WebMemo
Published by The Heritage Foundation
No. 1404
March 22, 2007

The Constitution and the District of Columbia

Lee A. Casey

> 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…
>
> (The U.S. Constitution, Article I, Section 8, Clause 17)

In *The Federalist* No. 43, James Madison explained the need for a "federal district," subject to Congress's exclusive jurisdiction and separate from the territory, and authority, of any single state:

> The indispensable necessity of compleat authority at the seat of Government carries its own evidence with it. It is a power exercised by every Legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings be interrupted, with impunity; but a dependence of the members of the general Government, on the State comprehending the seat of the Government for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the Government, and dissatisfactory to the other members of the confederacy.

Madison's concerns about insults to the "public authority" were not speculative. In June 1783, several hundred unpaid and angry Continental soldiers had marched on Philadelphia, menacing Congress in Independence Hall itself. Pennsylvania refused all requests for assistance and, after two days, Congress adjourned. Its Members fled into New Jersey.

The incident made a lasting impression. The Framers referenced it over and again in defending their provision for a "federal town," which Anti-Federalists persisted in visualizing as a sink of corruption and a potential nursery for tyrants. In fact, however, the need for a territory in which the general government exercised full sovereignty, not beholden to any state, was probably inherent in the federal system itself.

At the time, the location of the new capital was more contentious than its necessity. Both New York and Pennsylvania were desperate for the plum—with Benjamin Franklin urging Pennsylvania's Legislature to grant the land moments after the proposed Constitution was first read to that body. In any event, a "Southern" site was selected, near the fall line of the Potomac River. In exchange, the Southern states agreed that the new federal government would assume the states' Revolutionary War debts, which were more burdensome to the Northern states. That arrangement was sealed in a meet-

This paper, in its entirety, can be found at:
www.heritage.org/research/legalissues/wm1404.cfm

Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

ing between Alexander Hamilton and Thomas Jefferson in which the South gained the capital, but the federal government obtained economic prowess. Maryland and Virginia ceded "ten miles square" on their respective sides of the river, and the government finally moved to its permanent seat in 1800.

In 1846, the Virginia portion of the original territory of Columbia, encompassing Old Town Alexandria and Arlington County, was "retroceded" by Congress to the Commonwealth. The constitutionality of this act has never been determined. In 1875, the Supreme Court dismissed, for lack of standing, a case brought by a Virginia taxpayer who argued that he was properly subject to the District's then less onerous tax burden. The Court noted that the plaintiff sought to "vicariously raise a question" that neither Virginia nor the federal government had "desire[d] to make." *Phillips v. Payne (1875).*

The week before John Adams left the presidency in 1801, Congress established a government for the District, dividing it into two counties, Washington and Alexandria. The law provided that the laws then existing in the two counties, deriving from Virginia and Maryland, respectively, would remain in force until modified by Congress. A realization that the original bill would have left the District without a judiciary prompted Congress to provide for justices of the peace to be appointed by the President. Over the last two centuries, Congress has experimented with varying methods of home rule, as well as with direct rule. Today, the most controversial aspect of Congress's authority over the District is the fact that Washington, D.C., residents cannot elect Members to Congress. The Twenty-third Amendment gave the District the right to participate in presidential elections but not in congressional elections. Instead, the residents elect a nonvoting "delegate" to the House of Representatives.

Because of the District's unique character as the federal *city,* neither the Framers nor Congress accorded the inhabitants the right to elect Members of the House of Representatives or the Senate. In exchange, however, the District's residents received the multifarious benefits of the national capital. As Justice Joseph Story noted in *Commentaries on the Constitution of the United States,* "there can be little doubt, that the inhabitants composing [the District] would receive with thankfulness such a blessing, since their own importance would be thereby increased, their interests be subserved, and their rights be under the immediate protection of the representatives of the whole Union." In effect, the Framers believed that the residents were "virtually" represented in the federal interest for a strong, prosperous capital.

There have been a number of efforts to change this original design, including a proposed constitutional amendment (passed by Congress in 1977) that would have granted the District of Columbia congressional voting representation "as if it were a state." This amendment, however, was not ratified in the seven-year period established by Congress. Other proposals have included a retrocession of most, or all, of the District to Maryland—a plan that Attorney General Robert F. Kennedy in 1964 deemed impractical and unconstitutional—and the admission of Washington, D.C., to the Union as the fifty-first state.

In 2000, the courts rejected a series of arguments suggesting that the District's inhabitants were, on various constitutional and policy grounds, entitled to voting representation in Congress without an amendment. *See Adams v. Clinton* (2000). More recently, the courts have rejected efforts to invalidate a congressionally imposed limit on the District's ability to tax nonresident commuters. *See Banner v. United States* (2004). In that case, the court noted that, "simply put…the District and its residents are the subject of Congress' unique powers, exercised to address the unique circumstances of our nation's capital.

Statehood is now the clear preference of District of Columbia voting-rights advocates, but the proposal has never excited much support in Congress and would, in any case, also require a constitutional amendment since an independent territory, subject to the ultimate authority of Congress, was a critical part of the Framers' original design for an indestructible federal union of indestructible states.

—Lee A. Casey is a partner in the Washington office of Baker Hostetler, a major law firm. Mr. Casey served during the George H.W. Bush Administration in the Department of Justice's Office of Legal Counsel. This paper is excerpted from The Heritage Guide to the Constitution.

Further Reading

- Bob Arnebeck, *Through a Fiery Trial: Building Washington 1790-1800* (1991)
- Wilhelmus B. Bryan, *A History of the National Capital* (1914)
- Peter Raven-Hansen, *The Constitutionality of D.C. Statehood,* 60 GEO. WASH. L. REV. 160 (1991)
- U.S. Department of Justice, Office of Legal Policy, *Report to the Attorney General: The Question of Statehood for the District of Columbia* (1987)

Significant Cases

- Phillips v. Payne, 92 U.S. 130, 133 (1875)
- Albaugh v. Tawes, 233 F. Supp. 576 (D.C. Md. 1964), *aff'd,* 379 U.S. 27 (1964) (per curiam)
- Evans v. Cornman, 398 U.S. 419 (1970)
- Adams v. Clinton, 90 F. Supp. 2d 35 (D.D.C. 2000), *aff'd,* 531 U.S. 941 (2000)
- Adams v. Clinton, 90 F. Supp. 2d 27 (D.D.C. 2000), *cert. denied,* 154 L. Ed. 2d 15 (2002)
- Banner v. United States, 303 F. Supp. 2d 1 (D.D.C. 2004)