S. HRG. 110–440

# ENDING TAXATION WITHOUT REPRESENTATION: THE CONSTITUTIONALITY OF S. 1257

## HEARING

BEFORE THE

## COMMITTEE ON THE JUDICIARY
## UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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# ENDING TAXATION WITHOUT REPRESENTATION: THE CONSTITUTIONALITY OF S. 1257

**WEDNESDAY, MAY 23, 2007**

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
*Washington, D.C.*

The Committee met, Pursuant to notice, at 1:32 p.m., in room SD–226, Dirksen Senate Office Building, Hon. Russell D. Feingold, presiding.

Present: Senators Leahy and Hatch.

## OPENING STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator FEINGOLD. I call the committee to order.

Good afternoon, everybody. We will start the hearing and go as far as we can, then there are going to be two or three votes, so we will recess the committee and come back as soon as I can at that point. Good afternoon, Mr. Chairman.

Two hundred and twenty years ago this September, in Philadelphia, Pennsylvania, our Nation's Founders adopted the Constitution of the United States. We are here today to consider whether that document, perhaps the greatest testament to democracy and freedom in human history, prevents the elected legislature of the people of this country from granting the most basic right of citizenship to the people of the District of Columbia.

While I understand the textual and historical arguments made by those who believe that right can only be granted through a constitutional amendment, I simply cannot agree that our historic charter compelled that result.

We are fortunate to have with us today distinguished experts on constitutional law to give this committee a full airing of the issues raised by S. 1257, the District of Columbia House Voting Rights Act of 2007. We look forward to their testimony.

The bill would increase the size of the House of Representatives by two seats, granting one of those seats to the District of Columbia and the other to Utah, which fell just 857 people short of picking up a fourth seat in the reapportionment that took place after the 2000 Census.

A number of hearings have been held on the bill over the past few years, including just last week in the Homeland Security and Governmental Affairs Committee, which is the committee of jurisdiction in the Senate.

Senator Leahy and I decided to hold this hearing because we believe that it is important for the Senate Judiciary Committee to

carefully consider the primary argument raised by the opponents of S. 1257, that the bill is unconstitutional.

The two sides of this constitutional debate are well-known. Proponents of the bill believe that the District clause of Article I, Section 8 gives Congress the power to grant a vote in the House to residents in the District of Columbia, while opponents believe that doing so would violate what is sometimes referred to as the "Composition Clause" of Article I, Section 2, which provides that the House of Representatives shall be composed of members chosen by "the people of the several States."

Proponents note that the courts have interpreted the District clause quite broadly and have upheld congressional enactments that treat the District as a State and its citizens like citizens of States for various purposes.

Opponents argue that the plain language of the Constitution in this context leaves no doubt that the Framers meant what they said when they said that only people living in "States" could be represented in Congress.

This is obviously not an easy question of constitutional interpretation. There is no slam dunk here, but the answer is of enormous consequence. Over half a million people in the city where we now sit are currently unrepresented in Congress. They pay taxes at the second-highest rate per capita of any State in the Nation. They and their sons and daughters, fathers and mothers, defend our country in war.

The decisions of their local elected representatives are subject to a congressional veto, and they live in the capital city of the greatest democracy in the world. Yet, they have not even one voting representative in even one House of the legislature that governs them. In some ways, it is as if the American Revolution passed them by. That is a fundamental injustice.

We in Congress have a duty to correct that injustice, and now we have a chance to do so because a political "perfect storm" seems to be upon us, allowing partisan concerns to take a backseat, as they should, to granting fundamental rights and fulfilling the promise of democracy for the residents of the District of Columbia.

No person will be hurt, no group will be disadvantaged if we pass this bill. But hundreds of thousands of people will continue to be disadvantaged if we fail to act, simply because they live in the Nation's Capital.

In my view, in light of the historic wrong that this bill will correct, the case for its constitutionality is certainly strong enough to justify enacting it and asking the Supreme Court to make the final decision.

The Constitution grants Congress the power of "exclusive legislation in all cases whatsoever" over the District. It seems odd that we cannot use that authority to ensure that this government's just powers are derived from the consent of the governed.

The other fundamental document of our founding, the Declaration of Independence, laid out a list of grievances against the King of Great Britain, including the following: "He has refused to pass other laws for the accommodation of large districts of people unless those people would relinquish the right of representation in the leg-

islature, a right inestimable to them and formidable to tyrants only."

Those who rely on constitutional arguments to oppose this bill should ask themselves not only what the Framers thought at the time, but what they would think today if they were faced with the question of whether their handiwork should be used to prevent Congress from granting over half a million people the most basic right in a democracy, the right of representation in the legislature, a "right inestimable to them and formidable to tyrants only." I think the answer to that question is obvious.

Now let me turn to the Chairman of the full committee, my friend Senator Leahy.

**STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT**

Chairman LEAHY. Thank you, Mr. Chairman. I appreciate you holding this hearing, and I am proud to be a co-sponsor with you of this legislation. As many people know, I have taken this position consistently all the years I have been in the Senate. The District of Columbia and the State of Vermont have roughly the same, within 10 percent, population.

I think last year, if you will remember, Mr. Chairman, we were sitting here and we were having hearings on the Voting Rights Act. We came together, Republicans and Democrats, and we passed that, something of the extension so that we could make sure that the fundamental right to vote of all Americans was protected.

I wrote a letter to my four grandchildren at the time and told them this was a gift to them, that all four will have their rights protected when they are old enough to vote.

The DC Voting Rights bill, I think, falls in that same category. It was glad to see Congresswoman Eleanor Holmes Norton, who is a friend of longstanding. She has testified here before. It is interesting. As a young lawyer, she worked for civil rights and voting rights around the country. She then comes home. You helped get a lot of people the right to vote. Unfortunately, you could not vote yourself, even though you are such a strong voice in the District.

I see another friend, retired Chief Judge Patricia Wald, in the audience. In her thoughtful testimony she highlights the fact that Congress has a greater power to confer Statehood, and the District certainly contains a lesser one: the power to grant District residents voting rights in the House.

Congress exercised that authority in the past without rigid adherence to constitutional text. We granted voting rights to Americans abroad. They are able to vote in their last stated residence, regardless of whether they are citizens of that State, are now paying taxes in that State, or even have an intent to return to the State.

Congress has repeatedly used the District of Columbia as a State for other purposes. In the Judiciary Act of 1789, it made clear that Federal courts may hear cases between citizens of different States, and included the District for that.

We have allowed the District to be treated as a State for purposes of congressional power in regulating commerce. The Sixteenth Amendment grants Congress the power to directly tax in-

comes without apportionment among the several States, but includes, of course, the District.

In 2005, President Bush praised the Iraqi people for exercising their democratic right to vote and said that by participating in free elections the Iraqi people firmly rejected the anti-democratic ideology of the terrorists. They demonstrated the kind of courage that is always the foundation of sound government.

Now, the President spends a fair amount of time here in Washington, DC. I wish he would speak just as enthusiastically about the people who live here. The United States is the only democracy in the world that denies a portion of its citizens full representation, the only democracy in the world.

The administration contends we lack authority for this. Well, the purpose of the District clause in the Constitution was to ensure Federal authority over the Nation's Capital, not to deprive citizens living there their rights of citizenship.

The founders established a Republican form of government. That system has been perfected for more than 200 years. I find disappointing the administration's threat to veto this legislation. Sometimes I think they only read Article II that establishes the exclusive and all-encompassing power of the government and the President. I am glad that they at least acknowledged it in Article I when it comes to the District clause.

So I have a much longer statement and I will put it in the record. There are certain things where the time has come. Just like the voting rights extension, the time has come for this, too.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Senator FEINGOLD. Thank you so much, Mr. Chairman, for your leadership of the committee, and in particular your long-time commitment to this issue. Thank you for helping us open up the hearing.

We will now turn to our first panel, but before we proceed further I understand that Mr. Paul Strauss, who is the elected shadow Senator for the District of Columbia, is with us today.

Senator Strauss, if you can stand and be recognized at this time. Thank you very much for being here.

Now to our panel. Our first witness is Representative Chris Cannon. He has represented the Third District of Utah in the House since 1997. He is currently the Ranking Member of the Subcommittee on Commercial and Administrative Law of the House Judiciary Committee. He earned his undergraduate and law degrees from Brigham Young University.

Mr. Cannon, thank you for joining us today. You may proceed.

## STATEMENT OF HON. CHRIS CANNON, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF UTAH

Representative CANNON. Thank you, Mr. Feingold. I apologize, Mr. Chairman, for being late here. We had a vote on this side. If it is agreeable, we also have an ongoing hearing with Ms. Goodling on the Senate side, which is part of the subject matter of the subcommittee that I rank on over there. So if it is acceptable, I would like to be able to slip out after my testimony.

Thank you for inviting me to speak today about the District of Columbia House Voting Rights Act of 2007. I strongly support this legislation because it would correct two injustices. It would provide a long-overdue voting representative for residents of the District of Columbia and would restore adequate representation for residents of the State of Utah.

I appreciate that some have questioned whether providing District residents the fundamental right to vote is within Congress's power, but I do not share their doubts. There is no historical basis for concluding that the framers intended to disenfranchise residents of the Nation's Capital. In my view, the District clause of the Constitution gives Congress the necessary authority to restore voting rights to those residents.

Although the crux of the debate regarding this legislation focuses on the D.C. portion of the bill, let me, first, speak about the Utah portion. Utah is in the unique position to remedy a wrong imposed on it after the 2000 census.

Utah lost out on the fourth seat because of a Census Bureau decision to count, and enumerate to their respective homes, States' government employees residing temporarily abroad, but not to count similarly situated missionaries.

Had the Bureau either not counted any Americans residing temporarily abroad or counted all such Americans and not just those employed by the Federal Government, Utah would have been awarded a fourth seat after the 2000 Census.

This legislation puts Utah on a path to remedy a fraud decision, although I have some questions about the language in the House legislation that mandated an at-Large seat for Utah. I want to be clear that those concerns were not regarding the constitutionality of an at-Large seat, but rather its effects on the State's prerogatives and the historic role of the State in the apportionment.

I appreciate the deference the Senate bill has shown the State of Utah and look forward to working with you as this language of the legislation moves forward.

In order to understand that the District portion of this legislation, it is important to take a historical perspective. At the time of our Nation's founding, the Framers provided for a Federal District to house the seat of the Federal Government. This was done to ensure that the Nation's Capital would be insulated from undue influence from the States and that its security would be not left in the hands of any one State.

Denying District of Columbia residents the right in vote in elections for the House of Representatives was not necessary, or even relevant, to further these purposes. And contrary to the claims of some, there is no indication in the ratification debates that the Framers intended such disenfranchisement.

In fact, there was no discussion at all during the constitutional convention, and almost none in the State ratification debates as to the voting rights of the new District residents, likely because it was assumed that the States donating the land for the District would provide for the voting rights of the residents of the ceded land.

Indeed, from 1790 to 1800, District residents continued to vote in congressional elections in Maryland and Virginia. It was not until 1800 when the District became subject to complete Federal

control that the residents of the District lost their voting rights. The Framer's idea which focused closely on this issue may well have stemmed from the fact that there was no District of Columbia at the time the Constitution was ratified.

At that time, the Framers had prescribed only the District's purpose and the limitations on its geographic size. Even if location had not been selected, many municipalities, including Trenton, New Jersey, Yorktown, Virginia, and Reading, Pennsylvania vied for the honor. It was not until Congress passed the Residence Act that the site that is now the District of Columbia was selected as the seat of the Federal Government.

For all the Framers knew, the Capital would be located in the middle of an existing State, thereby allowing the residents of the District to continuing voting in that State, as residents of Federal enclaves do today.

Although they did not perceive a need explicitly to protect District residents' voting rights, the Framers did authorize Congress to exercise exclusive legislation in all cases whatsoever over the District.

As several constitutional scholars have observed, Congress has used its power under this clause numerous times to treat the residents of the District as though they were residents of a State, and that has been true even in instances where the Constitution gives rights or imposes responsibilities only on citizens of States.

Opponents of this legislation argue, however, that the Framers meant to exclude District residents from voting by providing, in Article I, Section 2, that Members of the House are chosen by the people of the several States.

But that language was not chosen because of an intention to deny democracy to residents of the Nation's Capital. Rather, the ratification debates indicate that this language resulted from two decisions made in the course of those debates: the decision that the House would be elected by the people of the several States as opposed to by State legislatures, and the decision to allow voting qualifications to be set by the State rather than at the Federal level.

At no point during the debates over these issues did anyone mention the residents of the newly conceived Federal District, let alone suggest that they would be deprived of the fundamental individual right to voting for representation.

In short, there is no historical basis for reading into the clause a limitation that would prevent Congress from ensuring adequate representation for all of the Nation's citizens. This act ensures adequate representation both in Utah and in the District of Columbia, and it does so constitutionally. I, therefore, urge you to join me in supporting it.

Senator FEINGOLD. Thank you very much, Representative.

I see my colleague, a former Chairman of the committee and distinguished Senator from Utah, Senator Hatch, is here, and I turn to him now.

## STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. Well, thank you, Mr. Chairman. I want to thank you and Chairman Leahy for scheduling this hearing so promptly, and for you chairing this hearing today. You are both co-sponsors of S. 1257, the District of Columbia House Voting Rights Act of 2007.

I also want to thank Senator Lieberman, who chairs the Homeland Security and Government Affairs Committee, who introduced the bill and held a hearing on this less than 2 weeks ago.

I am happy to welcome my colleagues from Utah. I am really pleased to have you here, and my dear friend, Eleanor Holmes Norton, who I have great regard for in addition.

Mr. Chairman, S. 1257 would correct two injustices by giving to Utah the additional House seat that many in my State believe we deserve following the 2000 Census, and giving the half-million Americans living in the District of Columbia full House representation. Unlike the House version, S. 1257 correctly defers to Utah's choice as to how to provide for a fourth House Member.

This avoids potential constitutional difficulties on the Utah side of the equation. On the District of Columbia side, America's founders might not have foreseen the District becoming the major population center that it is today. But while they did not affirmatively provide in the Constitution for District representation, I do not believe that they negatively denied Congress the power to do so.

On numerous occasions, the Supreme Court has approved Congress's application to the District of "duties or privileges normally reserved for States." These include the application of direct taxes, court jurisdiction and diversity cases—Federal court jurisdiction, if you will—and regulation of commerce.

In each of these, and other instances, the Court has not viewed the word "States" so narrowly as to trump Congress's explicit and exclusive power to legislate for the District. I do not believe that we should do so here.

I want to emphasize what I said before the Homeland Security Committee: this bill should not be seen as a step toward either Statehood or Senate representation for the District of Columbia. America's founders wisely concluded that the Nation's Capital should not be one of its constituent States.

James Madison said that this was "an indispensable necessity, and while the House represents people, the Senate represents States which have equal suffrage in that body."

Now, I believe the Senate represents people, too, but one of the most important things here, and pivotal things, to me, is that only States have equal rights of suffrage in the U.S. Senate.

Now, as such, the District population supports House representation. Its status as a District does not justify Senate representation, and I would not support changing that or granting that. I acknowledge, as Judge Wald put it in her prepared statement, this is a "close and difficult constitutional question." There are legitimate arguments on both sides. I must note that there are both liberal and conservative legal experts on both sides.

That said, the commitment of America's Founders to a representative government, their grant of complete authority over the Dis-

trict of Columbia to Congress, their failure to prohibit District representation in the House, and both congressional and judicial precedent combine to satisfy me that S. 1257 rests on sufficiently firm constitutional ground.

Now, Mr. Chairman, the distinguished witnesses before us represent different views and perspectives which are well suited to the question before us, whether or not S. 1257 is constitutional.

I am pleased to see here today the congressional Representatives of both Utah and the District, Representative Chris Cannon and Delegate Eleanor Holmes Norton, as well as our own Utah Attorney General, Mark Shurtleff, on the first panel. I have respect for each one of you.

And on the second panel, we have a mixture of views, with lawyers and law professors, a former Chief appeals court judge, as well as representatives from the Congressional Research Service and the Department of Justice.

Now, this is an able and learned group of witnesses. I know most all of them, and we will all benefit from their testimony. I particularly look forward to it and the interchange that we might have.

Thank you, Mr. Chairman. That is all I need to say at this point.

Senator FEINGOLD. Thank you, Senator Hatch.

Representative CANNON. Mr. Chairman?

Senator FEINGOLD. Yes, Representative Cannon?

Representative CANNON. Would you excuse me from the hearing? If there are some questions I would be happy to answer them, but we do have this hearing ongoing on the House side.

Senator FEINGOLD. Absolutely. Thank you for attending.

Representative CANNON. Thank you, Mr. Chairman.

Senator FEINGOLD. Now I am especially pleased to introduce our next witness. Eleanor Holmes Norton is the Delegate for the District of Columbia in the House of Representatives. She has served in this capacity since 1991.

Prior to her election, she was a law professor at Georgetown University Law Center, where she still teaches today on an adjunct basis. She graduated from Antioch College and Yale Law School.

Mrs. Norton, it is a great pleasure to welcome you to the Judiciary Committee, and the floor is yours.

## STATEMENT OF HON. ELEANOR HOLMES NORTON, A DELEGATE IN CONGRESS FROM THE DISTRICT OF COLUMBIA

Delegate NORTON. I appreciate the opportunity to testify here today. I especially appreciate the very thoughtful opening statements that each of you have made, you, Mr. Chairman, Chairman Leahy, and of course, Senator Hatch, my good friend for a long time.

I appreciate the opportunity to say a few words about what I think can rightfully be called the Voting Rights Act of 2007. The Senate and the House having just passed the Voting Rights Act of 2006, I think you will understand that I have not simply stolen a title in order to elevate our bill when you hear my testimony.

You, Mr. Chairman, and Senator Lieberman deserve special thanks from the District of Columbia because you were the original sponsors of my No Taxation Without Representation Act. I thank you now, also, for your leadership, for the leadership of all three

of you, on S. 1257, the bill, as Senator Hatch says, for a House seat only. That is all that the residents of the District of Columbia are here seeking.

I want to speak briefly from notes and ask that my full testimony be admitted into the record.

Senator FEINGOLD. Without objection.

[The prepared statement of Delegate Norton appears as a submission for the record.]

Delegate NORTON. Mr. Chairman, there are too many responsible for this bill to name, and I won't try to do so. I am enormously grateful to my old friend, Senator Orrin Hatch, the senior citizen—senior Senator—

[Laughter.]

Chairman LEAHY. You were right the first time.

[Laughter.]

Senator HATCH. You got it right the first time. I feel that way right now.

[Laughter.]

Delegate NORTON. In that case, Senator, you have plenty of company in this room.

[Laughter.]

Delegate NORTON. From Utah, and Senator Bob Bennett, who are lead sponsors of this bill. I want to thank Senator Hatch for his very compelling and principled testimony almost 2 weeks ago.

I want to thank Governor John Huntsman, who testified in the House for the bill. I am very pleased to see the distinguished Attorney General has come to the Senate today, and I am very grateful to the entire Utah delegation. You just heard from one of the unanimous Utah delegation who have worked literally side-by-side with us every step of the way.

I have to mention a special thanks to my co-author and lead sponsor, Representative Tom Davis of Virginia, who observed the precedents of the House and the Senate, that when there is bipartisanship you can enhance representation in Congress, and has worked closely with me and with the civil rights leadership because he saw no justification whatsoever for denying taxpaying residents of the District of Columbia a vote in their own House of Representatives.

Tom's bipartisanship, which began this bill, is epitomized by the votes in the House. And I do want the Senate to know that three committees voted, by large majorities, for this bill.

One of those large majorities occurred in the Republican House, and this bill almost got to the floor in the 109th Congress. Two of the large votes occurred this year. This bipartisanship is especially epitomized by two conservative scholars who have led the constitutional work on the committee.

Professor Viet Din has testified three times. As you may know, he served as the constitutional point man in the Ashcroft Justice Department, and Judge Kenneth Starr also testified in the House for this bill. I am very appreciative of the scholars who have come forward for this bill at this time.

I see Mr. Turley is here once again. He cannot get enough of this bill. Mr. Turley is my good friend. He and I belong to the same fra-

ternity, as it were; he and I both are tenured law professors. But that is where the resemblance ends.

[Laughter.]

Delegate NORTON. I have been able to do nothing with Mr. Turley, although he does inform me that I have converted his mother. That is good enough for me.

[Laughter.]

Delegate NORTON. I see that the apple has fallen very far from the tree.

[Laughter.]

Delegate NORTON. I have only three points to make, Mr. Chairman, and they are all points of principle on which S. 1257 is rooted. One is the principle of comity or deference to the House, the only House that is implicated, and comity and deference to the State of Utah, the only State that is implicated.

The second principle is respect for the mandate and trust which the Framers left with the Congress of the United States to assure that the voters of the new Capital would have a vote.

The third principle, Mr. Chairman, is equal representation under law, regardless of race or color, which S. 1257 inevitably carries, cutting loose from the racial moorings and roots that for more than 150 years denied all rights—all rights of all kinds—to the citizens of the Nation's Capital.

First, comity, deference, and respect for the House. The bill has no effect on the Senate. From its genesis, it was a request only for the House vote. The House labored long and hard. It required exact political equivalence of both jurisdictions. We have a bicameral legislature. So, Mr. Chairman, you of the Senate have an equal say on whether we of the House of Representatives can add two House seats, seats for Utah and for the District of Columbia. I ask you to respect the will of the House, and I ask you to respect and give deference to the State of Utah. I believe Utah is the most Republican State in the Union. I know that the District of Columbia is regarded as a Democratic jurisdiction.

Senator Hatch personally came to testify and he not only spoke for Utah, for his State, as you might expect, but he spoke as a constitutional expert who has chaired this committee and he spoke about the rights as well for the residents of the District of Columbia. I just want to say again, Senator Hatch, how much your testimony meant to me personally and to the residents of the District of Columbia.

I want to say as well that Utah is no mere Alaska and Hawaii, District of Columbia matching here. You are going to hear straight from the Attorney General about how Utah lost by a few hundred votes its chance for a House seat.

I think you should know—perhaps the Attorney General will tell you—that 1,100 young people who feel that it is their religious mission to carry the gospel of their church around the world, were temporarily absent, on a religious mission from their State, and that the State of Utah felt so deeply about being denied a vote, that they took this matter to the Supreme Court of the United States and almost won, 5:4. So they bring a kind of zeal to the table that we, the residents of the District of Columbia, bring.

Governor John Huntsman, when he testified in the House—and I will quote a sentence from him—"the people of Utah have expressed outrage over the loss of one constitutional seat for the last 6 years. I share their outrage. I can't imagine what it must be like for American citizens to have no representation at all for over 200 years."

Second, I ask you to respect and honor the will of the Framers, who fully expected that Congress would grant the vote when the District came under congressional jurisdiction.

It is absurd, Mr. Chairman, and I believe slanderous, to conclude that the Framers who we so revere would fight a revolution, with all of the risks that it took, on one issue, the issue of representation, and then would turn around and deny representation to the residents of their own Capital.

If you think there is not to be representation, find yourself another source. I do not believe that it is fair to derive that conclusion from our own Framers. You will hear more detailed testimony about this, that in fact the District is not a State. I can't help but mention something about that, Mr. Chairman, because the Congress has not had the slightest difficulty in treating the District as a State, with its laws, its treaties, and for constitutional purposes.

There are many, many examples. But you must know what my favorite one is: the Sixteenth Amendment. That, in its terms, says that the States, the citizens of the States, shall pay Federal income taxes. It does not mention the District of Columbia. Not withstanding that, the citizens of the District of Columbia gave to their Government, on April 15 and before, $4 billion to support their Government.

I ask you to remember that the land that was contributed came from six men who signed the Constitution, three from Maryland and three from Virginia, that on this land, which was populated—this was not a bare piece of land, this was fairly well populated, in fact, including veterans of the Revolutionary War.

These veterans and other citizens voted for the 10 years of transition until Congress took full control, and indeed the first Congress promised that Congress itself would carry out the mandate of the Framers to make sure that the residents of Maryland and Virginia living on that land were left whole.

It falls to the 110th Congress, Mr. Chairman, to fulfill this promise after 206 years. I do want to make clear my view, that I believe that the Framers would never have asked Maryland, Virginia, or the other Framers to contribute land, or whether or not contributing land, to deny representation to their own citizens in the process.

Third, and finally, Mr. Chairman, S. 1257 removes the racial scar that refuses to heal until the racial underpinnings of the denial of the vote and of democracy to the citizens of the District of Columbia is removed.

You here in the Congress have done exactly this in the Voting Rights Act of 2006, reauthorized last year. I, of course, believe this is indeed, and will always be, remembered as the Voting Rights Act of 2007.

Congress is responsible for the racial basis of our bill, just as responsible as the Southern States were responsible for the

underpinnings of the Voting Rights Act of 1965. We had no majority Black population here until the late 1950s, but many African-Americans came to the District of Columbia, surrounded by the southern States, especially Maryland and Virginia.

My great-grandfather, Richard Holmes, was one of those Black men, a runaway slave from Virginia who came here in the 1850s. It was the District's large African-American population that was responsible for the denial of home rule and for voting rights for White and Black citizens alike.

As one southern Senator put it, and I am quoting him, "The Negroes flocked in and there was only one way out, and that was to deny suffrage entirely to every human being in the District."

It is significant that the segregation in the District of Columbia was affirmatively mandated by the Congress of the United States. I ask you to remember that the District of Columbia was one of five *Brown* v. *Board of Education* cases.

On May 17, 1954, I was sitting in a segregated classroom in Dunbar High School when Charles Lawson, the principal, sounded the bell of the intercom system to say that the Supreme Court of the United States had just declared segregated classrooms, like the ones in which we were then seated, unconstitutional.

All public accommodations in this city were segregated by the Congress. Only the buses and streetcars did not carry segregation. There was no mayor, no city council, no self-government, no democracy until the civil rights movement forced the issue.

The District's home rule and voting rights have been high on the agenda of the NAACP ever since it was created, and of the Leadership Conference on Civil Rights since its founding. The civil rights leadership themselves wrote to the House concerning this bill. Julian Barn, Dorothy Height, Mark Morial, Wade Henderson wrote, and I am going to quote a word from what they wrote because it says from their own struggle why the District is where it is today.

I quote these four civil rights leaders: "The District of Columbia achieved a constitutional delegate and partial self-government only after its citizens were aided by the civil rights movement, including many of our organizations who finally made the total absence of congressional representation and self-government in the Nation's Capital a matter of national importance.

In light of the long history of federally enforced segregation in the Nation's Capital until recent decades and its majority African-American population, the continued disenfranchisement of District residents, particularly in the House of Representatives, cannot be explained or tolerated in today's world."

The Voting Rights Act, when it was pending last year, occasioned a letter from the first African-American popularly elected Senator in the United States, Senator Ed Brook. And I note that this native Washingtonian has already received from the Senate the requisite number of votes to get the highest constitutional medal, the so-called Congressional Medal; we are gathering signatures in the Senate.

But he wrote to Members of the House and the Senate in this way: "The experience of living in a segregated city and of serving in our segregated Armed Forces perhaps explains why my parties worked on the Voting Rights Act reauthorization last year. The

pending DC House Voting Rights Act has been so important to me personally. The irony, of course, is that I had to leave my hometown to get representation in the Congress and to become a Member."

There is no escaping, finally, Mr. Chairman, that Congress's responsibility for the racially segregated Capital for 150 years, for the denial of self-government to Whites and Blacks alike because of the significant numbers of African-Americans, that taint is so deep and will remain as long as the residents of this city are treated as second-class citizens.

I am a third-generation Washingtonian. I trace my own heritage back to a slave couple in Virginia in the early 19th century. My great-grandfather came here as a slave seeking freedom, not the vote. He was emancipated 9 months before the Emancipation Proclamation because Lincoln emancipated the slaves in the District of Columbia 9 months early. He lived to see his son, Richard, join the DC Fire Department in 1902.

I have had the high honor to represent citizens of my hometown for 17 years. They seek no honor. They do think the case has been made long ago for full representation, and that the case is closed today as District residents today are on the ground in Iraq and Afghanistan, fighting for their own country and for the rights of the Iraqis. I ask that you give the residents of your Capital the honor of a vote in the House of Representatives for the first time in 206 years.

I thank you, Mr. Chairman.

Senator FEINGOLD. Thank you so much, Mrs. Norton, for your important, interesting, and moving testimony. I greatly enjoyed listening to it.

Our final witness on this panel is Mark L. Shurtleff. He was reelected as Utah attorney general in 2004, and is now serving his second term. Previously, Attorney General Shurtleff served as an officer and attorney in the U.S. Navy Judge Advocate General Corps. We appreciate your making the trip to join us today, and you may proceed, sir.

**STATEMENT OF HON. MARK L. SHURTLEFF, UTAH ATTORNEY GENERAL, SALT LAKE CITY, UTAH**

Mr. SHURTLEFF. Thank you, Senator, Senator Hatch. Thank you very much for the invitation to be here today. It is a great honor to have a chance to say something.

When I was first asked to come here and comment I said, well, you have got Senator Hatch, a constitutional scholar, you have got Representative Cannon coming, he is a lawyer. Why do you need three lawyers from Utah to come and make a point?

I tried to understand why, or what I might possibly add. I hope that I am not repetitive of what has been said, and I would ask that you include my entire written statement in the record.

Senator FEINGOLD. Without objection.

[The prepared statement of Attorney General Shurtleff appears as a submission for the record.]

Mr. SHURTLEFF. I will maybe just highlight a couple of things. But what really struck me, I guess, today, is that as Attorney General Linda Singer, the attorney general of the District of Columbia,

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and I have worked together to present our comments and to write letters to the White House and to Congress, coming together and forging an unusual alliance between our State and the District of Columbia for a common good, and as Representative Norton was talking, it occurred to me, as a Dredd Scott biographer, that 150 years ago, you probably know, just a few hundred yards from here in the old Supreme Court room below your Senate chambers, the Chief Justice of the U.S. Supreme Court took a look at the Declaration of Independence, that self evident truth that all men are created equal, and he looked at a Black man and said, because of the color of your skin and because of your race, you are not a man, you are not protected by that great statement at the start of this Nation that made us what we are, and that you have no rights that any White man would ever have to respect. There was a great Civil War. In 100 years' worth of civil rights, we have come a long way.

I am not going on record necessarily as saying this is a race issue, but I am saying that it is an equality issue, it is a justice issue. The very foundation of this Nation, in that preamble to the Constitution, said the first thing we do in forming a more perfect union is to establish justice.

As you know all too well, justice means equality, equal access, equal opportunity to everybody, and ultimately everybody, regardless of race. Yet, we still have this problem here for 200 years, where equality and equal representation is a myth.

I want it understood that I am in a different position as attorney general. I am a member of the executive branch. My job is not to make the laws; you get to do that. My job is to enforce the laws made in my State, to execute the laws, and to defend in court those laws which you passed.

Even though we feel very strongly, and one of the first things I did as attorney general when I came into office in 2001, was to sue the Federal Government, the Census Bureau, over this issue regarding representation. I still smart over that.

I believe that, for 6 years, Utah has been the least-represented State in the Nation. We argued very strongly that under-representation is no representation. As Governor Huntsman said, as quoted by Representative Norton, I cannot imagine what it would be like to have no representation for over 200 years. So it is my responsibility to defend and enforce the law.

I will not, and I know that nobody here would be here, in a self-serving purpose. I know that it seems like we could all say Utah and DC, we are all in it for something. I would not be here testifying, and I know that this bill would not be before Congress if it was just that, if all those who supported it, who were the sponsors of it, did not believe it was constitutional. That ultimately is my responsibility. I will not support a law that I do not believe is constitutional and can be upheld in the courts, so that is what it boils down to.

What I and Attorney General Singer felt like was important for you to hear from the executive branch, from law enforcement officers, of our belief, based on a huge amount of study and a great number of scholars that you will hear from later, that it is, in fact, constitutional.

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If I may just hit a few of those points as far as constitutionality are concerned. I will just add that the intent of the District clause was to ensure Federal authority over the Nation's Capital, not to deprive its citizens living there of their rights of citizenship.

We all know it is very easy to read a few words in the Constitution. There are hundreds of thousands of people out there who will look at that and say, it is there, it is in writing, it is not a State, therefore you cannot have representation.

But it is so important to go into legislative intent, and the history and meaning, and how can there be anything more fundamental to our Nation and to our representative republican form of government than equal representation?

Second, there is evidence that the Framers assumed that the ceding States would ensure that their citizens' liberty interests were protected. We quote Madison in our comments: "Third, when the Framers wanted to restrict voting representation in the Constitution they did so affirmatively, as in Article I, Section 2, where for apportionment purposes, slaves and taxpaying Indians were counted as three-fifths person."

If the Framers wanted the District's citizens to have even less representation than that—meaning none at all—they surely would have included a provision to that effect.

Finally, at least one Framer, Alexander Hamilton, did want to include an affirmative provision for voting representation by District citizens to require that representation.

There appears to be no congressional historical documentation as to why this amendment did not pass, but the circumstantial record indicates that it was because the Framers believed it was not needed since the District of Columbia citizens could continue to vote with the ceding States at that time, Maryland and Virginia, which they all did for, as we know, 10 years after the District's creation in 1791, either that or because Congress could act to provide representation under the District clause. In sum, what Congress taketh away, Congress can give back.

I would, again, urge at this time, when our Nation seems so split on partisan lines, when there is so much taking our attention, that at this time we can come together as Americans, in the bipartisan nature of this bill, of these bills, to do what is right, to do what is American, to do what is just. We have tried to demonstrate that in Utah in creating a fourth seat in our Senate.

In fact, our Senate Majority Leader, Kurt Bramble, is here today. He chaired the committee on redistricting, drawing up a proposed fourth seat. It was not drawn to just ensure Republican, it was one that was fair and bipartisan. All the Democrats in our State Senate voted for that proposal. I think there was plenty of evidence that we are doing this together.

Finally, some people say, it is just the District of Columbia and Utah. Why should the Nation come together on this? I think that we must again return to the words of Dr. Martin Luther King, writing from a Birmingham jail, "Injustice anywhere," injustice in DC, I would say, "is a threat to justice everywhere."

Thank you, Mr. Chairman.

Senator FEINGOLD. Thank you so much, Mr. Attorney General.

Unless Senator Hatch has an additional comment, I want to thank the witnesses very much.

Senator HATCH. I would just like to say, Mr. Chairman, how much I have appreciated both of you coming and testifying.

Eleanor, you have been a wonderful leader here. I just want to pay total respect to you. I really enjoyed your statement and the passion that you have for this. I have an equal passion for it. I really believe that this is the right thing to do, and I intend to help you every step of the way if we can. Let us hope we can get enough people of good will to be able to do this.

Thank you. Thank you, both.

Senator FEINGOLD. Thank you, Senator Hatch. Thanks so much.

I would ask the second panel to take their seats. I do not know when the votes are going to start, but we will try to proceed.

I would ask the witnesses to please stand to be sworn.

[Whereupon, the witnesses were duly sworn.]

Senator FEINGOLD. I thank the witnesses.

We will proceed in order, proceeding from left to right. I would ask each of you to try to limit your oral presentation to 5 minutes so we can have ample time for questions and debate. Of course, we will include your full statements in the record.

Our first witness on this panel is John P. Elwood. Mr. Elwood is a Deputy Assistant Attorney General in the Office of Legal Counsel for the Department of Justice. He previously served as the Department's Assistant to the Solicitor General, as counsel to the Assistant Attorney General for the Criminal Division, and as an attorney in the Criminal Appellate Section.

Mr. Elwood, thank you for joining us today. You may proceed.

**STATEMENT OF JOHN P. ELWOOD, DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE, WASHINGTON, D.C.**

Mr. ELWOOD. Thank you, Mr. Chairman and members of the committee for the opportunity to appear today to discuss the constitutionality of S. 1257, the District of Columbia House Voting Rights Act of 2007.

The administration strongly opposes this legislation, not on grounds of policy, but on grounds of constitutionality. For at least 40 years, the Justice Department has maintained, under both Democratic and Republican administrations, the residents of the District of Columbia cannot, constitutionally, be given voting representation in Congress by simple legislation.

Our position is dictated by the clear language of the District, the understanding of the Framers, and the consistent view of both Congress and the executive branch.

Article I, Section 2 of the Constitution provides that "the House of Representatives shall be composed of Members chosen every second year by the people of the several States, and the electors in each State shall have qualifications requisite for electors of the most numerous branch of the State legislature."

Eleven other constitutional provisions likewise explicitly tie voting for Congress and the President to Statehood. The Framers and their contemporaries clearly understood that the Constitution barred congressional representation for District residents, begin-

ning in the ratification debates of 1788, continuing through the establishment of the District in 1800, and its early days as the Nation's Capital.

The Constitution was repeatedly criticized for denying District residents a hand in electing Congress. Advocates of representation, including Alexander Hamilton and Members of Congress, sought to address the matter by constitutional amendment or by postponing the formation of the District. Those efforts failed and Members of Congress and commentators indicated that Congress could not provide redress by legislation.

Soon after the District's formation, advocates focused on retroceding the land to Maryland and Virginia to restore representation, and in 1846 the southern portion of the District was returned to Virginia, in part for that reason.

The Framers of the Constitution were well aware of the Enclave clause, Article I, Section 8, Clause 12, which provides Congress authority to exercise exclusive legislation over such a district, and which some proponents of S. 1257 have recently identified as a constitutional basis for the bill.

But during the time the Framers were active in Government there was no proposal of which we are aware to provide District residents congressional representation under its authority. That is not surprising. They understood, as the Supreme Court later confirmed, that the clause is subject to the Constitution's other textural limits and, thus, would not authorize congressional representation for non-States.

Consistent with this historical understanding, Congress has consistently and expressly recognized that such representation would require either Statehood or a constitutional amendment.

In 1967, and again in 1975, the House Judiciary Committee emphatically stated, "If citizens of the District are to have voting representation in the Congress, a constitutional amendment is essential. Statutory action alone will not suffice."

Congress accepted the committee's view and approved a constitutional amendment in 1978 that would have given the District voting representation, but it failed to win ratification.

During this period, and particularly during the Johnson and Carter administrations, the Department consistently and emphatically maintained that "if the District is not to be a State, then a constitutional amendment is required" to afford its residents voting representation in Congress.

The Enclave clause provides no former basis now for providing the District congressional representation than it did in 1788, 1800, 1846, or 1978. Claims that it does authorize such legislation are inconsistent with the Framers' understanding and the consistent historical practice of Congress.

They are inconsistent with the bedrock constitutional provisions that specifically address the composition and election of Congress which were carefully crafted to achieve the great compromise that established our bicameral system, and they proved too much. If proponents of this view are current, Congress would also have authority to provide representation to other Federal enclaves and to the territories.

Moreover, if the word "State" is to be read out of constitutional provisions governing representation, Congress could also disregard the provision's other limits such as on the size of a congressional delegation. Indeed, S. 1257 fixes the District's representation at one Member, without reapportionment, no matter how large its population becomes.

The bill's departure from constitutional procedures would provide District residents an anomalous and unstable form of representation. Limited representation in a single House of Congress that can be eliminated at any time by a majority vote and which at best would exist under a cloud of suspect constitutionality, the Constitution establishes clear and uniform standards for representation to avoid that state of affairs. It is through adherence to the Constitution that we best guarantee liberty.

If the District is to be given representation, it must be accomplished through a process that is consistent with our constitutional scheme, such as amendment consistent with Article V of the Constitution. Accordingly, if S. 1257 were presented to the President, the senior advisors would recommend that he veto the bill.

I thank the committee for allowing me to testify and would be happy to take any questions you may have.

Senator FEINGOLD. Thank you, Mr. Elwood.

[The prepared statement of Mr. Elwood appears as a submission for the record.]

Senator FEINGOLD. The vote has just started, but the good news part of it is that there may just be one vote. So I am going to go right over there and come right back. The committee stands in recess.

[Whereupon, at 2:30 p.m. the hearing was recessed.]

AFTER RECESS [2:50 p.m.]

Senator FEINGOLD. I call the committee back to order. I thank you for your patience. I hope we're not interrupted again, but it is certainly possible there will be more votes. But let's proceed.

Our next witness is Judge Patricia Wald, who served for 20 years on the U.S. Court of Appeals for the DC Circuit, including a 5-year term as Chief Judge. She retired from the bench in 1999. Judge Wald was appointed by Kofi Annan to sit on the International Criminal Tribunal for the former Yugoslavia, where she served for 2 years until 2001.

Judge Wald, it is really an honor to have you here with us today, and you may proceed.

**STATEMENT OF PATRICIA WALD, FORMER CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, WASHINGTON, D.C.**

Judge WALD. Thank you, Senator Feingold.

Let me begin on a personal note. I was in Congress—actually on the Hill—testifying 30 years ago, advocating, for the Carter administration, a constitutional amendment, which, as everybody knows, did pass Congress. It would have given the District full representation in both the House and in the Senate. But, of course, it failed State ratification.

I am told that the outlet for constitutional amendments is not any more promising today than it was then, but I do want to make

one point in reference to Mr. Elwood's testimony. I was the Carter administration's representative in the House, and we did discussed all—we did back a constitutional amendment because that was the bill that was at issue then.

I discussed in my testimony, and the other people who appeared with me discussed, four different possibilities or alterations for giving the DC vote. The point I want to make is, not one of them involved the Article I, Section 8, Clause 13 power of Congress to confer it in its role as the exclusive legislator for the District. It simply was never discussed. So I think that when we look at the history, we have to look at that as well.

The question that is before this particular Congress is the constitutionality permissibility of Congress legislating under that Article I, Section 8, Clause 13 to provide House representation.

And I want to stress here that, from the time of Madison on down, through Supreme Court dicta, as it were, but nonetheless rousing rhetoric in the terms limits case in the early 1990s, it is the House that has been identified as deriving its power from the people and not necessarily from the States.

Just let me quote one line from the Federalist Paper Number 39, going to Madison, who said, "If we resort for a criterion to the different principles on which different forms of government are established, we may define a Republic to be a government which derives all its powers, directly or indirectly, from the great body of people. It is essential to such a government that it be derived from the great body of society."

He went on, "on confirming the Constitution with the standard here fixed, we perceive at once that the House of Representatives is elected immediately by the great body of the people. The House of Representatives will derive its power from the people of America."

Now, I listened with awe at Representative Eleanor Holmes Norton's eloquent statement of the morality and the justice, as well as yours, Senator, and Senator Hatch's and Senator Leahy's reasons for giving the District of Columbia House representation. I will, however, stick to my 5 minutes, so I am just going to take up three or four legal constitutional points.

As a long-time resident of the District myself, over 25 years, and I came here as a war bride in the early 1950s when my husband was on a ship during the Korean War. I do have a personal interest, but that is all it is, a personal interest.

As Senator Hatch repeated from my testimony, I do think it is a close, and I think it somewhat novel, constitutional issue. I do think, however, that Congress has to make up its mind that it is constitutional no matter how close or no matter how novel.

In many other fora I have sometimes railed at the notion of, we will let the courts decide. I think that Congress, however close, however novel, has to make up its own mind that this is constitutional. But it is close. That does not mean that it cannot decide that the Constitution tilts on one side rather than the other.

There are two potential clauses in the Constitution that are relevant. There is the Section 8, Clause 13, which says that Congress has the power to "exercise exclusive legislation in all cases whatsoever over the District."

Now, that sounds like a plenary grant of power, and indeed, several supreme courts and other courts have talked about how it is greater than the power that the States have over their citizens, and it is plenary, and there is virtually nothing that it cannot encompass.

That is not necessarily completely true, because even the District clause has to be accommodated to the rest of the Constitution, as Mr. Elwood pointed out. It couldn't, for instance, say we'll have racial segregation or gender discrimination in the District, but I think what it does say is there must be a clear impediment in the Constitution to Congress exercising its sovereign and plenary power.

I want to stress here that we are speaking of Congress's power to legislate, not a citizen's right to demand voting power. That claim was rejected in the three-judge courts, *Adams* v. *Clinton*, which was affirmed summarily by the Supreme Court.

But I think the principle, if not the only one impediment that has been raised, is Article I, Section 2, which says that "the House shall be composed of members chosen by the people of the several States and the electors shall have the qualifications requisite for the election of the most numerous branch of that legislature."

The history of that clause, however, strongly suggests to me that it is not an absolute requirement for voting in Federal elections. Congress and the courts have exercised and recognized a power to bestow voting power on those who would not qualify as State electors for the most numerous branch, as decided by either State supreme courts or by State executives or legislatures.

The Overseas Voting Act confers Federal and State voting power on those who emigrate abroad. It uses the convenient fiction—I think I may call it that—that it is merely an extension of bona fide residence, the same concept used in Article II.

But, however, if you look at the way the legislation reads and the way it has been applied, it covers all persons who have lived in a particular State whether they intend to return to those States or, indeed, whether they are citizens of the States at all.

Ironically, the effect of that has been that if a Massachusetts resident moves permanently to Zimbabwe, she can continue to vote, but if she moves to the District she can't vote.

The Supreme Court, in another case, *Kornman* v. *Evans*, in 1970, ruled that the State of Maryland tried to, but could not, disenfranchise NIH enclave residents from voting, even though they tried very hard to do so. In fact, they said that they were not residents.

There were several early cases that they cited, going back to the 1800s, to say the fact that Congress had the same powers under the Enclave clause as it had under the District, showed that Congress was the exclusive legislator and therefore they were not part of Maryland, and therefore they could not be residents of Maryland.

The Supreme Court didn't seem to want any of that. It said, listen we're not going to look at those old cases because we need not consider, they said, the early cases, for the relationship between Federal enclaves and the States in which they are located has changed considerably since they were decided. Then they went off on a Fourteenth Amendment interest of the States, showing that,

in fact, Congress had let Maryland take some jurisdiction for several aspects of people who lived in the enclaves.

But in so many other aspects, mentioned at greater length by other witnesses, from civil rights, to full faith and credit, to regulation of commerce, to imposition of taxes, Congress has legislated to put the District on a par with the States. I think you have to think hard why Congress should be denied that same power, when the most important civil right of all involves the right to vote for one's leaders.

Now, it is the *Tidewater* case of 1949 that's most frequently cited for the proposition that Congress does have this power under this same so-called District clause. There a plurality—yes, it was a plurality—ruled that, despite limiting language in Article III, that the judicial power of the United States shall extend to, inter alia, controversies between citizens of different States.

This plurality found that Congress, pursuant to this same District clause that we are talking about today, could confer power upon the Federal courts, the Article III courts, to hear cases or controversies between District residents and citizens of States.

Now, there are several things in that *Tidewater* case. I do not suggest that it can't be distinguished. It is very easy for lawyers like us and courts to distinguish this case from that case. Of course, there are several distinguishing characteristics. But what's really important is the way the plurality stressed "deference" to Congress on the method it sought to achieve a legitimate aim.

In that case, the plurality written by Justice Jackson said that Congress had a right to make adequate courts, to set up adequate courts for the DC citizens, and could do that by conferring upon the diversity jurisdiction courts, the Article III courts' jurisdiction to hear cases between District residents and citizens of other States.

Now, it is said by the opponents—and if I can predict—that Jackson also said that he, for the plurality, was dealing with "the mechanics of administering justice, not involving an extension or denial of a fundamental right." I have to pause there to say, Justice Jackson is one of my heroes, but I wonder if he really read the ratification debates, because all over them are proponents of States worrying about having their cases taken from their State courts and put into the Federal diversity courts.

But, nonetheless, I think even more important, in the next line—again, quoting—Jackson said, "The considerations which bid us strictly to apply the Constitution to constitutional enactments, which invade fundamental freedoms or which reach for powers which would substantially disturb the balance between the Union and its component States, are not present here. Such a law should be stricken down only upon a clear showing that it transgressed constitutional limitations."

I would say that we have no such showing, no such clear showing, that this bill would constitute a law that transgressed constitutional limitations, upset the balance between Congress and the States, since Congress has always had the ability under Article IV to admit new States. And certainly there is no invasion of fundamental rights, there is an extension.

Senator FEINGOLD. Thank you.

Judge WALD. I see that my time is up. The most I will do is say that there is so much evidence about who said what during the ratification debates, that there is grist for everybody's mill in there. It's like the Bible, there's something for everybody there.

But I do think a couple of things stand out. There is no evidence Congress meant, ever, to disenfranchise the District residents permanently. It legislated initially to let the residents of the ceded territories continue their voting in State elections.

When Madison assumed in the Federalist Paper that is quoted so often that the States would take care of their own in the act of setting up the District, I have to ask myself, how could they have done that? Even if they had been smart enough to do that and said we want to continue letting our people have the vote, would not there have had to be an enactment of Congress which put that into the organic law? And it would have been a statute. I didn't see any reference to that having to go through by a constitutional amendment.

So in concluding, I would say that, because of the plenary grant of power under the District's legislative clause and the absence of any clear impediment to Congress exercising that power, and in light of the overwhelming justice—after all, I think one other Justice once said it is a Constitution we are expounding here and I think we have a right to look at the aspirations, and the fact that the underlying—perhaps the greatest underlying Democratic/Republican notion in the Constitution is the right to select one's own leaders.

The fact that it is the very Congress which is composed now of the States that is going to be passing this, it is not a court, or even the executive, levying it on Congress, it is Congress itself that is doing that. Congress has every right to tilt the—

Senator FEINGOLD. Can I ask you to wrap up, please?

Judge WALD. I am done.

Senator FEINGOLD. OK.

Judge WALD. Can I finish the sentence?

[Laughter.]

Congress has every right to tilt the constitutional balance in favor of the legislation.

Senator FEINGOLD. I do not like doing this to judges.

Judge WALD. Thank you.

Senator FEINGOLD. Thank you for your very learned testimony.

Our next witness is Professor Jonathan Turley from the George Washington University Law School. Professor Turley is a well-known legal commentator on television and has represented whistle-blowers, military personnel, and CIA officers, among others.

I have quoted him on a number of occasions but, I'd say to Representative Norton, never on this subject.

[Laughter.]

He holds degrees from the University of Chicago and Northwestern Law School.

Professor Turley, thank you for joining us today. The floor is yours.

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**STATEMENT OF JONATHAN TURLEY, PROFESSOR, GEORGE WASHINGTON UNIVERSITY LAW SCHOOL, WASHINGTON, D.C.**

Professor TURLEY. Thank you, Mr. Chairman, thank you, Senator Hatch, thank you to the committee for inviting me on this important subject.

I hope at the outset we can agree that this is a matter for people of good faith to disagree about, and it is not a debate about those who would want a vote for the District of Columbia and those who do not want a vote for the District of Columbia.

I am hoping all of us can agree that the current status of the District of Columbia is a scandal—it long has been a scandal—and that the citizens should not remain disenfranchised.

For that reason, I agree with my good friend, Eleanor Holmes Norton, on virtually everything she had to say, except for the fact that she's calling my mother to rebut me.

[Laughter.]

But one of the greatest things we could do to improve Congress would be, indeed, to have Delegate Norton as a voting member. She is a national treasure.

But that still does not influence how one views the Constitution. If it were up to me, if it was a matter of looking just to Eleanor Holmes Norton, I would have no question at all as to what we should all do. But this has always been a debate about the means and not the ends. I'm afraid that this bill is the wrong means, in my view.

Now, Senator Pat Moynihan once said that everyone's entitled to their own opinion, but not to their own facts. You're going to hear a lot of disagreement coming from me and others as to what the facts are in terms of the Constitution.

I've submitted roughly 70 pages of testimony to leave no question, in my view, as to the intent of the Framers as to the status of the District of Columbia. I believe the Framers would be surprised to see the suggestion that the District is without representation.

It has the exact representation that they intended. The District is represented by the Congress of the United States. That is exactly how they envisioned it, that is exactly how they stated it.

Now, we may have great problems with that, and I actually would probably agree that it was a bad design. It has led to the disenfranchisement of citizens for too long. But I do not believe that there is any doubt from the record as to what the intent of the Framers are, but we should start all constitutional issues with the text of the Constitution. And the relevant clause is not the District clause, as convenient as that may be, it's the composition clause. It is the clause that defines the Members of the U.S. Congress. It is perhaps one of the most important clauses in the Constitution.

It was the subject of endless debate. The Framers were obsessed about States and they were obsessed about who would make up the Congress of the United States. They spent a lot of time on the composition clause. And Article I, Section 2 is a model of clarity.

It says what they meant, that it is limited to the representatives of the several States. That reference to "States" is ubiquitous throughout Article I, in that the meaning of "States" is perfectly co-

herent and consistent, until you change it with this bill. Then it becomes incoherent.

But I want to address very quickly the argument that somehow the Constitutional Convention and the ratification is somehow ambiguous or that the Framers just didn't think about this, or it was an oversight. I must tell you, I think there is no basis for that assertion.

If there were a basis, I think I would be on the other side of this table, of this debate. In the Constitutional Convention, when it came to the composition clause, the Framers were very clear that they meant States. In fact, nobody has suggested that they had anything else in mind when they used the word "States".

But, indeed, in the first defense of a Framer after the Constitutional Convention by James Wilson, he assured people that they had nothing to be afraid of from Congress, that Congress would not usurp the authority of the States, because it said, after all, Article I says that Members have to be selected from the several States. He said, if there's no State legislature there can't be a Member of Congress.

That view was carried forth in the 4th Congress, with many Framers in the Congress, in 1794, when a member of the territory of Ohio tried to get entrance as a voting member. He was allowed in as a non-voting member, but both sides of that debate agreed that only Representatives of the States—the States—can vote.

Now, I also want to note that I talk about the qualifications clause, which I would be interested in expanding on. But when you look at the incoherence that occurs when you change the meaning of "States", you look at the qualifications clause and look at the debate behind the qualifications clause, you'll see what I mean. They were very clear. They did not want Congress to have the ability to manipulate the membership of its body.

In fact, the Supreme Court looked at that history of the qualifications debate which followed the John Wilkes controversy in England, and the courts said that it was the manipulation of the membership, of the roles of Congress, that the Framers wanted to prevent and said, it's designed, and this is quote from the Supreme Court, "to stop Congress from being a self-perpetuating body to the detriment of the republic." If you can manipulate your roles, you could do great harm to this republic, and that is what you are suggesting today.

Now, I point out in my testimony that in the Constitutional Convention, but also in the ratification debates, there are numerous references to the status of the District. It was as controversial then as it is now. You could take those debates, change the names, and you would have the transcript of this hearing.

People were appalled by the fact that we were creating a Federal enclave where District residents would not have representation. People called it despotic, they called the residents vassals.

No one less than Alexander Hamilton tried to change it, tried to amend it. In fact, one of the various amendments in the State ratification conventions was this proposal. There was an amendment offered to give the District a vote in the House. It was rejected.

Now, I know that I am running out of time, but I will simply note that the issue during retrocession came up with the District.

The citizens of Virginia immediately hated the status. They despised the status of being without representation and almost immediately began a retrocession movement.

During that ample debate and the report of Congress looking at both the Virginia and Democratic sides, Congress noted that the District residents did not want to retrocede, that they were given the choice: do you want to stay in this status or would you like to have a voting status back with Maryland?

The report quotes District residents as saying that they are entirely content to remain in this status, and in fact a vote in Georgetown which was recorded was 559:139 against retrocession and in favor of keeping their current position.

Now, I go through the dangers that are presented by this type of interpretation. I hope that you will consider it quite seriously. I know that you will. But at the end of this debate, all of us have a duty to try to rectify this terrible status.

But the Constitution doesn't make things easy. In fact, the really important things that we have to do are often hard, and there's a reason why this hasn't happened before. We tried a Constitution amendment and it failed, and retrocession didn't have support. Those are hard roads, but those are the roads that the Framers left to you. It doesn't allow shortcuts. I commend the rest of my comments to the record, with the permission of the committee.

Senator FEINGOLD. Thank you very much, Professor Turley.

[The prepared statement of Professor Turley appears as a submission for the record.]

Senator FEINGOLD. Our next witness is Professor Charles Ogletree, who is the Jesse Climenko Professor of Law at Harvard Law School and the founding and Executive Director of the Charles Hamilton Houston Institute for Race and Justice.

Professor Ogletree is a prominent legal theorist and advocate for civil rights, and also a well-known legal commentator on television. He is a graduate of Stanford University and Harvard Law School.

Professor, thank you for joining us today, and you may proceed.

**STATEMENT OF CHARLES J. OGLETREE, JESSE CLIMENKO PROFESSOR OF LAW, HARVARD LAW SCHOOL, CAMBRIDGE, MASSACHUSETTS**

Mr. OGLETREE. Senator Feingold, thank you for allowing me to be here today. And Senator Hatch, it is always a pleasure to see you again.

I am very delighted to have a few minutes to talk about the constitutionality of S. 1257. I would ask that my testimony be part of the record and that the court as well consider the excellent testimony of my former student, Viet Din, who worked in the Republican administration, my friend and adversary, former Solicitor General, Kenneth Starr, who also worked in the Republican administration, and Senator Hatch's testimony, which I think crystallizes the conflict with the need to see a clear resolution in this matter.

I think not only can the Senate support this legislation, but it must. I say that in the context of the time that we face now. The Attorney General from Utah stole some of my thunder, but it is important.

This is 150 years since the *Dredd Scott* decision in 1857 and it crystallizes both the way that our courts and our Congress interpreted laws. They were wrong. They were mortally wrong. They were fatally wrong in ways that we are still paying the debt for society today.

I think that if you look at this in the broader context, that is, if you look at Article I, Section 8, Clause 17 which makes clear that Congress has the power to exercise exclusive legislation in all cases whatsoever over such District and grants Congress both plenary and exclusive authority to legislate all matters concerning the District, Professor Turley wants to move away from that. I think we have to embrace that in a serious way.

In the same respects, I would ask the Senate hearing to think of a couple of important contexts as well. When you think about where we are, even in *Adams* v. *Clinton*, the Supreme Court's decision on District of Columbia authority, the Supreme Court did not deny that Congress has authority to grant DC voting rights. It wasn't explicitly denied. I think it gives you even more ground to take a look at this.

If you go back to the *Hepburn* case that's been referenced in Mr. Turley's comments earlier, and Chief Justice Marshall made it clear, it is not the Court, but Congress who must adjudicate these issues. I think, in light of that, this Congress has a particular responsibility in a propitious time.

In the 18th century, we had the Revolutionary War, which was the war of freedom. It wasn't the Constitution, it wasn't the Bill of Rights, it was the people who fought that war for freedom.

In the 19th century, as a result of the *Dredd Scott* decision, we had the Civil War, the war of equality. That is, even though the Court, our highest Court, said that people weren't equal, it took a war and the bloodshed of hundreds of thousands of people for us to move from the period of inequality to the period of equality.

In the 21st century, we have a propitious opportunity for representation, the period of justice. For the first time, this Congress, not the aristocracy who drafted the Constitution 200 years ago, not a group of people sitting in a room, but this Congress can look at the history, the context, and look at Judge Frank Esterbrook's—from the Seventh Circuit—article about plain meaning. The one thing he says is pretty powerful: "The plain meaning makes no sense at all because nothing is plain when we talk about the Constitution and what it means some 200 years after."

I would ask as well, as Congresswoman Eleanor Holmes Norton talked about being a District of Columbia resident and being born here, she follows another great DC resident who I admire greatly, Charles Hamilton Houston. He grew up in this city and went to the same high school, formerly the M Street High School in Washington, DC, left here, went to Amhurst College, became a valedictorian, went to Harvard Law School, the first African-American ever on the Harvard Law Review.

He took all of his talent to come back to try to understand how to make the Constitution work for all the people. He came back here and became a professor at Howard Law School, transformed that law school from an unaccredited to an accredited law school. Changed the faculty.

He consulted with his colleagues at Harvard Law School, people like Roscoe Pound, people like Felix Frankfurter, about, could he bring a suit in the 1930s, 1940s, and 1950s to challenge the law that said *Plessy* v. *Ferguson*, the 1896 decision, was constitutional. They told him to a person, he had no authority to do that. The Constitution was clear, the court was clear: there was no challenge.

Houston didn't accept that temporary interpretation of the law. Instead, he went to work with Thurgood Marshall, a native of Maryland, and with Oliver Hill, who just turned 100 years old, a native of Virginia, and those men, and others, came together to change America when it came to the issue of racial equality.

What they accomplished in *Brown* v. *Board of Education* in 1954 is exactly what I think this Senate and this Congress has to accomplish in the year 2007. This is a year to commemorate the 150th anniversary of *Dredd Scott*, but as well it's a year for Congress to stand tall, to stand together, to see the bipartisan support for this, and to determine, I believe, with clarity and conviction that the District of Columbia residents who are born here will have the right to vote and be counted for the first time in the history of this District.

Thank you.

Senator FEINGOLD. Thank you so much, Professor Ogletree.

[The prepared statement of Professor Ogletree appears as a submission for the record.]

Senator FEINGOLD. Our next witness, Ken Thomas, has been a legislative attorney with the American Law Division of the Congressional Research Service for 20 years. Mr. Thomas advises Congress on various constitutional issues, including Federalism, individual rights, and the judiciary. He is a 1983 graduate of the George Washington University Law School.

Mr. Thomas, welcome to the committee. You may proceed.

**STATEMENT OF KENNETH R. THOMAS, CONGRESSIONAL RESEARCH SERVICE, WASHINGTON, D.C.**

Mr. THOMAS. Thank you, Mr. Chairman and Senator Hatch. I'd like to thank you for inviting me to testify today regarding S. 1257, the District of Columbia House Voting Rights Act of 2007.

Now, a number of panelists today have focused on what the Founding Fathers might have thought on this issue. What I'd like to focus on today is what the Supreme Court has said on the various subjects that we're discussing today.

As everybody has indicated, Article I, Section 2, Clause 1 of the Constitution provides that the House of Representatives shall be composed of "members of the several States." The meaning of this clause appears to be relatively clear. For instance, in the 1805 case of *Hepburn* v. *Elsey*, the Supreme Court denied District citizens the right to bring a Federal diversity suit against citizens from other States, or from the States.

In a unanimous opinion by Chief Justice John Marshall, the court held that such jurisdiction was limited to State citizens for the same reason that the District of Columbia was not granted House Members or Senators, and this was because the plain meaning of the term "State" did not include the District of Columbia.

More recently, in the case of *Adams* v. *Clinton* in the year 2000, the Supreme Court summarily affirmed a lower court ruling that the District could not be considered a State for purposes of having a vote in the House. This conclusion has also been consistently reached by a variety of other courts and is supported by most commentators.

Assuming for the moment that this position is correct, let's then move to the other question, which is whether Congress has the authority someplace else in the Constitution to override the apparent limitations of the House representation clause.

In this regard, of course, the argument has been made that Congress has plenary authority over the District of Columbia under Article I, Section 8, Clause 17, and that this clause is an independent authority to grant the District a voting representative.

The case which has been most often cited for this proposition is the 1948 Supreme Court case of *National Mutual Insurance Company* v. *Tidewater Transfer Company*. In *Tidewater*, Congress enacted a statute extending Federal diversity jurisdiction to cases between citizens of States and the District, even though, as I just mentioned, the Court had previously held that the Constitution does not allow for such suits. Because the statute was upheld, arguments had been made that the same reasoning could be used to grant House Membership for a Representative of the District.

On close examination, however, the *Tidewater* case does not appear to support the constitutionality of S. 1257. While five Justices agreed in the result of the *Tidewater* case, these Justices did not agree on their reasoning.

Three of the Justices, as indicated by Judge Wald, held that the DC residents could seek diversity jurisdiction based on Congress's power under the District clause. Two Justices rejected this argument entirely and instead would have overruled the *Hepburn* case, as I discussed earlier. These are the five Justices who were essential to the result in this case.

Since there were four Justices in dissent and they also rejected this expansive interpretation of the District clause, that means that six of the *Tidewater* Justices specifically rejected the notion that the District clause could be used as a means to expand constitutional provisions that were limited to States.

Of even greater concern is that even the three-judge plurality emphasized the narrowness of the ruling. Justice Jackson noted that "granting diversity jurisdiction neither affected the mechanics of administering justice, nor involved the extension or denial of a fundamental right, nor did it substantially disturb the balance between the Union and its component States."

Arguably, allowing non-State representatives a deciding vote in Congress on issues of national importance could be seen by the Supreme Court as a substantial disturbance to the existing federalism structure.

Now, while there are questions as to whether S. 1257 could pass constitutional scrutiny, I should note that most of the provisions of S. 1257 could be presented directly to the States by the Congress as a constitutional amendment.

For instance, unlike earlier constitutional proposals which have given the District representation in the House, two Senators, a full

slate of Presidential electors, and the power to vote on amendments to the Constitution, a more limited constitutional amendment could be crafted to provide the District of Columbia one vote in the House.

Further, in order to achieve the same goal of political balance, a statute could be passed granting Utah a fourth vote in the House, but making it contingent on the passage of such a constitutional amendment.

Mr. Chairman, that concludes my prepared statement. I'd be happy to answer any questions that you or members of the committee may have, and I look forward to working with all members of the committee and their staff on this issue.

Senator FEINGOLD. Thanks so much, Mr. Thomas.

[The prepared statement of Mr. Thomas appears as a submission for the record.]

Senator FEINGOLD. Our final witness, Richard Bress, is a partner in the Washington office of Latham & Watkins. He practices in the area of appellate and constitutional litigation. Before joining Latham, Mr. Bress served in the Office of the Solicitor General.

He received his undergraduate degree and MBA from Cornell University and his law degree from Stanford. He was a law clerk for Judge Steven Williams on the DC Circuit Court of Appeals, and Justice Antonin Scalia.

Thank you for joining us today. The floor is yours.

**STATEMENT OF RICHARD P. BRESS, PARTNER, LATHAM & WATKINS, LLP, WASHINGTON, D.C.**

Mr. BRESS. Thank you, Mr. Chairman, Senator Hatch. I appreciate the opportunity to be invited here today on this important subject. Others more eloquent than I have addressed the policy reasons why this is so important, why this Act should be passed. I will not try to elaborate on those.

Opponents of the bill have stressed, and taken pains, really, to stress that they come here in good faith and do not oppose the bill for political or policy reasons. Instead, they have said that they oppose it because, in their view, it is unconstitutional.

I have studied their arguments with great care. I have read all 70 pages, for example, of Professor Turley's submission, as well as those filed by others. I have read the legislative history that they have read. I have read the history of the debates, as they have. I have read the precedents and I have studied the text.

After doing that, I cannot agree with them. I believe that this is a difficult question, as Judge Wald noted. I think it is a close question and a novel one. But in the end, having studied the text, the structure, the precedents, and the history, I can't agree that the evidence shows that the Framers intentionally disenfranchised, and permanently intentionally disenfranchised, the people of the District of Columbia.

Rather than read from my prepared statement which I'd like to submit for the record, I think it would be more fruitful for me to comment on a couple of the arguments that we've heard here today so as not to repeat others.

There really are two constitutional provisions that are primarily at issue here. There is the Article I, Section 8, Clause 17, which

is the District clause, and there is the Article I, Section 2, which is the composition clause.

As far as the District clause goes, it is exclusive legislative jurisdiction for all cases. It has been described as plenary, it's been described as extraordinary.

It's not unlimited. As Judge Wald noted, certainly Congress can't act under that provision of the Constitution in a way that would violate express, or even specific, prohibitions elsewhere in the Constitution, and I think everyone on this panel would agree with that.

So I think the question that we will come down to is, are there any express, or distinct, or specific prohibitions against providing the District of Columbia a voting Member of the House of Representatives?

Before I move on to that clause, before I move on to the composition clause, which is cited by the opponents of the bill as the prohibition that would prevent such an enactment, I would like to discuss, briefly, the *Tidewater* case which has been discussed by Mr. Thomas.

In *Tidewater*, as this Court heard, five Justices of the Supreme Court concluded that Congress had the authority to provide District residents with diversity jurisdiction in the Federal courts, even though the Constitution says that diversity jurisdiction is for suits between citizens of different States.

Now, Mr. Thomas takes a look at that case and understands that there's a parallel to this one. He appreciates that in the *Hepburn* case, Chief Justice Marshall noted that the use of the word "State" in the diversity jurisdiction clause is the same use of the "State" as in the composition clause.

I don't disagree with him there, but I guess where I would disagree with him is where you go from there, because in the *Tidewater* case five Justices concluded that the diversity jurisdiction clause would permit diversity jurisdiction for the District upon constitutional enactment. I read *Tidewater* to suggest that the same would be true here.

Now, as far as the three Justices in the plurality in that Case go, I disagree with Mr. Thomas that they wouldn't have been with us here. He makes a distinction there between fundamental liberties and other matters that can be legislated for the District, but actually one of the things that Justice Jackson said in that case is that you couldn't use the clause "to invade fundamental freedoms or to substantially disturb the balance between the Union and its component States."

I would submit to you that this bill would do neither. It would actually expand fundamental freedoms and it certainly wouldn't substantially change the balance between the States and the Federal Union.

As far as the two concurring members of that court go, those two Justices emphasized that the case wasn't about State relations and treating the District as a State, it involved individual freedoms.

Once again, I think we have a parallel here in this case. This is about the individual right to vote, the vote of the people, as has been discussed here, which is the vote for the House as opposed to, perhaps, the Senate, which would be more of a State representation in the legislature.

I would like to move on now. I understand I'm getting close to the end of my time, but I'd like to address also some of the history because Professor Turley has stated that the history is incredibly robust, that you can go back to the debates of the Constitutional Convention and the ratification debates in the States, and my gosh, you'll find everything just as fulsome as you have here and as you have had in similar panels before the House of Representatives and the Senate.

I disagree strongly with that. I've gone back and re-read all of those materials, which are online and word searchable. What you'll find when you do that, is Professor Turley, with all due respect, has picked out snippets of history, statements made by particular legislators or others that support his position in this matter.

A couple of comments on that. First of all, some of the snippets come from anti-Federalists who were prone, because they were arguing against the enactment of the Constitution, to exaggerate the evils that they believed that the Constitution would lead to.

But another point that I'd like to make is that there's plenty among the snippets that cuts the other way. For example, you've got evidence from Mr. Madison and others that there was a strong belief that the States would take care of the liberties of the citizens of the States who were going to end up in this Federal District, the ceded part of those States, if you will, and that those States would provide for their fundamental and essential freedoms.

We know that in 1790, when those States ceded the territory and the session was accepted, which is all that's required under the District clause to create the District, from them till 1800 the vote continued for those citizens as votes in their prior States.

Now, Alexander Hamilton has been invoked as well here against this bill. I think he'd actually be on our side of the debate. His amendment, if you look at it closely, presumes that the citizens of the States, of the parts of the States that were ceded, would continue to vote with those States.

What his amendment was geared toward, actually, was not changing whether they would have the right to vote, but to provide that that vote would automatically become a vote as citizens of the District when the District attained a certain population level.

Now, it's true that that didn't pass, but that doesn't tell you very much about this bill. It certainly doesn't tell you that he believed that those citizens wouldn't continue to have the right to vote. In fact, it tells you that he thought they would. It doesn't tell you that the Constitutional Convention or the State ratifiers, as a whole, would have been against this, because all it tells you is they didn't believe that it should be set up automatically.

I'd like to address, briefly, why not. I mean, what did we have back then when they were acting? Well, first of all, we didn't know then where the District would be. There was every chance that the District would be inside of a State, and in that case it was presumed—I think quite reasonably—that the vote would continue for the people in that District along with the State.

Second, what we know, is there weren't very many people in areas that were 10 x 10 square back then. In fact, the only city in America at that point in time that would have had enough residents in it to qualify for a vote as a District or as a new State

would have been New York City. New York City had about 34,000 people in it. You needed 30,000 to get a voting district, or 60,000 to be admitted as a State.

So there was really no reason for the Framers to expect that there would be enough people at that time to justify a seat for the District qua District.

Another thing that you'll see as you move a little bit forward in history, is Professor Turley addressed what happened in 1800 and later. Now, certainly in 1800 when Congress took control and the Federal Government took control of the District, the legislation that they enacted took away the vote of the people who were then living in the District. And it's been suggested that this and the failure to remedy it shows that Congress lacks the authority to remedy it today.

I guess what I'd say to that, are two things. No. 1, there was still a very small number of people in the District. There were 8,000 people in the District. That was 22,000 people too few to qualify for their own vote.

No. 2, it was widely—and I think reasonably—assumed that the 8,000 people in the District would be mingling so frequently with the Members of Congress that their views would be taken into account.

Today, of course, things are far different: there's 560,000 or so people in the District and, as much as they'd like to mingle with you, the chances of that are far and few between.

[Laughter.]

So I finished looking at the text, the precedent, and the history, and what I come out of it with is really an utter failure to see intent of the Framers to deprive, permanently deprive, the citizens, the residents of the District of the right to vote. It's that intent that I would have to find in here to conclude that Congress lacks the authority, under the District clause, to remedy this great tragedy.

Thank you.

Senator FEINGOLD. Thank you, Mr. Bress.

[The prepared statement of Mr. Bress appears as a submission for the record.]

Senator FEINGOLD. This has been just an excellent panel. I thank all of you. I would like to include in the record the statement of Senator Kennedy on this matter, without objection.

[The prepared statement of Senator Kennedy appears as a submission for the record.]

Senator FEINGOLD. Senator Hatch has a pressing matter that he needs to get to, but would like to ask a round of questions before I do, and I'm happy to have him do that.

Senator Hatch, we'll do 7-minute rounds.

Senator HATCH. Well, thank you, Senator. Thank you for your graciousness, which you always show. I'm very grateful to you.

Mr. Bress, since you finished, let me ask a few questions of you. I appreciate your acknowledging that this is a serious constitutional question, as I think all of you have. You've been analyzing and writing about the legal issues related to District representation in the House for several years, as I understand it, so you know that there are, indeed, arguments on both sides.

Mr. Elwood argues that the language in the District representation clause is, as he puts it, "unambiguous". You say in your statement that the language in that clause is "indeterminate". Which is it? Doesn't the word "States" mean "States"?

Mr. BRESS. Your Honor, I do believe that the word "State" means "States". I guess the question isn't whether "States" in that provision means a State, but rather whether that clause evinces a desire to prohibit Congress from acting under the District clause to permit a District Representative.

Senator HATCH. We certainly acted to have a constitutional delegate who has a right to vote, as long as her vote doesn't change anything, as long as it doesn't mean anything.

Mr. BRESS. Indeed, Senator Hatch. Moreover, as Judge Wald—

Senator HATCH. And that's gone on for quite a while.

Mr. BRESS. It has been. And as Judge Wald noted, of course, overseas residents, who are not by any common understanding of the language, nor of the laws of the States, residents of the States any longer are still permitted to vote as residents of the State under that provision.

So if that provision were so clear and so unambiguous, you wouldn't find that. Plus, of course, residents of the Federal enclaves whom the States have already said are not eligible to vote for State legislators, nonetheless, have been found by the Supreme Court to be sufficiently residents to qualify under that clause. So, no. I guess I would submit, it's not as clear as all of that, as constitutional law often isn't.

Senator HATCH. Well, America's Founders clearly made a choice not to have the Nation's Capital be one of its constituent parts, so they created a District separate from any of the States in the Union.

Now, one of the important questions that we have to wrestle with is whether, in doing that, America's Founders also intended that the citizens who should reside, who would reside in the District, would be disenfranchised without House representation that those citizens would enjoy if they lived anywhere else.

Now, how did the Founders expect District residents would be treated with respect to representation? Did they intend that because the District is not a State, District residents would be without House representation?

Mr. BRESS. No, Senator Hatch. I'm sorry, I keep saying "Your Honor" because I'm used to being in court.

[Laughter.]

I don't believe they did. As I've noted earlier, I think my best reading—and again, this is murky and there aren't clear answers. But my best reading of the history is that they supposed that the States, the ceding States, would take care of those who were in the land that was being ceded for the District.

And once again, if we were talking about a District that was in the middle of a State, I don't think there would be any question that those citizens would have continued to vote with the State, as citizens who live in Federal enclaves do today if they're in the middle of a State.

I think things got a bit complicated when it turned out later on, after the Constitution was enacted, that the District straddled two

States and provision wasn't made at that time to continue voting after the Federal Government took over in 1800.

As I've noted before, I think that there were political reasons why at that point those in Congress and those who had been Framers didn't push harder for a law that would give District residents the vote. I think both the small size of the District, 8,000 people, certainly wasn't enough in people's minds to permit continued voting for the District as District residents, qua District residents.

I really do believe that the small number of people in the District, and the historical materials bear this out, gave people confidence that those serving in this body and serving in the House of Representatives would be taking into account the views of those who lived in the District.

I just don't think those things hold true today. Neither of them do. And, no, I don't read the Framers as ever evidencing a view that 500,000-plus people living in the Nation's Capital would be denied the right to vote.

Senator HATCH. Well, let me ask you a related question. Some have argued—and I think perhaps Professor Turley, who's with us today, would be in this camp—that rejected of Alexander Hamilton's proposed constitutional amendment to give the District representation in the House amounted to a deliberate rejection of such representation.

I want to know if you agree with that, and did America's Founders affirmatively intend that citizens living in the District would have no representation in Congress?

Mr. BRESS. No. I actually strongly disagree with that. Having read Alexander Hamilton's amendment, I think it's awfully clear what he was trying to accomplish. Hamilton took, in the amendment, as a given that the residents of the District would have the ability to continue to vote with their former States, and all that his amendment would have accomplished is to automatically permit them to vote as residents of the Federal District when the Federal District attained a certain size.

So, No. 1, it becomes quite clear that being District residents, in Alexander Hamilton's view, was not enough to mean that they wouldn't get the right to vote. So there you've got this sort of square first point, which is the fact that they're residents of the District and not of a State wouldn't have been enough.

Now, there was the second part where he was trying to enact a provision that would have given District residents the right, qua District residents, to vote once the District attained a certain size. That didn't pass, but it's very hard to get much out of that. What you have there is a proposed amendment at a State ratifying convention that doesn't pass, with no legislative history one way or the other as to why not. I think it's very hard to draw conclusions from that.

Senator HATCH. Well, the District of Columbia is not the only place that does not have representation—or the status of a State, let's put it that way—in which American citizens live. Some have argued that giving full House representation to District residents would necessarily lead to similar privileges for other entities, such as territories. I believe Mr. Thomas from the Congressional Re-

search Service, who is with us today, I think you make that argument as well.

I'm not sure this is a constitutional argument, that Congress somehow is foreclosed from granting the District of Columbia House representation because doing so would lead to unintended consequences. I think it's more of a practical argument.

Mr. BRESS. I would agree with you completely, Senator.

Senator HATCH. Well, could you respond to that? And will granting the District representation necessarily lead to granting the territories representation?

Mr. BRESS. Your Honor, I would agree with you that it's primarily—Your Honor. Senator Hatch.

Senator HATCH. That's OK. I like it.

[Laughter.]

Mr. BRESS. At any rate, I would agree with you entirely, that it's primarily a practical question. Certainly the imperatives toward granting the District residents the right to vote do not exist equally with regard to the citizens of the territories. The citizens of the District are unique in being subject to the draft, to Federal income tax, and not being able to vote.

The District is also unique as having once been among the United States, plural, and having been carved out of them. I don't believe that the same political imperatives exist for it.

Also, of course, the constitutional provision is different, whereas the provision that we're discussing, the District clause, provides for exclusive legislative jurisdiction, the clause with respect to the territories says "to dispose of and make all needful rules and regulations respecting the territory."

I don't know, and I won't tell you now, how exactly that ought to be interpreted with regard to potential voting rights for the territories. It's not a subject that I've studied closely. But it is different, and I don't think we can necessarily draw the same conclusions from it.

Senator HATCH. Well, I have questions for each of you, especially for Turley, over here.

[Laughter.]

And Thomas, too. This has been a very good panel.

Mr. Chairman, you've done an excellent job in getting really good people here. We appreciate all of you, each and every one of you. I think we've had some very cogent remarks.

I particularly wanted to go after Mr. Elwood here today, but I'll spare you that, because I personally believe that I wouldn't sign on to something like this if I didn't think there was enough constitutional justification for it.

But I do agree that there are legitimate questions that have been raised, and would be raised, that I knew of as well. But I think, on balance, I agree with you, Professor Ogletree, it's time to right this wrong. We can do it this way.

Now, if the court chooses later to say we're wrong, I can live with that, if that's the way it is. I personally don't believe they will. I think it's worthwhile pursuing.

Judge Wald, it's so nice to see you again. We appreciate each and every one of you. You've made great contributions to this com-

mittee on this very important subject, something that I feel very deeply about. I hope that we're successful in passing this.

And if we're wrong, Professor Turley, Mr. Elwood, Mr. Thomas, you'll win in the end. But if we're right, you will go down in the history thinking, "How in the hell could I be so stupid?"

[Laughter.]

No, no.

Senator FEINGOLD. He was kidding.

Senator HATCH. I am only kidding.

Senator FEINGOLD. For the record.

Senator HATCH. These are very, very bright people and I have great respect for all of you.

Senator FEINGOLD. Thank you, Senator Hatch.

Senator HATCH. Thank you.

Senator FEINGOLD. We were doing so well.

[Laughter.]

Thank you for your involvement with this issue and for your involvement with this hearing.

Senator HATCH. I am going to have to pay for that out in Utah.

[Laughter.]

Senator FEINGOLD. Yes, I think so.

[Laughter.]

Let me ask some questions. Mr. Elwood, as you know, the Justice Department, particularly the Solicitor General, is responsible for defending duly enacted Federal statutes against constitutional challenges.

In 2001, I had occasion to ask the nominee for Solicitor General at that time, Ted Olson, about the Department's responsibility in cases where it had doubts about the constitutionality of the statute.

He had written the following in a Law Review article in 1982: "We in the Justice Department must also defend the constitutionality of congressional enactments, whether we like them or not, in almost all cases. We are the Government's lawyer, so even if we disagree with the policies of the law and even if we feel that it is of questionable constitutionality, we must enforce it and we must defend it."

I asked him if he still held that view and he answered as follows: "Yes, I do. And there are, of course, circumstances, and they were mentioned by Attorney General Ashcroft and they have been mentioned by other people in the Department of Justice from time to time.

"For example, situations where the Executive's power involved or where something is clearly unconstitutional or there's no reasonable defense that can be mounted with respect to a statute because we have an obligation to the courts, especially the U.S. Supreme Court, to make arguments that we believe are legitimate arguments.

"But I strongly believe," he continued, "as a matter of separation of powers and the responsibility of the Department, that there's a heavy burden of presumption that the statute is constitutional. We must be vigorous advocates for the Congress when we go before the courts," he said.

So my first question to you is, do you have any doubt that the Department of Justice would defend this statute in court if it is passed by the House and Senate and signed by the President?

Mr. ELWOOD. Well, to begin with, I'd just like to—if I can preface my remarks, I just want to make clear that the disagreements that the Department has with this bill, again, are not based on policy at all, they're simply based on matters of constitutional principle, which we've had for a while.

Obviously I can't commit the Justice Department in advance to what its position would be, but it is true that the Department ordinarily defends enactments of Congress, if there are reasonable arguments to be made in its favor.

Certainly Mr. Olson—I worked with him—defended a lot of bills that he might not have agreed with on policy grounds, but that wasn't the inquiry. There have been other times when the Department didn't defend enactments of Congress, such as, under the Clinton administration they didn't defend the *Miranda* override bill.

Senator FEINGOLD. Well, let's use your exact language here. Is it your view that a reasonable argument in favor of the constitutionality of the statute can be made?

Mr. ELWOOD. It's kind of a hard position for me, a hard question for me to answer, only because the Department has taken the position for as long as it has. But certainly colorable arguments have been mustered on the other side. I think they're ultimately unpersuasive.

But I think the fact that Congress, both Houses of Congress, would have underwritten them would certainly be a factor that the Solicitor General would take into consideration in determining whether to defend the bill on appeal.

Senator FEINGOLD. Well, I must say I was hoping for a stronger answer. Mr. Olson was a clear opponent of the McCain-Feingold legislation, but when I asked him about whether or not he would vigorously defend that, he had no hesitation and said he would.

I think you know the record. Not only did he disagree with the statute itself, but he ended up doing a brilliant job of arguing in favor of it before the U.S. Supreme Court.

Mr. ELWOOD. In fairness—

Senator FEINGOLD. So I think it is important to reassure the committee that I think obviously there are arguments against this, but the notion that there are not reasonable arguments in favor of it strikes me as problematic.

Mr. ELWOOD. The thing is, I just want to make the point that it's easier for him to say that than for me because he's in a much better position to know. He is the boss and I am several rungs down and one office over, essentially.

But it is true that there are arguments to be made, very colorable arguments, and that it is always a very important thing to the executive branch that Congress was persuaded by these arguments themselves because we understand you take your obligations seriously. You take the same oath that we do. If you think it's constitutional, that's definitely something that they weight very heavily.

Senator FEINGOLD. OK. Mr. Elwood, one argument you made struck me and I'd like to followup on it. You noted that the vote for DC permitted by this bill can easily be repealed by a future Congress and is of dubious constitutionality, suggesting that statehood or a constitutional amendment would be a more solid way to get representation in the District.

Does this administration support statehood or a constitutional amendment?

Mr. ELWOOD. Again, I'm afraid that my answer is going to be unsatisfying to you. I'm in the Office of Legal Counsel. We're law nerds. I can't say anything about policy matters.

Senator FEINGOLD. Are you aware of any statement from the administration supporting either statehood or a constitutional amendment?

Mr. ELWOOD. I think that I can only say what I know has been basically run up the flag pole through the whole OMB process, and that is that if representation is going to be given we think it should be given in a manner that is consistent with the Constitution. Certainly you cannot impugn the amendment process or the—

Senator FEINGOLD. But the administration has indicated no support for either statehood or a constitutional amendment. Is that correct?

Mr. ELWOOD. I don't know that it has taken a position, but we are not a policy shop, we're purely questions of law.

Senator FEINGOLD. Are you aware of anything that the administration has done at all to try to secure representation for the District? Are you aware of any?

Mr. ELWOOD. I am not aware. But again, it is a matter of policy and I am just completely questions of law.

Senator FEINGOLD. I'm simply going with regard to the scope of your knowledge, but I think it does undercut that argument a bit when you realize the actual record of the administration on that.

Mr. ELWOOD. Well, I will note, though, that the Carter administration and the Johnson administration, both of which were ardently in favor of voting for the District, both took the position that it couldn't be accomplished by simple legislation and that both—

Senator FEINGOLD. That it could not be accomplished?

Mr. ELWOOD. Could not be accomplished by simple legislation, it had to be done by amendment.

Senator FEINGOLD. My problem here is that it rings a little more hollow with an administration that has not advanced those positions, but it certainly would be consistent from a constitutional point of view.

I'm going to let Judge Wald respond.

Judge WALD. I simply wanted to reiterate, Senator, that, again, to the best of my memory—and I hope that's not a dubious phrase any more, going back 30 years—in the discussions we had about my testimony on the constitutional amendment in 1978, it was before the House but it was in conjunction with John Harmon, who then headed the Office of Legal Counsel. We never discussed this option of the authority.

Senator FEINGOLD. Judge, were you done there? Were you done with your response?

Judge WALD. Yes.

Senator FEINGOLD. OK. Go ahead, Mr. Elwood.

Mr. ELWOOD. I think that if they didn't address it, this particular thing, it was not because of lack of awareness of the District Clause. For example, this is Judge Wald's testimony. She said, "We do see Article I, Section 8, Clause 17 as according Congress the power to exercise exclusive legislation in all cases whatsoever over such District as may become the seat of Government of the United States as an obstacle to the unilateral decision by Congress to convert the District into a State."

Now, they were addressing it in a very different context because when you're talking about statehood, the argument is that because the District clause clearly indicates that they didn't intend it to be a State, you can't just move it in like you would any other State by simple legislation.

But the only reason I note that, is just to say everyone was aware of the District clause and people before just didn't think, well, of course we could use this to vote the State in by simple legislation.

I think there's a reason for that, and that is, it just hasn't been read that way. It hasn't been read as a way of enacting essentially laws of national scope, laws that can shape the whole structure of our government.

In fact, James Madison, who people are constantly invoking him, said that this clause, the District clause, could not be used as a fulcrum basically to enact national legislation.

Senator FEINGOLD. Judge Wald?

Judge WALD. Well, I was just going to point out that the sentence that he read from my testimony, and I'm aware of it, was in the context of the particular four different alternatives that we were discussing, not one of which—now, it may be that John Harmon and others had in the back of their mind this District clause, but I have to tell you that, in all the discussions that I recall, and we wrote the testimony out of my Office of Legislative Affairs, maybe it was our shortcomings, but this particular option was never discussed. Maybe in some other forum but not on the part of the House hearings I went to, nor inside the Department which looked at my testimony.

It was entirely with respect—I think one could go historically and look at a lot of examples, and Senator Leahy raised one, where all of a sudden a clause which has sort of been slumbering there, like the commander in chief clause, suddenly is raised to encompass all sorts of things that none of us had the remotest idea, and that even the Founders had then said Alexander Hamilton—no, that just means—

Senator FEINGOLD. In fact, that's an area where I have quoted Professor Turley.

Judge WALD. Yes. That just means he can tell where the troops should go. So I don't think I have this quote right, but the old quote about, the absence of evidence is not evidence of absence. Whatever the right quote is, I don't think you can infer from that that everybody was aware of, and dismissed, the argument which is being pursued here.

Senator FEINGOLD. Thank you, Judge.

Mr. Ogletree, virtually everyone agrees that the District's lack of representation is manifestly unjust. Given the evolution of voting rights in this country's history and the history of racial discrimination, what is the appropriate way to analyze the constitutionality of legislation intended to correct this injustice?

Mr. OGLETREE. Senator Feingold, I think it's simple. If we look at our history of the pervasive denial of basic fundamental rights, not based on any sharp constitutional analysis but simply based on race, we will see the irony.

Let's take voting rights. African-Americans have been on this land since 1607, even before the Nation was founded, and not until 1965, 300-plus years, 360 years, did African-Americans finally have, universally, the right to vote. It was implied, it was suggested, but it didn't happen until 1965.

Even after 1965, in the last 42 years we see as well, with the reauthorization of the 2006 Voting Rights Act, that it wasn't applied equally even after we had a constitutional amendment to say that it was applied.

The reality is that there is a difference between what we profess to offer citizens as a right and what we actually offer to African-Americans. It is a pervasive failure of equality. We saw that in civil rights legislation that had to be enacted for African-Americans. We saw that in voting rights, that legislation had to be enacted. We see that in Congress now, even addressing the issue of voting.

I think, as you think about this city and the citizens who are poor, who are struggling, who pay the same taxes and fight in the same war and don't get any basic fundamental rights, that the only thing this Congress can do as a moral and legal response is to give them the basic rights, not more, but not less rights than any other citizen in America.

Senator FEINGOLD. Well, thank you very much. I appreciate everyone's participation.

Anyone want to make any closing remarks, very quickly? Professor Turley?

Professor TURLEY. Thank you. I just wanted to note two things about what was stated previously about the history. First of all, in terms of the ambiguity of Hamilton's amendment on July 22, 1788, Mr. Bress says he has a hard time really seeing how it was relevant, Hamilton said that he objected to the status of the residents and said that "the inhabitants of said District shall be entitled," under his amendment, "to the like essential rights as the other inhabitants of the United States in general."

I want to make perfectly clear, he wasn't talking about their having any rights with previous States. He was talking about the fact that they would be disenfranchised, and I fail to see the ambiguity. Madison, who has also been quoted, talked about a municipal legislature for local purposes. He thought that it would be a good idea if the District had "municipal legislature for local purposes".

Now, finally, if you look at the record you'll see references not just to the composition clause, but also the District clause. When the District clause comes up it is repeatedly referred to as a matter that deals administratively internally with Congress's authority.

That argument was made forward by Pendleton, who was the president of the Virginia Ratification Convention, who assured all

the other delegates, when they saw the District clause, that it would have no effect outside its borders. It is purely internal.

That's why all these examples of, but we can tax them, we can send residents to war, you can do a lot of things. That's where it is majestic: you can do most anything inside the District internally.

What you're doing now, is you're using an internal power to affect the status, not of other States, of States, an external application of that District clause. That's where I think the record is clear, that you cannot go beyond that line.

Senator FEINGOLD. Judge Wald?

Judge WALD. I just want to make a quickie here. It seems to me that the line you draw gets very fuzzy with the *Tidewater* case because you take the District representation, plurality, given, and you say the District clause and you say that enables us to require Article III Federal courts throughout the country, which normally receive the jurisdiction over its citizens between two different States but not prior to this, not citizens and District residents, to they now must accept the cases of citizens and the District residents. It seems to me that does take the District clause outside of the strictly District residents. I don't know if the Senator will give you reply time.

Senator FEINGOLD. Very quickly.

Professor TURLEY. Bless you, Senator. I think if you look at that, you'll see that six of those Justices do not seem to support the position. But if you look at *Lawboro* in 1820, the Supreme Court says quite clearly, "DC relinquished the right to representation." That is a direct quote of the Supreme Court on the matter.

Senator FEINGOLD. Thank you very much.

The record for this hearing will remain open for one week, during which time we will accept additional materials from our witnesses today or statements from other individuals on the topic of this hearing. In addition, any written questions that Senators may have for the witnesses should be submitted by one week from now.

Again, thank you all for just an excellent job.

This hearing is adjourned.

[Whereupon, at 4:03 p.m. the hearing was adjourned.]

[Questions and answers and submissions for the record follow.]

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# QUESTIONS AND ANSWERS

Answers of Richard P. Bress
"Ending Taxation Without Representation: The Constitutionality of S. 1257"

## QUESTIONS SUBMITTED BY SENATOR RUSSELL D. FEINGOLD

1. **Is there anything further you can tell us about amendments that were proposed at the state ratifying conventions pertaining to the District Clause? What, if anything, do you think these proposed amendments suggest about the Framers' intent regarding whether Congress may provide the Federal District's residents with a voting representative in the House of Representatives?**

Professor Jonathan Turley contends that the records from the state ratifying conventions provide repeated evidence that delegates to those conventions considered and rejected proposals that would have given the District of Columbia a voting representative in the House of Representative.[1] Professor Turley claims these failed proposals demonstrate that the Framers contemplated providing the as-yet known Federal District with a voting representative, but decided against it. Professor Turley is wrong on both scores. Other than Alexander Hamilton, no delegate proposed an amendment (and therefore there is no evidence of a failed amendment) that would have provided District residents with voting representation in the House of Representatives. As shown below, Professor Turley's more specific claims regarding events at the North Carolina, Pennsylvania, Massachusetts, and New York do not appear to be supported by any evidence.[2] To the contrary, to the extent the records of the state ratifying conventions reveal

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[1] In Professor Jonathan Turley's prepared statements submitted to both the Senate Judiciary Committee and the Senate Committee on Homeland Security and Governmental Affairs, he asserted,

> On July 22, 1788, Hamilton asked that the District Clause be amended to mandate that "the Inhabitants of the said District shall be entitled to the like essential Rights as the other inhabitants of the United States in general." Indeed, at least two amendments were proposed to give residents representations in that convention alone. Other such amendments were offered in states like North Carolina and Pennsylvania.

*Ending Taxation Without Representation: The Constitutionality of S. 1257: Hearing on S. 1257 Before the S. Comm. on the Judiciary*, 110th Cong. *29 (2007) [hereinafter *Senate Judiciary Hearing*] (testimony of Jonathan Turley, Professor, George Washington University Law School), *available at* http://judiciary.senate.gov/pdf/05-23-07Turleytestimony.pdf (same); *Equal Representation in Congress: Providing Voting Rights to the District of Columbia: Hearing on S. 1257 Before the S. Comm. on Homeland Security and Governmental Affairs*, 110th Cong. *23 (2007) [hereinafter *Senate Homeland Security and Governmental Affairs Hearing*] (statement of Jonathan Turley, Professor, George Washington University Law School), *available at* http://hsgac.senate.gov/_files/051507Turley.pdf; *see also District of Columbia Fair and Equal House Voting Rights Act of 2006: Hearing on H.R. 5388 Before the Subcomm. on the Constitution of the H. Comm. On the Judiciary*, 109th Cong. 64 (2006) [*House Subcomm. on the Constitution Hearing*] (statement of Jonathon Turley, Professor, George Washington University Law School) (same).

[2] Unfortunately, Professor Turley provides no citation to authority supporting his assertion that amendments in North Carolina and Pennsylvania would have granted District residents representation. Indeed, in his four published statements before Congress on the issue, Professor Turley has yet to cite authority showing that a delegate offered an amendment in the North Carolina or Pennsylvania Conventions that would grant District residents representation. *See Senate Judiciary Hearing*, *supra* note 1, at *29 (testimony of Jonathan Turley, Professor, George Washington University Law School); *Senate Homeland Security and Governmental Affairs Hearing*, , *supra* note 1, at *23 (statement of Jonathan Turley, Professor, George Washington University Law School); *Legislative Hearing on H.R. 1433, The "District of Columbia House Voting Rights Act of 2007" Before the H. Comm. on the Judiciary*, 110th Cong. *15 (2007) (statement of Jonathan Turley, Professor, George Washington University Law School) ("Neither [Hamilton's proposed amendment] nor other such amendments offered in states like North Carolina and Pennsylvania were adopted."), *available at* http://judiciary.house.gov/media/pdfs/Turley070314.pdf; *House Subcomm. on the*

anything, it is that the Framers considered and rejected amendments to the District Clause that would have substantially curtailed Congress's plenary power over the new Federal District.

***Proposals at the State Ratifying Conventions***

Professor Turley makes specific claims regarding proposals at four state ratifying conventions. Having reviewed the historical record, apart from Turley's citation to Hamilton's proposal in New York—which he accurately quotes but in my view misinterprets—I cannot agree with Turley's assertions.

*First*, the records of the North Carolina and Pennsylvania conventions do not support Professor Turley's claim that amendments to give the District of Columbia a voting representative "were offered in states like North Carolina and Pennsylvania." The only proposed amendments in North Carolina and Pennsylvania that concerned the District would have *limited* Congress's exclusive grant of power under the District Clause. Both of those amendments failed. In particular, a delegate to the first (unsuccessful) North Carolina ratifying convention proposed an amendment providing "[t]hat the exclusive power of legislation given to Congress Over the federal town and its adjacent district, and other places purchased or to be purchased by Congress of any of the states, shall extend only to such regulations as respect the police and good government thereof."[3] That amendment, however, failed, and the second North Carolina convention ratified the Constitution without any amendments that would have given District residents representation.[4]

I also found no evidence that the participants in the Pennsylvania ratifying convention proposed any amendments addressing the rights of District residents to voting representation in the House of Representatives. The record does show that, *after the Pennsylvania ratifying convention ended*, Pennsylvania Antifederalists petitioned the Pennsylvania General Assembly to pass legislation rejecting the conventions' ratification of the Constitution.[5] After that futile effort, several Pennsylvania Antifederalists met in Harrisburg on September 3, 1788, to discuss how to change the Constitution. They ultimately proposed twelve amendments, including one that mirrored the North Carolina amendment. It stated: "[t]hat the clause respecting the exclusive legislation over a district not exceeding ten miles square be qualified by a proviso that such right of legislation extend only to such regulations as respect the police and good order thereof."[6] The

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*Constitution Hearing*, *supra* note 1, at 64 (statement of Jonathon Turley, Professor, George Washington University Law School) ("Neither [Hamilton's proposed amendment] nor other such amendments offered in states like North Carolina and Pennsylvania were adopted.").

[3] The Debates in the Convention on the State of North Carolina, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTING OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 245 (Jonathan Elliot ed., Washington, D.C., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES], *available at* http://memory.loc.gov/ammem/amlaw/lwed.html; 2 THE DEBATE ON THE CONSTITUTION: FEDERALIST AND ANTIFEDERALIST SPEECHES, ARTICLES AND LETTERS DURING THE STRUGGLE OVER RATIFICATION 570 (Bernard Bailyn ed., The Library of America 1993) (1788) [hereinafter THE DEBATE ON THE CONSTITUTION].

[4] *See* 2 THE DEBATE ON THE CONSTITUTION, *supra* note 3, at 572-74.

[5] *See* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUION BY THE STATES, PENNSYLVANIA 709-25 (John P. Kaminski et al. eds., 1976).

[6] The Debates in the Convention of the State of Pennsylvania, *in* 2 ELLIOT'S DEBATES, *supra* note 3, at 545.

failure of that proposal, and similar proposals in North Carolina and Virginia,[7] undermines Turley's attempt to paint the broad District Clause that was enacted as a provision limited to local police power.

*Second*, and likewise, there seems to be no record supporting Professor Turley's suggestion that during the Massachusetts convention, "the very proposal to give the District a voting in the House but not the Senate was proposed."[8] Although Professor Turley claims Massachusetts delegate Samuel Osgood "sought to amend the provision to allow the residents to be 'represented in the lower House,'"[9] I have not been able to locate any evidence that Osgood (or anyone in Massachusetts) ever actually proposed such an amendment. At best, there is evidence that Osgood wrote a letter to Samuel Adams in which he stated that District residents *should be* represented in the House, but there is no evidence that Osgood proposed an amendment to that effect. Indeed, none of the proposed amendments during the Massachusetts convention would have affected District residents' representation in the House of Representatives.[10]

*Third*, although Professor Turley notes that "at least two amendments were proposed to give residents representations in [the New York] convention alone," it appears that no New York delegate other than Alexander Hamilton proposed an amendment that would have explicitly granted District residents representation.[11] As I previously noted in my May 23, 2007 testimony, Hamilton's proposal presumed that the District's residents could continue voting with the state from which the District was carved, and would have given them the *automatic* right to cast votes *as District residents* once the District's population reached the size necessary for a voting representative under the apportionment rules.[12] If anything, this failed amendment (at a *state*

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[7] The Debates in the Convention of the Commonwealth of Virginia, *in* 3 ELLIOT'S DEBATES, *supra* note 3, at 660 (proposing the following amendment: "That the exclusive power of legislation given to Congress over the federal town and its adjacent district, and other places, purchased or to be purchased by Congress of any of the states, shall extend only to such regulations as respect the police and good government thereof.").

[8] *Senate Judiciary Hearing*, *supra* note 1, at *29 (testimony of Jonathan Turley, Professor, George Washington University Law School).

[9] *Senate Judiciary Hearing*, *supra* note 1, at *29 (testimony of Jonathan Turley, Professor, George Washington University Law School); *Senate Homeland Security and Governmental Affairs Hearing*, *supra* note 1, at *23 (statement of Jonathan Turley, Professor, George Washington University Law School). Once again, Turley cites no authority supporting this claim.

[10] *See* The Debates in the Convention of the Commonwealth of Massachusetts, *in* 2 ELLIOT'S DEBATES, *supra* note 3, at 176-77; *see also* Hampden, *The Amendments Proposed*, MASSACHUSETTS CENTINEL, Jan. 26, 1788, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, MASSACHUSETTS 807-09 (John P. Kaminski et al. eds., 1998); Agrippa, MASSACHUSETTS GAZETTE, Feb. 5, 1788, *reprinted in* 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, MASSACHUSETTS 863-68 (John P. Kaminski et al. eds., 1998); 6 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: RATIFICATION OF THE CONSTITUTION BY THE STATES, MASSACHUSETTS 1116-21(John P. Kaminski et al. eds., 2000).

[11] Delegate Melancton Smith proposed an amendment to the District Clause that would have extended "essential rights" protected in the Constitution to District residents, but that amendment neither mentioned voting rights nor did Smith reference representation in his comments on the floor. The Debates in the Convention of the State of New York, *in* 2 ELLIOT'S DEBATES, *supra* note 3, at 410. In any event, Turley does not suggest that the failure of Smith's proposal means that the residents of the District lack "essential rights" protected in the Constitution.

[12] 5 THE PAPERS OF ALEXANDER HAMILTON 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

ratifying convention) supports the suggestion that the Framers assumed the District's residents would retain the right to vote with their former state, and it demonstrates at most a disinclination to provide automatically for representation of the District *qua District*—a fact not surprising given the unknown facts relating to the District during the ratification debates. It does not remotely suggest that the Framers believed that *Congress* would lack power to effect that result legislatively. Nor does it suggest the Framers intended that District residents would permanently lose the right to vote simply because they happened to live in the part of a state whose land became the Federal District.

*Finally*, a survey of the records of the ratifying conventions in the remaining eight states reveals that in no instance did any state consider—let alone approve—an amendment relating to voting representation for the District of Columbia. Participants to the Connecticut, Delaware, Georgia, Maryland, New Hampshire, New Jersey, Rhode Island, and South Carolina conventions proposed no amendments impacting this issue.

***Conclusion***

In sum, if anything can be gleaned from the debates and proposed amendments at the state ratifying conventions, it is the (unsurprising) fact that Antifederalists were very worried about the new federal government's power and—in the case of the District Clause—feared that Congress would use its power over the new Federal District to violate the individual rights of the Federal District's residents. To that end, Antifederalists in a handful of states proposed amendments that would have limited Congress's power over the individual rights of the Federal District's residents such that Congress could only provide for a "good government" and order therein. The states rejected these proposals, and purposefully ratified a District Clause that broadly authorizes Congress to regulate the substantive rights and liberties of its residents.

**2. Is there anything further you can tell us about the role the District's population may have played in the Framers' and early congressional decisions not to provide District residents a voting representative in the House of Representatives?**

As I suggested in my May 23, 2007 testimony, the absence of a sizable population in the District was likely significant—if not determinative—in the early Congresses' decision not to provide a separate voting representative for residents of the District of Columbia. Debate at the Constitutional Convention and in the first Congresses demonstrates that the Framers and early members of Congress were deeply concerned with ensuring proportionate representation in the House of Representatives. Had the Framers provided a voting representative for residents of the District of Columbia in the 1790s, its small population would have dramatically upset the Framers' scheme to ensure proportionate representation in the House. It is therefore neither surprising nor telling that in the years immediately following the District's establishment, no serious effort was made to secure the District's residents a voting representative.

***Debates at the Constitutional Convention***

Debate at the Constitutional Convention over apportionment of House seats indicates that the Framers would have considered voting representation for District residents *qua District residents* in 1787 incompatible with their predominant goal of equal representation in the House.

Under the Great Compromise, each state would have equal representation in the Senate and the residents of each state would have representation based on the state's relative population in the House. This left the Framers with the difficult task of apportioning House seats among the states while ensuring that each congressional seat represented an equal number of individuals. The fact that state populations were not all divisible by any practicable number made this a mathematical impossibility.

The Framers appear to have dealt with this problem by leaving it to future Congresses. As a short term solution, the Framers ratified a Constitution that (1) established a set number of seats per state for the First Congress, to be amended following the first census, and (2) established a maximum population-to-representative ratio for the House.[13] The debate on this ratio gives some indication as to how and why the Framers may have concluded that the District should not have a separate voting representative at the time of ratification.

The bill reported by the committee tasked with drafting the Composition Clause initially set the population-to-representative ratio at one representative for every 40,000 citizens.[14] This low ratio ensured a representative in the House for even the smallest state of Delaware, which had a population of approximately 45,000 in 1787. The Framers recognized that continuing to use this ratio despite increases in population would have led to a very large and (they feared) chaotic House of Representatives. To avoid that problem, Delegates James Madison and Roger Sherman moved to have the population-to-representative ratio amended to read, "*not exceeding* 1 for every 40,000."[15] This motion passed without debate.[16] Delegate Dickinson of Delaware then moved to include the clause "provided that each state shall have one representative at least," and his motion passed unanimously.[17] Later in the convention, Delegate Nathanial Gorham moved to have one representative for every 40,000 changed to one per 30,000, which also passed without debate.[18]

This limited debate reveals the three-sided challenge faced by the Framers: how to keep the House at a manageable size, ensure representation for even the small state of Delaware, and yet use the same population-to-representative ratio in each state. The Framers achieved this trifecta by using the one per 30,000 ratio, which the Framers believed was the lowest ratio they could use without producing a chaotic House. In this context, the idea of providing a voting representative for the residents of the as-yet unknown Federal City never would have occurred to the Framers. To begin with, the Framers had yet to decide on the location for the "ten mile square" capital. Regardless, only New York City provided a ten-mile-square tract of land in the colonies dense enough to yield a population near 30,000. Indeed, the swamp land that would become the District only had a population of approximately 8,000 residents in 1787.[19] The small

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[13] U.S. CONST. art I, § 1, cl. 3.

[14] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 178 (Max Farrand ed., 1911).

[15] *Id.* at 219.

[16] *Id.*

[17] *Id.* at 223.

[18] *Id.* at 643-44.

[19] U.S. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, 1 HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1970, at 26 (3d ed. 1975).

population of this would-be District, coupled with the Framers' intention to keep the population-to-representative ratio high enough to prevent an unmanageable House, made representation for residents of the District, as such, implausible in 1787.

***Debate in the Early Congresses***

Debate in the early Congresses reinforces this conclusion. Article I, Section 2 provided for apportionment in the House until the first census, at which time the Framers intended Congress to reapportion seats in the House.[20] Following the first census in 1790, the Second Congress had to devise a new apportionment scheme. This proved a difficult task.

Congress initially focused its attention on what Representative Sedgwick referred to as the "injury arising from unrepresented fractions."[21] This reference to "fractions" was just another name for the problem acknowledged but ultimately ignored by the delegates to the Constitutional Convention: that no population-to-representative ratio could be applied to all states without leaving behind a fraction of seemingly "unrepresented" citizens. Regardless of the ratio chosen, the fractions that remained after division would be different in every state. But these varying fractions would have to be absorbed by the seats allotted to each state, creating differently-sized districts in each state. Thus, voters in different states were not represented "equally" in the House. For example, consider a ratio of one representative for every 30,000 state residents. Under such a ratio, Delaware, with its population of 59,000[22] would receive just one representative. Rhode Island, with a population of 69,000,[23] would receive two representatives. Despite a population difference of just 10,000, Rhode Island would have twice as many votes in the House as Delaware, thereby depriving Delaware residents of the "perfect equality"[24] envisioned by the Framers. James Madison, hoping for such perfection, stated that it would be "an evil that one state should have greater unrepresented fractions than another."[25]

Although some members understood that this type of inequality was inevitable,[26] this did not stop Congress from seeking perfect equality. The first House bill to address the issue used the 30,000 figure found in the Constitution. The Senate returned with a 33,000 figure, having found that this ratio resulted in smaller fractions. Congress adopted the latter ratio and, with President George Washington's approval, it became law. This haggling over minor differences in apportionment schemes highlights the Framers' concern about even de minimus variations from perfect equality. The difference in apportionment that resulted from use of the 30,000 figure as opposed to the 33,000 figure was sufficient to raise the ire of the Framers. Madison considered

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[20] U.S. CONST. art. 1, § 2, cl. 3.

[21] 1 ANNALS OF CONG. 248 (Joseph Gales ed., 1791).

[22] U.S. BUREAU OF THE CENSUS, *supra* note 19, at 25.

[23] *Id.* at 34.

[24] 1 ANNALS OF CONG. 267 (Joseph Gales ed., 1791).

[25] 1 ANNALS OF CONG. 334 (Joseph Gales ed., 1792).

[26] *See id.* at 248 (statement of Rep. Sedgwick); *id.* at 334 (statement of Rep. Williamson); *id.* at 407 (statement of Rep. Madison).

such malapportionment "evil."[27] In this context, the Framers would have considered provision of a representative to the District unacceptable. Approximately 8100 residents lived in the District in 1790.[28] Providing these 8100 residents with the same number of representatives as 59,000-person South Carolina[29] would have offended the Framers sense of equality.

In sum, debate at the Constitutional Convention and in the early Congresses indicates that the Districts' small population made representation for the District implausible in the 1780s and 1790s. The Framers probably did not provide the District with a vote in part because doing so would have disrupted the Framers delicate balancing of apportionment in the House. That concern is no longer present today. Indeed, the District's 600,000-person population—larger than that of Wyoming—more than qualifies it for representation in the House.

**3. What, if anything, does the Organic Act of 1801 teach us regarding Congress's understanding at that time about its power to provide District residents with voting representation in the House of Representatives?**

In 1801, Congress enacted the Organic Act of 1801 through which Congress extinguished the jurisdiction of Maryland and Virginia over the Federal District.[30] In 1801, a state needed a minimum population of 60,000 residents to qualify for a voting representative in the House of Representatives. A mere 8000 residents lived in the District of Columbia.[31] It is therefore not surprising that in the years immediately following the District's establishment no serious effort was made to secure the District's residents a voting representative.

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[27] *Id.* at 334.

[28] U.S. BUREAU OF THE CENSUS, *supra* note 19, at 26.

[29] *Id.* at 34.

[30] Organic Act of 1801, An Act Concerning the District of Columbia, 2 Stat. 103, Feb. 27, 1801, *reprinted in* 1 D.C. Code Ann. 46-49.

[31] U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES 26 (1975).

## QUESTIONS SUBMITTED BY SENATOR TOM COBURN

**1. According to arguments by supporters of this legislation, Congress has broad plenary power over D.C. including the power to give D.C. representation in the House. Would that power also extend to a scenario where Congress decided that for any legislation regarding D.C., the D.C. City Council would have the authority to revise legislative language before the legislation's transmission to the President?**

I do not think that Congress would have the authority under the District Clause to delegate power to the District of Columbia's City Council to revise legislative language prior to its transmission to the President. Such legislation would in my view squarely violate the procedures set forth in Article I, Section 7, including the Presentment Clause.[1] The text of Article I, Section 7 lays out in clear terms the process by which legislation becomes law and the Supreme Court has repeatedly rejected efforts to amend that process through federal legislation, noting that there is "abundant support for the conclusion that the power to enact statutes may only 'be exercised in accord with a single, finely wrought and exhaustively considered procedure'" that the Framers laid out in Article I, Section 7.[2] Indeed, the Supreme Court's decisions in *INS v. Chadha* and *Clinton v. City of New York* are likely dispositive on this question: in both cases the Court considered the constitutionality of Congress's decision to amend the process by which a bill passed by both houses becomes a law and in both cases the Court held such legislation was unconstitutional and violated Article I, Section 7.

In *INS v. Chadha*, the Court considered the constitutionality of a one-house legislative veto whereby the Immigration and Nationality Act authorized the House of Representatives, by resolution, to invalidate a decision of the Executive Branch (exercising authority Congress delegated to the Attorney General).[3] After a detailed survey of the Framers' intent, the Court found no support for the view that the Constitution allows Congress to alter the Constitution's explicit dictates on the process by which a bill, passed by both houses of Congress, becomes a law. The Court thus held that by enacting legislation that authorized the House of Representatives to veto decisions made pursuant to valid legislation, Congress had violated the provisions set out in Article I, Section 7, including the requirements of bicameralism, presentment to the President, and the Presidential veto.

In *Clinton v. City of New* York, the Court held the Line Item Veto Act was likewise unconstitutional because, when Congress enacted the legislation that allowed the President to veto line items of legislation passed by Congress, the legislation provided a role for the President that conflicted with the plain instruction of Article I, Section 7. The Court was not persuaded by the fact the Framers explicitly authorized the President to veto legislation, and observed that while "[b]oth Article I and Article II assign responsibilities to the President that directly relate to the

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[1] U.S. CONST. art. 1, § 7, cl. 2

[2] *Clinton v. City of New York*, 524 U.S. 417, 439 (1998) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)).

[3] *Chadha*, 462 U.S. 919.

lawmaking process, . . . neither addresses the issue presented by these cases."[4] The Court noted that while the Constitution did authorize the President to "return" a bill—"which is usually described as a "veto[]"—the Constitution did not explicitly allow the President to cancel only part of a bill.[5] Instead, the Court noted, "[a]lthough the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral Presidential action that either repeals or amends parts of duly enacted statutes."[6]

Legislation that would interject the D.C. City Council into the process by which a bill that has passed the House and Senate becomes a law would similarly run afoul of the "finely wrought" procedures the Framers established in Article I, Section 7 in two respects. Such legislation would violate the Presentment Clause, which requires that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States." Nowhere does the Presentment Clause state that Congress may amend that process to allow for further modification by any state or federal entity.

For these reasons, I do not believe Congress's plenary power under the District Clause authorizes Congress to enact legislation that would do an end run around the clear requirements of Article I, Section 7.

**2. The District Clause is part of the Federal Enclave Clause at Article 1, Section 8, Clause 17. According to the Federal Enclave Clause, Congress has "like authority" over federal enclaves as it does over the District. Doesn't reading the District Clause in full context of the Federal Enclave Clause suggest the Framers were giving Congress a custodial, administrative and operational power over federal enclaves, including the District, and not the power to statutorily change the voting makeup of Congress to grant representation for the "forts, magazines, arsenals, dockyards, and other needful buildings" and the District?**

I believe it is a misreading of the District Clause to conclude that the Framers explicitly chose to limit Congress's power to custodial, administrative and operational power over federal enclaves. That interpretation is contradicted by the Constitution's text, legislative history, and Supreme Court precedent.

To begin with, the text of the Federal Enclave Clause places no such limits on Congress' authority. To the contrary, Article I, § 8, cl. 17 broadly delegates authority to Congress to

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[4] *Id.* at 438. In describing the two applicable provisions, the Court noted:

> The President "shall from time to time give to the Congress Information on the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient . . . ." Art. II, § 3. Thus, he may initiate and influence legislative proposals. Moreover, after a bill has passed both Houses of Congress, but "before it becomes a Law," it must be presented to the President. If he approves it, "he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it." Art. I, § 7, cl. 2. n28.

[5] *Id.* at 438-39.

[6] *Id.* at 439.

"exercise exclusive legislation *in all Cases whatsoever*, over such District . . . and to exercise like Authority over" federal enclaves.[7] This expansive language speaks to matters far broader than custodial control. Indeed, delegates at the North Carolina, Pennsylvania and Virginia state ratifying conventions were concerned about the breadth of Congress's plenary power under the District Clause and considered language that would have limited the Congress's power to custodial control. In all three instances, delegates proposed amendments that would have limited Congress's "exclusive power of legislation . . . over the federal district . . . only to such regulations as respect the police and good government thereof."[8] Those proposals—largely advanced by antifederalists who, like opponents to this legislation, sought to limit Congress's power—uniformly failed. The text and the legislative history thus provide no support for limiting Congress's power to custodial or administrative acts.

Any doubt on that score is resolved by Supreme Court precedent. In *National Mutual Insurance Company v. Tidewater Transfer Company*, the Supreme Court the suggestion that the Federal Enclave Clause provides Congress with only custodial and administrative powers over the District.[9] The plurality held that, although the District is not a "state" for purposes of Article III, the District Clause provides Congress with the power to provide the same diversity jurisdiction to District residents.[10] The Court reasoned that because Congress unquestionably had the power to provide District residents diversity jurisdiction in new Article I courts, the District Clause surely empowered it to accomplish the more limited result of granting District citizens diversity-based access to existing Article III courts.[11] The Court stated "[i]t is elementary that the exclusive responsibility of Congress for the welfare of the District" included "both power and duty to provide its inhabitants and citizens with courts adequate to adjudge not only controversies among themselves but also their claims against, as well as suits brought by, citizens of the various states."[12] If Congress's power was limited to "administrative" acts, it would have had no authority to expand the access of the federal courts *nationwide* to residents of non-states in contravention of Article III's statement that the judicial power of the United States to cases or controversies "between Citizens of different States." Yet the Court held that Congress's powers were not so limited.

Finally, if the metric for Congress's power to provide District residents voting representations in the House of Representatives were its ability to provide residents of federal enclaves voting representation in the House of Representatives, that test would counsel strongly in favor of interpreting the District Clause as authorizing S. 1257. In *Evans v. Corman*, the Supreme Court held that residents of federal enclaves within states—such as the National

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[7] U.S. CONST. art I, § 8, cl. 17 (emphasis added).

[8] 4 ELLIOT'S DEBATES, *supra* note 3, at 245 (North Carolina Ratification Convention); *see also* 2 ELLIOT'S DEBATES, *supra* note 3, at 545 (Pennsylvania Ratification Convention) (proposing that "the clause respecting the exclusive legislation over a district not exceeding ten miles square be qualified by a proviso that such right of legislation extend only to such regulations as respect the police and good order thereof"); 3 ELLIOT'S DEBATES, *supra* note 3, at 660 (Virginia Ratification Convention) (proposing similar amendment).

[9] *See* 337 U.S. 582, 601-02 (1949)

[10] *Id.* at 601-02.

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

[12] *Id.* at 590.

Institutes of Health—have a constitutional right to congressional representation.[13] And through the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), Congress has already provided Americans living abroad (including those working in federal enclaves) the right to vote in federal elections as though they were present in their last place of residence in the United States.[14] There is no reason why the Constitution should somehow authorize Congress to exercise less power over the residents of the District.

**3. Is there any historical evidence showing that Congress introduced, debated or advanced any similar legislation like S. 1257, that statutorily grants House representation to the District or other federal enclaves, especially in the post-Ratification era, post-Organic Act era, or post-Virginia Retrocession era?**

In the period between the Organic Act and the retrocession of Alexandria in 1847, Congress considered several proposals to investigate the possibility of granting the District a non-voting delegate in the House of Representatives. These proposals were approved by the Senate in 1820 and 1836, and by the House in 1831 and 1845 and are noted below.

- On December 30, 1819, Representative Kent of Maryland proposed that the "Committee on the District of Columbia be instructed to inquire into the expediency of granting to said District a Delegate on this floor, in the same manner that Delegates are allowed to other Territories of the United States."[15] The House voted against the proposal. None of the details of that debate are recorded in the Annals or the Journal of the House.[16]

- On March 29, 1820, the Senate considered a similar proposal introduced by Senator Johnson of Kentucky.[17] Congress had recently granted the territory of Michigan a non-voting delegate, and Senator Johnson spoke of the "equal necessity of allowing to the District of Columbia a delegate, upon a footing with the Territorial governments."[18] Senator Johnson believed that Congress was empowered to enact such legislation based on its exclusive authority for the district to "pass laws for the purposes of promoting their prosperity and happiness."[19] The Senate debated that proposal on April 3, 1820.[20] Senator King of New York spoke in opposition to the proposal. His principal objections were that the District residents "had not asked of Congress this privilege," that the House should act first, and that the measure might be

[13] 398 U.S. 419 (1970).

[14] 42 U.S.C. § 1973ff-1 (2007).

[15] 35 ANNALS OF CONG. 248 (1820), *available at* http://memory.loc.gov/ammem/amlaw/lwac.html.

[16] *Id.*; *see* U.S. *House Journal*. 16th Cong., 1st sess., 30 December 1819, *available at* http://memory.loc.gov/ammem/amlaw/lwac.html.

[17] 36 ANNALS OF CONG. 551-52 (1820).

[18] *Id.* at 552.

[19] *Id.*

[20] *Id.* at 566.

seen as a prelude to D.C. statehood.[21] Senator Johnson's proposal was approved over Senator King's objections.[22]

- On February 13, 1824, Representative Ross of Ohio submitted another similar proposal.[23] Mr. Ross stated that "he could see no reason why the people of the District of Columbia should not be represented here in the same manner as other inhabitants of the United States."[24] Representative Stevenson expressed skepticism as to whether there "had been any expression of the wishes of the people of the District in favor of the measure." Representative Taylor of New York opposed the bill because "[n]o petition from that District was submitted asking for this privilege; and he thought that this consideration alone was sufficient to show not only why such a Delegate should not be chosen, but why Congress should not even direct an inquiry on the subject."[25] The House then voted to table the resolution.[26]

- A bill to grant the District a non-voting delegate in the House was introduced by Representative Powers, a member from the Committee for the District of Columbia, on April 26, 1830.[27] It appears the House did not act on the proposal.[28]

- North Carolina Representative Carson submitted a similar proposal on December 21, 1831.[29] No one is recorded as speaking against that proposal, and it was approved by the full House of Representatives.[30] The constitutionality of the granting the District representation in the House was not discussed by any member.

- On March 9, 1836, the Senate approved a measure to "inquire into the expediency of allowing the District to be represented by a [non-voting] Delegate in Congress."[31] There is no recorded vote or debate on what followed.

- The Senate considered a similar proposal by Senator Norvell of Michigan to inquire into granting the District of Columbia a non-voting delegate on March 28, 1838.[32] In response, Senator Roane of Tennessee asked "whether there was any petition or

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[21] *Id.* at 566-67

[22] *Id.* at 567.

[23] 41 ANNALS OF CONG. 1504 (1824).

[24] *Id.* at 1505.

[25] *Id.* at 1505.

[26] *Id.* at 1506.

[27] *See* U.S. *House Journal*. 21st Cong., 2nd sess., 26 April 1830.

[28] *See id.*

[29] 8 CONG. DEB. 1449 (1831).

[30] *See id.*

[31] *See* U.S. *Senate Journal*. 24th Cong., 2nd sess., 9 March 1836; CONG. GLOBE, 24th Cong., 2nd Sess. 238 (1836).

[32] CONG. GLOBE, 25th Cong., 2nd Sess. 271 (1838).

memorial on the subject from the people of the District" and stated that the Senate should act only "when requested to do so by those most immediately affected."[33] Senator Grundy, also of Tennessee, opposed the bill on the basis that it should originate in the House of Representatives and that the Senate should not "attempt to force a delegate on the other body, without consulting them."[34] Senator Grundy then successfully moved to table the resolution.[35] Once again, none of the Senators discussed the issue of the constitutionality of granting D.C. a delegate in the House.[36]

- The House approved another measure to inquire into granting D.C. a non-voting delegate on January 28, 1845.[37] There does not appear to have been any debate on the measure.[38]

The debates on these proposals are revealing in several respects. First, although none of these measures became law, it appears the principal and repeated reason for their failure was the predominant feeling that District residents had not expressed interest in having representation in the House. Second, although members of the House and Senate repeatedly introduced legislation throughout this period, there was never any meaningful discussion of the constitutionality of granting the District voting representation in the House. Third and most tellingly, a decision by Congress to provide for a non-voting delegate was, in every instance, a prelude to obtaining a voting representative in the House. When a territory's population reached the requisite number (30,000 people at the time of ratification, for example) the territory received a delegate and could obtain voting representatives once the territory reached the population of 50,000 and was eligible for admission as a state. It would have naturally occurred to these members of Congress that awarding a delegate was a prelude to granting the District a voting member of the House.

For nearly half a century following ratification, it appears that members of Congress believed they had authority to grant the District a representative. While they did not ultimately exercise that power, their failure to do so was a product of weak political support, not a conclusion that such legislation was beyond their power under the District Clause.

**4. Since the House Composition Clause in Article I, Section 2 has no apparent ambiguity regarding House representation being connected to 'states,' why would the Federal Enclave Clause (Article I, Section 8, Clause 17) be able to shape the meaning of the House Composition Clause under rules of statutory construction?**

The constitutionality of the DC Voting Rights Act does not depend on the ability of the Federal Enclave (or "District") Clause "to shape the meaning of" the House Composition Clause.

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[33] *See id.*

[34] *See id.*

[35] *See id.*

[36] *See id.*

[37] *See* U.S. *House Journal*. 28th Cong., 2nd sess., 29 January 28 1945; *Cong. Globe,* 28th Cong., 2nd Sess. 210 (1836).

[38] *See id.*

Congress's authority to pass the legislation derives from the District Clause. The House Composition Clause is relevant only to the determination whether, as opponents of the legislation contend, that clause *forecloses* giving representation to citizens of the District, thus imposing a limitation upon the Congress's otherwise plenary power to legislate for the District. In my view, for the reasons I discussed at length in my prior testimony, the Framers' guarantee of representation to citizens of the states does not affirmatively forbid representation to residents of the capital city. *Cf. National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 601-02 (1949) (although Article III provides for diversity jurisdiction "between citizens of different States," Congress may provide diversity jurisdiction to District residents via simple legislation, pursuant to its District Clause authority).

Although it is thus unnecessary for present purposes to interpret "states" in the House Composition Clause as including the District of Columbia, it is worth noting that the courts and Congress have had no difficulty interpreting "states" as including the District in various other constitutional provisions. *See, e.g., Loughran v. Loughran*, 292 U.S. 216, 228 (1934) (District is a state for purposes of Full Faith and Credit Clause, which provides that "[f]ull faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State"); *Stoutenburgh v. Hennick*, 129 U.S. 141 (1889) (constitutional prohibition against state laws that interfere with commerce "among the several *States*" applies equally to D.C. municipal statutes that interfere with commerce between the District and states); *Kronheim & Co. v. District of Columbia*, 91 F. 3d 193, 198-99 (D.C. Cir. 1996) (although "D.C. is not a state," Commerce Clause and Twenty-first Amendment apply to the District); *see also Tidewater*, 337 U.S. at 623 (Rutledge, J., concurring) (Article III, Section 2—providing for diversity jurisdiction "between citizens of different States"—encompasses suits between state residents and residents of the District of Columbia). As these precedents confirm, it is entirely appropriate to consider constitutional provisions in context, even if the provision at issue would appear unambiguous in isolation.

**5. In Mr. John Elwood's (representing the U.S. Department of Justice Office of Legal Counsel) written testimony, he cites to *Banner* v. *U.S.*, 428 F.3d 303 (D.C. Cir. 2005) (per curiam) as follows:**

**In *Banner* v. *United States*, 428 F.3d 303 (D.C. Cir. 2005) (per curiam), a panel of the D.C. Circuit that included Chief Justice John Roberts flatly concluded: "[t]he Constitution denies District residents voting representation in Congress. . . . Congress *is* the District's Government, *see* U.S. Const. art. I, § 8, cl. 17, and the fact that District residents do not have congressional representation does not alter that constitutional reality." *Id.* at 309. The court added: "[i]t is beyond question that the Constitution grants Congress exclusive authority to govern the District, but does not provide for District representation in Congress." *Id.* at 312.**

**The *Banner* case has received little attention in previous hearings on similar legislation. Please comment on what precedential value this case should have on the constitutionality of S. 1257.**

For two reasons, the D.C. Circuit's per curiam opinion in *Banner* should not have any precedential value in evaluating the constitutionality of S. 1257.

First, the selected statements Mr. Elwood cites above are pure dictum. The issue in *Banner* was whether Section 602 of the Home Rule Act, D.C. Code Ann. § 1-206.02(a)(5) which prohibited the District from imposing a personal income tax on individuals who worked in the District but lived outside the District (also termed a "commuter tax") was unconstitutional. District residents claimed the prohibition violated (1) the Equal Protection Clause because it discriminated against District residents in favor of residents of other states, and (2) the Uniformity Clause, art. I, § 8, cl. 1, which authorizes Congress to lay and collect taxes, but requires that all duties, imposts and excises shall be uniform throughout the United States. The D.C. Circuit had no reason squarely to consider, and indeed did not address, whether the District Clause authorizes Congress legislatively to provide the District with a voting representative in the House of Representatives. To be sure, after noting that the District Clause provides Congress the power to regulate the rights of District residents just as a state legislature may regulate for the rights of the citizens of its own state, the D.C. Circuit observed in passing that "[t]his is true notwithstanding that the Constitution denies District residents voting representation in Congress."[39] But the court had no need directly to address the constitutional issues raised by S. 1257, and did not purport to do so.

Second, to the extent the D.C. Circuit, referenced the District's lack of a voting representative under the Constitution, it was merely summarizing the earlier *Adams* decision, which addressed the distinct question whether the Constitution creates a free-standing affirmative right for representation in the House of Representatives.[40] The question raised here—whether *Congress* could exercise its powers under the District Clause to affirmatively provide for such representation through legislation—was not before the *Adams* court. The D.C. Circuit's summary of *Adams* in dictum in *Banner* is not controlling here.

**6. If Congress has the authority under the Federal Enclaves Clause to give the District one seat in the House of Representatives, can Congress also give the District a second, third, fourth seat and/or first or second senator?**

This question raises two distinct questions regarding (1) Congress's power to create a malapportioned district, and (2) Congress's power to provide Senators in the absence of statehood.

First, the District Clause does not provide Congress power to do that which it is forbidden to do by other provisions in the Constitution. Accordingly, in my view, given the District's present size, Congress could not create a second, third, or fourth seat without violating the apportionment principles that are at the heart of the Constitution. As the Supreme Court has long recognized, "[t]he constitutional command that Representatives be chosen 'by the People of the several States' meant that "as nearly as is practicable one man's vote in a congressional election

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[39] 429 F.3d at 309 (citing *Adams v. Clinton*, 90 F.Supp. 2d 35, 72 (D.D.C. 2000)).

[40] *Adams*, 90 F. Supp at 47.

is to be worth as much as another's."[41] Because the District's population is slightly larger than Wyoming—which under the current apportionment scheme is entitled to one Representative and is very near the average population of a congressional district following the 2000 census, a decision to provide the District with multiple representatives at this time would unconstitutionally violate the "one man, one vote" principle and is therefore beyond the scope of Congress's power.

Second, I am doubtful of Congress's authority to provide the District a Senator without running afoul of the Constitution, because the Constitution provides that Senators represent *states*, whereas Representatives represent *the people*. A decision to grant the District a Senator notwithstanding its absence of statehood would seem directly to contravene the Great Compromise that led the Framers to establish the House and the Senate in the first place.[42] Indeed, the purpose of the Great Compromise was to ensure that *states* had special representation in the Congress as *states*.[43] The District is not a state for those purposes. Accordingly, I don't see how Congress could constitutionally provide the District with voting representation in the Senate without running afoul of the Framers intent and the Constitution's text.

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[41] *Dep't of Commerce v. Mont.*, 503 U.S. 442, 459-460 (1992) (quoting *Wesberry v. Sanders*, 386 U.S. 1 (1964)). Indeed, writing for the Court in *Wesberry*, Justice Black explained

> It would defeat the principle solemnly embodied in the Great Compromise—equal representation in the House for equal numbers of people—for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others. *The House of Representatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter.*

386 U.S. at 14 (emphasis added).

[42] *See INS v. Chadha*, 462 U.S. 919, 950 (1983) ("It need hardly be repeated here that the Great Compromise, under which one House was viewed as representing the people and the other the states, allayed the fears of both the large and small states.").

[43] *Id. See also Myers v. United States*, 272 U.S. 52, 110 (1926) (describing as "one of the great compromises of the Convention" the decision "giving the States equality of representation in the Senate").

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

January 23, 2008

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Please find enclosed responses to questions arising from the appearance of Deputy Assistant Attorney General John P. Elwood before the Committee on May 23, 2007, at a hearing entitled "Ending Taxation Without Representation: The Constitutionality of S. 1257." We hope that this information is of assistance to the Committee. Please do not hesitate to call upon us if we may be of additional assistance.

The Office of Management and Budget advises us that from the perspective of the Administration's program, there is no objection to submission of this letter.

Sincerely,

Brian A. Benczkowski
Principal Deputy Assistant Attorney General

Enclosures

cc: The Honorable Arlen Specter
Ranking Minority Member

**COMMITTEE ON THE JUDICIARY**
**UNITED STATES SENATE**
**POST-HEARING QUESTIONS**
**FOR JOHN P. ELWOOD**
**DEPUTY ASSISTANT ATTORNEY GENERAL**

**CONCERNING**
**"ENDING TAXATION WITHOUT REPRESENTATION: THE CONSTITUTIONALITY OF S. 1257"**
**MAY 23, 2007**

1. **According to arguments by supporters of this legislation, Congress has broad plenary power over DC including the power to give DC representation in the House. Would that power also extend to a scenario where Congress decided that for any legislation regarding DC, the DC City Council would have the authority to revise legislative language before the legislation's transmission to the President?**

**Answer:**

Congress's power to "exercise exclusive legislation" over the District under the Enclave Clause of the Constitution, U.S. CONST., art. I, § 8, cl. 17, would not allow Congress to grant the described legislative revision authority to the D.C. City Council for the same reason that the Clause does not authorize Congress to grant District of Columbia residents voting congressional representation by simple legislation. In both instances, the asserted power directly conflicts with explicit constitutional provisions that specifically govern matters central to the constitutional scheme. The hypothetical authority described in the question would conflict with Article I, Section 7, which prescribes the constitutional procedures for the bicameral passage and presentment of legislation. In the same manner, S. 1257 conflicts with numerous specific provisions of the Constitution—among them Article I, Sections 2 and 4; Article II, Section 1; and Section 2 of the Fourteenth Amendment—prescribing the composition, qualifications, apportionment, and election of Members of the United States House of Representatives. But if the expansive theory of the Enclave Clause espoused by proponents of S. 1257 were accepted, permitting Congress to override the express constitutional provisions to further District interests, it could similarly be invoked to support the hypothetical law described in the question. Neither expansive application of the Enclave Clause could be accepted without undermining the foundations of our constitutional structure.

2. **Doesn't reading the District Clause in full context of the Federal Enclave Clause suggest the Framers were giving Congress a custodial, administrative and operational power over federal enclaves, including the District, and not the power to statutorily change the voting makeup of Congress to grant representation for the "forts, magazines, arsenals, dockyards, and other needful buildings" and the District?**

**Answer:**

Yes. Authoritative interpretations of the Enclave Clause confirm the understanding of that clause set forth in your question. The Supreme Court has recognized that the underlying purpose of the "exclusive Legislation" provision in the Clause was to assure that the Seat of Government and the other Federal enclaves would be insulated from the undue influence of any State. *See, e.g., Fort Leavenworth R. Co. v. Lowe*, 114 U.S. 525, 529, 539 (1885). Towards that end, Congress's legislative authority over the District and the other enclaves encompasses the authority to apply Federal statutes of nationwide application to those areas, as well as the authority to exercise within them the police and regulatory powers which a State legislature or municipal government would have in legislating for State or local purposes. *See, e.g., Palmore v. United States*, 411 U.S. 389, 397 (1973); *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100, 108 (1953). But the Supreme Court has stressed time and again that the exercise of this authority may "not contravene any provision of the Constitution of the United States." *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899); *Palmore*, 411 U.S. at 397; *Binns v. United States*, 196 U.S. 486, 491 (1904).

As your question suggests, the authority the Enclave Clause gives Congress over the District is the same authority it gives Congress over the other Federal enclaves. The Enclave Clause explicitly states that Congress has "like Authority" over the District of Columbia and the other Federal enclaves, and the Supreme Court has confirmed that "[t]he power of Congress over the federal enclaves that come within the scope of Art. I, § 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia." *Paul v. United States*, 371 U.S. 245, 263 (1963). It follows that if Congress could authorize congressional representation for the District under the Enclave Clause, it would have "like Authority" to do so for other enclaves such as military bases and Federal facilities. *See generally Offutt Housing Co. v. Sarpy County*, 351 U.S. 253, 256 (1956). In light of the meticulous care the Founders devoted during the Great Compromise to creating a system of congressional representation that was fair to both large and small States — and the centrality of that arrangement to the Constitution's final acceptance and ratification — it is extraordinarily unlikely that the Framers would have adopted a provision granting Congress open-ended authority to create a potentially limitless number of additional voting representatives for Federal enclaves, the number, size, and nature of which were still unknown when the Constitution was adopted.

**3. Is there any historical evidence showing that Congress introduced, debated or advanced any similar legislation like S. 1257, that statutorily grants House representation to the District or other federal enclaves, especially in the post-Ratification era, post-Organic Act era, or post-Virginia retrocession era?**

**Answer:**

Because the question covers over 200 years of congressional history, we cannot state with certainty that such a provision has never been debated or introduced in some form. But based on available historical materials that we have reviewed, we have not identified any

specific legislation which seeks to grant voting representation in the House of Representatives to the District of Columbia without provision for statehood before the predecessors of S. 1257 that were introduced during the 109th Congress. And in particular, we are unaware of such a legislative proposal being introduced during the key periods in District history outlined in your question (during the ratification of the Constitution, the debates over the Organic Act and the establishment of the District, and the Nineteenth Century retrocession debates). Authoritative discussions of the history of District representation proposals do not identify such legislation. A Department of Justice report from 1987 stated that "[f]rom time to time it has been suggested that the District be granted, by simple legislation, a voting member in the House of Representatives," Office of Legal Policy, U.S. Department of Justice, *Report to the Attorney General on the Question of Statehood for the District of Columbia* 12 (1987). But that reference may be to proposals to have the District join the Union as a State, and in any event, the Report does not cite any examples of such a bill actually being introduced or debated in Congress. *Id.* (The Report concluded that such representation for District residents could only be obtained through a constitutional amendment or statehood. *Id.* at 16.) Although hearings on constitutional amendments for District representation in 1977 took note of an academic theory (referred to as "nominal statehood") advocating that the term "State" as used in Art. I, § 2 of the Constitution be interpreted to include the District, the constitutional viability of that theory was rejected in the Justice Department's testimony and there is no indication that the theory was embodied in a legislative proposal. *See* Proposed Constitutional Amendments to Provide for Full Congressional Representation for the District of Columbia: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 95th Cong. 128, 131 (1977) (statement of Patricia M. Wald, Assistant Attorney General, Office of Legislative Affairs, U.S. Department of Justice). The most analogous significant legislative proposals of which we are aware were bills such as the New Columbia Admission Act (last introduced as H.R. 51, 104th Cong., 1st Sess. (1995); essentially the same bill was introduced in the 103d Congress in 1993), which unsuccessfully sought to grant the District statehood, with full representation in the House and Senate. But those bills, unlike S. 1257, tied congressional representation to District statehood.

Significantly, the early post-ratification debates in Congress and elsewhere appeared to accept that such representation would require a constitutional amendment. In one early debate, Representative Dennis of Maryland said of D.C. residents that "[f]rom their contiguity to, and residence among the members of the General Government, they knew, that though they might not be represented in the national body, their voice would be heard. But if it should be necessary, the Constitution *might be so altered as to give them a delegate to the General Legislature* when their numbers should become sufficient." 10 Annals of Cong. 991, 998-99 (1801) (emphasis added). Other participants in the same debate did not dispute Representative Dennis's assertion that a constitutional amendment would be necessary and indeed confirmed it. *See, e.g., id.* at 996 (remarks of Rep. Bird) (noting that the "men who framed the Constitutional provision . . . peculiarly set apart this as a District under the national safeguard and Government" such that "the people could not be represented in the General Government"); *see also* 12 Annals of Cong. 487 (1803) (statement of Rep. Smilie) ("Under our exercise of exclusive jurisdiction, the citizens here are deprived of all political rights, *nor can we confer them.*") (emphasis added). Authoritative commentators at the time reached the same conclusion. For example, Augustus

Woodward, a prominent lawyer in the District who favored such representation (and whom President Jefferson later appointed to a judgeship), wrote that to ensure that residents of the District "who are governed by the laws ought to participate in the formation of them" "will require an amendment to the Constitution of the United States." *Considerations on the Territory of Columbia* 5-6 (1801) (quoted in *Adams v. Clinton*, 90 F. Supp.2d 35, 53 (D.D.C.), *aff'd*, 531 U.S. 941 (2000)).

Further authoritative evidence of the Framers' understanding that the Constitution did not authorize congressional representation for the District is provided by Alexander Hamilton's proposal of an amendment to authorize just such representation at the New York Ratifying Convention. Hamilton's proposed amendment to Art. I, sec. 8, cl. 17 would have authorized Congress to provide for a District representative in the House when its population reached an appropriate level, clearly reflecting his understanding that the Constitution as drafted did not authorize such representation. But the proposed amendment was rejected. *See 5 The Papers of Alexander Hamilton* 189-90 (Harold C. Syrett ed., 1962).

**4. Since the House Composition Clause in Article I, Section 2 has no apparent ambiguity regarding House representation being connected to 'states,' why would the Federal Enclave Clause be able to shape the meaning of the House Composition Clause under rules of statutory construction?**

**Answer**:

We believe that ordinary rules of construction strongly support the opposite conclusion. *See generally Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) (stating that the Constitution is interpreted using "those general principles which usually govern in the construction of fundamental or other laws"). The House Composition Clause states:

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

U.S. CONST. art. I, § 2, cl. 1 (emphasis added). Numerous other constitutional provisions likewise explicitly limit to States the ability to choose representatives. *Id.* art. I, § 2, cls.1-4; *id.* art. I, § 4; *id.* art. II, § 1, cl. 2; *id.* amend. XIV, § 2; *id.* amend XXIII, § 1. The Enclave Clause, in contrast, does not reference the composition or membership of the House or to the qualifications or election of its Members.

Under the rules of construction that the Supreme Court commonly applies to constitutional provisions, there is no basis for concluding that the Enclave Clause could override the explicit and unambiguous provisions of the Composition Clause, as well as the other express provisions in the Constitution, that limit congressional representation to the States. The many appearances of the term "State" throughout Article I to fix the composition of the Congress and

the apportionment, qualifications, and election of representatives all clearly refer to the sovereign States that joined together to form the United States. Thus, Chief Justice Marshall concluded during the early days of the Republic that "the word State is used in the constitution as designating a member of the union." *Hepburn v. Ellzey*, 6 U.S. (2 Cranch) 445, 452-53 (1805). "Clear and unambiguous constitutional language is itself the best expression of the framers' intent." 2A Norman J. Singer, Statutes and Statutory Construction § 45.11 (6th Ed. 2000).

Because the intention to limit congressional representation to the States is clear and unambiguous from the language of Article I, Section 2, and because the Enclave Clause is silent on the matter, the plain language of the Constitution resolves the question. But even if it were necessary to resort to rules of construction to reconcile the Composition Clause with the Enclave Clause with respect to eligibility for representation in Congress, it is clear that the former would control. Under ordinary principles of construction, more specific language "should control more general language when there is a conflict between the two." *Nat'l Cable & Telecomm. Assoc. v. Gulf Power Co.*, 534 U.S. 327, 335 (2002) (discussing statutory construction); *D. Ginsberg & Sons v. Popkin*, 285 U.S. 204, 208 (1932); *see also Graham v. Connor*, 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of protection" its provisions prevail over "the more generalized notion" of substantive due process). There is no question that the House Composition Clause and related provisions detailing the composition, apportionment, and qualifications for membership in the House constitute the most specific provisions discussing representation. The Enclave Clause, in contrast, provides for the general governance of the Seat of Government and other Federal enclaves.

**5. The *Banner* case has received little attention in previous hearings on similar legislation. Please comment on what precedential value this case should have on the constitutionality of S. 1257.**

**Answer:**

The issue in *Banner* was whether a congressionally enacted law prohibiting the District's imposition of a commuter tax on non-District residents violated principles of equal protection by discriminating against District residents (who lack voting representation in Congress) and in favor of the residents of the States (who enjoy such representation). The court rejected the District's argument that, because of their lack of representation in Congress, District residents stood in a disadvantaged relationship with respect to Congress as, for example, the residents of New York stand in relation to the legislature of New Jersey. After examining the representational status of District residents under the Constitution, the court stated:

> This argument misses the special character of the District under the Constitution. Congress is not a foreign sovereign government in relation to the District, as the New Jersey legislature is to New York; Congress *is* the District's government, *see* U.S. Const. art. I, § 8, cl. 17, and the fact that District residents do not have congressional representation does not alter that constitutional reality.

428 F.3d at 309. The court went on to explain that, in challenging Congress's allegedly discriminatory preference for its role as a national legislature rather than its role as a local legislature for the District, the plaintiffs were actually challenging the very plan of the Constitution: "But in this, their dispute lies with the plan of the Constitution and the judgment of its Framers. The evident purpose of granting Congress authority over the District was to provide the federal government a place where it would not be harassed or neglected by local interests [citing Federalist No. 43]." *Id.* The court concluded its equal protection analysis as follows:

> It is beyond question that the Constitution grants Congress exclusive authority to govern the District, *but does not provide for District representation in Congress.* That *constitutional plan* does not require heightened scrutiny of congressional enactments affecting the District.

*Id.* at 312 (emphasis added). The *Banner* court's determination that the "constitutional plan" "does not provide for District representation in Congress" was thus a critical element to its conclusion. While it is probably more accurate to characterize that determination as a critical legal premise rather than a "holding," it is nonetheless an unambiguous legal conclusion reached after thorough consideration that carries substantial authoritative force. It is also reinforced by other authoritative judicial statements cited in Deputy Assistant Attorney General Elwood's testimony, most notably by *Adams v. Clinton*, 90 F.Supp.2d 35, 46-47 (D.D.C.), *aff'd*, 531 U.S. 940, 941 (2000), in which a three-judge Federal court — in a judgment summarily affirmed by the Supreme Court — concluded that "the Constitution does not contemplate that the District may serve as a state for purposes of congressional representation."

We emphasize, however, that the court's statement in *Banner* merely provides supplemental support for the unambiguous text of the governing constitutional provisions, as well as 200 years of consistent practice reflecting the long-held understanding that voting representation in Congress is limited to the States.

**6. If Congress has the authority under the Federal Enclaves Clause to give the District one seat in the House of Representatives, can Congress also give the District a second, third, fourth seat and/or first or second senator?**

**Answer:**

The arguments supporting the assertion that Congress can by simple legislation afford residents of the District of Columbia voting representation in the House of Representatives equally support creating representation in the Senate by the same mechanism. Proponents of S. 1257 have repeatedly claimed that the Enclave Clause authority they invoke is "plenary," which suggests that it would empower Congress to provide representation in the Senate as well as in the House. A possible argument for limiting this claimed authority solely to providing House representation might be that the

House represents "the *people* of the several States," whereas the Members of the Senate originally represented the States themselves, and thus the Senate provisions more clearly foreclose representation for the District. But that distinction does not withstand analysis, because the governing provisions do not authorize House representation for "people" in the generic sense, but for "the People of the *Several States*."

The Enclave Clause theory invoked in support of S. 1257 could also be applied to support legislation giving the District an indeterminate number of House seats instead of merely one. If the Enclave Clause enables Congress to disregard constitutional provisions limiting representation to residents of "States," it is difficult to see why it would not likewise allow it to disregard provisions requiring the apportionment of House members "among the several States according to their respective numbers." U.S. CONST., Art. I, § 2, cl. 4; *id.* Amend. XIV, § 2. And indeed, S. 1257 fixes the District's representation at one member without reapportionment, no matter how large or small its population becomes.


***Memorandum*** June 11, 2007

**TO:** Senate Judiciary Committee
Attention: Jennifer Leathers

**FROM:** Kenneth R. Thomas
Legislative Attorney
American Law Division

**SUBJECT:** Post-Hearing Questions Regarding the Constitutionality of S.1257, The District of Columbia House Voting Rights Act of 2007

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The memorandum is to respond to a series of questions posed by Senator Tom Coburn regarding the constitutionality of S.1257, The District of Columbia House Voting Rights Act of 2007.

**1. According to arguments by supporters of this legislation, Congress has broad plenary power over DC including the power to give DC representation in the House. Would that power also extend to a scenario where Congress decided that for any legislation regarding D.C., the D.C. City Council would have the authority to revise legislative language before the legislation's transmission to the President?**

In general, for a congressional bill to become law, it must comply with the requirements of bicameralism and presentment, *i.e.*, the bill must have passed both houses and then be presented to the President for his approval.[1] Any significant variation from this process would appear likely to raise significant constitutional issues. For instance, in

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[1] Article I, section 7, clause 2 requires Congress to submit "Every Bill" to the President, U.S. Const. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President of the United States"), while article I, section 7, clause 3 requires Congress to submit "Every Order, Resolution, or Vote" to the President. U.S. Const. art. I, § 7, cl. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and the House of Representatives may be necessary . . . shall be presented to the President of the United States."). If the President vetoes the bill, Congress then has the option of overriding that veto. U.S. Const. art. I, § 7, cl. 2 (". . . but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law."

*Immigration and Naturalization Service v. Chadha*,[2] the Supreme Court held that a House veto of an order suspending deportation proceedings against Chadha was a legislative act and, as such, that it violated the Constitution's requirement that the Congress submit all legislation to the President for his approval.[3]

While a detailed analysis of the instant proposal is beyond the scope of this memorandum, it would appear likely that allowing the District of Columbia Council to amend legislation after passage by Congress, but before presentment to the president, would be inconsistent with the constitutional requirements of bicameralism and presentment. Consequently, the question arises as to whether such a process could be authorized by the provision of the Constitution that provides for the authority of Congress over the District of Columbia.

As was discussed extensively at the hearing, an argument has been made that the plenary authority that the Congress has over the District of Columbia under Article I, section 8, clause 17 – the District Clause – represents an independent source of legislative authority under which Congress can provide political powers to the District of Columbia that are not otherwise provided for in the Constitution.[4] And the case which has been most often cited for this proposition is the 1948 case of *National Mutual Insurance Co. v. Tidewater Transfer Co.*[5]

The *Tidewater Transfer Co.* case dealt with whether a federal statute could grant District of Columbia residents the ability to sue in federal courts under diversity jurisdiction, despite the fact that the Constitution limits such jurisdiction to disputes "between citizens of different states."[6] The Court in *Tidewater Transfer Co.* upheld this statute against a constitutional challenge, with a three-judge plurality holding that Congress, acting pursuant to the District Clause, could lawfully expand federal jurisdiction beyond the bounds of Article III.[7]

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[2] 462 U.S. 919 (1982).

[3] Chadha, 462 U.S. at 954-58. The Court employed a two-step analysis in reaching this conclusion. First, the Court found that the language and history of the Constitution require Congress to present all legislative acts to the President. Second, the Court found that the legislative veto of the suspension order affected the rights of persons outside the legislature and was, therefore, a legislative act.

[4] *See, e.g.*, Viet Dinh and Adam H. Charnes, The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives 12-13 (2004) (report submitted to the House Committee on Government Reform) available at [http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf]; *District of Columbia Fair and Equal House Voting Rights Act of 2006, before the Subcommittee on the Constitution, H.R. 5388,* 109th Cong., 2nd Sess. 83 (testimony of Hon. Kenneth W. Starr); Rick Bress and Kristen E. Murray, Latham & Watkins LLP, *Analysis of Congress's Authority By Statute To Provide D.C. Residents Voting Representation in the United States House of Representatives and Senate* at 7-12 (February 3, 2003)(analysis prepared for Walter Smith, Executive Director of DC Appleseed Center for Law and Justice) available at [http://www.dcvote.org/pdfs/Lathammemo02032003.pdf].

[5] 337 U.S. 582 (1948).

[6] U.S. Const. art. III, § 2.

[7] *See Tidewater Transfer Co.*, 337 U.S. at 600 (plurality opinion of Jackson, J.).

As I noted at the hearing, the *Tidewater Transfer Co.* case did not have a majority opinion, but instead consisted of a three-judge plurality, a two-judge concurrence, and two two-judge dissents. Of these various opinions, only the three-judge plurality held that District of Columbia residents could seek diversity jurisdiction based on Congress's exercising power under the District Clause, while the three other opinions rejected this holding. However, even the plurality emphasized the relative insignificance of allowing diversity cases to be heard in federal courts outside the District instead of limiting them to the geographical confines of the District. Justice Jackson, who wrote the opinion, noted that the issue did not affect "the mechanics of administering justice," involve the "extension or a denial of any fundamental right or immunity which goes to make up our freedoms"; nor did the legislation "substantially disturb the balance between the Union and its component states."[8]

The positions of the various Justices in the *Tidewater Transfer Co.* case on the question of whether Congress can grant diversity jurisdiction for District of Columbia residents would seem to inform the question of whether the District of Columbia Council could amend legislation after passage by Congress but before presentation to the President. As six Justices explicitly rejected the extension of diversity jurisdiction using Congress's power under the District Clause, it is likely that these six Justices would also have rejected the suggestion that Congress has the power to allow the District of Columbia to amend legislation under the hypothetical proposal.

Even the three-judge plurality might have distinguished the instant hypothetical from the legislation that was at issue in *Tidewater Transfer Co.* As discussed previously, the plurality opinion took pains to note the limited impact of its holding — that parties in diversity suits with residents of the District of Columbia would have a more convenient forum to bring a lawsuit. And, as noted, the plurality specifically limited the scope of its decision to legislation that neither involved an "extension or a denial of any fundamental right" nor substantially disturbed "the balance between the Union and its component states."[9]

**2. The District Clause is part of the Federal Enclave Clause at Article 1, Section 8, Clause 17. According to the Federal Enclave Clause, Congress has "like authority" over federal enclaves as it does over the District. Doesn't reading the District Clause in full context of the Federal Enclave Clause suggest that the Framers were giving Congress a custodial, administrative and operational power over federal enclaves, including the District, and not the power to statutorily change the voting makeup of Congress to grant representation for the "forts, magazines, arsenals, dockyards, and other needful buildings" and the District?**

The location of the District Clause within the Federal Enclave Clause is consistent with the suggestion that Congress was given custodial, administrative and operational authority over both the District of Columbia and federal enclaves. This power would also appear to provide the authority for the federal government to establish local governing authority, and in addition to provide for limited political representation in the Congress. Further, as noted previously, this power appears to have been the basis for a plurality of the Supreme Court to expand Article III jurisdiction to allow for District of Columbia citizens to bring federal diversity suits.

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[8] Id. at 585-586.

[9] Id. at 585.

The Constitution is, however, a document of both powers and limitations. Thus, the question of whether this power could be used to provide for a vote in the House of Representatives for the District of Columbia needs to be considered in the context of the House Representation Clause. As the House Representation Clause appears to limit the provision of House representation to the states, the question is whether the District Clause is a sufficient authority to overcome this apparent conflict. As previously indicated, relevant Supreme Court case law would indicate that the District Clause does not provide a separate constitutional authority to provide for House representation.

**3. Is there any historical evidence showing that Congress introduced, debated or advanced any similar legislation like S. 1257, that statutorily grants House representation to the District of other federal enclaves, especially in the post-Ratification, post-Organic Act era, or post-Virginia Retrocession era?**

Over the years, proposals to give the District voting representation in Congress have sought to achieve their purpose through constitutional amendment to give District residents voting representation in Congress, but not granting statehood; retrocession of the District of Columbia to Maryland; semi-retrocession, i.e., allowing qualified District residents to vote in Maryland in federal elections for the Maryland congressional delegation to the House and Senate; statehood for the District of Columbia; and other statutory means such as virtual-statehood, i.e., designating the District a state for the purpose of voting representation.[10]

S. 1257 does not appear to fit into any of the above categories of legislation providing for Representation for the District of Columbia in Congress. Other than bills in recent Congresses, there do not appear to have been significant similar efforts to statutorily grant House Representation to the District or other federal enclaves.

**4. Since the House Composition Clause in Article I, Section 2 has no apparent ambiguity regarding House Representation being connected to 'states,' why would the Federal Enclave Clause be able to shape the meaning of the House Composition Clause under rules of statutory construction?**

Please see answer number 2.

**5. In Mr. John Elwood's (representing the U.S. Department of Justice Office of Legal Counsel) written testimony, he cites to Banner v. U.S., 428 F.3d 303 (D.C. Cir. 2005) (per curiam) as follows:**

**'In Banner v. United States, 428 F.3d 303 (D.C. Cir. 2005) (per curiam), a panel of the D.C. Circuit that included Chief Justice John Roberts flatly concluded: "[t]he Constitution denies District residents voting representation in Congress .... Congress *is* the District Government, see U.S. Const. art I, § 8, cl. 17, and the fact that District residents do not have congressional representation does not alter that constitutional reality." Id. at 309. The court added: "[i]t is beyond question that the Constitution grants Congress exclusive authority to govern the District, but does not provide for District representation in Congress." *Id.* at 312.'**

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[10] CRS Report No. RL33830, *District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals,* by Eugene Boyd.

**The *Banner* case has received little attention in previous hearing on similar legislation. Please comment on what precedential value this case should have on the constitutionality of S. 1257.**

*Banner v. United States*, 428 F.3d 303 (D.C. Cir. 2005) (per curiam) involved a challenge to the federal prohibition on the District of Columbia government imposing a personal income tax on those who worked in the District but resided elsewhere (the commuter tax). The challenge was made on the grounds that the restriction violated the Equal Protection Clause and the Uniformity Clause of the Constitution.[11] The court held that, because Congress had been given exclusive legislative authority over the District and the residents did not constitute a suspect class, that such distinction only required the establishment of a rational governmental purpose, a test that was met here. The Court also found that because a state could constitutionally enact a similar restriction, that Congress's authority to control local taxes was consistent with the Uniformity Clause.

As part of the discussion of Equal Protection, the court addressed the issue of Congress's authority over the District, pointing out that the House Representation Clause of the Constitution does not provide for congressional representation in the House for the District of Columbia. As I noted in my testimony, the question of whether the House Representation Clause includes representation for the District of Columbia does not seem to be open to significant dispute. Not only have the federal courts consistently found that voting representation for purposes of the House Representation clause is limited to "states,"[12] but most scholarly commentators agree,[13] including proponents of the instant legislation.[14] In general, it appears that proponents of the instant proposal rely principally on an expansive interpretation of the District Clause, not of the House Representation Clause.

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[11] U.S. Const. art. I, § 8, cl. 1.

[12] Hepburn v. Ellzey , 6 U.S. (2 Cranch) 445, 452-53 (1805) (holding in *dicta* that the plain meaning of "state" in the House Representation Clause does not include the District of Columbia); Heald v. District of Columbia, 259 U.S. 114, 124 (1922) (stating in *dicta* that "residents of the district lack the suffrage and have politically no voice in the expenditure of the money raised by taxation."); Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 324 (1820) (stating in *dicta* that the District "relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government."); Adams v. Clinton, 90 F. Supp. 2d 35 (D.D.C.2000), *affirmed sub nom.* Alexander v. Mineta, 531 U.S. 940 (2000) (failure to provide congressional representation for the District of Columbia did not violate the Equal Protection Clause); Igartua de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994) (holding that United States citizens in Puerto Rico are not entitled to vote in presidential elections); Attorney Gen. of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984) (holding that United States citizens in Guam are not entitled to vote in presidential and vice-presidential elections).

[13] See, e.g., Jon M. Van Dyke, The Evolving Legal Relationships Between the United States and Its U.S. Flag Islands, U. HAW. L. REV. 445, 512 (1992); But see Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. on Legis. 167, 168 (1975); Lawrence M. Frankel, National Representation for the District of Columbia: A Legislative Solution, 139 U. Pa. L. Rev. 1659, 1661 (1991).

[14] *See, e.g.*, Viet Dinh and Adam H. Charnes, *supra* note 7, at 9.

**6. If Congress has the authority under the Federal Enclaves Clause to give the District one seat in the House of Representatives, can Congress also give the District a second, third, fourth seat and/or first or second senator?**

Following the logic that establishment of a House representative for the District of Columbia could be implemented despite the textual limits of the House Representation Clause, then it would seem that such a proposal could be implemented in a manner that also contravenes the requirement that Members of the House be apportioned among the states based on the number of persons in those states.[15] In fact, the current proposal establishes the number of House Representatives for the District of Columbia at one, regardless of the population of the District. Again, following this logic, it would appear to follow that the number of House Representatives could be set at a higher numbers.

It can also be noted that the question of whether the District of Columbia and its citizens should be treated as a state for purposes of the Constitution has generally included a consideration of whether the issue at hand involved individual rights of the District of Columbia residents or whether it involved the relationship of the District government to the national political structure. In general, the courts have been reluctant to find that the District of Columbia should be considered a state when the issue involves reorganizing the relationship between the federal government and the states.[16]

In order for the courts to find that the instant proposal was constitutional, it would seem necessary for the courts to reconsider the jurisprudence distinguishing issues turning on individual rights versus those affecting the relationship of the states and the federal government. If the courts did so, however, it is difficult to see how House representation would be distinguished from other possible changes to how the federal government operates. Thus, a holding that the District could be treated as a state for purposes of House representation would arguably also support a finding that the District could be treated as a state for the parts of the Constitution that deal with other aspects of the national political structure. Under this reasoning, Congress could arguably authorize the District of Columbia to have Senators, Presidential Electors, and perhaps even the power to ratify Amendments to the Constitution.[17]

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[15] U.S. Const., 14th Amendment, § 2.

[16] *See, e.g.*, National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582 (1948) (plurality opinion limited the scope of its decision to legislation that did not substantially disturb "the balance between the Union and its component states.")

[17] U.S. CONST. Art. V.

**Post-Hearing Questions for the Record**
**Submitted to Jonathan Turley**
**From Senator Tom Coburn**

**"Equal Representation in Congress:**
**Providing Voting Rights to the District of Columbia"**
**May 15, 2007**

**1. According to arguments by supporters of this legislation, Congress has broad plenary power over DC including the power to give DC representation in the House. Would that power also extend to a scenario where Congress decided that for any legislation regarding DC, the DC City Council would have the authority to revise legislative language before the legislation's transmission to the President?**
**Answer from Professor Turley:**

This is another example of the obvious flaws in the constitutional arguments made by advocates on the other side of this debate. Regardless of the fact that Congress has plenary authority of the treatment of residents *inside* the District, it does not have the authority to constructively amend other provisions of the Constitution such as a Composition Clause. Article I, Section 7 mandates that legislation passed by Congress must be submitted to the President for signature or veto. Congress cannot transfer this authority to another body without violating Article I.

The effort to avoid discussion of the history and text of the Composition Clause and Qualification Clause reflects this obvious flaw. Whatever authority Congress has over residents within the District Clause, it cannot use that authority to affect the right of citizens (or states) outside of

the District or to contradict another provision of the Constitution. This point was made in *Palmore v. United States*, 411 U.S. 389, 397-398 (1973):

> Congress may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, *so long as it does not contravene any provision of the Constitution of the United States.*

Sponsors seem to be laboring under the misconception that plenary authority within the District means that they can give residents any new status or benefit. The incomprehensible result is that the District Clause (which advocates insist was something of an afterthought) would devour fundamental structural provisions like the Composition Clause.

**2. The District Clause is part of the Federal Enclave Clause at Article 1, Section 8, Clause 17. According to the Federal Enclave Clause, Congress has "like authority" over federal enclaves as it does over the District. Doesn't reading the District Clause in full context of the Federal Enclave Clause suggest the Framers were giving Congress a custodial, administrative and operational power over federal enclaves, including the District, and not the power to statutorily change the voting makeup of Congress to grant representation for the "forts, magazines, arsenals, dockyards, and other needful buildings" and the District?**
**Answer from Professor Turley:**

Advocates often cite the District Clause without including the later words from the same section in which Congress is expressly allowed "to exercise like Authority [as over the District] over all Places purchased . . . for

the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings." It is obvious that the Framers viewed the authority over the federal enclave and federal territories to be similar: a view later repeatedly noted by the Supreme Court. The Supreme Court has repeatedly stated that the congressional authority over other federal enclaves derives from the same basic source:

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

*Paul v. United States*, 371 U.S. 245, 263-64 (1963). The plain and obvious meaning of this language is that Congress would be given administrative and operational control over such areas – not the power to fashion those areas into new forms of voting members in Congress. Indeed, if Congress could use this authority to award seats to a federal enclave, it could presumably do

the same thing for other federal enclaves and territories. After all, the way that the District received its own government in the 1960s was when Lyndon Johnson treated the District as a type of federal agency. Under that precedent and the current interpretative theory, Congress could award voting seats to the Department of Defense to cover tax-paying citizens in military reservations.

3. **Is there any historical evidence showing that Congress introduced, debated or advanced any similar legislation like S. 1257, that statutorily grants House Representation to the District or other federal enclaves, especially in the post-Ratification era, post-Organic Act era, or post-Virginia Retrocession era?**

**Answer from Professor Turley:**

There is a long and entirely consistent historical record running from the Constitutional Convention to the Ratification Conventions to the early Congresses to the Retrocession period on this question. The statements and actions during the late eighteenth and early nineteenth centuries reflect an understanding of the plain meaning of both the District and Composition Clauses. I have already cited the statements and amendments recorded in the Constitutional and Ratification Conventions. The most interesting are the amendments offered by Alexander Hamilton and Samuel Osgood. On July 22, 1788, Hamilton asked that the District Clause be amended to mandate that "the Inhabitants of the said District shall be entitled to the like essential

Rights as the other inhabitants of the United States in general." Hamilton wanted the District to be given the same proportional representation in Congress and recognize that, unless changed, the federal enclave would not be entitled to such representation:

> That When the Number of Persons in the District of Territory to be laid out for the Seat of Government of the United States, shall, according to the Rule for the Apportionment of Representatives and Direct Taxes Amount to [blank] such District shall cease to be parcel to the State granting the Same, and Provision shall be made by Congress for their having a District Representation in that Body. Among the other amendments offered to change the District Clause, Samuel Osgood in Massachusetts sought to amend the provision to allow the residents to be "represented in the lower House." These efforts failed. Once again, no one has suggested that the status of the District was a focus of the debates. However, the statements and amendments offered during this period show a consistent recognition of the obvious meaning of the clause.

Likewise, in Massachusetts, Samuel Osgood sought to amend the provision to allow the residents to be "represented in the lower House."

After ratification, the District and Composition Clauses continued to generate interest. One interesting example was the effort to add a non-voting member from the territory of Ohio. Connecticut Rep. Zephaniah Swift objected to the admission of anyone who is not a representative of a state. Although non-voting members would ultimately be allowed, the members on both sides agreed that the Constitution restricted voting members to

representatives of actual states. This debate, occurring only a few years after the ratification (and with both drafters and ratifiers) serving in Congress reinforces the clear understanding of the meaning and purpose of the language.

Early controversies also focused on the use of Congress' plenary authority under the District Clause to create national policies or affect states. The consistent view was that the plenary authority over the District was confined to its internal operations and would not extend beyond its borders to affect the states. For example, in 1814, the use of this authority was successfully challenged when used to create a second national bank. Senator John Calhoun and Rep. Robert Wright joined together to use the District Clause as a way of avoiding constitutional questions. It was defeated in part by arguments that the District Clause could not be used to circumvent national legislation or impose policies on the rest of the nation. In 1813, the proposed National Vaccine Institution was defeated after sponsors sought to use the District Clause to establish it under Congress' plenary authority. Again, it was viewed as an effort to use the District Clause to impose policies outside of its borders. Likewise, in 1823, an effort to create a fraternal association for the relief of families of dead naval officers was rejected.

Opponents objected to the use of the District Clause to create an institution with national purposes.

The retrocession movement began almost immediately after the District was formed. This early debate (occurring only a few years after ratification) reflect the same meaning of the District Clause. I have detailed those statements in my prior written testimony. However, during this period, it was proposed that the District should return to Maryland to afford its residents full voting rights. It was roundly rejected by District residents who accepted their status in exchange for being residents of the Capitol City. As I noted earlier, in one recorded vote taken within Georgetown, the Board of Common Council voted overwhelmingly (549 to 139) to accept these limitations in favor of staying with the federal district.

After the retrocession period, the debate over the status of the District uniformly acknowledged the need for a constitutional amendment unless retrocession occurred. This was the impetus of the constitutional amendment in 1978, which failed. Members in support of that amendment accepted the defeat and did not try to achieve the same result by legislative means.

**4. Since the House Composition Clause in Article I, Section 2 has no apparent ambiguity regarding House representation being connected to 'states', why would the Federal Enclave Clause be able to shape**

**the meaning of the House Composition Clause under rules of statutory construction?**

**Answer from Professor Turley:**

This is perhaps the single most important fact that is routinely ignored in this debate. Whatever the District Clause means, it cannot be interpreted to violated the express and plain meaning of the Composition Clause. In all of the effort to spin the historical record of the District Clause, sponsors have avoided any mention of the clear language and history of the Composition Clause.

In what was billed as the first public defense of the Constitution by one of its framers, in an October 6, 1787 speech, James Wilson cited the Composition Clause as the guarantee that Congress would be tethered closely to the states and that only states could elect members: "The house of representatives, is to be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature,--*unless therefore, there is a state legislature, that qualification cannot be ascertained*, and the popular branch of the foederal constitution must likewise be extinct." As I noted earlier, this principle was defended in Third Congress when there was an effort to add a representative from a

federal territory.

Given the expressed concerns over the composition of Congress during the constitutional debates and the fixation on the rights of states, it is perfectly ludicrous to suggest that the Framers would have left open the possibility that Congress could use its plenary authority over federal enclaves and territories to create to forms of voting members. The protection of state authority was a paramount concern and even the Senate was the product of the voting of state legislatures. It would make little sense for the Framers to work out the delicate balancing of state interests in the composition of Congress only to reserve the right of Congress to add non-state voting members at its discretion.

Equally evident in today's debate is the reluctance of advocates to recognize the conflict with the Qualifications Clause. By claiming the right to create new forms of voting members, Congress would negate the purpose of the Qualifications Clause since it could dictate the qualifications for anyone representing a federal enclave or territory. As Alexander Hamilton noted "[t]he qualifications of the persons who may choose or be chosen . . . are *defined and fixed* in the Constitution, and are *unalterable* by the legislature." As noted in my written testimony, the Supreme Court has been adamant in

preventing manipulation of the rolls of Congress through the creation of new qualifications or disqualifications.

**5. In John Elwood's (representing the US Department of Justice Office of Legal Counsel) Senate Judiciary Committee hearing written testimony, he cites to *Banner v. U.S.*, 428 F.3d 303 (D.C. Cir. 2005) (per curiam) as follows: 'In *Banner v. United States*, 428 F.3d 303 (D.C. Cir. 2005) (per curiam), a panel of the D.C. Circuit that included Chief Justice John Roberts flatly concluded: "[t]he Constitution denies District residents voting representation in Congress. . . . Congress *is* the District's Government, *see* U.S. Const. art. I, § 8, cl. 17, and the fact that District residents do not have congressional representation does not alter that constitutional reality." *Id.* at 309. The court added: "[i]t is beyond question that the Constitution grants Congress exclusive authority to govern the District, but does not provide for District representation in Congress." *Id.* at 312.'**
**Please comment on what precedential value this case should have on the constitutionality of S. 1257.**

**Answer from Professor Turley:**

*Banner* is only one of the latest in a long line of cases that affirm the plain meaning of the District Clause. Only a few years after ratification, the Supreme Court itself stressed this point in *Hepburn v. Ellzey,* rejecting the notion that "Columbia is a distinct political society; and is therefore 'a state' . . . the members of the American confederacy only are the states contemplated in the constitution." This view was reaffirmed by the D.C. Circuit just recently in *Parker v. District of Columbia* where both the majority and dissenting opinions stress that the word "states" refers to actual state entities.

**6. If Congress has the authority under the Federal Enclaves Clause to give the District one seat in the House of Representatives, can Congress also give the District a second, third, fourth seat and/or first or second senator?**
**Answer from Professor Turley:**

As noted above (and in my written testimony), there is no textual or interpretive limitation to the new authority claimed by some in Congress to create new forms of members. The District Clause is immediately followed by a clause referencing other federal territories. Section 17 states that Congress is expressly allowed "to exercise like Authority [as over the District] over all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings." Just as the District has tax-paying, military serving citizens, so do many other federal enclaves and territories. Congress could award voting representatives to military families living on military reservations or residents in Puerto Rico. With tens of millions of people living in such areas, dozens of new members could be created under proportional claims.

Likewise, the advocates have yet to offer a plausible basis for barring the same use of authority to create two new senators for the District. The most that they can offer are assurances that they do not intend to claim such authority – an assurance lacking in any legally binding effect. If Congress can use the District Clause to reform the composition of the House, it can use

the same authority to reform the composition of the Senate. The problem with discarding principle for political convenience is that one cannot predict what changes politics will demand in the future. Advocates have already stated that they believe that the District should receive such representation in the Senate and, as I note in my written testimony, advocates have already suggested using the same authority to demand multiple seats for Puerto Rico. If Congress yields to this temptation, it will allow the future manipulation of its rolls by any majority in Congress. It is precisely the type of fluidity and uncertainty that the Framers sought to avoid in our government.

The Honorable Patricia Wald
Answers to Written Questions

The following are answers to the 6 questions propounded in Senator Leahy's letter.

1. I do not believe that the District Clause would allow Congress to delegate to the D.C. City Council final revision of D.C.-related legislation before its presentation to the President. The District Clause must be interpreted in harmony with the rest of the Constitution including Art.I, Sec.7's protocol for enacting bills into law which would not allow for an intermediary reference between Congress and the President. Congress may, of course, and has delegated some legislative power concerning D.C. affairs to the City Council in the Home Rule Act. But it may not delegate its inherint legislative authority to enact bills into law to any other body under Art. I, Sec. I.

2. If I understand the question, the answer is No. Congress' power to legislate for the District (and for federal enclaves within States) has been repeatedly held to be "plenary" and "sovereign" and does not exclude the grant of representation in the House.(I note parenthetically that the phrase "composed of" (Art.I, Sec.2) is defined in Roger's Thesaurus, 4th ed. to mean "including" and "contained in" as well as more exclusive meanings). The Supreme Court in Cornman v Evans recognized the peculiar status of federal enclaves inside States when it invalidated Maryland's attempt to disenfranchise enclave residents on the basis that Congress had not exercised its exclusive powers granted by the Clause to legislate for these enclaves but had allowed the States to retain some legislative control over them. It left in reserve a situation like the District's where Congress has exercised full control and in so doing, recognized Congress' plenary power if it chose to exercise it.

3. Although I have not conducted extensive research on developments in the post-Ratification or Organic Act periods, my perusal of secondary sources suggests that no attempt was made to grant District residents voting power in the House at the time of Ratification because there was a widespread assumption by Madison and others that the ceding States would insist upon preservation of voting rights for their own former citizens. Indeed a 1790 Act of Congress validated just such rights which continued until 1800 when Congress established the Dstrict as the federal capitol. Nothing in my reading suggests that any of the Founding Fathers intended permanent disenfranchisement for Disreict residents. At the time of the Organic Act Washington had about 8000 residents (less than that required for statehood) and was described as "little more than a malarial swamp onthe banks of the Potomac". (John Edward Smith, John Marshall, Definer of a Nation,p.289)

4. Initially, I note John Marshall's admonition: "We must never forget that it is a constitution we are expounding". That is, normal rules of statutory construction do not automatically apply in all instances. Due consideration must be given to the underlying framework of the Constitution, separationof powers, rights of the governed. Apart from the fact that the lack of any ambiguity in Art.I,Sec.2 can be debated, it is important that the Constitution contains no explicit or even implicit intent to deny D.C. residents a vote in the House. Therefore the plenary power granted Congress to legislate "in all Cases whatsoever" for the District can and should be interpreted to include power to accord such a vote in order to bring the two parts of the Constitution into harmony. This result would be similar to that reached by the Supreme Court in the Tidewater case where a plurality said that the District Clause was a sound basis for conferring diversity jurisdiction on Art.III courts in cases involving citizens of the District and citizens of other States even though what was to many "unambiguous" language appeared to limit Art. III judicial power to "Controversies between Citizens of different States".

5. The D.C. Circuit case of Banner v. United States dealt with the constitutionality of a Home Rule Act provision that prohibited D>C> government taxation of the income of nonD.C. resident commuters. The Court upheld Congress' plenary power to impose such a restriction. The only

possible support for a position contrary to S1257 in the case is the phrase cited in the Question,i.e. that "the Constitution denies District residents voting representation ". That statement was not necessary to the holding and indeed is followed by a reference to the Adams case which dealt only with claims by D.C. citizens that the Constitution granted them such rights. The case in no way touced on the issue here--whether Congress could grant them such a right in the House. Indeed the case is replete with emphases on the broad nature of Congress' power over the District."It is beyond question that the Constitution grants Congress exclusive authority to govern the District but does not provide for District representation in Congress.The policy choices are Congress' to make; we simply hold that the commuter tax restriction does not violate...the Constitution". Anything else was dicta written in the context of a very different case involving a very different issue. It therefore has little, if any, precedential value here.

6. Should Congress assert its power to confer House voting rights to D.C. residents I would think it could assert them to the extent that the regular rules governing apportionment of House members apply. This would harmonize the varied parts of the Constitution. I do not however believe that it would have to exercise its power to that extent but beyond that would injure the rights of other States and their citizens . As for the Senate, the Constitution itself treats the two Houses very differently in power and status; from the beginning the House has been recognized as the forum of the people and the Senate as the repository of State power. The power and unique status of States qua States appears in Art.II (electoral college); Art. 4 (admissionof new States);Art.5 (amendments) and in Amendments XII,XVII and XX. Noone to my knowlege has seriously proposed that Congress itself could accord the District representation in the Senate outside of the statehood route.

**Post-Hearing Questions for the Record**
**Submitted to Elwood, Wald, Turley, Ogletree, Thomas, and Bress**
**From Senator Tom Coburn**

**"Ending Taxation without Representation: The Constitutionality of S. 1257"**
**Before the Senate Judiciary Committee**
**May 23, 2007**

1. According to arguments by supporters of this legislation, Congress has broad plenary power over DC including the power to give DC representation in the House. Would that power also extend to a scenario where Congress decided that for any legislation regarding DC, the DC City Council would have the authority to revise legislative language before the legislation's transmission to the President?

2. The District Clause is part of the Federal Enclave Clause at Article 1, Section 8, Clause 17. According to the Federal Enclave Clause, Congress has "like authority" over federal enclaves as it does over the District. Doesn't reading the District Clause in full context of the Federal Enclave Clause suggest the Framers were giving Congress a custodial, administrative and operational power over federal enclaves, including the District, and not the power to statutorily change the voting makeup of Congress to grant representation for the "forts, magazines, arsenals, dockyards, and other needful buildings" and the District?

3. Is there any historical evidence showing that Congress introduced, debated or advanced any similar legislation like S. 1257, that statutorily grants House representation to the District or other federal enclaves, especially in the post-Ratification era, post-Organic Act era, or post-Virginia Retrocession era?

4. Since the House Composition Clause in Article I, Section 2 has no apparent ambiguity regarding House representation being connected to 'states', why would the Federal Enclave Clause be able to shape the meaning of the House Composition Clause under rules of statutory construction?

5. In Mr. John Elwood's (representing the US Department of Justice Office of Legal Counsel) written testimony, he cites to *Banner v. U.S.,* 428 F.3d 303 (D.C. Cir. 2005) (per curiam) as follows:

'In *Banner v. United States*, 428 F.3d 303 (D.C. Cir. 2005) (per curiam), a panel of the D.C. Circuit that included Chief Justice John Roberts flatly concluded: "[t]he Constitution denies District residents voting representation in Congress. . . . Congress *is* the District's Government, *see* U.S. Const. art. I, § 8, cl. 17, and the fact that District residents do not have congressional representation does not alter that constitutional reality." *Id.* at 309. The court added: "[i]t is beyond question that the Constitution grants Congress exclusive authority to govern the District, but does not provide for District representation in Congress." *Id.* at 312.'

The *Banner* case has received little attention in previous hearings on similar legislation. Please comment on what precedential value this case should have on the constitutionality of S. 1257.

6. If Congress has the authority under the Federal Enclaves Clause to give the District one seat in the House of Representatives, can Congress also give the District a second, third, fourth seat and/or first or second senator?

**Senate Judiciary Committee**
**Hearing on "Ending Taxation Without Representation: The Constitutionality of S. 1257"**
**Wednesday, May 23, 2007**

**Questions Submitted by Senator Russell D. Feingold to Professor Charles Ogletree**

1. What is peculiar or unique about the District of Columbia that makes S.1257 so important?

# SUBMISSIONS FOR THE RECORD

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

I appreciate the opportunity to appear before this Committee to address S.1257. Others more eloquent than I have explained the political and policy imperatives for this legislation. No one has seriously disagreed with those sentiments. Instead, opponents of the bill have suggested that Congress lacks power to provide voting rights to the District's residents, and that the only legitimate ways to achieve that worthy goal are through constitutional amendment or retrocession. I have studied their argument and the text, precedents, and history on which they rely. And I believe the constitutionality of this bill presents a close question. But viewing the text in context and considering all of the relevant precedent and historical evidence, I conclude that Congress has ample authority to enact this bill.

* * * * *

Opponents of the current legislation argue that because the District of Columbia is not a state, the Framers intended to exclude its residents from voting representation in the House of Representatives. The relevant constitutional text, however, is indeterminate, and the legislative history—the record of the debates during the constitutional convention and the state ratifying conventions—suggests no purpose to permanently disenfranchise the residents of the capital city.

Two clauses in Article I of the Constitution are directly relevant here. Article I, Section 8, Clause 17 of the Constitution, known as the "District Clause," provides Congress the authority to "exercise exclusive Legislation in all Cases, whatsoever, over" the District of Columbia. Both the ratification debates and Supreme Court precedent suggest that this power is plenary and that, absent a distinct prohibition elsewhere in the Constitution, it provides Congress the ability to provide District residents the same essential liberties (such as the right to a jury trial, the right to go to federal court, and, here the right to vote) that are enjoyed by other Americans who reside in states.

Two related Supreme Court cases confirm the breadth of Congress's authority to enact this legislation under the "District Clause." In the first, *Hepburn v. Ellzey*, Chief Justice Marshall construed Article III, Section 2 of the U.S. Constitution—which provides diversity jurisdiction in suits "between citizens of different States"—to exclude citizens of the District of Columbia. The Court found it "extraordinary," however, that residents of the District should be denied the same access to federal courts that is provided to aliens and state residents, and it invited Congress to craft a solution, noting that the matter was "a subject for legislative, not judicial consideration."

Nearly 145 years later, Congress accepted that invitation, and enacted legislation that explicitly granted District residents access to federal courts on diversity grounds. That legislation was upheld by the Supreme Court in 1949 in a case called *National Mutual Insurance Company v. Tidewater Transfer Company*. A plurality of the Court led by Justice Jackson held that Congress could for this purpose treat District residents as though they were state residents pursuant to its authority under the District Clause. The two concurring justices would have gone even further; they argued that *Hepburn* should be overruled and that the District should be considered a state for purposes of Article III.

*Tidewater* strongly supports Congress's authority to provide the District a House Representative via simple legislation. As the plurality explained, because Congress unquestionably had the greater power to provide District residents diversity-based jurisdiction in special Article I courts, it surely could accomplish the more limited result of granting District residents diversity-based access to existing Article III courts. Similarly, Congress's authority to grant the District full rights of statehood (or grant its residents voting rights through retrocession) by simple legislation suggests that it may, by simple legislation, take the more modest step of providing citizens of the District with a voice in the House of Representatives.

Opponents of this bill, however, read a distinct prohibition against extending District residents the right to vote into Article I, Section 2 of the Constitution—which requires that the House of Representative be chosen by the "people of the several states." In their view, this clause impliedly prohibits Congress from authorizing voting by District residents because they are not residents of a state. That argument is challenged at the threshold by the fact that Congress has already twice granted voting representation to citizens not actually living in a state. In *Evans v. Cornman*, the Supreme Court held that residents of federal enclaves within states—such as the National Institutes of Health—have a constitutional right to congressional representation. And through the Overseas Voting Act, Congress has provided Americans living abroad the right to vote in federal elections as though they were present in their last place of residence in the United States. There is no reason to suppose that Congress has less ability to provide voting representation to the residents of the Nation's capital.

Constitutional interpretation, moreover, requires text to be read in context, and there is simply no evidence that the Framers ever adverted to the rights of the District's residents when crafting the language of Article I, Section 2. Instead, the Framers' word choice reflected two compromises. First, there was division over whether the House should be elected by the "people" or by state legislatures. As you know, the Framers resolved this debate in favor of direct election by individuals. Second, there was debate over whether voting qualifications should be set at the federal or state level—a debate that was resolved by letting states decide who would vote. At no point during either of those debates did anyone suggest that all residents of the new Federal "District" would lack this fundamental, individual right.

Nor do the history and the debates leading to the creation of the District support the opponents' view. The Framers established a federal district to ensure that the nation's capital would not be vulnerable to the power of any one state. The need for a federal district was fairly

uncontroversial, and elicited relatively little debate. But nowhere in the historical record is there any evidence that the participants in the constitutional convention affirmatively intended to deprive the residents of the new district of their voting representation or other civil liberties by virtue of their residence in the new federal enclave.

In retrospect, it not surprising that the Framers failed specifically to address the voting rights of District residents. After all, so long as the location, size, and population of the new federal district remained unknown, the issue was purely theoretical. All citizens of the Nation lived in a state at the time the Constitution was ratified, including those who lived in the parts of Maryland and Virginia that later became the District. Moreover, it would have struck the Framers as highly unlikely that, at the time of its creation, the District would be sufficiently populous to merit independent representation. At the time, no American city besides New York had a large enough population to justify a separate representative. Now, of course, the District has nearly 600,000 people—greater than the population of all of the thirteen original states.

Debates at the state ratifying conventions also suggest that the Framers may not have explicitly addressed this issue because they assumed that the states ceding the land to the federal government would provide for the civil rights and liberties of their residents as a condition of cession. Indeed, delegates at the Virginia and North Carolina ratifying conventions repeatedly observed that the states donating the land for the District could be expected to protect their residents' liberties as a condition of the cession. James Madison, for example, dismissed the anti-federalists' fear that Congress would exercise its power to strip the District's residents of basic liberties as unwarranted, because "nothing could be done without the consent of the states."

In the beginning, Madison's presumption bore out. As a condition of cession, Virginia and Maryland both made general provision for the rights of their former residents, who continued to vote with Virginia and Maryland from Congress's acceptance of the cession in 1790

until Congress formally took control of the District in 1800. As it turned out, though, when the Congress assumed power over the District in 1800, the federal statute effectuating that change-in-control disenfranchised the District's 8,000 residents. Congress's failure at the time to provide voting rights to the District's residents was, again, understandable. The District was more than 20,000 residents shy of the number then constitutionally required for a congressional district, and it was widely assumed that the residents' proximity to and frequent contact with members of Congress would make up in reality for any formal rights of representation they lacked.

In short, precedent supports Congress's authority under the District Clause to provide the District's residents the fundamental rights possessed by other Americans who reside in states absent a countervailing constitutional imperative. And nothing in the Constitution or in the records of the constitutional convention or state ratifying debates demonstrates that the Framers affirmatively intended to deprive District residents of voting representation in the House of Representatives. Instead, the historical record suggests the Framers likely did not specifically protect this right because they assumed the residents of the new federal district would be taken care of by the ceding states, and felt no need to provide distinct voting representation for residents of an as-yet undesignated district that would almost certainly have lacked the population necessary to warrant a separate seat.

* * * * *

In sum, while I understand and appreciate the views of those who oppose this legislation, I do not agree with them. I believe Congress has authority to enact the D.C. Voting Rights bill and, indeed, that this legislation is what the Framers would have expected and embraced today as fulfilling their democratic vision for the Nation.

**Addendum**

The United States is the only democratic nation that deprives the residents of its capital city of voting representation in the national legislature. American citizens resident in the District of Columbia are represented in Congress only by a non-voting delegate to the House of Representatives. These residents pay federal income taxes, are subject to any military draft, and are required to obey Congress's laws, but they have no say in the enactment of those laws. Because Congress also has authority over local District legislation, District residents have no voting representation in the body that controls the local budget to which they must adhere and the local laws that they are required to obey. District residents thus lack what has been recognized by the Supreme Court as perhaps the single most important of constitutional rights.

As discussed more fully below, Congress can fix that glaring problem legislatively without running afoul of the Constitution. Neither the Constitution's text nor controlling Supreme Court precedent preclude treating the District of Columbia as akin to a "state" for the purpose of providing the District's residents with voting representation. To the contrary, in *National Mutual Insurance Company v. Tidewater Transfer Company*, a plurality held that, although the District is not a "state" for purposes of Article III, Congress could nonetheless provide diversity jurisdiction to District residents pursuant to its authority under the District Clause.[1] There is no reason to reach a different outcome here. Moreover, the historical record cannot fairly be read to reflect an affirmative desire by the Framers to bar District residents from voting representation. Instead, a far more plausible reading of the historical record is that the Framers did not explicitly address the issue of voting representation because they did not advert to the possibility that the residents of the as-yet undefined District would be *without* voting representation. To infer from the Framers' silence an intent to deprive District residents of this

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[1] *See* 337 U.S. 582, 601-02 (1949).

basic right would be to adopt an unfounded, aggressive reading of the history that simply does not hold up when considered in context. Finally, other reasons given for denying District residents a right to vote are unpersuasive and do not provide a sound basis for defeating the legislation proposed here.

## I. THE TEXT OF THE DISTRICT CLAUSE GIVES CONGRESS FAR-REACHING POWER TO ENACT LEGISLATION THAT WOULD GIVE THE DISTRICT VOTING REPRESENTATION IN THE HOUSE

The "District Clause" gives Congress the power to "exercise exclusive Legislation in all Cases, whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the Seat of the Government of the United States."[2] The District Clause grants Congress broad authority to create and legislate for the protection and administration of a distinctly federal district. Congressional power is at its zenith when it legislates for the District, surpassing both the authority a state legislature has over state affairs and Congress's authority to enact legislation affecting the fifty states.[3] Although no case specifically addresses its authority to provide the District voting representation in the House, existing case law confirms the plenary nature of Congress's power to see to the welfare of the District and its residents.

Two related Supreme Court cases confirm the breadth of Congress's authority under the District Clause. In the first, *Hepburn v. Ellzey*,[4] the Court held that Article III, Section 2 of the U.S. Constitution—providing for diversity jurisdiction "between citizens of different

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[2] U.S. Const. art. I, § 8, cl. 17.

[3] *See Palmore v. United States*, 411 U.S. 389, 397-98 (1973); *Nat'l Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 592 (1949) (District Clause grants Congress power over the District that is "plenary in every respect"); *Gibbons v. District of Columbia*, 116 U.S. 404, 408 (1886); *see also* Testimony of Hon. Kenneth W. Starr, House Government Reform Committee (Jun. 23, 2004); Viet Dinh and Adam H. Charnes, *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives* (2004), *available at*: http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf.

[4] 6 U.S. 445 (1805).

States"—did not extend to suits between state residents and residents of the District of Columbia.[5] The Court found it "extraordinary," however, that residents of the District should be denied access to federal courts that were open to aliens and residents in other states,[6] and invited Congress to craft a solution, noting that the matter was "a subject for legislative, not judicial consideration."[7]

Nearly 145 years later, Congress accepted the *Hepburn* Court's invitation, enacting legislation that explicitly granted District residents access to federal courts on diversity grounds. That legislation was upheld by the Court in *National Mutual Insurance Company v. Tidewater Transfer Company*. In *Tidewater*, a plurality held that, although the District is not a "state" for purposes of Article III, Congress could nonetheless provide the same diversity jurisdiction to District residents pursuant to its authority under the District Clause.[8] The two concurring justices went even further, arguing that *Hepburn* should be overruled and that the District should be considered a state for purposes of Article III.[9]

**A. Significance of *Tidewater***

A January 24, 2007 report from the Congressional Research Service ("CRS report") discusses *Tidewater* at length and adopts an unduly narrow view of the decision's value as precedent for Congress's authority to enact voting-rights legislation.[10] The report emphasizes that no one opinion earned the votes of a majority of the Court. For present purposes, however, the fundamental import of *Tidewater* is that a *majority of the Court* found that Congress had the

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[5] *Id.* at 453.

[6] *Id.*

[7] *Id.*

[8] *See* 337 U.S. at 601-02.

[9] *See id.* at 604-06.

[10] *See* CRS Report for Congress: The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives or the Committee of the Whole (Jan. 24, 2007) ("CRS Report") 10-17, *available at* http://opencrs.cdt.org/rpts/RL33824_20070124.pdf.

authority to accomplish an outcome that mirrors the goal and effect of the D.C. Voting Rights bill. The decision thus provides strong support for the position that Congress has authority to grant the District a House Representative via simple legislation.

Because Congress unquestionably had the greater power to provide District residents diversity jurisdiction in new Article I courts, the *Tidewater* plurality explained, it surely could accomplish the more limited result of granting District citizens diversity-based access to existing Article III courts.[11] Similarly, Congress's authority to grant the District full rights of statehood[12] (or grant its residents voting rights through retrocession) by simple legislation suggests that it may by legislation take the more modest step of providing citizens of the District with a vote in the House of Representatives.[13]

It is likely that the two concurring justices, who found the District was a "state" for purposes of diversity jurisdiction, would also have concluded that the District is a "state" for purposes of voting representation. Observing that the Constitution had failed explicitly to accord District residents access to federal courts through diversity jurisdiction, Justice Rutledge remarked: "I cannot believe that the Framers intended to impose so purposeless and indefensible a discrimination, although they may have been guilty of understandable oversight in not providing explicitly against it."[14] Having concluded that the Framers did not intend to deprive District residents of access to the federal courts, Justice Rutledge reasoned that the term "state" should include the District of Columbia where it is used with regard to "the civil rights of

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[11] 337 U.S. at 597-99.

[12] *See* U.S. Const. art. IV, § 3, cl. 1.

[13] Indeed, Congress has granted voting representation to other categories of citizens who do not reside in a "state." In *Evans v. Cornman*, the Supreme Court held that residents of federal enclaves within states have a constitutional right to congressional representation, ruling that Maryland had denied its "citizen[s'] link to his laws and government" by disenfranchising residents on the campus of the National Institutes of Health. 398 U.S. 419, 422 (1970). And through the Overseas Voting Act, Congress afforded Americans living abroad the right to vote in federal elections as though they were present in their last place of residence in the United States. *See* 42 U.S.C. § 1973ff-1.

[14] *Tidewater*, 337 U.S. at 625.

citizens."[15] Access to the federal courts via diversity jurisdiction, he concluded, fell within that category of usage. Contrary to the view expressed in the CRS report,[16] the same is of course true with respect to the right conferred by the D.C. Voting Rights bill, as the right to vote is among the most fundamental of civil rights; in the context of congressional elections, it is a right not of the States, but of the people "in their individual capacities."[17] Based on Justice Rutledge's reasoning, the *Tidewater* concurring justices surely would have upheld Congress's determination to redress the denial of voting representation to District residents.[18]

Finally, it is not clear that the *dissenters* would have rejected the D.C. Voting Rights bill as exceeding Congress's authority. The four dissenting justices, although divided between two separate opinions, emphasized the same point as central to their analyses: As Justice Frankfurter put it, "[t]here was a deep distrust of a federal judicial system, as against the State judiciaries, in the Constitutional Convention."[19] It was that distrust of federal power that

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[15] *Id.* at 623.

[16] *See* CRS Report at 13-14. CRS takes contradictory positions as to whether voting representation in the House involves a "fundamental right" to support its thesis that Congress lacks the power to provide District residents voting representation. CRS first asserts that the D.C. Voting Rights bill concerns not the rights of individual citizens, but the "distribution of power among political structures." Based on that characterization, CRS concludes that the concurring justices would not have thought that the district was a "state" for purposes of representation. CRS then contends that the bill does involve a "fundamental right," a characterization that serves its argument that the *Tidewater* plurality might have thought such legislation to be beyond Congress's authority under the District Clause. In my view, these characterizations miss the point and ascribe an unintended meaning to the plurality's passing observation about fundamental rights. Although the plurality noted that the dispute over diversity jurisdiction in *Tidewater* did not "involve" fundamental rights, it explained in the next paragraph that the critical distinction was between congressional enactments that do and do not "*invade* fundamental freedoms or *substantially* disturb the balance between the Union and its component states." 337 U.S. at 585-86 (emphasis added). The plurality indicated that congressional enactments that invade fundamental freedoms or substantially disturb the federal-state balance of power would not be entitled to judicial deference. The D.C. Voting Rights bill triggers neither of those concerns. If the grant of voting representation involves a "fundamental right," then the bill would effect an expansion, not an invasion, of that right. And the addition of the single additional seat by the consent of the House and Senate would not "substantially disturb" the relationship between the states and the federal government.

[17] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 839, 844 (1995) (Kennedy, J., concurring) (quoting *The Federalist No. 2* (James Madison), at 38-39 (C. Rossiter ed. 1961)) (internal quotation marks omitted).

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

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

engendered fierce debates about the scope of the federal judiciary, and resulted in its careful enumeration in Article III. In view of the fact, made clear by the debates, that the Constitution's defenders had to "justify[] every particle of power given to federal courts,"[20] the four dissenting justices thought it inconceivable that the Framers would have bestowed upon Congress in Article I a supplemental power to expand the federal judiciary "whenever it was thought necessary to effectuate one of [Congress's] powers."[21]

Thus, the driving force behind the dissenters' conclusion that the District Clause did not permit an expansion of federal jurisdiction thus had little to do with the scope of the District Clause and everything to do with the character of the Article III power at stake. Those concerns are not present in the context of voting representation for citizens of the District. As noted above, voting representation is a right belonging to the individual citizens of the District, not to the District as seat of the federal government. The federalism concerns triggered by congressional expansion of the federal judiciary are not implicated by legislation that effects the modest, but important, result of meaningful House representation for the citizens of the United States who reside in the District of Columbia.

**B.** ***Adams v. Clinton***

In 2000, a three-judge panel of the United States District Court for the District of Columbia addressed D.C. voting representation in *Adams v. Clinton*.[22] Opponents of the D.C. Voting Rights bill have made much of a statement in the *Adams* opinion to the effect that the

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

[21] *Id.*

[22] 90 F. Supp. 2d 35 (D.D.C. 2000). The Supreme Court summarily affirmed without opinion. *Alexander v. Mineta*, 531 U.S. 941 (2000).

District is not "a state for purposes of the apportionment of congressional representatives."[23] But the question whether *Congress* could affirmatively provide for such representation through legislation was not before the *Adams* court. That case involved D.C. residents' claim that the Constitution *requires* that the District be treated as a state for purposes of representation in the House and Senate.[24] And, in a passage strikingly similar to that in *Hepburn*, the *Adams* court invited the plaintiffs to seek congressional representation through "other venues," suggesting (as *Hepburn* did) that Congress may provide the right legislatively.[25]

## II. A BROAD READING OF CONGRESS'S POWERS UNDER THE DISTRICT CLAUSE IS CONSISTENT WITH THE FRAMERS' ORIGINAL INTENT

The legislative history surrounding the Constitution's ratification provides further support for concluding that the District Clause authorizes Congress to enact legislation to provide voting representation for the District of Columbia. Although the constitutional debates reveal the Framers gave little specific attention to whether District residents would cast votes for a member in the House, the limited evidence on this subject does suggest that they assumed the ceding states would ensure as a condition of cession that the District residents would retain their essential liberties. The Framers apparently did not debate whether District residents would have the same civil rights as other Americans because they never contemplated that District residents would *not* have those rights. Thus, to the extent opponents of the legislation argue that the Framers intended to deprive District residents of voting representation, those opponents are simply wrong: such a reading rests on cherry-picking selective quotes out of context from the state ratification debates, ignores the fact that amendments restricting Congress's power under

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[23] *See, e.g.*, Senate Republican Policy Committee, *D.C. Voting Rights: H.R. 1433 Presents More Problems Than It Resolves* 4, *available at* http://rpc.senate.gov/_files/032007DCVotingRightsSN.pdf (quoting *Adams*, 90 F. Supp. at 50); *see also* CRS Report at 4-5, 11.

[24] *Adams*, 90 F. Supp at 47.

[25] *Id.* at 72.

the District Clause failed, and cannot be squared with Congress's assertion of its power to authorize representation for the new District's residents immediately following ratification.

### A. The Framers Assumed That, After Ratification, District Residents Would Retain Voting Representation In The House Of Representatives

In his recent testimony before the Senate Committee on Homeland Security and Governmental Affairs, Professor Jonathan Turley argues that the District Clause should play no role in analyzing the Framers' intent on this issue and, moreover, that the Framers' failure to mention the word "district" in Article I, Section 2 necessitates a finding that the Framers did not intend to extend voting representation to District residents.[26] Mr. Turley's argument largely rests on his implicit conclusion that silence in the legislative history requires a finding that the Framers *affirmatively intended* to strip District residents of the franchise. Mr. Turley's aggressive reading of the legislative history, however, is belied by the facts and circumstances attending ratification as well as statements made during the debates.

The legislative history accompanying ratification of both the District Clause and the Composition Clause is mostly silent on the question of whether the Framers expected residents of the new Federal District to have voting representation in the House. That limited history, however, is nonetheless instructive in understanding why the Framers did not explicitly grant District residents an affirmative right to vote. As shown below, the issue was mostly a distant one and to the extent it immediately affected the District's new residents, the Framers assumed those residents *would* have representation.

#### 1. The District Clause

It is undisputed that the perceived need for a Federal District arose from a 1783 meeting of the Continental Congress in Philadelphia. During that meeting, Pennsylvania refused

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[26] *Equal Representation in Congress: Providing Voting rights To The District of Columbia*, before the Committee on Homeland Security and Governmental Affairs, United states Senate, 110th Cong., May 15, 2007 (testimony of Jonathan Turley).

to provide assistance when the Continental Congress was confronted by a mob of mutinous soldiers from the Continental Army.[27] Unable to obtain any guarantee of protection from the state, the Continental Congress was forced to adjourn its meeting and reconvene elsewhere. The events in Philadelphia that summer convinced the Framers that they could not leave the security of the new federal government in the hands of any one particular state. As James Madison remarked in *The Federalist No. 43*, without a Federal District, "the public authority might be insulted and its proceedings interrupted with impunity" and "the gradual accumulation of public improvements at the stationary residence of the government would be both too great a public pledge to be left in the hands of a single State, and would create so many obstacles to a removal of the government, as still further to abridge its necessary independence."[28] James Iredell, a delegate at the North Carolina state ratifying convention, likewise opined, "What would be the consequence if the seat of the government of the United States, with all the archives of America, was in the power of any one particular state? Would not this be most unsafe and humiliating?"[29] It was this widespread feeling—and certainly not a desire to create a second-class citizenry deprived of federal representation—that spurred the Framers to carve out a ten-mile square that would serve as the new seat of the federal government.[30]

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[27] Roy F. Franchino, *The Constitutionality of Home Rule and National Representation for the District of Columbia*, 46 GEO. L. REV. 207, 209 (1957).

[28] *The Federalist No. 43* in THE FEDERALIST PAPERS 279-80 (Cosmio, Inc. 2006).

[29] Remarks at the Debate in North Carolina Ratifying Convention, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTING OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 219-20 (Jonathan Elliot ed., 2d ed. 1907), *available at* http://memory.loc.gov/ammem/amlaw/lwed.html (hereafter "THE DEBATES IN THE SEVERAL STATE CONVENTIONS").

[30] *See* Franchino, 46 Geo. L. Rev. at 211 ("It is quite clear that the objective of the Founding Fathers was to create a Federal District free from any control by an individual state."), *id.* at 213 ("It cannot be overemphasized that throughout the debates regarding the selection of the site and the adoption of the District clause, the desire for an area free from state control was paramount."); Remarks by James Madison in the Virginia Ratifying Convention, *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 433 ("How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the sessions and deliberations of Congress, would they be secure from insults, or the influence of such state?"); Peter Raven-Hansen, *Congressional Representation for the District of Columbia: A*

Although the Framers were silent at the Constitutional Convention on the scope and source of rights the new District's residents would enjoy, the state ratification debates reveal the District Clause engendered no debate at the Constitutional Convention on this subject because it was widely (and uncontroversially) assumed that a state ceding territory for the District would, as a condition of cession, safeguard the fundamental liberties of its inhabitants.[31] Statements at the state ratifying conventions confirm this view. At the North Carolina ratification convention, delegate Iredell noted that the District would have authority from "the state within which it lies" and that "such state [would] take care of the liberties of its own people."[32] During the Virginia ratifying convention, James Madison (also a participant in the Constitutional Convention) similarly asserted that, for the creation of a Federal District to actually happen, the state(s) must agree to the terms of the cession.[33] Virginia Delegate George Nichols likewise "insisted that as the state, within which the ten square miles might be, could prescribe the terms on which Congress should hold it, no danger could arise, as no state would consent to injure itself."[34] Ratification of the District Clause was thus based on the assumption that states ceding territory for the District would protect the fundamental liberties of their citizens, of which the right to vote was paramount.

Professor Turley counters that a series of amendments proposed in the state ratification conventions demonstrate that "the *status* of the residents was clearly debated and understood: residents would be represented by Congress as a whole and would not have

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*Constitutional Analysis*, 12 HARV. J. ON LEGIS. 167, 170 (1975) (having the national and a state capital in the same place would give "'a provincial tincture to your national deliberations." (quoting George Mason *in* THE DEBATES IN THE SEVERAL STATE CONVENTIONS 332)).

[31] Raven-Hansen, 12 HARV. J. ON LEGIS. at 172 (noting "it was widely assumed that the land-donating states would make appropriate provision in their acts of cession to protect the residents of the ceded land").

[32] 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 219-220.

[33] 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 433 ("T]he states may settle the terms of the cession. The states may make what stipulation they please in it, and, if they apprehend any danger, they may refuse it altogether.").

[34] *Id.* at 434.

individual representation in Congress."[35] Professor Turley's evidence does not beat that out. Principally, Professor Turley basis this assertion on a proposed amendment offered by Alexander Hamilton at the New York ratifying convention. That proposal, however, presumed that the District's residents could continue voting with the state from which the District was carved, and would have given them the *automatic* right to cast votes *as District residents* once the District's population reached the size necessary for a voting representative under the apportionment rules.[36] Professor Turley and other critics of the current proposed legislation claim this amendment's failure shows that the Framers opposed giving District residents any voting representative in Congress.[37] But it shows no such thing. To the contrary, this failed amendment (at a *state* ratifying convention) highlights the Framers' assumption that the District's residents would retain the right to vote with their former state, and it demonstrates at most a disinclination to provide automatically for representation of the District *qua District*—a fact not surprising given the unknown facts relating to the District during the ratification debates. It does not remotely suggest that the Framers believed that *Congress* would lack power to effect that result legislatively. Nor does it suggest the Framers intended that District residents would not have the right to vote simply because they happened to live in the part of a state whose land became the Federal District.

Professor Turley fares no better in claiming that other events at the state ratification debates somehow show that the Framers intended to limit congressional power over the District. For instance, Professor Turley errs in arguing that failed amendments in state ratifying conventions demonstrate a purpose to limit federal power.[38] To stave off concerns of anti-

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[35] Turley at 22 (emphasis in original).

[36] 5 The Papers of Alexander Hamilton 189 (Harold C. Syrett and Jacob E. Cooke eds., 1962).

[37] *See, e.g.*, Turley at 23.

[38] *Id.*

federalists, North Carolina, Pennsylvania and Virginia all proposed amendments to the Constitution as drafted that would have limited Congress to acting in the same capacity as a state. In all three cases, the states proposed amendments that would have limited Congress's "exclusive power of legislation . . . over the federal district . . . only to such regulations as respect the police and good government thereof."[39] Tellingly, those amendments were not adopted—so to the extent they provide proof of any intent, they reveal the Framers desire *not* to limit federal power in the way Professor Turley claims.

Similarly, Professor Turley relies heavily on statements by Edmund Pendleton, President of the Virginia Ratifying Convention, and others to argue that the Framers intended to deprive District residents of voting representation because they feared that such power could be used to the detriment of the states.[40] Professor Turley's reliance on Pendleton's statements, however, is misplaced because Pendleton merely addressed the concern that Congress would use its power over the district to augment its federal power *to the detriment of the states*. Here, of course, giving a voting representative to the District's more than 600,000 residents—leaving it with less representation in Congress than any state—would not aggrandize federal power at the expense of the states or enable the federal government to oppress the states. Professor Turley's other unsubstantiated statements—including his suggestion that providing district residents with voting representation would have "doomed" ratification—are hyperbole that find no support in the scant legislative record. Indeed, if precluding representation was so essential to ratification,

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[39] 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 245 (North Carolina Ratification Convention); *see also* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 545 (Pennsylvania Ratification Convention) (proposing that "the clause respecting the exclusive legislation over a district not exceeding ten miles square be qualified by a proviso that such right of legislation extend only to such regulations as respect the police and good order thereof"); 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS 660 (Virginia Ratification Convention) (proposing similar amendment).

[40] Turley at 25.

the Framers would have at the very least debated the subject if not enacted clear language addressing the question.

When considered in context, the Framers' relative silence as to whether District residents would enjoy separate voting representation as an independent district is not surprising. At the time of ratification, the Framers decided *only* the limitations on its geographic bounds and left the rest to future Congresses. That made imminent sense at the time because the Framers did not yet know even the location or population of the new District. Indeed, it was not until the July 9, 1790 passage of the Residence Act, 1 Stat. 130 (1790), during the second session of the First Congress, that Congress (not the Framers) ultimately selected the District of Columbia as the seat of federal government in a compromise between the North and the South. Earlier, when the District Clause was enacted, it was possible that the nascent District would reside in the middle of an existing state (thereby easily allowing the residents of the District to continue voting in their original state, as residents of federal enclaves do today), or in a region that had fewer than 60,000 residents—the minimum then needed to qualify for statehood under the terms of the Northwest Ordinance.[41]

The First Congress, for example, split its time between New York City and Philadelphia. During this period various localities (large and small) were engaged in fierce lobbying efforts to become the seat of the nation's capital. As Rep. Samuel Livermore of New Hampshire noted, "[m]any parts of the country appear extremely anxious to have Congress with them. There is Trenton, Germantown, Carlisle, Lancaster, Yorktown, and Reading, [which] have sent us abundance of petitions, setting forth their various advantages . . . ."[42] Tellingly, however,

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[41] The Northwest Ordinance was passed by the Continental Congress in 1787 under the Articles of Confederation. In 1789, the Congress adopted the ordinance as federal law. Ordinance of 1787: The Northwest Territorial Government, 1 Stat. 50 (1789).

[42] 1 ANNALS OF CONG. 819 (Joseph Gales, ed., 1834), *available at* http://memory.loc.gov/ammem/amlaw/lwac.html.

the population of none of those cities was more than 2,500.[43] Indeed, New York City—the largest urban area in the entire country in 1790—had a population of only 33,131.[44] It was highly unlikely (if not impossible) that the new 10-mile square Federal District would have the number of residents necessary to qualify it for independent voting rights. And it seems equally implausible that states would have been fiercely competing to house the new Federal District if the price of winning the competition was expected to be the disfranchisement of their residents.

**2. The Composition Clause**

Professor Turley's very brief discussion of the debates surrounding the Composition Clause,[45] fares no better in demonstrating that the Framers intended to deprive more than half a million people of representation in the federal government.[46] In short, he claims that the Framers put much care in deciding that Representatives would be elected from "the people of the several *states*" and that, because the Framers placed great emphasis on "states," the Framers intended to exclude voting representation for the District. The ratification debates do not support his assumption because there is simply no evidence that the Framers ever adverted to the rights of the District's residents when crafting that language. Instead, the Framers' word choice reflected two compromises. First, there was division over whether the House should be elected by the "people of the several states" or by state legislatures.[47] The Framers, of course, resolved this debate in favor of direct election by individuals. Second, there was debate over whether voting qualifications should be set at the federal or state level—a debate that was resolved by letting

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[43] U.S. Department of Commerce, Bureau of the Census, "Population of the 24 [largest] Urban Places: 1790," *available at* http://www.census.gov/population/documentation/twps0027/tab02.txt.

[44] *Id.*

[45] Art. 1, sec. 2, cl. 3.

[46] Turley at 18-19.

[47] *See, e.g.*, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 55-61 (Max Farrand ed., 1911), *available at* http://memory.loc.gov/ammem/amlaw/lwfr.html (debates concerning whether individuals or state legislatures should elect a state's representative to the House of Representatives).

states decide who would vote.[48] At no point during either of those debates did anyone suggest that all residents of the new Federal "District" would lack this fundamental, individual right.

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Certainly, when the Framers created the Federal District, they did not know that it would ultimately straddle two states, thereby raising a multiplicity of issues concerning the scope of the laws that would govern its residents' civil and political rights. Nor did they know the size of the new District, though they presumably did not think it would be large enough initially for its own residents to qualify as such for Congressional representation. Notwithstanding those facts, the ratification history suggests that the Framers believed that the ceding states would preserve their former residents' essential liberties. There is no evidence in the ratification debates that that the Founders of our democracy affirmatively meant to deny democracy to those living in our capital.

### B. Congress's Actions In The Period Following Ratification Confirm That The Framers Expected District Residents To Maintain Their Voting Rights And Meant For Congress To Have The Authority To Establish Those Rights

Any doubt on whether the Framers expected the District residents to maintain voting representation in the House of Representatives is largely dispelled by their actions in the period immediately following ratification.

In 1788 and 1789, Maryland and then Virginia ceded land to the United States for the new Federal District.[49] In ceding the land, both Maryland and Virginia explicitly provided that their respective laws would continue in force in the territories they ceded until Congress

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[48] *See, e.g.*, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 201-04 (debates concerning qualifications for voters in elections for the House of Representatives).

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

accepted the cessions and provided for government of the District. In 1790, acting pursuant to the District Clause, Congress enacted legislation that accepted the ceded land and provided for the metes and bounds of new District and authorized the President to determine the metes and bounds of the new territory.[50] That legislation likewise provided that the laws of Maryland and Virginia would continue to operate after the land was ceded until the date Congress formally moved to the new Federal District.[51]

On March 20, 1791, the President issued a proclamation defining the boundaries of the new federal district.[52] At that moment, consistent with the District Clause, the territory comprising the federal district was officially established. Yet notwithstanding that fact, the residents of the new District did not lose their representation in Congress but instead, pursuant to the 1790 legislation, continued voting in Maryland and Virginia. "Thus, during that interim period, the citizens enjoyed both local and national suffrage notwithstanding the fact that the District was a federal jurisdiction and theoretically under the exclusive control of Congress."[53]

Pursuant to the 1790 legislation, on December 1, 1800, the Congress assumed full control over the federal district. And in 1801, the Congress enacted legislation that provided the laws of Maryland and Virginia "shall be and continue in force" in the areas of the District ceded by the respective states.[54] Yet because the Congress had assumed jurisdiction over the District's residents in 1800 but failed to enact legislation that protected their franchise, in 1800 the District's residents ceased voting for a federal representative. At that point, it was a decade too

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[50] An Act for Establishing the Temporary and Permanent Seat of the of the Government of the United States, 1 Stat. 130 (1790), *reprinted in* 1 D.C. Code Ann. 42, amended 1 Stat. 214, *reprinted in* 1 D.C. Code Ann. 45.

[51] *Id.*

[52] Proclamation Fixing Boundaries of the District of Columbia, March 30, 1791, *reprinted in* 1 D.C. Code Ann. 45-46.

[53] Franchino, 46 GEO. L. REV. at 214.

[54] Organic Act of 1801, An Act Concerning the District of Columbia, 2 Stat. 103, Feb. 27, 1801, *reprinted in* 1 D.C. Code Ann. 46-49.

late for the ceding states to protect the franchise of their former residents.[55] It bears noting that it was Congress's decision to terminate the authority of Maryland and Virginia over its former residents—not a judicial interpretation of the Constitution and the Framers' intent—that took away District residents' right to vote.

To be sure, in the years that followed, Congress did not act affirmatively to restore this right, as it is now doing. Yet for two reasons, that absence of such legislative action should not be interpreted to suggest a view by the early Congresses that they lacked the *power* to provide District residents with the right to vote. First, although in 1800 the minimum population required for a state to elect a voting representative to Congress was 60,000 residents, a mere 8000 residents resided in the District of Columbia at that time.[56] It is therefore neither surprising nor telling that in the years immediately following the District's establishment no serious effort was made to secure the District's residents a voting representative. Second, as a practical matter, with the District housing just 8000 residents in 1800, the need for federal representation was far weaker than it later became. When the Congress convened in the District for its first full session in 1801, the 137 members of the Seventh Congress alone (not including their families and staff) constituted nearly two percent of the entire District's population. Thus, there was some sense to the notion that the views of District residents would naturally be taken into account from their frequent, direct interaction with members of Congress themselves. In contrast, with an estimated

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[55] As one commentator has noted:

> The ceding states could have prevented the situation that now exists by reserving that the rights of their citizens should not be impaired. Such a reservation would have insured the continuation of franchise rights. However, it is reasonable to assume that the ceding states felt such a reservation was not necessary, that such political rights went with the transfer of jurisdiction. It would seem that any view which considers that the Founding Fathers intended to preclude such a basic right would be contrary to the rights and privileges existing in the ceding states and totally inconsistent with the underlying principles which gave rise to the Federal Congress.

*Id.*

[56] U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES 26 (1975).

population of 581,530 residents in 2006, even assuming all of the 535 members of Congress reside in the District, they constitute just .092 percent of the District's population.[57] And now, of course, many members of Congress live outside of the District, and modern transportation permits representatives to travel more frequently to their home districts. In today's world, there is simply no opportunity for the average District resident to interact on a day-to-day basis with members of Congress, and no reason to believe that residents' views and concerns will naturally be considered by the federal legislature in the absence of their having a voting representative.

## III. OTHER CONCERNS IDENTIFIED BY OPPONENTS DO NOT PROVIDE A SOUND BASIS FOR REJECTING THE PROPOSED LEGISLATION

Apart from the issues addressed herein, the January 24, 2007 CRS report identifies two concerns unrelated to Congress's constitutional authority to enact the D.C. Voting Rights bill which have also been raised by opponents of the bill that merit a response. First, the report suggests that granting the District voting representation in the House would open the door to claims by residents of the various federal territories for their own Representatives.[58] It also contends that "holding that the District could be treated as a state for purposes of representation would arguably also support a finding that the District could be treated as a state for the places in the Constitution [that] deal with other aspects of the national political structure."[59] These concerns are unfounded. Passage of the D.C. Voting Rights Act would not have any effect on federal territories or their residents. Nor would it necessarily support an argument that the District is a "state" in the context of constitutional provisions governing the national political structure.

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[57] U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, Quickfacts for the District of Columbia, *available at* http://quickfacts.census.gov/qfd/states/11000.html (last visited May 11, 2007).

[58] CRS Report at 17.

[59] *Id.*

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

As a constitutional and historical matter, territories occupy a position fundamentally different from the District in the overall schema of American Federalism and have long enjoyed disparate rights and privileges. Congress's authority over the territories stems from an entirely different constitutional provision, which empowers Congress to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."[60] Although this provision unquestionably grants Congress broad authority to manage and legislate over federal lands, the Framers' use of two different clauses suggests that they intended the District and the various territories to be constitutionally distinct.[61] The Supreme Court has recognized as much, specifically noting that, "[u]nlike either the States or Territories, the District is truly *sui generis* in our governmental structure."[62] Accordingly, the case law that supports Congress's power to provide District residents congressional voting representation cannot be applied uncritically to support the same argument for the territories.

Moreover, unlike territorial residents, but like the residents of the several states, District residents bear the full burden of federal taxation and military conscription. Granting the District a House Representative readily flows from these obligations; it is both incongruous and constitutionally significant that District residents lack an equal voice in the legislative body that can spend their tax dollars and send them off to war. Further, while birth in the District accords

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[60] U.S. Const. art. IV, § 3, cl. 2.

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

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

a person the same right to automatic U.S. citizenship that attaches to birth in the 50 states, those born in some territories are allotted only U.S. *nationality*, requiring only basic fealty to the United States, and not U.S. citizenship.[63] And unlike the territories, the District was part of the original 13 states; until the Capital was established in 1801, residents of what is now the District did enjoy full voting representation in the Congress.

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

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

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

The CRS report offers in passing another "slippery slope" argument, suggesting that legislative creation of a House Representative for the District would provide support for an argument that "Congress could . . . authorize the District to have Senators, Presidential Electors, and perhaps even the power to ratify [a]mendments to the Constitution." The report does not dwell on these concerns, with good reason. Regardless of whether Congress could have enacted

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

legislation to provide the District representation in the Electoral College, District residents already have that representation by virtue of the 23rd Amendment.[64] Any impetus to providing the District the power to ratify amendments would face grave constitutional hurdles, as that is a power of the states *qua* states, not a right of their individual citizens.[65] And the question whether Congress might ever attempt to provide District residents representation in the Senate is entirely speculative.

* * * * *

As the Court noted in *Tidewater*, the District was little more than a "contemplated entity" at the time the Constitution was ratified, and "[t]here is no evidence that the Founders, pressed by more general and immediate anxieties, thought of the special problems of the District of Columbia. . . ."[66] The Framers had no way of knowing at the time the Constitution was ratified what the Federal District they conceived would look like more than two centuries later. Indeed, the Framers did not even know where the Federal District would be located.

Today, we have little direct evidence of the Framers' views regarding the Federal District's residents' right to congressional representation. The ratification debates suggest that the Framers never seriously contemplated the possibility that residents of the national capital would be deprived of the fundamental right to vote. Indeed, as a practical matter, they likely did not perceive a need to create an explicit provision for District residents to elect a voting member

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[64] That the District obtained a vote in the electoral college by way of a constitutional amendment does not demonstrate its inability to provide District residents congressional voting representation by statute. Even if Congress's authority were the same in both contexts (a point that is not at all clear), *see, e.g.*, Dinh and Charnes, *supra* note 11, at 20-21, Congress's determination in 1961 to proceed by constitutional amendment casts no substantial light on the Framers' understanding as to whether an amendment would be necessary to affect such a change.

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

[66] *Tidewater*, 337 U.S. at 587. *See also* Raven-Hansen, 12 HARV. J. ON LEGIS. at 172 (noting that "[t]he question of the representation of the District received little express attention during the course of drafting [the District Clause], or in subsequent ratification debates. . . .").

of Congress because they presumed the ceding states would make adequate provision for their former residents. But apart from that most accurate reading of the history, we do know that the Framers considered the franchise the most cherished of liberties and that they believed the state or states which ceded land for the District would generally safeguard their former residents' fundamental rights. After all, the Framers had quite carefully devised a government based on "the consent of the governed."

For these reasons, it would be improper (as the Court found in *Tidewater*) to view the term "state" as a limitation on Congress's power. The Framers simply were not thinking of the states to the exclusion of the District's residents when they so limited representation in the House. And it would be contrary to the basic liberties they sought to preserve and protect to leave those nearly 600,000 residents as the last residents in any capital city in the world that are denied voting representation in the national legislature. The Congress can and should enact legislation restoring the franchise to the District's residents without running afoul of the Constitution.

**STATEMENT OF**

**REPRESENTATIVE CHRIS CANNON**

**Hearing on S.1257, the District of Columbia House Voting Rights Act of 2007**

**United States Senate Judiciary Committee**

**May 23, 2007**

Members of the Committee: Thank you for inviting me to speak to you today about the District of Columbia House Voting Rights Act of 2007. I strongly support this legislation because it would correct two injustices: It would provide a long-overdue voting representative for residents of the District of Columbia, and it would restore adequate representation for the

residents of the State of Utah. I appreciate that some have questioned whether providing District residents the fundamental right to vote is within Congress's power, but I do not share their doubts. There is no historical basis for concluding that the Framers intended to disenfranchise residents of the Nation's capital, and in my view the District Clause of the Constitution gives Congress the necessary authority to restore voting rights to those residents.

Although the crux of the debate regarding this legislation focuses on the DC portion of the bill, let me first speak about the Utah portion. Utah is in the unique position to remedy a wrong imposed on it after the 2000 census. Utah lost out on a 4th seat because of a Census

Bureau decision to count and to enumerate to their respective home states government employees residing temporarily abroad, but not to count similarly situated missionaries. Had the Bureau either not counted any Americans residing temporarily abroad, or counted all such Americans and not just those employed by the federal government, Utah would have been awarded a fourth seat after the 2000 census.

This legislation puts Utah on a path to remedy a flawed decision. Although I have some questions about the language in the House legislation that mandated an "at large" seat for Utah, I want to be clear that those concerns were not regarding the constitutionality of an "at large" seat, but rather its effects on state's prerogatives and the

historic role of the State in re-apportionment. I appreciate the deference the Senate bill has shown the state of Utah and look forward to working with you on this language as the legislation moves forward.

In order to understand the District portion of this legislation, it is important to take a historical perspective. At the time of our Nation's founding, the Framers provided for a federal district to house the seat of the federal government. This was done to ensure that the nation's capitol would be insulated from undue influence of the states and that its security would not be left in the hands of any one state. Denying District of Columbia residents the right to vote in elections for the House of

Representatives was not necessary, or even relevant, to further these purposes. And contrary to the claims of some, there is no indication in the ratification debates that the Framers intended such disenfranchisement.

In fact, there was no discussion at all during the Constitutional Convention, and almost none in the state ratification debates, as to the voting rights of the new District residents, likely because it was assumed that the states donating the land for the District would provide for the voting rights of the residents of the ceded land. Indeed, from 1790-1800, District residents continued to vote in congressional elections in Maryland and Virginia. It was not until 1800, when the District became subject to

complete federal control, that residents of the District lost their voting rights.

The Framers' failure to focus closely on this issue may well have stemmed from the fact that there was no District of Columbia at the time the Constitution was ratified. At that time, the Framers had prescribed only the District's purpose and the limitations on its geographic size. Even its location had not been selected. Many municipalities, including Trenton, New Jersey, Yorktown, Virginia and Reading, Pennsylvania vied for the honor. It was not until Congress passed the Residence Act that the site that is now the District of Columbia was selected as the seat of the federal government. For all the

Framers knew, the capital would be located in the middle of an existing state—thereby allowing the residents of the District to continue voting in that state, as residents of federal enclaves do today.

Although they did not perceive a need explicitly to protect District residents' voting rights, the Framers did authorize Congress "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District." As several Constitutional scholars have observed, Congress has used its power under this clause, numerous times, to treat residents of the District as though they were residents of a state. And that has been true even in instances where the Constitution gives rights or imposes responsibilities only

on citizens of states. Opponents of this legislation argue, however, that the Framers meant to exclude District residents from voting by providing in Article I, Section 2 that members of the House are chosen "by the people of the several States." But that language was not chosen because of an intention to deny democracy to residents of the Nation's capital. Rather, the ratification debates indicate that this language resulted from two decisions made in the course of those debates: the decision that the House would be elected by the "people of the several States," as opposed to by the state legislatures; and the decision to allow voting qualifications to be set at the state, rather than the federal, level. At no point during the debates over these issues did anyone mention the

residents of the newly-conceived federal district—let alone suggest that they would be deprived of the fundamental, individual right to voting representation.

In short, there is no historical basis for reading into the District Clause a limitation that would prevent Congress from ensuring adequate representation for all of the Nation's citizens. This Act ensures adequate representation both in Utah and in the District of Columbia, and it does so constitutionally. I therefore urge you to join me in supporting it.


P.O. Box 65691
Washington, DC 20035-5691

May 23, 2007

The Honorable Patrick J. Leahy
Chair, Senate Committee on Judiciary
United States Senate
Washington, DC 20510

The Honorable Russell D. Feingold
Chair, Senate Subcommittee on The Constitution
United States Senate
Washington, DC 20510

RE: S. 1257, the D.C. House Voting Rights Act of 2007

Dear Chairman:

On behalf of DC For Democracy (DCFD) and Democracy For America (DFA), we thank you for your leadership in support of the DC House Voting Rights Act of 2007 (S. 1257).

The bill, which received bi-partisan support in the House as H.R. 1905, is now before the Senate. As you know, the newly introduced Senate companion bill replaces the at-large fourth seat to Utah, as provided for in the House-passed bill (H.R. 1905), with a new proportionate seat similar to that which the House considered under H.R. 5388 of the 109th Congress. Like the House-passed bill, S. 1257 also continues to pair voting representation in the House of Representatives for citizens living in the District of Columbia with the additional Utah seat by expanding the size of the House to 437 members. This approach is vote-neutral and balances the seat for traditionally Democratic District of Columbia with an additional seat for Republican-leaning Utah. Both DCFD and our Burlington-based national DFA strongly support this bipartisan approach to expanding democratic rights to all under- and unrepresented American citizens, as embodied in S. 1257.

We commend you for your leadership in support of the bipartisan Senate bill, and appreciate your scheduling today's hearing before the full Judiciary Committee. The citizens of the District of Columbia are eager to enjoy full House voting rights for the first time in our nation's history. With your continued leadership and the necessary bipartisan support of the Senate, we can end 206 years of taxation without representation for the citizen's of our national capital.

Again, thank you for your consideration and your support.

Sincerely,

Keshini Ladduwahetty, Chair
DC For Democracy

James H. Dean, Chair
Democracy for America

Karen D. Rose, Chair
Committee on Democracy & Voting Rights
DC For Democracy


May 23, 2007

The Honorable Patrick J. Leahy
Chair, Senate Committee on Judiciary
United States Senate
Washington, DC 20510

The Honorable Russell D. Feingold
Chair, Senate Subcommittee on The Constitution
United States Senate
Washington, DC 20510

RE: S. 1257, the D.C. House Voting Rights Act of 2007

Dear Chairmen:

On behalf of Democracy for Utah (D4U), a statewide grassroots political organization dedicated to promoting American values such as civic participation, good government, and social responsibility in Utah, we thank you for your leadership in support of the DC House Voting Rights Act of 2007 (S. 1257).

The bill, which received bi-partisan support in the House as H.R. 1905, is now before the Senate. As you know, your newly introduced Senate bill, supported by both Utah Senators Orrin Hatch and Robert Bennett, replaces the at-large fourth seat to Utah, as provided for in the House-passed bill (H.R. 1905), with a new proportionate seat similar to that which the House considered under H.R. 5388 of the 109th Congress. Like the House bill, S. 1257 also pairs voting representation in the House of Representatives for citizens living in the District of Columbia with the additional Utah seat by expanding the size of the House to 437 members. This approach is vote-neutral and balances the seat for traditionally Democratic DC with an additional seat for Republican-leaning Utah. Both D4U and our national DFA strongly support this bipartisan approach to expanding democratic rights to all under- and unrepresented American citizens, as embodied in S. 1257.

We commend you for your leadership in scheduling today's hearing before the full Judiciary Committee on the constitutionality of S. 1257, and very much appreciate your early cosponsorship of the bill. With your continued support for this legislation, we believe now is the time for Utah to receive its historic fourth congressional seat that we so narrowly missed gaining after the last national reapportionment. With the bipartisan support of the Senate, we can expand Utah's rightful voice in Congress while ending more than 200 years of taxation without representation for the citizens of our nation's capital.

Again, thank you for your consideration and your support.

Sincerely,

Carrie Ulrich

Carrie Ulrich, President
Democracy for Utah

Kristine Griggs

Kristine Griggs, Vice President
Democracy For Utah

# Department of Justice

STATEMENT

OF

JOHN P. ELWOOD
DEPUTY ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
UNITED STATES DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

"ENDING TAXATION WITHOUT REPRESENTATION: THE CONSTITUTIONALITY OF S. 1257, THE DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2007"

PRESENTED ON

MAY 23, 2007

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Thank you for the opportunity to discuss the Department's views on S. 1257, a bill to grant the District of Columbia representation in the House of Representatives as well as to provide an additional House seat for Utah. For the same reasons stated in the Statement of Administration Policy on the House version of this legislation, the Administration concludes that S. 1257 violates the Constitution's provisions governing the composition and election of the United States Congress. Accordingly, if S. 1257 were presented to the President, his senior advisors would recommend that he veto the bill. I will confine my testimony to the constitutional issues posed by the legislation.

The Department's constitutional position on the legislation is straightforward and is dictated by the unambiguous text of the Constitution as understood and applied for over 200 years. Article I, section 2 of the Constitution provides:

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

This language, together with the language of eleven other explicit constitutional provisions, including the Twenty-Third Amendment ratified in 1961,[1] "makes clear just how

[1] *E.g.*, U.S. Const. art. I, §§ 2-4; art. II, § 1, cl. 2; amend. XIV, § 2; amend. XVII; amend. XXIII, § 1.

deeply Congressional representation is tied to the structure of statehood."[2] The District of Columbia is not a State. In the absence of a constitutional amendment, therefore, the explicit provisions of the Constitution do not permit Congress to grant congressional representation to the District through legislation.

Shortly after the Constitution was ratified, the District of Columbia was established as the Seat of Government of the United States in accordance with Article I, section 8, clause 17 of the Constitution. The Framers deliberately placed the capital in a federal enclave that was not itself a State to ensure that the federal Government had the ability to protect itself from potentially hostile state forces. The Framers also gave Congress "exclusive" authority to enact legislation for the internal governance of the enclave chosen as the Seat of Government—the same authority Congress wields over the many other federal enclaves ceded by the States, such as military bases and federal park lands.

Beginning even before the District of Columbia was established as the Seat of Government, and continuing to today, there have been determined efforts to obtain congressional representation for the District. Apart from the various unsuccessful litigants attempting to secure representation through litigation, such efforts have consistently recognized that, because the District is not a State, a constitutional amendment is necessary for it to obtain congressional representation. S. 1257 represents a departure from that settled constitutional and historical understanding, which has long been recognized and accepted by even ardent proponents of District representation.

One of the earliest attempts to secure congressional representation for the Seat of Government was made by no less a constitutional authority than Alexander Hamilton at the pivotal New York ratifying convention. Recognizing that the proposed Constitution did not provide congressional representation for those who would reside in the Seat of Government, Hamilton offered an amendment to the Enclave Clause that would have provided:

> 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 [left blank] 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*.[3]

Hamilton's proposed amendment was rejected. Other historical materials confirm the contemporary understanding that the Constitution did not contemplate congressional representation for the District, and that a constitutional amendment would be necessary to make such provision.[4] These materials refute the contention by proponents of S. 1257 that the Framers

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[2] *Adams v. Clinton*, 90 F. Supp. 2d 35, 46-47 (D.D.C.), *aff'd*, 531 U.S. 940, 941 (2000).

[3] 5 *The Papers of Alexander Hamilton* 189-90 (Harold C. Syrett ed., 1962) (emphasis added).

[4] *See* 10 Annals of Congress 991, 998-99 (1801) (remarks of Rep. John Dennis of Maryland) (stating that because of District residents' "contiguity to, and residence among the members of [Congress]," "though they might not be represented in the national body, their voice would be heard. But if it should be necessary [that they be

simply did not consider the District's lack of congressional representation and that, if they had considered it, they would have provided such representation. In fact, Framers and ratifiers *did* consider the question and rejected a proposal for such representation.

In more recent years, major efforts to provide congressional representation for the District were pursued in Congress in the 1960s and 1970s, but on each occasion Congress expressly recognized that obtaining such representation would require either Statehood or a constitutional amendment. For example, when the House Judiciary Committee favorably recommended a constitutional amendment for District representation in 1967, it stated as follows:

> *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.* This is the case because provisions for elections of Senators and Representatives in the Constitution are stated in terms of the States, and the District of Columbia is not a State.[5]

Congress again considered the District representation issue in 1975, and the House Judiciary Committee again expressly acknowledged that, "[i]f the citizens of the District are to have voting representation in Congress, a constitutional amendment is essential; statutory action will not suffice."[6]

Of course, the courts have not directly reviewed the constitutionality of a statute purporting to grant the District representation because, for the reasons so forcefully articulated by the House Judiciary Committee, Congress has not previously considered such legislation constitutionally permissible. But numerous federal courts *have* emphatically concluded that the existing Constitution does not permit the provision of congressional representation for the District. In *Adams v. Clinton*, a three-judge court stated, in a decision affirmed by the Supreme Court, that "the Constitution does not contemplate that the District may serve as a state for purposes of the apportionment of congressional representation," and stressed that Article I "makes clear just how deeply Congressional representation is tied to the structure of statehood." 90 F. Supp. 2d 35, 46-47 (D.D.C.), *aff'd*, 531 U.S. 941 (2000); *see generally Southern Ry. Co. v.*

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represented], the Constitution might be so altered as to give them a delegate to the General Legislature when their numbers should become sufficient"); *see also* 5 *The Documentary History of the Ratification of the Constitution* 621 (Merrill Jensen, John P. Kaminski, & Gaspare J. Saladino eds., 1976) (statement by Samuel Osgood, a delegate to the Massachusetts ratifying convention, that he could accept the Seat of Government provision only if it were amended to provide that the District be "represented in the lower House," though no such amendment was ultimately included in the amendments recommended by the Massachusetts convention); Augustus Woodward, *Considerations on the Territory of Columbia* 5-6 (1801) (to ensure that residents of the District "who are governed by the laws ought to participate in the formation of them" "[i]t will require an amendment to the Constitution of the United States") (quoted in *Adams v. Clinton*, 90 F. Supp.2d 35, 53 (D.D.C.), *aff'd*, 531 U.S. 941 (2000)).

[5] *Providing Representation of the District of Columbia in Congress*, H.R. Rep. No. 90-819, at 4 (Oct. 24, 1967) (emphasis added).

[6] *Providing Representation of the District of Columbia in Congress*, H.R. Rep. No. 94-714, at 4 (Dec. 11, 1975).

*Seaboard Allied Milling Corp.*, 442 U.S. 444, 462 (1979) (stating that summary affirmance is a precedential ruling on the merits). In *Banner v. United States*, 428 F.3d 303 (D.C. Cir. 2005) (per curiam), a panel of the D.C. Circuit that included Chief Justice John Roberts flatly concluded: "[t]he Constitution denies District residents voting representation in Congress. . . . Congress *is* the District's Government, *see* U.S. Const. art. I, § 8, cl. 17, and the fact that District residents do not have congressional representation does not alter that constitutional reality." *Id.* at 309.[7] The court added: "[i]t is beyond question that the Constitution grants Congress exclusive authority to govern the District, but does not provide for District representation in Congress." *Id.* at 312. And in explaining why the Constitution does not permit the District's delegate in Congress to have the voting power of a Representative, the District Court for the District of Columbia stressed that the legislative power "is constitutionally limited to 'Members chosen . . . by the People of the several States.' U.S. Const. Art. I, § [2], cl. 1." *Michel v. Anderson*, 817 F. Supp. 126, 140 (D.D.C. 1993).

The numerous explicit provisions of the constitutional text; the consistent construction of those provisions throughout the course of American history by courts, Congress, and the Executive;[8] and the historical evidence of the Framers' and ratifiers' intent in adopting the Constitution conclusively demonstrate that the Constitution does not permit the granting of congressional representation to the District by simple legislation.

We are aware of, and not persuaded by, the recent and novel claim that S. 1257 should be viewed as a constitutional exercise of Congress's authority under the Enclave Clause, U.S. Const. art. I, § 8, cl. 17, to "exercise exclusive legislation" over the Seat of Government and other federal enclaves. That theory is insupportable. First, it is incompatible with the plain language of the many provisions of the Constitution that, unlike the Enclave Clause, are directly and specifically concerned with the composition, election, and very nature of the House of Representatives and the Congress. Those provisions were the very linchpin of the Constitution, because it was only by reconciling the conflicting wishes of the large and small States as to representation in Congress that the Great Compromise that enabled the Constitution's ratification was made possible. Every word of Article I's provisions concerning the composition and election of the House and the Senate—and particularly the words repeatedly linking congressional representation to "each State" or "the People of the several States"—was carefully chosen. In contrast, the Enclave Clause has nothing to do with the composition, qualifications, or election of Members of Congress. Its provision for "exclusive legislation" concerns

[7] Judge Roberts was a member of the D.C. Circuit when *Banner* was briefed and argued, but was serving as Chief Justice (and Circuit Justice) when the opinion issued. *See Banner*, 428 F.3d at 304-05 n.1.

[8] *See, e.g.*, Letter for Mr. Benjamin Zelenko, Committee on the Judiciary, House of Representatives, from Martin F. Richman, Acting Assistant Attorney General, Office of Legal Counsel (Aug. 11, 1967) (expressing the view that "a constitutional amendment is essential" for the District to obtain voting representation in Congress in the recommendations for the Committee Report on a proposed constitutional amendment); District of Columbia Representation in Congress: *Hearings on S.J. Res. 65 Before the Subcommittee on the Constitution of the Committee on the Judiciary*, 95th Cong. 16-29 (1978) (statement of John M. Harmon, Assistant Attorney General, Office of Legal Counsel) (discussing, in endorsing a constitutional amendment as the means of obtaining congressional representation for the District, the alternative ways of obtaining such representation, particularly the option of statehood legislation; conspicuous by its absence was any suggestion that such representation could be provided through legislation granting the District a seat).

legislation respecting *the internal operation* of "such District" and other enclaves. The Enclave Clause gives Congress extensive legislative authority "over such District," but that authority plainly does not extend to legislation affecting the entire Nation. S. 1257 would do that by altering the very nature of the House of Representatives. By no reasonable construction can the narrowly focused provisions of the Enclave Clause be construed to give Congress such sweeping authority.

Second, whatever power Congress has under the Enclave Clause is limited by the other provisions of the Constitution. As stated by the Supreme Court in *Binns v. United States,* 194 U.S. 486 (1904), the Enclave Clause gives Congress plenary power over the District "save as controlled by the provisions of the Constitution." *Id.* at 491. As the Supreme Court has further explained, the Enclave Clause gives Congress legislative authority over the District and other enclaves "in all cases where legislation is possible."[9] The composition, election, and qualifications of Members of the House are expressly and specifically governed by other provisions of the Constitution that tie congressional representation to Statehood. The Enclave Clause gives Congress no authority to deviate from those core constitutional provisions.

Third, the notion that the Enclave Clause authorized legislation establishing congressional representation for the Seat of Government is contrary to the contemporary understanding of the Framers and the consistent historical practice of Congress. As I mentioned earlier, the amendment unsuccessfully offered by Alexander Hamilton at the New York ratifying convention to authorize such representation when the Seat of Government's population reached a certain level persuasively demonstrates that the Framers did not read the Enclave Clause to authorize or contemplate such representation. Other contemporaneous historical evidence reinforces that understanding. *See* note 4, *supra.* Moreover, Congress's consistent recognition in practice that constitutional amendments were necessary not only to provide congressional representation for the District, but also to grant it electoral votes for President and Vice President under the Twenty-Third Amendment, belies the notion that the Enclave Clause has all along authorized the achievement of such measures through simple legislation. Given the enthusiastic support for such measures by their congressional proponents, it is simply implausible that Congress would not previously have discovered and utilized that legislative authority as a means of avoiding the enormous difficulties of constitutional amendment if such authority existed.

Fourth, the proponents' interpretation of the Enclave Clause proves far too much; the consequences that would necessarily flow from acceptance of that theory demonstrate its implausibility. As the Supreme Court has recognized, "[t]he power of Congress over the federal enclaves that come within the scope of Art. I, § 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia."[10] It follows that if Congress has constitutional authority to provide congressional representation for the District under the Enclave Clause, it has the same authority for the other numerous federal enclaves (such as military bases and various federal lands ceded by the States). But that is not all. The Supreme Court has also recognized that Congress's authority to legislate respecting the U.S. territories under the Territories Clause,

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[9] *O'Donoghue v. United States*, 289 U.S. 516, 539 (1993) (citation omitted).

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

U.S. Const., art. IV, § 3, cl. 2, is equivalent to its "exclusive legislation" authority under the Enclave Clause. *E.g.*, *Binns*, 194 U.S. at 488. If the general language of the Enclave Clause provides authority to depart from the congressional representation provisions of Article I, it is not apparent why similar authority does not likewise reside in the Territories Clause, which would enable Congress to enact legislation authorizing congressional representation for Puerto Rico, the Virgin Islands, and other territories. These unavoidable corollaries of the theory underlying S. 1257 demonstrate its invalidity. Given the great care with which the Framers provided for State-based congressional representation in the Composition Clause and related provisions, it is implausible to suggest that they would have simultaneously provided for the subversion of those very provisions by giving Congress *carte blanche* to create an indefinite number of additional seats under the Enclave Clause.

Finally, we note that the bill's proponents conspicuously fail to address another logical consequence that flows from the Enclave Clause theory: If Congress may grant the District representation in the House by virtue of its purportedly expansive authority to legislate to further the District's general welfare, it follows logically that it could use the same authority to grant the District (and other enclaves and territories) two Senators as well.

At bottom, the theory that underlies S.1257 rests on the premise that the Framers drafted a Constitution that left the door open for the creation of an indefinite number of congressional seats that would have fatally undermined the carefully crafted representation provisions that were the linchpin of the Constitution. Such a premise is contradicted by the historical and constitutional record.

The clear and carefully phrased provisions for State-based congressional representation constitute the very bedrock of our Constitution. Those provisions have stood the test of time in providing a strong and stable basis for the preservation of constitutional democracy and the rule of law. If enacted, S. 1257 would undermine the integrity of those critical provisions and open the door to further deviations from the successful framework that is our constitutional heritage. If the District is to be accorded congressional representation without Statehood, it must be accomplished through a process that is consistent with our constitutional scheme, such as amendment as provided by Article V of the Constitution.

**Statement of Senator Edward M. Kennedy**
**on the District of Columbia House Voting Rights Act of 2007**

Mr. Chairman, thank you for holding this important hearing on the District of Columbia House Voting Rights Act of 2007. Providing a vote in Congress for the citizens of D.C. is long overdue, and I strongly support this legislation.

The issue is basic fairness. The right to vote is the cornerstone of American democracy, and it's a gross injustice to deny that right to those who live in the nation's capital.

In the 1970s and 1980s, we worked hard to correct the wrong caused by the District's lack of representation in both the House and Senate. We finally passed a constitutional amendment giving D.C. full, equal representation in the House and Senate – but unfortunately it was not ratified by enough states to become part of the Constitution.

Fortunately, the Constitution's District Clause provides another, legal means for providing citizens of the District of Columbia an equal voice in Congress. As several constitutional scholars have made clear, Article I, Section 8 of the Constitution, gives Congress the authority "To exercise exclusive Legislation, in all Cases whatsoever" over the District of Columbia. As long ago as 1933 the Supreme Court ruled that the exclusive authority of Congress over the District is broad and "national in the highest sense." O'Donoghue v. United States, 289 U.S. 516, 539-40 (1933).

Some have questioned the constitutionality of this approach. But nothing in the Constitution explicitly disenfranchises American citizens if they live in the District. The Supreme Court has recognized that Congress has the power to treat District of Columbia citizens as citizens of a state in other contexts, such as for purposes of diversity jurisdiction in federal courts, despite the Constitution's express statement in Article III, Section 2 of the U.S. Constitution, providing diversity jurisdiction in suits "between citizens of different States."

Because no court has ruled on the issue, it's especially important for the Committee to examine this issue closely. I commend the Chairman for holding this hearing, and I look forward to today's testimony.

**Statement Of Senator Patrick Leahy,**
**Chairman, Senate Judiciary Committee**
**Hearing On**
**"Ending Taxation Without Representation:**
**The Constitutionality Of S. 1257"**
**May 23, 2007**

Exactly one year ago, this Committee was in the middle of extensive hearings on the reauthorization of the Voting Rights Act. It was a rare example of both chambers of Congress and both political parties working together to enact important legislation. That bipartisan legislation was referred to as the cornerstone of all civil rights laws because it preserved the fundamental right to vote for all Americans. Today, we are considering another bipartisan measure involving the fundamental right of all citizens in a democracy – the right to vote and to have their votes counted.

The D.C. voting rights bill would give the District of Columbia Delegate a full vote in the House and would grant a new seat to the State of Utah.

I am a cosponsor of this legislation in the Senate. I thank Senator Feingold, Chairman of the Constitution Subcommittee, for chairing this important hearing on the constitutionality of the bill.

We welcome our colleague from the House, Congresswoman Eleanor Holmes Norton, to the Senate Judiciary Committee. She has testified here before in connection with nominees for the District of Columbia. On those issues, and so many others, we value her views.

As a young lawyer she worked for civil rights and voting rights around the country. It is a cruel irony that upon her return to the District of Columbia and election to the House of Representatives she does not yet have the right to vote on behalf of the people of the District of Columbia who she was elected to represent. She is a strong voice in the Congress but she and the people of the District of Columbia deserve a vote, as well.

One of the constitutional experts testifying today is Retired Chief Judge Patricia Wald. In her thoughtful testimony, she highlights the fact that Congress's greater power to confer statehood on the District certainly contains the lesser one, the power to grant District residents voting rights in the House of Representatives.

Judge Wald also reminds us that Congress has exercised this authority in the past without a rigid adherence to the constitutional text when it granted voting rights to Americans abroad – in their last state of residence – regardless of whether they are citizens of that state, pay taxes to that state, or have any intent to return to that state. Congress has repeatedly acted to treat the District of Columbia as a "State" for various purposes.

Examples of these actions include a revision of the Judiciary Act of 1789 that broadened Article III diversity jurisdiction to include citizens of the District even though the Constitution only provides that federal courts may hear cases "between citizens of different States." Congress has also been allowed to treat the District as a "State" for purposes of congressional power to regulate commerce "among the several States." The Sixteenth Amendment grants Congress the power to directly tax incomes "without apportionment among the several States" but has been interpreted also to apply to residents of the District.

In 2005, President Bush praised the Iraqi people for exercising their democratic right to vote, and noted that "by participating in free elections, the Iraqi people have firmly rejected the anti-democratic ideology of the terrorists...[a]nd they have demonstrated the kind of courage that is always the foundation of self-government."

Unfortunately, the President does not speak so enthusiastically about voting rights for the American citizens living literally in his backyard. The United States is the only democracy in the world that denies a portion if its citizens full representation. That is wrong. It is well past time for us to correct this unfair and undemocratic practice.

The Bush Administration contends that Congress lacks the authority to authorize congressional representation for the residents of the District of Columbia. As one of our witnesses will point out today, the purpose of the District Clause in the Constitution was to ensure federal authority over the Nation's Capital "not to deprive citizens living there of their rights of citizenship." In my view, disenfranchisement of American citizens living in our Nation's Capital is contrary to the genius of the Framers. Our Founders established a republican form of government and that system that has been perfected for more than 200 years.

It is disappointing that the Bush Administration has threatened to veto this legislation. Generally this President's concern with the Constitution has been limited to reading Article II as if establishing the exclusive and all-encompassing power of the government in the President. I am encouraged that at least this Administration must acknowledge that the Constitution *has* an Article I in order for it to reference the District Clause.

I regret this Administration's effort to construe it in a most limited and narrow way, however, in a way the former White House counsel might call "quaint." As we move forward, perhaps based on the record we establish at this hearing today, I hope the Administration will reconsider its interpretation of the District Clause, just as I hope we will be able to restore meaning to the right of habeas corpus which is also specified in Article I.

I believe that the legislation I have cosponsored and that we are considering today is within Congress's express powers as provided in the Constitution. I believe that it is also the right thing to do for hundreds of thousands of Americans residing in our Nation's Capital, paying taxes, serving our Nation and working hard.

The reauthorization and renewal of the Voting Rights Act last year was a triumph for all Americans, and a testament to the efforts of its supporters in the House and Senate. Similarly, the D.C. Voting Rights Act can be another bipartisan triumph. It passed the House of Representatives by a wide, bipartisan margin. I hope we will see a repeat of that experience and success in the Senate.

Our democracy and our Nation will be better when we complete the circle in this Congress by granting the residents of our Nation's capital, the right to a full vote in the House of Representatives. We can and we should provide this fundamental right to those who live in the seat of the greatest democracy on earth.

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**Testimony of Congresswoman Eleanor Holmes Norton Concerning S. 1257**

**The Nation's Civil Rights Act of 2007**

**Senate Judiciary Committee**
**May 23, 2007**

I want to express my appreciation to you, Mr. Chairman, for convening the second Senate hearing on S. 1257, and particularly to the original cosponsors of S. 1257 and H.R. 1905 coauthored by Rep. Tom Davis and me to give new seats to Utah and to the District of Columbia. I thank you, Mr. Chairman, along with Senator Joe Lieberman, who has already had a hearing on S. 1257, for always being on the front line of support for the rights of the citizens of the District of Columbia, and especially also for sponsoring my original bill, the No Taxation Without Representation Act. May I thank as well the witnesses who are appearing today to testify on behalf of the constitutionality of the bill, as well as the original expert witnesses on constitutional issues, former D.C. Court of Appeals Judge Kenneth Starr, and former Assistant Attorney General Viet Dinh, who served in the Ashcroft Justice Department. I am particularly grateful to my old friend Utah Senator Orrin Hatch and to Senator Bob Bennett, who have responded with the same strong sense of determination for the citizens of their state as I have for the citizens of the District of Columbia. We are deeply grateful to the equally committed Utah House delegation and to Governor Jon Huntsman for their steadfast commitment throughout this process, joining with us after their state barely missed getting a seat according to the 2000 census, when young Mormon missionaries were temporarily out of the state on the religious mission of their church expected of young Mormon men and women. As Governor Jon Huntsman said, "The people of Utah have expressed outrage over the loss of one congressional seat for the last 6 years. I share their outrage. I can't imagine what it must be like for American citizens to have no representation at all for over 200 years." In fact, this bill was born bipartisan, but given its first form not by me or any D.C. resident but by an "outlander", my regional colleague, Committee on Oversight and Government Reform Ranking Member Tom Davis, who was moved by his personal sense of right and wrong when he was chair to use his insider political knowledge, his stature as a leader of his party, and his chairmanship to start us down this bipartisan path. The hundreds of thousands of Americans and others in this country who have pressed for S. 1257 in this country and around the world, in the more than four years we have sought this bill, cannot all be named, but the bill in the House was made possible as a personal priority of Speaker Nancy Pelosi; the out-spoken determination and procedural craftsmanship of Majority Leader Steny Hoyer; the splendid guidance and dedication of two chairmen, John Conyers and Henry Waxman; Utah Governor Jon Huntsman and the Utah delegation, Representatives Rob Bishop, Chris Canon, and Jim Matheson, who forged a unique partnership on their understanding that Utah and D.C. citizens felt the same sense of loss, were after the same precious right, and could get there together; the local and national civil rights organizations that formed themselves into a formidable D.C. voting rights coalition, led for decades by the Leadership Conference on Civil Rights and locally by D.C. Vote; international organizations, including the Organization of American States (OAS) and the Organization for Security and Cooperation in Europe, who asked the United States to come into conformance with international law by granting voting rights to the citizens of its capital; my own colleagues of both parties and especially my Republican colleagues who have joined this effort for D.C. and

for Utah out of principle; Mayor Adrian Fenty, Council Chairman Vincent Gray, the entire District of Columbia Council, D.C. elected officials, past and present, and of course, the residents of this city, living and dead, who have fought for equal citizenship over the ages.

We are late in relieving our country of our unique standing as the only nation that denies representation to the citizens of its capital in approving the laws all citizens must observe. If ever a case has been made, the case for representation of every citizen, excluding none, in every nation's legislature has been made here and around the world, ironically and most recently by the words and actions of this country in Iraq and Afghanistan. However for most Americans, the case is made when they understand that the Taxation Without Representation slogan of our American Revolution of 1776 as yet still applies only to the citizens of the nation's capital, although they rank second in federal income taxes that support the government of the United States. For others, the case is closed at the funerals of District residents who have died fighting for the vote for the citizens of Iraq and Afghanistan, as Washingtonians have in every war, including the war for the Republic for which we stand. As this hearing receives testimony from some that the vote should continue to be denied, District residents are again serving in a shooting war. Andy Shallal, a D.C. citizen said it best, "People like me of Iraqi ancestry and even my son, who was born in the United States, are entitled to vote in the Iraqi election, due in large part to the service of the citizens of the District of Columbia and other Americans who have fought and died in Iraq."

A vote for our capital also will erase the slander that the founders of our country, who staged their revolution because they themselves were denied representation, would then almost immediately deny representation to the residents of their own capital city. Professor Viet Dinh, President Bush's former assistant attorney general for constitutional matters, has wiped away the major argument of opponents, that because the District is not a state, its American citizens cannot vote in the House, by detailing the many ways "since 1805 the Supreme Court has recognized that Congress has the authority to treat the District as a state and Congress has repeatedly exercised this authority." The personal favorite of District residents is the 16th Amendment which requires that only citizens of states pay federal income taxes. Why, then, have District residents continuously been taxed without representation?

S. 1257, it must be said, will finally and formally erase a history of racial wrong. As our country has unequivocally embraced equal rights regardless of race or color, the denial of a vote to the residents who live in our capital, where Black people have long been the majority, carries unintended messages around the world. S. 1257 will relieve Congress of the terrible racial burden that has been at the core of the denial of the rights of D.C. citizens. Congress required the same racial segregation here in schools and public accommodations as the southern states mandated in their jurisdictions until the 1954 Brown decision. The denial of representation was part of that pattern of racial discrimination that differed only yet significantly in that whites suffered the same fate. As one southern Senator put it, "The Negroes . . . flocked in . . . and there was only one way out...and that was to deny...suffrage entirely to every human being in the District." Former Republican Senator Edward Brooke, a native Washingtonian and the nation's first popularly elected Black senator, wrote, "The experience of living in a segregated city and of serving in our segregated armed forces perhaps explains why my party's work on the Voting Rights Act reauthorization last year and on the pending D.C. House Voting Rights Act has been

so important to me personally. The irony, of course, is that I had to leave my hometown to get representation in Congress and to become a Member." The importance of giving representation to the only Americans denied it makes our bill the Voting Rights Act of 2007, just as last year's Congress reauthorized the 1965 Voting Rights Act.

Utah and the District jumped high hurdles by successfully addressing the two most prominent issues that stood in the way – the need to achieve political balance, and to show that our bill is constitutional. Our bill observes a virtual historical mandate that additional representation requires political balance. The bill's balance is modeled most recently on Alaska and Hawaii, both admitted to the Union in 1959 after Congress assured itself that their admission would benefit both parties. Our bill went further than many expected in the last Republican Congress, getting a large bipartisan majority in two committees. After requiring Utah to draw a new map, the chairman of the Judiciary Committee, Rep. Jim Sensenbrenner, waived mark-up, but the bill nevertheless failed to move during the lame duck session. However, in the final days of that session when it appeared that the bill would pass the House, the two Utah senators and Senator Joe Lieberman wrote a letter to their respective leadership asking immediate consideration on the Senate floor upon House passage. They were acting in the traditions of the Senate, which traditionally has deferred to senators when a bill affects only their state. I ask that the Senate defer to the Utah sponsors of the bill. I also ask that the Senate grant deference and courtesy to the House because only the House is affected by S. 1257.

I defer to the legal scholars you have asked to testify concerning the underlying constitutional issues, but as a lawyer who practiced constitutional law, I would like to summarize my thoughts on the bill's constitutionality as well. It is not surprising that unprecedented bills would attract claims of unconstitutionality, beyond those claims that often are offered as little more than political cover by opponents. There is some respectable opinion against the bill on constitutional grounds, but fortunately, the District has the better side of the case. Conservative scholars such as Professor Starr and Professor Dinh have both testified that our bill is constitutional. Although the District of Columbia is not at state, as Professor Dinh testified, the District meets the constitutional standards for House representation because "since the birth of the Republic, courts have repeatedly affirmed treatment of the District as a 'state' for a wide variety of statutory, treaty, and even constitutional purposes." Judge Starr testified that the District Clause, which gives Congress authority "[to] exercise exclusive legislation in all cases whatsoever" is "majestic in its scope" – and authorizes Congress to enact our bill. Most telling is the certainty that the framers did not and could not have intended to deny voting rights to the residents of the new capital. In accepting the land for the District, the first Congress, by law, guaranteed that the existing laws of the donor states, Maryland and Virginia, would be observed until jurisdiction passed to Congress, which would then "by law provide" the laws for the District. For ten years, until the day that Congress took jurisdiction, citizens living in the District continued to exercise their congressional voting rights "*not* because they were citizens of those states – the cession had ended their political link with those states. . ." Dinh testified, "[but because] their voting rights derived from Congressional action under the District Clause recognizing and ratifying the ceding states' law as the applicable law." Particularly considering that veterans of the revolutionary war who fought to get representation were living on the land ceded in the constitution for the new capital, it is unthinkable that Maryland and Virginia would

have agreed to the sacrifice of the basic rights of their citizens as they donated the land or that the constitutional framers would have required it.

The only real obstacles to S. 1257 are political. Yet, this is one of those moments in our history when I believe that democratic principles can prevail. I hope I can be allowed a personal reference. I am counted among the veterans of the southern civil rights movement for equal rights for African Americans, beginning with my work in Mississippi with the Student Nonviolent Coordinating Committee. The irony is that I went south for equal rights when the city where I was born and live had no rights, no mayor, no city council, no delegate, no self-government, and no democracy. The larger-than-life civil rights movement was the world changing forest that overshadowed the trees without leaves at home. By the time I was elected to the House, it was not difficult to translate the world view that had led me to go south to the issues of self-governance and representation in Congress at home. This struggle had been for my constituents, the citizens of the District of Columbia, here and now. Yet I cannot deny the personal side of this quest, epitomized by my family of native Washingtonians, my father Coleman Holmes, my grandfather, Richard Holmes, who entered the D.C. Fire Department in 1902 and whose picture hangs in my office, a gift from the D.C. Fire Department, and especially my great-grandfather Richard Holmes, a slave who walked off a Virginia plantation in the 1850s, made it to Washington, and while still a slave, settled our family here. By definition, subliminal motivation is unknown and unfelt, but today as I testify in the Senate, I embrace the memory of Richard Holmes, a slave in the District of Columbia until Lincoln freed the slaves here nine months before the Emancipation Proclamation. I embrace the memory of my great-grandfather who came here in a furtive search for freedom itself, not the vote on the House floor. I cannot help but wonder what a man who lived as a slave in the District, and others like him, would think if Richard's great-granddaughter became the first to cast the first full vote for the District of Columbia on the House floor. I hope to have the special honor of casting the vote I have sought for 17 years. I want to cast that vote for the residents of my city whom I have had the great privilege of representing and who have fought and waited for two centuries. Yes, and I want to cast that vote in memory of my great-grandfather, Richard Holmes.

Testimony of Charles J. Ogletree Jr.

Before the

Senate Committee on the Judiciary

on

Ending Taxation without Representation:
The Constitutionality of S. 1257

May 23, 2007

Professor Charles J. Ogletree, Jr.
Jesse Climenko Professor of Law
Executive Director, Charles Hamilton Houston Institute for Race & Justice
Harvard Law School*

*For identification purposes only

Senate Judiciary Committee
DC Voting Rights Act of 2007
May 23, 2007 1:30 pm

Mr. Chairman, members of the Committee, I am honored to have the opportunity to speak to you today concerning the District of Columbia Voting Rights Act of 2007. It is entirely appropriate that the United States Senate has taken up this measure, in the same spirit that the House of Representatives has considered it. I am hopeful that Congress will be able to address one of the incredible incongruities in our philosophical goal of "one person one vote" in The United States of America.

As you know, I am the Jesse Climenko Professor of Law and Executive Director of the Charles Hamilton Houston Institute for Race and Justice at Harvard Law School. I have written books and articles on a wide range of topics involving matters of race and justice, and hosted programs, moderated forums, and participated in dialogues on issues of citizenship, democracy, and equality as well as testified before both Houses of Congress. My full biographical information is attached and I will not use the committee's valuable time to review it now. In questions related to citizenship, democracy, and equality, there is no matter more compelling or more urgent than the District of Columbia Voting Rights Act of 2007. This is a measure rooted in the principle of promoting equality among citizens.

Before joining the faculty at Harvard Law School in 1985, I spent eight wonderful years here in the District of Columbia. I served as Staff Attorney, Chief of the Training Division, Chief of the Trial Division, and Deputy Director of the District for the Public Defender Service. In that capacity, I had many opportunities to assess the value of citizenship and the importance of equality of opportunity for all of our citizens. It was amazing to me to realize that America's greatest city, the District of Columbia, was treated as a second-class place of citizenship. While there are debatable arguments about what defines a state, it is without debate that the District of Columbia is home to more than 600,000 citizens who pay taxes, who work and live here, and who send their children to public and private schools.

It is difficult to contemplate a rational argument in the 21st Century that would deny such a large group of citizens their most basic and fundamental right to representation in Congress. The right to vote, in fact, is made meaningful only by the right to have representative government as well. The fact that, within a matter of miles to the South, North, East and West, residents of the District of Columbia are treated dramatically differently than other citizens is untenable. It is particularly untenable in the 21st Century, when citizens find that they meet all the obligations of similarly-situated citizens just a few miles of where they live. Yet, they are denied their most fundamental right. Their votes simply do not count for as much as those of other citizens. It is regrettable that children who, by the accident of location, are born at a hospital in the District of Columbia, and who live here, have materially different and substantially less fulfilling rights than their counterparts in Maryland and Virginia. It is important that this

Congress and particularly this Senate take on this issue with the vigor that makes all of our citizens whole, full, participating members with an equal voice.

The Charles Hamilton Houston Institute carries on the legacy of Charles Hamilton Houston, one of the 20th century's greatest legal minds, and one of the most effective educators and important civil rights lawyers. The Houston Institute is dedicated to the principle that a fundamental tenet of a democratic society is equal access for all residents to the benefits and responsibilities of citizenship. Houston, a Harvard Law School graduate and an African-American lawyer, embarked on his civil rights career after being subjected to racial discrimination in the military while he served his country in World War I. To Houston, it was not merely ironic but fundamentally unfair that he and others could be and were denied equal access to justice based on the color of their skin, something no less random than being born in one jurisdiction rather than another. Of course one has greater freedom to move from one place to another than to change one's race. It is for this reason that, painful as it is, I must address this sensitive topic.

As you may know, the Houston Institute just completed a major conference reflecting on the 150th anniversary of the *Dred Scott v. Sandford* decision, one of the truly painful blots on our nation's past. You will recall that this decision, handed down across the street from here, held that the rights of citizenship did not apply to a certain group of people, in this case African-Americans. It is awkward but necessary for me to remind you that many of our citizens currently denied the full right to equal representation (and thus equal voting rights) in the District of Columbia are not only the symbolic but actual descendants of Dred Scott and of the people affected by that 150-year-old Supreme Court decision that bore his name. It was with considerable dismay that I heard debates about coupling voting rights for residents of DC with an added seat for Utah. Those of you who remember your history will recognize the kind of horse trading that went on prior to *Dred Scott*; in which citizenship rights were used as political fodder.

Senator Orrin Hatch, in his reasoned testimony noted that this legislation is politically balanced, but also said: "There are many who wish the District voting rights issue would go away." I am sure that is true. Sadly, I am sure there are also many who wish the matter of racial justice that this legislation embodies would "just go away." But it will not go away -- not until we as a nation live up to our democratic principles and make real the assurances contained in our sacred documents which, I might emphasize, include the 13th, 14th, and 15th Amendments as well as the various original articles being so closely scrutinized in this debate.

Representative Tom Davis noted: "no one can explain with a straight face why this country is willing to send soldiers around the world to extend liberty to every corner of the globe, yet Americans living in this Federal District don't have representation in the Federal legislature." It is indeed, difficult to appear here today in support of so fundamental a right. Why is it still necessary to underscore so obvious an injury.

In our April, 2007 report, We The People: Race, Ethnicity and Citizenship in the United States[1], the Houston Institute measured the status of citizenship for people of color in our nation. In particular, we noted: "The District of Columbia counts a larger share of residents as racial minorities than any other state besides Hawaii." If we consider the history of the District, we cannot help but be struck by the fact that it is a city built, at least in part by slave labor. As historian Bob Arnebeck documents in his book, "Through a Fiery Trail: Building Washington 1790-1800," slaves were an important part of the labor force that built the nation's capital. As Arnebeck writes: ". . .the 50 to 100 slaves hired each year, roughly half the work force, were relegated to the less skilled tasks such as cutting trees, squaring and sawing lumber, hauling stone and bricks and helping skilled white masons and carpenters. There were a handful of slave carpenters, some slave quarries, perhaps a few stone cutters, and at least one slave bricklayer who were hired by the federal government's commissioners in charge of the building." [2]

Similarly, in their 1986 book, written in cooperation with the National Geographic Society, historians Seale William and Harry N. Abrams tell a similar story. They write: "Since much was accomplished very quickly there must have been many; the conditions of their labor from daybreak to dark. . .can only be imagined." The White House master stonemason, they write, trained tired slaves at the quarry to cut the stone used to build the foundation of the White House. [3]

Today, Washington, D.C. is inhabited significantly by the descendants of slaves. It is them to whom we are continuing to deny full citizenship.

Finally, opponents of the D.C. Voting Rights bill -- or more accurately, those who have raised constitutional concerns about it - are over-relying on the simple text in the Constitution that says that voting representation is granted to "States." Others offering testimony today will argue that this represents an oversimplified reading of a complex document. Also important, the argument ignores history. In fact, there exists no evidence that the Framers of the Constitution intended to deny representation to the federal district, now known as Washington, D.C.

Indeed, in the 1949 case, *National Mutual Insurance Company v. Tidewater Transfer Company,*[4] the Court noted that at the time of the ratification of the Constitution, the District of Columbia was little more than a "contemplated entity." There was no evidence, the Court stressed, that the Founders, "pressed by more. . .immediate anxieties, thought of the special problems of the District of Columbia. . ." The federal district was created so that the place of residence for the federal government would be free from

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[1]Report available at:
http://www.charleshamiltonhouston.org/assets/documents/events/150th%20Anniversary%20of%20Dred%20Scott/We%20The%20People%20-%20Full%20Report.pdf

[2] Arnebeck, Bob. "The Use of Slaves to Build the Capitol and White House, 1791-1801." Available at www.geocites.com/bobarnebeck/slaves.html.

[3] See, Seale, William and Harry N. Abrams, White House Historical Association with the Cooperation of the National Geographic Society, 1986, vol. 1, Pages 38, 50, 52, 57, 60)

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

control or influence by the particular state in which it might be located.[5] There is no record whatsoever that the Framers discussed the eventual denial of a voting Congressional Representative to the imagined federal district. There was no argument made about the need to deny the federal district a vote in Congress. This has led scholars to conclude that most likely, the lack of representation was not purposeful, but simply an oversight during the planning of a distinct federal district that, at the time of its establishment was home to about 10,000 people.[6]

It is difficult to believe that the Framers of our Constitution, might they have foreseen the development of Washington, D.C, would have intended to disenfranchise the now nearly 600,000 residents of what is now the District of Columbia. There would have been no justification for this. Indeed, the Framers never stated one. Clearly, this was an unforeseen level of what is now serious disenfranchisement. It is an oversight that could easily be corrected through simple legislation.

In conclusion, there exist so many reasons for Congress to finally correct an unjustifiable disenfranchisement of the nearly 600,000 people of our nation's capital. The current inequality is simply incongruous with our most deeply held principles. I suspect other people testifying today will touch on other important matters and tensions that this legislation provokes. I will say, though, that granting the District of Columbia a voting representative is so clearly within Congress' power, that the more appropriate question for us all to ponder might be: Why has it taken so long?

I would like all of you to know, as well, that our Institute's namesake, Charles Hamilton Houston, was himself born and raised in Washington, D.C. He attended public schools here and after completing his successful legal studies at Harvard, returned to his hometown and transformed Howard Law School into the preeminent training ground for African American attorneys. He and many of those attorneys he trained and mentored went on to dismantle the separate but equal doctrine that for so long denied rights of citizenship to black Americans across our country. It is beyond irony that I must come here today to make the plea to you to honor the legacy of Houston by granting this most basic right to your neighbors.

I am pleased that the men and women of this Congress have the power to finally right a long-standing wrong. Thank you.

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[5] For example, see Markman, Stephen J. Statehood for the District of Columbia: Is It Constitutional? Is it Wise? Is It Necessary? 48 (1988) Federalist Paper No. 43 James Madison stated: "The gradual accumulation of public improvements at the stationary resident of the Government, would be . . .to great a public pledge to be left in the hands of a single State."

[6] Bowling, Kenneth R., The Creation of Washington, D.C.: The Idea and Location of the American Capital,. (1991). Also, Bress, Richard P. and Lori Alvino McGill. "Congressional Authority to Extend Voting Representation to Citizens of the District of Columbia: The Constitutionality of H.R. 1905. The American Constitution Society for Law and Policy.

**Testimony of Utah Attorney General Mark L. Shurtleff**
**Before the Senate Committee on the Judiciary**

**"Taxation Without Representation: The Constitutionality of S. 1257."**

Chairman Leahy and Members of the Committee:

My name is Mark Shurtleff, and I am the Attorney General of the State of Utah. Thank you for the opportunity to speak in support of S. 1257 – "District of Columbia House Voting Rights Act of 2007," (hereafter "Voting Rights Act.") Last week, the Attorney General of the District of Columbia, Linda Singer, and I co-authored a bi-partisan letter to Congress and the White House communicating our strong support of Congressional efforts towards the official recognition that all citizens of the United States, regardless of where they reside, are entitled to the fundamental right to vote." Referring to the Declaration of Independence, Susan B. Anthony asked, "how can 'the consent of the governed' be given, if the right to vote be denied?"

As the top law enforcement officials for the District of Columbia and Utah, we have each taken an oath to defend the Constitution of the United States. It is therefore our obligation to ensure that any legislation we support be not only fair, but also constitutional. The Voting Rights Act is both.

History is full of unusual alliances forged in service of the public good. Our own alliance is no exception, as we come together to support expanding American democracy to better represent our two respective populations. We both believe the time has come to expand the United States House of Representatives to 437 members, adding a first-ever seat for the District of Columbia and an additional seat for Utah.

Linda Singer and I are two very different Attorneys General serving two very different constituencies. One of us is appointed, serving the 572,000 mostly Democratic residents who live in the 68 square miles that make up the District of Columbia. One of us is elected, serving the 2.5 million mostly Republican residents who live in the 85,000 square miles that make up the State of Utah.

Despite these differences, we have similar goals. The District of Columbia is seeking to right a longstanding wrong. The District's local budget and laws are subject to congressional approval. Its residents pay federal income taxes, go to war and serve on federal juries. Yet it has had no voting representation in Congress for more than 200 years, and remains the only democratic capital in the world with no voice in the national legislature. Utah's fight, a more recent one, is against under-representation. The Beehive State missed receiving a fourth House seat by just 857 people in the 2000 census, despite having more than 11,000 missionaries living overseas and uncounted by census takers. North Carolina, by contract, had 18,360 overseas members of the military counted and received the additional seat.

Our interests are appropriately intertwined in legislation now before the Senate. The bill in question would permanently expand the House for the first time since 1911, adding a first voting seat for the District and a fourth voting seat for Utah. This addresses the concerns of our respective constituencies with a solution that is long overdue.

The proposed legislation is constitutional. The Framers of the Constitution did not intend to deprive the District's citizens of representation in Congress. To understand the Framers ' intention for the District of Columbia, it is important to understand the historical context in which the Nation's Capital was established, free from any control by the states. After an incident in 1783 in which the government of Pennsylvania refused to protect a Continental Congress meeting in Philadelphia against a militia uprising, the Framers of the Constitution resolved that the site of the federal government should be independent from the states and under total federal control. James Madison was convinced after the Philadelphia incident that there was an "indispensable necessity of complete [federal] authority at the seat of the government" and that this seat should be located on land ceded by the states and appropriated to the federal government.[1] Accordingly, the Framers included in the Constitution the District Clause, which authorizes Congress

> [t]o exercise exclusive Legislation in all Cases whatsoever, over such District [2] (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 intent of the District Clause was to ensure federal authority over the Nation's Capital, not to deprive citizens living there of their rights of citizenship. There was no restriction regarding voting inserted in the District Clause. Nor was there any need to disenfranchise the District's citizens in order to maintain control of the capital site.[3] Any such restriction on representation of the District's citizens would have been contrary to the principles and intent of the Framers to ensure a republican – that is, representative -- form of government.[4] It is true that the Constitution has no affirmative provision

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[1] *The Federalist* No. 43 at 288 (James Madison) (The Easton Press Ed., 1979).

[2] At the time that the Constitution was ratified, the "District" included in the District Clause did not refer to the District of Columbia because it was not yet established. However, references herein to "District" refer to the District of Columbia.

[3] In contrast to concerns about limiting the rights of District citizens, some Framers, including George Mason, expressed concern that these citizens situated in the Nation's capital would get special treatment and "become the object of the jealousy and envy of the other states. "Debates on the Federal Constitution 433 (J. Elliot ed. 1876) ("Elliot's Debates").

[4] Madison strongly believed that the ceding states should protect their citizens' rights. He declared during the ratification debates that any violation of the agreement by the ceding states

guaranteeing voting representation for the District citizens in the Constitution. However, given the Framers' intention to establish a fully representative government,[5] there would have been no need to make a special provision for District citizens. Second, there is evidence that the framers assumed that the ceding states would ensure that their citizens' liberty interests were protected. Madison wrote:

> And as it is to be appropriated to this use with the consent of the State ceding it; as the State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting it; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them... every imaginable objection seems to be obviated.[6]

Third, when the Framers wanted to restrict voting representation in the Constitution, they did so affirmatively, as in Article I, Section 2, where for apportionment purposes slaves and taxpaying Indians were counted as 3/5 persons. If the Framers wanted the District citizens to have even less representation, *i.e.* none at all, they surely would have included a provision to that effect.

Finally, at least one Framer, Alexander Hamilton, did want to include an affirmative provision for voting representation by District citizens in the House. He introduced an amendment in the New York ratifying convention to require that representation.[7] There appears to be no congressional historical documentation as to why this amendment did not pass, but the circumstantial record indicates that it was because the Framers believed it was not needed since 1) the District's citizens could continue to vote with the ceding states, Maryland and Virginia – which they all in fact did for approximately 10 years after the District's creation in 1791, or 2) Congress could act to provide representation under the District Clause.[8]

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under which they protected the rights of their citizens would be "usurpation". Elliot's Debates, Vol. 3 at 439. See also *The Federalist, supra,* No. 43 at 288.

[5] *See* Statements of another Framer, Luther Martin, Attorney General of Maryland and a Delegate to the Constitutional Convention of 1787, 3 Records of the Federal Convention of 1787 (M. Farrand ed. 1911) at 175 (There should be an "equitable rate of representation, namely, in proportion to the whole number of white, and other free citizens and inhabitants of every age, sex, and condition...")

[6] *The Federalist, supra,* No. 43 at 288. *See also Elliot's* Debates, Vol. 3 at 439. Madison stressed that any failure by the federal government to protect the rights of the citizens of the ceding states would be "usurpation".

[7] *The Papers of Alexander Hamilton* at 189-190 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

It is the District Clause in the Constitution that allows Congress to now enact legislation to provide voting representation for the District. This provision in the Constitution has been described as "majestic in its scope,"[9] giving Congress plenary and exclusive power to legislate for the District.[10] Without an act by Congress, District residents have been unsuccessful in obtaining such rights from the courts, but there are numerous judicial opinions holding that Congress can act on behalf of the District. Thus, if Congress acts by passing the voting rights bill, it will be properly exercising its authority under the District Clause to enfranchise District citizens. In an early decision, *Hepburn v. Ellzey*, 2 Cranch 445 (1805), the Supreme Court considered whether the District could bring suits in federal court under the Constitution's Diversity Clause, which gives jurisdiction to federal courts to hear cases between citizens of different states.[11] The Court held that while the District was not a "state" within the meaning of Article III for purposes of diversity jurisdiction, the District could be included by an act of Congress. Congress did subsequently enact such legislation, which was upheld by the Supreme Court in *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582 (1949), in a plurality opinion that upheld the action by Congress.[12]

Under these precedents, Congress can act pursuant to its "exclusive legislation" authority provided in the District Clause to enfranchise District residents through the passage of the voting rights bill. In a recent decision in *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000), *aff'd* 537 U.S. 940 (2000), a federal court held that the Constitution did not

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[8] Some congressional members believed that District residents would be disenfranchised only temporarily. Representative Benjamin Huger of South Carolina pointed out during a post-enactment debate over the federal authority under the Organic Act of 1801, effective February 27, 1801, 2 Stat. 103, ch. 15 (establishing the District of Columbia as the Nation's capitol) that just "because [District residents] are now disenfranchised of their rights, it does not follow that they are always to remain so." Annals, 7th Congress, 2d Sess. 1803: 488.

[9] *Testimony of the Honorable Kenneth W. Starr Before the House Government Reform Committee*, in support of a prior version of legislation to give the District voting representation in the House of Representatives (June 23, 2004).

[10] *Palmore v. United States*, 411 U.S. 389, 397 (1973); *United States v. Cohen*, 733 F.2d 128, 140 (D.C. Cir. 1984) (Congress has extraordinary and plenary power to act for the District in ways that it cannot act for the 50 states).

[11] Article III, § 2, cl. 1

[12] The recent Congressional Research Service ("CRS") Report, dated March 16, 2007, criticizes *Tidewater* for being a plurality opinion with no majority holding. However, this criticism overlooks the fact that a majority of justices voted to uphold the legislation by Congress to include the District under the Diversity Clause, albeit that there was a split on whether the authority for the legislation was found in the District Clause or by considering the District a "state" for purposes of the Diversity Clause.

categorically require that District residents be given voting representation, but found in the end that while it was inequitable to continue to deny the vote, the "court lacks authority to grant plaintiffs the relief they seek. If they are to obtain it, they must plead their cause in other venues." *Id.* at 122. By holding open this possibility; the Court indicated its view that it would be constitutional for Congress to grant the District voting representation.

Opponents of the voting rights bill maintain that Article I, Section 2 of the Constitution limits the House of Representatives to members elected by "the several States" and therefore cannot include the District of Columbia. But this argument ignores the fact that Congress, operating under the District Clause, has acted hundreds of times to treat the District as a "state" for specific legislative purposes, and these actions have not been successfully challenged. For example, Congress has acted to regulate commerce across the District borders, even though Congress's power under the Commerce Clause (Article I, § 8, c l. 3) is to regulate commerce "among the several States"[13]; to bind the District with an international treaty, which allows French citizens to inherit property in the "States of the Union."[14]; and to consider the District as a state for purposes of alcohol regulation.[15] Certainly, Congress can also act here to allow District citizens to be enfranchised, a right which is at the core of our democratic principles.

The recent Congressional Research Service ("CRS") Report, dated March 16, 2007, argues against granting the District voting rights, but fails to establish any constitutional prohibition to Congress enacting the voting rights bill. In fact, the report acknowledges that it is not "beyond question" that Congress has authority to grant voting representation in the House of Representatives.[16] While the CRS report raises concern that granting the District voting representation might extend such rights to the territories, this argument fails to recognize that the territories occupy a very different position than the District and have long enjoyed disparate rights and privileges. The fact that Congress's constitutional authority over the territories and the District emanates from two different constitutional clauses[17], suggests that the Framers' intent was to treat the territories and the District differently. Moreover, unlike residents of the territories, the District's citizens pay income taxes, are subject to military conscription, and (as noted above) have repeatedly been regulated by Congress on a variety of subjects in the same way as the citizens of the fifty states. Absent convincing evidence that the Framers of the Constitution intended to

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

[14] *DeGeofroy v. Riggs*, 133 U.S. 258, 268-69 (1890).

[15] *Milton Kronheim v. District of Columbia*, 91 F.3d 193 (D.C. Cir. 1996).

[16] CRS Report at 24.

[17] *See* U.S. Const. Art. IV, §3, cl. 2.

deprive the District of Columbia of voting representation in the House of Representatives, the only conclusion that can be drawn is that the lack of representation resulted from inadvertence or historical accident. Indeed, the Framers risked their lives and families to establish representative government. It cannot be casually assumed that they cast this principle aside in creating the new nation's capital.

The District Clause must be read in light of events at the time of the founding—events which focused on securing every citizen a voice in Congress. *See* Thomas Jefferson, Letter to William Johnson (June 12, 1823), in 15 *Writings of Thomas Jefferson* 439, 449 (A. Lipscomb, ed. 1904) ("On every question of construction, [we should] carry ourselves back to the time when the Constitution was adopted; recollect the spirit manifested in the debates; and instead of trying [to find] what meaning may be squeezed out or the text, or invented against it, conform to the probable one in which it was passed.") (quoted in *McIntyre* v. *Ohio Elec. Comm'n*, 514 U.S. 334, 371-72 (1995) (Scalia, J, dissenting)).

Finally, it is important that the current version of the voting rights bill contains provisions that remedy another failure to provide adequate representation in the House of Representatives for all U.S. citizens. The voting rights bill thus provides a unique opportunity for Congress to correct two wrongs. The text of the Constitution requires the federal government to conduct an "actual Enumeration" of the American population every ten years. U.S. Const. art. I, § 2, cl. 3 & amend. XIV, § 2. This federal decennial census has served as the basis for apportioning seats in the House of Representatives. *See id.* However, in the 2000 census the Census Bureau decided to enumerate only a portion of the Americans who were temporarily living abroad on census day (thereby excluding many Utahns who were providing religious and community service around the world) and used a technique for estimating population.[18] The Bureau's actions resulted in a significant undercount of Utah's citizens and deprived Utah of a fourth seat in the House of Representatives. The voting rights bill remedies this deprivation, not by taking a vote away from another state, but by granting Utah an additional Member of the House of Representatives until the next decennial census.

In conclusion, the framers of the Constitution did not intend to deprive residents of the nation's capital of their fundamental right to vote. Indeed, for approximately 10 years

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[18] In 2000 the Census Bureau elected to enumerate (a) U.S. citizens living abroad temporarily while employed by the U.S. military or an agency of the federal government, and (b) all dependents of such persons who were living with them. *See* Prepared Statement of Kenneth Prewitt, Director, U.S. Bureau of the Census, Before the Subcommittee on the Census, Committee on Government Reform, U.S. House of Representatives, at 2-4 (June 9, 1999). These individuals were apportioned to their respective home states and were thus considered part of the "population" of the United States within the meaning of the Census Act. *Id.* However, the Bureau elected to exclude from the enumeration other U.S. citizens temporarily living abroad. *See id.* at 2-4, 6-7. Utah would have been entitled to an additional seat in the House of Representatives if an additional 857 individuals had been counted in its resident population. A large number of Utahns were temporarily overseas on census day, yet were excluded from the census by the Bureau's actions. For example, on April 1, 2000 (census day), 11,176 Utah residents were serving temporary assignments abroad as missionaries for the Church of Jesus Christ of Latter-day Saints.

after the District's creation in 1791, residents continued to vote for the Maryland and Virginia congressional delegations. Their subsequent loss of this representation came not as a result of any constitutional provision, but from an act of Congress. What Congress taketh away, Congress can give again. The Constitution's District Clause gives Congress plenary and exclusive power to legislate for the District. This sweeping authority allowed Congress to create the District's system of local government in the 1970s, and it allows Congress to provide voting representation in the House today.

The federal government's legislative branch is the proper venue for this change. No judicial solution exists for the problem of the District's lack of representation, or for the problem of Utah's under representation. The United States Supreme Court refused to take on the District problem by denying certiorari in *Adams v. Clinton* in 2000. Likewise, the Court opted not to overrule the Utah Census process in *Utah v. Evans* in 2002. Congress alone has the authority and responsibility to right these wrongs.

Countless legal scholars from across the political spectrum, including Whitewater special prosecutor Kenneth Starr and PATRIOT Act architect Viet Dinh, agree with our assessment of the Voting Rights Act's constitutionality. Dinh calls the District of Columbia's lack of representation "a political disability with no constitutional rationale."

Attorney General Singer and I urge the Senate to end the injustices suffered by our respective constituencies and approve the House expansion without delay.

**Statement Submitted on behalf of Stand Up! for Democracy in DC Coalition**
**Ending Taxation Without Representation: The Constitutionality Of S. 1257**
**United States Senate**
**Committee on the Judiciary**
**May 23, 2007**

**The DC "One Vote" BILL – DANGEROUS COMPROMISE!!!**

***Anise Jenkins – Stand Up! for Democracy in DC Coalition (aka Free DC!)****
***202-232-2500 www.FreeDC.org***

Civil rights icon, Fannie Lou Hamer, was known for her gift of plain-spoken powerful speech. At the 1964 Democratic Convention, she declared on national television that after being imprisoned, beaten, threatened with death, losing her share-cropper's job and home while working as an organizer with the Student Nonviolent Coordinating Committee: "We didn't come all the way up here to compromise for no more than we'd gotten here. We didn't come all this way for no two seats, 'cause all of us is tired." " As a founding member of the Mississippi Freedom Democratic Party (MFDP) she was telling the Democratic Party that the duly elected, racially diverse MFDP was not going to accept a compromise that offered them two nonvoting seats while still seating the 68 member all white segregationist Mississippi delegation. That year, MFDP left the Convention with nothing. But their refusal to accept that outrageously unfair deal helped accelerate the passage of the 1965 Voting Rights bill. Today, Mississippi has more Black elected officials than any other state in the country.

What does this 1960's civil rights story have to do with DC voting rights? Washington, DC has been the capital of the United States since 1800, yet on May 23, 2007 (two hundred and seven years later) the District of Columbia House Voting Rights Act of 2007 (S.1257) was presented to the United States Senate Judiciary Committee to grant residents of Washington, DC **one** voting member in the U.S. House of Representatives. Of course, such representation is justified – there are no other people in America that live under the Congressional colonial rule that oversees DC residents. We pay more federal taxes per person than any state in the nation, our local government serves as host to more than 400,000 commuters a day who work here but pay no taxes. We cannot tax more than 41% of our land due to the federal buildings and the many tax-free organizations. DC residents have served, been maimed and killed in every war since the war of 1812. Yet, some of our elected officials, civil rights icons and constitutional scholars are calling this 'DC One Vote' bill a step towards full citizenship for DC residents. We are being told to march, protest and fight for a bill that treats a population that is at least 55% African American as **less** than the three-fifths of a person compromise used to count Southern slaves. This 'DC One Vote' bill, presented as a step towards our equal civil rights, will restrict DC residents to one vote in the United States House of Representatives no matter how large our population. And, there are no provisions for voting representation in the U.S. Senate at all.

Another odd feature of S.1257 is that even this DC "One Vote" status can be attained **only** if our political and cultural opposite – **Utah** – receives an additional voting representative in the United States House of Representatives; which will also give Utah residents an additional electoral vote to decide presidential elections. To paraphrase Fannie Lou Hamer, "The people of DC didn't' wait 2007 years for no one vote! We are sick and tired of being treated like third-class citizens!"

This DC One Vote bill strangely abolishes the office of DC Statehood Representative! The DC statehood delegation (consisting of a nonvoting representative and two nonvoting senators) was created to lobby Congress for DC statehood. These officials have been elected city-wide by DC residents since 1990. Why does S. 1257 seek to abolish one of these offices, limiting our ability to achieve statehood?

Congressman Tom Davis (R-VA) has introduced various convoluted versions of the DC 'One Vote" bill since 2003. At that time, the bill would have forced DC voters to form a 9th district in Maryland, for voting purposes at least, while Utah would gain another district. DC Delegate Eleanor Holmes Norton (D-DC), did not publicly support any of these strange variations until last year, maintaining that DC would accept no less than full voting rights in the U.S. House and Senate. Since 2003, there have been numerous hearings on these proposals in the United States House of Representatives and now in the U.S. Senate, but there has been no real effort to fully explain the legislation to DC residents, much less ask for our consent. DC residents voted in 1980 for full statehood which would entitle us to all the rights that all other American citizens take for granted as their basic freedoms. As of this date, **Stand Up! for Democracy in DC Coalition (aka Free DC!)** is one of the few organizations that has consistently promoted a public discussion of this legislation and has continued to oppose it.

Again, we can paraphrase Ms. Hamer. She made a stunning challenge to that 1964 Convention, when she asked: "Is this America? The land of the free and the home of the brave?" We DC residents now ask: "Is this America? Where the people living in its capital are offered such a strange and unacceptable substitute for their civil and human rights? "Is this America?"

**What is the 'District of Columbia House Voting Rights Act of 2007' (S. 1257?)**

**S. 1257** is NOT statehood; it is not FULL voting rights in the U.S. Congress (a voting representative in United States House of Representatives and two voting United States Senators). Some may ask, isn't this a step? Isn't one vote better than none? Isn't politics all about compromise? The ongoing American civil and human rights movement is a prime example of how we are still going step by step towards "a more perfect" union, but each step must be examined carefully to make certain that the step does not take us back to where we do not want to be. Stand Up! for Democracy in DC Coalition has opposed this legislation since its first introduction in 2003. We feel that a bill that creates such a diminished definition of democracy for DC residents, while ignoring the will of the people, **must** be questioned.

The District of Columbia House Voting Rights Act of 2007 would make of DC a truly strange creation, and to what end? It in no way changes the plantation/overseer relationship between the people living in Washington, DC and the members of the United States Congress. We need to take a GOOD look at what we will get if it passes the Senate in its current form.

***Stand Up! For Democracy in DC Coalition (aka Free DC!) was founded in 1997 and observes its 10th anniversary by continuing the movement for full democracy for DC residents, including full voting rights in the U.S. House and Senate, an end to Congressional review of DC's local budget and control of our criminal justice and judicial systems.***

## DC DEMOCRACY COMPARISON CHART

| **District of Columbia House Voting Rights Act of 2007 (S. 1257)** | **Equal Representation in US House** | **Equal Representation in both House and Senate** | **Statehood** - The status of being a state, especially of the United States, rather than being a territory or dependency.[9] |
|---|---|---|---|
| Provides for **no more than 1 (one)** voting Representative in the U.S. House of Representatives for DC no matter the size of DC's population.[1] DC would have **no** voting U.S. Senators. | DC would receive the **same number** of voting representatives in the U.S. House as any state with a similar number of residents.[6] | DC would receive the **same number** of voting representatives in the U.S. House as any state with a similar number of residents.[6]<br><br>DC would have two voting Senators in the U.S. Senate[7] | a - DC would receive the **same number** of voting representatives in the U.S. House as any state with a similar number of residents. [1]<br><br>b - DC would have two voting Senators in the U.S. Senate. [7] |
| The office of a voting representative for DC in the U.S. House will exist ONLY if an additional district and representative is given to Utah [2] | The office of a DC voting rep. in the U.S. House would be independent of any deal with any state. | The office of a DC voting rep. in the U.S. House would be independent of any deal with any state. | The office of a DC voting rep. in the U.S. House or two voting Senators would be independent of any deal with any state. |
| The position of a voting DC rep. will be null and void if the position of an additional representative for Utah is denied by the Congress or the courts.[3] | The office of a DC voting rep in the U.S. House would be independent of any state | The office of DC voting rep or voting U.S. senator would be independent of any state. | The office of DC voting rep or voting U.S. senator would be independent of any state. |
| The office of DC statehood representative will be **abolished.**[4] | The office of DC statehood representative **will not be abolished.** | The office of DC statehood representative **will not be abolished.** | The office of DC statehood representative does not need to exist because the **DC statehood delegation was created to lobby for DC statehood.** |
| The office of DC voting Representative **could be abolished** by the next vote in the U.S. Congress. [8] | The office of DC voting Representative **could be abolished** by the next vote in the U.S. Congress (unless achieved with a Constitutional amendment). [8] | The office of DC voting Representative **could be abolished** by the next vote in the U.S. Congress (unless achieved with a Constitutional amendment). [8] | The offices of DC voting Representative(s) and voting U.S. Senators would be **guaranteed by the U.S. Constitution.**[7] |
| This bill does not create a state legislature | This bill does not create a state legislature | This bill does not create state legislature | DC residents would have voting representation not |

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| or governor. | or governor. | or governor. | only in the U.S. House and Senate but also in a **state legislature and a vote for Governor.** |
| **Does not change congressional control over Washington, DC's budget, legal system, local legislation, restrictions against taxing income earned in DC by non-residents, etc.** [8] | **Does not change congressional control over Washington, DC's budget, legal system, local legislation, restrictions against taxing income earned in DC by non-residents, etc.** [8] | **Does not change congressional control over Washington, DC's budget, legal system, local legislation, restrictions against taxing income earned in DC by non-residents, etc.** [8] | **DC statehood would mean that:**<br>a) The 1980 vote by the people of Washington DC for statehood would be recognized<br>b) Full voting representation in the U.S. House and U.S Senate<br>c) Local control over DC's local budget – end of Congressional review and approval<br>d) An elected district attorney – Referendum A as passed by 89% of DC residents in 2002<br>e) Locally elected judges (now appointed by President of US)<br>f) Right to tax income earned in District of Columbia (including nonresidents)<br>g) Restoration of federal payment to compensate for DC's federal land and federal functions (41% of land in DC now is tax-free)<br>h) An end to the U.S. violation of the human and civil rights as ruled by the UN Human Rights Committee, Organization of American States and Organization for |

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| | | | Security and Cooperation in Europe<br>i) DC residents would be first-class citizens at last! [10] |

[1]Section 2, Paragraph D of S 1257 IS states that "the District of Columbia may not receive more than one Member under any reapportionment of Members.')

[2] Section 3, Paragraph C of S. 1257 states that "(a))... identifying the State of Utah as the State entitled to one additional Representative pursuant to this section."

[3] Section 6 of S. 1257 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 or any amendment made by this Act shall be treated and deemed invalid and shall have no force or effect of law.

[4] Section 5, paragraph B of S. 1257: Repeal of Office of Statehood Representative

[5] Regarding representation in the U.S. House, Article I, Section 2 of the U.S. Constitution reads: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States..."

[6]Article One Section 2. The constitution makes representation in the U.S. House dependent on the population size, according to the US. Census taken every 10 years – 14th Amendment - Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State,

[7] Article One. Section 3. The Senate of the United States shall be composed of two Senators from each state, chosen by the legislature thereof, for six years; and each Senator shall have one vote.

[8] "The District Clause" – Article One, Section 8, Paragraph 17. "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 ..."

[9] The American Heritage Dictionary.

[10] DC Statehood Constitution ratified by the voters of the District of Columbia in 1982; demands of Stand Up! for Democracy in DC Coalition (aka Free DC!) – FreeDC.org (1997) and Organization for Security and Co-operation in Europe (OSCE), 2005 - Worldright).

Statement of

# Paul Strauss

**United States Senator**
**District of Columbia (Shadow)**

Before the

## United States Senate
## Committee on The Judiciary

Regarding

## S. 1257

# District of Columbia House Voting Rights Act of 2007

**1:30 PM – May 23rd 2007**
**Room 226**
**Dirksen Senate Office Building**

Chairman Feingold and members of the committee I thank you for acknowledging my presence here today, and for allowing me to present this statement. I am the United States Senator for the District of Columbia and serve as a representative of the residents of the District who lack a voice in Congress, and thus rely on my office to speak on their behalf. This opportunity is significant in this regard, and I hope that this hearing today will serve to remind all Americans of the injustice that persists in their midst, as the residents of D.C., the seat of government for the greatest democracy in the world, remain disenfranchised and without a voice in their own nation. While this bill will only provide the residents of the District with a seat in the House of Representatives, it is, we hope, a step on the road to full representation, but leaves the question of statehood for another day. While I understand and respect that some of those testifying today, and many members of this committee do not share my desire for full statehood for the District of Columbia, my position on this record is clear. However, for the purposes of this hearing today I will focus my statement solely on the scope and intentions of the bill at hand.

In addition to my role as District United States Senator, I have also served as a professor of Political Science and Government, at the American University's School of Public Affairs, where I taught graduate level courses on the legal and political status of the District of Columbia. As a practicing attorney, I was active in strategising with representative advocates in both the Adams v. Clinton and Alexander v. Daley court cases, and filed an amicus brief in those cases. I am pleased to be allowed to add my voice to today's discussion of Bill S. 1257 and to address the constitutionality of the proposed legislation that intends to finally afford the residents

of the District of Columbia the long overdue right of voting representation in the House of Representatives.

For over 200 years, the District of Columbia has been denied full voting representation by Congress. Residents of the District of Columbia are subject to the same laws as other American citizens, fight in wars, serve on juries and pay federal taxes, and yet are still denied representation in Congress. There have been many occasions in which the courts have sanctioned Congress' distinctive power to legislate for the District when it employs that power to put the District on a level with States in key constitutionally related areas such as § 1983 civil rights remedies; federal tax duties[1]; and regulation of commerce[2]. The justification of the courts in such cases has been that Congress, as detailed in the District Clause, has the power to impose on District residents similar obligations and to grant similar rights as the States maintain power to do under the Constitution itself.

The Constitution was designed to protect the rights of citizens, not to deliberately remove them, and it is illogical to suppose the framers meant this to be any other way. As Professor Viet Dihn[3] so eloquently noted when he referred to this absurd anomaly as a "historic accident", it is clear that the intentions of the Founders have been imbued with an unintended interpretation. It is important to recognize that, at the heart of the Constitution, is the desire of the Framers to provide and protect the rights of the citizens of our great nation, the most fundamental of which is the provision 'one person-one vote', that is at the core of any democracy. As Professor

[1] U.S. CONST. Article I, Section 2, prior to 16th Amendment
[2] U.S. CONST. Article I, Section 8
[3] Professor Dihn was the former Assistant Attorney General for Legal Policy at the U.S. Department of Justice and current serves as a professor of law at Georgetown University specializing in constitutional law.

Jamin Raskin[4] stated, "To be an American citizen living in the District is still to be part of the constitutional "People" of the United States identified in the Preamble and Article I."[5] I believe that most Americans, and even many citizens of other nations, can agree that there is little rationality to the continued denial of full voting rights to residents of the District. In fact the remaining barrier seems to be the constitutionality of this endeavour, not the democratic merits behind it. I believe that there is ample legal precedent to support the constitutionality of granting voting representation in Congress to District residents.

When the Framers ratified the Constitution, the District did not in fact exist as an independent capital district. Thus the decision regarding voting rights for the residents of D.C. has been left to the expertise of future sessions of Congress. The current Congress has exactly the same power and authority as it did 200 years ago at the first Congress in 1790, when it accepted the land ceded from Maryland and Virginia as the federal city. At the time the land was ceded, residents of the District could still vote in Maryland and Virginia, and remained under their respective jurisdictions until 1800, when the federal government formally assumed control of the District. The significance of this lies in the fact that residents of the District maintained full voting rights during the period of 1790-1800, not due to continued citizenship in either the states of Maryland or Virginia, as the cession had ended all political links, but rather because their voting rights came from "Congressional action under the District Clause"[6]. As Justice George Sutherland elucidated in the court ruling on O'Donoghue v. United States, 289 U.S. 516, 540 (1993),

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[4] Professor Raskin is the Director of WCL's program on law and government and founder of its acclaimed Marshall-Brennan Constitutional Literacy Project, and author of Is *This America? The District of Columbia and the Right to Vote*. Jamin Raskin is now a State Senator for Maryland.
[5] Raskin, Jamin. "Is This America? The District of Columbia and the Right to Vote." Harvard Civil Rights-Civil Liberties Law Review, 97(1999): 7, 1-53.
[6] U.S. CONST. Art. I, s 8, cl. 17.

> "The District was made up of portions of two of the original states of the Union, and was not taken out of the Union by cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution...We think it is not reasonable to assume that the cession stripped them of these rights."[7]

In 1801, when the Organic Act was passed and Congress officially assumed authority over the District, they provided no provision for voting rights for residents of the District of Columbia. Hence, it was not the act of cessation itself, but instead the federal assumption of authority that revoked the District's voting rights. Thus, if Congress can take away voting rights form the District then they are equally capable of bestowing them on the District.

Congress' authority was based in 1790, as it is now, in the District Clause, as outlined in the U.S. Constitution Article 1 section 8, which sanctions Congress to "exercise exclusive Legislation in all Cases whatsoever, over such District"[8]. This, therefore, imbues Congress with plenary and exclusive authority to legislate in all matters regarding the District. The courts have likened this relationship between Congress and the District to that between a state and its people. On this basis, denying the District's residents representation in Congress bars these citizens not only from their national legislature, but also from what is, in a sense, their state legislature. This makes District residents the only U.S. citizens currently with no representation in either Congress or their 'state' legislature.[9] However, the sweeping legislative power that Congress has over the District includes granting Congressional voting rights to the residents of the District of Columbia, as supported by both the Constitution and the judicial decisions and pronouncements that have preceded this bill.

At the core of contemporary voting rights jurisprudence is the principle of one person-one vote, which under Wesberry v. Sanders, 376 U.S. 1 (1964), was

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[7] O'Donoghue v. United States, 289 U.S. 516, 540 (1993). (finding that, unlike territorial courts, the local courts of the District of Columbia are Article III courts for constitutional purposes).
[8] U.S. CONST. Art 1, s 8.
[9] Raskin, at 3.

interpreted to mean that individual citizens should have an equal voice in electing members of the United States House of Representatives, without discrimination in regards to geographical residence.[10] In Wesberry, the court ruled against a Georgia statute that malapportioned House districts so that particular urban districts had as much as three times as many voters as the rural districts, thus according to the ruling the larger districts had one-third of their intended influence. Professor Raskin observed that "representation in Congress is a right that belongs to the people, not the states"[11], thus it is not the state that holds the right to congressional representation but rather the U.S. citizens living within. The fundamental ideals of democracy dictate that House representatives are to be elected by the people, thus individual district population is the intended basis of the House of Representatives. It seems apparent from this ruling that the government cannot dilute the representation of the people; much less disenfranchise a whole section of the population.[12]

The courts have always recognized Congress' authority to treat D.C. as a state, as the ruling in Hepburn v. Ellzey, 6 U.S. (2 Cranch) 445 (1805), established, wherein District residents filed suit in the Circuit Court of Virginia, on the basis of diversity jurisdiction, which, under Article III, Section 2 of the Constitution exists solely between residents of different States. Plaintiffs claimed that for the purposes of Article III's Diversity Clause the District was in fact a state. The court ruled that the District was not a state under Article III, with Chief Justice John Marshall holding that within the language of the Constitution, the only 'states' recognised were those that were members of the American Confederacy. The court upheld that the same definition of 'state' outlined in the Constitution applied to all judicial matters. The key importance of this case was Chief Justice Marshall's elaboration based on the courts

[10] Wesberry v. Sanders, 376 U.S. 1 (1964).
[11] Raskin, at 11.
[12] Wesberry, at 8-9.

ruling that this was, in effect, a matter of legislative jurisdiction, and not for the Judiciary to decide. The court distinctly acknowledged the special authority that Congress has over matters concerning the District. Although this established that the District was not a state under the Constitution for the purposes of diversity jurisdiction, it also laid the foundation for Congress to assume a greater legislative function over the District.[13]

Since this case in 1804, Congress has indeed granted the District access to the federal courts for purposes of diversity jurisdiction. In 1940, Congress enacted a statute that bestowed jurisdiction on the federal courts in all actions "between the citizens of different states, or citizens of the District of Columbia... and any state."[14] This established Congress' ability to, in fact, use legislative means to treat the District as a state pursuant to the District Clause under Article 1.

This statute was later challenged in National Mutual Insurance Co. of the District of Columbia v. Tidewater Transfer Co, 337 U.S. 582 (1949). The Supreme Court upheld the statute, ruling that,

> "Congress had lawfully expanded federal jurisdiction beyond the bounds of Article III by using its Article I power to legislate for the district"[15]

Consequently, although the District is not a state under Article III of the Constitution, Congress does have the power under constitutional provision to treat the District like a state for the purposes of diversity jurisdiction. The decision of the court was based squarely on the ruling in Hepburn and the broad power of Congress under The District Clause as traditionally recognized by the courts. Justice Robert Jackson echoed the earlier ruling of Justice Marshall that this was, in fact, a matter for legislative not judicial consideration, and that the District Clause gives Congress the

[13] Hepburn., at 452.
[14] Act of April 20th, 1940, ch. 117, 54, stat. 143.
[15] 90 F. Supp. 2d 35, 54-55.

power to treat D.C. as a state for the purposes of diversity jurisdiction[16]. The importance of the ruling in Tidewater stems from the fact that the five concurring justices in the court ruling acknowledged the ability of Congress to legitimately treat the District as a state; both in regards to provisions of the Constitution, and in possessing the authority to pass legislation that treats the District as a state. Consequently, there is legal precedent allowing Congress to grant a House seat to the District of Columbia.

The rulings in Hepburn and Tidewater both served as important precedent for Alexander v. Daley, 90 F. Supp.2d 35 (D.D.C. 2000), which served to further establish Congress' unique and sweeping authority over the District. In this case, the District of Columbia and its residents contended that the Constitution instructs that the District be afforded voting rights in the House of Representatives. Although the court ruled that the Constitution does not explicitly require that District residents be afforded voting representation in Congress, the decision also served to establish Congress' legislative authority to grant D.C. citizens voting representation. The ruling established not that the Constitution prohibited District residents from voting representation in Congress, but rather that the Court did not have the authority to grant it. Furthermore, the Court recommended that the residents of D.C would be better to seek recourse in "other venues", of which the legislative process was highlighted.[17]

In Adams v. Clinton, 90 F. Supp. 2d 35 (D.D.C. 2000), aff'd 531 U.S. 940 (2000), as in Alexander, District residents contended that they had a Constitutional right to elect representatives to Congress; however, the Court determined that the District was not a state under Article 1 Section 2, and therefore did not have a

[16] U.S. CONST. art 1, s 8.

[17] Alexander, at 72.

constitutional right to representation. While this might initially appear to be contrary to a constitutional argument for representation, it in fact reinforces Justice Marshall's ruling in Hepburn that courts lack the authority to grant voting rights, and that it is a matter for the Legislature. These rulings established not that Congress was required to grant D.C. full voting rights, but rather that Congress is expressly permitted to grant this right, whereas the courts are not in a position to do so.[18] It is important to clarify that we are referring here to Congress' power to legislate not whether an individual District resident can declare such a voting right under the Constitution[19], rather we are referring to Congress' power to grant these voting rights. Congress' power to grant these rights and District citizens' power to demand voting rights are different questions with quite possibly different answers.

The residents of the District of Columbia pay more federal taxes than the national average for American citizens, despite being denied a vote on how this money is spent. The case of Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 319-20 (1820), posed the question of whether Congress has the right to impose direct taxation on the District. The Court ruled that Congress, according to Article I Section 8 did in fact have the authority to tax the District, regardless of the provisions of Article I section 2, which states that taxes are to be apportioned to the "several states".[20] This reinforces the ability of Congress to bestow both the benefits and burdens of U.S. citizenship upon the residents of the District, regardless of the fact that the Constitution may reserve such provisions for residents of the various states. Similarly, the courts have ruled that the Sixth Amendment granting the right to trial by jury applies to the residents of the District, regardless of the fact that the language of the

[18] Id. At 72.
[19] (cf. Adams v. Clinton, Alexander v. Daley, 90 F. Supp. 2d 35 (D. D.C. 2000), 531 U.S. 940 (2000) [hereinafter Adams])
[20] 18 U.S. 317 (1820).

Constitution explicitly states that the accused shall be granted a trial by impartial jury of the *state* where the crime was committed. [21]

Frequent opposition to District representation largely focuses on the argument that Article I links voting for Congressional representation to residence in a particular State. This, however, is wrong, as is demonstrated by the Uniformed and Overseas Citizens Absentee Voting Act.[22] The Act provides for U.S. citizens residing abroad that have retained their US citizenship, allowing them to cast an absentee ballot in their last place of domicile. This does not require the absent voter to be a citizen of the state where their ballot is cast, to pay taxes or even to have the intent to return to that state at a future date.[23] Thus it is apparent that this Act allows for voting in federal elections by persons not residing in any of the "several states". It seems that if there is no constitutional impediment to Congress accepting the ballots of overseas voters, then there should be no such impediment in the case of voting rights for District residents.

Further, it is important to note that this bill in no way transgresses constitutional limitations and is merely an extension not an invasion of the most fundamental rights. The same Congress that has sovereign power over the District is that which is elected by the people of the States themselves, and will have to pass this legislation. Consequently, in no way are these States' powers usurped. However, while Bill S. 1257 in itself violates no constitutional provisions, it does not address the necessity of full representation in both the House of Representatives and the Senate for residents of D.C. Article IV Section 3 of the Constitution outlines the inclusion of new states into the union, wherein it maintains, "no new states shall be

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[21] U.S. CONST. Amend. IV.
[22] Pub. L. 99-410, 100 Stat. 924 (1986), codified at 42 U.S.C. ss 1973ff *et seq.* (2003).
[23] Att'y Gen. v. United States, 738 F.2d at 1020; Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160, 185 (1991).

formed or erected within the Jurisdiction of any other state"[24]. As the District of Columbia does not exist within any other state, a Constitutional Amendment is not necessary for Congress to grant full voting representation. Rather a simple statute law is all that would be required in this instance. As the preceding cases have established Congresses authority under the District Clause to take legislative action in matters concerning the District of Columbia, it seems only right that Congress should act expeditiously to rectify this appalling injustice.

In closing, I would like to thank Senator Feingold and the Committee on The Judiciary, as well as the Subcommittee on The Constitution for holding this hearing to address this important issue. Finally, I would like to thank my Legislative Director, Vanessa Marsh, for her help with preparation of this testimony.

[24] U.S. CONST. Art. IV, s 3.


**Statement of Kenneth R. Thomas**
**Legislative Attorney, American Law Division**
**Congressional Research Service**

**Before**

**The Committee on the Judiciary**
**United States Senate**

**May 23, 2007**

**on**

**"Ending Taxation Without Representation: The Constitutionality of S. 1257."**

Mr. Chairman and members of the Committee:

My name is Ken Thomas. I am a Legislative Attorney with the American Law Division of the Congressional Research Service at the Library of Congress. I'd like to thank you for inviting me to testify today regarding the Committee's consideration of S. 1257, the "District of Columbia House Voting Rights Act of 2007." Today, I would like to discuss the constitutional questions surrounding this bill.

S. 1257 provides the following: "Notwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives." The bill also provides that regardless of existing federal law regarding apportionment, "the District of Columbia may not receive more than one member under any reapportionment of members." In addition, the bill contains a non-severability clause, so that if a provision of the Act is held unconstitutional, the remaining provisions of S. 1257 would be treated as invalid.

First, I would like to start with some background on the political status of the District of Columbia. Residents of the District of Columbia have never had more than limited representation in Congress. For this reason, for more than 100 years, various Members of Congress have sought to amend the Constitution so that the District would be treated as a state for purposes of voting representation. The most significant such effort occurred in 1978, when H.J. Res. 554 was approved by two-thirds of both the House and the Senate, and was sent to the states. The text of that proposed constitutional amendment, like S. 1257, provided that, for certain purposes, the District would be treated as a state. I should note, however,

that H.J. Res 554 was a much more far-reaching proposal than S. 1257, as it would have granted the District the right to representation in the House and in the Senate, the right to appoint Presidential Electors,[1] and the right to participate in the ratification of Constitutional Amendments. The Amendment was ratified by 16 states, but expired in 1985 without winning the support of the requisite 38 states.

Since the expiration of this proposed Amendment, other proposals have been made to give the District of Columbia representation in the full House. In general, these proposals avoided the more procedurally difficult route of amending the Constitution, being implemented instead by statute. Thus, for instance, bills have been introduced and considered that would have: (1) granted statehood to the non-federal portion of the District; (2) retroceded the non-federal portion of the District to the State of Maryland; and (3) allowed District residents to vote in Maryland for their representatives to the Senate and House. Efforts to pass these bills have been unsuccessful, with some arguing that these approaches raise constitutional and/or policy concerns.

Unlike the proposals cited above, S. 1257 closely tracks the language used in the constitutional amendment that was sent to the states, but then seeks to implement that language by statute. Thus, the question arises as to whether direct House representation for the District of Columbia, as contemplated by S. 1257, can be achieved by statute, or whether it is necessary for Congress to pass and the states to ratify a constitutional amendment. I would like to spend a few moments today exploring this issue.

First, it is important to emphasize that there are two separate questions to be asked here. The first is whether that portion of the Constitution that grants House membership, the "House Representation Clause," provides for or allows the District of Columbia to have House Members. If the answer is no, then the next question is whether there is some separate constitutional provision that allows the Congress to override the limitations of the House Representation Clause. The provision most often cited for this latter proposition is the clause granting Congress authority over the District of Columbia, or the "District Clause." Let me address these two issues separately.

Article I, § 2, clause 1 of the Constitution, the "House Representation Clause," provides:

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

The meaning of this clause appears relatively clear. For instance, an early consideration of this clause occurred in 1805, when Chief Justice John Marshall authored a unanimous opinion in the case of *Hepburn v. Ellzey*.[2] In the *Hepburn* case, the Court was asked to consider the limits of federal diversity jurisdiction, authorized under Article III of the Constitution, which provides that a citizen of one state may bring a federal suit against the citizen of another state. In order to identify these limits, the Court considered whether the

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[1] This authority, it should be noted, has already been granted, but it was done by Constitutional Amendment. *See* U.S. CONST. Amend. XXIII.

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

District of Columbia should be treated as a state for purposes of Article III of the Constitution.[3]

In the *Hepburn* case, Justice Marshall defined a "state" as a member of the Union, i.e., those political entities that preexisted the federal government or had been granted statehood. The District of Columbia, on the other hand, is a creation of the Constitution, and of Congress. In *Hepburn*, Justice Marshall held that diversity jurisdiction could not be conferred on the District for the same reason that the District of Columbia did not have House Members or Senators. And that was because the plain meaning of term "state," at least for purposes of these provisions, did not include the District of Columbia.

More recently, the Supreme Court summarily affirmed a three-judge panel of the United States District Court of the District of Columbia which had held that the District of Columbia should not be considered a state for purposes of having a vote in the House of Representatives. In *Adams v. Clinton*,[4] a three-judge panel examined the issue of whether failure to provide congressional representation for the District of Columbia violated the Equal Protection Clause. The court in *Adams* examined the Constitution's language, history, and relevant judicial precedents to determine whether the Constitution allowed for areas that were not states to have representatives in the House. In doing so, it extensively discussed whether the Constitution, as it stands today, allows such representation.

The court noted that, while the phrase "people of the several States" could be read as meaning all the people of the "United States," the use of the phrase later in the clause and throughout the Article[5] makes clear that the right to representation in Congress is limited to states. This conclusion has been consistently reached by a variety of other courts,[6] and is supported by most commentators.[7]

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[3] Although, strictly speaking, the opinion was addressing statutory language in the Judiciary Act of 1789, the language was so was so similar to the language of the Constitution that it was an interpretation of the latter that was essential to the Court's reasoning. *See* National Mutual Insurance Co. v. Tidewater Transfer Co., 337 U.S. 582, 586 (1948).

[4] 90 F. Supp. 2d 35 (D.D.C.2000), *affirmed sub nom.* Alexander v. Mineta, 531 U.S. 940 (2000).

[5] *See, e.g.,* U.S. Const. Art. I, § 2, cl. 2 (each representative shall "be an Inhabitant of that State" in which he or she is chosen); *id.* at Art. I, § 2, cl. 3 (representatives shall be "apportioned among the several States which may be included within this Union"); *id.* ("each State shall have at Least one Representative"); *id.* at art. I, § 2, cl. 4 (the Executive Authority of the "State" shall fill vacancies); *id.* at art. I, § 4, cl. 1 (the legislature of "each State" shall prescribe times, places, and manner of holding elections for representatives).

[6] *See* Igartua de la Rosa v. United States, 32 F.3d 8 (1st Cir. 1994) (holding that United States citizens in Puerto Rico are not entitled to vote in presidential elections); Attorney Gen. of Guam v. United States, 738 F.2d 1017 (9th Cir. 1984) (holding that United States citizens in Guam are not entitled to vote in presidential and vice-presidential elections).

[7] *See, e.g.,* Jon M. Van Dyke, The Evolving Legal Relationships Between the United States and Its U.S. Flag Islands, U. HAW. L. REV. 445, 512 (1992). Even some proponents of D.C. voting rights generally assume the District of Columbia is not currently a state for purposes of Article I, § 2, cl. 1. *See, e.g.,* Viet Dinh and Adam H. Charnes, *The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives* 9 (2004) (report submitted to the House Committee on Government Reform) available at [http://www.dcvote.org/pdfs/congress/vietdinh112004.pdf]. *But see* Peter Raven-Hansen, (continued...)

The court in *Adams* noted that construing the term "state" to include the "District of Columbia" for purposes of House and Senate representation would lead to many incongruities in other parts of the Constitution. For instance, Article I requires that voters in House elections "have the Qualifications requisite for the Electors of the most numerous Branch of the State Legislature."[8] The District, unlike the states, did not have a legislature until home rule was passed in 1973, so this rule would have been ineffectual for most of the District's history.[9] This same point can be made regarding the clause providing that the "Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof...."[10] Similar issues arise where the Constitution refers to the executive branch of a state.[11]

The court went on to examine the debates of the Founding Fathers to determine the understanding of the issue at the time of ratification. The court concluded that such evidence as exists seems to indicate an understanding that the District would not have a vote in the Congress.[12] Later, when Congress was taking jurisdiction over land ceded by Maryland and Virginia to form the District, the issue arose again, and concerns were apparently raised precisely because District residents would lose their ability to vote.[13] Finally, the court noted that other courts that had considered the question had concluded in *dicta* or in their holdings that residents of the District do not have the right to vote for Members of Congress.[14]

Thus, the question of whether the House Representation Clause includes the District of Columbia does not seem to be open to significant dispute. Not only have the federal courts

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[7] (...continued)
*Congressional Representation for the District of Columbia: A Constitutional Analysis,* 12 Harv. J. on Legis. 167, 168 (1975); Lawrence M. Frankel, *National Representation for the District of Columbia: A Legislative Solution*, 139 U. Pa. L. Rev. 1659, 1661 (1991).

[8] U.S. CONST. art. I, § 2, cl. 1.

[9] *See* District of Columbia Self-Government and Governmental Reorganization Act, P.L. 93-198 (1973).

[10] U.S. CONST. art. I, § 4, cl. 1.

[11] "When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies." U.S. CONST. Art. I, § 2, cl. 4.

[12] For instance, at the New York ratifying convention, Thomas Tredwell argued that "[t]he plan of the federal city, sir, departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote...." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 402 (Jonathan Elliot ed., 2d ed. 1888), *reprinted* in 3 THE FOUNDERS' CONSTITUTION 225 (Philip B. Kurland & Ralph Lerner eds., 1987).

[13] *See, e.g.,* 10 ANNALS OF CONG. 992 (1801) (remarks of Rep. Smilie) (arguing that upon assumption of congressional jurisdiction, "the people of the District would be reduced to the state of subjects, and deprived of their political rights").

[14] Hepburn v. Ellzey , 6 U.S. (2 Cranch) 445, 452 (1805) (District of Columbia is not a state for purposes of diversity jurisdiction); Heald v. District of Columbia, 259 U.S. 114, 124 (1922) (stating in *dicta* that "residents of the district lack the suffrage and have politically no voice in the expenditure of the money raised by taxation."); Loughborough v. Blake, 18 U.S. (5 Wheat.) 317, 324 (1820) (stating in *dicta* that the District "relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government.")

consistently found that the term "state" in that clause does not include the District of Columbia, but most scholarly commentators have agreed. Assuming for the moment that this position is correct, we can then move to the question of whether the Congress has authority somewhere else in the Constitution to override this restriction.

In this regard, the argument has been made that the plenary authority that the Congress has over the District of Columbia under Article I, section 8, clause 17 – the District Clause – represents an independent source of legislative authority under which Congress can grant the District a voting Representative.[15] And the case which has been most often cited for this proposition is the 1948 case of *National Mutual Insurance Co. v. Tidewater Transfer Co.*[16]

The *Tidewater Transfer Co.* case appears to provide a highly relevant comparison to the instant proposal. As with the instant proposal, the congressional statute in question was intended to extend a right to District of Columbia residents that was only provided to citizens of "states." As I noted previously, the Supreme Court held in *Hepburn v. Ellzey*[17] that federal diversity jurisdiction did not include suits where one of the parties was from the District of Columbia.[18] Despite this ruling, Congress enacted a statute extending federal diversity jurisdiction to cases where a party was from the District.[19] The Court in *Tidewater Transfer Co.* upheld this statute against a constitutional challenge, with a three-judge plurality holding that Congress, acting pursuant to the District Clause, could lawfully expand federal jurisdiction beyond the bounds of Article III.[20]

On closer examination, however, the *Tidewater Transfer Co.* case may not support the constitutionality of the instant proposal. Of primary concern is that this was a decision where no one opinion commanded a majority of the Justices. Justice Jackson's opinion (the Jackson plurality), joined by Justices Black and Burton, held that District of Columbia residents could seek diversity jurisdiction based on Congress's exercising power under the District Clause. Justice Rutledge's opinion (the Rutledge concurrence) joined by Justice Murphy, argued that the provision of Article III that provides for federal diversity jurisdiction[21] permits such lawsuits, even absent congressional authorization. Justice Vinson's opinion (the Vinson dissent), joined by Justice Douglas, and Justice Frankfurter's opinion (the Frankfurter dissent), joined by Justice Reed, would have found that neither the Diversity Clause nor the District Clause provided the basis for such jurisdiction.

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[15] *See* Viet Dinh and Adam H. Charnes, *supra* note 7, at 12-13; *District of Columbia Fair and Equal House Voting Rights Act of 2006, before the Subcommittee on the Constitution, H.R. 5388,* 109th Cong., 2nd Sess. 83 (testimony of Hon. Kenneth W. Starr); Rick Bress and Kristen E. Murray, Latham & Watkins LLP, *Analysis of Congress's Authority By Statute To Provide D.C. Residents Voting Representation in the United States House of Representatives and Senate* at 7-12 (February 3, 2003)(analysis prepared for Walter Smith, Executive Director of DC Appleseed Center for Law and Justice) available at [http://www.dcvote.org/pdfs/Lathammemo02032003.pdf].

[16] 337 U.S. 582 (1948).

[17] 6 U.S. (2 Cranch) 445 (1805).

[18] Id. at 452.

[19] Act of April 20, 1940, c. 117, 54 Stat. 143.

[20] *See Tidewater Transfer Co.*, 337 U.S. at 600 (plurality opinion of Jackson, J.).

[21] U.S. Const., Art. III, § 2, cl. 1 provides that "The Judicial Power shall extend to... Controversies between two or more States...."

The Jackson plurality opinion considered whether, despite the Court's holding in *Hepburn*, Congress, by utilizing its power under the District Clause, could avoid the apparent limitations of Article III on diversity jurisdiction. The plurality first noted that it had been previously established that Congress had the power to create courts in the District of Columbia, and that such local courts could hear local cases that did not fall under Article III federal court jurisdiction. Thus, the plurality suggested that there would be little objection to establishing a federal court in the District of Columbia to hear diversity cases. Instead, the concerns arose because the statute in question would operate in federal courts located outside of the geographical confines of the District.

While conceding that the power of Congress under the District Clause has limitations, the plurality concluded that federal diversity cases involving District of Columbia citizens could occur in federal courts outside of the District. The plurality held that, because Congress had the authority to establish a court to hear diversity cases within the District of Columbia, the Court could also allow Congress to authorize such cases to be heard in federal courts outside the District. Essentially, the Court held that, because the end of providing District residents access to federal courts under diversity jurisdiction was constitutional, the Court would defer to Congress to decide the means of executing this power.[22]

It should be noted that even the plurality opinion felt it necessary to place this extension in a larger context. The plurality emphasized the relative insignificance of allowing diversity cases to be heard in federal courts outside the District instead of limiting them to the geographical confines of the District. Justice Jackson noted that the issue did not affect "the mechanics of administering justice," involve the "extension or a denial of any fundamental right or immunity which goes to make up our freedoms"; nor did the legislation "substantially disturb the balance between the Union and its component states." Rather, the issue involved whether a plaintiff who sued a party from another state could require that the case be decided in a convenient forum.[23]

Despite the limited nature of this holding, the Rutledge concurrence explicitly rejected the reasoning of the plurality, finding that the Congress clearly did not have the authority to authorize even this relatively modest authority to District of Columbia citizens.[24] In fact, the concurring opinion rejected the entire approach of the plurality as unworkable, arguing that it would allow any limitations on Article III courts to be disregarded if Congress purported to be acting under the authorization of some other constitutional power.[25] And, as I noted previously, the four Justices in dissent also rejected this expansive interpretation of the District Clause.

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[22] Id. at 602-03.

[23] Id. at 585.

[24] Id. at 604-606 (Rutledge, J., concurring)("strongly" dissenting from the suggestion that Congress could use Article I powers to expand the limitations of Article III jurisdiction).

[25] "The Constitution is not so self-contradictory. Nor are its limitations to be so easily evaded. The very essence of the problem is whether the Constitution meant to cut out from the diversity jurisdiction of courts created under Article III suits brought by or against citizens of the District of Columbia. That question is not answered by saying in one breath that it did and in the next that it did not." Id. at 605 (Rutledge, J, concurring).

The positions of the various Justices in the *Tidewater Transfer Co.* case on the question of whether Congress can grant diversity jurisdiction for District of Columbia residents would seem to inform the question of whether the Justices would have supported the granting of House representation to District citizens. As six Justices explicitly rejected the extension of diversity jurisdiction using Congress's power under the District Clause, it is likely that these six Justices would also have rejected the suggestion that Congress has the power to award voting representation in Congress to District residents. The recurring theme of both the *Hepburn* and *Tidewater Transfer Co.* decisions was that the limitation of House representation to the states was the least controversial aspect of the Constitution, and that the plain meaning of the term "state" with regard to the organization of the federal political structures was essentially unquestioned.

Consequently, it appears that only the three Justices of the plurality in *Tidewater Transfer Co.* might have supported the doctrine that the Congress's power over the District of Columbia would allow extension of House representation to its citizens. However, even the three-judge plurality might have distinguished the instant proposal from the legislation that was at issue in *Tidewater Transfer Co.* As discussed previously, the plurality opinion took pains to note the limited impact of its holding — that parties in diversity suits with residents of the District of Columbia would have a more convenient forum to bring a lawsuit. And, as noted, the plurality specifically limited the scope of its decision to legislation that neither involved an "extension or a denial of any fundamental right" nor substantially disturbed "the balance between the Union and its component states."[26]

This distinction is important, because it brings us to the nature of the power being granted by S. 1257. For instance, consider what might occur if the House voted on an issue of national import, such as raising the minimum wage, and the representatives from the states were evenly divided on the question. As the proponents of the legislation had not gained the majority support of state representation, the provision would normally fail. However, if a representative of the District of Columbia were then to cast the deciding vote, this would have several effects. First, it would appear to overrule the decision of the states of the Union to not raise the minimum wage. Second, it would appear to have a significant legislative effect outside of the District of Columbia. Arguably, this could be seen by the Supreme Court as a substantial disturbance to the existing federalism structure. Thus, even the Justices in the Jackson plurality might distinguish the instant proposal from their holding in *Tidewater Transfer Co.*

A further concern with the instant proposal is that the act before the Justices in *Tidewater Transfer Co.* did not affect just the District of Columbia, but also extended diversity jurisdiction to the territories of the United States, including the then-territories of Hawaii and Alaska.[27] Although the question of diversity jurisdiction over residents of the territories was not directly before the Court, subsequent lower court decisions[28] have found that the reasoning of the *Tidewater Transfer Co.* case supported the extension of diversity jurisdiction to the territories, albeit under the Territory Clause.[29]

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[26] Id.. at 585.

[27] Id. at 584-585.

[28] *See, e.g.*, Detrea v. Lions Building Corporation, 234 F.2d 596 (1956).

[29] U.S. Const. Art. IV, § 3, cl. 2 provides:

(continued...)

Thus, a concern arises as to whether it would be difficult to legally distinguish the instant proposal from an extension of House representation to other subordinate political entities, such as the territories. While the extension of diversity jurisdiction to residents of territories has been relatively uncontroversial, a decision to grant a voting Delegate to the territories might not be. Under the Territory Clause, Congress has plenary power over the territories of American Samoa, Guam, the Virgin Islands, Puerto Rico, and the Commonwealth of the Northern Marianas Islands. If the Supreme Court extended the reasoning of the *Tidewater Transfer Co.* case to voting representation, it might be difficult for the Court to later distinguish a similar effort to allow each of these territories representation in the House.[30]

Similarly, a holding that the District could be treated as a state for purposes of representation would arguably also support a finding that the District could be treated as a state for the places in the Constitution that deal with other aspects of the national political structure. Under this reasoning, Congress could arguably authorize the District of Columbia to have Senators, Presidential Electors, and perhaps even the power to ratify Amendments to the Constitution.[31] Again, it seems unlikely that even the three-judge plurality in *Tidewater Transfer Co.* would support such an extension of the District Clause.

In conclusion, it is difficult to identify either constitutional text or existing case law which would support the extension by Congress of the power to vote in the full House to the District of Columbia Delegate. Further, that case law that does exist would seem to indicate that not only is the District of Columbia not a "state" for purposes of representation, but that congressional power over the District of Columbia is not a sufficient basis to grant congressional representation.

However, it is clear that there is a constitutionally sufficient route to granting the District of Columbia voting representation in the House, and that is by amending the Constitution. I should also note that such an amendment could be modeled on the S. 1257 rather than on the broader amendment sent to the states in 1978. For instance, rather than providing for representation in both the House and the Senate, Presidential electors, and the right to vote on constitutional amendments, as did the previous proposed amendment, a constitutional amendment could be limited to providing the District of Columbia a vote in the House of Representatives. Further, in the same manner as S. 1257, a constitutional amendment could be presented in such a way as to preserve the current political balance of Congress. For instance, Utah could be granted a vote in the House, contingent on the passage of a constitutional amendment granting the District of Columbia a similar vote. In other words, unlike the broad amendment sent to the states in 1978, such a constitutional amendment could more closely track the narrower provisions of S. 1257.

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[29] (...continued)

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

[30] *But see Tidewater Transfer Co.*, 337 U.S. at 639 (Vinson, J., dissenting)(noting differences between Congressional regulation of local courts under the District Clause and the Territorial Clause.)

[31] U.S. CONST. Art. V.

Mr. Chairman, that concludes my prepared statement. I would be happy to answer any questions that you or other Members of the Committee may have, and I look forward to working with all Members and the staff of the Committee on this issue in the future.

**STATEMENT FOR THE RECORD**
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***ENDING TAXATION WITHOUT REPRESENTATION:***
***THE CONSTITUTIONALITY OF S. 1257***

**MAY 23, 2007**

**COMMITTEE ON THE JUDICIARY**
**THE UNITED STATES SENATE**

## I.
## INTRODUCTION

Chairman Feingold, Senator Specter, members of the Committee, it is an honor to appear before you today to discuss the important question of the representational status of the District of Columbia in Congress. At the outset, I believe that it is important for people of good faith to acknowledge that this is not a debate between people who want District residents to have the vote and those who do not. I expect that everyone here today would agree that the current non-voting status of the District is fundamentally at odds with the principles and traditions of our constitutional system. As Justice Black stated in *Wesberry v. Sanders*:[1] "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

Today, we are all seeking a way to address the glaring denial of basic rights to the citizens of our Capitol City.[2] Clearly, this is a matter that is heavily laden with passions from decades of disenfranchisement. However, there is a tendency to personalize the barriers to such representation and to ignore any countervailing evidence in the constitutional debates. In the last Senate hearing, my friend Delegate Eleanor Holmes Norton told Senators that if they are going to vote against this bill, "do not to blame the Framers

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

2 While I am a former resident of Washington, I come to this debate with views primarily of an academic and litigator. In addition to teaching at George Washington Law School, I was counsel in the successful challenge to the Elizabeth Morgan Act. Much like this bill, a hearing was held to address whether Congress had the authority to enact the law -- the intervention into a single family custody dispute. I testified at that hearing as a neutral constitutional expert and strongly encouraged the members not to move forward on the legislation, which I viewed as a rare example of a "Bill of Attainder" under Section 9-10 of Article I. I later agreed to represent Dr. Eric Foretich on a pro bono basis to challenge the Act, which was struck down as a Bill of Attainder by the Court of Appeals for the District of Columbia. *Foretich v. United States,* 351 F.3d 1198 (D.C. Cir. 2003). The current bill is another example of Congress exceeding its authority, though now under sections 2 and 8 (rather than section 9 and 10) of Article I.

blame Jonathan Turley."[3] Del. Norton went further to argue that it was "slander" to claim that the Framers intended to leave District residents without their own representatives in Congress.[4] In reality, I have long argued for *full* representation for the District and abhor the status of its residents.[5] As for claims of slandering the Framers, truth remains an absolute defense to defamation and the record in this case could not be more clear as to the intentions of the Framers. While some may view it as obnoxious (and indeed some at the time held the same view), the Framers most certainly did understand the implications of creating a federal enclave represented by Congress as a whole.

Unlike many issues before Congress, there has always been a disagreement about the means rather than the ends of full representation for the District residents. Regrettably, I believe that S. 1257 is the wrong means.[6] Despite the best of motivations, the bill is fundamentally flawed on a constitutional level and would only serve to needlessly delay true reform for District residents.[7] Indeed, considerable expense would likely come from an inevitable and likely successful legal challenge -- all for a bill that

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[3] *Equal Representation in Congress: Providing Voting Rights to the District of Columbia,* before the Committee on Homeland Security and Government Operations, United States Senate, 110th Cong., May 15, 2007 (testimony of De. Norton).

[4] *Id.* In the same hearing, Secretary Jack Kemp noted that "I would hate to be my friend Jonathan Turley." On that sentiment at least, we may be in agreement.

[5] I have described the modified retrocession plan that I proposed in the last analysis section and I would be happy to discuss it at more length during this hearing.

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

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

would ultimately achieve only partial representational status. The effort to fashion this as a civil rights measure ignores the fact that it confers only partial representation without any guarantee that it will continue in the future. It is the equivalent of allowing Rosa Parks to move halfway to the front of the bus in the name of progress. District residents deserve full representation and, while this bill would not offer such reform, there are alternatives, including a three-phased proposal that I have advocated in the past.

As I laid out in detail in my prior testimony on this proposal before the 109th Congress[8] and twice before the 110th Congress,[9] I must respectfully but strongly disagree with the constitutional analysis offered to Congress by Professor Viet Dinh,[10] and the Hon. Kenneth Starr.[11] Notably, since my first testimony on this issue, the independent Congressional Research Service joined those of us who view this legislation as facially unconstitutional.[12]

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

[9] *Equal Representation in Congress: Providing Voting Rights to the District of Columbia,* before the Committee on Homeland Security and Government Operations, United States Senate, 110th Cong., May 15, 2007 (testimony of Jonathan Turley); *District of Columbia Fair and Equal House Voting Rights Act of 2007*, before the Committee on the Judiciary, United States House of Representatives, 110th Cong., March 14, 2007 (testimony of Jonathan Turley).

[10] This analysis was co-authored by Mr. Adam Charnes, an attorney with the law firm of Kilpatrick Stockton, LLP. Viet Dinh and Adam Charnes, "The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives," Nov. 2004 found at http://www.dcvote.org/pdfs/congress/vietdinh 112004.pdf. This analysis was also supported recently by the American Bar Association in a June 16, 2006 letter to Chairman James Sensenbrenner.

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

[12] 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, January 24, 2007, at i (Analysis by Mr. Eugene Boyd) (concluding "that case law that does exist would seem to indicate that not only is the District of Columbia not a 'state' for purposes of

Likewise, the White House recently disclosed that its attorneys have reached the same conclusion and found this legislation to be facially unconstitutional.[13] President Bush has indicated that he will veto the legislation on constitutional grounds.

Permit me to be blunt, I consider this Act to be the most premeditated unconstitutional act by Congress in decades.[14] I have taken the liberty of submitting roughly 70 pages of testimony today in the hope of leaving no question as to the clarity of the textual language and historical record on this point. As shown below, on every level of traditional constitutional analysis (textualist, intentionalist, historical) the unconstitutionality of this legislation is plainly evident. Conversely, the interpretations of Messrs. Dinh and Starr are based on uncharacteristically liberal interpretations of the text of Article I, which ignore the plain meaning of the word "states" and the express intent of the Framers.

The bill's drafters have boldly stated that "[n]otwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives."[15] What this language really means is: "notwithstanding any provision of the Constitution." The problem is that this Congress cannot set aside provisions of the Constitution absent a ratified constitutional amendment. Of course, the language of S. 1257 is strikingly similar to a 1978 constitutional amendment that failed after being ratified by only 16 states.[16] Indeed, in both prior successful and unsuccessful amendments[17] (as

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representation, but that congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation.").

[13] Suzanne Struglinski, *House OKs a 4th seat for Utah*, Deseret Morning News, April 20, 2007, at 1; Christina Bellantoni, *Democrats Adjust Rules for D.C. Vote Bill*, Wash. Times, April 19, 2007, at A5.

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

[15] S. 1257 §2.

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

well as in arguments made in court),[18] the Congress has conceded that the District is not a State for the purposes of voting in Congress. Now, unable to pass a constitutional amendment, sponsors hope to circumvent the process laid out in Article V[19] by claiming the inherent authority to add a non-state voting member to the House of Representatives.

The Senate has wisely changed the at-large provision for the Utah district to require the creation of new individual districts. However, given the House bill, I wish to stress that I also believe that the concurrent awarding of an at-large seat would raise difficult legal questions, including but not limited to the guarantee of "one person, one vote." I will address each of these arguments below. However, in the hope of a more productive course, I will also briefly explore an alternative approach that would be (in my view) both unassailable on a legal basis and more practicable on a political basis.

## II.
## THE ORIGINAL PURPOSE OF A FEDERAL ENCLAVE IN THE 21ST CENTURY

The non-voting status of District residents remains something of a historical anomaly that should be a great embarrassment for all citizens.

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

18 *Michel v. Anderson*, 14 F.3d 623, 630 (D.C. Cir. 1994) ("despite the House's reliance on the revote mechanism to reduce the impact of the rule permitting delegates to vote in the Committee of the Whole, [the government] concede[s] that it would be unconstitutional to permit anyone but members of the House to vote in the full House under any circumstances.").

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

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

On January 1, 1783, Congress was meeting in Philadelphia when they were surprised by a mob of Revolutionary War veterans demanding their long-overdue back pay. It was a period of great discontentment with Congress and the public of Pennsylvania was more likely to help the mob than to help suppress it. Indeed, when Congress called on the state officials to call out the militia, they refused. To understand the desire to create a unique non-state enclave, it is important to consider the dangers and lasting humiliation of that scene as it was recorded in the daily account from the debates:

> On 21 June 1783, the mutinous soldiers presented themselves, drawn up in the street before the state-house, where Congress had assembled. [Pennsylvania authorities were] called on for the proper interposition. [State officials demurred and explained] the difficulty, under actual circumstances, of bringing out the militia . . . for the suppression of the mutiny . . . . [It was] thought that, without some outrages on persons or property, the militia could not be relied on . . . . The soldiers remained in their position, without offering any violence, individuals only, occasionally, uttering offensive words, and, wantonly pointing their muskets to the windows of the hall of Congress. No danger from premeditated violence was apprehended, but it was observed that spirituous drink from the tippling-houses adjoining, began to be liberally served out to the soldiers, and might lead to hasty excesses. None were committed, however, and, about three o'clock, the usual hour, Congress adjourned; the soldiers, though in some instances offering a mock obstruction, permitting the members to pass through their ranks. They soon afterwards retired themselves to the barracks.[20]

Congress was forced to flee, first to Princeton, N.J., then to Annapolis and ultimately to New York City.[21]

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[20] 25 Journals of the Continental Congress 1774-1789, at 973 (Gov't Printing Office 1936) (1783).

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

When the Framers gathered again in Philadelphia in the summer of 1787 to draft a new constitution, the flight from that city five years before was still prominent in their minds. Madison and others called for the creation of a federal enclave or district as the seat of the federal government – independent of any state and protected by federal authority. Only then, Madison noted, could they avoid "public authority [being] insulted and its proceedings . . . interrupted, with impunity."[22] Madison believed that the physical control of the Capitol would allow direct control of proceedings or act like a Damocles' Sword dangling over the heads of members of other states: "How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the sessions and deliberations of Congress, would they be secure from insults, or the influence of such a state?"[23] James Iredell raised the same point in the North Carolina ratification convention when he asked, "Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress?"[24] By creating a special area free of state control, "[i]t is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself."[25]

In addition to the desire to be free of the transient support of an individual state, the Framers advanced a number of other reasons for creating this special enclave.[26] There was a fear that a state (and its

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

[23] 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 433 (Madison, J.) (Jonathan Elliot, ed., 2d ed. 1907).

[24] 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, *supra*, reprinted in 3 The Founders' Constitution 225 (Philip B. Kurland & Ralph Lerner eds., 1987).

[25] *Id.*

[26] The analysis by Dinh and Charnes places great emphasis on the security issue and then concludes that, "[d]enying the residents of the District the right to vote in elections for the House of Representatives was neither necessary nor intended by the Framers to achieve this purpose." Dinh & Charnes, *supra*. However, this was not the only purpose motivating the establishment of a federal enclave. Moreover, the general intention was the creation of a non-state under complete congressional authority as a

representatives in Congress) would have too much influence over Congress, by creating "a dependence of the members of the general government."[27] There was also a fear that symbolically the honor given to one state would create in "the national councils an imputation of awe and influence, equally dishonorable to the Government and dissatisfactory to the other members of the confederacy."[28] There was also a view that the host state would benefit too much from "[t]he gradual accumulation of public improvements at the stationary residence of the Government."[29] Finally, some Framers saw the capitol city as promising the same difficulties that London sometimes posed for the English.[30] London then (and now) often took steps as a municipality that challenged the national government and policy. This led to a continual level of tension between the national and local representatives.

The District was, therefore, created for the specific purpose of being a non-State without direct representatives in Congress.

Indeed, even the title of this hearing reveals a fundamental rejection of the design and intent of the Framers. The Framers did not leave the District "without representation" and would not view its current status as an example of the colonial scourge of "taxation without representation." Rather, they repeatedly stated that the District would be represented by the entire Congress and that members (as residents or commuters to that District) would bear a special interest in its operations. Whatever the merits of that view, the District was and is represented in the fashion envisioned by the Framers.

Under the original design, the security and operations of the federal enclave would remain the collective responsibilities of the entire Congress – of all of the various states. The Framers, however, intentionally preserved the option to change the dimensions or even relocate the federal district. Indeed, Charles Pinckney wanted that District Clause to read that Congress

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federal enclave. The Framers clearly understood and intended for the District to be represented derivatively by the entire Congress.

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

[28] *Id.*

[29] *Id.*

[30] Kenneth R. Bowling, The Creation of Washington, D.C.: The Idea and Location of The American Capitol 76 (1991).

could "fix and *permanently* establish the seat of the Government . . ."[31] However, the Framers rejected the inclusion of the word "permanently" to allow for some flexibility.

While I believe that the intentions and purposes behind the creation of the federal enclave are clear, I do not believe that most of these concerns have continued relevance for legislators. Since the Constitutional Convention, courts have recognized that federal, not state, jurisdiction governs federal lands. As the Court stressed in *Hancock v. Train*,[32] "because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is 'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.'"[33] Moreover, the federal government now has a large security force and is not dependent on the states. Finally, the position of the federal government vis-à-vis the states has flipped with the federal government now the dominant party in this relationship. Thus, even though federal buildings or courthouses are located in the various states, they remain legally and practically separate from state jurisdiction – though enforcement of state criminal laws does occur in such buildings. Just as the United Nations has a special status in New York City and does not bend to the pressure of its host country or city, the federal government does not need a special federal enclave to exercise its independence from individual state governments.

The original motivating purposes behind the creation of the federal enclave, therefore, no longer exist. Madison wanted a non-state location for the seat of government because "if any state had the power of legislation over the place where Congress should fix the general government, this

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31 *See generally* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160, 168 (1991) (citing James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America 420 (Gaillard Hund & James Brown Scott eds., 1920)).

32 426 U.S. 167, 179 (1976).

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

would impair the dignity, and hazard the safety, of Congress."[34] There is no longer a cognizable "hazard [to] safety" but there certainly remains the symbolic question of the impairment to the dignity for the several states of locating the seat of government in a specific state. It is a question that should not be dismissed as insignificant. I personally believe that the seat of the federal government should remain completely federal territory as an important symbol of the equality of all states in the governance of the nation. The actual seat of government, however, is a tiny fraction of the current federal district.

Throughout this history from the first suggestion of a federal district to the retrocession of the Virginia territory, the only options for representation for District residents were viewed as limited to either a constitutional amendment or retrocession of the District itself.[35] Those remain the only two clear options today, though retrocession itself can take many different forms in its actual execution, as will be discussed in Section V.

## III.
## THE UNCONSTITUTIONALITY OF THE CREATION OF A SEAT IN THE HOUSE FOR THE DISTRICT UNDER ARTICLE I

### A. The Text and Context of Article I of the Constitution Contradict Claims that the Congress May Award Voting Rights to the District of Columbia.

As noted above, I believe that S. 1257 would violate the clear language and meaning of Article I. To evaluate the constitutionality of the legislation, one begins with the text, explores the original meaning of the language, and then considers the implications of the rivaling interpretations for the Constitution system. This analysis overwhelmingly shows that the creation of a vote in the House of Representatives for the District would do great violence to our constitutional traditions and values. To succeed, it would require the abandonment of traditional interpretative doctrines and

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[34] 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 89 (Madison, J.) (Jonathan Elliot ed., 2d ed. 1907).

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

could invite future manipulation of one of the most essential and stabilizing components of the Madisonian democracy: the voting rules for the legislative branch. The Composition of Congress was one of the structural provisions that are fixed within our system – protected from opportunistic manipulation or creative realignment.[36]

1. *The Text of the Constitutional Provisions.*

Any constitutional analysis necessarily begins with the text of the relevant provision or provisions. To the extent that the language clearly addresses the question, there is obviously no need to proceed further into other interpretative measures that look at the context of the provision, the historical evidence of intent, etc. The instant question could arguably end with this simple threshold inquiry.

Article I, Section 2 is the most obvious and controlling provision on this question – not the District Clause. The Framers defined the voting membership of the House in that provision as composed of representatives of the "several States." Conversely, the District Clause was designed to define the power of Congress *within* the federal enclave.

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[36] Stephen Carter made an analogous point in discussing structural provisions in the checks and balances of the Constitution.

> The specificity of these clauses is completely sensible if the authors were attempting to implement a particular conception of the way the government should work. Thus while we assume with respect to the entire Constitution that the Framers meant what they said, we may also assume that with respect to the Constitution's structural provisions they took care to say what they meant. The entire Constitution means something; the more determinate clauses mean something specific. After all, these structural provisions were meant to constitute a government comprising institutions that would interact, and it is difficult to design institutional interaction without a concrete image of what the institutions are. Because the structural provisions are relatively clear, moreover, important substantive biases held by the interpreters -- the judges -- cannot easily creep in and corrupt the process of adjudication.

Stephen L. Carter, *Constitutional Adjudication and the Indeterminate Text: A Preliminary Defense of an Imperfect Muddle*, 94 Yale L.J. 821, 854 (1985).

The language of Article I, Section 2 is a model of clarity:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch in the States Legislature.[37]

As with the Seventeenth Amendment election of the composition of the Senate,[38] the text clearly limits the House to the membership of representatives of the several states.

On its face, the reference to "the people of the several states" is a clear restriction of the voting membership to actual states. The reference to "states" is repeated in the section when the Framers specified that each representative must "when elected, be an inhabitant of that State in which he shall be chosen." Moreover, the reference to "the most numerous Branch in the States Legislature" clearly distinguishes the state entity from the District. The District had no independent government at the time and currently has only a city council.

In reading such constitutional language, the Supreme Court has admonished courts that "every word must have its due force, and appropriate meaning; . . . no word was unnecessarily used or needlessly added."[39] In his famous commentaries on the Constitution, Justice Story warned against the use of the interpretation to avoid unpopular limitations in our constitutional system:

> The constitution of the United States is to receive a reasonable interpretation of its language, and its powers, keeping in view the objects and purposes, for which these powers were conferred. By a reasonable interpretation, we mean, that in case the words are susceptible of two different senses, the one strict, the other more enlarged, that should be adopted, which is most consonant with the

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37 U.S. Const. Art. I, Sec.2.

38 While not directly relevant to S. 1257, the Seventeenth Amendment contains similar language that mandates that the Senate shall be composed of two senators of each state "elected by the people thereof."

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

> apparent objects and intent of the constitution. . . .
>
> On the other hand, a rule of equal importance is, not to enlarge the construction of a given power beyond the fair scope of its terms, merely because the restriction is inconvenient, impolitic, or even mischievous. If it be mischievous, the power of redressing the evil lies with the people by an exercise of the power of amendment.[40]

In Article I, the drafters refer repeatedly to states or several states as well as state legislatures in defining the membership of the House of Representatives. As the Court has noted, "[a] state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."[41] Notably, no one has seriously argued that the Framers had any other meaning in mind when they used the term "several states" beyond the conventional meaning of a state.

Putting aside notions of plain meaning,[42] the structure and language of this provision clearly indicate that the drafters were referencing formal state entities. It takes an act of willful blindness to ignore the obvious meaning of these words.

Academics have also noted that the use of the term "members" in the Composition Clause was a clear distinction in the minds of the Framers between voting and non-voting representatives. Professors John O. McGinnis and Michael B. Rappaport address this very point and note that word "members" was meant to protect the essential structural role by guaranteeing that representatives of the states -- and only the states -- would vote in Congress:

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[40] 1 Joseph Story, Commentaries on the Constitution of the United States §§ 419-26, at 298-302 (2d ed. 1851).

[41] *Texas v. White*, 74 U.S. (7 Wall.) 700, 721 (1868).

[42] It is true that plain meaning at times can be over-emphasized. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 67 (1994) ("Plain meaning as a way to understand language is silly. In interesting cases, meaning is not 'plain'; it must be imputed; and the choice among meanings must have a footing more solid than a dictionary."). Yet, it should not be ignored when the context of the language makes its meaning plain, as here.

> If the House could deprive Representatives from certain states of the right to vote on bills or *could assign that right to non-members of its choosing*, a majority of the House could circumvent the carefully crafted structure established by the Framers to govern national legislation. This structure maintained important compromises that were essential to the Constitution's creation, such as the equilibrium between large and small states. The structure also protected minorities by making it more difficult for unjust legislation to pass. It is inconceivable that the Framers would have permitted a majority of the House to subvert this arrangement.[43]

The second provision is the District Clause found in Article I, Section 8 which gives Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over such District." Notably, the use of "in all cases whatsoever" emphasizes the administrative and operational character of the power given to Congress. It was a power to dictate the internal conditions and operations of the federal enclave. On its face, this language is not a rival authority to the Composition Clause or structural provisions for Congress. Adding a member to Congress is not some "case" or internal matter of the District, it is changing the structure of Congress and the status of the several states.

As will be discussed more fully below, the obvious meaning of this section is supported by a long line of cases that repeatedly deny the District the status of a state and reaffirm the intention to create a non-state entity. This status did not impair the ability of Congress to impose other obligations of citizenship. Thus, in *Loughborough v. Blake*,[44] the Court ruled that the lack of representation did not bar the imposition of taxation. Lower courts rejected challenges to the imposition of an unelected local government. The District was created as a unique area controlled by Congress that expressly distinguished it from state entities. This point was amplified by then Judge Scalia of the D.C. Circuit in *United States v. Cohen*:[45] the District Clause "enables Congress to do many things in the District of Columbia which it

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[43] John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules,* 47 Duke L.J. 327, 333 (1997).

[44] 18 U.S. (5 Wheat.) 317, 324 (1820).

[45] 733 F.2d 128, 140 (D.C. Cir. 1984).

has no authority to do in the 50 states. There has never been any rule of law that Congress must treat people in the District of Columbia exactly as people are treated in the various states."[46]

*2. The Context of the Language.*

In some cases, the language of a constitutional provision can change when considered in a broad context, particularly with similar language in other provisions. The Supreme Court has emphasized in matters of statutory construction (and presumably in constitutional interpretation) that courts should "assume[] that identical words used in different parts of the same act are intended to have the same meaning."[47] This does not mean that there cannot be exceptions[48] but such exceptions must be based on circumstances under which the consistent interpretation would lead to conflicting or clearly unintentional results.[49]

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

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46 *Id.*

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

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

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

There is also the Qualification Clause under which members must have "the Qualifications requisite for Electors of the most numerous Branch of the State legislature" in Article I, Section 2. Obviously, the District has no state legislature and was never intended to have such a state-like structure. Moreover, as noted below, if Congress can manipulate the meaning of the Qualifications, it can change not just the voting members of Congress but their basic qualifications to serve in that capacity.

The drafters also referred to the "executive authority" of states in issuing writs for special elections to fill vacancies in Article I, Section 2. Like the absence of a legislative branch, the District did not have a true executive authority.

Article I also requires that "[n]o person shall be a Representative who shall not . . . be an Inhabitant of that state in which he shall be chosen." The drafters could have allowed for inhabitants of federal territories or the proposed federal district. Instead, they chose to confine the qualification for service in the House to being a resident of an actual state.

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

Article I also ties the term "several states" to the actual states making up the United States. The drafters, for example, mandated that "Representatives and direct Taxes shall be apportioned among the several states which may be included within this union, according to their respective Numbers." The District was neither subject to taxes at the beginning of its existence nor represented as a member of the union of states.

Article I, clause 3 specified that "each state shall have at Least one Representative." If the Framers believed that the District was a quasi-state under some fluid definition, the District would have presumably had a representative and two Senators from the start. At a minimum, the Composition Clause would have referenced the potential for non-state members, particularly given the large territories such as Ohio, which were yet to achieve state status. Yet, there is no reference to the District in any of

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

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

Notably, just as Article I refers to apportionment of representatives "among the several states," the later Fourteenth Amendment adopted the same language in specifying that "Representatives shall be apportioned among the several States according to their respective numbers." Thus, it is not true that the reference to states may have been due to some unawareness of the District's existence. The Fourteenth Amendment continued the same language in 1868 after the District was a major American city. Again, the drafters used "state" as the operative term– as with Article I – to determine the apportionment of representatives in Congress. The District was never subject to such apportionment and, even under this bill, would not be subject to the traditional apportionment determinations for other districts.

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

Conversely, when the drafters wanted to refer to citizens without reference to their states, they used fairly consistent language of "citizens of the United States" or "the people." This was demonstrated most vividly in provisions such as the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[50] Not

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[50] *See generally Lee v. Flintkote Co.*, 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) ("[t]he District, unlike the states, has no reserved power to be guaranteed by the Tenth Amendment."). The same can be said of the

only did the drafters refer to the two common constitutional categories for rights and powers (in addition to the federal government), but it cannot be plausibly argued that a federal enclave could be read into the meaning of states in such provisions.

The District Clause itself magnifies the distinction from actual states. It is referred to as the "Seat of Government" and subject to the same authority that Congress would exercise "over all Places purchased by the Consent of the Legislature of the State . . ." Under this language, the District as a whole was delegated to the United States. As the D.C. Circuit stressed recently in *Parker*, "the authors of the Bill of Rights were perfectly capable of distinguishing between "the people," on the one hand, and "the states," on the other." Likewise, when the drafters of the Constitution wanted to refer to the District, they did so clearly in the text. This was evident not only with the original Constitution and the Bill of Rights, but much later amendments. For example, the Twenty-Third Amendment giving the District the right to have presidential electors expressly distinguishes the District from the States in the Constitution and establishes, for that purpose, the District should be treated like a State: mandating "[a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a State.*"[51] This amendment makes little sense if Congress could simply bestow the voting rights of states on the District. Rather, it reaffirmed that, if the District wishes to vote constitutionally as a State, it requires an amendment formally extending such parity.[52]

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Eleventh Amendment. *See LaShawn v. Barry*, 87 F.3d 1389, 1394 n.4 (D.C. Cir. 1996) ("The District of Columbia is not a state . . . Thus, [the Eleventh Amendment] has no application here.").

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

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

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

When one looks to the District Clause, the context belies any suggested reservation of authority to convert the district into a voting member of either house. Instead of being placed in the structural section with the Composition Clause, it was relegated to the same section as other areas purchased or acquired by the federal government. Under this clause, Congress is expressly allowed "to exercise like Authority [as over the District] over all Places purchased . . . for the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings." If this clause gives Congress the ability to make the federal district into a voting member, then presumably Congress could exercise "like Authority" and give the Department of Defense ten votes in Congress.

The context of the District Clause shows that it is a provision crafted for administrative purposes as opposed to the structural provisions of Section 2. Indeed, the argument of unlimited powers under the District Clause parallels a similar argument under the Election Clause. Some argued that the Framers gave states[53] or Congress authority to manipulate the qualifications for members. In the latter case, the clause provides that "Congress may at any time by law make or alter such regulations" that related to the time, place and manner of federal elections."[54] Section 4 of Article I, however, was viewed by the Court as a purely procedural provision despite the absence of limiting language. As the Ninth Circuit noted in *Schaefer v. Townsend*, the Court has rejected "a broad reading of the Elections Clause and held the balancing test inapplicable where the

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recognizable offices of a city government – though still ultimately under the control of Congress.

[53] *U.S. Term Limits*, 514 U.S. at 832-33 ("the Framers intended the Elections Clause to grant States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from federal office.").

[54] U.S. Cong. Art. I, sec. 4.

challenged provision supplemented the Qualifications Clause."[55] It is the Composition Clause (and, as noted below, the Qualifications Clause) that determine the prerequisites for congressional office.

The effort to focus on the District Clause rather than the Composition Clause is unlikely to succeed in court. The context of this language reinforces the plain meaning of the text itself. The District Clause concerns the authority of Congress over the internal affairs of the seat of government. To elevate that clause to the same level as the Composition Clause would do great violence to the traditions of constitutional interpretation.

B. The Original Meaning and History of Article I Strongly Rebut the Claims of Inherent Authority to Create New Forms of Members in Congress.

*1. The Original Understanding of the Composition Clause.*

The intent behind the Composition Clause was clear throughout the debates as a vital structural provision. The Framers were obsessed with the power of the states and the structure of Congress. Few matters concerned the Framers more than who could vote in Congress and how they were elected. Indeed, some delegates wanted the House to be elected by the state legislatures as was the Senate.[56] This proposal was not adopted, but the clear import of the debate was that representatives would be elected from the actual states. The very requirement of qualifications being set by "state legislature" was meant to reaffirm that the composition of Congress would be controlled by states.

This view was reinforced by Framers at the time. It was precisely the control of the states of the composition of both houses and the presidency that was the principle argument for the Constitution. The Composition Clause was vital to securing the votes of reluctant members, particularly Antifederalists. Madison emphasized this point in *Federalist No. 45* when he pointed out that "each of the principal branches of the federal government will owe its existence more or less to the favor of the State governments, and must consequently feel a dependence."[57]

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55 *Schaefer v. Townsend*, 215 F.3d 1031, 1038 (9th Cir. 2000).

56 1 Records of the Federal Convention of 1787, at 359 (Max Farrand ed., rev. ed. 1966)

57 The Federalist No. 45, at 220 (J. Madison).

In his first comments after the Constitutional Convention, James Wilson emphasized the Composition Clause and the requirement that members be elected by actual states. In an October 6, 1787 speech, Wilson responded to Anti-Federalists who feared the power of the new Congress – a speech described at the time as "the first authoritative explanation of the principles of the NEW FEDERAL CONSTITUTION."[58] Wilson stressed that Congress would be tethered closely to the states and that only states could elect members:

> [U]pon what pretence can it be alleged that it was designed to annihilate the state governments? For, I will undertake to prove that upon their existence, depends the existence of the foederal plan. For this purpose, permit me to call your attention to the manner in which the president, senate, and house of representatives, are proposed to be appointed. . . . The senate is to be composed of two senators from each state, chosen by the legislature; and therefore if there is no legislature, there can be no senate. The house of representatives, is to be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature,--*unless therefore, there is a state legislature, that qualification cannot be ascertained,* and the popular branch of the foederal constitution must likewise be extinct. From this view, then it is evidently absurd to suppose, that the annihilation of the separate governments will result from their union; or, that having that intention, the authors of the new system would have bound their connection with such indissoluble ties.[59]

Wilson's comments, in what was billed at the time as the first public defense of the draft Constitution by a Framer, illustrate how important the Composition Clause of Article I, Section 2 was to the structure of government.[60] It was not some ambiguity but the very cornerstone for the new federal system. It is safe to say that the suggestion that the District could achieve equal status to states in Congress would have been viewed as absurd, particularly given the fact that there could be no state legislature for the federal city. Wilson and others made clear that voting members of

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58 13 Documentary History of the Ratification of the Constitution 337, 342 (John P. Kaminski & Gaspare J. Saladino, eds., 1981)

59 *Id.*

60 *Id.*

Congress would be reserved to the representatives of the actual states.

This view was again reaffirmed in the Third Congress in 1794 – only a few years after ratification. The issue of the meaning of Article I, Section 2 was raised when a representative of the territory of Ohio sought admission as a non-voting member to the House. Connecticut Rep. Zephaniah Swift objected to the admission of anyone who is not a representative of a state:

> The Constitution has made no provision for such a member as this person is intended to be. If we can admit a Delegate to Congress or a member of the House of Representatives, we may with equal propriety admit a stranger from any quarter of the world.[61]

Although non-voting members would be allowed, the members on both sides agreed that the Constitution restricted voting members to representatives of actual states. This debate, occurring only a few years after the ratification (and with both drafters and ratifiers) serving in Congress reinforces the clear understanding of the meaning and purpose of the language.

*2. The Original Understanding of the Qualifications Clause.*

Equally probative is the intent behind the Qualifications Clause of Section 2 of Article I. If Congress changes the meaning of the Composition Clause, it could also change the meaning of the Qualifications Clause, which refers to the fixed criteria for eligibility to the House of Representatives, including the condition of being a resident of a state.

It is not simply the reference to a state that makes the Qualifications Clause material to this debate. The Framers wrote this provision in the aftermath of the controversy over John Wilkes.[62] Wilkes had publicly attacked the peace treaty with France and, in doing so, earned the ire of Crown and Parliament. After he was convicted and jailed for sedition, the Parliament moved to declare his ineligible for service in the legislature. He served anyway and eventually the Parliament rescinded the legislative effort to disqualify him. It was deemed as violative of a center precept of the Parliament that it could not manipulate the qualifications needed for entry or service.

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[61] 4 Annals of Cong 884 (Nov 17, 1794). This debate is detailed in David P. Currie, *The Constitution in Congress: The Third Congress* 1793-1795, 63 U. Chi. L. Rev. 1, 42 (1996).

[62] *Powell,* 395 U.S. at 535

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The Wilkes controversy was referenced in the Constitutional Convention as members called for a rigid and fixed meaning as to the qualifications for Congress. Unless Congress was prevented from manipulating its membership, history would repeat itself. James Madison noted "[t]he abuse [the British Parliament] had made of it was a lesson worthy of our attention."[63] Madison warned if Congress could engage in such manipulation it would "subvert the Constitution."[64]

This debate was largely triggered by proposals to allow for congressional authority to add qualifications or to expressly require property prerequisites to membership. These efforts failed, however, on a more general opposition to allowing Congress to change its membership. In a quote later cited by the Supreme Court, Alexander Hamilton noted that "[t]he qualifications of the persons who may choose or be chosen, as has been remarked upon other occasions, are *defined and fixed* in the Constitution, and are *unalterable* by the legislature."[65]

The Supreme Court has emphasized this history in repeatedly holding that it was the intent of the Framers to prevent legislators from altering their own qualifications to manipulate the membership of Congress. Noting the Wilkes affair, the Court observed that the Clause was written in the aftermath of "English precedent [which] stood for the proposition that 'the law of the land had regulated the qualifications of members to serve in parliament' and those qualifications were 'not occasional but fixed.'"[66]

This debate has striking similarity to the current controversy. Today, members are claiming that they can use their inherent authority to create new forms of members in federal enclaves. In the debate over term limits, the Court faced a claim of reserved and undefined authority under the Tenth Amendment.[67] States claimed that the Tenth Amendment establishes leaves them with all reserved powers and thus, unless prohibited, states are entitled to exercise the authority. This is analogous to the District Clause argument that, unless expressly prohibited, Congress has absolute authority under the

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63 *Id.* (quoting 2 Farrand 250).

64 *Id.*

65 The Federalist No. 60, at 371 (emphasis added).

66 *Powell,* 395 U.S. at 528 (quoting 16 Parl. Hist. Eng. 589, 590 (1769)).

67 U.S. Term Limits, Inc. v. Thorton, 514 U.S. 779 (1995).

clause – even to create new members. The Court, however, rejected the argument and noted that this power was never part of the original powers of the states and that "the Framers intended the Constitution to be the exclusive source of qualifications for members of Congress." [68] The same can be said of the District Clause. The power to unilaterally manipulate the rolls of membership in Congress was never an inherent power of Congress and the composition of Congress was exclusively defined under Section 2 of Article I. Indeed, as the Court noted in *U.S. Term Limits v. Thorton*, the Framers feared that, if the membership of Congress could be manipulated, Congress could become "a self perpetuating body to the detriment of the new Republic."[69]

The Qualifications Clause, and its debate, magnify the significance of this section to the design of our constitutional system. While this debate concerned the ability of states rather than Congress to manipulate the rolls of members, the principle remains the same. Indeed, the Framers were so concerned about efforts in Congress to use majority voting to manipulate membership that they required a super-majority to expel a member.[70] Just as there is no inherent right to exclude members or tweak qualifications, there is no right to create new forms of members. The Framers clearly viewed such efforts at manipulation of the composition of Congress as destabilizing for the entire system. Indeed, the very stability of the legislative branch depends upon preventing Congress to unilaterally shrink or expand its membership by tweaking the Qualifications Clause.

*3. The Original Understanding of the District Clause.*

As opposed to either the Composition or Qualifications Clauses, the District Clause was not part of the debate or the provisions relating the structure of the government itself. It was contained with a list of enumerated powers of Congress in Section 8 that cover everything from creating post

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68 *Id.*

69 *Id.* at 794.

70 U.S. Const. art. I, 5, cl. 2. Madison viewed expulsion as a potential abuse tool of factional interests, the scourge of democratic systems. *See* Records, *supra,* at 254 (referencing how "in emergencies of faction might be dangerously abused"); *see also Powell v. McCormack*, 395 U.S. 486, 536 (1969) (noting that "the Convention's decision to increase the vote required to expel, because that power was 'too important to be exercised by a bare majority'").

offices to inferior courts. It was notably placed in the same clause as the power of the Congress over "the Erection of Forts, Magazines, Arsenals, dock-yards, and other needful buildings." Nevertheless, the creation of a seat of government was an issue of interest and concern before ratification.

As noted above, the status of the federal district was also clearly understood as a non-state entity. The Supreme Court has observed that "[t]he object of the grant of exclusive legislation over the district was . . . national in the highest sense, and the city organized under the grant became the city, not of a state, not of a district, but of a nation."[71] While Madison conceded that some form of "municipal legislature for local purposes" might be allowed, the district was to be the creation of Congress and maintained at its discretion.[72]

It has been repeatedly asserted by defenders of this legislation that the Framers simply did not consider the non-voting status of District residents and could not possibly have intended such a result. This argument is clearly and irrefutably untrue. The political status of the District residents was a controversy then as it is now. The Federal Farmer captured this concern in his January 1788 letter, where he criticized the fact that there was not "a single stipulation in the constitution, that the inhabitants of this city, and these places, shall be governed by laws founded on principles of Freedom."[73]

The absence of a vote in Congress was clearly understood as a prominent characteristic of a federal district. However, being a resident of the new capitol city was viewed as compensation for this limitation. Indeed, it was the source of considerable competition and jealousy among the states.[74] In the Virginia Ratification Convention, Patrick Henry observed with unease how they have been

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71 *O'Donoghue*, 289 U.S. at 539-40.

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

73 Letters from the Federal Farmer to the Republican, XVI (January 20, 1788) reprinted in 2 The Complete Anti-Federalist 327 (Herbert J. Storing, ed., Univ. of Chicago Press 1981); *see also* The Founders' Constitution, *supra*, at 220.

74 Notably, during the Virginia Ratification Convention, when Grayson describes the District as "detrimental and injurious to the community, and how repugnant to the equal rights of mankind," he is not referring to the

> told that numerous advantages will result, from the concentration of the wealth and grandeur of the United States in one happy spot, to those who will reside in or near it. Prospects of profits and emoluments have a powerful influence on the human mind.[75]

Since residence would be voluntary within the federal district, most viewed the representative status as a *quid pro quo* for the obvious economic and symbolic benefit. Indeed, despite the fact that the citizens of the capitol city would be disenfranchised, many cities from Baltimore to Philadelphia to Elizabethtown vied for the opportunity to be selected for the honor.[76] Moreover, it is not true that few people thought that the capitol city "would evolve into the vibrant demographic and political entity it is today."[77] To the contrary, the competition among the states for this designation was due in great part to the expectation that it would grow to be the greatest American city. Indeed, some cities vying for the status were already among the largest cities like Baltimore, Annapolis, and Philadelphia. The new capitol city was expected to be grand. Ultimately, Pierre Charles L'Enfant designed a city plan to accommodate 800,000 people – a huge city at that time.[78]

It is true that there was little consideration of how residents would fare in terms of taxation, civil rights, conscription and the like.[79] There is a very

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lack of voting rights but the anticipated power that District residents would wield over the rest of the nation due to "such exclusive emoluments." The Founders' Constitution, *supra,* at 190.

[75] *Id.*

[76] Bowling, *supra,* at 78-79, 182-190.

[77] Richard P. Bress & Lori Alvino McGill, "Congressional Authority to Extend Voting Representation to Citizens of the District of Columbia: The Constitutionality of H.R. 1905, American Constitutional Society," May 2007, at 3.

[78] *Adams v. Clinton*, 90 F. Supp. 2d 35, 49 n. 24 (D.D.C. 2000).

[79] Various references were made to potential forms of local governance that might be allowed by Congress. Madison noted that:

> as the [ceding] State will no doubt provide in the compact for the rights and the consent of the citizens inhabiting [the federal district]; as the inhabitants will find sufficient inducements of interest to become willing parties to the cession; as they will have had their voice in the election of the government which is to exercise authority over them; as a municipal legislature for local purposes, derived from their

good reason for this omission: the drafters understood that these conditions would depend entirely on Congress. Since these matters would be left to the discretion of Congress, the details were not relevant to the constitutional debates. However, the *status* of the residents was clearly debated and understood: residents would be represented by Congress as a whole and would not have individual representation in Congress.

During ratification, various leaders objected to the disenfranchisement of the citizens in the district. In New York, Thomas Tredwell objected that the non-voting status of the District residents "departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote."[80]

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> own suffrages, will of course be allowed them; and as the authority of the legislature of the State, and of the inhabitants of the ceded part of it, to concur in the cession, will be derived from the whole people of the State, in their adoption of the Constitution, every imaginable objection seems to be obviated.

The Federalist Papers No. 43, *supra*, at 280 The drafters correctly believed that the "inducements" for ceding the land would be enough for residents to voluntarily agree to this unique status. Moreover, Madison correctly envisioned that forms of local government would be allowed – albeit in varying forms over the years.

[80] 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 402 (Jonathan Elliot ed., 1888). The whole of Thomas Tredwell's comments merit reproduction:

> The plan of the federal city, sir, departs from every principle of freedom, as far as the distance of the two polar stars from each other; for, subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote, is laying a foundation on which may be erected as complete a tyranny as can be found in the Eastern world. Nor do I see how this evil can possibly be prevented, without razing the foundation of this happy place, where men are to live, without labor, upon the fruit of the labors of others; this political hive, where all the drones in the society are to be collected to feed on the honey of the land. How dangerous this city may be, and what its operation on the general liberties of this country, time alone must discover; but I pray God, it

Some delegates even suggested amendments that would have addressed the problem. One such amendment was offered by Alexander Hamilton, who wanted the District residents to be able to secure representation in Congress once they grew to a reasonable size.[81] On July 22, 1788, Hamilton asked that the District Clause be amended to mandate that "the Inhabitants of the said District shall be entitled to the like essential Rights as the other inhabitants of the United States in general."[82] Indeed, at least two amendments were proposed to give residents representations in that convention alone. Other such amendments were offered in states like North Carolina and Pennsylvania. These efforts to give District residents conventional representation failed despite the advocacy of no less a person than Alexander Hamilton.[83]

Notably, in at least one state convention, the very proposal to give the District a vote in the House but not the Senate was proposed. In Massachusetts, Samuel Osgood sought to amend the provision to allow the residents to be "represented in the lower House."[84] No such amendment was enacted. Instead, some state delegates like William Grayson distinguished the District from a state entity in Virginia. Repeatedly, he stressed that the District would not have basic authorities and thus "is not to be a fourteenth state."[85]

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may not prove to this western world what the city of Rome, enjoying a similar constitution, did to the eastern.

81 5 The Papers of Alexander Hamilton 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

82 *Id.*

83 This is not to say that the precise conditions of the cessation were clear. Indeed, some states passed Amendments that qualified their votes – amendments that appear to have been simply ignored. Thus, Virginia ratified the Constitution but specifically indicated that some state authority would continue to apply to citizens of the original state from which "Federal Town and its adjacent District" was ceded. Moreover, Congress enacted a law that provided that the laws of Maryland and Virginia "shall be and continue in force"[83] in the District – suggesting that, unless repealed or amended, Maryland continues to have jurisdictional claims in the District.

84 *Id.*

85 The Founders' Constitution, *supra*, at 223.

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**PROFESSOR JONATHAN TURLEY**

Objections to the political status of the District residents were unpersuasive before ratification. The greatest concern was that the District could become create an undue concentration of federal authority and usurp state rights. Even with the express guarantees of state powers under the Composition Clause, there were many who were still deeply suspicious of the ability of the federal government to "annihilate" state authority.[86] Antifederalists like George Mason viewed the existence of a district under the exclusive control of Congress to be threatening.[87] He was not alone. Many viewed the future city to be a likely threat not just to other cities but the nation due to its power and size. Samuel Osgood noted that he had "finally fixed upon the exclusive legislation in the Ten Miles Square . . What an inexhaustible fountain of corruption we are opening?"[88] A member of the New York Ratification Convention compared the new Capitol City to Rome and complained that it could prove so large and powerful as to control the nation as did that ancient city.[89] There would have been a riot if, in addition to creating a federal district, Congress could give it voting status equal to a state. The possibility of a federal district or territory being made voting members of Congress would have certainly endangered – if not doomed -- the precarious majority supporting the Constitution.

In order to quell fears of the power of the District, supporters of the Constitution emphasized that the exclusive authority of Congress over the District would have no impact on states, but was only a power related to the *internal* operations of the seat of government. This point was emphasized

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86 *Id.*

87 In the Virginia Ratification Convention, notes record how George Mason stressed his view that

> few clauses in the Constitution so dangerous as that which gave Congress exclusive power of legislation within ten miles square. Implication, he observed, was capable of any extension, and would probably be extended to augment the congressional powers. But here there was no need of implication. This clause gave them an unlimited authority, in every possible case, within that district. This ten miles square, says Mr. Mason, may set at defiance the laws of the surrounding states, and may, like the custom of the superstitious days of our ancestors, become the sanctuary of the blackest crimes.

88 Bowling, *supra*, at 81.

89 *Id.*

by Edmund Pendleton on June 16, 1788 as the President of the Virginia Ratification Convention. He assured his colleagues that Congress could not use the District Clause to affect states because the powers given to Congress only affected District residents and not states or state residents:

> Why oppose this power? Suppose it was contrary to the sense of their constituents to grant exclusive privileges to citizens residing within that place; the effect would be directly in opposition to what he says. It could have *no operation without the limits* of that district. Were Congress to make a law granting them an exclusive privilege of trading to the East Indies, it could have no effect the moment it would go without that place; for their exclusive power is confined to that district. . . . This exclusive power is limited to that place solely for their own preservation, which all gentlemen allow to be necessary ...[90]

Pendleton's comments capture the essence of the problem then and now. Congress has considerable plenary authority over the District, but that authority is lost when it is used to change the District's status vis-à-vis the states. Such external use of District authority is precisely what delegates were assured could not happen under this clause.

*iii. Retrocession and the Affirmance of the Non-Voting Status of District Residents.*

The knowledge of the non-voting status of the Capitol City was again reaffirmed not long after the cessation when a retrocession movement began. Within a few years of ratification, leaders continued to discuss the disenfranchisement of citizens from votes in Congress was clearly understood. Republican Rep. John Smilie from Pennsylvania objected that "the people of the District would be reduced to the state of subjects, and deprived of their political rights."[91] The passionate opposition to the non-voting status of the District was a strong as it is today:

> We have most happily combined the democratic representative with the federal principle in the Union of the States. But the inhabitants of this territory, under the exclusive legislation of Congress, partake of

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90 The Founders' Constitution, *supra*, at 180.

91 10 Annals of Cong. 992 (1801); *see also* Congressional Research Service, *supra*, at 6.

> neither the one nor the other. They have not, and they cannot possess a State sovereignty; nor are they in their present situation entitled to elective franchise. They are as much the vassals of Congress as the troops that garrison your forts, and guard your arsenals. They are subjects, not merely because they are not represented in Congress, but also because they have no rights as freemen secured to them by the Constitution.[92]

Members questioned the need to "keep the people in this degraded situation" and objected to subjecting American citizens to "laws not made with their own consent."[93] The federal district was characterized as nothing more than despotic rule "by men . . . not acquainted with the minute and local interests of the place, coming, as they did, from distances of 500 to 1000 miles."[94] Much of this debate followed the same lines of argument that we hear today. While acknowledging that "citizens may not possess full political rights," leaders like John Bacon of Massachusetts noted that they had special status and influence as residents of the Capitol City.[95] Yet, retrocession bills were introduced within a few years of the actual cessation – again prominently citing the lack of any congressional representation as a motivating factor. Indeed, the retrocession of Virginia highlights the original understanding of the status of the District. Virginians contrasted their situation with those residents of Washington. For them, cessation was "an evil hour, [when] they were separated" from their state and stripped of their political voice.[96] Washingtonians, however, were viewed as compensated for their loss of political representation. As a committee noted in 1835, "[o]ur situation is essentially different, and far worse, than that of our neighbors on the northern side of the Potomac. They are citizens of the Metropolis, of a great, and noble Republic, and wherever they go, there clusters about them all those glorious associations, connected with the progress and fame of their country. They are in some measure compensated in the loss of their political rights."[97]

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

93 Richards, *supra*, at 3

94 *Id.* (quoting Rep. Smilie)

95 *Id.* at 4.

96 *Id.*

97 *Id.*

Thus, during the drive for retrocession that began shortly after ratification, District residents appear to have opposed retrocession and accepted the condition as non-voting citizens in Congress for their special status. Indeed, the only serious retrocession effort focused on Georgetown and not the Capitol City itself. Some in Maryland vehemently objected to the non-voting status, complaining to Congress that "the people are almost afraid to present their grievances, least a body in which they are not represented, and which feels little sympathy in their local relations, should in their attempt to make laws for them, do more harm than good."[98] Yet, even in a vote taken within Georgetown, the Board of Common Council voted overwhelmingly (549 to 139) to accept these limitations in favor of staying with the federal district.[99]

During the Virginia retrocession debate, various sources reported the strong opposition of residents in the city to returning to Maryland – even though such retrocession would return their right to full representation. The reason was financial. District residents received considerable economic advantages from living within the federal city. These benefits were not as great in the Virginia areas, a point made in congressional report:

> The people of the county and town of Alexandria have been subjected not only to their full share of those evils which affect the District generally, but they have enjoyed none of those benefits which serve to mitigate their disadvantages in the county of Washington. The advantages which flow from the location of the seat of Government are almost entirely confined to the latter county, *whose people, as far as your committee are advised, are entirely content to remain under the exclusive legislation of Congress*. But the people of the county and town of Alexandria, who enjoy few of those advantages, are (as your committee believe) justly impatient of a state of things which subjects them not only to all the evils of inefficient legislation, but also to political disfranchisement.[100]

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98 *Id.* (quoting memorial submitted by Maryland Senator William D. Merrick).

99 *Id.*

100 *Retrocession of Alexandria to Virginia*, Daily Nat'l Intelligencer, Mar. 20, 1846, at 1 (reprinting committee report).

The result of this debate was the retrocession of Northern Virginia, changing the shape of the District from the original diamond shape created by George Washington.[101] The Virginia land was retroceded to Virginia in 1846. The District residents chose to remain as part of the federal seat of government – independent from participation or representation in any state. Just as with the first cession, it was clear that residents had knowingly "relinquished the right of representation, and . . . adopted the whole body of Congress for its legitimate government."[102]

Finally, much is made of the ten-year period during which District residents voted with their original states – before the federal government formally took over control of the District. As established in *Adams*, this argument has been raised and rejected by courts as without legal significance.[103] This was simply a transition period before the District became the federal enclave. Under the Residence Act of 1790, entitled An Act for Establishing the Temporary and Permanent Seat of the Government of the United States, Congress selected Philadelphia as the temporary capitol while authorizing the establishment of the federal district.[104] This law allowed the District to continue under the prior state systems pending the implementation of federal jurisdiction. That law expressly states that, while the District was being surveyed and established, "the operation of the laws of the State within such district shall not be affected by this acceptance, until the time fixed for the removal of the government thereto, and until Congress shall otherwise by law provide."[105] Clearly, Congress could use its authority regarding the internal affairs of the District to continue such state functions

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

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

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

104 Act Establishing the Temporary and Permanent Seat of the Government of the United States, ch. 28, 1 Stat. 130 (1790).

105 *Id.*

pending its final takeover – to avoid a dangerous gap in basic governmental functions. It was clearly neither the intention of the drafters nor indicative of the post-federalization status of residents. Rather, as indicated by the Supreme Court,[106] the exclusion of residents from voting was the consequence of the completion of the cessation transaction – which transformed the territory from part of a state, whose residents were entitled to vote under Article I, to being the seat of government, whose residents were not. Although Congress' exercise of jurisdiction over the District through passage of the Organic Act was the last step in that process, it was a step expressly contemplated by the Constitution.[107]

iv. *Modern Evolution of the District Government as a Non-State Entity.*

When one looks at the historical structure and status of the District as a governing unit, it is obvious that neither the drafters nor later legislators would have viewed the District as interchangeable with a state under Article I. When this District was first created, it was barely a city, let alone a substitute for a state: "The capitol city that came into being in 1800 was, in reality, a few federal buildings surrounded by thinly populated swampland, on which a few marginal farms were maintained."[108]

For much of its history, the District was not even properly classified as an independent city. In 1802, the first mayor was a presidential appointee -- as was the council.[109] Congress continued to possess authority over its budget and operations. While elections were allowed until 1871, the city was placed under a territorial government and effectively run by a Board and Commissioner of Public Works – again appointed by the President. After 1874, the city was run through Congress and the Board of Commissioners.[110]

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

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

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

109 *Id.* at 826-828.

110 *Id.*

President Lyndon Johnson expressly treated the District as the equivalent of a federal agency when he appointed Walter Washington to be mayor in 1967.[111] Under Johnson's legal interpretation, giving the District a vote in Congress would have been akin to making the Department of Defense a member to represent all of the personnel and families on military bases. In granting this form of home rule, Congress retained final approval of all legislative and budget items. In 1973, when it passed the Self-Government Act, Congress noted that it was simply a measure to "relieve Congress of the burden of legislating upon essentially local District matters."[112] Congress again retained final approval.

Thus, for most of its history, the District was maintained as either a territory, a federal agency, or a delegated governing unit of Congress. Both of these constructions is totally at odds with the qualification and descriptions of voting members of Congress. The drafters went to great lengths to guarantee independence of members from federal offices or benefits in Article I, Section 6. Likewise, no members are subject to the potential manipulation of their home powers by either the federal government or the other states (through Congress).

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

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

Given the unwavering consistency between the plain meaning of the text of Article I and the historical record, it is baffling to read assertions by Professor Dinh that "[t]here are no indications, textual or otherwise" to suggest that the Framers viewed the non-voting status of the District to be permanent or beyond the inherent powers of Congress to change.[113] Indeed, in the last hearing, Professor Dinh repeated his position that this issue was no consideration during the drafting and ratification. He (and Mr. Charnes)

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111 *Id.* at 829-830.
112 D.C. Code 1981, § 1-201(a).
113 Dinh & Charnes, *supra*, at 6.

have written that the non-voting status "was neither necessary nor intended by the Framers" and further assert that the only purpose of establishing a federal district was "to ensure that the national capitol would not be subject to the influences of any state."[114] They insist that the "representation for the District's residents seemed unimportant" at the time.[115] The record, however, directly contradicts these statements. As noted earlier, there were various stated purposes behind the federal district and the non-voting status was repeatedly raised before final ratification. Most importantly, the non-voting status of residents was tied directly to the concept of a seat of government under the control and exclusive jurisdiction of Congress. The non-voting status of the District was viewed as obnoxious by some and essential by others before ratification and during the early retrocession movement.

It is true that the District is viewed as "an exceptional community" that is "[u]nlike either the States or Territories,"[116] this does not mean that this unique or "*sui generis*" status empowers Congress to bestow the rights and privileges to the District that are expressly given to the states. To the contrary, Congress has plenary authority in the sense that it holds legislative authority on matters *within* the District.[117] The extent to which the District has and will continue to enjoy its own governmental systems is due entirely to the will of Congress.[118] This authority over the District does not mean that it can increase the power of the District to compete with the states or dilute their constitutionally guaranteed powers under the Constitution. Indeed, as noted below, the District itself took a similar position in recent litigation when it emphasized that it should not be treated as a state under the Second Amendment and that constitutional limitations are not implicated by laws affecting only the federal enclave with "no possible impact on the states."[119]

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114 *Id.*

115 *Id.* at 6.

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

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

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

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

The repeated reference to the District Clause in terms of taxation, conscription, and other state-like matters is entirely irrelevant. Congress can impose any of these requirements within the District. However, it cannot use the authority over the internal operations of the District to change its political status vis-à-vis the states. Ironically, just as the non-voting status of the District was discussed before ratification, so was the distinction between exercising powers within the District and using the same powers against states. For example, during the Virginia debates, Pendleton defended the District Clause by noting that "this clause does not give Congress power to impede the operation of any part of the Constitution, or to make any regulation that may affect the interests of the citizens of the Union at large." The dangers posed by a "Federal Town" were muted by the fact that Congress would control its operations and Congress' exclusive legislation concerned its internal operations.

It is equally hard to see the "ample constitutional authority" alluded to by Dinh and Charnes for Congress using its authority over the internal operations of the District to change the composition of voting members in a house of Congress.[120] To the contrary, the arguments made in their paper strongly contradict suggestions of inherent authority to create de facto state members of Congress. For example, it is certainly true that the Constitution gives Congress "extraordinary and plenary power to legislate with respect to the District."[121] However, this legislation is not simply a District matter. This legislation affects the voting rights of the states by augmenting the voting members of Congress. This is legislation with respect to Congress and its structural make-up. More importantly, Dinh and Charnes go to great lengths to point out how different the District is from the states, noting that the District Clause

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

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120 Dinh & Charnes, *supra*, at 4.

121 *Id.*

> reservation under the Tenth Amendment, serves to check the power of Congress vis-à-vis the states.[122]

This is precisely the point. The significant differences between the District and the states further support the view that they cannot be treated as the same entities for the purposes of voting in Congress. The District is not independent of the federal government but subject to the will of the federal government. Nor is the District independent of the states, which can exercise enormous power over its operations. The drafters wanted members to be independent of any influence exerted through federal offices or the threat of arrest. For that reason, they expressly prohibited members from holding offices with the federal government[123] other than their legislative offices and protected them under the Speech or Debate Clause.[124]

The District has different provisions because it was not meant to act as a state. For much of its history, the District was treated like a territory or a federal agency without any of the core independent institutions that define most cities, let alone states. Thus, the District is allowed exceptions because it is not serving the functions of a state in our system.

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

> The District was made up of portions of two of the original states of the Union, and was not taken out of the Union by

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122 *Id.* at 6.

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

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

> cessation. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution . . . The Constitution had attached to [the District] irrevocably. There are steps which can never be taken backward . . . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession.[125]

The upshot of these opinions is that a literal interpretation of the word "states" would produce facially illogical and unintended consequences. Since residents remain U.S. citizens, they must continue to enjoy those protections accorded to citizens.[126] Otherwise, they could all be enslaved or impaled at the whim of Congress.

Likewise, the Commerce Clause is intended to give Congress the authority to regulate commerce that crosses state borders. While the Clause refers to commerce "among the several states," the Court rejected the notion that it excludes the District as a non-state.[127] The reference to several states was to distinguish the regulated activity from intra-state commerce. As a federal enclave, the District was clearly subsumed within the Commerce Clause.

None of these cases means that the term "states" can now be treated as having an entirely fluid and malleable meaning. The courts merely adopted a traditional interpretation as a way to minimize the conflict between provisions and to reflect the clear intent of the various provisions.[128] The District clause was specifically directed at the meaning of a state – it creates a non-state status related to the seat of government and particularly Congress.

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

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

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

128 *See also District of Columbia v. Carter,* 409 U.S. 418, 420 (1973) ("Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.").

Non-voting status directly relates and defines that special entity. In provisions dealing with such rights as equal protection, the rights extend to all citizens of the United States. The literal interpretation of states in such contexts would defeat the purpose of the provisions and produce a counterintuitive result. Thus, Congress could govern the District without direct representation but it must do so in such a way as not to violate those rights protected in the Constitution:

> Congress may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before them, as it may think fit, *so long as it does not contravene any provision of the Constitution of the United States.*[129]

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

The decision in *National Mutual Ins. Co. v. Tidewater Transfer Co., Inc.*,[130] is heavily relied upon in the Dinh and Starr analyses. However, the actual rulings comprising the decision would appear to contradict their conclusions. Only two justices indicated that they would treat the District as a state in their interpretations of the Constitution. The Court began its analysis by stating categorically that the District was not a state and could not be treated as a state under Article III. This point was clearly established in 1805 in *Hepburn v. Ellzey,*[131] only a few years after the establishment of the District. The Court rejected the notion that "Columbia is a distinct political society; and is therefore 'a state' . . . the members of the American

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129 *Palmore v. United States*, 411 U.S. 389, 397-398 (1973).
130 337 U.S. 582 (1948)
131 6 U.S. (2 Cranch) 445 (1805).

confederacy only are the states contemplated in the constitution."[132] This view was reaffirmed again by the Court in 1948:

> In referring to the "States" in the fateful instrument which amalgamated them into the "United States," the Founders obviously were not speaking of states in the abstract. They referred to those concrete organized societies which were thereby contributing to the federation by delegating some part of their sovereign powers and to those that should later be organized and admitted to the partnership in the method prescribed. They obviously did not contemplate unorganized and dependent spaces as states. The District of Columbia being nonexistent in any form, much less a state, at the time of the compact, certainly was not taken into the Union of states by it, nor has it since been admitted as a new state is required to be admitted.[133]

However, the Court also ruled that Congress could extend diversity jurisdiction to the District because this was a modest use of Article I authority given the fact that the "jurisdiction conferred is limited to controversies of a justiciable nature, the sole feature distinguishing them from countless other controversies handled by the same courts being the fact that one party is a District citizen."[134] Thus, while residents did not have this inherent right as members of a non-state, Congress could include a federal enclave within the jurisdictional category.

When one looks at the individual opinions of this highly fractured plurality decision, it is hard to see what about *Tidewater* gives advocates so much hope.[135] Dinh and his co-author Charnes state that "[t]he significance of *Tidewater* is that the five justices concurring in the result believed either that the District was a state under the terms of the Constitution or that the District Clause authorized Congress to enact legislation treating the District as a state."[136] Yet, to make this bill work, a majority of the Court would have to recognize that the District clause gives Congress this extraordinary

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132 *Id.* at 453.

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

134 *Id.* at 592.

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

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

authority to convert the District into an effective state for voting purposes. In *Tidewater*, six of nine justices appear to reject the argument that the clause could be used to extend diversity jurisdiction to the District, a far more modest proposal than creating a voting non-state entity. It was the fact that five justices agreed *in the result* that produced the ruling, a point emphasized by Justice Frankfurter when he noted with considerable irony in his dissent:

> A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected -- but not the same majority. And so, conflicting minorities in combination bring to pass a result -- paradoxical as it may appear -- which differing majorities of the Court find insupportable.[137]

When one reviews the insular opinions, it is easy to see what Frankfurter meant and why this case is radically overblown in its significance to the immediate controversy. Justices Rutledge and Murphy, in concurring, based their votes on the irrelevance of the distinction between a state citizen and a District citizen for the purposes of diversity. This view, however, was expressly rejected by the Jackson plurality of Jackson, Black, and Burton. The Jackson plurality did not agree with Rutledge that the term "state" had a more fluid meaning – an argument close to the one advanced by Dinh and Starr. Conversely, Rutledge and Murphy strongly dissented from the arguments of the Jackson plurality.[138] Likewise, two dissenting opinions, Justice Frankfurter, Vinson, Douglas and Reed rejected arguments that Congress had such authority under either the District Clause or the Diversity Clause in the case. The Jackson plurality prevailed because Rutledge and Murphy were able to join in the result, not the rationale. Rutledge and Murphy suggested that they had no argument with the narrow reading of the structuring provisions concerning voting members of Congress. Rather, they drew a distinction with other provisions affecting the rights of individuals as potentially more expansive:

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

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

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

Thus, Rutledge saw that, even allowing for some variation in the interpretation of "states," there was distinction to be drawn when such expansive reading would affect the organization or structure of Congress. This would leave at most three justices who seem to support the interpretation of the District clause advanced in this case.

The citation of *Geofroy v. Riggs*,[139] by Professor Dinh is equally misplaced. It is true that the Court found that a treaty referring to "states of the Union" included the District of Columbia. However, this interpretation was not based on the U.S. Constitution and its meaning. Rather, the Court relied on meaning commonly given this term under international law:

> It leaves in doubt what is meant by "States of the Union." Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, §§ 5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government.[140]

This was an interpretation of a treaty based on the most logical meaning that the signatories would have used for its terminology. It was not, as suggested, an interpretation of the meaning of that term in the U.S. Constitution. Indeed, as shown above, the Court begins by recognizing the more narrow

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139 133 U.S. 258 (1890).

140 *Id.* at 268.

meaning under the Constitution before adopting a more generally understood meaning in the context of international and public law for the purpose of interpreting a treaty.

Finally, Professor Dinh and Mr. Charnes place great importance on the fact that citizens overseas are allowed to vote under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[141] This fact is cited as powerful evidence that "[i]f there is no constitutional bar prohibiting Congress from permitting overseas voters who are not citizens of a state to vote in federal elections, there is no constitutional bar to similar legislation extending the federal franchise to District residents." Again, the comparison between overseas and District citizens is misplaced. While UOCAVA has never been reviewed by the Supreme Court and some legitimate questions still remain about its constitutionality, a couple of courts have found the statute to be constitutional.[142] In the overseas legislation, Congress made a logical choice in treating citizens abroad as continuing to be citizens of the last state in which they resided. This same argument was used and rejected in *Attorney General of the Territory of Guam v. United States*.[143] In that case, citizens of Guam argued (as do Dinh and Charnes) that the meaning of state has been interpreted liberally and the Overseas Act relieves any necessity for being the resident of a state for voting in the presidential election. The court categorically rejected the argument and noted that the act was "premised constitutionally on prior residence in a state."[144] The court quoted from the House Report in support of this holding:

> The Committee believes that a U.S. citizen residing outside the United States can remain a citizen of his last State of residence and domicile for purposes of voting in Federal elections under this bill, as long as he has not become a citizen of another State and has not otherwise relinquished his citizenship in such prior State.[145]

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

142 *See Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001); *De La Rosa v. United States*, 842 F. Supp. 607, 611 (D. P. R. 1994).

143 738 F.2d 1017 (9th Cir. 1984).

144 *Id.* at 1020.

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

Given this logical and limited rationale, the Court held that UOCAVA "does not evidence Congress's ability or intent to permit all voters in Guam elections to vote in presidential elections."[146]

Granting a vote in Congress is not some tinkering of "the mechanics of administering justice in our federation."[147] This would touch upon the constitutionally sacred rules of who can create laws that bind the nation.[148] This is not the first time that Congress has sought to give the District a voting role in the political process that is given textually to the states. When Congress sought to allow the District to participate in the Electoral College, it passed a constitutional amendment to accomplish that goal – the Twenty-Third Amendment. Likewise, when Congress changed the rules for electing members of the United States Senate, it did not extend the language to include the District. Rather, it reaffirmed that the voting membership was composed of representatives of the states. These cases and enactments reflect that voting was a defining characteristic of the District and not a matter that can be awarded (or removed) by a simple vote of Congress.

The overwhelming case precedent refutes the arguments of Messrs. Dinh and Starr. Indeed, just recently in *Parker v. District of Columbia*,[149] the United States Court of Appeals for the District of Columbia reaffirmed in both majority and dissenting opinions that the word "states" refers to actual state entities.[150] *Parker* struck down the District's gun control laws as

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146 *Id.*

147 *National Mutual Ins.* at 585.

148 In the past, the District and various territories were afforded the right to vote in Committee. However, such committees are merely preparatory to the actual vote on the floor. It is that final vote that is contemplated in the constitutional language. *See Michel v. Anderson*, 14 F.3d 623, 629 (D.C. Cir. 1994) (recognizing the constitutional limitation that would bar Congress from granting votes in the full House).

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

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

violative of the Second Amendment.[151] That amendment uses the term "a free state" and the parties argued over the proper interpretation of this term. Notably, in its briefs and oral argument, the District appeared to take a different position on the interpretation of the word "state," arguing that the court could dismiss the action because the District is not a state under the Second Amendment—a position later adopted by the dissenting judge. The District argued:

> The federalism concerns embodied in the Amendment have no relevance in a purely federal entity such as the District because there is no danger of federal interference with an effective *state* militia. This places District residents on a par with state residents. . . . The Amendment, concerned with ensuring that the national government not interfere with the "security of a free State," is not implicated by local legislation in a federal district having no possible impact on the states or their militias.[152]

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

> The Supreme Court has long held that "State" as used in the Constitution refers to one of the States of the Union. [citing cases] . . .

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

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

> In fact, the Constitution uses "State" or "States" 119 times apart from the Second Amendment and in 116 of the 119, the term unambiguously refers to the States of the Union.[153]

The dissent goes on to specifically cite the fact that the District is not a state for the purposes of voting in Congress.[154] Thus, in the latest decision from the D.C. Circuit, the judges continue the same view of the non-state status of the District as described in earlier decisions of both the Supreme Court and lower courts.

### *B.* S. 1257 Would Create Both Dangerous Precedent and Serious Policy Challenges for the Legislative Branch.

The current approach to securing partial representation for the District is fraught with dangers. What is striking is how none of these dangers have been addressed by advocates on the other side with any level of detail. Instead, members are voting on a radical new interpretation with little thought or understanding of its implications for our constitutional system. The Framers created clear guidelines to avoid creating a system on a hope and a prayer. It would be a shame if our current leaders added ambiguity where clarity once resided in the Constitution on such a question. The burden should be on those advocating this legislation to fully answer each of these questions before asking for a vote from Congress. Members cannot simply shrug and leave this to the Court. Members have a sacred duty to oppose legislation that they believe is unconstitutional. While many things may be subject to political convenience, our constitutional system should be protected by all three branches with equal vigor.

*i. Partisan Manipulation of the Voting Body of Congress.* By adopting a liberal interpretation of the meaning of states in Article I, the Congress would be undermining the very bedrock of our constitutional system. The membership and division of Congress was carefully defined by the Framers. The legislative branch is the engine of the Madisonian democracy. It is in these two houses that disparate factional disputes are converted into majoritarian compromises – the defining principle of the

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

[154] *Id.*

Madisonian system. By allowing majorities to manipulate the membership rolls, it would add dangerous instability and uncertainty to the system. The obvious and traditional meaning of "states" deters legislative measures to create new forms of voting representatives or shifting voters among states.[155] By taking this approach, the current House could award a vote to District residents and a later majority could take it away. The District residents would continue to vote, not as do other citizens, but at the whim and will of the Congress like some party favor that can be withdrawn with the passing fortunes of politics. Moreover, as noted below in the discussion of the Utah seat, the evasion of the 435 membership limitation created in 1911 would encourage additional manipulations of the House rolls in the future. Finally, if the Congress can give the District one vote, they could by the same authority give the District ten votes or, as noted below, award additional seats to other federal enclaves.

*ii. Creation of New Districts Among Other Federal Enclaves and Territories.* If successful, this legislation would allow any majority in Congress to create other novel seats in the House. This is not the only federal enclave and there is great potential for abuse and mischief in the exercise of such authority. Under Article IV, Section 3, "The Congress shall have Powers to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States. . . ." Roughly thirty percent of land in the United States (over 659 million acres) is part of a federal enclave regulated under the same power as the District.[156] The Supreme Court has repeatedly stated that the

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[155] This latter approach was raised by Judge Leval in *Romeu v. Cohen*, 265 F.3d 118, 128-30 (2d Cir. 2001) when he suggested that Congress would require each state to accept a certain proportion of voters in territories to give them a voice in Congress. This view has been rejected, including in that decision in a concurring opinion that found "no authority in the Constitution for the Congress (even with the states' consent) to enact such a provision." *Id.* at 121 (Walker, Jr., C.J., concurring); *see also Igartua-De La Rosa v. United States*, 417 F.3d 145, 154 n9 (1st Cir. 2005). According to Chief Judge Walker, there are "only two remedies afforded by the Constitution: (1) statehood . . ., or (2) a constitutional amendment." *Id.* at 136.

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

congressional authority over other federal enclaves derives from the same basic source:[157]

> This brings us to the question whether Congress has power to exercise 'exclusive legislation' over these enclaves within the meaning of Art. I, § 8, cl. 17, of the Constitution, which reads in relevant part: 'The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever' over the District of Columbia and 'to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.' The power of Congress over federal enclaves that comes within the scope of Art. I, § 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia. The cases make clear that the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action.[158]

Congress could use the same claimed authority to award seats to other federal enclaves. Indeed, since these enclaves were not established with the purpose of being a special non-state entity (as was the District), they could claim to be free of some of these countervailing arguments against the District. Indeed, they are often treated the same as states for the purposes of federal jurisdiction, taxes, military service etc. There are literally millions of people living in these areas, including Puerto Rico (with a population of 4 million people -- roughly eight times the size of the District). These territories are under the plenary authority of Congress.[159] Like the cases involving the District, this authority is stated in often absolute terms. In *Downes v. Bidwell*, the Court held that "[t]he Territorial Clause ... is absolute in its terms, and suggestive of no limitations upon the power of Congress in

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[157] In addition to Article I, Section 8, the Territorial Clause in Article IV. Section 3 states that "[t]he Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

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

[159] *See, e.g., Davila-Perez v. Lockheed Martin Corp.*, 202 F.3d 464, 468 (1st Cir. 2000) ("Puerto Rico ... is still subject to the plenary powers of Congress under the territorial clause ... .").

dealing with them."[160] Puerto Rico would warrant as many as six districts.[161] It is not enough to assert that the District has a more compelling political or historical case. Advocates within theses federal enclaves and territories can (and have)[162] cited the same interpretation for their own representation in Congress.

It is no answer to this concern to note that territory residents do not bear full taxation burdens, military conscription, or the right to vote in presidential elections.[163] Congress determines whether these territories will bear taxation or service burdens – just as it did for the District. The District previously did not share the taxation burden, but now does as a result of congressional fiat. As for the presidential election, it took the 23rd Amendment to secure that right for the District residents. If anything, voting in the presidential elections is proof that the District is not distinct from territories. Finally, it is argued that residents in the territories only have nationality not citizenship.[164] In fact, there are millions of citizens residing in federal enclaves and territories. More to the point, the interpretation being advanced in this legislation turns on the authority of Congress, not the status of residents, to justify the creation of a new district.

*iii. Expanded Senate Representation.* While the issue of Senate representation is left largely untouched in the Dinh and Starr analyses,[165]

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160 *Downes v. Bidwell*, 182 U.S. 244, 285 (1901).

161 Indeed, citing this bill, some have already called for Puerto Rico to be given multiple seats in Congress. Jose R. Coleman Tio, *Comment: Six Puerto Rican Congressmen Go to Washington*, 116 Yale L.J. 1389 (2007).

162 *Id.*

163 Bress & McGill, *supra,* at 8.

164 *Id.*

165 In their footnote on this issue, Dinh and Charnes note that there may be significance in the fact that the Seventeenth Amendment refers to the election of two senators "from each state." Dinh & Charnes, *supra*, at n. 57. They suggest that this somehow creates a more clear barrier to District representatives in the Senate – a matter of obvious concern in that body. The interpretation tries too hard to achieve a limiting outcome, particularly after endorsing a wildly liberal interpretation of the language of Article I. Article I, Section 2 refers to members elected "by the People of the several states" while the Seventeenth Amendment refers to two senators "from each State" and "elected by the people thereof." Since the object of the

there is no obvious principle that would prevent a majority from expanding its ranks with two new Senate seats for the District. Two Senators and a member of the House would be a considerable level of representation for a non-state with a small population. Yet, this analysis would suggest that such a change could take place without a constitutional amendment. When asked about the extension of the same theory to claiming two Senate seats in the last hearing before the House Judiciary Committee, Professor Dinh once again said that he had not given it much thought. Yet, since his first report in 2004, this issue has been repeatedly raised to Dinh without a response. Likewise, Richard Bress has given legal advice to the House Committee on the constitutionality of the legislation for years and was asked the same question in the last hearing. He also insisted that he had not resolved the question. This month, Mr. Bress published a defense of the current bill and, despite the earlier questions from members on this point, he again declined to answer and dismissed the issue as "entirely speculative."[166]

In the last hearing, Dinh ventured to offer a possible limitation that would confine his interpretation to only the House. He cited Article I, Section 3 and (as he had in his 2004 report) noted that "quite unlike the treatment of the House of Representatives, the constitutional provisions relating to composition of the Senate additionally specifies that there shall be two senators 'from each State.'" However, as I pointed out in the prior hearing, Section 2 has similar language related to the House, specifying that "each State shall have at Least one Representative." It remains unclear why this language does not suggest that same "interests of states qua states" for the House as it does for the Senate. Conversely, if this language can be ignored in Section 2, it is not clear why it cannot also be ignored in Section 3. One would expect at a minimum that after three years, these advocates could answer this question with the certainty that they offer on the House question. There is an element of willful blindness to the implications of the new interpretation. To his credit, at the last hearing, Bruce Spiva of DC Vote answered the question directly. He stated that he wanted to see such

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Seventeenth Amendment is to specify the number from each state, it is hard to imagine an alternative to saying "two Senators from each State." It is rather awkward to say "two Senators from each of the several states."

[166] Richard P. Bress & Lori Alvino McGill, "Congressional Authority to Extend Voting Representation to Citizens of the District of Columbia: The Constitutionality of H.R. 1905, American Constitutional Society, May 2007, at 9.

Senate representation and believed that the same arguments could secure such an expansion. Legislators should not vote on a radical new interpretation without confirming whether the same argument would allow the addition of new members in the Senate.

*iv. One Person, One Vote.* This legislation would create a bizarre district that would not be affected by a substantial growth or reduction in population. The bill states that "the District of Columbia may not receive more than one Member under any reapportionment of Members."[167] Thus, whether the District of Columbia grew to 3 million or shrank to 30,000 citizens, it would remain a single congressional district – unlike other districts that must increase or decrease to guarantee such principles as one person/one vote. This could ultimately produce another one person/one vote issue. If the District shrinks to a sub-standard district size in population, other citizens could object that the District residents are receiving greater representation. Since it is not a state under Article I, Section 3 (creating the minimum of vote representative per state), this new District would violate principles of equal representation. Likewise, if it grew in population, citizens would be underrepresented and Congress would be expected to add a district under the same principles – potentially giving the District more representatives than some states. The creation of a district outside of the apportionment requirements is a direct contradiction of the Framers' intent.[168]

*v. Non-severability.* The inevitable challenge to this bill could produce serious legislative complications. With a relatively close House division, the casting of an invalid vote could throw future legislation into question as to its validity. Moreover, if challenged, the status of the two new members would be in question. This latter problem is not resolved by Section 7's non-severability provision, which states "[i]f any provision of this Act, or any amendment made by this Act, is declared or held invalid or unenforceable, the remaining provisions of this Act and any amendment made by this Act shall be treated and deemed invalid and shall have no force or effect of law." However, if the D.C. vote is subject to a temporary or permanent injunction (or conversely, if the Utah seat is enjoined), a provision of the Act would not be technically "declared or held invalid or unenforceable." Rather, it could be enjoined for years on appeal, without

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167 S. 1257, Sec. 2.

168 Wesberry, 376 U. S. at 8-11.

any declaration or holding of unenforceability. This confusion could even extend to the next presidential election. By adding a district to Utah, that new seat would add another electoral vote for Utah in the presidential election. Given the last two elections, it is possible that we could have another cliffhanger with a tie or one-vote margin between the main candidates. The Utah vote could be determinative. Yet, this is likely to occur in the midst of litigation over the current legislation. My challenge to the Elizabeth Morgan Act took years before it was struck down as an unconstitutional Bill of Attainder.[169] Thus, we could face a constitutional crisis over whether the Congress will accept the results based upon this vote when both the Utah and District seats might be nullified in a final ruling.

*vi. Qualification issues.* Delegates are not addressed or defined in Article I, these new members from the District or territories are not technically covered by the qualification provisions for members of Congress. Thus, while authentic members of Congress would be constitutionally defined,[170] these new members would be legislatively defined – allowing Congress to lower or raise such requirements in contradiction to the uniform standard of Article I. Conversely, if Congress treats any district or territory as "a state" and any delegate as a "member of Congress," it would effectively gut the qualification standards in the Constitution by treating the title rather than the definition of "members of Congress" as controlling. As noted above, this directly contradicts the express effort of the Framers to make the qualifications of Congress a fixed structural element of the Constitution. Another example of this contradiction can be found in the definition of the districts of members versus delegates. Members of Congress represent districts that are adjusted periodically to achieve a degree of uniformity in the number of constituents represented, including the need to add or eliminate districts for states with falling constituencies. The District member would be locked into a single district that would not change with the population. The result is undermining the uniformity of qualifications and constituency provisions that the Framers painstakingly placed into Article I.

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169 *Foretich v. United States,* 351 F.3d 1198 (D.C. Cir. 2003).

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

*vii. Faustian Bargain.* This legislation is a true Faustian bargain for District residents who are about to effectively forego true representation for a limited and non-guaranteed district vote in one house. S. 1257 would only serve to delay true representational status for district residents. On a practical level, this bill would likely extinguish efforts at full representation in both houses. During the pendency of the litigation, it is highly unlikely that additional measures would be considered – delaying reforms by many years. Ultimately, if the legislation is struck down, it would leave the campaign for full representation frozen in political amber for many years.

## IV.
## THE CONSTITUTIONAL AND STATUTORY PROBLEMS WITH THE CREATION OF A NEW DISTRICT IN UTAH

While most of my attention has been directed at the addition of a voting seat for the District, I would like to address the second seat that would be added to the House. In my first testimony in the House on this matter, I expressed considerable skepticism over the legality of the creation of an at-large seat in Utah, particularly under the "one-man, one-vote" doctrine established in *Wesberry v. Sanders.*[171] It was decided after the hearing that Utah would take the extraordinary step of holding a special session to create new congressional districts to avoid the at-large problem. The Senate now appears inclined to return to the option of creating a new Utah district. This was a better solution on a constitutional level, but as I argued in a recent article,[172] there seems to be a misunderstanding as to how those seats could be filled.

### A. The New Utah Districts Would Present Logistical Barriers to the Inclusion in the 110th Congress.

There has been an assumption that both the D.C. and Utah seats could be filled immediately and start to cast votes. However, since the districts would change, these would not constitute ordinary vacancies that could be filled by the same voters in the same district.[173] This would require the three

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171 376 U.S. 1 (1964).

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

173 Pursuant to U.S. CONST. art. 1, § 3, states are allowed to address such vacancies and this authority is codified at 2 U.S.C. § 8 (1994) ("The

current members to resign to create vacancies. At a minimum, all four members would have to stand for election and, as new districts (like redistricted districts), the four Utah districts arguably should be filled at the next regular election in two years for the 111th Congress. Reportedly, the prospect of a special election led to the abandonment of the new districts and a return to the more questionable use of an at-large seat.[174]

Thus, while constitutionally superior, the creation of a new seat comes with practical issues that have been largely ignored. If the reciprocity policy contained in this legislation is honored, the District would not begin to exercise its vote until Utah could exercise its vote. However, the non-severability clause refers to portions of the bill being struck down in court rather than simply delayed by the election cycle. The District would be able to exercise its vote immediately while Utah may be delayed until the 111th Congress.

I commend the Senate in adopting this approach to the Utah portion of the legislation. Section 4 of the Senate bill addresses this problem by specifying that these changes would not occur until the 111th Congress at the earliest. This creates a very significant departure from the House bill. While the new districts could always be challenged under conventional gerrymandering allegations, the new language avoids the constitutional problems associated with both an at-large seat and an effort to exercise the new voting district in the 110th Congress.

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time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively."). The presumption is that any special election would be confined to the preexisting district. *See, e.g.*, N.C. GEN. STAT. § 163-13(a) (1995) ("If at any time after expiration of any Congress and before another election, or if at any time after an election, there shall be a vacancy in this State's representation in the House of Representatives of the United States Congress, the Governor shall issue a writ of election, and by proclamation fix the date on which an election to fill the vacancy shall be held in the appropriate congressional district.").

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

B. An At-Large Seat in Utah Would Raise Serious Constitutional and Policy Questions.

Since the House bill has the at-large seat provision and the matter might have to be resolved in conference, it is important to understand why the at-large seat option would guarantee that the Utah portion of the legislation would invite a serious constitutional challenge. There is no question that Congress has profound authority over the regulation and recognition of congressional elections.[175] This power includes determinations on matters related to the manipulation of district borders.[176] Obviously, there are limitations on this authority within the structure of the Constitution. Moreover, at-large seats have long been viewed with suspicion by both the courts and Congress, particularly due to their past use to diminish minority voting. For this reason, 2 U.S.C. §2c codifies a congressional policy against the use of such districts:

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative.[177]

The Supreme Court has noted that this provision controls in the creation of districts "unless the state legislature, and state and federal courts, have all failed to redistrict" in accordance with the federal law.[178] In this circumstance, there would be no new apportionment or redistricting. Rather, the House would simply pass an at-large district over the full range of all other existing districts.

As opposed to the District portion of the legislation, the Utah at-large seat raises some close questions as well as some fairly metaphysical notions

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175 *See, e.g., Smiley v. Holm*, 285 U.S. 355, 366 (1932); *United States v. Gradwell*, 243 U.S. 476, 483 (1917) .

176 *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *see also Oregon v. Mitchell*, 400 U.S. 112, 131-22 (1970).

177 2 U.S.C. §2c.

178 *Branch v. Smith*, 538 U.S. 254, 274 (2003).

of overlapping representation and citizens with 1.4 representational status.[179] On one level, the addition of an at-large seat would seem to benefit all Utah citizens equally since they would vote for two members. Given the deference to Congress under the "necessary and proper" clause, an obvious argument could be made that it does not contravene the "one person, one vote" standard. Moreover, in *Department of Commerce v. Montana*,[180] the Court upheld the method of apportionment that yielded a 40% differential off of the "ideal." Thus, a good-faith effort at apportionment will be given a degree of deference and a frank understanding of the practical limitations of apportionment.

However, there are various reasons a federal court might have cause to strike down this portion of the House bill. Notably, this at-large district would be roughly 250% larger than the ideal district in the last 2000 census (2,236,714 v. 645,632). In addition, citizens would have two members serving their interests in Utah -- creating the appearance of a "preferred class of voters."[181] On its face, it raises serious questions of equality among voters:

> To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People.'[182]

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

[180] 503 U.S. 442 (1992).

[181] *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications . . . The conception of political equality . . . can mean only one thing – one person, one vote.").

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

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This massive size and duplicative character of the Utah district draws obvious points of challenge.[183] In *Wesberry v. Sanders,*[184] the Court held that when the Framers referred to a government "by the people," it was articulating a principle of "equal representation for equal numbers of people" in Congress.[185] While not requiring "mathematical precision,"[186] significant differences in the level of representation are intolerable in our system. This issue comes full circle for the current controversy: back to Article I and the structural guarantees of the composition and voting of Congress. The Court noted that:

> It would defeat the principle solemnly embodied in the Great Compromise - equal representation in the House for equal numbers of people - for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.[187]

While the Supreme Court has not clearly addressed the interstate implications of "one person, one vote," this bill would likely force it to do so.[188] The Court has stressed that the debates over the original Constitution reveal that "one principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress."[189] Moreover, the Court has strongly indicated that there is no conceptual barrier to applying the *Wesberry* principles to an interstate rather than an intrastate controversy:

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183 *Cf.* Jamie B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 Harv. C.R.-C.L. L. Rev. 39 (1999) (discussing "one person, one vote" precedent vis-à-vis the District).

184 376 U.S. 1 (1964).

185 *Id.* at 18.

186 *Id.*

187 *Id.* at 14.

188 *But see Department of Commerce*, 503 U.S. at 463 ("although 'common sense' supports a test requiring 'a goodfaith effort to achieve precise mathematical equality' within each state, *Kirkpatrick v. Preisler*, 394 U.S. at 530-531, the constraints imposed by Article I, § 2, itself make that goal illusory for the Nation as a whole.").

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

> the same historical insights that informed our construction of Article I, 2 ... should apply here as well. As we interpreted the constitutional command that Representatives be chosen "by the People of the several States" to require the States to pursue equality in representation, we might well find that the requirement that Representatives be apportioned among the several States "according to their respective Numbers" would also embody the same principle of equality.[190]

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

Moreover, while interstate groups could challenge the disproportionate representation for Utah citizens, the at-large seat could also be challenged by some intrastate groups as diluting their specific voting power as in *City of Mobile v. Bolden.*[191] At-large seats have historically been shown to have disproportionate impact on minority interests. Indeed, in *Connor v. Finch,* the Supreme Court noted at-large voting tends "to submerge electoral minorities and over-represent electoral majorities."[192] Notably, during the heated debates over the redistricting of Utah for the special session, there was much controversy over how to divide the districts affecting the urban areas.[193] The at-large seat means that Utah voters in concentrated areas like Salt Lake City will have their votes heavily diluted in the selection of their additional representative. If Utah simply added an additional congressional district, the ratio of citizens to members would be reduced. The additional member would represent a defined group of people who have unique geographical and potentially racial or political

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

191 446 .U.S. 55 (1980) (striking down an at-large system); see also *Rogers v. Lodge,* 458 U.S. 613, (1982).

192 431 U.S. 407, 415 (1977).

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

characteristics.[194] However, by making the seat at large, these citizens would now have to share two members with a much larger and more diffuse group – particularly in the constituency of the at-large member. It is likely that the member who is elected at large would be different from one who would have to run in a particular district from the more liberal and diverse Salt Lake City.

Another concern is that this approach could be used by a future majority of Congress to manipulate voting and to reduce representation for insular groups.[195] Rather than creating a new district that may lean toward one party or have increased representation of one racial or religious group, Congress could use at-large seats under the theory of this legislation. Congress could also create new forms of represented districts for overseas Americans or federal enclaves.[196] The result would be to place Congress on a slippery slope where endangered majorities tweak representational divisions for their own advantage.

The lifting of the 435 limit on membership of the House established in 1911 is also a dangerous departure for this Congress.[197] While membership was once increased on a temporary basis for the admission of Alaska and Hawaii to 437, past members have respected this structural limitation. These members knew instinctively that, while there was always the temptation to tweak the membership rolls, such an act would invite future manipulation and uncertainty. After this casual increase, it will become much easier for future majorities to add members. When presented with a plausible argument that a state was short-changed, a majority could simply add a seat. Use of an at-large seat magnifies this problem by abandoning the principle of

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

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

196 Notably, rather than try to create representatives for overseas Americans as some nations do, Congress enacted a law that allows citizens to use their former state residence to vote if the state complies with the requirements of the Uniformed and Overseas Citizens Absentee Voting Act. 42 U.S.C. §1973ff.

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

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

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

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

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

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

> Senate equal to the greatest State in the Union? In my conception it would be unjust and impolitic.[198]

We are, hopefully, in the final chapter of this debate. One hundred and sixty years ago, Congress retroceded land back to Virginia under its Article I authority. Retrocession has always been the most direct way of securing a resumption of voting rights for District residents.[199] Most of the District can be simply returned from whence it came: the state of Maryland. The greatest barrier to retrocession has always been more symbolic than legal. Replacing Washington, DC with Washington, MD is a conceptual leap that many are simply not willing to make. However, it is the most logical resolution of this problem.[200]

For a number of years, I have advocated the reduction of the District of Columbia to the small area that runs from the Capitol to the Lincoln Memorial. The only residents in this space would be the First Family. The remainder of the current District would then be retroceded to Maryland.

Such retrocession can occur without a constitutional amendment in my view. Ironically, in 1910 when some members sought to undo the Virginia retrocession, another George Washington Law Professor, Hannis

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

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

200 At first blush, there would seem to be a promising approach found in legislation granting Native Americans the right to vote in the state in which their respective reservation is located. 8 U.S.C. § 1401(a)(2). After all, these areas fall under congressional authority in the provision: Section 8 of Article I. However, the District presents the dilemma of being intentionally created as a unique non-state entity – severed from Maryland. For this approach to work, the District would still have to be returned to Maryland while retaining the status of a federal enclave. *See also Evans v. Cornman*, 398 U.S. 419 (1970) (holding that residents on the campus of the National Institutes of Health (NIH) in Maryland could vote as part of that state's elections).

Taylor, supplied the legal analysis that the prior retrocession was unconstitutional without an amendment.[201] I have to respectfully disagree with my esteemed predecessor. In my view, Congress can not only order retrocession but can do it without the prior approval of Maryland – though I believe that this would be a terrible policy decision. This land was ceded to Congress, which always had the right to retrocede it. Obviously, no one is suggesting such a step. However, as a constitutional matter, I do not see the barrier to retroceding the Maryland portion of the original federal enclave. As John Calhoun correctly noted in 1846 "[t]he act of Congress, it was true, established this as the permanent seat of Government; but they all knew that an act of Congress possessed no perpetuity of obligation. It was a simple resolution of the body, and could be at any time repealed."[202]

I have also proposed a three-phase process for retrocession. In the first phase, a political transfer would occur immediately with the District securing a House seat as a Maryland district and residents voting in Maryland statewide elections. In the second phase, incorporation of public services from education to prisons to law enforcement would occur. In the third phase, any tax and revenue incorporation would occur.

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

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[201] S. Doc. No. 286, 61st Cong., 2d Sess. 4 (1910) (Opinion of Hannis Taylor as to the Constitutionality of the Act of Retrocession of 1846).

[202] *See* Cong. Globe, 29th Cong., 1st Sess. 1046 (1846).

In my view, this approach would be unassailable on a legal level and highly efficient on a practical level. I realize that there remains a fixation with the special status of the city, but much of this status would remain. While the city would not technically be the seat of government, it would obviously remain for all practical purposes our Capitol City.

This is not to suggest that a retrocession would be without complexity. Indeed, the Twenty-Third Amendment represents an obvious anomaly.[203] Section one of that amendment states:

> The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct:
>
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform such duties as provided by the twelfth article of amendment.[204]

Since the only likely residents would be the first family, this presents something of a problem. There are a couple of obvious solutions. One would be to repeal the amendment, which is the most straight-forward and preferred.[205] Another approach would be to leave the amendment as constructively repealed. Most presidents vote in their home states. A federal law can bar residences in the new District of Columbia. A third and related approach would be to allow the clause to remain dormant since it states that electors are to be appointed "as the Congress may direct."[206] Congress can enact a law directing that no such electors may be chosen. The

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203 U.S. Const. amend. XXIII

204 *Id.*

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

206 *See generally* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160, 187-88 (1991); Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 Cath. U.L. Rev. 311, 317 (1990).

only concern is that a future majority could do mischief by directing an appointment when electoral votes are close.

## VI.
## CONCLUSION

There is an old story about a man who comes upon another man in the dark on his knees looking for something under a street lamp. "What did you lose?" he asked the stranger. "My wedding ring," he answered. Sympathetic, the man joined the stranger on his knees and looked for almost an hour until he asked if the man was sure that he dropped it here. "Oh, no," the stranger admitted, "I lost it across the street but the light is better here." Like this story, there is a tendency in Congress to look for answers where the political light is better, even when it knows that the solution must be found elsewhere. That is the case with S. 1257, which mirrors an earlier failed effort to pass a constitutional amendment. The 1978 amendment was a more difficult course but the answer to the current problems can only be found constitutionally in some from of either an amendment or retrocession.

Currently, the drafters of the current bill are looking where the light is better with a simple political trade-off of two seats. It is deceptively easy to make such political deals by majority vote. Not only is this approach facially unconstitutional, but the outcome of this legislation, even if sustained on appeal, would not be cause for celebration. Indeed, S. 1257 would replace one grotesque constitutional curiosity in the current status of the District with new curiosity. The creation of a single vote in the House (with no representation in the Senate) would create a type of half-formed citizens with partial representation derived from residence in a non-state. It is an idea that is clearly put forward with the best of motivations but one that is shaped by political convenience rather than constitutional principle.

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

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

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**Statement of Patricia M. Wald**

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

**United States Senate Committee on the Judiciary**

**May 23, 2007**

Senator Feingold, Members of the Committee: Thank you for this opportunity to discuss the constitutionality of the pending District of Columbia House Voting Rights Act of 2007, which would provide representation for District residents in the U.S. House of Representatives. I mention initially that this is a return visit to Congress for me on the same basic mission: nearly 30 years ago I appeared as the official spokesperson for the Carter Administration supporting a constitutional amendment to give full voting representation in both Houses to the District of Columbia.[1] The proposed amendment, as you well know, made it through Congress but failed to capture the needed approval in three-fourths of the States. That route looks no more promising today and the question before you is whether there is a constitutionally permissible way to give District residents a right to representation in the one House whose members have been since the founding of the Republic directly elected by the people and apportioned according to their numbers.[2]

I would be less than candid if I did not say up front that you have before you a close and difficult constitutional question. We are, in my view, faced with two pieces of constitutional

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[1] During those hearings before the House Judiciary Committee in 1978, I stated the official position of the Administration that Statehood could not be attained for the District in the current century by unilateral action of Congress alone because of Article I, Section 8, Clause 17 and the 23rd Amendment. I said, "the most straightforward and direct route to full representation [was] through a constitutional amendment treating the District as if it were a State" for purposes of electing House members and Senators. I also said that the word "State" in Article I, Section 2 could not "fairly be construed" to include the District under a theory of "nominal statehood" and if "nominal statehood" is not a viable possibility, then a constitutional amendment is necessary. I did not discuss the alternative of using the District Clause as the source of Congress' power to grant District representation in the House.

[2] See, e.g., Federalist Papers, No. 39 (Madison):

> "If we resort for a criterion, to the different principles on which different forms of government are established, we may define republic to be . . . a government which derives all its powers directly or indirectly from the great body of people. . . . It is *essential* to such a government, that it be derived from the great body of society. . . . On confirming the Constitution planned by the Convention, with the standard here fixed, we perceive at once that . . . the House of Representatives . . . is elected immediately by the great body of the people . . . the House of Representatives will derive its powers from the people of America. . . ." *Compare Term Limits Inc. v. Thornton*, 514 U.S. 803 (1995) ("Framers envisioned a uniform national system, rejecting the notion that the Nation was a collection of States, and instead creating a direct link between the National Government and the people of the United States."

text, both in Article I dealing with the Legislative power of the United States, either one of which, read alone, could lead one to a quick conclusion, albeit different ones, as to whether the bill is constitutional. Those two sentences must, of course, be read together and in the further context of other controlling principles embedded in the Constitution, with a purpose to harmonize them, if that is possible. The "District Clause" upon which the bill's supporters rely (Article I, Section 8, Clause 17) providing Congress with authority to "exercise exclusive Legislation in all cases, whatsoever, over such District" appears to grant comprehensive and plenary power on all; District matters, of national and local import. And, indeed, when courts have referred to this Clause they have used such terms as "a unique and sovereign power" an "extraordinary and plenary power" (*United States v. Cohen*, 713 F.2d 128 (D.C. Cir. (1984)) as well as a mandate to "provide for the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end" (*Neil v. District of Columbia*, 110 F.2d 246 (D.C. Cir. 1940)).

Yet traditional modes of constitutional analysis and plain common sense tell us that a literal reading of this Clause in isolation from the rest of Article I or the rest of the Constitution cannot provide us with a definitive answer. For there are many other parts of the Constitution that guarantee rights and regulate processes that Congress in wielding power as a District legislator cannot ignore or violate. For instance, the Congress could not legislate racial segregation in the District or deny the right to vote in local elections to women. Congress must wield its plenary legislative power over the District in harmony with other constitutional mandates and principles.

Thus your primary inquiry may be whether there are other parts of Article I in the Constitution generally that require Congress to refrain from granting the District residents the

right to a representative in the House. I stress here that we are talking about Congress' power to legislate not whether an individual District resident can claim such a voting right under the Constitution (*cf. Adams v. Clinton, Alexander v. Daley*, 90 F. Supp. 2d 35 (D. D.C. 2000), 531 U.S. 940 (2000) [hereinafter *Adams*]). Congress' power to grant and District citizens' power to demand voting rights are different questions with quite possibly different answers.[3] The principal provision raised as an express constitutional bar to the bill is Article I, Section 2 which says that the House shall "be composed of Members chosen . . . by the People of the several States and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[4] Again, were we to view this directive in isolation, we might well conclude, as critics of the bill indeed do, that Congress is powerless, short of a constitutional amendment, to provide to District residents and participation in the exercise of its legislative power, because the District is not a State whose "people" are qualified to choose members of the House.[5] But this position, too, becomes problematic as an absolute when looked at in the context of other parts of the Constitution as well as key judicial interpretations of the scope of Congress' legislative powers, including those specifically exercised pursuant to the District Clause.

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[3] *See, e.g., Adams*, at 38-39 (complaint alleges failure of President to apportion representatives to District and to allow District residents to vote in House and Senate elections and failure of Congress to provide the District with a state government violate citizen plaintiffs' rights to equal protection of laws and guarantee of republic form of government). Some plaintiffs also alleged violations of the due process and privileges and immunities clauses.

[4] The paragraph following Article I, Section 2 declares that "no person shall be a Representative . . . who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." If the first paragraph is found not to be an obstacle to congressional action, accommodation of the second paragraph would follow, the same is true of Article I, Section 2 (apportionment of members among States on population basis). This section was amended by the 14th Amendment.

[5] Of course Congress has already legislated to permit the participation of a nonvoting delegate elected from the District in deliberations in the House (apart from the House sitting as Committee of the Whole) (2 U.S.C.A. § 25a) (1994)). These deliberations are an intrinsic part of the deliberative process envisioned by the Constitution. *See, e.g.,* Article I, Section 6 (Speech and Debate of Members protected from arrest or questioning).

To begin with, Congress has the power under a separate clause, Article IV, Section 3, to admit all parts of the District, with the exception of federal buildings and lands constituting the Seat of Governments into the Union as a State. While practical and political considerations may well militate against such a move, Congress' constitutional power to do so provides a reasonable basis for the proposition that the greater power to confer statehood contains the lesser one, i.e., granting voting representation in the House to District residents. Clearly, the Constitution accords Congress the core power to decide which new entities can attain representation in the House as States.[6] Such power is entirely consonant with and indeed paralleled by the "Exclusive" legislative power "in all Cases whatsoever" conferred on Congress by the "District Clause." Thus an exercise of District Clause authority to confer House voting powers would not seem in any way to disturb the separation of powers or the federalism principles underlying the Constitution. As others have testified at greater length, the States were the sole components of the Union at the time of the adoption of the Constitution and it is natural that in defining the processes of choosing Members of the House, they should have been designated as the location of congressional elections.[7] There certainly is no evidence in the text or history of the Constitution signifying the Framers wanted to deny the District the franchise forever for any legitimate reason.

[6] This power is circumscribed only by the requirement that no new States be admitted without the consent of the Legislatures of the States involved. I note as well that the *Adams* case, *supra*, decided only that Congress was not *required* to make the District a State, not that it was not constitutionally authorized to do so. While District residents obtained the right to vote in Presidential elections through the 23rd Amendment ratified in 1961 this historical fact does not affect Congress' constitutional power to provide representative status for the District. Noteworthy as well is the fact that the 12th Amendment preserves a role for states *qua* states in the electoral process for Presidents that is not present in House elections—which are based solely on numbers of people in the congressional districts.

[7] But note Congress retained in Article I, Section 4 the power to "make or alter" regulations on the time and manner of holding congressional elections and the place as to Representatives only.

In the past Congress has indeed exercised powers to pass the Uniformed and Overseas Citizens Voting Act, 42 U.S.C. § 1973 ff-1, allowing Americans living abroad to vote in federal elections held in their last State of residence in the United States, regardless of whether they were citizens of that State or would qualify as electors for the State legislature in those States as Article I, Section 2 on its face requires.[8] The Supreme Court, in turn, has ruled that U.S. citizens living in a federal enclave within a State, governed by the same exclusive congressional authority as the District, may not be denied the right to vote in state or federal elections by the State.[9] The overseas voter legislation, on the books since 1975, has never been challenged in court.

The message I carry from these two examples authorizing voting by U.S. citizens overseas and in federally regulated enclaves is that neither Congress nor the Court feels compelled to comply rigidly with the exact textual provisions of Article I, Section 2, i.e., that a State affiliation requirement is not a must that cannot be adjusted or accommodated with other powers, duties and rights under the Constitution.[10]

There are many other instances in which the courts have acceded to Congress' unique power to legislate for the District when it exercises that power to put the District on a par with

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[8] The OCVA requires States to allow voting for federal and state offices in their last state of domicile as a "reasonable extension of the bona fide residence concept." H.R. Rep. No. 94-699, art. 7.

[9] The *Adams* majority opinion, *supra*, reasoned that the Supreme Court in *Evans v. Cornman*, 398 U.S. 419 (1970) reached this result only because there was no attempt by Congress to exercise its exclusive and plenary power over the enclave so that the State continued to regulate the laws of the enclave residents in important ways. If that reasoning is valid, the counterproposition would be strange indeed—the more intrusive the Congress' role in their lives, the less power citizens in the enclaves would have over the choice of its members.

[10] *See, e.g.*, Justice Jackson's dissent in *Terminiello v. Chicago* ("there is danger that, if the Court does not temper its doctrinal logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact") (337 U.S. 1137 (1949)). If Congress cannot address the District's disenfranchisement we are left in the anomalous situation where a Massachusetts resident can move to Zimbabwe and retain the right to vote in federal elections but the same citizen cannot retain that right if she moves to the District even though the District has ultimate power over her public welfare and Massachusetts has little or none.

States in critical constitutionally-related areas such as § 1983 civil rights remedies[11]; federal tax duties[12] (Article I, Section 2, prior to 16th Amendment); regulation of commerce (Article I, Section 8).[13] Most frequently cited is the Supreme Court case of *National Mutual Insurance Company v. Tidewater Transfer Company*, 337 U.S. 582 (1949), a case which merits and will receive further discussion below. The rationale of the courts in all these cases has been that Congress, under the District Clause, has the power to impose on District residents similar obligations and to grant similar rights as the States claim power to do under the Constitution itself. Given that the District is in reality a City-State of 600,000 people engaged in a multitude of private businesses and occupations, there is realistically no other way that a federalist union can do business under our Constitution. The only possible distinction between those exercises of congressional power and this one would be if it is concluded that the Constitution forbids any deviation or extension from the precise terms of Article I, Section 2 in franchising voters for congressional elections. The overseas and federal enclave examples demonstrate that is not the case.

The *Tidewater* case deserves special attention for several reasons. The Supreme Court, per Justice Jackson, dealt with the authority of Congress under the District Clause to confer upon Article III federal courts additional jurisdiction to hear controversies between citizens of the District and citizens of other States. Article III, Section 2 states clearly enough that the judicial power of the United States shall extend to "Controversies . . . between Citizens of different States." The Court reasoned, however, that Congress could treat District residents the same as

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[11] 42 U.S.C. 1983 (1979), amendment following *District of Columbia v. Carter*, 409 U.S. 419 (1973).

[12] *Loughborough v. Blake*, 18 U.S. (5 Wheat) 317 (1820).

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

State residents for purposes of diversity jurisdiction since it had power (1) to order citizens of States to come to the District's own local courts in District-State citizen controversies and (2) power to set up District courts outside the District. Why then should it be denied the power to let those controversies be heard in the existing Article III federal courts.[14] The three Justices who signed on to the main opinion said Congress had no power to extend the meaning of Article III so far as the definition of a State was concerned, but that Congress' power and duty under the District Clause to provide for the welfare of District residents included the power to provide adequate courts for their controversies with residents of States.

In choosing to confer jurisdiction on existing federal courts rather than creating new District courts outside of the District, Congress was legitimately exercising its sovereign authority and "in no matter should the courts pay more deference to the opinions of Congress than in its choice of instrumentalities to perform a function that is within its power."[15] It is true that Jackson considered the additional grant of diversity jurisdiction to District residents "a constitutional issue affect[ing] only the mechanics of administering justice . . . not involv[ing] an extension or a denial of any fundamental right or immunity which goes to make up our freedoms."[16] But Jackson then proceeded to lay down a standard for permissible line-drawing on Congress' power under the District Clause:

> The considerations which bid us strictly to apply the Constitution to congressional enactments which invade fundamental freedoms or which reach for powers that would

[14] Justices Murphy and Rutledge, concurring in the result, would have held the District to be a State under the diversity clause of Article III, Section 2. Four Justices dissented from the result.

[15] In 1804, Chief Justice Marshall had authored an opinion saying that a District resident was not a citizen of a State within the meaning of Article III diversity jurisdiction. *Hepburn & Dundas v. Ellzey*, 2 (Cranch) 445 (1804).

[16] 337 U.S. 584. Justice Jackson did not refer to the lively debate that preceded constitutional ratification centering about the grant of diversity jurisdiction in Article III and the vigorous objections of some State citizens to being pulled away from their local jurists into a foreign forum. *See, e.g.*, Federalist Paper No. 80 (Hamilton) "On the Bounds and Jurisdiction of the Federal Courts."

substantially disturb the balance between the Union and its component states are not present here.

Just so, they are not present here. The grant of voting rights to District residents does not disturb the relations between the federal government and the States. The people in the District will eventually be counted in the census and House members apportioned on that total. Other States have always been subject to some change in their representation when new States are admitted and no State will suffer a loss of representation under the bill. The Congress, which exercises sovereign power over the District, is the same Congress elected by the people of the States themselves which will have to pass this legislation. In no way are these States' powers usurped. Fundamental freedoms are enhanced, not invaded.[17]

*Tidewater*'s caution is relevant here: "Congress is reaching permissible ends by a choice of means which certainly are not expressly forbidden by the Constitution. . . . Such a law of Congress should be stricken down only on a clear showing that it transgresses constitutional limitations."[18]

In the end, I go back to my original comments. Make no mistake: we are on unchartered territory. Everyone, from the beginning of the Republic, has lamented the unfairness of refusing the vote to District residents now numbering more than half a million people. There is no legitimate reason for doing so. The goal of providing representation to these voters in the House is a universally accepted one (at least in theory); like Madison, many would say it is indispensable in a democratic Republic. The omission of the Founding Fathers to provide for it in the Constitution itself or in the legislation setting up the Seat of Government was likely

[7] This bill in no way presages power to add other nonstate-affiliated entities to the ranks of those who may vote for House representatives. The situation of D.C. residents is unique in that Congress, under the Constitution, is designated the ultimate head of their local government. If they cannot vote for congressional representatives they are doubly disenfranchised from voting for national and for local leaders. This is the equivalent to a State resident being denied the right to vote for State leaders as well as national leaders.

[8] 337 U.S. 603-04.

inadvertent rather than deliberate.[19] Congress is the legislative sovereign of the District; at the same time it is the sole source of all legislative power of the national government. If it decides under its current Article I, Section 2 composition (about which there can be no controversy) to confer a limited franchise on District residents as part of its duty to provide for their welfare and this exercise infringes no structural balance between the Union and the States or dilutes no civil rights of any U.S. citizens, I believe it is entitled to a reasonable presumption of constitutionality under the Federalist approach. Of course no one can guarantee how the Third Branch will rule; acknowledgedly there are conflicting signals in their past jurisprudence though no directly contrary precedent that I know of on this precise issue. In such a landscape, Congress is justified in concluding the balance tilts in favor of recognizing for D.C. residents the most basic right of all democratic societies, the right to vote for one's leaders.

Thank you.

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[19] I will not rehash here the extensive history of comments made about District residents' voting rights before and after the adoption of the Constitution by leaders such as Madison, Hamilton and others. There is grist for several mills in those comments. All agree that after the cessations of land by Maryland and Virginia in 1790 and prior to Congress' establishment of the District as the Seat of Government in 1800, citizens in the ceded land continued to vote for a decade in their original States pursuant to the congressionally-enacted terms of the cessation. After 1800 they did not. It is difficult to conclude that if Congress in the 1800 legislation establishing the Seat of Government had provided for District residents voting in congressional elections, as many thought they would, it would have been denounced as violative of that Constitution. As for relying on the ceding State to take care of their former residents in the cessation documents, as others thought they would, it also seems clear that the States could only do that for their own former residents, not for all other newcomers from other States who emigrated to the District. The ball had to be in Congress' court to provide for this suffrage. For varying interpretations of this history, see majority and dissenting opinions in *Adams v. Clinton, supra.*

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# Picking the Brains of the Founding Fathers



Experts Clash Over Whether the District Was Meant to Get a Vote in Congress

By Mary Beth Sheridan
Washington Post Staff Writer
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The setting is Congress, the year 2007. But as lawmakers wrangle over the D.C. voting rights bill, they are turning the clock back to the 1700s, furiously debating whether the Founding Fathers intended to deprive District residents of a vote in the national legislature.

On one side: the Bush administration and other critics of the bill, who believe the framers created the current situation intentionally. On the other: supporters of the bill, including Eleanor Holmes Norton (D), the District's nonvoting congressional delegate.

It is "slander," she declared heatedly last week, to suggest that the founders would fight a war over voting rights "and then would turn around and deny representation to the residents of their own capital."

Who's right?

Leading historians say the record on the founders' intentions for the future capital is unclear in some respects. But there is little evidence they sought to deny the vote to what would eventually become hundreds of thousands of D.C. residents, the historians say.

Does it matter what a bunch of bewigged 18th-century revolutionaries thought about the District? It actually matters a lot: Their 200-year-old opinions could affect whether the current voting rights bill is deemed legal. The legislation, which seeks to give the District its first full seat in the House of Representatives, has passed the House and is now before the Senate.

The main argument advanced by the bill's opponents is that the Constitution reserves House membership for representatives from states. And the District is not a state, they note.

Supporters and opponents of the bill are delving into history to try to clarify what the framers intended in 1787, when they inserted 38 words into the Constitution allowing for the creation of a federal government district. The brief clause gives Congress the power "to exercise exclusive legislation" over a future seat of government.

Did the framers mean its residents couldn't vote in Congress?

Absolutely, said John P. Elwood, a Justice Department official who testified at a hearing before the Senate

Judiciary Committee
last week. "The framers and their contemporaries clearly understood that the Constitution barred congressional representation for District residents," he said.

Nonsense, retorted Richard P. Bress, a former assistant to the U.S. solicitor general. "I can't agree the evidence shows the Founding Fathers intentionally and permanently disenfranchised the people of the District of Columbia," he told the Senate panel.

Historians say early politicians disagreed about the nature of the future federal seat of government, with some wanting a strong, independent enclave and others fearing it would turn into a new imperial Rome. Political maneuvering colored the discussion.

"There is no one Founding Father position," said John Kaminski, a historian at the University of Wisconsin and editor of a 28-volume collection of documents on the ratification of the Constitution.

But several prominent scholars who have studied the period say there appeared to be little debate on whether residents of the new federal enclave would have the vote.

"The Constitutional Convention overlooked it," said Kenneth Bowling, a George Washington University historian and author of "The Creation of Washington, D.C." "The issue was not on their radar screen."

Historians traditionally have traced the District's status to a raucous demonstration in 1783 by unpaid Revolutionary War veterans outside what's now known as Independence Hall in Philadelphia. The federal Congress, which used the building, was not in session at the time; the rioters were aiming their wrath at a meeting of the Pennsylvania state executive council.

But some congressmen who were proponents of a strong central government seized on the incident, saying it underscored the need for a federal enclave under Congress's control, historians say. They got their way when the Constitution was drawn up.

Soon afterward, Alexander Hamilton
and a few other politicians realized the Constitution did not provide specifically for congressional representation for residents of the new capital. Hamilton suggested that the first Congress fix the problem, but his amendment went nowhere.

Opponents of the current bill view the Hamilton amendment as a sign that the issue was debated at the time -- and that Hamilton lost.

"It was as controversial then as it is now," Jonathan Turley, a legal scholar from George Washington University, said at last week's Senate hearing.

But Bowling and other historians disagree, saying the young states and the first U.S. Congress were preoccupied with weightier issues -- such as the amendments that became known as the Bill of Rights.

"They had to organize the entire government!" declared Bowling, co-editor of a 22-volume edition of records and letters from the first federal Congress, which met in 1789-91. "They certainly weren't going to pay a lot of attention to the federal district when it didn't even exist yet."

In fact, it was 1790 before the U.S. government decided where to locate the capital -- on land ceded by Maryland and Virginia. Residents of the new district continued to vote in those states until 1801.

But in that year, Congress passed the Organic Act, assuming control of the District of Columbia and providing no provision for its residents to vote for members of Congress or a president.

That would seem a clear enough sign of Congress's intent. But historians caution that that act, too, should be seen

in the context of the politics of the time.

It was passed by a lame-duck Congress fearful that the incoming president, Thomas Jefferson, an anti-federalist, would junk their vision of a strong capital, said William diGiacomantonio, a historian who has studied the period.

The outgoing Congress "really did want to preserve the independence of the District. And so they passed this really haphazard thing," he said, referring to the act.

"It's politics," the historian added. "It doesn't have anything to do with principle."