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Voting Representation for the District of Columbia: Violating the Framers' Vision and Constitutional Commands

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The Senate will soon consider S. 160, the District of Columbia House Voting Rights Act of 2009, which would grant the District of Columbia a representative in Congress and provide an additional representative to Utah until the next reapportionment. The House of Representatives passed similar legislation in the previous Congress and is considering a related measure, H.R. 157, in the present session.

The case for granting full congressional representation to District residents rests on the theory of government by consent and the failure to recognize that, although they lack direct voting representation, District residents do not want for representation of their interests and concerns. This is not a historical accident but an integral part of the Framers' plan for a "federal town" designed to serve the needs of the federal government, as all Members of Congress would share responsibility for the city's well-being.

It should not be surprising, then, that Congress lacks the constitutional authority to simply grant the District a voting representative by fiat, as S. 160 would do. The Constitution limits such representation to states alone. Even if Congress wishes to alter the means by which District concerns are raised in the national legislature, it still has the responsibility to reject proposals that violate the Constitution.

What the Constitution Says

The Constitution's District Clause, in Article I, Section 8, declares the District of Columbia to be subject directly to the federal legislature. "The Congress shall have power," it reads,

Talking Points

- District residents do not want for representation of their interests and concerns. This is not a historical accident, but by design, an integral part of the Framers' plan for a "federal town" paired with Congress's reciprocal obligation to provide for the District's well-being.
- Congress lacks the constitutional authority to legislate voting representation for the District. The Framers, after carefully considering and debating the issue, carefully crafted the Constitution to forbid that result.
- Nonetheless, challenging such legislation in the courts would be difficult or impossible. Even with a standing provision, Members would probably lack constitutional standing, and the courts would therefore be unable to rule on the merits.
- Members of Congress have an obligation to assess the constitutionality of legislation and vote accordingly. They should not, and cannot, pass the buck to the courts.
- If Congress wishes to provide the District a voting representative, it may only do so through constitutional amendment. There is no shortcut around the Constitution's quite clear requirements on that point.

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> 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….

Contemporary constitutional analysis upholds Congress's exclusive authority over the District. As a federal court stated in a 2004 opinion, "the District and its residents are the subjects of Congress's unique powers, exercised to address the unique circumstances of our nation's capital."[1]

In addition, Congress lacks the constitutional authority to grant the city a representative by legislation; the District of Columbia is not a state, and representation is limited to states alone.[2] While Article I of the Constitution does grant Congress the power to apportion seats, it also explains that "Representatives…shall be apportioned *among the several states*" (emphasis added), an arrangement reiterated in the 14th Amendment.

Liberal constitutional scholar Jonathan Turley, who favors ending what he calls "the glaring denial of basic rights to the citizens of the District," labels legislative efforts to provide congressional representation to District residents "fundamentally flawed on a constitutional level." In a careful analysis, Turley considers the original meaning of the constitutional provisions at issue—the Composition, Qualifications, and District Clauses—and finds no support for the proposition that Congress may alter its composition legislatively. Indeed, the Constitution's Framers intended the opposite. As Turley explains:

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

Congress, he concludes, simply "cannot set aside provisions of the Constitution absent a ratified constitutional amendment."[3] Until recently Congress shared this view.[4]

The Constitution also precludes Congress granting the District statehood. If the District is subject to Congress's "exclusive legislation," then no state government can manage its affairs. Furthermore, if the District is to be created "by cession of particular states," it is, by implication, not part of any state. The District's home rule, whereby it elects its mayor and other local officials, came about only by a specific act of Congress ceding such authority. However, Congress, by retaining the power to veto any local legislation, did not give up ultimate responsibility for the District.[5]

There is broad consensus about the statehood requirement and the District's status as a non-state under the Constitution. Studying the text, structure, and history of the document, constitutional experts have argued that a constitutional amendment is required for the District to become a state. Lee Casey, for example, has explained that the Framers envisaged the District as a "federal town,"

1. Banner v. United States, 303 F. Supp. 2d 1, 19 (D.D.C. 2004).
2. *See, e.g.,* Adams v. Clinton, 90 F. Supp. 2d 35, 47 (D.D.C. 2000), *aff'd*, 531 U.S. 941 (2000).
3. Jonathan Turley, *Too Clever By Half: The Unconstitutionality Of Partial Representation Of The District Of Columbia In Congress*, 76 GEO. WASH. L. REV. 305 (2008).
4. H.R. Rep. No. 90-819, at 4 (1967) (Emanuel Celler, Comm. on the Judiciary, Providing Representation of the District of Columbia in Congress).
5. Thomas R. Ascik, District of Columbia Representation: "As Though It Were a State," September 7, 1978, at http://www.heritage.org/research/governmentreform/IB24.cfm.

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not a state, and that altering that original design therefore requires a constitutional amendment.[6]

One proposed solution to this problem is for Congress to "retrocede" residential portions of the city to Maryland. But this approach may also run into constitutional obstacles, due to the structure of the Constitution and the 23rd Amendment. When retrocession plans were introduced in the early 1960s, Attorney General Robert F. Kennedy found them to be both impractical and unconstitutional.[7] Others, however, argue that retrocession could be accomplished in a way consistent with the Constitution's strictures.[8]

The Founders' Intentions for the District

The Founders intended that the nation's capital remain autonomous and not subject to political pressure from a state government. In other words, they deliberately crafted the Constitution so that the District would not be within a state.

In *The Federalist* No. 43, James Madison argued that situating the capital city within a state would subject the federal government to undue influence by the host 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.[9]

This concern was apparent in the political debate surrounding the temporary site of the capital (New York) prior to the District's creation, and the debate and subsequent deal between Thomas Jefferson and Alexander Hamilton over the District's final location.

Congress did not act immediately to secure its control over the territory that is now the District of Columbia. Until Congress first met in the city in 1800, District residents voted for representatives as if they were residents of Virginia or Maryland.[10] Supporters of District representation have pointed to this practice as a precedent for allowing the city representation under the Constitution.[11] This argument, however, does not withstand scrutiny.

Since the Constitution limits Congress's authority to "such District…as may become the seat of government," lawmakers could not exercise their inherent authority until they actually convened in the District. Taking up this authority was among lawmakers' top priorities after Congress first met in the District. President John Adams called on Congress to "consider whether the local powers over the District of Columbia vested by the Constitution in the Congress of the United States shall be immediately exercised."[12] In February of the following

6. Lee A. Casey, The District of Columbia: A Federal City, February 18, 2009, at http://www.heritage.org/Research/LegalIssues/wm2300.cfm.
7. *See id*. The Department of Justice has not, in subsequent years, departed from that view.
8. *See* Turley, *supra* note 3. Turley proposes a "three-phase process for retrocession." *See also* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 GEO. WASH. L. REV. 160 (1991).
9. THE FEDERALIST No. 43 (James Madison).
10. Mark David Richards, *The Debates over the Retrocession of the District of Columbia, 1801–2004*, WASH. HIST., Spring/Summer 2004, *available at* http://www.dcvote.org/pdfs/mdrretro062004.pdf.
11. D.C. Vote, Response to Senate Republican Policy Committee Paper on H.R. 1433: D.C. Voting Rights, at http://www.dcvote.org/pdfs/congress/ResponseToSRPConHR1433.pdf.
12. John Adams, "Fourth Annual Message," November 22, 1800, at http://www.yale.edu/lawweb/avalon/presiden/sou/adamsme4.htm.

year, Congress duly passed the Organic Act and formally took the District under its jurisdiction, as provided in the Constitution.[13]

In doing so, Congress fulfilled the Framers' vision of Members serving the District in addition to their electoral districts.[14] Though District residents have no representative who answers to them exclusively, they command the attention of all Members of Congress, who share their streets, squares, and other public places, as well as their local concerns. Unlike the appalling British claim of "virtual representation"—that American colonists were adequately represented because allegedly similar voters, in Britain, had elected the Members of Parliament—the Framers actually seated the government in the federal district, ensuring that knowledge and self-interest would coincide so as to promote the District's needs, in the same way that the franchise attunes legislators to their district's needs. Thus, this representation, born of shared interest and concern, is real and tangible, reflected in federal government's financial commitment to the District, as well as Congress's close oversight of District government and affairs.

Pass a Law or Amend the Constitution?

At present, the District sends a "delegate" to the House who may vote in committee and draft legislation but cannot vote on the House floor.[15] Under S. 160, "Notwithstanding any other provision of the law [i.e., the Constitution?], the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives." The additional representative for Utah comes across as a purely political effort to secure the support of Republican lawmakers.

S. 160 conflicts with the long-accepted notion that only through a constitutional amendment can the nation's capital be treated as a state.

There is already a constitutional amendment on the books that deals with voting rights for the District. The 23rd Amendment, passed by Congress in 1960 and ratified by the states in 1961, grants the city a voice in presidential elections by allowing it to appoint the number of electors "to which the District would be entitled if it were a state."

Lawmakers argued at the time of its passage that the 23rd Amendment "would not give the District of Columbia any other attributes of a State or change the constitutional powers of the Congress to legislate with respect to the District of Columbia and to prescribe its form of government." For this and other reasons, only another amendment could grant full representation to District residents who "cannot now vote in national elections because the Constitution has restricted that privilege to citizens who reside in States."[16]

Later Congresses also looked to the Constitution when they sought to change the city's status in federal elections. In 1978, Congress proposed an amendment declaring that "[f]or purposes of representation in the Congress, election of the President and Vice President, and Article V of this Constitution, the District constituting the seat of government of the United States shall be treated as though it were a State." The amendment failed to secure the support of the 38 states required for adoption.[17]

Congress's Duty

Members of Congress who doubt the constitutionality of legislation to provide the District with representation have a duty to oppose it, rather than pass the buck to the courts. This duty flows directly

13. Ascik, *supra* note 5.

14. *See* Ending Taxation Without Representation: The Constitutionality of S. 1257: Hearing on S. 1257 Before the S. Comm. on the Judiciary, 110th Cong. 9 (2007) (statement of Jonathan Turley, George Washington University Law School) ("[The Framers] 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.").

15. D.C. Statehood, http://www.grc.dc.gov/grc/cwp/view,a,3,q,461394.asp.

16. H. Rep. No. 86-1698, at 1, 2 (1960), *available at* http://caselaw.lp.findlaw.com/data/constitution/amendment23.

17. *Proposed Amendments Not Ratified by the States*, in THE CONSTITUTION OF THE UNITED STATES, AS AMENDED (2003), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_documents&docid=f:hd095.pdf.

from the Constitution and the oath of office that it requires all Members of Congress to take.[18] In that oath, Members swear to "support and defend the Constitution," not to assist in its evisceration.

Further, judicial review is unlikely to be availing of constitutional government in this case. Even if a bill like S. 160 is amended to state that a Member of Congress has standing to challenge its provisions, and even if it provides some "fast-track" procedure for doing so, the requirement of *constitutional* standing, which is required in addition to *statutory* standing, would remain.

The precedent on this point is clear. In *Raines v. Byrd* (1997), the Supreme Court declined to consider the constitutionality of a line-item veto statute because the Senator who brought suit lacked constitutional standing to do, notwithstanding the law's explicit grant of statutory standing.[19] Only "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." Even pervasive injuries that significantly affect lawmaking—such as shifts in the balance of power in the chamber and changes to committee assignments and compositions—are considered mere "political" injuries and fall short of this standard.

While any exercise of a line-item veto would necessarily give rise to the required injury by blocking expenditures that otherwise would have been made, changes to the composition of Congress would present fewer, if any, opportunities for such injury and thus for judicial review. Only a Member on the losing side of a vote where the net margin was determined by one or both of the new seats created by the statute might have the proper standing to challenge it. That situation could be easily and effectively evaded, perhaps indefinitely, stymieing constitutional challenge.

In addition, there is the dim possibility that some government employee who has a duty to serve a Member in one of the newly created seats, such as by issuing the Member's paycheck, could decline to fulfill that duty or even seek declatory judgment that he is not required to perform it. Aside from the question of why a functionary would choose this course—it seems doubtful that any would—their duty may still be insufficient to confer constitutional standing, especially given the separation-of-powers concerns that would lurk in the background.

In sum, if legislating representation for District residents is unconstitutional, as it most surely is, then it is the duty of Members of Congress to oppose it. The courts will be unable, and perhaps unwilling, to provide the searching constitutional analysis that Members themselves are duty-bound to perform.

Alternative Proposals

Lawmakers may consider a number of alternatives, several of which are not so problematic as S. 160 and arguably comport with constitutional requirements. While there are drawbacks to any of these solutions, lawmakers would be wise to closely examine them before rushing to adopt the blatantly unconstitutional proposal now before them.

- **Propose an Amendment.** Congress could propose an amendment granting the District a representative in Congress, perhaps using the 1978 proposal noted earlier as a model. Adding such representation directly to the Constitution would by definition avoid running afoul of the nation's supreme law. In addition, the amendment solution would retain the Founders' intention that the capital city remain subject to the "exclusive legislation" of Congress—even as it grants the city's residents a more direct voice in that legislation. For many purposes, this would treat the District as if it were a state granted representation in Congress, but it would seem to require unanimous consent of every state if it sought to provide representation in the Senate, per Article V. An amendment would also upset the Framers'

18. U.S. CONST. art. VI, cl. 3; 5 U.S.C. § 3331.
19. 521 U.S. 811 (1997).

design for the federal district and placement in the national polity.

- **Grant Statehood.** It is highly unlikely that Congress could simply grant statehood to the District upon its application. More likely, doing so would require a constitutional amendment, because the Constitution grants Congress, not any state body, "exclusive legislation" over the nation's capital. Such a plan would also run counter to the Framers' still reasonable intent to have a national capital outside the influence of state politics. Granting statehood would also automatically provide the District with a representative and two senators, more representation than it would receive under current legislative proposals, possibly shifting the balance of power in that smaller chamber.
- **Retrocede to Maryland.** Congress may be able to return, or "retrocede," residential portions of the District to Maryland, allowing residents to vote as citizens of that state. Some scholars argue that this would be analogous to the retrocession of Arlington and Alexandria to Virginia undertaken by Congress in 1846. The constitutionality of retrocession is hardly settled, however. The Supreme Court avoided ruling directly on the Virginia retrocession, and the 23rd Amendment, by conferring three electoral votes for President upon the District, may limit the changes that can now be made to its territory. At this date, legal scholars are sharply divided on the issue.
- **Allow Voting in Maryland.** Though the idea has been proposed many times, Congress could probably not allow District residents to vote as if they were residents of Maryland or some other state. While such a plan would give city residents a say in congressional elections and would not affect the District's status under the Constitution, it would suffer from a number of practical and constitutional defects, due in part to the 23rd Amendment.
- **End Federal Taxation.** Given its exclusive power over the District, Congress could abolish federal income taxes on District residents, providing a powerful solution to the city's "taxation without representation" complaint. This compromise is fully within Congress's powers, and indeed, Congress has enacted special tax policies for the District in the past, something that it cannot do concerning states. There are also strong policy arguments in favor of this approach.[20]
- **Change of Residence.** It should be noted that District residents—unlike the American colonists, who had little choice in the face of British denial of representation—have always had the option to move to other U.S. jurisdictions, like Maryland or Virginia, where they could enjoy full representation in Congress. While this might not be preferable or immediately affordable to all District residents, it remains a simple and unobjectionable option.

Preserving the Constitution

Under the Constitution, lawmakers must reject any legislative proposal granting the residents of the District of Columbia a separate, voting representative in Congress. Providing such a representative would run afoul of a commonsense understanding of the Constitution, the intentions of the Founders, and more than two centuries of interpretation by legislators and the courts. If Congress seeks to shift the means of congressional representation for District residents and their concerns, it should instead examine proposals that do justice to principles of republican governance and the Constitution.

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20. Why Cutting Taxes in the District of Columbia Will Lead to Economic Growth and Stronger District Finances, Hearing before the District of Columbia Subcommittee of the Appropriations Committee of the U.S. House of Representatives, 106th Cong. (1999) (statement of William W. Beach, The Heritage Foundation), *available at* http://www.heritage.org/research/taxes/Test062399.cfm.