping and expansive grants of federal authority found in the Constitution. It allows Congress "[t]o exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States. . . ."[6]

Judge Kenneth W. Starr stated in testimony before this Committee:

> As emphasized by the federal courts on numerous occasions, the Seat of Government Clause is majestic in its scope. In the words of the Supreme Court, "[t]he object of the grant of exclusive legislation over the [D]istrict was, therefore, national in the highest sense. . . . In the same article which granted the powers of exclusive jurisdiction . . . are conferred all the other great powers which make the nation." And my predecessors on the D.C. Circuit Court of Appeals once held that Congress can "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."[7]

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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] U.S. Const. art. I, § 8, cl. 17.

[7] Common Sense Justice for Nation's Capital: An Examination of Proposals to Give D.C. Residents Direct Representation: Hearing on H.R. 5388 Before the H. Comm. On Government Reform, 108th Cong. 4–5 (2004) (Statement of the Honorable Kenneth W. Starr, Former Solicitor General of the United States, Former Judge, U.S. Court of Appeals for the District of Columbia Circuit) (quoting O'Donoghue v. United States, 289 U.S. 516, 539–40 (1993); Neil v. District of Columbia, 110 F.2d 246, 250–51 (D.C. Cir. 1940)).

On July 16, 1790, Congress passed "An Act for establishing the temporary and permanent seat of the Government of the United States." This legislation explicitly acknowledged 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." [8]

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.[9] 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.[10]

From of 1790–1800, District residents were able to vote in Congressional elections in Maryland and Virginia not because they were citizens of those states since the cession had ended their political link with those states.[11] Rather, their voting rights derived from Congressional action under the District Clause recognizing and ratifying the ceding states' laws as the applicable law for the now-federal territory until further legislation.[12] Therefore, it was not the cessions themselves but the federal assumption of authority in 1800 that deprived District residents of representation in Congress.

In the subsequent 216 years, various efforts have been made to extend voting representation to District residents. As early as 1801, the citizens of the town of Alexandria petitioned Congress to create a functioning municipal government within the District and provide its citizens representation in the House of Representatives.[13]

This effort has been repeatedly documented. However, two efforts in particular deserve mention here. The first attempt was a Constitutional amendment. On August 22, 1978, the District of Columbia Voting Rights Constitutional Amendment passed both houses with overwhelming bipartisan support. The amendment would have given District residents voting representation in the House and the Senate. Supporters of the amendment were given seven years to ratify the amendment in the 38 states required. Only 16 states ratified the measure before it expired in 1985.

The second endeavor sought to gain representation through a lawsuit brought under the Fourteenth Amendment to the Constitution. During the 1990s, District residents brought a series of legal challenges essentially claiming that the Constitution required that District citizens be granted voting representation. The Supreme Court found that the Constitution contains no provisions providing

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

[9] An Act to Cede to Congress a District of Ten Miles Square in This State for the Seat of the Government of the United States, 1788 Md. Acts ch. 46, reprinted in 1 D.C. Code Ann. 34 (2001) (hereinafter "Maryland Cession"); 28 An Act for the Cession of Ten Miles Square, or any Lesser Quantity of Territory Within This State, to the United States, in Congress Assembled, for the Permanent Seat of the General Government, 13 Va. Stat. at Large, ch. 32, reprinted in 1 D.C. Code Ann. 33 (2001) (hereinafter "Virginia Cession").

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

[11] 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).

[12] 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.

[13] Petition to Congress, "Memorial of Sundry Freeholders and Inhabitants of the Town of Alexandria, in the District of Columbia," January 26, 1801.

for or guaranteeing congressional voting representation to District residents. The Supreme Court, in Alexander v. Daley, affirmed the holding of the United States Court of Appeals for the District of Columbia Circuit, finding that the Constitution does not require Congress to provide residents of District representation in the House of Representatives.[14] In Alexander, the plaintiffs argued that under Article I, and because the Supreme Court had interpreted the term "State" to include the District, the District was required to be treated as a State for the purposes of representation. However, the Court rejected this theory holding that the Constitution does not treat the District as a State in order to provide for representation in the House of Representatives.[15]

Although the Court rejected the reasoning by the plaintiffs, it did not find that Congress was prohibited by any provision of the Constitution to extend voting rights to District residents through legislative means. Instead, it held that it was not the job of the judiciary to confer such franchise. The Court stated:

> Like our predecessors, we are not blind to the inequity of the situation plaintiffs seek to change. But longstanding judicial precedent, as well as the Constitution's text and history, persuade us that this court lacks authority to grant plaintiffs the relief they seek. If they are to obtain it, they must plead their cause in other venues.[16]

While the Court did not specify "other venues" in which plaintiffs may proceed, it expressly stated that counsel for the House of Representatives had earlier acknowledged Congress's authority to extend the vote to District residents legislatively. The Court said, House Counsel "assert[ed] that because Article I of the Constitution limits voting to residents of the fifty states, only congressional legislation or constitutional amendment can remedy plaintiffs' exclusion from the franchise." [17]

Throughout the nation's history, many Americans have agreed that the present political status of District residents is untenable. Even before the District was created James Madison addressed concerns about the political status of the new citizens:

> The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature. And it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducement of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State, in their

[14] 90 F. Supp. 2d 35 (D.D.C. 2000), aff'd 531 U.S. 940 (2000).
[15] Id. at 47.
[16] Id. at 72.
[17] Id. at 40 (emphasis added).

> adoption of the Constitution, every imaginable objection seems to obviated.[18]

Historically, President Andrew Jackson made the point that no articulable value to the federal district is gained from denying the people of the District some direct representation:

> It was doubtless wise in the framers of our Constitution to place the people of this District under the jurisdiction of the General Government. But to accomplish the objects they had in view, it is not necessary that this people should be deprived of all the privileges of self-government . . . I earnestly recommend the extension to them of every political right which their interests require and which may be compatible with the Constitution.[19]

Some years later, William Henry Harrison properly laid out the argument for the rights of citizens:

> The people of the District of Columbia are not the subjects of the people of the States, but free American citizens. Being in the latter condition when the Constitution was formed, no words used in that instrument could have been intended to deprive them of that character. If there is anything in the great principle of unalienable rights so emphatically insisted upon in our Declaration of Independence, they could neither make nor the United States accept a surrender of their liberties and become the subjects . . . of their former fellow-citizens.[20]

More recently, President Nixon said, "It should offend the democratic sense of this nation that the 850,000 citizens of its Capital, comprising a population larger than 11 of its states, have no voice in the Congress."[21]

Citizens serving in the United States military have engaged in the fight for District representation while they fight for democracy overseas. In 2002, then West Point Cadet James Rimensnyder wrote President George W. Bush making the point, "Today, we are the only citizens of the United States, excluding felons, who pay federal taxes and serve in the Armed Forces, but are denied representation in Congress."[22] In 2005, Specialist Marcus Gray, Specialist Emory Kosh, and Specialist Isaac Lewis wrote to Speaker of the House Dennis Hastert that, "The elections in Iraq and Afghanistan remind us of our obligation to seek the same rights here in our country for ourselves and for all citizens.[23]

Taken as a collective whole, these comments and efforts suggest that the lack of basic representation for District residents is neither insignificant nor irrelevant. It is one of the largest remaining gaps in our constitutional system of government. If the advancement of the cause of democracy around the world is viewed as a

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

[19] President Andrew Jackson, Third Annual Message, December 6, 1831.

[20] President William Henry Harrison, Inaugural Address, March 4, 1841.

[21] President Richard Nixon, Special Message to the Congress on the District of Columbia, (1969), http://www.presidency.ucsb.edu/ws/print.php?pid=2022.

[22] James N. Rimensnyder, "Letter to President George W. Bush," April 2, 2002. (At the time this report was written 2nd Lt. Rimensnyder was serving in Ramadi, Iraq with the 1rst Armored Division).

[23] Spc. Marcus Gray, Spc. Emory Kosh, and Spc. Isaac Lewis, "Letter to Speaker Dennis Hastert," January 3, 2005.

worthy national goal, of the political status of the citizens of the District should be resolved if at all possible.

## DEVELOPMENT OF H.R. 5388

Early in his tenure as chairman for the House Committee on Government Reform, Chairman Davis made clear he intended to seek a new, radically different, approach to solving the representation problem faced by District residents. In July of 2003, Chairman Davis told the Washington Post, "It's hard to make a straight-faced argument that the capital of the free world shouldn't have a vote in Congress."[24] This position was a long held view for the Chairman, but the effort to find a way to give the District some representation was born out of a unique political opportunity which arose after the 2000 Census and apportionment process.

The State of Utah was denied a new congressional district by less than a thousand citizens. This caused considerable outrage in Utah. Utah citizens and officials believed that this figure was miscalculated since many thousands of Utahns were currently serving as missionaries for the Church of Jesus Christ of Latter Day Saints in other states or countries. A lawsuit followed the apportionment which Utah ultimately lost before the U.S. Supreme Court. In spite of this defeat, the citizens of Utah remain convinced that they deserved a fourth congressional seat. This presented a unique historical opportunity.

Drawing from past history, Chairman Davis took notice of the fact that the United States had traditionally increased representation in Congress in a politically balanced way. This tradition began with the Missouri Compromise and more recently the inclusion of Hawaii and Alaska as states. Given the diametrically opposite political environments in Utah and the District of Columbia, Chairman Davis recognized that this could be a singular time in American history to partially solve the lack of direct representation for District residents.

While the idea may seem unusual, the legislation reflects a unique solution for a unique jurisdiction. In developing the legislation, two major questions need to be addressed. Does Congress have the authority to do such a thing? Can Congress mandate the creation of an at-large seat for a state?

## CONGRESSIONAL AUTHORITY

In looking at the scope of Congressional authority, it quickly became obvious that Congress has an extraordinary power under the exclusive jurisdiction granted in the District Clause which states, "Congress shall have the power to exercise exclusive Legislation in all Cases whatsoever, over such District. . . ."[25] In testimony before the Committee Judge Kenneth Starr stated, "Congress's powers over the District are not simply limited to those powers that a State legislature might have over a State. As emphasized by the federal courts on numerous occasions, the Seat of Government

[24] Craig Timberg, Davis Backs Expanding House for D.C. Seat, Washington Post, June 27, 2003, at B01.

[25] U.S Const. art. I, §8, cl. 17.

Clause is majestic in its scope."[26] Judge Starr testified that "it has been held by the District of Columbia Circuit Court of Appeals that Congress can '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.'"[27]

In support of this proposition, the Committee sought a legal opinion from Professor Viet Dinh, noted Georgetown law professor and former Assistant Attorney General under Attorney General John Ashcroft. Professor Dinh's opinion states Congress's broad legislative authority extends to the granting of Congressional voting rights for District residents. The opinion refers to the text of the Constitution, judicial decisions, and similar Congressional actions to support this proposal.

The construction of the Constitution suggests the limited powers granted Congress in relation to the states do not apply to the District. "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."[28] These facts lead Professor Dinh to conclude, "[i]n few, if any, other areas does the Constitution grant any broader authority to Congress to legislate."[29]

Professor Dinh also noted that 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. Chief Justice Marshall in Hepburn v. Ellzey recognized that Congress and not the courts can treat the District as a state.[30] Also, Justice Jackson in National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co., relying on Hepburn, held that although the District is not defined as a "state" for the purpose of Article III, other provisions of the Constitution do not prohibit Congress from considering the District as a state.[31] More recently, in Adams v. Clinton, a district court held that Congress, and not the courts, is equipped to remedy District residents' need for direct representation.[32]

Professor Dinh also noted the courts have recognized Congressional authority outside the District Clause to regulate District affairs and afford them everyday protections most American citizens take for granted. The Supreme Court has held that the Commerce Clause authorizes Congress to regulate commerce across the District's borders.[33] Also, the Court held that the people of the District are afforded the right to trial by jury under the Sixth Amendment, regardless of the fact that the text of the Amendment maintains that "in all criminal prosecutions the accused shall enjoy the right

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[26] Common Sense Justice for Nation's Capital: An Examination of Proposals to Give D.C. Residents Direct Representation: Hearing on H.R. 5388 Before the H. Comm. On Government Reform, 108th Cong. 2 (2004) (Statement of the Honorable Kenneth W. Starr, Former Solicitor General of the United States, Former Judge, U.S. Court of Appeals for the District of Columbia Circuit) (quoting O'Donoghue v. United States, 289 U.S. 516, 539–40 (1993); Neil v. District of Columbia, 110 F.2d 246, 250–51 (D.C. Cir. 1940)).

[27] Id. at 4.

[28] Memorandum from Viet D. Dinh and Adam H. Charnes on "The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives," to Committee on Government Reform, U.S. House of Representatives. 6 (November 2004) (on file with the Committee).

[29] Id. at 6.

[30] Id. at 11.

[31] Id at 11–12.

[32] Id. at 14.

[33] Stoutenburgh v. Hennick, 129 U.S. 141, 147 (1889).

to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . ."[34]

Interestingly, Professor Dinh's research revealed two previous times that Congress has granted Congressional representation to persons who are not citizens of States. In its initial acceptance of the ceded lands from Maryland and Virginia the Congress exercised its authority to give the district's representation by allowing its citizens to vote with ceding states until the Federal Government accepted the District in 1800.[35] District citizens' voting rights derived from Congressional action under the District Clause recognizing and ratifying the ceding states' law as the applicable law for the now-federal territory until further legislation.

Also, the Uniformed and Overseas Citizens Absentee Voting Act[36] allows American citizens to vote by absentee ballot in "the last place in which the person was domiciled before leaving the United States." The overseas voter need not be a citizen of the state where voting occurs. Indeed, the voter need not have an abode in that state, pay taxes in that state, or even intend to return to that state. Based on the construction of the Constitution itself, prior established case law and prior legislative activity it is clear that Congress can, if it chooses to do so, grant the citizens of the District some representation in the House of Representatives.

Therefore, it is evident that the remedy for the representation of District residents rests with the Congress and not the courts. In this case, Congress has the legislative power to provide District residents some measure of direct representation in the House of Representatives.

In spite of the unusual nature of this solution, the Committee believes action is warranted because the District, unlike a state, owes its existence to the Constitution.[37] This jurisdiction is unlike any other political jurisdiction in our system. The people living in this federal enclave are American citizens. But it is equally without doubt that they are not citizens of a State or a territory. Before the Constitution was enacted this type of American citizenship did not exist. This unique nature suggests that a unique solution may be available to the Congress.

Congress's authority to treat the District as a state for representation purposes is not constrained by the use of the word "states," which is mentioned five times in Article I. The framers attempted to create in the House of Representatives the most representative body possible. Hence, the phrase people of the several states should not be read narrowly to mean state citizens, but not other citizens of the nation. Instead, it should be read broadly to mean all the people in the Union.

The framers' use of the word "state" refers to the particular types of political jurisdiction that the Constitution intended to unite into a Union. The framers took no notice of the fact that the Constitu-

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[34] 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.").

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

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

[37] Establishing Congress: The Removal to Washington, D.C., and the Election of 1800, 39–41 (Kenneth R. Bowling and Donald R. Kennon eds., 2005).

tion, once ratified, would create a wholly new type of political jurisdiction which would exist separately but alongside states in the new Union. It is important to recall that, at the time these phrases were written, the residents of what would later become the District of Columbia were the people of the several states, and, as reflected in James Madison's views described above, no one intended or envisioned that these people would be deprived of their rights without recourse when the land was ceded to the new federal enclave.[38]

In describing who shall be eligible to vote for a Representative, Section 2 states "the Electors in each State shall have the Qualifications requisite for electors of the most numerous Branch of the State Legislature."[39] Clause 2 of this section states a representative must be "an Inhabitant of the State in which he shall be chosen."[40] When discussing how the new legislative body should be formed, Clause 3 declares "Representatives . . . shall be apportioned among the several States."[41] This clause also lays out that each State shall have at least one representative.[42] Finally, Clause 4 establishes what should happen when a vacancy occurs in "the Representation from any State."[43] In each instance where the words "state" or "states" is used, the primary and plain meaning of the phrases is not one that limits representation to certain citizens. Instead, the obvious meaning is that everyone eligible to elect some representative in any political jurisdiction joining this Union should be eligible to elect representation to the Nation's House of Representatives.

MANDATING AN AT-LARGE SEAT

Finally, the question is whether Congress has the authority to mandate a state to adopt an "at-large" Congressional district for a new House seat. Generally, the Constitution grants Congress broad authority to regulate national elections, stating, "The Times, Place 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."[44] The Supreme Court has repeatedly affirmed this broad authority.[45]

Current federal law appears to conflict regarding "at-large" congressional representation: Under 2 U.S.C. § 2c, Representatives must run from single-member districts, rather than running "at-large"[46]; under 2 U.S.C. § 2a(c) Congress may provide for "at-large" representation if a state failed to redistrict after a census.[47] Noth-

[38] The Federalist No. 43, at 288–98 (James Madison) (Jacob E. Cooke ed., 1961).
[39] U.S. Const. art. I, § 2, cl. 1.
[40] U.S. Const. art. I, § 2, cl. 2.
[41] U.S. Const. art. I, § 2, cl. 3.
[42] U.S. Const. art. I, § 2, cl. 3.
[43] U.S. Const. art. I, § 2, cl. 4.
[44] U.S. Const. art. I, § 4, cl. 1.
[45] In Oregon v. Mitchell, 400 U.S. 112, 119 (1970), Justice Black wrote, "The breadth of power granted to Congress to make or alter election regulations in national elections, including the qualifications of voters, is demonstrated by the fact that the Framers of the Constitution and the state legislatures which ratified it intended to grant to Congress the power to lay out or alter the boundaries of the congressional districts. Surely no voter qualification was more important to the Framers than the geographical qualification embodied in the concept of congressional districts." In Ex parte Siebold, 100 U.S. 371, 383–384, the Court held that "the power of Congress over [the election of Senators and Representatives] is paramount. It may be exercised as and when Congress sees fit to exercise it."
[46] 2 U.S.C. § 2c (1967).
[47] 2 U.S.C. § 2a(c).

ing in the present legislation, however, is intended to overturn or influence these two statutes' relationship. Instead, this legislation draws upon Congress's above-mentioned, broad authority to regulate congressional elections. As Justice Scalia wrote in Vieth v. Jubelirer, "Article I, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permits Congress to 'make or alter' those districts if it wished."[48]

Throughout its history Congress has wielded this broad authority, even in the face of a contradicting statute. For example, in 1843, statutory language proclaimed that no district shall elect more than one Representative. However, three states elected their delegations "at-large."[49] 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."[50] The Committee's report found the 1842 law unconstitutional. Later, however, the House adopted a resolution declaring the "at-large" Representatives "duly elected," omitting any mention of the 1842 law.[51] In 1861, California elected three Representatives at large, and they too were seated.[52] In both these instances, Congress explicitly blessed the states' "at-large" elections.

Moreover, it is an open question as to whether the founders intended Representatives to be elected through the districting process. Prior to 1842, members of Congress were elected "at-large" unless state law or practice provided otherwise. According to Justice Story, "it is observable, that the inhabitancy required is within the state, and not within any particular district of the state, in which the member is chosen."[53] The current districting process is not a function of the founders' explicit intent, but rather a later, more modern Congressional mandate.

Having resolved these major questions the Committee proceeded to take up the resulting bill. One major overarching fact has guided the entire process. The current situation is the result of an historic collateral effect and the pressing politics of the day. No one intended or envisioned that District citizens would be deprived of their rights without recourse. The solution embodied in H.R. 5388 is unusual, creative, and without precedent. Ironically, it is these very characteristics that make the bill as unique as the problem itself.

## LEGISLATIVE HISTORY

This bill was originally introduced on June 22, 2004 as the District of Columbia Fairness in Representation Act. This bill temporarily increased the size of Congress by two members. One seat was designated for the District of Columbia and the other seat would go to the next state in line under the apportionment formula (Utah). The bill made no reference to how the newly apportioned Utah seat would be districted. On June 23, 2004 the Committee on Government Reform held a hearing entitled, "Common Sense Jus-

[48] Vieth v. Jubelirer, 124 S. Ct. 1769, 1775 (2004).
[49] See Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States, 170–173 (Washington: GPO, 1907).
[50] Id.
[51] Id.
[52] Id. at 182.
[53] Joseph Story, Commentaries on the Constitution of the United States, 2:§ 618.

tice for the Nation's Capital, An Examination of Proposals to Give D.C. Residents Direct Representation." Testifying at the hearing were: the Honorable Ralph Regula, Member of Congress, State of Ohio; the Honorable Dana Rohrabacher, Member of Congress, State of California; the Honorable Anthony A. Williams, Mayor, District of Columbia; the Honorable Linda W. Cropp, Chairman, Council of the District of Columbia; Mr. Wade Henderson, Esquire, Executive Director, Leadership Conference on Civil Rights; the Honorable Kenneth W. Starr, Former Solicitor General of the United States, Former Judge, U.S. Court of Appeals for the District of Columbia Circuit; Mr. Ilir Zherka, Executive Director, DC Vote; Mr. Walter Smith, Executive Director, The DC Appleseed Center for Law and Justice, Ms. Betsy W. Werronen, Chairman, District of Columbia Republican Committee; Mr. Ted Trabue on behalf of the Greater Washington Board of Trade. Testimony focused on the effects of not having direct representation in the federal enclave. Judge Starr testified on the constitutional ramifications of the legislation and Congress's authority to enact a legislative solution.

On June 23, 2004 the Committee approved a contract for The Honorable Viet Dinh to answer the question as to whether Congress had the authority to give the District a seat in the House of Representatives. On September 13, 2004 the Committee on Government Reform received Professor Dinh's report which studied the legal challenges to the legislation. Professor Dinh reported "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." [54]

In the 109th Congress this bill was re-introduced as on May 3, 2005 as H.R. 2043 by the same name. On May 16th, 2006 Chairman Davis, with Delegate Eleanor Holmes Norton, Representative Henry Waxman and Representative Christopher Shays introduced the District of Columbia Fair and Equal House Voting Rights Act of 2006. This new legislation contained two major changes from the two prior bills. First, the legislation made the increase in the size of Congress permanent. Second, the legislation mandated that new seat created in Utah would be an at-large seat until the 2010 reapportionment.

On May 18, 2006, the Committee met in open session and voted favorably to report the bill, H.R. 5388. At that markup, the question was raised regarding how this bill affects the number of electors granted to Utah for the 2008 presidential election. It is the Committee's intention for this bill to be political neutral on the Electoral College issue. But we must also respect the bounds of the Constitution. Members will continue to work together to try to resolve this issue before the bill gets to the House floor.

[54] Memorandum from Viet D. Dinh and Adam H. Charnes on "The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives," to Committee on Government Reform, U.S. House of Representatives. 6 (November 2004) (on file with the Committee).

## SECTION-BY-SECTION

Section 1. Short Title: This section would provide a short title to the bill as the "District of Columbia Fair and Equal House Voting Rights Act of 2006."

Section 2. Findings: This section takes notice of the fact that the citizens of the District of Columbia lack direct voting representation in the U.S. Senate and House of Representatives. It also notes that District citizens have served in every war since the War of Independence. It notes that District citizens pay federal taxes. Finally, this section notes that the nation is founded on principles of one person one vote and government by the consent of the governed.

Section 3. Treatment of District of Columbia as Congressional District: This section would establish that the District of Columbia shall be considered a Congressional District for purposes of representation in the House of Representatives. It would make conforming amendments at various places in the U.S. Code where the current language mentions Congressional Districts and adds "the District of Columbia." The section also would establish that the amendments made by this section shall apply in the 110th Congress and each succeeding Congress.

Section 4. Permanent Increase in the Membership of Representatives: This section would provide that, effective January 3, 2007, the size of Congress shall be increased by two members. One seat would be designated for the District of Columbia and the other seat would go to the next state in line under the apportionment formula (Utah). The section also states 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.

Section 5. Repeal of Office of District of Columbia Delegate: The section would repeal the Office of the District of Columbia Delegate, and it would make conforming changes in the U.S. Code by striking the term "Delegate" or Delegate of the District of Columbia." The section would make these changes effective during the elections of 2006 and any succeeding year.

Section 6. Repeal of Office of Statehood Representative: This section would end the Office of Statehood Representative, but would leave intact the Office of Statehood Senator. This section also would make other conforming amendments throughout the District of Columbia Constitutional Convention Initiative of 1979. The changes made by this section would become effective during the elections of 2006 and any succeeding year.

Section 7. Nonseverability of Provisions: This section will ensure that should any section of this bill be struck down all sections will be vacated. Political neutrality is the linchpin of the entire legislative effort. Any result that would grant a seat to the District and not Utah or vice versa is counter to Congresses intent. Therefore no section of this legislation should be effective without the entire bill being ruled effective. No section of the bill should be subject to injunction without the entire bill being subject to the same injunction.

## EXPLANATION OF AMENDMENTS

There were no amendments offered.

## COMMITTEE CONSIDERATION

On May 18, 2006, the Committee met in open session and ordered favorably reported the bill, H.R. 5388, on a rollcall vote.

ROLLCALL VOTES

Final Passage
H.R. 5388
**COMMITTEE ON GOVERNMENT REFORM**
*109TH CONGRESS* – **2nd SESSION**
**ROLL CALL SHEET**

| Representatives | Aye | No | Present | Dem. | Aye | No | Present |
|---|---|---|---|---|---|---|---|
| MR. DAVIS (VA) (CHAIRMAN) | X | | | MR. WAXMAN | X | | |
| MR. SHAYS | X | | | MR. LANTOS | | | |
| MR. BURTON | X | | | MR. OWENS | X | | |
| MS. ROS-LEHTINEN | X | | | MR. TOWNS | X | | |
| MR. MCHUGH | | X | | MR. KANJORSKI | | | |
| MR. MICA | | | | MR. SANDERS | | | |
| MR. GUTKNECHT | X | | | MRS. MALONEY | X | | |
| MR. SOUDER | | | | MR. CUMMINGS | X | | |
| MR. LATOURETTE | X | | | MR. KUCINICH | X | | |
| MR. PLATTS | X | | | MR. DAVIS (IL) | X | | |
| MR. CANNON | X | | | MR. CLAY | X | | |
| MR. DUNCAN | X | | | MS. WATSON | X | | |
| MRS. MILLER (MI) | | X | | MR. LYNCH | X | | |
| MR. TURNER (OH) | X | | | MR. VAN HOLLEN | X | | |
| MR. ISSA | X | | | MS. SANCHEZ | X | | |
| MR. PORTER | X | | | MR. RUPPERSBERGER | X | | |
| MR. MARCHANT | | | | MR. HIGGINS | X | | |
| MR. WESTMORELAND | X | | | MS. NORTON | X | | |
| MR. MCHENRY | | X | | | | | |
| MR. DENT | X | | | | | | |
| MRS. FOXX | | | | | | | |
| MRS. SCHMIDT | | X | | | | | |
| VACANCY | | | | | | | |
| | | | | | | | |

Totals: Ayes 29 Nays 4 Present ____

## APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to the terms and conditions of employment or access to public services and accommodations.

## STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause 2(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report.

## STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report.

## CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress to enact the law proposed by H.R. 5388. Article I, Section 8, Clauses 17 and 18, Article I, Section 4, Clause 1, and, Article I, Section 2, Clause 1 of the Constitution of the United States grants the Congress the power to enact this law.

## FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

## UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by Section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement whether the provisions of the report include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

## COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 3128. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

## BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 3128 from the Director of Congressional Budget Office:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
*Washington, DC, May 26, 2006.*

Hon. TOM DAVIS,
*Chairman, Committee on Government Reform,*
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5388, the District of Columbia Fair and Equal House Voting Rights Act of 2006.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contacts are Matthew Pickford (for federal costs) and Sarah Puro (for the state and local impact).

Sincerely,

DONALD B. MARRON,
*Acting Director.*

Enclosure.

*H.R. 5388—District of Columbia Fair and Equal House Voting Rights Act of 2006*

Summary: H.R. 5388 would expand the number of Members in the House of Representatives from 435 to 437 beginning with the 110th Congress (i.e., in 2007). The legislation would provide the District of Columbia with one Representative and add one new at-large Member. Under H.R. 5388, the new at-large seat would initially be assigned to the state of Utah and then would be reallocated based on the next Congressional apportionment based on the 2010 census.

CBO estimates that enacting the bill would increase direct spending by about $200,000 in 2007 and by about $2.5 million over the 2007–2015 period. In addition, implementing the bill would have discretionary costs of $1 million of 2007 and about $7 million over the 2007–2011 period, assuming the availability of the appropriated funds.

H.R. 5388 contains an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA), but CBO estimates that the costs would not be significant and would not exceed the threshold established in UMRA ($64 million in 2006, adjusted annually for inflation). The bill contains no private-sector mandates as defined in UMRA.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 5388 is shown in the following table. The costs of this legislation fall within budget function 800 (general government).

| | By fiscal year, in millions of dollars— | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | 2007 | 2008 | 2009 | 2010 | 2011 | 2012 | 2013 | 2014 | 2015 | 2016 |
| CHANGES IN DIRECT SPENDING | | | | | | | | | | |
| Representative Salary and Benefits: | | | | | | | | | | |
| Estimated Budget Authority | * | * | * | * | * | * | * | * | * | * |
| Estimated Outlays | * | * | * | * | * | * | * | * | * | * |
| CHANGES IN SPENDING SUBJECT TO APPROPRIATION | | | | | | | | | | |
| Representative's Office and Administrative Expenses: | | | | | | | | | | |
| Estimated Authorization Level | 1 | 1 | 1 | 1 | 2 | 2 | 2 | 2 | 2 | 2 |
| Estimated Outlays | 1 | 1 | 1 | 1 | 2 | 2 | 2 | 2 | 2 | 2 |

Note: * = less than $500,000

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted near the start of fiscal year 2007 and that spending will follow historical patterns for Congressional office spending.

The legislation would permanently expand the number of Members in the House of Representatives by two to 437 Members. One new Member would represent the District of Columbia and the other would be a Representative at-large for the state of Utah until the next apportionment based on the 2010 census. The District of Columbia currently has a nonvoting delegate to the House of Representatives; establishing voting representation for the conversion from delegate to Representative would not add significant costs since the position is already funded with the same salary and administrative support as other Representatives.

*Direct spending*

Enacting H.R. 5388 would increase direct spending for the salary and associated benefits for the new at-large Representative. CBO estimates that the increase in direct spending for the Congressional salary and benefits would be about $2.5 million over the 2007–2015 period. That estimate assumes that the current Congressional salary of $162,100 would be adjusted for inflation. With benefits, the 2007 cost would be about $200,000.

*Spending subject to appropriation*

Based on the current administrative and expense allowances available for Members and other typical Congressional office costs, CBO estimates that the addition of a new Member would cost about $1 million in fiscal year 2007 and about $7 million over the 2007–2011 period, subject to the availability of appropriated funds.

Estimated impact on state, local, and tribal governments: H.R. 5388 contains an intergovernmental mandate as defined in UMRA because it would temporarily preempt laws in the state of Utah that govern the election of Members of the House of Representatives. The bill would require the state to elect an additional Member of the House using a statewide election. The state may derive benefits from having an additional Member of the House of Representatives. However, Utah could incur some costs to hold a special election in 2006 or 2007 and would incur small marginal costs to elect the additional Member through the 2010 election cycle. CBO estimates that these costs would not be significant and would

not exceed the threshold established in UMRA ($64 million in 2006, adjusted annually for inflation.)

Estimated impact on the private sector: The bill contains no private-sector mandates as defined in UMRA.

Estimate prepared by: Federal Costs: Matthew Pickford and Deborah Reis. Impact on State, Local, and Tribal Governments: Sarah Puro. Impact on the Private-Sector: Paige Piper/Bach.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

## SECTION 22 OF THE ACT OF JUNE 18, 1929

AN ACT To provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress.

SEC. 22. (a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of [the then existing number of Representatives] *the number of Representatives established with respect to the One Hundred Tenth Congress* by the method known as the method of equal proportions, no State to receive less than one Member.

* * * * * * *

*(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.*

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## SECTION 3 OF TITLE 3, UNITED STATES CODE

NUMBER OF ELECTORS

§ 3. The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice President to be chosen [come into office;] *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);* except, that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives.

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## TITLE 10, UNITED STATES CODE

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# SUBTITLE B—Army

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## PART III—TRAINING

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## CHAPTER 403—UNITED STATES MILITARY ACADEMY

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### § 4342. Cadets: appointment; numbers, territorial distribution

(a) The authorized strength of the Corps of Cadets of the Academy (determined for any year as of the day before the last day of the academic year) is 4,000 or such higher number as may be prescribed by the Secretary of the Army under subsection (j). Subject to that limitation, cadets are selected as follows:

(1) * * *

* * * * * * *

[(5) Five cadets from the District of Columbia, nominated by the Delegate to the House of Representatives from the District of Columbia.]

* * * * * * *

(f) Each candidate for admission nominated under clauses (3) through (9) of subsection (a) must be domiciled in the State, or in the congressional district, from which he is nominated, or in [the District of Columbia,] Puerto Rico, American Samoa, Guam, or the Virgin Islands, if nominated from one of those places.

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# SUBTITLE C—Navy and Marine Corps

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## PART III—EDUCATION AND TRAINING

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## CHAPTER 603—UNITED STATES NAVAL ACADEMY

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### § 6954. Midshipmen: number

(a) The authorized strength of the Brigade of Midshipmen (determined for any year as of the day before the last day of the academic year) is 4,000 or such higher number as may be prescribed by the Secretary of the Navy under subsection (h). Subject to that limitation, midshipmen are selected as follows:

(1) * * *

* * * * * * *

[(5) Five from the District of Columbia, nominated by the Delegate to the House of Representatives from the District of Columbia.]

* * * * * * *

**§ 6958. Midshipmen: qualifications for admission**

(a) * * *

(b) Each candidate for admission nominated under clauses (3) through (9) of section 6954(a) of this title must be domiciled in the State, or in the congressional district, from which he is nominated, or in [the District of Columbia,] Puerto Rico, American Samoa, Guam, or the Virgin Islands, if nominated from one of those places.

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## SUBTITLE D—Air Force

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### PART III—TRAINING

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### CHAPTER 903—UNITED STATES AIR FORCE ACADEMY

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**§ 9342. Cadets: appointment; numbers, territorial distribution**

(a) The authorized strength of Air Force Cadets of the Academy (determined for any year as of the day before the last day of the academic year) is 4,000 or such higher number as may be prescribed by the Secretary of the Air Force under subsection (j). Subject to that limitation, Air Force Cadets are selected as follows:

(1) * * *

* * * * * * *

[(5) Five cadets from the District of Columbia, nominated by the Delegate to the House of Representatives from the District of Columbia.]

* * * * * * *

(f) Each candidate for admission nominated under clauses (3) through (9) of subsection (a) must be domiciled in the State, or in the congressional district, from which he is nominated, or in [the District of Columbia,] Puerto Rico, American Samoa, Guam, or the Virgin Islands, if nominated from one of those places.

* * * * * * *

## DISTRICT OF COLUMBIA DELEGATE ACT

### TITLE II—DISTRICT OF COLUMBIA DELEGATE TO THE HOUSE OF REPRESENTATIVES

SHORT TITLE

SEC. 201. This title may be cited as the "District of Columbia Delegate Act".

[DELEGATE TO THE HOUSE OF REPRESENTATIVES

[SEC. 202. (a) The people of the District of Columbia shall be represented in the House of Representatives by a Delegate, to be known as the "Delegate to the House of Representatives from the District of Columbia", who shall be elected by the voters of the District of Columbia in accordance with the District of Columbia Election Act. The Delegate shall have a seat in the House of Representatives, with the right of debate, but not of voting, shall have all the privileges granted a Representative by section 6 of Article I of the Constitution, and shall be subject to the same restrictions and regulations as are imposed by law or rules on Representatives. The Delegate shall be elected to serve during each Congress.

[(b) No individual may hold the office of Delegate to the House of Representatives from the District of Columbia unless on the date of his election—

[(1) he is a qualified elector (as that term is defined in section 2(2) of the District of Columbia Election Act) of the District of Columbia;

[(2) he is at least twenty-five years of age;

[(3) he holds no other paid public office; and

[(4) he has resided in the District of Columbia continuously since the beginning of the three-year period ending on such date.

He shall forfeit his office upon failure to maintain the qualifications required by this subsection.]

* * * * * * *

[OTHER PROVISIONS AND AMENDMENTS RELATING TO THE ESTABLISHMENT OF A DELEGATE TO THE HOUSE OF REPRESENTATIVES FROM THE DISTRICT OF COLUMBIA

[SEC. 204. (a) The provisions of law which appear in—

[(1) section 25 (relating to oath of office),

[(2) section 31 (relating to compensation),

[(3) section 34 (relating to payment of compensation),

[(4) section 35 (relating to payment of compensation),

[(5) section 37 (relating to payment of compensation),

[(6) section 38a (relating to compensation),

[(7) section 39 (relating to deductions for absence),

[(8) section 40 (relating to deductions for withdrawal),

[(9) section 40a (relating to deductions for delinquent indebtedness),

[(10) section 41 (relating to prohibition on allowance for newspapers),

[(11) section 42c (relating to postage allowance),

[(12) section 46b (relating to stationery allowance),

[(13) section 46b–1 (relating to stationery allowance),

[(14) section 46b–2 (relating to stationery allowance),

[(15) section 46g (relating to telephone, telegraph, and radiotelegraph allowance),

[(16) section 47 (relating to payment of compensation),

[(17) section 48 (relating to payment of compensation),

[(18) section 49 (relating to payment of compensation),

[(19) section 50 (relating to payment of compensation),

[(20) section 54 (relating to provision of United States Code Annotated or Federal Code Annotated),

[(21) section 60g–1 (relating to clerk hire),

[(22) section 60g–2(a) (relating to interns),

[(23) section 80 (relating to payment of compensation),

[(24) section 81 (relating to payment of compensation),

[(25) section 82 (relating to payment of compensation),

[(26) section 92 (relating to clerk hire),

[(27) section 92b (relating to pay of clerical assistants),

[(28) section 112e (relating to electrical and mechanical office equipment),

[(29) section 122 (relating to office space in the District of Columbia), and

[(30) section 123b (relating to use of House Recording Studio),

of title 2 of the United States Code shall apply with respect to the Delegate to the House of Representatives from the District of Columbia in the same manner and to the same extent as they apply with respect to a Representative. The Federal Corrupt Practices Act and the Federal Contested Election Act shall apply with respect to the Delegate to the House of Representatives from the District of Columbia in the same manner and to the same extent as they apply with respect to a Representative.

[(b) Section 2106 of title 5 of the United States Code is amended by inserting "a Delegate from the District of Columbia," immediately after "House of Representatives,".

[(c) Sections 4342(a)(5), 6954(a)(5), and 9342(a)(5) of title 10 of the United States Code are each amended by striking out "by the Commissioner of that District" and inserting in lieu thereof "by the Delegate to the House of Representatives from the District of Columbia".

[(d)(1) Section 201(a) of title 18 of the United States Code is amended by inserting "the Delegate from the District of Columbia," immediately after "Member of Congress,".

[(2) Sections 203(a)(1) and 204 of title 18 of the United States Code are each amended by inserting "Delegate from the District of Columbia, Delegate Elect from the District of Columbia," immediately after "Member of Congress Elect,".

[(3) Section 203(b) of title 18 of the United States Code is amended by inserting "Delegate," immediately after "Member,".

[(4) The last undesignated paragraph of section 591 of title 18 of the United States Code is amended by inserting "the District of Columbia and" immediately after "includes".

[(5) Section 594 of title 18 of the United States Code is amended (1) by striking out "or" immediately after "Senate,", and (2) by striking out "Delegates or Commissioners from the Territories and

possessions" and inserting in lieu thereof "Delegate from the District of Columbia, or Resident Commissioner".

[(6) Section 595 of title 18 of the United States Code is amended by striking out "or Delegate or Resident Commissioner from any Territory or Possession" and inserting in lieu thereof "Delegate from the District of Columbia, or Resident Commissioner".

[(e) Section 11(c) of the Voting Rights Act of 1965 (42 U.S.C. 1973i(c)) is amended by striking out "or Delegates or Commissioners from the territories or possessions" and inserting in lieu thereof "Delegate from the District of Columbia".

[(f) The second sentence in the second paragraph of section 7 of the District of Columbia Alcoholic Beverage Control Act (D.C. Code, sec. 25–107) is amended by striking out "the presidential election" and inserting in lieu thereof "any election".]

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## TITLE 18, UNITED STATES CODE

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# PART I—CRIMES

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## CHAPTER 29—ELECTIONS AND POLITICAL ACTIVITIES

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### § 594. Intimidation of voters

Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, *or* Member of the House of Representatives, [Delegate from the District of Columbia, or Resident Commissioner] *Delegates or Commissioners from the Territories and possessions*, at any election held solely or in part for the purpose of electing such candidate, shall be fined under this title or imprisoned not more than one year, or both.

### § 595. Interference by administrative employees of Federal, State, or Territorial Governments

Whoever, being a person employed in any administrative position by the United States, or by any department or agency thereof, or by the District of Columbia or any agency or instrumentality thereof, or by any State, Territory, or Possession of the United States, or any political subdivision, municipality, or agency thereof, or agency of such political subdivision or municipality (including any corporation owned or controlled by any State, Territory, or Possession of the United States or by any such political subdivision, municipality, or agency), in connection with any activity which is financed in whole or in part by loans or grants made by the United States, or any department or agency thereof, uses his official authority for the purpose of interfering with, or affecting, the nomina-

tion or the election of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, [Delegate from the District of Columbia, or Resident Commissioner] *or Delegate or Resident Commissioner from any Territory or Possession*, shall be fined under this title or imprisoned not more than one year, or both.

This section shall not prohibit or make unlawful any act by any officer or employee of any educational or research institution, establishment, agency, or system which is supported in whole or in part by any state or political subdivision thereof, or by the District of Columbia or by any Territory or Possession of the United States; or by any recognized religious, philanthropic or cultural organization.

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## SECTION 11 OF THE VOTING RIGHTS ACT OF 1965

SEC. 11. (a) * * *

* * * * * * *

(c) Whoever knowingly or willfully give false information as to his name, address, or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than $10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, [Delegate from the District of Columbia] *or Delegates or Commissioners from the territories or possessions*, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

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## DISTRICT OF COLUMBIA OFFICIAL CODE

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## TITLE 1—GOVERNMENT ORGANIZATION

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## CHAPTER 1—DISTRICT OF COLUMBIA GOVERNMENT DEVELOPMENT

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## SUBCHAPTER II—STATEHOOD

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## PART A—CONSTITUTIONAL CONVENTION INITIATIVE

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## SUBPART I—GENERAL

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### § 1—123. Call of convention; duties of convention; adoption of constitution; rejection of constitution; election of Senator and Representative.

(a) * * *

* * * * * * *

(d)(1) Following the approval of a proposed constitution by a majority of the electors voting thereon, there shall be held an election of candidates for the [offices of Senator and Representative] *office of Senator* from the new state. Such election shall be partisan and shall be held at the next regularly scheduled primary and general elections following certification by the District of Columbia Board of Elections and Ethics that the proposed constitution has been approved by a majority of the electors voting thereon. In the event that the proposed constitution is approved by the electors at the general election to be held in November, 1982, the primary and general elections authorized by this paragraph shall be held in September, 1990, and November, 1990, respectively.

(2) The qualifications for candidates for the [offices of Senator and Representative] *office of Senator* shall conform with the provisions of Article I of the United States Constitution and the primary and general elections shall follow the same electoral procedures as provided for candidates for nonvoting Delegate of the District of Columbia in the District of Columbia Election Code of 1955, subchapter I of Chapter 10 of this title. The term of the 1st Representative elected pursuant to this initiative shall begin on January 2, 1991, and shall expire on January 2, 1993. The terms of the 1st Senators elected pursuant to this initiative shall begin on January 2, 1991, and shall expire on January 2, 1997, and January 2, 1995, respectively. At the initial election, the candidate for Senator receiving the highest number of votes will receive the longer term and the candidate receiving the second highest number of votes will receive the shorter term. A primary and a general election to replace [a Representative or] a Senator whose term is about to expire shall be held in September and in November respectively, of the year preceding the year during which the term of [the Representative or] the Senator expires. Each [Representative shall be elected for a 2-year term and each] Senator shall be elected for a 6-year term as prescribed by the Constitution of the United States.

(3) The District of Columbia Board of Elections and Ethics shall:

(A) Conduct elections to fill the positions of 2 United States Senators [and 1 United States Representative]; and

* * * * * * *

(e) A [Representative or] Senator elected pursuant to this subchapter shall be a public official as defined in § 1—1106.02(a), and subscribe to the oath or affirmation of office provided for in § 1—604.08.

(f) [A Representative or] Senator:

(1) * * *

* * * * * * *

(g)(1) A [Representative or] Senator may solicit and receive contributions to support the purposes and operations of the [Representative's or] Senator's public office. A [Representative or] Senator may accept services, monies, gifts, endowments, donations, or bequests. A [Representative or] Senator shall establish a District of Columbia statehood fund in 1 or more financial institutions in the District of Columbia. There shall be deposited in each fund any gift or contribution in whatever form, and any monies not included in annual Congressional appropriations. A [Representative or] Senator is authorized to administer the [Representative's or] Senator's respective fund in any manner the [Representative or] Senator deems wise and prudent, provided that the administration is lawful, in accordance with the fiduciary responsibilities of public office, and does not impose any financial burden on the District of Columbia.

(2) Contributions may be expended for the salary, office, or other expenses necessary to support the purposes and operations of the public office of a [Representative or] Senator, however, each [Representative or] Senator shall receive compensation no greater than the compensation of the Chairman of the Council of the District of Columbia, as provided in § 1—204.03 and § 1—611.09.

(3) Each [Representative or] Senator shall file with the Director of Campaign Finance a quarterly report of all contributions received and expenditures made in accordance with paragraph (1) of this subsection. No campaign activities related to election or reelection to the office of [Representative or] Senator shall be conducted nor shall expenditures for campaign literature or paraphernalia be authorized under paragraph (1) of this subsection.

(4) The recordkeeping requirements of subchapter I of Chapter 11 of this title, shall apply to contributions and expenditures made under paragraph (1) of this subsection.

(5) Upon expiration of a [Representative's or] Senator's term of office and where the [Representative or] Senator has not been reelected, the [Representative's or] Senator's statehood fund, established in accordance with paragraph (1) of this subsection, shall be dissolved and any excess funds shall be used to retire the [Representative's or] Senator's debts for salary, office, or other expenses necessary to support the purposes and operation of the public office of the [Representative or] Senator. Any remaining funds shall be donated to an organization operating in the District of Columbia as a not-for-profit organization within the meaning of section 501(c) of the Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2085; 26 U.S.C. 501(c)).

(h) A [Representative or] Senator elected pursuant to subsection (d) of this section, shall be subject to recall pursuant to § 1—1001.18, during the period of the [Representative's or] Senator's service prior to the admission of the proposed new state into the union.

* * * * * * *

**§ 1—125. Statehood Commission.**

(a) The Statehood Commission shall consist of [27] *26* voting members appointed in the following manner:

(1) * * *

* * * * * * *

(5) The United States Senators shall each appoint 1 member; *and*

[(6) The United States Representative shall appoint 1 member; and]

[(7)] *(6)* The Mayor, the Chairman of the Council, and the Councilmember whose purview the Statehood Commission comes within shall be non-voting members of the Commission.

(a-1)(1) Notwithstanding any other provision of law, members serving unexpired terms on August 26, 1994, may continue to serve until appointments or reappointments are confirmed. Appointments or reappointments shall be made immediately after August 26, 1994, in the following manner:

(A) * * *

* * * * * * *

[(H) The United States Representative shall appoint 1 member for a 2 year term.]

* * * * * * *

**§ 1—127. Appropriations.**

There is authorized to be appropriated from the General Fund of the District of Columbia an amount for the salaries and office expenses of the elected representatives to the Senate [and House] referred to in 1—123(d) during the period of their service prior to the admission of the proposed new state into the union.

* * * * * * *

## PART B—HONORARIA LIMITATIONS

**§ 1—131. Application of honoraria limitations.**

Notwithstanding the provisions of 1—135, the honoraria limitations imposed by part H of subchapter I of Chapter 11 of this title shall apply to a Senator [or Representative] elected pursuant to 1—123(d)(1), only if the salary of the Senator [or Representative] is supported by public revenues.

* * * * * * *

## PART C—CAMPAIGN FINANCE REFORM

**§ 1—135. Application of Campaign Finance Reform and Conflict of Interest Act.**

All provisions of the District of Columbia Campaign Finance Reform and Conflict of Interest Act, subchapter I of Chapter 11 of this title, which apply to the election of and service of the Mayor of the District of Columbia shall apply to persons who are candidates or elected to serve as United States Senators [and United States Representative] pursuant to this initiative.

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## CHAPTER 10. ELECTIONS

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## SUBCHAPTER I. REGULATION OF ELECTIONS

### § 1—1001.01. Election of electors.

In the District of Columbia electors of President and Vice President of the United States, [the Delegate to the House of Representatives,] *the Representative in the Congress,* the members of the Board of Education, the members of the Council of the District of Columbia, the Mayor and the following officials of political parties in the District of Columbia shall be elected as provided in this subchapter:

(1) * * *

* * * * * * *

### § 1—1001.02. Definitions.

For the purposes of this subchapter:

(1) * * *

* * * * * * *

[(6) The term "Delegate" means the Delegate to the House of Representatives from the District of Columbia.]

* * * * * * *

(13) The term "elected official" means the Mayor, the Chairman and members of the Council, the President and members of the Board of Education, [the Delegate to Congress for the District of Columbia,] *the Representative in the Congress,* United States Senator [and Representative], and advisory neighborhood commissioners of the District of Columbia.

* * * * * * *

### § 1—1001.08. Qualifications of candidates and electors; nomination and election of [Delegate] *Representative*, Mayor, Chairman, members of Council, and members of Board of Education; petition requirements; arrangement of ballot.

(a) * * *

* * * * * * *

(h)(1)(A) The [Delegate,] *Representative in the Congress,* Mayor, Chairman of the Council of the District of Columbia and the 4 at-large members of the Council shall be elected by the registered qualified electors of the District of Columbia in a general election. Each candidate for the office of [Delegate,] *Representative in the Congress,* Mayor, Chairman of the Council of the District of Columbia, and at-large members of the Council in any general election shall, except as otherwise provided in subsection (j) of this section and 1-1001.10(d), have been elected by the registered qualified electors of the District as such candidate by the next preceding primary election.

* * * * * * *

(i)(1) Each individual in a primary election for candidate for the office of [Delegate,] *Representative in the Congress,* Mayor, Chairman of the Council, or at-large member of the Council shall be nominated for any such office by a petition:

(A) * * *

* * * * * * *

(j)(1) A duly qualified candidate for the office of [Delegate,] *Representative in the Congress,* Mayor, Chairman of the Council, or member of the Council, may, subject to the provisions of this subsection, be nominated directly as such a candidate for election for such office (including any such election to be held to fill a vacancy). Such person shall be nominated by petition:

(A) * * *

(B) In the case of a person who is a candidate for the office of member of the Council (other than the Chairman or an at-large member), signed by 500 voters who are duly registered under 1-1001.07 in the ward from which the candidate seeks election; and in the case of a person who is a candidate for the office of [Delegate,] *Representative in the Congress,* Mayor, Chairman of the Council, or at-large member of the Council, signed by duly registered voters equal in number to 1 1/2 per centum of the total number of registered voters in the District, as shown by the records of the Board as of 123 days before the date of such election, or by 3,000 persons duly registered under 1-1001.07, whichever is less. No signatures on such a petition may be counted which have been made on such petition more than 123 days before the date of such election.

* * * * * * *

**§ 1—1001.10. Dates for holding elections; votes cast for President and Vice President counted as votes for presidential electors; voting hours; tie votes; filling vacancy where elected official dies, resigns, or becomes unable to serve.**

(a)(1) * * *

* * * * * * *

(3)(A) Except as otherwise provided in the case of special elections under this subchapter or section 206(a) of the District of Columbia Delegate Act, primary elections of each political party for [the office of Delegate to the House of Representatives] *the office of Representative in the Congress* shall be held on the 1st Tuesday after the 2nd Monday in September of each even-numbered year; and general elections for such office shall be held on the Tuesday next after the 1st Monday in November of each even-numbered year.

* * * * * * *

(d)(1) In the event that any official, other than [Delegate,] Mayor, member of the Council, member of the Board of Education, or winner of a primary election for the office of [Delegate,] Mayor, or member of the Council, elected pursuant to this subchapter dies, resigns, or becomes unable to serve during his or her term of office leaving no person elected pursuant to this subchapter to serve the remainder of the unexpired term of office, the successor or succes-

sors to serve the remainder of the term shall be chosen pursuant to the rules of the duly authorized party committee, except that the successor shall have the qualifications required by this subchapter for the office.

(2)[(A) In the event that a vacancy occurs in the office of Delegate before May 1 of the last year of the Delegate's term of office,] *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,* the Board shall hold a special election to fill the unexpired term. The special election shall be held on the first Tuesday that occurs more than 114 days after the date on which the vacancy is certified by the Board unless the Board determines that the vacancy could be filled more practicably in a special election held on the same day as the next District-wide special, primary, or general election that is to occur within 60 days of the date on which the special election would otherwise have been held under the provisions of this subsection. The person elected to fill the vacancy in the office of Delegate shall take office the day on which the Board certifies his or her election.

[(B) In the event that a vacancy occurs in the office of Delegate on or after May 1 of the last year of the Delegate's term of office, the Mayor shall appoint a successor to complete the remainder of the term of office.]

(3) In the event of a vacancy in the office of [United States Representative or] United States Senator elected pursuant to § 1—123 and that vacancy cannot be filled pursuant to paragraph (1) of this subsection, the Mayor shall appoint, with the advice and consent of the Council, a successor to complete the remainder of the term of office.

* * * * * * *

**§1—1001.11. Recount; judicial review of election.**

(a)(1) * * *

(2) If in any election for President and Vice President of the United States, [Delegate to the House of Representatives,] *Representative in the Congress,* Mayor, Chairman of the Council, member of the Council, President of the Board of Education, or member of the Board of Education, the results certified by the Board show a margin of victory for a candidate that is less than one percent of the total votes cast for the office, the Board shall conduct a recount. The cost of a recount conducted pursuant to this paragraph shall not be charged to any candidate.

* * * * * * *

**§1—1001.15. Candidacy for more than 1 office prohibited; multiple nominations; candidacy of officeholder for another office restricted.**

(a) * * *

(b) Notwithstanding the provisions of subsection (a) of this section, a person holding the office of Mayor, [Delegate,] *Representative in the Congress,* Chairman or member of the Council, or member of the Board of Education shall, while holding such office, be eligible as a candidate for any other of such offices in any primary or general election. In the event that said person is elected in a

general election to the office for which he or she is a candidate, that person shall, within 24 hours of the date that the Board certifies said person's election, pursuant to subsection (a)(11) of § 1-1001.05, either resign from the office that person currently holds or shall decline to accept the office for which he or she was a candidate. In the event that said person elects to resign, said resignation shall be effective not later than 24 hours before the date upon which that person would assume the office to which he or she has been elected.

* * * * * * *

**§1—1001.17. Recall process.**

(a) The provisions of this section shall govern the recall of all elected officers of the District of Columbia except [the Delegate to the Congress from the District of Columbia] *the Representative in the Congress*.

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ADDITIONAL MATERIALS

# TESTIMONY OF THE HON. KENNETH W. STARR

## BEFORE THE HOUSE GOVERNMENT REFORM COMMITTEE

## 2154 RAYBURN HOUSE OFFICE BUILDING

## WASHINGTON, D.C.

## JUNE 23, 2004

# TESTIMONY OF THE HON. KENNETH W. STARR BEFORE THE HOUSE GOVERNMENT REFORM COMMITTEE 2154 RAYBURN HOUSE OFFICE BUILDING JUNE 23, 2004

I am pleased to testify on the very important issue and to discuss congressional authority to govern the District of Columbia more generally. Following immediately in the wake of the District's establishment as the Seat of our National Government in 1800,[1] Congress began working to enfranchise the capital city's residents. Previous efforts – which have included bills to retrocede the District to Maryland, bills calling for the District's residents to vote in Maryland's House and Senate contests, and bills deeming the District to be a "State" for purposes of federal elections – have been thwarted by constitutional and political barriers. While I will leave for others discussion of the political considerations presented by the particulars of the D.C. Fairness Act, I commend Chairman Davis for seeking to address – and surmount – the legal and constitutional obstacles that have hobbled congressional efforts to solve the continuing problem of District disenfranchisement.

## I. CONGRESS ENJOYS PLENARY POWER OVER THE DISTRICT OF COLUMBIA.

Legislation to enfranchise the District's residents is authorized by the Seat of Government Clause, Art. I, § 8, Cl. 17, which provides: "The Congress shall have power ... to exercise exclusive legislation in all cases whatsoever" over the District of Columbia. This

[1]. *See* "An act establishing the temporary and permanent seat of the Government of the United States," 1 Stat. 130 (July 16, 1790). The 1790 Act identified the first Monday of December 1800 (December 1) as the date for the transfer of the seat of the federal government from its current home (then Philadelphia) to its new permanent home in the District of Columbia.

sweeping language gives Congress "extraordinary and plenary" power over our nation's capitol city.[2]

To understand the scope and importance of the Seat of Government Clause, it is important first to understand its historical foundations. There is general agreement that the 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.[3] Congress called upon the government of Pennsylvania to provide protection, but the Commonwealth refused, Congress was forced to adjourn, quietly leave the city, and

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2. *United States v. Cohen*, 733 F.2d 128, 140 (D.C. Cir. 1984) (Scalia, J.). *See also id.* at 140-141 (the Seat of Government Clause, Art. I, § 8, Cl. 17, "enables Congress to do many things in the District of Columbia which it has no authority to do in the 50 states. There has never been any rule of law that Congress must treat people in the District of Columbia exactly the same as people are treated in the various states.") (footnote omitted).

3. *See, e.g.*, KENNETH R. BOWLING, THE CREATION OF WASHINGTON, D.C. 30-34 (1991); JUDITH BEST, NATIONAL REPRESENTATION FOR THE DISTRICT OF COLUMBIA 14-15 (1984) ("The proximate cause of the provision for a federal district was the Philadelphia Mutiny of 21 June 1783."); STEPHEN MARKMAN, STATEHOOD FOR THE DISTRICT OF COLUMBIA 47 (1988) ("Unquestionably, this incident made a deep impression on the members [of the Continental Congress]."); Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A Constitutional Analysis*, 12 HARV. J. ON LEGISLATION 167, 171 (1975) ("That the memory of the mutiny scare . . . motivated the drafting and acceptance of the 'exclusive legislation' clause was clearly demonstrated in the subsequent ratification debates."). THE FEDERALIST, No. 43 at 289 (Jacob E. Cooke ed., 1961); JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION §§ 12-13 (1833). 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 capitol 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." THE FEDERALIST NO. 43, *supra*, at 289; *see also* 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, at 220 (Jonathan Elliot ed., 2d ed. 1888), *reprinted in* 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987) ("Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress? . . . . It 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.") (North Carolina ratify ing convention, remarks of Mr. Iredell).

reconvene at Princeton.[4] In the wake of this dramatic event, the Framers took drastic measures – through the Seat of Government Clause – to ensure "that the federal government be independent of the states,"[5] and to ensure that the District would be beholden exclusively to the federal government for any and all purposes, big and small.[6]

Congress's powers over the District are not limited to simply those powers that a State legislature might have over a State.[7] As emphasized by the federal courts on numerous occasions, the Seat of Government Clause is majestic in its scope. In the words of the Supreme Court, "[t]he object of the grant of exclusive legislation over the [D]istrict was, therefore, national in the highest sense. . . . In the same article which granted the powers of exclusive legislation . . . are conferred all the other great powers which make the nation."[8] And my predecessors on the D.C. Circuit Court of Appeals once held that Congress can "provide for the

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4. MARKMAN, *supra* note 3, at 46-47; Raven-Hansen, *supra* note 3, at 169.

5. MARKMAN, *supra* note 3, at 48.

6. *See, e.g.*, THE FEDERALIST No. 43, at 272 (Madison) (Clinton Rossiter ed. 1961) (remarking on the "indispensable necessity of complete authority at the seat of government" since without it, "the public authority might be insulted and [the federal government's] proceedings interrupted with impunity"); Raven-Hansen, *supra* note 3, at 169-72 (citing statements from the ratification debates).

7. *See* Palmore v. United States, 411 U.S. 389, 397-398 (1973) ("Not only may statutes of Congress of otherwise nationwide application be applied to the District of Columbia, but Congress may also exercise all the police and regulatory powers which a state legislature or municipal government would have in legislating for state or local purposes. Congress 'may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, so long as it does not contravene any provision of the Constitution of the United States.' *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899). This has been the characteristic view in this Court of congressional powers with respect to the District. It is apparent that the power of Congress under Clause 17 permits it to legislate for the District in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, § 8.").

8. *O'Donoghue v. United States*, 289 U.S. 516, 539-40 (1933). Presumably, these "great powers" include the power to admit States to the Union and the power to regulate elections.

general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end."[9]

## II. THE CONSTITUTION IS SILENT ABOUT VOTING RIGHTS FOR THE DISTRICT'S RESIDENTS.

While the Framers clearly intended to give Congress plenary authority over the District, what is far less clear is what they intended with respect to representation of the area. The question of representation does not appear to have seriously arisen until the federal government took up residence in the District in 1800, well after the Constitution had been drafted and ratified.[10]

In the face of the Constitution's silence, some ardent textualists (and indeed some courts) have insisted that Article I effectively disenfranchises the District's residents in congressional elections. For example, the United States District Court for the District of Columbia has held that D.C.'s residents cannot be treated like residents of the 50 States for purposes of electing members to the House of Representatives,[11] and the House may not unilaterally amend its Rules to give the District's Delegate the right to vote in the Committee of the Whole.[12]

But legislation to enfranchise the District's residents presents an entirely and altogether different set of issues. While the Constitution may not affirmatively grant the District's residents

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9. *Neild v. District of Columbia*, 110 F.2d 246, 250-51 (D.C. Cir. 1940).

10. *See* Raven-Hansen, *supra* note 3, at 172.

11. *Adams v. Clinton*, 90 F. Supp. 2d 35, 62 (D.D.C.) (holding "exclusion [of D.C. residents from voting in Congressional elections] was the consequence of the completion of the cession 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. *See* U.S. Const. art. I, § 8, cl. 17."), *aff'd*, 531 U.S. 941 (2000), *reh'g denied*, 531 U.S. 1045 (2000), *appeal dismissed*, 2001 U.S. App. LEXIS 25877 (D.C. Cir. Oct. 18, 2001), *cert. denied*, 537 U.S. 812 (2002).

12. *Michel v. Anderson*, 817 F. Supp. 126, 141 (D.D.C. 1993), *aff'd*, 14 F.3d 623 (D.C. Cir. 1994).

the right to vote in congressional elections, the Constitution *does* affirmatively grant Congress plenary power to govern the District's affairs. Accordingly, the judiciary has rightly shown great deference where Congress announces its considered judgment that the District should be considered as a "State" for a specific legislative purposes.[13] For example, Congress may exercise its power to regulate commerce across the District's borders, even though the Commerce Clause[14] only referred to commerce "among the several states."[15] And Congress may bind the District with a duly ratified treaty, which allows French citizens to inherit property in the "States of the Union."[16]

## III. THE SUPREME COURT HAS AFFIRMED CONGRESS'S PLENARY POWER TO EXTEND "STATES'" RIGHTS TO D.C. RESIDENTS WHERE THE CONSTITUTION IS SILENT.

In *Hepburn & Dundas v. Ellzey*,[17] the Supreme Court considered whether the District's citizens could bring suits in federal court under the Constitution's Diversity Clause,[18] which confers power on the federal courts to hear suits "between Citizens of different **States**." Absent

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13. *Adams* does *not* compel a different result. In *Adams*, the court held the District's voters could not vote in Maryland's congressional elections, basing its decision, in large part, on the fact that "Congress has ceded none of its authority over the District back to Maryland, and Maryland has not purported to exercise any of its authority in the District." 90 F. Supp. 2d at 64. The Fairness Act, in sharp contrast, would express Congress's incontrovertible intention to enfranchise the District's voters.

14. U.S. Const. Art. I, § 8, Cl. 3.

15. *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889).

16. *De Geofroy v. Riggs*, 133 U.S. 258, 268-69 (1890) (while "state" might not ordinarily include an "organized municipality" such as the District, "[t]he term is used in general jurisprudence . . . as denoting organized political societies with an established government. Within this definition the District of Columbia . . . is as much a State as any of those political communities which compose the United States.").

17. 6 U.S. 445 (1805).

18. Art. III, § 2, Cl.1.

a congressional pronouncement to the contrary,[19] the Court concluded that the constitutional reference to "States" did not include the District.[20]

In 1948, however, Congress enacted a statute that treated the District as a State so that its residents could maintain diversity suits in federal courts.[21] In 1949, the Supreme Court's *Tidewater* decision upheld that statute as an appropriate exercise of Congress' power under the Seat of Government Clause, even though the Diversity Clause refers *only* to cases "between Citizens of different **States**."[22] The *Tidewater* holding confirms what is now the law: the Constitution's use of the term "State" in Article III cannot mean "and not of the District of Columbia." Identical logic supports legislation to enfranchise the District's voters: the use of the word "State" in Article I cannot bar Congress from exercising its plenary authority to extend the franchise to the District's residents.

## IV. FUNDAMENTAL PRINCIPLES OF REPRESENTATIVE DEMOCRACY SUPPORT CONGRESS' DETERMINATION TO EXTEND THE FRANCHISE TO DISTRICT OF COLUMBIA RESIDENTS.

As the Supreme Court has repeatedly insisted, interpretation of the Constitution, particularly Article I, should be guided by the fundamental democratic principles upon which this nation was founded.[23] Absent any persuasive evidence that the Framers' intent in using the

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19. Section 11 of the Judiciary Act of 1789 gave federal courts jurisdiction to hear cases where "the suit is between the citizen of the State where the suit is brought, and a citizen of another State." 1 Stat. 73, 78. It was unclear whether Congress intended for the Judiciary Act to apply to the District's residents.

20. *Hepburn*, 6 U.S. at 452-53.

21. *See* 62 Stat. 869, *codified at* 28 U.S.C. § 1332(d).

22. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949).

23. *See Powell v. McCormack*, 395 U.S. 486, 547 (1969) (noting that "[a] fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them'") (citation omitted); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 819-823 (1995) (adding that "an aspect of sovereignty is the right of the people to vote for whom they wish").

term "State" was to deny the inhabitants of the District the right to vote for voting representation in the House of Representatives, a consideration of fundamental democratic principles further supports the conclusion that the use of that term does not necessitate that result.

A republican, that is representative, form of government, is a foundational cornerstone in the Constitution's structure; the denial of representation was one of the provocations that generated the Declaration of Independence and the War that implemented it. Article I creates the republican form of the national government, and Article IV guarantees that form to its *people*,[24] regardless of whether they reside in a District or a State.

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24. The right to vote arises out of the "relationship between the people of the Nation and their National Government, with which the States may not interfere." *Term Limits*, 514 U.S. at 845 (Kennedy, J., concurring); *see also id.* at 844 ("The federal right to vote . . . 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."); *id.* at 805 (noting that "'while, in a loose sense, the right to vote for representatives in Congress is sometimes spoken of as a right derived from the states,'" in fact it "was a new right, arising from the Constitution itself") (quoting *United States v. Classic*, 313 U.S. 299, 314-15 (1941)); 514 U.S. at 820-21 (noting "that the right to choose representatives belongs not to the States, but to the people").

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

*submitted to*

Committee on Government Reform
U.S. House of Representatives

*by*

Viet D. Dinh
Georgetown University Law Center
and Bancroft Associates, PLLC

Adam H. Charnes
Kilpatrick Stockton LLP

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

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

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

> not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government and dissatisfactory to the other members of the confederacy.[3]

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

The District of Columbia Fairness in Representation Act, H.R. 4640 (the "Act"), would grant District residents Congressional representation by providing that the District be considered a Congressional district in the House of Representatives, beginning with the 109th Congress.[6] To accommodate the new representative from the District, membership in the House would be increased by two members from the 109th Congress until the first reapportionment occurring

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DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 332 (Gaillard Hund & James B. Scott eds., 1920)).

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

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

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

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

after the 2010 census.[7] One newly created seat would go to the representative from the District, and the other would be assigned to the State next eligible for a Congressional district.[8] After the 2010 census, membership in the House would revert to 435 and the seats would be allotted pursuant to 2 U.S.C. § 2a, with the District retaining its single representative.[9]

We conclude that Congress has ample constitutional authority to enact the District of Columbia Fairness in Representation Act. The District Clause, U.S. Const. Art. I, § 8, cl. 17, empowers Congress to "exercise exclusive Legislation in all Cases whatsoever, over such District" and thus grants Congress plenary and exclusive authority to legislate all matters concerning the District. This broad legislative authority extends to the granting of Congressional voting rights for District residents—as illustrated by the text, history and structure of the Constitution as well as judicial decisions and pronouncements in analogous or related contexts. Article I, section 2, prescribing that the House be composed of members chosen "by the People of the several States," does not speak to Congressional authority under the District Clause to afford the District certain rights and status appurtenant to states. Indeed, the courts have consistently validated legislation treating the District as a state, even for constitutional purposes. Most notably, the Supreme Court affirmed Congressional power to grant District residents access to federal courts through diversity jurisdiction, notwithstanding that the Constitution grants such jurisdiction only "to all Cases . . . between Citizens of different States."[10] Likewise, cases like *Adams v. Clinton*, 90 F. Supp. 2d 35, 50 n.25 (D.D.C.), *aff'd*, 531 U.S. 940 (2000), holding that

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[7] *See id.*, § 4(a)(1).

[8] *See id.*, § 4(a)(3).

[9] *See id.*, § 4(c).

[10] U.S. CONST. art. III, § 2.

District residents do not have a judicially enforceable constitutional right to Congressional representation, do not deny (but rather, in some instances, affirm) Congressional authority under the District Clause to grant such voting rights.

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

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

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

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

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

This clause, which has been described as "majestic in its scope,"[11] gives Congress plenary and exclusive power to legislate for the District.[12] Courts have held that the District Clause is "sweeping and inclusive in character"[13] and gives Congress "extraordinary and plenary power"

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

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

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

over the District.[14] It allows Congress to legislate within the District for "every proper purpose of government."[15] Congress therefore possesses "full and unlimited jurisdiction to provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end," subject, of course, to the negative prohibitions of the Constitution.[16]

To appreciate the full breadth of Congress' plenary power under the District Clause, one need only recognize that the Clause works an exception to the constitutional structure of "our Federalism,"[17] which delineates and delimits the legislative power of Congress and state legislatures. In joining the Union, the states gave up certain of their powers. Most explicitly, Article II, section 10 specifies activities which are prohibited to the States. None of these prohibitions apply to Congress when it exercises its authority under the District Clause. Conversely, Congress is limited to legislative powers enumerated in the Constitution; such limited enumeration, coupled with the reservation under the Tenth Amendment, serves to check the power of Congress vis-à-vis the states.[18] The District Clause contains no such counterbalancing restraints because its authorization of "exclusive Legislation in all Cases whatsoever" explicitly recognizes that there is no competing state sovereign authority. Thus, when Congress acts pursuant to the District Clause, it acts as a legislature of national character,

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

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

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

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

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

exercising "complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other."[19] In few, if any, other areas does the Constitution grant any broader authority to Congress to legislate.

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

There are no indications, textual or otherwise, to suggest that the Framers intended that Congressional authority under the District Clause, extraordinary and plenary in all other respects, would not extend also to grant District residents representation in Congress. The delegates to the Constitutional Convention discussed and adopted the Constitution without any recorded debates on voting, representation, or other rights of the inhabitants of the yet-to-be-selected seat of government.[20] The purpose for establishing a federal district was to ensure that the national capital would not be subject to the influences of any state.[21] Denying the residents of the District the right to vote in elections for the House of Representatives was neither necessary nor intended by the Framers to achieve this purpose.[22]

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

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

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

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

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

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

donating the land for the District would make appropriate provisions in their acts of cession for the rights of the residents of the ceded land.[24] As a delegate to the North Carolina ratification debate noted,

> Wherever they may have this district, they must possess it from the authority of the state within which it lies; and that state may stipulate the conditions of the cession. Will not such state take care of the liberties of its own people?[25]

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

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[24] *Id.*

[25] 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 219-20 (Jonathan Elliot ed., 1888).

[26] 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 433 (Jonathan Elliot ed., 2d ed. 1907) (cited in *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 109-10 (1953)).

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

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

by Act of Congress in 1790.[29] This Act also established the first Monday in December 1800 as the official date of federal assumption of control over the District.[30] Because of the lag between the time of cession by Maryland and Virginia and the actual creation of the District by the federal government, assertion of exclusive federal jurisdiction over the area was postponed for a decade.[31] During that time, District residents voted in Congressional elections in their respective ceding state.[32]

In 1800, when the United States formally assumed full control of the District, Congress by omission withdrew the grant of voting rights to District residents. The legislatures of both Maryland and Virginia provided that their respective laws would continue in force in the territories they had ceded until Congress both accepted the cessions and provided for the government of the District.[33] Congress, in turn, explicitly acknowledged by act that the "operation of the laws" of Maryland and Virginia would continue until the acceptance of the District by the federal government and the time when Congress would "otherwise by law provide."[34] The laws of Maryland and Virginia thus remained in force for the next decade and District residents continued to be represented by and vote for Maryland and Virginia congressmen during this period.[35]

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

[30] *See id.* § 6.

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

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

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

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

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

The critical point here is that during the relevant period of 1790-1800, District residents were able to vote in Congressional elections in Maryland and Virginia *not* because they were citizens of those states—the cession had ended their political link with those states.[36] Rather, their voting rights derived from *Congressional action under the District Clause* recognizing and ratifying the ceding states' law as the applicable law for the now-federal territory until further legislation.[37] It was therefore not the cessions themselves, but the federal assumption of authority in 1800, that deprived District residents of representation in Congress. The actions of this first Congress, authorizing District residents to vote in Congressional elections of the ceding states, thus demonstrate the Framers' belief that Congress may authorize by statute representation for the District.

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

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

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

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

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

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

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

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

Case law dating from the early days of the Republic demonstrates that Congressional legislation is the appropriate mechanism for granting national representation to District residents. In *Hepburn v. Ellzey*,[38] residents of the District attempted to file suit in the Circuit Court of Virginia based on diversity jurisdiction.[39] However, under Article III, section 2, of the Constitution, diversity jurisdiction only exists "between citizens of different States."[40] Plaintiffs argued that the District was a state for purposes of Article III's Diversity Clause.[41] Chief Justice Marshall, writing for the Court, held that "members of the American confederacy" are the only "states" contemplated in the Constitution.[42] Provisions such as Article I, section 2, use the word

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

[39] *Id.* at 452.

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

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

[42] *Id.*

"state" as designating a member of the Union, the Court observed, and the same meaning must therefore apply to provisions relating to the judiciary.[43] Thus, the Court held that the District was not a state for purposes of diversity jurisdiction under Article III.

However, even though the Court held that the term "state" as used in Article III did not include the District, Chief Justice Marshall acknowledged that "it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon [District citizens]."[44] But, he explained, "this is a subject for legislative, not for judicial consideration."[45] Chief Justice Marshall thereby laid out the blueprint by which *Congress*, rather than the courts, could treat the District as a state under the Constitution.

Over the many years since *Hepburn*, Congress heeded Chief Justice Marshall's advice and enacted legislation granting District residents access to federal courts on diversity grounds. In 1940, Congress enacted a statute bestowing jurisdiction on federal courts in actions "between citizens of different States, or citizens of the District of Columbia . . . and any State or Territory.'"[46] This statute was challenged in *National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co.*[47] Relying on *Hepburn* as well as Congress' power under the District Clause, the Court upheld the statute. Justice Jackson, writing for a plurality of the Court, declined to overrule the conclusion in *Hepburn* that the District is not a "state" under the

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

[44] *Id.* at 453.

[45] *Id.*

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

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

Constitution.[48] Relying on Marshall's statement that "the matter is a subject for 'legislative not for judicial consideration,'"[49] however, the plurality held that the conclusion that the District was not a "state" as the term is used in Article III did not deny Congress the power under other provisions of the Constitution to treat the District as a state for purposes of diversity jurisdiction.[50]

Specifically, the plurality noted that the District Clause authorizes Congress "to exercise exclusive Legislation in all Cases whatsoever, over such District,"[51] and concluded that Chief Justice Marshall was referring to this provision when he stated in *Hepburn* that the matter was more appropriate for legislative attention.[52] The responsibility of Congress for the welfare of District residents includes the power and duty to provide those residents with courts adequate to adjudicate their claims against, as well as suits brought by, citizens of the several states.[53] Therefore, according to the plurality, Congress can utilize its power under the District Clause to impose "the judicial function of adjudicating justiciable controversies on the regular federal

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

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

[50] *Id.* at 588.

[51] *Id.* at 589.

[52] *Id.*

[53] *Id.* at 590. The plurality also made a distinction between constitutional issues such as the one before it, which "affect[] only the mechanics of administering justice in our federation [and do] not involve an extension or a denial of any fundamental right or immunity which goes to make up our freedoms" and "considerations which bid us strictly to apply the Constitution to congressional enactments which invade fundamental freedoms or which reach for powers that would substantially disturb the balance between the Union and its component states . . . ." *Id.* at 585.

courts . . . ."[54] The statute, it held, was constitutional. Justice Rutledge, concurring in the judgment, would have overruled *Hepburn* outright and held that the District constituted a "state" under the Diversity Clause.[55]

The significance of *Tidewater* is that the five justices concurring in the result believed either that the District was a state under the terms of the Constitution or that the District Clause authorized Congress to enact legislation treating the District as a state. The decision did not overrule *Hepburn*, but it effectively rejected the view that "state" has a "single, unvarying constitutional meaning which excludes the District."[56] Although both Article I, section 2, and Article III, section 2, refer to "States" and by their terms do not include the District, *Tidewater* makes clear that this limitation does not vitiate Congressional authority to treat the District like a state for purposes of federal legislation, including legislation governing election of members to the House.[57]

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

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

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

[57] We have not considered whether Congress could similarly enact legislation to provide the District of Columbia with voting representation in the United States Senate. That question turns additionally on interpretation of the text, history, and structure of Article I, section 3, and the 17th Amendment to the U.S. Constitution, which is outside the scope of this opinion. We note only that, like Article I, section 2, these provisions specify the qualification of the electors. Compare U.S. Const. art. I, § 2 ("chosen every second year by the People of the several States") with *id.* art. I, § 3 ("chosen by the Legislature thereof") and *id.* amend. XVII ("elected by the

*Adams v. Clinton*[58] is not to the contrary. Rather, the decision reinforces Chief Justice Marshall's pronouncement that Congress, and not the courts, has authority to grant District residents certain rights and status appurtenant to state citizenship under the Constitution. In *Adams*, District residents argued that they have a constitutional right to elect representatives to Congress.[59] A three-judge district court, construing the constitutional text and history, determined that the District is not a state under Article I, section 2, and therefore the plaintiffs do not have a judicially cognizable right to Congressional representation.[60] In so doing, the court noted specifically that it "lack[ed] authority to grant plaintiffs the relief they seek," and thus District residents "must plead their cause in *other venues*."[61] Just as Chief Justice Marshall in *Hepburn* and Justice Jackson in *Tidewater* recognized that the District Clause protected the plenary and exclusive authority of Congress to traverse where the judiciary cannot tread, so too the court in *Adams v. Clinton* suggested that it is up to Congress to grant through legislation the fairness in representation that the court was unable to order by fiat.

*Tidewater* is simply the most influential of many cases in which courts have upheld the right of Congress to treat the District as a state under the Constitution pursuant to its broad authority under the District Clause. From the birth of the Republic, courts have repeatedly

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people thereof"). However, quite unlike the treatment of the House of Representatives, the constitutional provisions relating to composition of the Senate additionally specifies that there shall be two senators "from each State," see U.S. Const. art. I, § 3; *id.* amend. XVII, thereby arguably giving rise to interests of states *qua* states not present in Article I, section 2.

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

[59] *Id.* at 37.

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

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

affirmed treatment of the District a "state" for a wide variety of statutory, treaty, and even constitutional purposes.

In deciding whether the District constitutes a "state" under a particular statute, courts examine "the character and aim of the specific provision involved."[62] In *Milton S. Kronheim & Co. Inc. v. District of Columbia*,[63] Congress treated the District as a state for purposes of alcohol regulation under the Alcoholic Beverage Control Act.[64] The District of Columbia Circuit held that such a designation was valid and it had "no warrant to interfere with Congress' plenary power under the District Clause '[t]o exercise exclusive Legislation in all Cases whatsoever, over [the] District.'"[65] In *Palmore v. United States*,[66] the Court recognized and accepted that 28 U.S.C. § 1257, which provides for Supreme Court review of the final judgments of the highest court of a state, had been amended by Congress in 1970 to include the District of Columbia Court of Appeals within the term "highest court of a State."[67] The federal district court in the District found that Congress could treat the District as a state, and thus provide it with 11th Amendment immunity, when creating an interstate agency, as it did when it treated the District as a state under the Washington Metropolitan Area Transit Authority.[68] Even *District of*

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

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

[64] *Id.* at 201.

[65] *Id.*

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

[67] *Id.* at 394.

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

*Columbia v. Carter*,[69] which found that the District was not a state for purposes of 42 U.S.C. § 1983,[70] helps illustrate this fundamental point. In the aftermath of the *Carter* decision, Congress passed an amendment treating the District as a state under section 1983,[71] and this enactment has never successfully been challenged. Numerous other examples abound of statutes that treat the District like a state.[72]

The District may also be considered a state pursuant to an international treaty. In *de Geofroy v. Riggs*,[73] a treaty between the United States and France provided that:

> In all states of the Union whose existing laws permit it, so long and to the same extent as the said laws shall remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title, and in the same manner, as the citizens of the United States.[74]

The Supreme Court concluded that "states of the Union" meant "all the political communities exercising legislative powers in the country, embracing, not only those political communities which constitute the United States, but also those communities which constitute the political bodies known as 'territories' and the 'District of Columbia.'"[75]

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

[70] *Id.* at 419.

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

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

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

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

[75] *Id.* at 271.

Courts have even found the District to constitute a state under other provisions of the Constitution. The Supreme Court has held that the Commerce Clause[76] authorizes Congress to regulate commerce across the District's borders, even though that Clause only refers to commerce "among the several States."[77] Similarly, the Court has interpreted Article I, section 2, clause 3, which provides that "Representatives and direct Taxes shall be apportioned among the several States . . . according to their respective Numbers," as applying to the District.[78] The Court also found that the Sixth Amendment right to trial by jury extends to the people of the District,[79] even though the text of the Amendment states "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the *state* and district wherein the crime shall have been committed . . . ."[80] And the District of Columbia Circuit held that the District is a state under the Twenty-First Amendment,[81] which prohibits "[t]he transportation or importation into any *state*, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof . . . ."[82] If the

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[76] U.S. CONST. art. I, § 8, cl. 3.

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

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

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

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

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

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

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

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

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

The Uniformed and Overseas Citizens Absentee Voting Act[85] allows otherwise disenfranchised American citizens residing in foreign countries while retaining their American citizenship to vote by absentee ballot in "the last place in which the person was domiciled before leaving the United States."[86] The overseas voter need not be a citizen of the state where voting occurs. Indeed, the voter need not have an abode in that state, pay taxes in that state, or even intend to return to that state.[87] Thus, the Act permits voting in federal elections by persons who

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

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

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

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

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

are not citizens of any state. Moreover, these overseas voters are not qualified to vote in national elections under the literal terms of Article I; because they are no longer citizens of a state, they do not have "the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[88] If there is no constitutional bar prohibiting Congress from permitting overseas voters who are not citizens of a state to vote in federal elections,[89] there is no constitutional bar to similar legislation extending the federal franchise to District residents.

Justice Kennedy's concurring opinion in *U.S. Term Limits, Inc. v. Thornton*[90] provides further evidence that the right to vote in federal elections is not necessarily tied to state citizenship. In his opinion, Justice Kennedy wrote that the right to vote in federal elections "do[es] not derive from the state power in the first instance but . . . belong[s] to the voter in his or her capacity as a citizen of the United States."[91] Indeed, when citizens vote in national elections, they exercise "a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere."[92]

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

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

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[88] U.S. CONST. art. I, § 2, cl. 1.

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

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

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

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

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

The right to vote is regarded as "a fundamental political right, because preservative of all rights."[94] Such a right "is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[95] Given these considerations, depriving Congress of the right to grant the District Congressional representation pursuant to the District Clause thwarts the very purposes on which the Constitution is based.[96] Allowing Congress to exercise such a power under the authority granted to it by the District Clause would remove a political disability with no constitutional rationale, give the District, which is akin to a state in virtually all important respects, its proportionate influence in national affairs, and correct the historical accident by which District residents have been denied the right to vote in national elections.[97]

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

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

> The District constituting the seat of Government of the United States shall appoint in such manner as the Congress may direct:

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

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

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

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

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

> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a State, but in no event more than the least populous State; . . . but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a State . . . .[98]

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

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

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[98] U.S. CONST. amend. XXIII, § 1.

[99] U.S. CONST. art. I, § 8, cl. 18.

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

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

of necessity had to be achieved via constitutional amendment.[102] By contrast, providing the District with representation in Congress implicates Article I concerns and Congress is authorized to enact such legislation by the District Clause. Therefore, no constitutional amendment is needed, and the existence of the 23rd Amendment does not imply otherwise.[103]

* * *

Although we have limited our opinion to analyzing the legal basis of Congressional authority to enact the District of Columbia Fairness in Representation Act and have not ventured a view on its policy merits, we note that it is at least ironic that residents of the Nation's capital continue to be denied the right to select a representative to the "People's House." Our conclusion that Congress has the authority to grant Congressional representation to the District is

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[102] In *Oregon v. Mitchell*, 400 U.S. 112 (1970), a five-to-four decision, the Court upheld a federal statute that, *inter alia*, lowered the voting age in presidential elections to 18. *Id.* at 117-18 (opinion of Black, J.). Of the five Justices who addressed whether Article I gives Congress authority to lower the voting age in presidential elections, four found such authority lacking because the election of the President is governed by Article II. *See id.* at 210-12 (Harlan, J., concurring in part and dissenting in part); *id.* at 290-91, 294 (Stewart, J., concurring in part and dissenting in part). Four other justices based their decision on Congress' authority under § 5 of the 14th Amendment. *See id.* at 135-44 (Douglas, J., concurring in part and dissenting in part); id. at 231 (Brennan, J., concurring in part and dissenting in part). This rationale is unavailable to citizens of the District. See *Adams*, 90 F. Supp. 2d at 65-68. Thus, any Congressional authority to allow District residents to vote in presidential elections by statute must lie in Article I. Lacking authority by statute to grant District residents the right to vote in presidential elections, Congress needed to amend the Constitution through the 23rd Amendment. These obstacles to legislation in the context of presidential elections are not present here, however, because Article I (not Article II) governs Congressional elections and it provides Congress with plenary authority over the District in the District Clause.

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

motivated in part by the principle, firmly imbedded in our constitutional tradition, that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."[104]

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