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107TH CONGRESS *2d Session*	SENATE	REPORT 107–343

NO TAXATION WITHOUT REPRESENTATION ACT OF 2002

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TOGETHER WITH

MINORITY VIEWS

TO ACCOMPANY

S. 3054

TO PROVIDE FOR FULL VOTING REPRESENTATION IN CONGRESS FOR THE CITIZENS OF THE DISTRICT OF COLUMBIA, AND FOR OTHER PURPOSES

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NOVEMBER 15, 2002.—Ordered to be printed

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NOVEMBER 15, 2002.—Ordered to be printed

Mr. LIEBERMAN, from the Committee on Government Affairs, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 3054]

The Committee on Governmental Affairs, to which was referred the bill (S. 3054) to provide for full voting representation in Congress for the citizens of the District of Columbia, and for other purposes, reports favorably thereon and recommends that the bill do pass.

I. PURPOSE AND SUMMARY

The purpose of S. 3054, the No Taxation Without Representation Act of 2002, is to provide full voting representation in Congress for the residents of the District of Columbia ("D.C." or the "District") by providing that D.C. residents would be entitled to elect and be represented by two Senators in the United States Senate, and as many representatives in the House of Representatives as a similarly populous State would be entitled to under the law.

II. BACKGROUND

The residents of the District of Columbia have no representation in the United States Senate, and they are represented in the House of Representatives only by a Delegate, who cannot vote either on the floor or in the Committee of the Whole. Despite their lack of Congressional representation, D.C. residents pay federal income

tax, paying the second-highest per capita amount in the nation.[1] In a country founded upon a cry of "No Taxation Without Representation," D.C.'s lack of Congressional representation is an intolerable state of affairs that is incompatible with core American values. S. 3054 seeks to right this wrong by the most direct route available: legislation to afford the District two Senators and a Member of the House of Representatives with full voting rights.

The History of District of Columbia and Its Lack of Congressional Representation

The Constitution provides for a seat of government for the United States outside of any one state and under the exclusive control of Congress. The "District Clause" in Article I, Section 8, Clause 17 of the Constitution, provides Congress the authority 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. . . ."

The purpose of establishing a capital outside the jurisdiction of any one state was to ensure that authority over the seat of the federal government would be exercised exclusively by the federal government. In 1783, when the Continental Congress met in Philadelphia, a group of disgruntled Revolutionary War soldiers who had not yet been paid went to the Executive Council of Pennsylvania, which was meeting in the same building as the Congress, to obtain relief. When the Members of the Continental Congress requested that the Executive Council have the Pennsylvania militia put down the brewing uprising, the Pennsylvania authorities refused for fear of provoking a violent confrontation. Madison later called this incident disgraceful, and used it during constitutional debates to argue successfully for the need for exclusive federal jurisdiction over the seat of the federal government.[2]

The location of the District of Columbia was established in 1791, on land on the banks of the Potomac River that had been ceded to the federal government by Maryland and Virginia. The laws of those states continued in force in the respective areas they had ceded.[3] For a time, the residents of the area that would become the District of Columbia continued to vote in Maryland and Virginia for federal office holders, including Congressional representatives. Once federal legislation formally establishing the District as the seat of the national government took effect in 1801, however, its residents ceased to be citizens of Maryland and Virginia and were no longer permitted to vote in those jurisdictions.[4]

In 1846, the land which had been ceded to the District by Virginia was returned to Virginia by Congress, reducing the size of the District of Columbia from 100 square miles to 68 square miles.[5]

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[1] Voting Representation in Congress for Citizens of the District of Columbia, Hearing Before the Senate Governmental Affairs Committee, 107th Cong., S. Hrg. 107–555 (May 23, 2002) at 55 (Testimony of the Honorable Linda Cropp, Chairwoman, District of Columbia City Council).

[2] *Id.* at 81 (Testimony of Jamin Raskin, Professor of Law, Washington College of Law).

[3] Michael K. Fauntroy, "The Evolution of District of Columbia Governance," CRS Report for Congress (November 13, 2001), at 2.

[4] Voting Representation in Congress for the District of Columbia, Hearing Before the Senate Governmental Affairs Committee, 103rd Cong., S. Hrg. 103–1053 (August 4, 1994) at 95 (Statement of Adam H. Kurland, Professor of Law, Howard University School of Law).

[5] Fauntroy, November 13, 2001, at 3, cited at note 2 above.

Therefore, the District of Columbia that exists today is comprised of the land ceded by Maryland.

Efforts to Obtain Voting Rights For the District of Columbia

Over the years, numerous and persistent efforts have been made to provide residents of the District the same right that residents of the States enjoy to vote for and be represented by elected federal officials. In 1961, the 23rd Amendment granted District residents the right to appoint three electors for the purpose of electing the President and Vice-President. Then, in 1970, the District of Columbia Delegate Act allowed District residents a non-voting Delegate in the House of Representatives.[6] Like other Delegates and the Resident Commissioner from Puerto Rico, the Delegate to Congress from the District of Columbia is allowed to vote in committee, but not in the House sitting as the Committee of the Whole, or in the House sitting as the House.[7] At the beginning of the 103rd Congress, the House of Representatives agreed to a rule change that permitted Delegates to vote in the Committee of the Whole,[8] but the House revoked this change at the start of the 104th Congress.[9]

Past attempts to allow D.C. residents to elect full-voting representatives in the House and Senate have come primarily in five forms: (1) bills, similar to S. 3054, providing full voting representation in Congress for D.C. residents (two D.C. senators and one representative); (2) proposed constitutional amendments granting full Congressional representation to D.C. residents; (3) bills to grant statehood to the District; (4) bills to retrocede the District to the State of Maryland; and (5) bills calling for District residents to vote in Maryland for their representatives to the House and Senate.

Earlier in this Congress, Chairman Lieberman, together with Senator Russ Feingold, introduced the No Taxation Without Representation Act of 2001 (S. 603), which provided that: "[n]otwithstanding any other provision of law, the community of American citizens who are residents of the District constituting the seat of government of the United States shall have full voting representation in the Congress."[10] The bill was cosponsored by Senators Clinton, Corzine, Daschle, Dayton, Dodd, Durbin, Feinstein, Harkin, Jeffords, Kennedy, Leahy and Schumer. Delegate Eleanor Holmes Norton introduced an identical bill in the House of Representatives, which has 119 cosponsors.[11] These bills also provide that to the extent such representation is denied, residents of the District would be exempt from taxation. S. 3054 does not include this tax provision, and more expressly would grant Congressional representation by providing for two Senators and a House Member representing the District of Columbia.

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[6] Pub. L. No. 91–405.

[7] Michael K. Fauntroy, "District of Columbia Voting Representation in Congress: Background, Issues and Options for the 107th Congress," CRS Report for Congress (October 31, 2001), at 1.

[8] If Delegates' votes were the decisive margin on any measure, however, the rules provided for another ballot, from which the Delegates would be excluded. *See* H. Res. 5, which passed the House of Representatives on January 5, 1993.

[9] *See* H. Res. 6, which passed the House of Representatives on January 5, 1995.

[10] S. 603 was introduced on March 23, 2001.

[11] H.R. 1193 was introduced on March 22, 2001. In the 105th Congress, Delegate Norton introduced a bill on July 14, 1998 containing similar language to the provision quoted above.

In 1967, Congress considered a possible constitutional amendment granting full Congressional representation to the District.[12] Congress approved a similar measure in 1978, when a resolution for a constitutional amendment in this regard passed both the House and Senate.[13] The proposed amendment lapsed, however, when only 16 States (rather than the 38 required) ratified it by the 1985 deadline.[14]

Another route to representation in Congress, which would also provide for increased local autonomy over District affairs, is statehood. In the last two decades, thirteen statehood bills have been introduced in the House and the Senate.[15] Congress last considered this option in 1993 when Delegate Norton's statehood bill was defeated on the floor of the House.[16] Concerns were expressed about statehood proposals that extended beyond issues relating to voting representation.[17]

Retrocession to Maryland of the non-federal land currently in the District has been proposed as an avenue to Congressional representation for D.C. residents. Seven bills to achieve this have been introduced since the 101st Congress.[18] This would make District residents citizens of Maryland, eligible to vote for federal officers representing that state. Critics of this approach question whether Marylanders want the non-federal portion of the District back as a portion of their state, and, just as important, whether D.C. residents wish to be Marylanders. The retrocession to Virginia in 1846 of the area that had been contributed by Virginia occurred at the urging both of Virginia and those living in the area retroceded. It is unclear whether Congress can, or indeed whether it would be appropriate for Congress to, compel Maryland to take back the portion of the District it gave up more than 200 years ago.[19]

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[12] Fauntroy, October 31, 2001, at 3–4.

[13] H.J. Res. 554, which was introduced by Representative Don Edwards on July 25, 1977, passed the House on March 2, 1978 and the Senate on August 22, 1978.

[14] H.J. Res. 554 required that the state legislatures act on ratification within a seven year period.

[15] In the 98th Congress, D.C. Delegate Walter Fauntroy introduced H.R. 3861 on September 12, 1983, and Senator Edward Kennedy introduced S. 2672 on May 15, 1984. In the 99th Congress, Delegate Fauntroy introduced H.R. 325 on January 3, 1985, and Senator Kennedy introduced S. 293 on January 24, 1985. In the 100th Congress, Delegate Fauntroy introduced H.R. 51 on January 6, 1987, and Senator Kennedy introduced S. 863 on March 26, 1987. In the 101st Congress, Delegate Fauntroy introduced H.R. 51 on January 3, 1989, and Senator Kennedy introduced S. 2647 on May 17, 1990. In the 102nd Congress, Delegate Eleanor Holmes Norton introduced H.R. 2482 on May 29, 1991, and Senator Kennedy introduced S. 2023 on November 22, 1991. In the 103rd Congress, Delegate Norton introduced H.R. 51 on January 5, 1993, and Senator Kennedy introduced S. 898 on May 5, 1993. In the 104th Congress, Delegate Norton introduced H.R. 51 on January 4, 1995.

[16] H.R. 51 failed on November 21, 1993, by a vote of 277–153. The Senate never voted on any of the statehood bills introduced by Senator Kennedy.

[17] According to the Congressional Research Service, there are concerns about the consequences of further loosening federal control over the city that houses the seat of the federal government, although statehood proposals have generally carved out a smaller area within the city over which the federal government would maintain control. There are additional concerns about the economic viability of D.C. as a state given that it does not have a mix of rural, suburban and urban areas found in other states, even though economic indicators show that D.C. compares favorably in this regard with other states. Fauntroy, October 31, 2001, at 7–9.

[18] In the 101st Congress, Representative Ralph Regula introduced H.R. 4195 on March 6, 1990. In the 102nd Congress, Representative Regula introduced H.R. 1204 on February 28, 1991. In the 103rd Congress, Representative Regula introduced H.R. 1205 on March 3, 1993. In the 104th Congress, Representative Regula introduced H.R. 1028 on February 23, 1995. In the 105th Congress, Representative Regula introduced H.R. 831 on February 25, 1997. In the 106th Congress, Representative Regula introduced H.R. 558 on February 3, 1999. In the 107th Congress, Representative Regula introduced H.R. 810 on March 9, 2001.

[19] *See* Voting Representation in Congress for the District of Columbia, Hearing Before the Senate Governmental Affairs Committee, 103rd Cong., S. Hrg. 103–1053 (August 4, 1994) at 90 (Statement of Jamin Raskin, Professor of Law, Washington College of Law) (suggesting that

The suggestion that D.C. remain its own separate entity, but have its residents vote for Maryland Senators, is similarly problematic. It is not clear what kind of support for this solution exists among D.C. residents, and it is unknown how Marylanders would feel about having their votes for Senate diluted by the nearly 600,000 residents of D.C.[20] Congress' power to impose this solution is also in question.[21]

In addition to the possible legislative solutions, D.C. residents have attempted to obtain Congressional representation through the courts. The most recent effort in this regard was *Alexander* v. *Daley*.[22] In that case, a 2–1 majority of a three-judge court ruled that under the Constitution, District residents were not entitled to representation in Congress, which the court held was reserved to the states. Because the constitution does not contemplate voting rights for District residents, the court further ruled that the lack of representation does not violate equal protection, due process, or any other constitutional principles. Therefore, despite its recognition of the "inequity of the situation plaintiffs seek to change," the court ruled that it could not grant the relief that the D.C. residents sought, indicating that they "must plead their cause in other venues."[23]

The legislative branch is the best venue for correcting this historic inequity. S. 3054 will achieve this important goal by granting District residents full Congressional representation in both chambers of the national legislature.

Constitutional Issues

There is some debate about the means by which voting rights may constitutionally be granted to D.C. residents. Congress clearly has the power, pursuant to Article IV of the Constitution, to grant statehood through legislation alone.[24] The Committee believes that affording D.C. full Congressional representation—two Senators and a House Member—may also be achieved through legislation alone, and that a constitutional amendment, though a reasonable means to this goal, is not a necessary step.

Article I of the Constitution specifically provides that the Senate itself shall be composed of two Senators from each "state," and that the House be composed of members chosen by the people of the several "states." Under the plain meaning of these clauses, the citizens of the District are not entitled to representation in the House or the Senate because the District of Columbia is not a state. Indeed,

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Maryland's consent would be required for retrocession pursuant to Article IV of the Constitution).

[20] Fauntroy, October 31, 2001, at 9, 11.

[21] *See* Voting Representation in Congress for the District of Columbia, Hearing Before the Senate Governmental Affairs Committee, 103rd Cong., S. Hrg. 103–1053 (August 4, 1994) at 92 (Statement of Jamin Raskin, Professor of Law, Washington College of Law) (suggesting that such an arrangement might, among other things, violate the constitutional requirement that members of Congress be elected "by the people" of the state).

[22] 90 F. Supp.2d 35 (D.D.C. 2000), *aff'd,* 531 U.S. 940 (2000). This case was actually two cases consolidated: *Adams* v. *Clinton,* Civ. No. 98–1665 (LFO, MBG, CKK) (D.D.C), filed June 30, 1998, and *Alexander* v. *Daley,* Civ. No. 98–2187 (LFO, MBG, CKK) (D.D.C.) filed September 14, 1998. Because they involved similar claims, the cases were consolidated on November 3, 1998.

[23] *Id.* at 72.

[24] Some commentators, however, suggest that granting statehood to D.C. would be constitutionally problematic. *See, e.g.,* Voting Representation in Congress for Citizens of the District of Columbia, Hearing Before the Senate Governmental Affairs Committee, 107th Cong., S. Hrg. 107–555 (May 23, 2002) at 75–76 (Statement of Adam H. Kurland, Professor of Law, Howard University School of Law) (suggesting the 23rd Amendment, which granted to D.C. electoral votes in Presidential elections, would have to be repealed).

this interpretation of Article I, supported by contemporary historical evidence, has been adopted by courts.[25]

Some argue that a constitutional amendment is necessary to alter this arrangement because it is integral to the constitutional structure of the United States, and represents a delicate compromise among the states that made ratification of the Constitution possible.[26] Thus, the argument goes, the present lack of D.C. representation in the federal legislature is a feature of American federalism and because Congress does not have the power, by itself, to alter the structure of the Constitution, a constitutional amendment would be required to change this inequity.[27]

The Committee believes that a constitutional amendment to afford D.C. full Congressional representation would be an effective and appropriate means to this end. The Committee does not, however, believe that a constitutional amendment is necessary; Congress has the power to treat D.C. as if it were a state for the purposes of Congressional representation, which is what S. 3054 does.

Congress already treats the District as though it were a state for over 500 statutory purposes—from federal taxation to military conscription to highway funds, education funds, and national motor voter requirements. The Supreme Court has also deemed D.C. the equivalent of a state for certain constitutional purposes, including the Fourteenth Amendment's Privileges and Immunities Clause and the Full Faith and Credit Clause under Article IV of the Constitution.[28] Even where the Supreme Court has held that D.C. residents do not have the same rights granted to inhabitants of a state by the Constitution, it has ruled in at least one case that Congress could extend those rights to D.C. residents.

That 1949 case, *National Mutual Insurance Co.* v. *Tidewater Transfer Co.,* considered the constitutional provision regarding diversity jurisdiction, which allows cases arising under state law to be brought in federal courts where the controversy exists between "citizens of different states."[29] An 1805 Supreme Court case had held that D.C. did not constitute a state for the purposes of that clause, and therefore that D.C. residents could not sue or be sued in diversity in federal court. Justice Marshall indicated, however, that the matter was one for "legislative, not judicial consideration."[30] It took over a hundred years, but Congress eventually took the cue: in 1940, Congress passed a law that extended diversity jurisdiction to cases involving D.C. residents, thereby essentially treating the District as if it were a state for the purposes of that provision of the Constitution.[31] The Senate Judiciary Committee, in reporting out the bill, cited Congress' plenary power over the District under Article I, section 8 of the Constitution.[32]

The *Tidewater* Court, in a plurality opinion, upheld the statute. The plurality determined that Congress' conclusion that it had the

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[25] *See, e.g., Alexander* v. *Daley,* 90 F. Supp.2d at 65.

[26] Voting Representation in Congress for Citizens of the District of Columbia, Hearing Before the Senate Governmental Affairs Committee, 107th Cong., S. Hrg. 107–555 (May 23, 2002) at 69 (Testimony of Adam H. Kurland, Professor of Law, Howard University School of Law).

[27] *Id.*

[28] *Id.* at 83 (Testimony of Jamin Raskin, Professor of Law, Washington College of Law).

[29] *National Mutual Ins. Co.* v. *Tidewater Transfer Co., Inc.,* 337 U.S. 582 (1949).

[30] *Hepburn & Dundas* v. *Ellzey,* 2 Cranch. 445, 463 (1805).

[31] Codified at 28 U.S.C. § 1332.

[32] *Tidewater,* 337 U.S. at 588–89.

requisite power under Article I was "well founded."[33] The plurality described that power as a "full and unlimited jurisdiction to provide for the general welfare" of the District "by any and every act of legislation which [Congress] may deem conducive to that end."[34] Based on this extensive power, as well Congress' power to ordain and establish the lower federal courts, the plurality held that Congress could extend diversity jurisdiction to include cases involving D.C. residents. Thus, Congress, pursuant to its plenary power over the District, was able to give D.C. residents rights—in this case access to the courts—that the Constitution appears on its face to deny them, and to grant only to citizens of states.[35]

As Walter Smith of the D.C. Appleseed Center, and L. Elise Dieterich of Swidler Berlin Shereff Friedman LLP, argue in their May 22, 2002 memorandum, "Congress' Authority to Pass Legislation Giving District of Columbia Citizens Voting Representation in Congress," the very situation that led the Supreme Court to conclude that Congress had authority to treat D.C. as if it were a state is paralleled here.[36] The holding in *Alexander* v. *Daley*—that Article I affords Congressional representation only to states, and that term cannot be interpreted to include D.C. for the purposes of those provisions—is similar to the holding in *Hepburn,* in which the Supreme Court held that Article III extends diversity jurisdiction only to states, which does not include D.C. It follows, therefore, that Congress may act here for the benefit of District residents pursuant to its plenary power over D.C. as it acted in 1940: by passing legislation to treat D.C. as if it were a state for the purposes of Congressional representation under Article I. As Smith and Dieterich put it, "Given the breadth of Congress' power under the District Clause, it would appear that Congress has the authority to provide for the 'general welfare' of D.C. citizens by providing them the most important right they as citizens should possess—the right to vote."[37]

Thus, by adopting S. 3054, even though a court has held that D.C. is not a "state" as that term is used under Article I for the purposes of Congressional representation, Congress may similarly choose to extend to the residents of the District representation in

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[33] *Id.* at 589.

[34] *Id.* at 602, quoting *Neild* v. *District of Columbia,* 110 F.2d 246, 250 (D.C. Cir. 1940).

[35] In answers he submitted to questions for the record in the May 23, 2002 Governmental Affairs Committee hearing, Voting Representation in Congress for Citizens of the District of Columbia, Professor Adam Kurland of Howard University argued that *Tidewater* held that "citizens of DC are not citizens of a State for the purposes of diversity jurisdiction, and that Congress lacked the legislative authority to alter that constitutional result." Voting Representation in Congress for Citizens of the District of Columbia, Hearing Before the Senate Governmental Affairs Committee, 107th Cong., S. Hrg. 107–555 (May 23, 2002) at 199–200. While it is certainly true that a majority of the Court affirmed the 1805 ruling that D.C. does not constitute a state for the purposes of the Constitutional clause regarding diversity, the *Tidewater* court based its very holding on Congressional authority to alter that result. Obviously Congress by itself does not have the power to change the Constitution, but it can and did in that case treat D.C. as if it were a state, granting District residents the same rights as state residents have under that Constitutional provision. It is on that Congressional power that the Committee relies here to advance legislation that treats D.C. as if it were a state for the purposes of Congressional representation.

[36] Voting Representation in Congress for Citizens of the District of Columbia, Hearing Before the Senate Governmental Affairs Committee, 107th Cong., S. Hrg. 107–555 (May 23, 2002) at 89–99 (Walter Smith, Esq. and L. Elise Dieterich, Esq., "Congress' Authority to Pass Legislation Giving District of Columbia Citizens Voting Representation in Congress," May 22, 2002, submitted for the record by Professor Jamin Raskin). This memorandum is also included in the record of the Senate Governmental Affairs Committee business meeting dated October 9, 2002, at which the Committee voted to report S. 3054 favorably.

[37] *Id* at 90.

both chambers of Congress. Nothing in the Constitution prohibits this expressly—it is simply something that the Constitution grants specifically to the states, without mentioning the District of Columbia either way. To be sure, D.C. is not a state, nor would S. 3054 make it a state. Nevertheless, Congress may as it did with access to the courts, grant D.C. the same voice in the national legislature that states expressly receive under the Constitution.

The *Tidewater* Court made clear that the one limiting principle on Congress' plenary power over the District is that "it may not draw into Congressional control subjects over which there has been no delegation of power to the Federal Government."[38] In that case, the court held that Congress' general authority to ordain and establish the lower federal courts meant that Congress already had the power to expand jurisdictional limits beyond those expressly provided in the Constitution, as it had in the context of bankruptcy.[39] Thus, Congress was not venturing into an area outside its normal scope of authority. Similarly, granting representation in the national legislature is something Congress already has the authority to do, pursuant to its power to grant Statehood under Article IV, Section 3. Therefore, Congress has the power to act on behalf of the residents of the District, and treat them as if they were residents of a state, in order to rectify an inequity that has persisted now for over 200 years.

Increased Membership of the House of Representatives

Membership in the House has stayed the same since 1911, when it was set at 435 members. Until then, throughout the 19th century, Congress increased the size of the House with each census both to account for the growth in population and to provide for additional Members from newly admitted states.[40] As a result of a dispute about the validity of the 1920 census, Congress failed to approve a bill that would have increased the size of the House to 438 (the number required so that no state would lose a Member), and indeed failed to reapportion the House until after the next census.[41] In 1929, just before the 1930 census, Congress passed the statute in effect today, which provides for reapportionment based on the "then-existing number of Representatives."[42] The number in effect then, 435, has not changed. When Alaska and Hawaii were admitted, a House bill was introduced to increase the membership in the House, but it never reached the floor.[43]

There is no magic to the number "435," and there appears to be no reason beyond tradition simply to stay with it. The Committee deems it appropriate to increase the House membership in this case as a recognition that D.C.'s Delegate in the House really is and should always have been regarded as a full Member of that body.

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[38] *Tidewater,* 337 U.S. at 602.

[39] *Id.* at 594–95.

[40] David C. Huckabee, "House of Representatives: Setting the Size at 435," CRS Report for Congress (July 11, 1995) at 1.

[41] *Id.* at 1–2.

[42] 2 U.S.C. §2(a).

[43] H.R. 10264 was reported by the House Judiciary Committee on February 20, 1962, but failed when it was recommitted on March 8, 1962 by a voice vote. *See* Huckabee at 6.

III. LEGISLATIVE HISTORY

S. 3054, the "No Taxation Without Representation Act of 2002," was introduced by Chairman Lieberman on October 3, 2002 and referred to the Governmental Affairs Committee. Senators Feingold, Kennedy, Durbin, Jeffords, Schumer, Daschle, Mikulski, Sarbanes, and Landrieu joined as co-sponsors of this legislation.

Senator Lieberman had introduced an earlier bill, S. 603, the "No Taxation Without Representation Act of 2001," which also addressed the inequity of D.C. residents' lack of Congressional voting representation. On February 14, 2002, during the debate on S. 565, the Equal Protection of Voting Rights Act of 2001, Chairman Lieberman and Senator Feingold offered, and then withdrew, S. 603 as an amendment to that legislation. This debate marked the first time since 1978 that the issue of voting representation for residents of the District of Columbia had been considered on the floor of the United States Senate. As Chairman Lieberman stated:

> The vote is a civic entitlement of every American citizen. We believe the vote to be democracy's most essential tool. Not only is the vote the indispensable sparkplug of our democracy, the vote is the sine qua non of democracy and equality because each person's vote is of equal weight, no matter what their wealth is or their station in life—or is it? That is the question this amendment poses. As we engage in this debate to remedy the voting problems that arose in the election of 2000, we have to acknowledge the most long standing denial of voting representation in our country, and that is the denial of voting rights to the citizens who live right here in our Nation's Capital.[44]

On May 23, 2002, the Committee held a hearing entitled "Voting Representation in Congress for Citizens of the District of Columbia." Nine witnesses appeared: Senator Russell Feingold, an original cosponsor of both S. 603 and S. 3054; Congresswoman Eddie Bernice Johnson (D–TX) Chair, Congressional Black Caucus; Congresswoman Eleanor Holmes Norton (Delegate–D.C.); the Honorable Anthony A. Williams, Mayor of the District of Columbia; the Honorable Linda W. Cropp, Chairwoman, D.C. City Council; the Honorable Florence H. Pendleton, District of Columbia Statehood Senator; Wade Henderson, Executive Director, Leadership Conference on Civil Rights; Adam H. Kurland, Professor of Law, Howard University School of Law; and Jamin Raskin, Professor, Washington College of Law, American University.

Resolutions in support of voting representation for residents of the District were submitted by the State of Illinois, as well as the cities of Philadelphia, Chicago, Baltimore, New Orleans, Cleveland, Los Angeles, and San Francisco. Written statements for the record were also submitted by Betty Ann Kane, on behalf of the Board of Directors, Committee for the Capital City; the Honorable Ralph Regula, (R–Ohio); the Honorable Paul Strauss, Shadow United States Senator, District of Columbia; John Forster, Activities Coordinator, Committee for the Capital City; and Antonia Hernandez, President and General Counsel, Mexican American Legal Defense and Educational Fund.

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[44] 148 Cong. Rec. S822 (February 14, 2002).

All of the witnesses testified in support of full voting representation in Congress for citizens of the District of Columbia. Congresswoman Eleanor Holmes Norton testified that the District is "seriously harmed" by having no representation in the Senate. She noted that after struggling to get the budget of the District of Columbia to the floor of the House,

> I must then stand aside, unable to cast a vote on our own budget, while members of the House from 49 States where residents pay less in Federal income taxes per capita than my constituents vote yea or nay on the D.C. budget. Indeed, my colleagues from seven states that have populations about our size each have one vote in the House and two in the Senate on the D.C. budget and everything else. This pathetic paradox has been acted out on the House floor countless times in the 32 years D.C. has had a delegate.[45]

The Committee met on October 9, 2002 to consider S. 3054. The Committee ordered the bill reported out of the Committee by a vote of 9–0. Senators Levin, Akaka, Durbin, Cleland, Torricelli, Carper, Carnahan, Dayton, and Lieberman voted in favor of the legislation.

IV. SECTION-BY-SECTION ANALYSIS

Section 1 sets forth the short title of the Act, the "No Taxation Without Representation Act of 2002."

Section 2 details the findings of the Act. Congress finds that (1) the residents of the District of Columbia are the only Americans who pay Federal income taxes but are denied voting representation in the House of Representatives and the Senate, (2) the residents of the District suffer the very injustice against which our Founding Fathers fought, because they do not have voting representation as other taxpaying Americans do and are nevertheless required to pay Federal income taxes, unlike Americans who live in the territories, (3) the principle of one-person, one vote requires that residents of the District are afforded full voting representation in the House and Senate, (4) despite the denial of voting representation, Americans in the Nation's Capital are second among residents of all States in the per capita income taxes paid to the Federal Government, and (5) unequal voting representation in our representative democracy is inconsistent with the founding principles of the Nation and the strongly held principles of the American people today.

Section 3 specifically entitles D.C. residents to the Congressional representation they would have if they were residents of a State. The section permits them to elect two Senators and as many Members of the House of Representatives as Washington, D.C. would be apportioned based on its population if it were a State. (Under current apportionment standards, D.C. would receive one Representative.)

Section 4 provides for elections of D.C.'s two Senators and its Representative in the House of Representatives, requiring that 30 days following enactment, the Mayor of Washington, D.C. issue a proclamation for the election of two Senators and a Representative

[45] Voting Representation in Congress for Citizens of the District of Columbia, Hearing Before the Senate Governmental Affairs Committee, 107th Cong., S. Hrg. 107–555 (May 23, 2002) at 7 (Testimony of the Honorable Eleanor Holmes Norton).

to take place, including a primary and a general election according to local law. Once elections are held, the bill provides that certification of the results by the Mayor shall entitle the winners to take seats in the appropriate Chambers of Congress.

Section 5 provides that the permanent membership of the House of Representatives will be increased by one to 436. This section also provides that until the next reapportionment—when D.C. will receive as many Members in the House as its population allows—D.C. will be entitled to elect one Member of the House of Representatives. In addition, this section expressly provides that D.C.'s current Delegate to the House of Representatives will continue in her current position until the elections contemplated by the bill take place.

V. EVALUATION OF REGULATORY IMPACT

Paragraph 11(b)(1) of rule XXVI of the Standing Rules of the Senate requires that each report accompanying a bill evaluate the "regulatory impact which would be incurred in carrying out this bill." According to the Congressional Budget Office (CBO), S. 3054 contains no private sector mandates, but does contain an intergovernmental mandate as defined in the Unfunded Mandates Reform Act (UMRA). The bill would require the District to hold both a primary and a general election to fill the two Senate seats and one seat in the House of Representatives. CBO estimates that the costs to comply with those requirements would not exceed the threshold established in UMRA. S. 3054 has no additional regulatory impact.

VI. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, October 16, 2002.

Hon. JOSEPH I. LIEBERMAN,
Chairman, Committee on Governmental Affairs, U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 3054, the No Taxation Without Representation Act of 2002.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

S. 3054—No Taxation Without Representation Act of 2002

S. 3054 would deem the District of Columbia to have the status of a state for the purposes of Congressional representation. The bill would authorize the District of Columbia to elect two Senators in the United States Senate and as many Representatives in the House of Representatives to which a similarly populous state would be entitled.

Based on the current administrative and expense allowances available for Senators and other typical office costs, CBO estimates that the addition of two new Senators would cost approximately $5

million annually beginning in fiscal year 2003, subject to the appropriation of necessary funds. Establishing voting representation in the House of Representatives would not add significant costs because the District of Columbia currently has a nonvoting delegate to that chamber.

Enacting S. 3054 would increase direct spending for the payment for the salaries of the two new Senators. CBO estimates that the increase in direct spending would be approximately $400,000 per year.

The bill contains no private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA). S. 3054 contains an intergovernmental mandate as defined in UMRA because it would require the District of Columbia to hold both a primary and general election to fill two Senate seats and one seat in the House of Representatives. Based on information from the Board of Elections and Ethics of the District of Columbia, CBO estimates that the one-time cost to hold a special primary and general election would be less than $1 million, well below the threshold established in UMRA ($58 million in 2002, adjusted annually for inflation). No additional costs would be incurred in subsequent years as the elections would be part of the District's normal election cycle.

The CBO staff contacts for this estimate are Matthew Pickford (for federal costs), who can be reached at 226–2860, and Susan Sieg Tompkins (for the state and local impact), who can be reached at 225–3220. This estimate was approved by Robert A. Sunshine, Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, must be shown, S. 3054 would effect no changes in existing law.

VIII. MINORITY VIEWS

Voting representation in Congress for the residents of the District of Columbia is a serious and important issue that has been the subject of debate since the inception of this Nation. Historical records dating back to the founding of this country indicate that this issue is not a new one and is a complicated one raising important constitutional issues.[1] I am troubled, therefore, that the Committee has favorably reported a bill to the full Senate of this magnitude that was introduced less than one week prior to the Committee business meeting. This Committee did hold a hearing on the issue of voting representation for the District of Columbia in May; however, this Committee was not provided enough information or time to adequately make a decision on this new piece of legislation. As of this business meeting, the May hearing record is incomplete—post-hearing questions Senator Fred Thompson submitted to legal experts who testified at the hearing have not all been returned. The questions Senator Thompson submitted for the record go right to the heart of the matter: does Congress have the power through simple legislation to provide District residents voting representation in Congress or does it require a Constitutional amendment?

Representation in the House of Representatives and the U.S. Senate is governed by the United States Constitution. Governing the election of U.S. Senators, Article I, § 3 of the Constitution states, "[t]he Senate of the United States shall be composed of two Senators from each State." With regard to electing Members of the House, Article I, § 2 provides that the House of Representatives shall be composed of members chosen by the people of the several states and that each member of Congress shall be an inhabitant of the state from which he shall be chosen. Implicit in each section is the requirement that the individuals elected come from a "State"

[1] The issue of voting representation for D.C. residents has been debated and considered for over 200 years, beginning with the Continental Congress. A permanent seat for the government was desired to end the movement of Congress from city to city. The importance of creating the District under the exclusive legislative authority of Congress was highlighted following an incident in 1783 when the Congress was meeting in Philadelphia. Continental soldiers left their barracks and marched to Congress to collect their unpaid wages. The Congress, after seeking help from the local officials for protection, were denied assistance. Under increasing threats, the Congress adjourned and reconvened in Princeton, NJ. This revolt highlighted the need for Congress to have control of its surroundings, for its protection. In 1787, the Constitutional Convention agreed to provide exclusive control to the federal government over the national capital.

The constitutional provisions adopted did not set a specific location and much debate occurred thereafter as to where to locate the seat of the government. Philadelphia and New York were among the cities lobbying for that privilege; however, a final agreement was made to locate the capital on the Potomac River. In 1790, Congress authorized the President to appoint a panel of three commissioners to fix an exact location along the Potomac River. Following that time, Maryland and Virginia ceded land accordingly to the federal government. From 1790 until 1801, those inhabitants of the District remained under the laws of the respective states and were allowed to continue voting in those states as residents. This ended in 1801 when Congress passed the Organic Act of 1801 followed by the Organic Act of 1802, which combined established a local government. At that time, residents of the new city were no longer permitted to vote in Maryland and Virginia.

of the United States. Because the District of Columbia is not a state, nor, in fact, does the majority claim it to be, this legislation is inadequate to circumvent these constitutional provisions. Instead, the provisions must be repealed or, as the minority contemplates, rectified by subsequent amendment.[2]

Furthermore, treating the District of Columbia as a state without amending the Constitution is an attempt to circumvent the longstanding principles of federalism first enunciated by the Framers. The Framers created a dual system of governance for America, dividing power between the States and the federal government. In order for each to serve its proper function in our federal system, States must maintain independence of the federal government, and consequently, the federal government must remain independent of the States.

Further, in discussing the authorities of Congress, the Constitution specifically refers to States in delineating the makeup of the federal legislature, whereas other provisions direct Congress' authority over varying entities within the United States, including the District as the "seat of Government,"[3] the many Indian Tribes,[4] and territories.[5] The District of Columbia is a federal enclave, designed to be both politically and economically dependent on the federal government. Legislating this enclave to the status of a State, without amending the Constitution or making it a State, would violate the federalist principle of one State among many. Because it is the national capital, The District would be primus inter pares, first among equals.[6] It would become, as James Madison argued, the entity "whose sole business is to govern, to control all the other states. It would be the imperial state; it would be 'Rome on the Potomac.'"[7]

Alternatively, the majority's conclusion that mere legislation will grant the District the status of a State makes light of the serious process this Nation undertook to ratify the 23rd Amendment. The 23rd Amendment provides the "District constituting the seat of Government of the United States" with three electoral votes in presidential elections. Congress recognized that the Constitution prevented residents of the District from participating in presidential elections; the District is not a state and, therefore, did not have the Congressional representation necessary to participate in the Electoral College. Congress does not have the authority through simple legislation to alter the presidential election process. Similarly, Congress does not have the authority through simple legislation to alter the makeup of the federal legislature as provided for in Article I, §§ 2–3 of the Constitution.

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[2] In fact, a subsequent amendment was precisely the approach taken by this body in 1978. At that time, Assistant Attorney General John M. Harmon stated that "it was the intent on behalf of the Framers that the actual seat of the Federal Government, as opposed to its other installations, be outside any State and independent of the cooperation and consent of the State authorities. . . . If these reasons have lost validity, the appropriate response would be to provide statehood for the District by constitutional amendment rather than to ignore the Framers' intentions."

See Department of Justice "Report to the Attorney General on The Question of Statehood for the District of Columbia," April 3, 1987, at p.2.

[3] Article I, § 8, Clause 17.

[4] Article I, § 8, Clause 3.

[5] Article IV, § 3, Clause 2.

[6] Department of Justice, April 2, 1987, at p. 1.

[7] *Id.*

The majority consistently points to other instances where Congress treats the District as a state, as authority for allowing the District to be treated as such in the particular instance of awarding voting rights. This argument, however, is wholly unpersuasive in supplanting the need for a constitutional amendment to give District residents full representation in Congress.

Legislation that treats the District "as if it were a state" is a permissible use of Congressional authority, when done pursuant to Congress' powers, as enumerated in Article I, § 8 of the Constitution. However, this authority does not extend to altering the make-up of the federal legislature, as provided for in Article I, §§ 2–3 of the Constitution. Congress has absolutely no authority to pass legislation treating the District as a state for purposes of providing and allocating representatives in the national legislature.

The majority cites the Tidewater[8] case as controlling in this instance. In this case, five justices of the U.S. Supreme Court concurred in a decision that upheld a statute allowing District residents to sue residents of other states in federal courts under diversity jurisdiction.[9] The majority infers from this holding, as well as comments made by Justice Marshall in the Ellzey[10] case, that Congress has the power to give District residents voting rights.[11] This conclusion, however, is wholly unsupported.

In Tidewater, six justices reaffirmed the opinion of Justice Marshall in Ellzey, holding that District residents are not citizens of a State for the purposes of diversity jurisdiction, and that Congress lacks the authority to modify that result.[12] Tidewater and Ellzey do not, as the majority argues, provide Congress with the authority to grant voting rights to District residents, rather, these cases merely stand for the presumption that Congress has the ability to modify the jurisdiction of the federal courts.[13]

In addition to the evidence of the Framers' intent, there have been consistent interpretations of Congress' authority to legislate on this issue in the legal community. The Justice Department, during both Republican and Democrat Administrations, has consistently maintained that providing D.C. residents with voting representation in Congress would require a Constitutional amendment.[14] A constitutional amendment was required to provide for di-

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

[9] The Tidewater case was decided by a plurality decision—a majority of the Supreme Court Justices concurred in the decision to the case but disagreed in the rationale. As a result, there is no opinion from Tidewater which is controlling or binding on the courts.

[10] *Hepburn & Dundas* v. *Ellzey,* 6 U.S. 445 (1805).

[11] Chief Justice John Marshall concluded in the Ellzey case that residents in the District of Columbia are not residents of a State as provided in the Constitution for purposes of diversity jurisdiction. Chief Justice Marshall concedes the discrepancy since District residents are United States citizens and that a solution exists through the legislation. He did not discuss in detail whether simple legislation or a Constitutional amendment was required. Congress eventually legislated a solution, using its authority to amend the jurisdiction of the courts.

[12] See Tidewater at 588: "We therefore decline to overrule the opinion of Chief Justice Marshall, and we hold that the District of Columbia is not a state within Article III of the Constitution. In other words, cases between citizens of the District and those of the states were not included in the catalogue of controversies over which the Congress could give jurisdiction to the federal courts by virtue of Art. III."

[13] Thus when Justice Marshall states that the matter was one for "legislative, not judicial consideration," he is not talking about giving the District all rights guaranteed to states, but merely adjusting the jurisdiction of the federal courts. Ellzey, 6 U.S. at 463.

[14] See generally Report to the Attorney General on the Question of Statehood for the District of Columbia (April 3, 1987).

rect election of Senators,[15] women's suffrage,[16] and the District's participation in the election of the President and Vice President.[17] For example, during the Carter Administration the Justice Department maintained in their testimony before the Senate Judiciary Committee that "because article I was in part intended precisely to distinguish the Federal District from the States, we do not believe that the word 'State' as used in article I can fairly be construed to include the District under any theory of 'nominal statehood.'"[18] During the 1960 consideration of the constitutional amendment to allow D.C. residents to vote in presidential elections, the House Judiciary Committee concluded that just as the Constitution at that time only provided selection of the President and Vice President through the States, the Constitution provides voting representation in Congress through the States.[19] Moreover, in 2000 the U.S. District Court for the District of Columbia concluded, "denial of representation does not deny them equal protection, abridge their privileges or immunities, deprive them of liberty without due process, or violate the guarantee of a republican form of government."[20] Any contradiction in the lack of Congressional voting representation for residents of the District of Columbia derives from the Constitution.

Thus, to achieve the goal of granting Congressional representation to the residents of the District of Columbia, neither the Constitution, nor statute, nor case law provides Congress with the power to bypass the constitutional amendment process.

GEORGE VOINOVICH.
JIM BUNNING.

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[15] U.S. Const. Amend. XVII.
[16] U.S. Const. Amend. XIX.
[17] U.S. Const. Amend. XXIII. In 1961, President Kennedy signed the 23rd Amendment which was ratified by the States in 1963. This amendment allows District residents to vote for President and Vice President as if D.C. were a state.
[18] District of Columbia Representation in Congress, Hearings Before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. Senate, 95th Congress, 2d Session on S.J. Res. 65. (April 17, 27 and 28, 1978), p. 19.
[19] Granting Representation in the Electoral College to the District of Columbia, Committee on the Judiciary, U.S. House of Representatives, 86th Congress, 2d Session (May 3, 1960), p. 2.
[20] *Adams* v. *Clinton,* 90 F.Supp. 2d at 72 (2000). The opinion in this case highlights records from the Constitutional Convention that the framers of the Constitution intended not to grant residents of the District voting representation in Congress. They intended for Congress to be the governing body over the federal city.