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111TH CONGRESS, 1st Session } HOUSE OF REPRESENTATIVES { REPORT 111–22

DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2009

MARCH 2, 2009.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. CONYERS, from the Committee on the Judiciary, submitted the following

R E P O R T

together with

DISSENTING VIEWS

[To accompany H.R. 157]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 157) 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 with an amendment and recommend that the bill as amended do pass.

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79–006

THE AMENDMENT

The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "District of Columbia House Voting Rights Act of 2009".

SEC. 2. TREATMENT OF DISTRICT OF COLUMBIA AS CONGRESSIONAL DISTRICT.

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

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

(1) INCLUSION OF SINGLE DISTRICT OF COLUMBIA MEMBER IN REAPPORTIONMENT OF MEMBERS AMONG STATES.—Section 22 of the Act entitled "An Act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress", approved June 18, 1929 (2 U.S.C. 2a), is amended by adding at the end the following new subsection:

"(d) This section shall apply with respect to the District of Columbia in the same manner as this section applies to a State.".

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

SEC. 3. INCREASE IN MEMBERSHIP OF HOUSE OF REPRESENTATIVES.

(a) PERMANENT INCREASE IN NUMBER OF MEMBERS.—Effective with respect to the One Hundred Twelfth Congress and each succeeding Congress, the House of Representatives shall be composed of 437 Members, including any Members representing the District of Columbia pursuant to section 2(a).

(b) REAPPORTIONMENT OF MEMBERS RESULTING FROM INCREASE.—

(1) IN GENERAL.—Section 22(a) of the Act entitled "An Act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress", approved June 18, 1929 (2 U.S.C. 2a(a)), is amended by striking "the then existing number of Representatives" and inserting "the number of Representatives established with respect to the One Hundred Twelfth Congress".

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

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

(1) TRANSMITTAL OF REVISED STATEMENT OF APPORTIONMENT BY PRESIDENT.—Not later than 30 days after the date of the enactment of this Act, the President shall transmit to Congress the most recent statement of apportionment submitted under section 22(a) of the Act entitled "An Act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress", approved June 18, 1929 (2 U.S.C. 2a(a)), revised to take into account this Act and the amendments made by this Act.

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

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

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

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

SEC. 4. NONSEVERABILITY OF PROVISIONS.

If any provision of this Act, or any amendment made by this Act, is declared or held invalid or unenforceable, the remaining provisions of this Act and any amendment made by this Act shall be treated and deemed invalid and shall have no force or effect of law.

SEC. 5. EXPEDITED JUDICIAL REVIEW.

If any action is brought to challenge the constitutionality of any provision of this Act or any amendment made by this Act, the following rules shall apply:

(1) The action shall be filed in the United States District Court for the District of Columbia and shall be heard by a 3-judge court convened pursuant to section 2284 of title 28, United States Code.

(2) A copy of the complaint shall be delivered promptly to the Clerk of the House of Representatives and the Secretary of the Senate.

(3) A final decision in the action shall be reviewable only by appeal directly to the Supreme Court of the United States. Such appeal shall be taken by the filing of a notice of appeal within 10 days, and the filing of a jurisdictional statement within 30 days, of the entry of the final decision.

(4) It shall be the duty of the United States District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of the action and appeal.

PURPOSE AND SUMMARY

H.R. 157, the "District of Columbia House Voting Rights Act of 2009," will provide the District of Columbia with a Representative in the U.S. House of Representatives. The bill permanently increases the U.S. House of Representatives from 435 to 437 seats, providing one of those seats to the District of Columbia, and the other to Utah, as the State that would have been next entitled to an additional Congressional representative based on the 2000 Census. The seats for the District of Columbia and Utah will be implemented in the One Hundred Twelfth Congress, and Utah's seat will be at large during that Congress. In the One Hundred Thirteenth Congress, the at-large seat will be become a single-Member district, like the other 436, based on the reapportionment and redistricting that will follow the 2010 Census.

BACKGROUND AND NEED FOR THE LEGISLATION

Over half a million people living in the District of Columbia lack direct voting representation in the U.S. House of Representatives and U.S. Senate.[1] For over 200 years, the District has been denied this voting representation in Congress—the very entity that has ultimate authority over all aspects of the city's legislative, executive, and judicial functions. The United States is the only democracy in the world that deprives the residents of its capital city voting representation in the national legislature.[2] Essentially, citizens of every State have a vote regarding the laws that govern the District, while those living in the District itself do not.[3]

[1] Dick Meyer, Mr. Obama, Give D.C. the Vote, Now, NPR.org, Jan. 8, 2009, available at http://www.npr.org/templates/story/story.php?storyId=99096356.

[2] Rick Bress, Memorandum submitted to the U.S. House of Representatives, Committee on the Judiciary, Constitutionality of the D.C. Voting Rights Bill (March 2006).

[3] Id.

Residents of the District of Columbia pay billions of dollars in Federal taxes each year.[4] They must also register for selective service, serve on Federal juries, and assume other responsibilities of U.S. citizenship.[5] Ironically, many District residents work for the Federal Government and are members of the armed services. District residents have defended the United States in war since the District was created. More than 192,000 District residents have participated in World War I and subsequent wars. Over 1,600 District residents have made the ultimate sacrifice for their country.[6]

Yet despite such contributions, the United States denies democracy in its capital, even while it promotes democracy abroad. At a January 27, 2009, Subcommittee on the Constitution, Civil Rights, and Civil Liberties hearing, U.S. Army National Guard Captain Yolanda Lee testified, "[a]lthough I was proud to see the Iraqis exercise their right to vote for voting representatives in their new democracy, I could not vote for such a representative to the U.S. House of Representatives in our country."[7]

Many Americans realize the great injustice of denying U.S. citizens living in the Nation's Capital representation in Congress. A recent poll indicates six in ten Americans support a voting Representative for the residents of the District of Columbia.[8] Support for the District of Columbia House Voting Rights Act of 2009, H.R 157, in particular is significant and diverse. The Leadership Conference on Civil Rights (LCCR), with 55 of its coalition members, wrote to urge prompt Congressional consideration of H.R. 157.[9] In a letter to Congress, 25 prominent legal scholars stated their concensus belief that "Congress has the power through 'simple' legislation to provide voting representation in Congress for DC residents."[10]

The lack of representation for District residents also resonates with the international community. As Leadership Conference on Civil Rights President and CEO Wade Henderson testified, the "situation will also undermine our Nation's moral high ground in promoting democracy and respect for human rights in other parts of the world."[11] Before the United Nations Committee on Human Rights, Timothy Cooper of Worldrights spoke to the "oldest continuing human rights violations taking place in the United States today,"[12] citing findings by the Organization for Security and Co-

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[4] Mark David Richards, PhD, 10 Myths About Washington, DC, Nov. 2002, available at http://www.dcvote.org/pdfs/10MythsAboutDC.pdf.

[5] Letter from Wade Henderson, Leadership Conference on Civil Rights President & CEO and Nancy Zirkin, Leadership Conference on Civil Rights Vice President & Director of Public Policy, to Members of Congress (April 18, 2007).

[6] DC Vote, DC Veterans Fact Sheet, available at http://www.dcvote.org/pdfs/vets.pdf.

[7] Testimony on H.R. 157, the "District of Columbia House Voting Rights Act of 2009": Hearing before the H. Subcomm. on the Constitution, Civil Rights & Civil Liberties, 111th Cong., 1st Sess. (2009) (statement of Yolanda Lee, U.S. Army Guard Captain of the District of Columbia National Guard).

[8] Shannon N. Geis and Gary Langer, Six in 10 Americans Say Aye To a D.C. Vote in Congress, ABC News, Feb. 24, 2009.

[9] Letter from the Leadership Conference on Civil Rights to the Honorable Nancy Pelosi, Speaker of the U.S. House of Representatives (Jan. 14, 2009).

[10] Letter from Sheryll D. Cashin, Georgetown University Law Center Professor, et al. to Members of Congress (Mar. 12, 2007).

[11] Testimony on H.R. 157, the "District of Columbia House Voting Rights Act of 2009": Hearing before the H. Subcomm. on the Constitution, Civil Rights & Civil Liberties, 111th Cong., 1st Sess. (2009) (statement of Wade Henderson, President & CEO of the Leadership Conference on Civil Rights).

[12] Timothy Cooper, Intervention Before the U.N. Committee on Human Rights on Equal D.C. Voting Rights, July 10, 2006, available at http://www.world-rights.org/pdf/un_committee_statement_2006.pdf.

operation in Europe (OSCE) and the Inter-American Commission on Human Rights (IACHR) that the District's status is a violation of international law.[13]

There is no sound explanation as to why District residents have been disenfranchised since the District was formally established on December 1, 1800 under the Act of 1790.[14] The Constitution and the Organic Act of 1801[15] are completely silent on the question of Congressional representation for District residents; they neither provide nor deny representation for them. While there is no evidence that the Framers intended to deny voting representation for District residents, the Framers did provide the Congress with absolute authority over the District, broad enough to rectify such a problem. Professor Viet D. Dinh explains, "[t]here are no indications, textual or otherwise, to suggest that the Framers intended that congressional authority under the District Clause, extraordinary and plenary in all respects, would not extend also to grant District residents representation in Congress."[16]

Professor Dinh also points out that during 1790–1800, 1790 being the year in which Maryland and Virginia ceded land to the Federal Government for the creation of the capital city, and 1800 being the year in which the Federal Government assumed control over the District, District residents were able to vote in Congressional elections in Maryland and Virginia. He says, "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."[17] It was in 1788 that James Madison wrote in the Federalist Papers that "the rights and the consent of the citizens inhabiting [the District]" would "no doubt" be protected and that District residents would have "their voice in the election of the government which is to exercise authority over them."[18] As Senator Orrin Hatch has noted, "America's founders prized the franchise as central to the political system they were establishing,"[19] so it seems unlikely that the Founders would have intentionally denied any Americans the right to participate in this new democracy.

CONGRESS'S CONSTITUTIONAL AUTHORITY TO PROVIDE CONGRESSIONAL REPRESENTATION TO THE DISTRICT

Article I, section 8, clause 17—the "District Clause"—provides Congress with the authority to provide the District with full representation in the U.S. House of Representatives. The District Clause provides:

> "The Congress shall have Power . . . To exercise exclusive Legislation in all cases whatsoever, over such District (not

[13] Id.
[14] Act of July 16, 1790, ch. 28, 1 Stat. 130.
[15] Organic Act of 1801, ch. 15, 2 Stat. 103.
[16] Testimony on H.R. 157, the "District of Columbia House Voting Rights Act of 2009": Hearing before the H. Subcomm. on the Constitution, Civil Rights & Civil Liberties, 111th Cong., 1st Sess. (2009) (statement of Professor Viet D. Dinh, Georgetown University Law Center Professor).
[17] Id.
[18] James Madison, The Federalist No. 43, N.Y. Independent Journal (Jan. 23, 1788).
[19] Senator Orrin G. Hatch, "No Right is More Precious in a Free Country": Allowing Americans in the District of Columbia to Participate in National Self-Government, 45 Harvard J. on Legislation 287, 290 (2008).

> 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. . . ."[20]

Testifying before the House Government Reform Committee on June 23, 2004, Mr. Kenneth Starr, former U.S. Solicitor General and Judge for the U.S. Court of Appeals for the D.C. Circuit and current Dean of Pepperdine University School of Law, said:

> "Congress's powers over the District are not limited to simply those powers that a State legislature might have over a State. As emphasized by the Federal courts on numerous occasions, the Seat of Government Clause is majestic in 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." (quoting *O'Donoghue v. United States,* 289 US 516, 539–540 (1933)). 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."[21]

Ample case law substantiates Dean Starr's claim that "the Seat of Government Clause is majestic in scope."[22] *Neild v. District of Columbia* holds that the District Clause is "sweeping and inclusive in character."[23] *United States v. Cohen* finds that Congress has "extraordinary and plenary power" over the District.[24] Even in *Adams v. Clinton,* in which the U.S. District Court for the District of Columbia held that District residents do not have a judicially cognizable right to Congressional representation, as the District is not a State under article I, section 2,[25] the court found that "if [the plaintiffs] are to obtain [relief], they must plead their cause in other venues."[26] The court stated that counsel for defendant House officials acknowledged that "only congressional legislation or constitutional amendment can remedy plaintiffs' exclusion from the franchise."[27] This holding implies that Congress is enabled, through the District Clause, to provide the District with Congressional representation through simple legislation.

A statement from the American Bar Association, the largest voluntary professional membership organization in the world, quoting then Representative Tom Davis, states that use of the District Clause has never been struck down when affording District residents the same rights and privileges that other U.S. citizens enjoy, and that "there is no reason to think that [the courts] would act

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[20] U.S. Const., Art. I, § 8, cl. 17.

[21] Testimony on Common Sense Justice for the 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. (2004). (statement of the Hon. Kenneth W. Starr, former U.S. Solicitor General and Judge for the U.S. Court of Appeals for the D.C. Circuit).

[22] Id.

[23] 110 F.2d 246, 249 (D.C. App. 1940).

[24] 733 F.2d 128, 140 (D.C. Cir. 1984).

[25] 90 F. Supp. 2d 35, 55–56 (D.D.C. 2000).

[26] Id. at 72.

[27] Id. at 40.

differently in this case."[28] Furthermore, there are distinctions to be made between *Adams v. Clinton* and *Michel v. Anderson,*[29] the current precedent on District of Columbia voting rights. The Congressional Research Service (CRS) reports that, "The argument has been made, however, that the *Adams* case . . . can be distinguished from the instant question—whether Congress has power to grant the District a voting representative in Congress."[30] CRS also reasons, "[a]rguably, the court [in *Michel*] did not consider the issue of whether the Congress as a whole would have had the authority to provide for representation for the District of Columbia under the District Clause. Under this line of reasoning, the power of the Congress over the District may represent a broader power than the power of the House to set its own rules."[31]

The Supreme Court first recognized Congress's plenary authority over the District in 1805. In *Hepburn v. Ellzey,*[32] the Supreme Court held that diversity jurisdiction did not exist between the District and Virginia, as article III, section 2 of the U.S. Constitution provides that diversity jurisdiction only exists "between citizens of different *States.*"[33] The Court explained, however, that "this is a subject for legislative, not for judicial consideration,"[34] clarifying Congress's authority to enact legislation extending diversity jurisdiction to the District.[35] Congress went on to enact such a statute, which, when later challenged in *National Mutual Insurance Co. of the District of Columbia v. Tidewater Co.,* was upheld based on Congress's article I power to legislate for the District.[36]

Tidewater thus substantiates that the District Clause can be used to grant District residents Constitutional rights and status provided in the text of the Constitution to citizens of the States. As such, while article I, section 2 provides for the election of Members of the House of Representatives by the "people of the several States,"[37] Congress is not precluded from providing the District with the opportunity to elect a U.S. House Representative. Significantly, five of the justices in Tidewater ascribed to the view either that the District was a State under the terms of the Constitution, or that the Congress, through use of the District Clause, could treat the District like a State.[38]

Aside from diversity jurisdiction, use of the District Clause has always been upheld, even when conferring on the District other Constitutional rights and obligations that are provided in the text

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[28] Testimony on H.R. 5388, the "District of Columbia Fair and Equal House Voting Rights Act": Hearing before the H. Subcomm. on the Constitution, 109th Cong., 2nd Sess. (2006) (statement of the American Bar Association).

[29] 817 F. Supp. 126 (D.D.C. 1993). In Michel v. Anderson, the U.S. District Court for the District of Columbia determined that providing nonvoting Delegates with the ability to vote in the Committee of the Whole of the House of Representatives through House Rules did not violate the U.S. Constitution.

[30] Kenneth R. Thomas, Congressional Research Service (CRS) Report, The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole" (January 24, 2007) at 7.

[31] Id. at 8.

[32] 6 U.S. 445 (1805).

[33] U.S. Const., Art. III, § 2 (emphasis added).

[34] This opinion in Hepburn provides the foundation for the opinion in *Adams.* Both courts recognized the ability of the Congress to act through legislation where the Judiciary was unable to act through an order.

[35] 6 U.S. 445, 453 (1805).

[36] National Mutual Ins. Co. of the District of Columbia v. Tidewater Co., 337 U.S. 582, 589 (1949).

[37] U.S. Const., Art. I, § 2.

[38] 337 U.S. 582, 589 (1949).

of the Constitution to the States. Congress treating the District as a State for purposes of alcohol regulation under the Alcoholic Beverage Control Act, for example, was upheld as in accordance with the 21st amendment in *Milton S. Kronheim & Co. Inc. v. District of Columbia.*[39] The District is also treated like a State for purposes of Federal income taxation under the 16th amendment,[40] for purposes of affording 11th amendment immunity to the Washington Metropolitan Area Transit Authority,[41] for purposes of Federal regulation of commerce in the District consistent with the article I, section 8, clause 3 Commerce Clause,[42] and for purposes of providing District residents with the right to a jury trial under the sixth amendment.[43]

There are a number of other instances of the Congress using the District Clause to treat the District like a State. In *Palmore v. United States,*[44] for example, the Supreme Court upheld Congress's designation of the District of Columbia Court of Appeals as the "highest court of a State" for purposes of Supreme Court review of final State court judgments. District residents are also treated like State residents for purposes of civil actions for deprivation of rights,[45] and crime victim assistance programs,[46] among other examples.

CONGRESS'S CONSTITUTIONAL AUTHORITY TO MANDATE A TEMPORARY AT-LARGE SEAT

The permanent increase in the U.S. House of Representatives from 435 to 437 seats in H.R. 157 means that, in addition to the District, the State next in line to increase its Congressional delegation, which is Utah, is entitled to a seat, as provided for in section 3 of H.R. 157.[47] According to 2000 Census data, Utah is the State next in line to increase its delegation,[48] having missed the seat following the 2000 Census by just 856 people.[49] Utah Governor Jon Huntsman strongly supports "granting one seat to the District of Columbia and the other to Utah, the state that should have received an additional seat in the wake of the 2000 Census."[50] Governor Huntsman also "welcome[s] the fact that, if the legislation passes, Utah's new seat would be elected on an at-large basis (rather than from a specific district) until 2012," as redistricting is "always a difficult, time-consuming, and politically costly process."[51]

[39] 91 F.3d 193 (D.C. Cir. 1996).
[40] U.S. Const., Amend. XVI.
[41] Clarke v. Wash. Metro. Area Transit Auth., 654 F. Supp. 712 (D.D.C. 1985), aff'd, 808 F.2d 137 (D.C. Cir. 1987).
[42] Stoutenburgh v. Hennick, 129 U.S. 141 (1889)).
[43] Callan v. Wilson, 127 U.S. 540 (1888).
[44] 411 U.S. 389 (1973).
[45] 42 U.S.C. § 1983.
[46] 42 U.S.C. § 10603(d)(1).
[47] H.R. 157, 111th Cong. (2009).
[48] See U.S. Dept. of Commerce, U.S. Census Bureau, Census 2000 Apportionment Data (Dec. 28, 2000), available at http://www.census.gov/population/www/cen2000/maps/files/tab01.pdf.
[49] Election Data Services, Inc., Next Six Seats Not Awarded with Number of People Missed By, Provided by the U.S. Census Bureau (on file with the H. Comm. on the Judiciary).
[50] Letter from the Honorable John M. Huntsman, Jr., Governor of Utah, to the Honorable John Conyers, Jr., Committee on the Judiciary Chairman (Jan. 26, 2009).
[51] Testimony on H.R. 5388, the "District of Columbia Fair and Equal House Voting Rights Act of 2006": Hearing before the H. Subcomm. on the Constitution, Civil Rights & Civil Liberties, 109th Cong., 2nd Sess. (2006) (statement of the Honorable John M. Huntsman, Jr, Governor of Utah).

Importantly, Congress has the Constitutional authority to require that Utah's seat be at-large temporarily.

Article I, section 4 of the Constitution provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of [choosing] Senators.

In interpreting article I, the Supreme Court has determined that the Constitution gives Congress broad authority to regulate national elections. In *Oregon v. Mitchell,*[52] Justice Black wrote, "[i]n the very beginning the responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations, if it deemed advisable to do so."[53] In 2004, in *Vieth v. Jubelirer,* Justice Scalia noted that "article I, section 4, while leaving in State legislatures the initial power to draw districts for Federal elections, permitted Congress to 'make or alter' those districts if it wished."[54]

Given this broad authority to regulate Federal elections, Congress has the ability to mandate that Utah's fourth seat be an at-large seat through the year 2012. CRS concludes that "Congress has ultimate authority over most aspects of the congressional election process" and that "congressional power is at its most broad in the case of House elections."[55] As such, Congress has the constitutional authority to temporarily mandate an at-large seat for Utah, notwithstanding the general statutory requirement in 2 U.S.C. 2(c) that Members run from single-member districts rather than at-large districts.[56]

Additionally, a temporary at-large seat in Utah is consistent with the "one person, one vote" principle. The U.S. Supreme Court has held that the U.S. Constitution requires that each Congressional district in a State contain equal population.[57] The Court has held that article I, section 2 of the Constitution requires that "as nearly as is practicable, one man's vote in a congressional election is to be worth as much as another's."[58] In Utah, all voters will have the opportunity to vote both for a candidate to represent his or her congressional district and a candidate to represent the State at-large, "thereby comporting with the one person, one vote principle."[59]

HEARINGS

The Subcommittee on the Constitution, Civil Rights, and Civil Liberties held one day of hearings on H.R. 157 on January 27, 2009. On the first panel, testimony was received from House Majority Leader Steny Hoyer (D-MD), former Representative Tom

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[52] 400 U.S. 112 (1970).
[53] Id. at 119.
[54] 541 U.S. 267, 275 (2004).
[55] L. Paige Whitaker and Kenneth R. Thomas, Congressional Research Service (CRS) Memorandum, Constitutionality of Congress Creating an At-Large Seat for a Member of Congress" (June 5, 2006) at 1–2.
[56] 2 U.S.C. 2(c).
[57] See Wesberry v. Sanders, 376 U.S. 1 (1864).
[58] Id. at 18.
[59] L. Paige Whitaker and Kenneth R. Thomas, Congressional Research Service Memorandum, Constitutionality of Congress Creating an At-Large Seat for a Member of Congress" (June 5, 2006) at 4.

Davis (R-VA), Representative Jason Chaffetz (R-UT), and (4) Representative Louie Gohmert (R-TX).

On the second panel, testimony was received from Mr. Wade Henderson, President and CEO of the Leadership Conference on Civil Rights (LCCR); Ms. Yolanda Lee, U.S. Army Guard Captain of the District of Columbia National Guard; Mr. Viet Dinh, Professor of Law at the Georgetown University Law Center, and former U.S. Assistant Attorney General for Legal Policy from 2001 to 2003; and Mr. Jonathan Turley, J.B. and Maurice Shapiro Professor of Public Interest Law at the George Washington University Law School.

COMMITTEE CONSIDERATION

On February 25, 2009, the Committee met in open session and ordered the bill H.R. 157 favorably reported, by a vote of 20 to 12, a quorum being present.

COMMITTEE VOTES

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following roll call votes occurred during the Committee's consideration of H.R. 157.

1. An amendment offered by Mr. Smith, to the amendment in the nature of a substitute offered by Mr. Nadler and Mr. Conyers, providing for intervention and standing by Members of Congress in any action challenging the constitutionality of H.R. 157. The amendment failed by a vote of 15 to 15.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman		X	
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters			
Mr. Delahunt			
Mr. Wexler			
Mr. Cohen			
Mr. Johnson		X	
Mr. Pierluisi		X	
Mr. Gutierrez			
Mr. Sherman			
Ms. Baldwin		X	
Mr. Gonzalez		X	
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Ms. Wasserman Schultz			
Mr. Maffei		X	
[Vacant].			
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		

ROLLCALL NO. 1—Continued

	Ayes	Nays	Present
Mr. Lungren	X		
Mr. Issa	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Franks			
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Rooney	X		
Mr. Harper	X		
Total	15	15	

2. An amendment offered by Mr. Sensenbrenner to the amendment in the nature of a substitute, requiring Utah to redistrict into four single-member districts. The amendment failed by a vote of 9 to 19.

ROLLCALL NO. 2

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman			
Mr. Berman		X	
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Delahunt			
Mr. Wexler		X	
Mr. Cohen			
Mr. Johnson		X	
Mr. Pierluisi		X	
Mr. Gutierrez		X	
Mr. Sherman		X	
Ms. Baldwin		X	
Mr. Gonzalez		X	
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Ms. Wasserman Schultz		X	
Mr. Maffei		X	
[Vacant].			
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.	X		
Mr. Coble			
Mr. Gallegly			
Mr. Goodlatte			
Mr. Lungren	X		
Mr. Issa	X		
Mr. Forbes			
Mr. King			
Mr. Franks			
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Rooney			
Mr. Harper	X		

ROLLCALL NO. 2—Continued

	Ayes	Nays	Present
Total	9	19	

3. A motion to table the appeal of the ruling of the chair that an amendment offered by Mr. Chaffetz to amend the amendment in the nature of a substitute, repealing the Office of the District of Columbia Delegate, is non-germane. The motion to table was agreed to by a vote of 17 to 11.

ROLLCALL NO. 3

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Cohen	X		
Mr. Johnson			
Mr. Pierluisi	X		
Mr. Gutierrez			
Mr. Sherman	X		
Ms. Baldwin	X		
Mr. Gonzalez			
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Ms. Wasserman Schultz	X		
Mr. Maffei	X		
[Vacant].			
Mr. Smith, Ranking Member		X	
Mr. Sensenbrenner, Jr.		X	
Mr. Coble			
Mr. Gallegly			
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Issa		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks			
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Rooney			
Mr. Harper			
Total	17	11	

4. An amendment offered by Mr. Issa to the amendment in the nature of a substitute, increasing the U.S. House of Representatives to 436, providing a seat only for the District of Columbia, and eliminating the additional seat for Utah. The amendment failed by a vote of 12 to 20.

ROLLCALL NO. 4

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman		X	
Mr. Berman			
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Delahunt			
Mr. Wexler		X	
Mr. Cohen		X	
Mr. Johnson		X	
Mr. Pierluisi		X	
Mr. Gutierrez		X	
Mr. Sherman		X	
Ms. Baldwin		X	
Mr. Gonzalez		X	
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Ms. Wasserman Schultz		X	
Mr. Maffei		X	
[Vacant].			
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly			
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Issa	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Franks			
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Rooney	X		
Mr. Harper	X		
Total	12	20	

5. An amendment offered by Mr. Chaffetz to the amendment in the nature of a substitute, providing that H.R. 157 cannot be construed to suggest that the District of Columbia should have Senate representation. The amendment failed by a vote of 12 to 18.

ROLLCALL NO. 5

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman		X	
Mr. Berman			
Mr. Boucher			
Mr. Nadler		X	
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren		X	
Ms. Jackson Lee		X	
Ms. Waters		X	
Mr. Delahunt			
Mr. Wexler		X	
Mr. Cohen		X	

ROLLCALL NO. 5—Continued

	Ayes	Nays	Present
Mr. Johnson			
Mr. Pierluisi		X	
Mr. Gutierrez		X	
Mr. Sherman		X	
Ms. Baldwin		X	
Mr. Gonzalez		X	
Mr. Weiner		X	
Mr. Schiff		X	
Ms. Sánchez		X	
Ms. Wasserman Schultz		X	
Mr. Maffei			
[Vacant].			
Mr. Smith, Ranking Member	X		
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Issa	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Franks			
Mr. Gohmert	X		
Mr. Jordan	X		
Mr. Poe	X		
Mr. Chaffetz	X		
Mr. Rooney			
Mr. Harper	X		
Total	12	18	

6. An amendment in the nature of a substitute to H.R. 157 offered by Mr. Nadler and Mr. Conyers. The amendment was agreed to by a vote of 24 to 5.

ROLLCALL NO. 6

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Gutierrez	X		
Mr. Sherman			
Ms. Baldwin	X		
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Ms. Wasserman Schultz	X		
Mr. Maffei			
[Vacant].			
Mr. Smith, Ranking Member	X		

ROLLCALL NO. 6—Continued

	Ayes	Nays	Present
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Lungren	X		
Mr. Issa	X		
Mr. Forbes	X		
Mr. King	X		
Mr. Franks			
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Rooney			
Mr. Harper		X	
Total	24	5	

7. H.R. 157 was ordered favorably reported by a vote of 20 to 12.

ROLLCALL NO. 7

	Ayes	Nays	Present
Mr. Conyers, Jr., Chairman	X		
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott	X		
Mr. Watt	X		
Ms. Lofgren	X		
Ms. Jackson Lee	X		
Ms. Waters	X		
Mr. Delahunt			
Mr. Wexler	X		
Mr. Cohen	X		
Mr. Johnson	X		
Mr. Pierluisi	X		
Mr. Gutierrez	X		
Mr. Sherman	X		
Ms. Baldwin	X		
Mr. Gonzalez	X		
Mr. Weiner	X		
Mr. Schiff	X		
Ms. Sánchez	X		
Ms. Wasserman Schultz	X		
Mr. Maffei	X		
[Vacant].			
Mr. Smith, Ranking Member		X	
Mr. Sensenbrenner, Jr.			
Mr. Coble			
Mr. Gallegly		X	
Mr. Goodlatte		X	
Mr. Lungren		X	
Mr. Issa		X	
Mr. Forbes		X	
Mr. King		X	
Mr. Franks			
Mr. Gohmert		X	
Mr. Jordan		X	
Mr. Poe		X	
Mr. Chaffetz		X	
Mr. Rooney			
Mr. Harper		X	

ROLLCALL NO. 7—Continued

	Ayes	Nays	Present
Total	20	12	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 157, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, February 27, 2009.

Hon. JOHN CONYERS, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 157, the "District of Columbia House Voting Rights Act of 2009."

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford, who can be reached at 226–2860.

Sincerely,

DOUGLAS W. ELMENDORF,
DIRECTOR.

Enclosure

cc: Honorable Lamar S. Smith.
Ranking Member

H.R. 157—District of Columbia House Voting Rights Act of 2009.

SUMMARY

H.R. 157 would expand the number of Members in the House of Representatives from 435 to 437 beginning with the 112th Congress. The legislation would provide the District of Columbia with one Representative and add one new at-large Member. Under H.R. 157, the new at-large seat would likely be assigned to a State based on information from the 2000 census and then be reallocated

based on the next Congressional apportionment following the 2010 census (which would occur prior to the start of the 113th Congress).

The legislation's effects on direct spending over the 2009–2013 and 2009–2018 periods are relevant for enforcing pay-as-you-go rules under the current budget resolution. CBO estimates that enacting this legislation would increase direct spending by about $1 million over the five-year period from 2009 through 2013 and by about $4 million over the 2009–2018 period. Implementing the bill would increase discretionary costs by about $2 million in 2011 and about $12 million over the 2011–2014 period, assuming the availability of appropriated funds.

H.R. 157 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 ($69 million in 2009, 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. 157 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

	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2010–2014	2010–2019
CHANGES IN DIRECT SPENDING													
Salaries and Benefits													
Estimated Budget Authority	0	0	*	*	*	*	*	*	1	1	1	2	5
Estimated Outlays	0	0	*	*	*	*	*	*	1	1	1	2	5
CHANGES IN SPENDING SUBJECT TO APPROPRIATION													
Office and Administrative Expenses													
Estimated Authorization Level	0	0	2	3	3	4	4	4	4	4	4	12	32
Estimated Outlays	0	0	2	3	3	4	4	4	4	4	4	12	32

Note: * = less than $500,000.

BASIS OF ESTIMATE

For this estimate, CBO assumes that the bill will be enacted during 2009 and that spending will follow historical patterns of spending by Congressional offices.

The legislation would permanently expand the number of Members in the House of Representatives by two to 437. One new Member would represent the District of Columbia and the other would likely be a Representative at-large for the State of Utah until the next apportionment based on the 2010 census. The District currently has a nonvoting delegate to the House of Representatives (which would be retained under this legislation). Consequently, enacting H.R. 157 would increase costs for two new Members.

Direct Spending

CBO estimates that the salaries and benefits of the two new representatives would increase direct spending by about $5 million over the 2011–2019 period. We assume that the current Congressional salary of $174,000 would be adjusted in future years for anticipated inflation.

Spending Subject to Appropriation

Based on the current allowances for administration and expenses available for Members and other typical costs for a Congressional office, CBO estimates that adding two new members would increase costs by about $3 million annually ($1.5 million per office, adjusted annually for inflation) and about $12 million over the 2011–2014 period, subject to the availability of appropriated funds.

ESTIMATED IMPACT ON STATE, LOCAL, AND TRIBAL GOVERNMENTS

H.R. 157 contains an intergovernmental mandate as defined in UMRA. Assuming that the additional Representative provided for in the bill is assigned to Utah, the bill would temporarily preempt laws in that State governing the election of Members of the House of Representatives. The bill would require Utah to elect an additional Member of the House using a statewide election. CBO estimates that the State would incur marginal costs to elect the additional Member in the 2010 election cycle, but those costs would not be significant and would not exceed the threshold established in UMRA ($69 million in 2009, adjusted annually for inflation.)

ESTIMATED IMPACT ON THE PRIVATE-SECTOR

The legislation contains no private-sector mandates as defined in UMRA.

PREVIOUS CBO ESTIMATE

On February 17, 2009, CBO transmitted a cost estimate for S. 160, the District of Columbia House Voting Rights Act of 2009, as ordered reported by the Senate Committee on Homeland Security and Governmental Affairs on February 11, 2009. The two bills are similar in that they would permanently increase the number of Members of the House of Representatives, with those new Members coming from the District of Columbia and Utah. However, the House bill would not repeal the provisions of current law related to the delegate for the District of Columbia. The estimated costs of each bill reflect that difference.

ESTIMATE PREPARED BY:

Federal Costs: Matthew Pickford
Impact on State, Local, and Tribal Governments: Elizabeth Cove Delisle
Impact on the Private Sector: Paige Piper/Bach

ESTIMATE APPROVED BY:

Theresa Gullo
Deputy Assistant Director for Budget Analysis

PERFORMANCE GOALS AND OBJECTIVES

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 157 will provide the District of Columbia with full representation in the U.S. House of Representatives.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 17 of the Constitution and article I, section 4, clause 1.

ADVISORY ON EARMARKS

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 157 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of Rule XXI.

SECTION-BY-SECTION ANALYSIS

The following discussion describes the bill as reported by the Committee.

Section 1. Short Title. This section designates the short title of H.R. 157 as the "District of Columbia House Voting Rights Act of 2009."

Section 2. Treatment of District of Columbia as Congressional District. This section provides that the District of Columbia shall be considered a Congressional District for purposes of representation in the House of Representatives, beginning in the 112th Congress.

Section 3. Increase in the Membership of House of Representatives. This section permanently increases the number of Members in the U.S. House of Representatives from 435 to 437. The District of Columbia would receive one of those seats, the same as if it were a State, and Utah would receive the other seat, as the State next in line for a seat based on the 2000 Census apportionment formula. In future reapportionments, the allocation of Congressional seats will be based on 437 as opposed to 435, with the apportionment among the States and the District of Columbia based on population, with each State, and the District, entitled to at least one seat. This section also provides that for the 112th Congress only, the seat Utah will receive is to be an at-large seat.

Section 4. Nonseverability of Provisions. This section provides that if any provision of this Act is held invalid or unenforceable, the entire Act will be deemed invalid or unenforceable. As such, no provision of this Act will be effective unless the entire bill is. And no provision of the bill will be enjoined without the entire bill being likewise enjoined.

Section 5. Expedited Judicial Review. This section provides for expedited judicial review in the United States District Court for the District of Columbia for any challenge to the constitutionality of this Act. The District Court's decision will be reviewable only by appeal directly to the United States Supreme Court.

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):

ACT OF JUNE 18, 1929

(Public Law 71-28)

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 Twelfth 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.

SECTION 3 OF TITLE 3, UNITED STATES CODE

§ 3. Number of electors

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.

DISSENTING VIEWS

We all agree that residents of the District of Columbia are entitled to representation in Congress, and we are committed to that goal. We also all agree that such representation must occur by constitutional means. For that reason, we regretfully oppose H.R. 157.

H.R. 157 would, by statute, attempt to create a full-fledged Member of Congress to represent the District of Columbia. The bill

would also grant one additional Member to the state next in line to receive a new Member based on its population growth. According to the U.S. Census Bureau's figures, that state would be Utah. The bill would also permanently increase the size of the House to include 437 Members. The bill also contains a "non-severability" clause, such that if any of the provisions of the bill are struck down, the entire bill will be rendered invalid.

The bill, however, would not abolish the position of Delegate for the District of Columbia (Delegate Eleanor Holmes Norton's current position). As a result, if the bill as introduced were enacted D.C. residents would be represented by both a voting Member of Congress who could vote in committee and on the House floor, and also a D.C. Delegate who could vote in committee. Consequently, D.C. residents would get more representation in Congress than any other American citizens because both the D.C. Member and the D.C. Delegate would be able to vote in committee, giving D.C. residents more power in committee than the residents of any other state.

We oppose this legislation because it contains profound constitutional and policy flaws, which are described in detail below.

H.R. 157 HAS PROFOUND CONSTITUTIONAL FLAWS

Professor Jonathan Turley of the George Washington University Law School, who supports voting rights for D.C. residents, called the same legislation last Congress "the most premeditated unconstitutional act by Congress in decades." [1]

The actual creation of the District of Columbia occurred during the First Congress, when that body accepted [2] the cessions of Maryland and Virginia. From 1780 until the capital officially moved to the District of Columbia in December 1800, the residents of the District were able to vote for the representatives of the states from which they had been ceded. Once the District was formally adopted as the seat of government, the residents of the District ceased to have voting representation in Congress.

Supporters of the bill claim Congress has the authority to enact H.R. 157 under Article I, Section 8, clause 17 of the Constitution ("the District Clause"), which states "The Congress shall have power . . . To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . ." [3] However, that very clause also makes clear that D.C. is *not* a State (it is a specially-created "District"), and Article I, Section 2 of the Constitution's first sentence makes clear that "The House of Representatives shall be composed of Members chosen every second

[1] Jonathan Turley, Statement for the Record, Legislative Hearing on H.R. 1433, the "District of Columbia House Voting Rights Act of 2007" (March 14, 2007) before the House Constitution Subcommittee.

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

[3] Proponents of this legislation, including Ken Starr, Viet Dinh, and Adam Charnes maintain that the District Clause gives Congress plenary authority to grant additional Members to the District of Columbia. *See Testimony of the Hon. Kenneth W. Starr Before the House Government Reform Committee,* at 1 (June 23, 2004), reprinted in H.R. Rep. No. 109–593, at 34 (2006); Viet D. Dinh & Adam H. Charnes, *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives,* at 9 (2004), *reprinted in* H.R. Rep. No. 109–593, at 50 (2006).

year by the people of the Several *States* . . ." Since D.C. is not a State, it cannot have a voting Member in the House.

The District was denied representation in the Constitution because it was feared that if the District received Congressional representation, the Members and Senators who represented the state that contained the Seat of Government would become disproportionately influential, to the detriment of the other States. It was also feared that, if the District were within the jurisdiction of a state, that state might refuse to protect the Seat of Government were a dispute to arise between federal and state interests.

The rationale for this provision was set forth by James Madison in Federalist Paper No. 43, in which he stated:

> The indispensable necessity of complete authority at the seat of government carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it not only the public authority might be insulted and its proceedings 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.[4]

Indeed, in 1783, when the delegates to Congress met in Philadelphia, a group of veterans demanding back pay overran them. The Congressional delegates asked for the state militia to help protect them, but the state refused.[5] Memories of that episode led the Founders to later put forth a Constitution that made the Seat of Government an exclusively federal enclave.

There is little question that the original rationale for denying D.C. residents Congressional representation has become outdated. America is much more populated today, and the power of the federal government over all the States has grown enormously, for better or worse, such that there is little cause for concern today that allowing Congressional representation to those who live in the residential parts of D.C. would significantly alter any balance of power. But the Constitution cannot be amended by statute. It must be amended through the formal Article V process of constitutional amendment or, in the alternative, the land that constitutes the residential sections of the District of Columbia could be returned to Maryland, by statute, through a process called retrocession, in which case the current residents of D.C. would become residents of Maryland and enjoy representation as citizens of that state.

The fact is, statements to the contrary notwithstanding, that the Founders clearly understood the ratified Constitution to deny Congressional representation to D.C. Indeed, at the New York Constitutional Convention, Alexander Hamilton himself offered an amendment to the proposed Constitution that would have allowed District residents to secure representation in Congress once they

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[4] THE FEDERALIST NO. 43, at 240 (James Madison) (Clinton Rossiter ed., 1961).

[5] Jonathan Turley, "Too Clever by Half: The Unconstitutionality of Partial Representation of the District of Columbia in Congress," 76 Geo. Wash. L. Rev. 305, 310 (2008).

grew to a reasonable size.[6] On July 22, 1788, Hamilton asked that the District Clause be amended to mandate that "When the Number of Persons in the District of Territory to be laid out for the Seat of the Government of the United States, shall according to the Rule for the Apportionment of Representatives and direct Taxes Amount to [blank, a figure Hamilton sought to insert later] such District shall cease to be parcel of the State granting the Same, and Provision shall be made by Congress for their having a District Representation in that Body."[7] But that amendment to the Constitution was rejected. Consequently, it is clear that the Framers considered and rejected granting Congressional representation to the District in the Constitution.

Subsequent generations reaffirmed that understanding in the Constitution yet again when the Twenty-Third Amendment was ratified on March 29, 1961. That Amendment grants District residents the right to vote for Presidential electors by granting the District "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 . . .*" Clearly, the Constitution must be amended again if the District is to be treated as "if it were a State" for purposes of Congressional representation.

The independent Congressional Research Service's own analysis concludes that H.R. 157 is facially unconstitutional, stating that the "case law that does exist would seem to indicate that not only is the District of Columbia not a 'state' for purposes of representation, but that congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation."[8]

As Jonathan Turley has also written, "It would be ridiculous to suggest that the delegates to the Constitutional Convention or ratification conventions would have worked out such specific and exacting rules for the composition of Congress, only to give the majority of Congress the right to create a new form of voting members from federal enclaves like the District. It would have constituted the realization of the worst fears for many delegates, particularly Anti-Federalists, to have an open-ended ability of the majority to manipulate the rolls of Congress and to use areas under the exclusive control of the federal government as the source for new voting members."[9]

Insofar as the federal courts have already reviewed the issue presented by H.R. 157, the answer is clear. In 2000, a federal three-judge panel in D.C. itself stated "We conclude from our analysis of the text that the Constitution does *not* contemplate that the District may serve as a state for purposes of the apportionment of con-

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[6] 5 The Papers of Alexander Hamilton 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

[7] *Id.* at 189.

[8] Kenneth R. Thomas, Congressional Research Service, The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole, CRS-20 (2007), available at http://assets.opencrs.com/rpts/RL33824_20070124.pdf (concluding).

[9] Jonathan Turley, "Too Clever By Half: The Unconstitutionality of Partial Representation of the District of Columbia," 76 Geo. Wash. L. Rev. 305, 328 (2008).

gressional representatives."[10] The Supreme Court affirmed that decision.[11]

Supporters of H.R. 157 point for precedent to a case, called *Tidewater,* decided by the Supreme Court in 1949[12] that upheld a federal law extending the diversity jurisdiction of the federal courts to hear cases in which D.C. residents were parties. But as the Congressional Research Service stated in a recent report, "The plurality opinion [in that case] took pains to note the limited impact of their holding . . . [T]he plurality specifically limited the scope of its decision to cases which did not involve an extension of any fundamental right,"[13] such as the right to vote for a Member of Congress.

Further, if the 1949 *Tidewater* Supreme Court case does what proponents of the bill says it does, Congress would not have had to go through the trouble of passing a constitutional amendment to the States, which it did in 1978, that would have provided D.C. two Senators and a Representative. (That amendment failed to get the approval of three-quarters of the States over seven years.)[14] The need for a constitutional amendment to accomplish what supporters of H.R. 157 seek to accomplish today was clear to Democrats the last time a serious push was made for D.C. representation. When the House Judiciary Committee, under the leadership of Democratic Chairman Peter Rodino in the 95th Congress, reported out a constitutional amendment to do what this bill purports to be able to do, the report accompanying that constitutional amendment stated the following: "If the citizens of the District are to have voting representation in the Congress, a constitutional amendment is essential; *statutory action alone will not suffice.*"[15]

H.R. 157 IS BAD POLICY

Even conceding for purposes of argument the proponents of this bill's understanding of the vast breadth of the District Clause, the bill would actually set a terrible precedent for the manipulation of House and Senate membership, and be unfair to others.

H.R. 157 requires us to ask what will happen in the future under the precedent it sets? Will future Congresses use this same authority to grant D.C. two, five, or ten or more Members, or Senators, when politically expedient? Will they then abolish those seats if the Members holding them vote "the wrong way"? This bill invites political gamesmanship and manipulation of the District's representation.

In fact, although this bill seeks only one House Member to represent the District, we have reason to believe its supporters have broader plans in mind. According to *The Washington Post,* the

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[10] *Adams v. Clinton,* 90 F.Supp.2d 35, 50 (D.D.C. 2000).

[11] 531 U.S. 941 (2000).

[12] *National Mutual Insurance Co. v. Tidewater,* 337 U.S. 582 (1949).

[13] Kenneth R. Thomas, CRS Report to Congress, RL33824, "The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole" (January 24, 2007) at 16.

[14] In 1978, Congress passed a constitutional amendment providing the District with full representation in both the House and Senate. The amendment then needed 38 of the 50 state legislatures to ratify it within seven years time. Ultimately, only 16 did so, and the amendment was rendered void. The following is a list of the 16 states that approved the amendment: New Jersey; Michigan; and Ohio in 1978; Minnesota; Massachusetts; Connecticut; and Wisconsin in 1979; Maryland and Hawaii in 1980; Oregon in 1981; Maine; West Virginia; and Rhode Island in 1983; Iowa; Louisiana; and Delaware in 1984.

[15] H. Rep. No. 95–886 (95th Cong., 2d Sess.) at 4.

Mayor of D.C. claims to have had a private conversation with President Obama in which the President said he would support not only one House Member to represent D.C., but two Senators for D.C. as well. According to *The Washington Post,* "[D.C. Mayor] Fenty (D), who endorsed Obama at the community center event in the summer of 2007, said Obama pledged in a private conversation to support 'full voting rights.' That, the mayor added, has traditionally meant two senators and a representative."[16] *The Washington Post* has similarly editorialized that "[C]ity leaders could carefully explore other ways to provide greater democracy for the residents of the nation's capital, including ways to secure a voice in the Senate."[17]

But again, the false logic of the supporters of H.R. 157—who say the District Clause allows Congress to pass legislation that trumps all other parts of the Constitution—does not stop at two Senators and one House Member for the District of Columbia. That false logic is infinitely expansive, as it also allows Congress to, by statute, grant D.C. dozens, even hundreds, of extra Senators if it wants to. If we follow that false logic even one step, it will invite future manipulations of voting rules and give the green light to future Congresses to add and subtract Member or Senators at its whim.

The false logic of the supporters of H.R. 157, if legitimized by passage of this legislation, would also invite Congress to deny existing constitutional rights to D.C. residents in the future. Surely, under the false logic of the bill, if Congress can give voting rights to D.C. under the constitution by statute—and ignore other provisions of the Constitution in the process—then Congress can take rights away as well. Under the constitutional theory of proponents of this bill, Congress could, by statute, *deny* D.C. voters the protection from racial discrimination in voting afforded them under the Fifteenth Amendment, *deny* them the protections from discrimination in voting based on sex afforded them under the Nineteenth Amendment, and *take away* the right to vote to those over 18 as granted by the Twenty-Sixth Amendment. Again, this bill sets a very bad precedent by opening up the possibility of vast abuse.

Under the false logic that underlies this bill, H.R. 157 also arguably allows additional Congressional representation for men and women training for the military. The exact same Article I, Section 8, clause 17 of the Constitution, which supporters of this bill say gives Congress the authority to grant D.C. a Member of Congress by statute, grants the *exact same authority* to Congress to do the same thing for our men and women training for the military at Forts around the country. That very same clause of the Constitution states: "The Congress shall have power . . . to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of *Forts,* Magazines, Arsenals, Dockyards, and other needful Buildings; . . ." So if the District Clause grants Congress the authority to grant D.C. a voting Member by statute, then it must also grant Congress the authority to give added representation in Congress to members of the military serving in federal enclaves used for mili-

[16] *See* David Nakamura, "Backers Of Voting Rights Face Split: Some in District Don't Want to Settle For Just House Seat," *The Washington Post* (November 10, 2008) at B1.
[17] "A New Chance for D.C.?" *The Washington Post* (editorial) (November 6, 2008).

tary purposes. The false logic underlying H.R. 157 invites a future Congress to do just that.

AT-LARGE REPRESENTATION CONFLICTS WITH THE PRINCIPLE OF "ONE PERSON, ONE VOTE"

Another part of H.R. 157 that raises constitutional questions pertains to the allocation of an at-large seat to the State of Utah. Under the bill, each citizen of Utah will have a vote for their geographically designated representative as well as an additional vote for the at-large representative allocated by the bill.

At-large districting had effectively ended by 1966, a mere two years after the Supreme Court announced its decision in *Wesberry v. Sanders,* in which it held that "the command of Art I, § 2, [of the Constitution] that Representatives be chosen 'by the People of the Several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[18] Over time, the Court interpreted this "one person, one vote" doctrine to mean that congressional districts within a state must be mathematically equal.[19] While the at-large district in Utah will be three times as large as the state's three geographic districts, each voter within Utah will have the same voting power because they will have an equal vote for their geographic representative and an equal (albeit significantly diluted) vote for the at-large representative. Therefore, the allocation of an at large seat to Utah does not appear to present a "one person, one vote" problem in the traditional *intrastate* context.

However, there is a question of whether H.R. 157's "one person, two votes" apportionment for Utah violates the "one person, one vote" constitutional imperative in the *interstate* context. The Supreme Court has held that Congress' apportionment power[20] gives it the authority to allocate representatives to states in a manner that creates districts that are more than 40% larger than the national average for a congressional district.[21] In according Congress "far more deference [in apportionment] than a state districting decision," the Court acknowledged that Congressional alterations of the apportionment formula "remain[] open to challenge . . . at any time."[22]

Accordingly, H.R. 157's "one person, two vote" allocation to Utah potentially exceeds Congress' authority under the apportionment clause.[23]

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[18] *Wesberry v. Sanders,* 376 U.S. 1, 7–8 (1964).

[19] *Kirkpatrick v. Preisler,* 394 U.S. 526, 531 (1969).

[20] U.S. Const. art. I, § 2, cl. 3 ("The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as [the House of Representatives] shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative.").

[21] *U.S. Dept. of Commerce v. Montana,* 503 U.S. 442, 463 (1992) ("Accordingly, although 'common sense' supports a test requiring 'a good-faith effort to achieve precise mathematical equality' *within* each State, the constraints imposed by Article I, § 2, itself make that goal illusory for the Nation as a whole.")(citation omitted)(emphasis in original).

[22] *Id.* at 465, 466.

[23] *See Legislative Hearing on H.R. 5388, the "District of Columbia Fair and Equal House Voting Rights Act of 2006" Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary,* 109th Cong. 23(2006) (statement of Professor Jonathan Turley, Professor, George Washington University School of Law) at 20 ("This at-large district would be roughly 250% larger than the ideal district in the last 2000 census (2,236,714 v. 645,632). In addition, citizens would have two members serving their interests in Utah—creating the appearance of a 'preferred class of voters.'").

At the very least, the novel nature of the at-large seat will certainly invite protracted litigation. Congress has two options with regard to the Utah seat that do not present the same constitutional questions. The first is to remove the language relating to the at-large district which would have the effect of forcing Utah to redistrict should this bill become law. To ameliorate concerns that this redistricting would result in partisan advantage, Governor Jon Huntsman of Utah testified at the Subcommittee on the Constitution's hearing on a similar bill in the 109th Congress that he would personally work to insure that any redistricting would be done in a "fair and objective" manner. The second option is for Congress to set forth the boundaries of the four districts in the statute. Congress has used this power in the past,[24] and it is expressly contemplated by the Constitution.[25]

AMENDMENTS OFFERED AT COMMITTEE

As introduced, H.R. 157 lacked, and sorely needed, a provision requiring expedited judicial review of the constitutionality of its provisions to make sure that, if the bill unconstitutionally grants D.C. a voting Member, that unconstitutional action does not go on any longer than it has to. If this bill becomes law, any legislation whose history was tainted by the involvement a Member whose seat was later declared unconstitutional would be placed into legal doubt.

Ranking Member Smith offered an amendment requiring expedited judicial review to similar legislation on the House floor last Congress, but it was rejected by the majority. This year, it was incorporated into the substitute amendment brought up by Chairman Conyers and reported out of committee. Those provisions constitute the very same expedited judicial review provision Congress agreed was appropriate, on a bipartisan basis, in the McCain-Feingold campaign finance law.[26] That provision was successfully employed to facilitate the Supreme Court's expeditious review of that legislation.[27]

This year, the Majority Leader himself, Mr. Hoyer from Maryland, testified in support of this amendment at the House Constitution Subcommittee hearing on this bill, and he pledged to support it, saying "I will be for the . . . amendment which says that we will have accelerated consideration of this in the courts. I think that makes sense." This amendment is also supported this year by the Leadership Conference on Civil Rights. Wade Henderson, the President of the Leadership Conference, testified that "Indeed, I believe that it would be appropriate for judicial review to occur on an expedited basis, to remove all doubt about the bill's constitutionality as quickly as possible." This provision is also part of the bill the Senate considered. As is becoming increasingly clear, there is no reason to stall a judicial resolution of these important issues, especially when doing so risks legislative chaos regarding the validity of future legislation passed by the House.

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[24] *See, e.g.,* Oklahoma Enabling Act, Pub. L. No. 59–234, § 6, 34 Stat. 267, 271–72 (1906).

[25] *See,* U.S. CONST. art. 1, § 4; *see also Vieth v. Jubelirer,* 541 U.S. 267, 275 (2004) ("It is significant that the Framers provided a remedy for [gerrymandering] in the Constitution. Article 1, § 4, while leaving in state legislatures the initial power to draw districts for federal elections, permitted Congress to 'make or alter' those districts if it wished.").

[26] *See* Pub.L. 107–155, Title IV, § 403, Mar. 27, 2002, 116 Stat. 113.

[27] *See McConnell v. Federal Election Com'n,* 540 U.S. 93 (2003).

However, we were disappointed that the bill as reported out of committee does not contain other provisions contained in the McCain-Feingold law that statutorily codify the principle that Members should have the right to bring a claim that the legislation is unconstitutional in court and intervene in such cases brought by others. Ranking Member Smith offered an amendment that would have done just that, and such an amendment was supported this year by the Leadership Conference on Civil Rights. Wade Henderson, the President of the Leadership Conference, testified at the Constitution Subcommittee's hearing on H.R. 157 that Congress should "appropriately indicate in the bill that it wished Members to have standing to mount a challenge to it." Even so, Ranking Member Smith's amendment was rejected on party lines.

Of course, the precedents in the D.C. Circuit Court of Appeals, where a challenge to this legislation would be heard, grant standing to Members of Congress on the grounds that their voting power has been diluted. In the 1994 case of *Michel v. Anderson,*[28] the D.C. Circuit Court of Appeals unanimously confirmed the right of Members of Congress to challenge the validity of a House rule change that allowed delegates from the territories to vote in the Committee of the Whole. In that case, the court stated that the parties "do not question the congressmen's standing to assert that their voting power has been diluted," and that existing case law "establishes that congressmen asserting such a claim have suffered an Article III injury."[29]

However, this legislation poses a question of such fundamental importance—namely Congress' power to alter the constitutional makeup of Congress—that we have a responsibility to do everything we can to ensure that the courts will hear argument on the constitutionality of this bill as soon as possible by statutorily codifying the right of Members to bring a direct challenge to this legislation. Since Congress did no less in its bipartisan campaign finance legislation, it should do the same here. If, however, this amendment is rejected in this context when it was accepted on campaign finance legislation, it would seem that supporters of the legislation before us today have less confidence in the constitutionality of this bill than supporters of campaign finance legislation had in that bill.

Other improving amendment were offered by Republicans, but defeated on party line votes. One such amendment, offered by Rep. F. James Sensenbrenner, Jr., would have struck the provision in the bill requiring that the additional seat for Utah be an at-large seat and provided that the Utah legislature would be able to adopt a four-Member district plan as it saw fit, which could include the plan adopted by the Utah legislature to do just that in 2006. Another such amendment, offered by Rep. Jason Chaffetz, would have made clear that Congress did not intend the legislation to set a precedent for treating the District as a State for purposes of Senate representation.

Other improving amendments offered by Republicans were rejected on the grounds they were not germane. These included amendments offered by Rep. Louis Gohmert that embodied the sub-

[28] 14 F.3d 623 (D.C.Cir. 1994).
[29] *Id.* at 625.

stance of his legislation to exempt D.C. residents from federal taxation until they received constitutional representation in Congress,[30] and his legislation to retrocede the residential and non-Federal portions of D.C. back to Maryland.[31] These also included an amendment offered by Rep. Steve King to repeal the District's oppressive gun laws, and an amendment offered by Rep. Jason Chaffetz to repeal the provisions providing for a concurrent D.C. Delegate that would unfairly grant District residents more representation in Congress than residents of any other State.

CONCLUSION

In the end, the approach taken by supporters of H.R. 157 does a grave disservice to the residents of the District of Columbia, as it gives them a false hope, and it will squander precious time that would be better spent seeking a constitutional remedy to the injustice they seek to address. We have every reason to believe every level of the federal courts is likely to strike down this legislation. But that process may take years, and at the end of the day District residents will be exactly where they are now in their quest for Congressional representation.

LAMAR SMITH.
F. JAMES SENSENBRENNER, JR.
HOWARD COBLE.
ELTON GALLEGLY.
BOB GOODLATTE.
DANIEL E. LUNGREN.
DARRELL E. ISSA.
J. RANDY FORBES.
STEVE KING.
TRENT FRANKS.
LOUIE GOHMERT.
JIM JORDAN.
TED POE.
JASON CHAFFETZ.
TOM ROONEY.
GREGG HARPER.

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[30] *See* H.R. 1014, the No Taxation Without Representation Act (111th Congress).
[31] *See* H.R. 1015, the District of Columbia-Maryland Reunion Act (111th Congress).