Calendar No. 257

110TH CONGRESS *1st Session*	SENATE	REPORT 110–123

DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2007

R E P O R T

OF THE

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS UNITED STATES SENATE

TO ACCOMPANY

S. 1257

together with

ADDITIONAL VIEWS

TO PROVIDE THE DISTRICT OF COLUMBIA A VOTING SEAT AND THE STATE OF UTAH AN ADDITIONAL SEAT IN THE HOUSE OF REPRESENTATIVES

JUNE 28, 2007.—Ordered to be printed

COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

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DISTRICT OF COLUMBIA HOUSE VOTING RIGHTS ACT OF 2007

JUNE 28, 2007.—Ordered to be printed

Mr. LIEBERMAN, from the Committee on Homeland Security and Governmental Affairs, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany S. 1257]

The Committee on Homeland Security and Governmental Affairs, to which was referred the bill (S. 1257) to provide the District of Columbia a voting seat and the State of Utah an additional seat in the House of Representatives, having considered the same, reports favorably thereon with amendments and recommends that the bill, as amended, do pass.

CONTENTS

I. PURPOSE AND SUMMARY

The purpose of S. 1257 is to provide the District of Columbia with full representation in the U.S. House of Representatives. The bill permanently expands the U.S. House of Representatives from 435 to 437 seats. The two-seat increase will provide a voting representative to the District of Columbia and a fourth seat to the

State of Utah, the next state in line to receive an additional seat based on the 2000 census.

II. Background and Need for the Legislation

BACKGROUND

The citizens of the District of Columbia have lived without a voting representative in Congress since the federal government established the District as the nation's capital on land ceded by Maryland and Virginia over 200 years ago.[1] Although the land was ceded to the federal government in 1790, the District of Columbia was not officially established by Congress for another ten years.[2] Between 1790 and 1800, residents of what would become the District were allowed through legislation to continue to vote in congressional elections in their former states.[3] Congress then passed the Organic Act of 1801 severing District residents' ties with Maryland and Virginia, thereby eliminating District residents' representation in Congress.[4]

Today, District residents, who number close to 600,000, are still disenfranchised. These American citizens pay federal income taxes, serve in the military, and fulfill all other obligations of citizenship. Arguably, DC residents are more impacted by the federal government than the rest of the nation. The District has the second highest tax obligation per capita in the country;[5] the District, unlike every other U.S. city, must receive the approval of Congress to spend locally generated tax dollars; and many District residents work for the federal government, meaning that their benefits and salary are directly impacted by the decisions of Congress. Moreover, DC has been the target of terrorist attack because it is the home of the U.S. government. Yet District residents do not have a vote in determining tax levels, defense and homeland security policy, or decisions impacting the federal workforce.

Most Americans disapprove of the denial of voting rights to residents of the nation's capital. In 2005, an independent research firm found that 82 percent of Americans support equal voting rights in Congress for the District of Columbia.[6] The results of the poll were consistent across the country regardless of age, geography, religion, or political affiliation.[7]

Moreover, the denial of voting representation to the District is a blemish on the United States' reputation in the international community. The United States is the only democracy in the world that denies voting representation to the residents of its nation's capital.[8] This inconsistency was criticized by the Organization of American States in 1993 when it issued a report finding that the United

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[1] Equal Representation in Congress: Providing Voting Rights to the District of Columbia: Hearing Before the Senate Comm. on Homeland Security and Governmental Affairs, 110th Cong. (2007) (testimony of Viet D. Dinh).

[2] Id.

[3] Id.

[4] Id.

[5] Equal Representation in Congress: Providing Voting Rights to the District of Columbia: Hearing Before the Senate Comm. on Homeland Security and Governmental Affairs, 110th Cong. (2007) (testimony of Adrian M. Fenty).

[6] KRC Research, Survey conducted for DC Vote, U.S. Public Opinion on DC Voting Rights (January 2005).

[7] Id.

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

States was in violation of international human rights law.[9] The United Nations Human Rights Commission followed suit in 2006 by admonishing the U.S. for violating the International Covenant on Civil and Political Rights.[10]

S. 1257 would correct this injustice by providing the District with one voting member in the U.S. House of Representatives beginning with the 111th Congress.

The legislation would also give Utah, the next state in line to receive an additional representative based on the 2000 census, a fourth seat in the House. Utah missed a fourth seat by less than 1,000 people in the year 2000 even though Utah officials argued that close to 10,000 missionaries were excluded from that count. Moreover, Utah's population has grown substantially since that time. According to the U.S. Census Bureau, Washington County in Southern Utah is the nation's fastest-growing metro area.[11] The county's population has grown by over 40 percent since 2000, and the growth statistics from around the state are equally impressive.[12] Based on its current population, Utah deserves a fourth seat in the House.

CONGRESS'S CONSTITUTIONAL AUTHORITY

Though some disagree, many constitutional scholars believe that providing the District with a House representative through legislation is clearly constitutional. In May 2007, 25 widely respected legal scholars wrote to Congress affirming that "Congress has the power through 'simple' legislation to provide voting representation in Congress for DC residents."[13] This authority lies within Article I, Section 8 of the Constitution ("the District Clause"), which gives Congress authority to "exercise exclusive legislation in all cases whatsoever" regarding the District of Columbia.[14]

Those who argue that Congress does not have the authority to legislatively create a House seat for DC reference Article I, Section 2 of the Constitution, which states that the House "shall be composed of members chosen * * * by the people of the several states."[15] However, the District did not exist when these words were ratified, and they cannot be read in isolation.[16]

Courts have repeatedly upheld Congress's broad use of the District Clause to apply to the District constitutional provisions that on their face are limited to states. Article I, Section 2, for example, says that "direct taxes shall be apportioned among the several states."[17] In 1820, the Supreme Court unanimously held that Congress, exercising its legislative authority over the District, could impose direct federal taxes on District residents. Chief Justice John

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[9] Inter-American Commission on Human Rights, Organization of American States, Report Number 98/03, Case 11.204 (December 2003).

[10] United Nations Human Rights Commission, International Covenant on Civil and Political Rights (September 2006) at 11–12.

[11] U.S. Census Bureau, Population Change in the 100 Metropolitan Statistical Areas With the Largest Numeric Gain: April 1, 2000 to July 1, 2006 (April 2007).

[12] Id.

[13] Sheryll D. Cahsin, Viet D. Dinh, and 23 other legal scholars, Letter to the U.S. House of Representatives on the Constitutionality of DC Voting Rights Legislation (included in the May 15, 2007 hearing record) (March 2007).

[14] U.S. CONST., Art. I, § 8, cl. 17.

[15] U.S. CONST., Art. I, § 2, cl. 1.

[16] Peter Raven-Hansen, Congressional Representation for the District of Columbia: A Constitutional Analysis, 12 Harv. J. on Legis.167, 172 (1975).

[17] U.S. CONST., Art. I, § 2, cl. 3.

Marshall wrote that "certainly the Constitution does not consider [the District's] want of a representative in Congress as exempting it from equal taxation." [18] If the word "states" did not prevent Congress from imposing taxes on District residents then, how can it prevent Congress from granting representation to District residents now?

Article III grants the federal courts jurisdiction over controversies "between citizens of different states." [19] Noting that it would be "extraordinary" for courts to be open to citizens of states but not citizens of the District,[20] the Supreme Court unanimously held that Congress could correct this anomaly, and later upheld Congress' decision to do so by legislation.[21] If the word "states" did not prevent Congress from granting access to the judicial branch then, how can it prevent Congress from granting access to the legislative branch today?

Originally, the Fourteenth Amendment's guarantee of due process and equal protection applied only to states.[22] The Supreme Court held in 1973 that while the Fourteenth Amendment itself does not apply to the District, Congress could extend the same protections by legislation under the District Clause.[23] Congress did just that.[24] If the word "state" did not prevent Congress from allowing District residents to sue for violation of constitutional rights, how can it prevent Congress from granting District residents a full voice in that same Congress?

In 2000, after determining that the District does not have a "judicially cognizable" right to congressional representation, the Supreme Court affirmed that the District may pursue that goal in "other venues," suggesting that such authority could be granted legislatively.[25]

Two centuries of political and judicial precedent support Congress's authority to legislatively extend House representation to the District under the District Clause. The Committee believes this authority, which the Supreme Court described as "plenary in every respect," [26] allows Congress to live up to the principles this nation was founded upon, and provide representation in the U.S. House of Representatives to the District of Columbia.

III. LEGISLATIVE HISTORY

S. 1257 was introduced by Chairman Lieberman, Senator Hatch, and Senator Bennett on May 1, 2007, and was referred to the Committee on Homeland Security and Governmental Affairs. The bill was later cosponsored by Senators Clinton, Landrieu, Leahy, Kennedy, Obama, Mikulski, Kerry, Feingold, McCaskill, Pryor, Carper, Levin, and Sanders.

The Committee held a hearing entitled "Equal Representation in Congress: Providing Voting Rights to the District of Columbia," on

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[18] *Loughborough* v. *Blake*, 18 U.S. (5 Wheat.) 317, 320 (1820).
[19] U.S. CONST., Art. III, § 2, cl. 1.
[20] Hepburn, 6 U.S. (2 Cranch) at 453 (1805).
[21] *Nat'l Mutual Ins. Co.* v. *Tidewater Transfer Co.*, 337 U.S. 582, 600 (1949).
[22] U.S. Const. amend. XIV, § 1.
[23] *District of Columbia* v. *Carter,* 409 U.S. 418 (1973).
[24] P.L. 96–170.
[25] Equal Representation in Congress: Providing Voting Rights to the District of Columbia: Hearing Before the Senate Comm. on Homeland Security and Governmental Affairs, 110th Cong. (2007) (testimony of Viet D. Dinh).
[26] *Nat'l Mutual Ins. Co.* v. *Tidewater Transfer Co.,* 337 U.S. 582, 592 (1949).

May 15, 2007. Testimony was received from: Senator Orrin G. Hatch; Representative Tom Davis; Delegate Eleanor Holmes Norton; Mayor Adrian Fenty, District of Columbia; Jack Kemp, former Congressman and Secretary of Housing and Urban Development; Wade Henderson, President and Chief Executive Officer, Leadership Conference on Civil Rights; Viet D. Dinh, Professor of Law, Georgetown University Law Center; and Jonathan R. Turley, Professor of Law, George Washington University Law School.

The Committee on the Judiciary held a subsequent hearing entitled, "Ending Taxation without Representation: The Constitutionality of S. 1257," on May 23, 2007. Testimony was received from: Representative Chris Cannon; Delegate Eleanor Holmes Norton; Mark L. Shurtleff, Utah Attorney General; John P. Elwood, Deputy Assistant Attorney General, Department of Justice; Patricia Wald, former Chief Judge, United States Court of Appeals for the District of Columbia Circuit; Jonathan Turley, Professor of Law, George Washington University Law School; Charles J. Ogletree, Professor of Law, Harvard Law School; Kenneth R. Thomas, Congressional Research Service; and Richard P. Bress, Partner, Latham & Watkins, LLP.

On June 13, 2007, the Committee considered S. 1257.

The Committee adopted two amendments offered by Senator Collins and cosponsored by Senators Coleman and Voinovich. The first added a provision to the bill stating that the District shall not be considered a state for the purposes of Senate representation. This amendment was adopted by voice vote.

Senators present were Lieberman, Levin, Akaka, Landrieu, Obama, McCaskill, Tester, Collins, Stevens, Voinovich, Coleman, and Warner.

The second amendment required expedited consideration of any constitutional challenge to the legislation. The amendment was adopted by a vote of 15–1.

Yeas: Lieberman, Levin, Akaka, Landrieu, Obama, Tester, Collins, Voinovich, Coleman, and Warner. Yeas by proxy: Carper, Pryor, McCaskill, Domenici, and Sununu. Nays: Stevens. Senator Coburn was not present and provided no instructions.

By a vote of 9–1, the Committee ordered the bill as amended favorably reported to the full Senate.

Yeas: Lieberman, Levin, Akaka, Landrieu, Obama, Tester, Collins, Voinovich, and Coleman. Nays: Warner. Yeas by proxy: Carper, Pryor, McCaskill. Nays by proxy: Stevens, Coburn, Domenici, and Sununu.

IV. Section-by-Section Analysis

Section 1. Short title

Section 2. Treatment of District of Columbia as a Congressional District

This section requires that the District of Columbia be treated as a congressional district for purposes of representation in the House of Representatives. House representation will apply to the District in the same way as to a state, except that the District may not receive more than one member under reapportionment of members. The section further clarifies that the District may not be treated as a state for purposes of Senate representation.

Section 3. Increase in membership of House of Representatives

This section requires a permanent increase in the number of members in the House of Representatives from 435 to 437, effective with the 111th Congress and each succeeding Congress. One of the new members will be elected from the District of Columbia and the other from the state next in line to receive an additional seat, based on the 2000 census. The President is required to transmit a revised statement of reapportionment to Congress within 30 days of the enactment of this Act. The Clerk of the House of Representatives is then required to submit a report to the Speaker within 15 days of receiving the revised statement of apportionment naming Utah as the state receiving an additional seat (in addition to the District).

Section 4. Effective date; Timing of elections

This section states that the new members from the District of Columbia and Utah may not be seated until the 111th Congress. In order for both members to be seated, the additional representative from Utah must be elected according to a redistricting plan enacted by the State of Utah. The Committee is aware that Utah signed a new redistricting plan into law on December 6, 2006, and encourages the state to use that plan. This plan will stay in effect for the 111th and 112th Congresses.

Section 5. Conforming amendments

This section repeals the Office of the District of Columbia Delegate and the Office of the Statehood Representative. This section also contains a number of conforming amendments to the District of Columbia Election Code and the law governing appointments to the military academies to reflect the repeal of the DC delegate and the establishment of a voting representative for the District.

Section 6. Nonseverability of provisions

If any provision in this bill is determined to be invalid, the entire bill will be deemed invalid and have no effect of law.

Section 7. Judicial review

If a legal challenge is brought to any provision in this bill, the judicial review shall be expedited to the greatest possible extent. The legal action will be heard by a 3-judge court in the U.S. District Court for the District of Columbia, and any appeal must be made directly to the Supreme Court.

V. Evaluation of Regulatory Impact

Pursuant to the requirement of paragraph 11(b)(1) of rule XXVI of the Standing Rules of the Senate the Committee has considered the regulatory impact of this bill. CBO states that there are no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and no costs on State, local, or tribal governments. The legislation contains no other regulatory impact.

VI. ESTIMATED COST OF LEGISLATION

JUNE 15, 2007.

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

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1257, the District of Columbia House Voting Rights Act of 2007.

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

Sincerely,

PETER R. ORSZAG.

Enclosure.

S. 1257—District of Columbia House Voting Rights Act of 2007

Summary: S. 1257 would expand the number of Members in the House of Representatives from 435 to 437 beginning with the 111th Congress. The legislation would provide the District of Columbia with one permanent Representative and add one additional new Member. Under S. 1257, the seat would initially be assigned to the state of Utah and then would be reallocated based on the next Congressional apportionment following the 2010 census.

CBO estimates that enacting the bill would increase direct spending by about $200,000 in 2009 and by about $2 million over the 2008–2017 period. In addition, implementing the bill would have discretionary costs of about $1 million in 2009 and about $7 million over the 2008–2012 period, assuming the availability of the appropriated funds.

S. 1257 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would impose no significant costs on state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 1257 is shown in the following table. The costs of this legislation fall within budget function 800 (general government).

	By fiscal year, in millions of dollars—											
	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2008–2012	2008–2017
CHANGES IN DIRECT SPENDING												
New Representative's Salary and Benefits:												
Estimated Budget Authority	0	*	*	*	*	*	*	*	*	*	1	2
Estimated Outlays	0	*	*	*	*	*	*	*	*	*	1	2
CHANGES IN SPENDING SUBJECT TO APPROPRIATION												
New Representative's Office and Administrative Expenses:												
Estimated Authorization Level	0	1	2	2	2	2	2	2	2	2	7	17
Estimated Outlays	0	1	2	2	2	2	2	2	2	2	7	17

Note: * = less than $500,000.

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted this year and that spending will follow historical patterns for Congressional office spending, beginning in 2009.

The legislation would permanently expand the number of Members in the House of Representatives by two to 437 Members. The new representatives would take office on the same day beginning with the 111th Congress. One new Member would represent the District of Columbia and the other would be a Representative for the state of Utah until the next apportionment based on the 2010 census. The District of Columbia currently has a nonvoting delegate to the House of Representatives. S. 1257 would establish voting representation for the conversion of the District's delegate to Representative and would not add significant costs since the position is already funded with the same salary and administrative support as other Representatives.

Direct spending

Enacting S. 1257 would increase direct spending for the salary and associated benefits for the new representative, beginning with a new Member from the state of Utah until the next apportionment based on the 2010 census. CBO estimates that the increase in direct spending for the Congressional salary and benefits would be about $2 million over the 2008–2017 period. That estimate assumes that the current Congressional salary of $165,200 would be adjusted for inflation. With benefits, the 2008 cost would be about $200,000.

Spending subject to appropriation

Based on the current administrative and expense allowances available for Members and other typical Congressional office costs, CBO estimates that the addition of a new Member would cost about $1 million in fiscal year 2009 and about $7 million over the 2008–2012 period, subject to the availability of appropriated funds.

Intergovernmental and private-sector impact: S. 1257 contains no intergovernmental or private-sector mandates as defined in UMRA and would impose no significant costs on state, local, or tribal governments.

Previous CBO estimate: On March 16, 2007, CBO transmitted a cost estimate for H.R. 1433, the District of Columbia House Voting Rights Act of 2007, as ordered reported by the House Committee on the Judiciary on March 15, 2007, and the House Committee on Oversight and Government Reform on March 13, 2007. The three pieces of legislation are similar in that they all expand the number of Members in the House of Representatives. Under H.R. 1433, the new Members would take office during the 110th Congress. Under the Senate bill, membership in the House of Representatives would be expanding beginning with the 111th Congress. The cost estimates reflect that difference.

Estimate prepared by: Federal costs: Matthew Pickford; Impact on state, local, and tribal governments: Elizabeth Cove; Impact on the private-sector: Paige Piper/Bach.

Estimate approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

VII. CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the following changes in existing law made by the bill, as reported, are shown as follows: (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 22 OF THE ACT OF JUNE 18, 1929

AN ACT To provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress.

SEC. 22. (a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of [the then existing number of Representatives] *the number of Representatives established with respect to the One Hundred Tenth Congress* by the method known as the method of equal proportions, no State to receive less than one Member.

* * * * * * *

(d) This section shall apply with respect to the District of Columbia in the same manner as this section applies to a State, except that the District of Columbia may not receive more than one Member under any reapportionment of Members.

SECTION 3 OF TITLE 3, UNITED STATES CODE

NUMBER OF ELECTORS

SEC. 3. The number of electors shall be equal to the number of Senators and Representatives to which the several States are by law entitled at the time when the President and Vice President to be chosen [come into office;] *come into office (subject to the twenty-third amendment to the Constitution of the United States in the case of the District of Columbia);* except, that where no apportionment of Representatives has been made after any enumeration, at the time of choosing electors, the number of electors shall be according to the then existing apportionment of Senators and Representatives.

TITLE 10, UNITED STATES CODE

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Subtitle B—Army

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PART III—TRAINING

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CHAPTER 403—UNITED STATES MILITARY ACADEMY

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SEC. 4342. CADETS: APPOINTMENT; NUMBERS, TERRITORIAL DISTRIBUTION

(a) The authorized strength of the Corps of Cadets of the Academy (determined for any year as of the day before the last day of the academic year) is 4,000 or such higher number as may be prescribed by the Secretary of the Army under subsection (j). Subject to that limitation, cadets are selected as follows:

(1) * * *

* * * * * * *

[(5) Five cadets from the District of Columbia, nominated by the Delegate to the House of Representatives from the District of Columbia.**]**

* * * * * * *

(f) Each candidate for admission nominated under clauses (3) through (9) of subsection (a) must be domiciled in the State, or in the congressional district, from which he is nominated, or in **[**the District of Columbia,**]** Puerto Rico, American Samoa, Guam, or the Virgin Islands, if nominated from one of those places.

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Subtitle C—Navy and Marine Corps

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PART III—EDUCATION AND TRAINING

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CHAPTER 603—UNITED STATES NAVAL ACADEMY

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SEC. 6954. MIDSHIPMEN: NUMBER

(a) The authorized strength of the Brigade of Midshipmen (determined for any year as of the day before the last day of the academic year) is 4,000 or such higher number as may be prescribed by the Secretary of the Navy under subsection (h). Subject to that limitation, midshipmen are selected as follows:

(1) * * *

* * * * * * *

[(5) Five from the District of Columbia, nominated by the Delegate to the House of Representatives from the District of Columbia.**]**

* * * * * * *

SEC. 6958. MIDSHIPMEN: QUALIFICATIONS FOR ADMISSION

(a) * * *

(b) Each candidate for admission nominated under clauses (3) through (9) of section 6954(a) of this title must be domiciled in the State, or in the congressional district, from which he is nominated, or in [the District of Columbia,] Puerto Rico, American Samoa, Guam, or the Virgin Islands, if nominated from one of those places.

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Subtitle D—Air Force

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PART III—TRAINING

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CHAPTER 903—UNITED STATES AIR FORCE ACADEMY

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Sec. 9342. Cadets: appointment; numbers, territorial distribution.

(a) The authorized strength of Air Force Cadets of the Academy (determined for any year as of the day before the last day of the academic year) is 4,000 or such higher number as may be prescribed by the Secretary of the Air Force under subsection (j). Subject to that limitation, Air Force Cadets are selected as follows:

(1) * * *

* * * * * * *

[(5) Five cadets from the District of Columbia, nominated by the Delegate to the House of Representatives from the District of Columbia.]

* * * * * * *

(f) Each candidate for admission nominated under clauses (3) through (9) of subsection (a) must be domiciled in the State, or in the congressional district, from which he is nominated, or in [the District of Columbia,] Puerto Rico, American Samoa, Guam, or the Virgin Islands, if nominated from one of those places.

* * * * * * *

DISTRICT OF COLUMBIA DELEGATE ACT

TITLE II—DISTRICT OF COLUMBIA DELEGATE TO THE HOUSE OF REPRESENTATIVES

SHORT TITLE

SEC. 201. THIS TITLE MAY BE CITED AS THE 'DISTRICT OF COLUMBIA DELEGATE ACT'.

[DELEGATE TO THE HOUSE OF REPRESENTATIVES]

[SEC. 202. (a) The people of the District of Columbia shall be represented in the House of Representatives by a Delegate, to be known as the 'Delegate to the House of Representatives from the

District of Columbia', who shall be elected by the voters of the District of Columbia in accordance with the District of Columbia Election Act. The Delegate shall have a seat in the House of Representatives, with the right of debate, but not of voting, shall have all the privileges granted a Representative by section 6 of Article I of the Constitution, and shall be subject to the same restrictions and regulations as are imposed by law or rules on Representatives. The Delegate shall be elected to serve during each Congress.]

[(b) No individual may hold the office of Delegate to the House of Representatives from the District of Columbia unless on the date of his election—]

[(1) he is a qualified elector (as that term is defined in section 2(2) of the District of Columbia Election Act) of the District of Columbia;]

[(2) he is at least twenty-five years of age;]

[(3) he holds no other paid public office; and]

[(4) he has resided in the District of Columbia continuously since the beginning of the three-year period ending on such date.]

He shall forfeit his office upon failure to maintain the qualifications required by this subsection.

* * * * * * *

[OTHER PROVISIONS AND AMENDMENTS RELATING TO THE ESTABLISHMENT OF A DELEGATE TO THE HOUSE OF REPRESENTATIVES FROM THE DISTRICT OF COLUMBIA]

[SEC. 204. (a) The provisions of law which appear in—]

[(1) section 25 (relating to oath of office),]

[(2) section 31 (relating to compensation),]

[(3) section 34 (relating to payment of compensation),]

[(4) section 35 (relating to payment of compensation),]

[(5) section 37 (relating to payment of compensation),]

[(6) section 38a (relating to compensation),]

[(7) section 39 (relating to deductions for absence),]

[(8) section 40 (relating to deductions for withdrawal),]

[(9) section 40a (relating to deductions for delinquent indebtedness),]

[(10) section 41 (relating to prohibition on allowance for newspapers),]

[(11) section 42c (relating to postage allowance),]

[(12) section 46b (relating to stationery allowance),]

[(13) section 46b–1 (relating to stationery allowance),]

[(14) section 46b–2 (relating to stationery allowance),]

[(15) section 46g (relating to telephone, telegraph, and radiotelegraph allowance),]

[(16) section 47 (relating to payment of compensation),]

[(17) section 48 (relating to payment of compensation),]

[(18) section 49 (relating to payment of compensation),]

[(19) section 50 (relating to payment of compensation),]

[(20) section 54 (relating to provision of United States Code Annotated or Federal Code Annotated),]

[(21) section 60g–1 (relating to clerk hire),]

[(22) section 60g–2(a) (relating to interns),]

[(23) section 80 (relating to payment of compensation),]

[(24) section 81 (relating to payment of compensation),]

[(25) section 82 (relating to payment of compensation),]

[(26) section 92 (relating to clerk hire),]

[(27) section 92b (relating to pay of clerical assistants),]

[(28) section 112e (relating to electrical and mechanical office equipment),]

[(29) section 122 (relating to office space in the District of Columbia), and]

[(30) section 123b (relating to use of House Recording Studio),]

of title 2 of the United States Code shall apply with respect to the Delegate to the House of Representatives from the District of Columbia in the same manner and to the same extent as they apply with respect to a Representative. The Federal Corrupt Practices Act and the Federal Contested Election Act shall apply with respect to the Delegate to the House of Representatives from the District of Columbia in the same manner and to the same extent as they apply with respect to a Representative.

[(b) Section 2106 of title 5 of the United States Code is amended by inserting 'a Delegate from the District of Columbia,' immediately after 'House of Representatives,'.]

[(c) Sections 4342(a)(5), 6954(a)(5), and 9342(a)(5) of title 10 of the United States Code are each amended by striking out 'by the Commissioner of that District' and inserting in lieu thereof 'by the Delegate to the House of Representatives from the District of Columbia'.]

[(d)(1) Section 201(a) of title 18 of the United States

Code is amended by inserting 'the Delegate from the District of Columbia,' immediately after 'Member of Congress,'.]

[(2) Sections 203(a)(1) and 204 of title 18 of the United States Code are each amended by inserting 'Delegate from the District of Columbia, Delegate Elect from the District of Columbia,' immediately after 'Member of Congress Elect,'.]

[(3) Section 203(b) of title 18 of the United States Code is amended by inserting 'Delegate,' immediately after 'Member,'.]

[(4) The last undesignated paragraph of section 591 of title 18 of the United States Code is amended by inserting 'the District of Columbia and' immediately after 'includes'.]

[(5) Section 594 of title 18 of the United States Code is amended (1) by striking out 'or' immediately after 'Senate,', and (2) by striking out 'Delegates or Commissioners from the Territories and possessions' and inserting in lieu thereof 'Delegate from the District of Columbia, or Resident Commissioner'.]

[(6) Section 595 of title 18 of the United States Code is amended by striking out 'or Delegate or Resident Commissioner from any Territory or Possession' and inserting in lieu thereof 'Delegate from the District of Columbia, or Resident Commissioner'.]

[(e) Section 11(c) of the Voting Rights Act of 1965 (42 U.S.C. 1973i(c)) is amended by striking out 'or Delegates or Commissioners from the territories or possessions' and inserting in lieu thereof 'Delegate from the District of Columbia'.]

[(f) The second sentence in the second paragraph of section 7 of the District of Columbia Alcoholic Beverage Control Act (D.C. Code, sec. 25–107) is amended by striking out 'the presidential election' and inserting in lieu thereof 'any election'.]

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DISTRICT OF COLUMBIA OFFICIAL CODE

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TITLE 1—GOVERNMENT ORGANIZATION

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CHAPTER 1—DISTRICT OF COLUMBIA GOVERNMENT DEVELOPMENT

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Subchapter II—Statehood

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PART A—CONSTITUTIONAL CONVENTION INITIATIVE

* * * * * * *

Subpart I—General

* * * * * * *

SEC. 1—123. CALL OF CONVENTION; DUTIES OF CONVENTION; ADOPTION OF CONSTITUTION; REJECTION OF CONSTITUTION; ELECTION OF SENATOR AND REPRESENTATIVE.

(a) * * *

* * * * * * *

(d)(1) Following the approval of a proposed constitution by a majority of the electors voting thereon, there shall be held an election of candidates for the [offices of Senator and Representative] *office of Senator* from the new state. Such election shall be partisan and shall be held at the next regularly scheduled primary and general elections following certification by the District of Columbia Board of Elections and Ethics that the proposed constitution has been approved by a majority of the electors voting thereon. In the event that the proposed constitution is approved by the electors at the general election to be held in November, 1982, the primary and general elections authorized by this paragraph shall be held in September, 1990, and November, 1990, respectively.

(2) The qualifications for candidates for the [offices of Senator and Representative] *office of Senator* shall conform with the provisions of Article I of the United States Constitution and the primary and general elections shall follow the same electoral procedures as provided for candidates for nonvoting Delegate of the District of Columbia in the District of Columbia Election Code of 1955, subchapter I of Chapter 10 of this title. The term of the 1st Representative elected pursuant to this initiative shall begin on January 2, 1991, and shall expire on January 2, 1993. The terms of the 1st Senators elected pursuant to this initiative shall begin on January 2, 1991, and shall expire on January 2, 1997, and January 2, 1995, respectively. At the initial election, the candidate for Senator receiving the highest number of votes will receive the longer term and the candidate receiving the second highest number of votes will receive the shorter term. A primary and a general election to replace [a Representative or] a Senator whose term is about to ex-

pire shall be held in September and in November respectively, of the year preceding the year during which the term of [the Representative or] the Senator expires. Each [Representative shall be elected for a 2-year term and each] Senator shall be elected for a 6-year term as prescribed by the Constitution of the United States.

(3) The District of Columbia Board of Elections and Ethics shall:

(A) Conduct elections to fill the positions of 2 United States Senators [and 1 United States Representative]; and

* * * * * * *

(e) A [Representative or] Senator elected pursuant to this subchapter shall be a public official as defined in Sec. 1–1106.02(a), and subscribe to the oath or affirmation of office provided for in 1–604.08.

(f) A [Representative or] Senator:

(1) * * *

* * * * * * *

(g)(1) A [Representative or] Senator may solicit and receive contributions to support the purposes and operations of the [Representative's or] Senator's public office. A [Representative or] Senator may accept services, monies, gifts, endowments, donations, or bequests. A [Representative or] Senator shall establish a District of Columbia statehood fund in 1 or more financial institutions in the District of Columbia. There shall be deposited in each fund any gift or contribution in whatever form, and any monies not included in annual Congressional appropriations. A [Representative or] Senator is authorized to administer the [Representative's or] Senator's respective fund in any manner the [Representative or] Senator deems wise and prudent, provided that the administration is lawful, in accordance with the fiduciary responsibilities of public office, and does not impose any financial burden on the District of Columbia.

(2) Contributions may be expended for the salary, office, or other expenses necessary to support the purposes and operations of the public office of a [Representative or] Senator, however, each [Representative or] Senator shall receive compensation no greater than the compensation of the Chairman of the Council of the District of Columbia, as provided in Sec. 1–204.03 and 1–611.09.

(3) Each [Representative or] Senator shall file with the Director of Campaign Finance a quarterly report of all contributions received and expenditures made in accordance with paragraph (1) of this subsection. No campaign activities related to election or reelection to the office of [Representative or] Senator shall be conducted nor shall expenditures for campaign literature or paraphernalia be authorized under paragraph (1) of this subsection.

(4) The recordkeeping requirements of subchapter I of Chapter 11 of this title, shall apply to contributions and expenditures made under paragraph (1) of this subsection.

(5) Upon expiration of a [Representative's or] Senator's term of office and where the [Representative or] Senator has not been reelected, the [Representative's or] Senator's statehood fund, established in accordance with paragraph (1) of this subsection, shall be dissolved and any excess funds shall be used to retire the [Representative's or] Senator's debts for salary, office, or other expenses necessary to support the purposes and operation of the public office

of the [Representative or] Senator. Any remaining funds shall be donated to an organization operating in the District of Columbia as a not-for-profit organization within the meaning of section 501(c) of the Internal Revenue Code of 1986, approved October 22, 1986 (100 Stat. 2085; 26 U.S.C. 501(c)).

(h) A [Representative or] Senator elected pursuant to subsection (d) of this section, shall be subject to recall pursuant to Sec. 1–1001.18, during the period of the [Representative's or] Senator's service prior to the admission of the proposed new state into the union.

* * * * * * *

SEC. 1—125. STATEHOOD COMMISSION.

(a) The Statehood Commission shall consist of [27] *26* voting members appointed in the following manner:

(1) * * *

* * * * * * *

(5) The United States Senators shall each appoint 1 member; *and*

[(6) The United States Representative shall appoint 1 member; and]

[(7)] *(6)* The Mayor, the Chairman of the Council, and the Councilmember whose purview the Statehood Commission comes within shall be non-voting members of the Commission.

(a–1)(1) Notwithstanding any other provision of law, members serving unexpired terms on August 26, 1994, may continue to serve until appointments or reappointments are confirmed. Appointments or reappointments shall be made immediately after August 26, 1994, in the following manner:

(A) * * *

* * * * * * *

[(H) The United States Representative shall appoint 1 member for a 2 year term.]

* * * * * * *

SEC. 1—127. APPROPRIATIONS.

There is authorized to be appropriated from the General Fund of the District of Columbia an amount for the salaries and office expenses of the elected representatives to the Senate [and House] referred to in 1–123(d) during the period of their service prior to the admission of the proposed new state into the union.

* * * * * * *

PART B—HONORARIA LIMITATIONS

SEC. 1—131. APPLICATION OF HONORARIA LIMITATIONS.

Notwithstanding the provisions of 1–135, the honoraria limitations imposed by part H of subchapter I of Chapter 11 of this title shall apply to a Senator [or Representative] elected pursuant to 1–123(d)(1), only if the salary of the Senator [or Representative] is supported by public revenues.

* * * * * * *

PART C—CAMPAIGN FINANCE REFORM

SEC. 1—135. APPLICATION OF CAMPAIGN FINANCE REFORM AND CONFLICT OF INTEREST ACT.

All provisions of the District of Columbia Campaign Finance Reform and Conflict of Interest Act, subchapter I of Chapter 11 of this title, which apply to the election of and service of the Mayor of the District of Columbia shall apply to persons who are candidates or elected to serve as United States Senators [and United States Representative] pursuant to this initiative.

* * * * * * *

CHAPTER 10. ELECTIONS

* * * * * * *

Subchapter I. Regulation of Elections

SEC. 1—1001.01. ELECTION OF ELECTORS.

In the District of Columbia electors of President and Vice President of the United States, [the Delegate to the House of Representatives,] *the Representative in the Congress,* the members of the Board of Education, the members of the Council of the District of Columbia, the Mayor and the following officials of political parties in the District of Columbia shall be elected as provided in this subchapter:

(1) * * *

* * * * * * *

SEC. 1—1001.02. DEFINITIONS.

For the purposes of this subchapter:

(1) * * *

* * * * * * *

[(6) The term 'Delegate' means the Delegate to the House of Representatives from the District of Columbia.]

* * * * * * *

(13) The term 'elected official' means the Mayor, the Chairman and members of the Council, the President and members of the Board of Education, [the Delegate to Congress for the District of Columbia, United States Senator and Representative,] *the Representative in the Congress, United States Senator,* and advisory neighborhood commissioners of the District of Columbia.

* * * * * * *

SEC. 1—1001.08. QUALIFICATIONS OF CANDIDATES AND ELECTORS; NOMINATION AND ELECTION OF [DELEGATE] *REPRESENTATIVE,* MAYOR, CHAIRMAN, MEMBERS OF COUNCIL, AND MEMBERS OF BOARD OF EDUCATION; PETITION REQUIREMENTS; ARRANGEMENT OF BALLOT.

(a) * * *

* * * * * * *

(h)(1)(A) The [Delegate], *Representative in the Congress,* Mayor, Chairman of the Council of the District of Columbia and the 4 at-large members of the Council shall be elected by the registered

qualified electors of the District of Columbia in a general election. Each candidate for the office of [Delegate,] *Representative in the Congress,* Mayor, Chairman of the Council of the District of Columbia, and at-large members of the Council in any general election shall, except as otherwise provided in subsection (j) of this section and 1–1001.10(d), have been elected by the registered qualified electors of the District as such candidate by the next preceding primary election.

* * * * * * *

(i)(1) Each individual in a primary election for candidate for the office of [Delegate,] *Representative in the Congress,* Mayor, Chairman of the Council, or at-large member of the Council shall be nominated for any such office by a petition:

(A) * * *

* * * * * * *

(j)(1) A duly qualified candidate for the office of [Delegate,] *Representative in the Congress,* Mayor, Chairman of the Council, or member of the Council, may, subject to the provisions of this subsection, be nominated directly as such a candidate for election for such office (including any such election to be held to fill a vacancy). Such person shall be nominated by petition:

(A) * * *

(B) In the case of a person who is a candidate for the office of member of the Council (other than the Chairman or an at-large member), signed by 500 voters who are duly registered under 1–1001.07 in the ward from which the candidate seeks election; and in the case of a person who is a candidate for the office of [Delegate,] *Representative in the Congress,* Mayor, Chairman of the Council, or at-large member of the Council, signed by duly registered voters equal in number to 1½ per centum of the total number of registered voters in the District, as shown by the records of the Board as of 123 days before the date of such election, or by 3,000 persons duly registered under 1–1001.07, whichever is less. No signatures on such a petition may be counted which have been made on such petition more than 123 days before the date of such election.

* * * * * * *

SEC. 1—1001.10. DATES FOR HOLDING ELECTIONS; VOTES CAST FOR PRESIDENT AND VICE PRESIDENT COUNTED AS VOTES FOR PRESIDENTIAL ELECTORS; VOTING HOURS; TIE VOTES; FILLING VACANCY WHERE ELECTED OFFICIAL DIES, RESIGNS, OR BECOMES UNABLE TO SERVE.

(a)(1) * * *

* * * * * * *

(3)(A) Except as otherwise provided in the case of special elections under this subchapter or section 206(a) of the District of Columbia Delegate Act, primary elections of each political party for [the office of Delegate to the House of Representatives] *the office of Representative in the Congress* shall be held on the 1st Tuesday after the 2nd Monday in September of each even-numbered year; and general elections for such office shall be held on the Tuesday

next after the 1st Monday in November of each even-numbered year.

* * * * * * *

(d)(1) In the event that any official, other than [Delegate,] Mayor, member of the Council, member of the Board of Education, or winner of a primary election for the office of [Delegate,] Mayor, or member of the Council, elected pursuant to this subchapter dies, resigns, or becomes unable to serve during his or her term of office leaving no person elected pursuant to this subchapter to serve the remainder of the unexpired term of office, the successor or successors to serve the remainder of the term shall be chosen pursuant to the rules of the duly authorized party committee, except that the successor shall have the qualifications required by this subchapter for the office.

(2) [(A) In the event that a vacancy occurs in the office of Delegate before May 1 of the last year of the Delegate's term of office,] *In the event that a vacancy occurs in the office of Representative in the Congress before May 1 of the last year of the Representative's term of office,* the Board shall hold a special election to fill the unexpired term. The special election shall be held on the first Tuesday that occurs more than 114 days after the date on which the vacancy is certified by the Board unless the Board determines that the vacancy could be filled more practicably in a special election held on the same day as the next District-wide special, primary, or general election that is to occur within 60 days of the date on which the special election would otherwise have been held under the provisions of this subsection. The person elected to fill the vacancy in the office of Delegate shall take office the day on which the Board certifies his or her election. [(B) In the event that a vacancy occurs in the office of Delegate on or after May 1 of the last year of the Delegate's term of office, the Mayor shall appoint a successor to complete the remainder of the term of office.]

(3) In the event of a vacancy in the office of [United States Representative or] United States Senator elected pursuant to Sec. 1—123 and that vacancy cannot be filled pursuant to paragraph (1) of this subsection, the Mayor shall appoint, with the advice and consent of the Council, a successor to complete the remainder of the term of office.

* * * * * * *

1—1001.11. RECOUNT; JUDICIAL REVIEW OF ELECTION.

(a)(1) * * *

(2) If in any election for President and Vice President of the United States, [Delegate to the House of Representatives,] *Representative in the Congress*, Mayor, Chairman of the Council, member of the Council, President of the Board of Education, or member of the Board of Education, the results certified by the Board show a margin of victory for a candidate that is less than one percent of the total votes cast for the office, the Board shall conduct a recount. The cost of a recount conducted pursuant to this paragraph shall not be charged to any candidate.

* * * * * * *

1—1001.15. CANDIDACY FOR MORE THAN 1 OFFICE PROHIBITED; MULTIPLE NOMINATIONS; CANDIDACY OF OFFICEHOLDER FOR ANOTHER OFFICE RESTRICTED.

(a) * * *

(b) Notwithstanding the provisions of subsection (a) of this section, a person holding the office of Mayor, [Delegate,] *Representative in the Congress*, Chairman or member of the Council, or member of the Board of Education shall, while holding such office, be eligible as a candidate for any other of such offices in any primary or general election. In the event that said person is elected in a general election to the office for which he or she is a candidate, that person shall, within 24 hours of the date that the Board certifies said person's election, pursuant to subsection (a)(11) of Sec. 1–1001.05, either resign from the office that person currently holds or shall decline to accept the office for which he or she was a candidate. In the event that said person elects to resign, said resignation shall be effective not later than 24 hours before the date upon which that person would assume the office to which he or she has been elected.

* * * * * * *

1—1001.17. RECALL PROCESS.

(a) The provisions of this section shall govern the recall of all elected officers of the District of Columbia except [the Delegate to the Congress from the District of Columbia] *the Representative in the Congress.*

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VIII. Additional Views

ADDITIONAL VIEWS OF SENATORS COBURN AND STEVENS

The lack of Congressional representation for American citizens living in the District of Columbia is a grave injustice. However, the oath we swear upon taking office is to uphold and defend the Constitution, not justice. Happily, the two rarely diverge. However, our Framers wisely foresaw the possibility of such divergence and provided a remedy. When all constitutional options are exhausted in pursuit of justice, the one remaining remedy is the constitutional amendment process.

We believe that there are constitutional options to remedy the injustice faced by District residents, but S. 1257 is not one of them. If the American people, in their wisdom, deem that the plainly constitutional options of admitting new States into the union, or of States voluntarily redrawing their borders are not desirable, then the Constitutional amendment process is the exclusive remaining remedy.

Supporters of S. 1257 claim it is constitutional, but can only support their claim with a broad interpretation of the text, supplemented by a handful of Supreme Court opinions. In his letter to William Johnson of June 12, 1823, Thomas Jefferson provided us guidance with the following: "Laws are made for men of ordinary understanding and should, therefore, be construed by the ordinary rules of common sense. Their meaning is not to be sought for in metaphysical subtleties which may make anything mean everything or nothing at pleasure."

The simple rules of statutory interpretation, rather than Jefferson's "metaphysical subtleties," leave us no choice but to conclude that the bill is unconstitutional. These rules include first examining the plain meaning of the text of the Constitution before relying on an interpretation of another, and interpreting the parts that are unclear by those parts that are clear.

We hope to demonstrate in these minority views that both an historical and a textual analysis of the Constitution will not support the approach taken by S. 1257. Further, we hope to demonstrate that the approach taken by supporters of the bill can produce at best only a tenuous constitutional foundation, and at worst a reason for Congress to embark upon, in the words of Professor Jonathan Turley, "the most premeditated unconstitutional act by Congress in decades."[1] Either conclusion should prevent Congress, bound by our oath of office, from passing this bill.

[1] Turley, Jonathan, statement for the record for the Committee on the Judiciary, U.S. House of Representatives, "Legislative Hearing on H.R. 1433, the 'District of Columbia House Voting Rights Act of 2007," March 14, 2007, pg. 4.

HISTORICAL ANALYSIS

In looking at history, it is clear that representation in government is at the heart of the American identity and that voting is one of the nation's most sacred rights. It is puzzling, then, why the Framers of the Constitution didn't choose to be more explicit regarding whether voting rights were intended for the residents of the District of Columbia. Yet, though the Constitution isn't as clear as some might want it to be, the Framers were not silent on the issue and have left us with sufficient evidence to conclude that this bill is unconstitutional.

Claim: The Federal District was not designed to be different than a State

Supporters of the bill argue that the Framers, with the ideals of the Revolutionary War fresh on their minds, obviously intended to provide residents of the District full voting rights like other citizens. Its omission, they claim, was simply an oversight of the Constitutional Convention. But, a closer look at the circumstances surrounding the creation of the federal district plainly refutes this claim.

The idea of an independent federal district is said to have arisen in 1783 after an incident involving the Continental Congress in Philadelphia, and a mob of disgruntled soldiers.[2] The soldiers claimed they had gone unpaid and, under threat of violence, forced Congress to meet and address their grievance. Congress sought protection from the Pennsylvania state militia, but was denied. Left without any protection, Congress convened under duress and addressed the matter. Realizing that the situation could happen again, the Framers recognized that the seat of government should not be dependent on the good graces and protection of any one State.

Though the notion of protecting the federal government from the States is in many ways outdated and in modern times reversed, the Framers were concerned about preserving the government's independence. To ensure its independence, they not only carved out land for the District that was not located in any State, but designed it to be governed equally by all States through Congress. Additionally, the Framers wanted to protect the States from any unnecessary burdens. For example, housing the District within any single state would have, on the one hand, put a large financial burden on that state to maintain the capital, while on the other hand would have unfairly given that state the benefits of capital improvements paid for by the other States. The decision was eventually made to cede land from Maryland and Virginia to form a small district of ten square miles to ensure that the land belonged to no state.[3]

James Madison reinforced this point on January 23, 1788, in writing Federalist no. 43 on the topic of a federal district:

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[2] Footnote 1, Congressional Research Service Report for Congress RL 33830, District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals, April 23, 2007, pg. CRS–1.

[3] Congress passed the Residence Act on July 16, 1790, during the First Congress, second session. Text of the act can be found here: *http://memory.loc.gov/cgi-bin/ampage?collId-llsl-&fileNamellsl001.db&rec.Num-253*

> The indispensable necessity of complete authority at the seat of government, carries its own evidence with it. It is a power exercised by every legislature of the Union, I might say of the world, by virtue of its general supremacy. Without it, not only the public authority might be insulted and its proceedings interrupted with impunity; but a dependence of the members of the general government on the State comprehending the seat of the government, for protection in the exercise of their duty, might bring on the national councils an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the Confederacy. This consideration has the more weight, as 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. The extent of this federal district is sufficiently circumscribed to satisfy every jealousy of an opposite nature.

While this would answer the question of independence for the nation's capital, it raised another question of what to do with the residents of Maryland and Virginia living in the land to be ceded to create the new federal district. These citizens had full voting rights as citizens of Maryland and Virginia, but those rights would be relinquished under the new plan.

Claim: The Founders forgot to address congressional representation for district residents

Supporters of S. 1257 today claim that the Framers inadvertently forgot to address congressional representation for these citizens because there were other pressing issues to consider at the time. Further still, the Constitution was a relatively new document and all of its implications were not yet well understood, particularly the issue of representation for citizens living in the newly formed federal district. Therefore, they believe that the Framers did not feel a pressing need to consider the question, but that if they had they certainly never intended to exclude residents from voting.

The historical record, however, refutes this claim. In fact, there is solid evidence that the Framers had given this issue more than just a passing glance. Following the passage of the Residence Act in 1790, which designated the future site of Washington, D.C., residents of those areas retained their right to vote for representatives in Congress, but they were simply not allowed to vote as district residents. The Framers approached the issue by deferring to the State-based structure of the Union and allowed each former resident of Maryland and Virginia to vote in their home state. This was no small technicality; they believed it was the only acceptable means to allow these residents to vote in a manner consistent with the Constitution.

Madison hints at this in a further reading of Federalist no. 43, by assuming that the state governments in Maryland and Virginia

would make adequate provision for their residents living in those lands, including the matter of representation.

> And as [the land to create a federal district] 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; as a municipal legislature for local purposes, derived from their 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.

This voting system changed with the passage of the Organic Act in 1801, which provided for governance of the federal district. Because the bill did not specifically address voting rights for district residents, it effectively nullified the previous arrangement. That voting rights weren't immediately restored to district residents after the passage of the Organic Act through other legislation is significant. It demonstrates that such rights were not automatically granted to district residents by the Constitution and that Congress would not or could not act legislatively in this area.

Although some may point to this example and claim that if district residents were taken away by legislation (Organic Act) then voting rights can be given through legislation today. The flaw in this argument is that it fails to see the decidedly state-centered way in which the Framers handled the matter in contrast to the means being considered by S. 1257. The prior arrangement only allowed district residents to vote when they were still considered residents of their former home states. Above all else, what this example clearly shows is that these issues were in the minds of the Framers when they drafted the Constitution and were not, as some claim, an afterthought.

Claim: No one anticipated the district becoming a large city with many citizens

Another dubious claim made by supporters of S. 1257 is that hardly anyone, including the Framers themselves, anticipated the federal district becoming a large city home to large numbers of citizens seeking the right to vote. After all, there were barely 8,000 citizens living in the District at the time of its inception. They believe that if the Framers knew that larger numbers of people would be impacted by the creation of the District, then voting rights would have been granted. This point is easily refuted by looking at the original plan for the city, as commissioned by the federal government itself. As early as 1791, nine years before the federal government began its operations in Washington, D.C., Pierre-Charles L'Enfant completed a commission by President George Washington to design the city, and his design was anything but small. L'Enfant's design envisioned the federal district to be a large, thriv-

ing city with as many as 800,000 residents [4]—a size that is not matched today.[5] Even a cursory glance at L'Enfant's earliest plans show that the intended design for the federal district is largely similar to today's design.[6]

Furthermore, the following journal entry was written by Henry Wansey in 1794, only three years after L'Enfant's plans for the district were finalized. This first-hand account clearly shows that the expectation existed even then that the city of Washington would become a great city.

> [A friend] has often been to the new federal city of Washington; has no doubt it must be very considerable in a few years, if the government is not overturned, for nothing less can prevent it. Mercantile men will principally settle in the South-East corner on the East River. . . . The government will make it a principal object to improve this place, and all its regulations respecting its future grandeur are already planned, suitable to a great and growing empire. . . . Many houses are already built, and a very handsome hotel, which cost in the erection more than thirty thousand dollars . . . It is now apportioned into one thousand two hundred and thirty-six lots, for building, (which are for sale). Each lot contains ground for building three or four houses.[7]

It stretches the bounds of one's imagination, in light of this evidence, to assume that the Framers and the Congress simply forgot to consider the voting rights of citizens in a city as large as the District would become. Even if they had, it was not long before citizens of the District began seeking such rights, reminding them of their "mistake." In 1801, following the passage of the Organic Act, a group of District residents petitioned Congress for the right to vote. Tellingly, though, voting rights were not given to residents of the District, despite the fact that the Congress of that time was made up of many Framers of the Constitution. That residents were denied representation then does not necessarily mean they should be so denied today. However, this record does provide strong evidence that the Framers intended, whatever their reasons, that the District's residents would not have the same automatic rights to Congressional representation as residents of the several States.

Claim: The Framers did not intentionally exclude residents from voting for congressional representation

Supporters of S. 1257 believe, despite the fact that District residents were never given congressional representation, that these rights were not withheld on purpose. This claim is contradicted by

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[4] Library of Congress sources, *http://memory.loc.gov/ammem/today/jul16.html*

[5] Statistics provided by the U.S. Census Bureau, and can be found online at: *http://quickfacts.census.gov/qfd/states/11000.html*

[6] A picture of L'Enfant's design for the City of Washington can be seen on the website of the Library of Congress, and can be found here: *http://www.loc.gov/exhibits/us.capitol/twtynine.jpg*

[7] This excerpt was taken from the "Journal of an Excursion to the United States of North America in the Summer of 1794," by Henry Wansey. It was reprinted in pg. 10. Text of the book can also be found at: *http://memory.loc.gov/cgi-bin/ampage?collId=lhbcb&fileName=03201.//1hbcb03201.db&recNum=9&itemLink=r?ammem/lhbcbbib:@field(NUMBER+@od1(1hbcb+03201))&linkText=0*

examining the opinion of a prominent Framer soon after the Constitution's ratification. Supreme Court Chief Justice John Marshall, former commander in the Revolutionary War, said the following in 1820 indicating strongly that voting rights were far from an afterthought:

> "[The District has] relinquished the right of representation, and has adopted the whole body of Congress for its legitimate government. Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the district, certainly the Constitution does not consider their want of a representative in Congress as exempting it from equal taxation."[8]

Clearly, Chief Justice Marshall, like us today, was uncomfortable with the distinct divergence in this case between justice and the Constitution, but barring a Constitutional amendment, he considered himself bound to the Constitution, whatever its perceived flaws. Prior to his appointment on the Supreme Court, William Rehnquist confirmed Marshall's opinion that the District did not have a legislative option for obtaining a vote, despite his own personal opinion that district residents should be given representation in Congress. Serving then as an assistant Attorney General in the U.S. Department of Justice in 1970, Rehnquist said: "The need for an amendment [providing representation for the District] at this late date in our history is too self-evident for further elaboration; continued denial of voting representation from the District of Columbia can no longer be justified."[9]

Claim: Congress has always had the constitutional power to address this matter through legislation

The historical record of those who have previously attempted to address voting rights for the District itself testifies that nothing less than a change in the Constitution would be necessary. Since 1888, no fewer than 150 constitutional amendments have been attempted to resolve the matter.[10] Had a legislative option been available under the Constitution, surely a serious attempt would have been made prior to today to pass such a bill in Congress rather than go through the arduous task of passing a constitutional amendment—yet the supporters behind each of these efforts knew that it was an amendment, not a bill, that should be attempted.

Of those in Congress that did try to address the matter, the issue primarily revolved around allowing the election of a non-voting delegate to Congress.[11] No attempt has been made prior to S. 1257 to

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[8] *Adams* v. *Clinton*, 90 F. Supp. 2d 35, 55 (D.D.C.), aff'd, 531 U.S. 940 (2000) citing to Chief Justice Marshall's opinion in *Loughborough* v. *Blake* 18 U.S. (5 Wheat.) 317 (1820). Interestingly enough, the supporters of S. 1257 repeatedly cite to *Loughborough* as a case that supports their position since the Supreme Court ultimately did uphold federal taxation of District residents in the case.

[9] See the website of DC Vote at: *http://www.dcvote.org/pdfs/congress/dcvrarepublicanquotespdf.pdf*

[10] Footnote 1, Congressional Research Service Report for Congress RL33830, District of Columbia Voting Representation in Congress: An Analysis of Legislative Proposals, April 23, 2007, pg. CRS–3.

[11] The following points were outlined by Richard P. Bress in responses to questions for the records in Ending Taxation Without Representation: The Constitutionality of S. 1257: Hearing on S. 1257 Before the S. Comm. on the Judiciary, 110th Cong. *29 (2007). Mr. Bress identified

Continued

try and provide House representation through the legislative process. It is significant that until the consideration of S. 1257 by the 110th Congress that all previous Congresses, without exception, understood that the Constitution prevented them from passing such a bill.[12]

The 150 constitutional amendment attempts have taken various forms and each one has failed to pass, with the exception of what became the 23rd Amendment. The 23rd Amendment provides District residents with the right to vote in Presidential elections. Other amendment attempts would have provided the District with one member of the House of Representatives and two Senators, while still others would have allowed for some combination of voting for the President as well as for representation in the House of Representatives and the Senate.

While the merits of those proposals are not the subject of this discussion, they were seen to have failed by many because of their implications for Statehood for the federal district. No serious attempt has ever been made to pass a Constitutional amendment providing simply for representation in the House of Representatives. Until this is attempted, there is no historical evidence to demonstrate how such an amendment might fare. That the amendment process is difficult, though, does not grant Congress the luxury of circumventing the Constitutional process for the sake of political expediency.

Conclusion: The historical record demonstrates that S. 1257 is unconstitutional

The historical record is far from silent on the matter of congressional voting rights for residents of the federal district. In our view, the weight of evidence supports the notion that the original intent of the Framers, as well as the interpretation of 109 consecutive Congresses, was to preclude the residents of the District from being represented in the House of Representatives. Though the Framers believed at the time that such an arrangement did not run counter to our republican form of government, we have now come to believe differently.

It is our view that though the reasons for creating a federal enclave without explicitly-provided voting rights for its residents may have seemed reasonable at the time, the reasons no longer hold the same appeal. And though it may be past time to alter the House of Representatives and allow a vote for the District in the House, Congress is constrained to act only in a Constitutional manner. We

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the previous attempts by Congress to address the matter of congressional voting rights for the District of Columbia and categorized them in one of two ways: (1) legislation to examine the notion of voting rights for residents, and (2) allowing for a non-voting delegate. Such attempts were made: Dec. 30, 1819, Rep. Kent (MD); March 20, 1819, Sen. Johnson (KY); Feb. 13, 1824, Rep. Ross (OH); April 26, 1830, Rep. Powers; Dec. 21, 1831, Rep. Carson (NC); March 9, 1836; March 28, 1838, Sen Norvell (MI); January 28, 1845. No such attempts were made to legislatively expand the House of Representatives and provide for full voting representation for residents of the federal district.

[12] This point is made in full recognition of the fact that legislation was introduced in recent Congresses to address the matter of congressional representation through either (1) retrocession, (2) semi-retrocession, or (3) granting full membership to the House of Representatives. None of this legislation passed the Congress or was presented to the President for signature. Such legislation included in the 109th Congress: H.R. 190, H.R. 398, H.R. 5388, S. 195; in the 108th Congress: H.R. 1285, H.R. 3709, S. 617; and in the 107th: S. 3054.

do not believe this to be the case with the approach taken by S. 1257.

CONSTITUTIONAL ANALYSIS

Textual analysis

As stated earlier, any effort to analyze the meaning of a specific constitutional provision must begin with the text itself. Supporters of the bill assert that the best place to begin this discussion is with the Federal Enclave Clause, at Article I, Section 8, Clause 17. However, since the bill's main effect is to change the composition of the House of Representatives, the proper place to begin is with the House Composition Clause found at Article I, Section 2:

> Section 2. 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.

It is clear that the term "state" is used numerous times in this provision, as it is throughout the Constitution. It is also clear from the records of the Framers during the Constitutional Convention that they chose their words carefully when drafting the text. Nowhere does the context suggest that the term "state" could be interpreted to mean anything other than what it straightforwardly implies. Since the federal district is not a state, the plain reading of the text clearly precludes the District of Columbia from being considered a state for the purposes of choosing members for the House of Representatives.

A basic rule of statutory interpretation is that when a reader is interpreting a statute, or in this case the Constitution, the statute should be read with the plainest reading in context; if no ambiguity appears, the search into the meaning of the word is complete. As the U.S. Supreme Court stated, "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' "*Connecticut Nat'l Bank* v. *Germain,* 503 U.S. 249, 254 (1992). In the absence of any ambiguity in the term "state" in Article I, Section 2, Congress should not look to other places, such as the history of the District or in the Federal Enclave Clause, to attempt to justify the constitutionality of S. 1257.

Some supporters of this legislation argue that because the Founders placed such a premium on direct voting for representation as well as on government powers being derived from the consent of the governed, the Founders could not have possibly meant to exclude district residents from congressional representation simply because the District is not a state. However, they have no evidence in the text of the Constitution to suggest the Framers intended to treat the District like a state under Article I, Section 2. In fact, the evidence points in the opposite direction. A Representative of the District would not even meet the qualifications set out in Article I, Section 2, the Qualifications Clause:

> 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. (Emphasis added)

Supporters of S. 1257 misguidedly draw support for their position from certain U.S. Supreme Court and other federal court cases that extend to the District, as an entity or its citizens, other rights found in the Constitution. Nevertheless, supporters of the bill cannot refute the fact that the text of Article I, Section 2, leaves no open door to treat the District as a state for House representation short of actual statehood or Constitutional amendment.

In fact, the provision of the Constitution that supporters rely on most, the Federal Enclave Clause, directly contradicts any notion that the federal district should be considered a state for purposes of House representation.

The Federal Enclave Clause in Article I, Section 8, Clause 17 states Congress' rights regarding the federal district:

> 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, 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, dockyards, and other needful buildings. (Emphasis added).

The Federal Enclave Clause itself shows that the District is different than "states" in the Constitution. By using both the term "District" and "states" in the same sentence, the language shows most clearly that the Framers had two distinct concepts in mind regarding what was a state and what was the District. To construe this provision to define the word "state" in such a way as to include the federal district is to render the words meaningless.

Finally, supporters of S. 1257 wrongly believe that Congress' complete power over the District gives Congress the power to alter even the makeup of the House of Representatives. In so doing, they create the perverse problem by which one provision of the Constitution is used to cancel out the meaning of another provision. In other words, supporters have interpreted Congress' constitutional powers over the District to be so broad that they can use them even to overcome that provision which explains the makeup of the House of Representatives.

The text of the Federal Enclave Clause states that Congress has "exclusive" power "in all cases whatsoever, over such District." Nothing in the phrase "*over such District*" or the related context allows an interpretation in which Congress could change the makeup of Congress. Quite the opposite as the text grants to Congress a custodial and operational power of control over the District. Thus, the plain reading of this provision demonstrates that Congress' power within the District itself is nearly unlimited, but that power does not extend beyong the District's borders. In fact, if the power given to Congress in this provision is as broad as supporters of S. 1257 claim it is, there would be no limits to how Congress could use this power. Nothing could stop Congress from adding addi-

tional seats to the House for the District as well as representatives in the Senate.

The full context of the Federal Enclave Clause shows that the power granted to Congress over the District is the *exact same* power as that granted to Congress to erect "forts, magazines, etc." Thus, the supporters of S. 1257 are forced to argue that the power of Congress to purchase land for the military is the exact same broad, sweeping and "plenary" power to grant membership in the House of Representatives. Therefore, in light of this context, these provisions merely grant Congress control over operational matters related to the governance, both administrative and political, of the District just as it is for forts, needful buildings and arsenals. One would need to stretch the rules of interpretation beyond reason to interpret this provision in such a way as to grant Congress power to alter other more plainly drafted sections of the Constitution such as those that determine membership in the House of Representatives and the qualifications of its members.

The 23rd amendment

Passage of the 23rd Amendment to the Constitution is illustrative of why S. 1257 falls short of the Constitution. Before its passage in 1960, and subsequent ratification, District residents could not vote in Presidential elections by virtue of the fact that the District is not a state. Congress remedied this situation not through legislation, but rather by amending the Constitution.

The 23rd Amendment reads:

> Section 1. 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.
>
> Section 2. The Congress shall have power to enforce this article by appropriate legislation. (Emphasis added)

The language clearly establishes that D.C. is not a state and that its electors are only for Presidential elections. The House Report accompanying the passage of the Amendment in 1960 clearly states that the Amendment would not change the status or powers of the District:

> [This] . . . amendment would change the Constitution only to the minimum extent necessary to give the District appropriate participation in national elections. *It would not make the District of Columbia a State. It 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.* . . . It would, however, per-

petuate recognition of the unique status of the District as the seat of Federal Government *under the exclusive legislative control* of Congress.[13] (Emphasis added.)

The House Report recognizes two important points. First, the District is not a state and the 23rd Amendment does nothing to make it a state. Second, the House Report affirms the understanding that Congress' power in the District Clause is one of operational control.

The example of the 23rd Amendment illustrates clearly that when Congress wanted to give residents of the federal district the right to vote for the President, they didn't see fit to do so through legislation. They knew then what is still true today—that such rights can only be conferred on citizens through a change in the Constitution through the amendment process.

Legal analysis

Supporters of S. 1257 also stake their claim for the bill's constitutionality on a selection of U.S. Supreme Court and federal court cases in which Congress has treated the federal district's residents the same as residents of states. Examples include imposing federal taxation on D.C. residents, allowing diversity jurisdiction to apply to D.C. residents, giving D.C. residents rights to trial by jury and subjecting D.C. to the interstate commerce regulations. Federal courts have allowed Congress to treat D.C. as if it were a state in each instance in order to uphold the Congressional action. Proponents believe that based on this line of cases, future courts will hold that granting House representation to D.C. is also a legitimate act of Congress' power under the Federal Enclaves Clause. However, there is no direct legal precedent for S. 1257, thus it will be a case of first impression for federal courts to review.

In fact, the case law may point in the opposite direction, as in *Adams v. Clinton*.[14] In 2000, the federal District Court of the District of Columbia ruled that D.C. residents suffered no Constitutional harm when the District of Columbia was excluded from the apportionment of Congressional districts for House representation. Lois Adams and other District citizens brought their case against President Clinton and the Secretary of Commerce because the Administration did not include D.C. when they transmitted their post-census apportionment results to the House Clerk. The District Court, sitting as a special three-judge trial panel, rejected Adams' claim 2–1 holding that the District could not be treated as a state for purpose of House apportionment and that denial of House representation was not a violation of the Equal Protection or Republican form of Government Guarantee clauses.[15] The U.S. Supreme Court affirmed the holding without an opinion, demonstrating that the Constitution does not provide representation in Congress for residents of the District.

The *Adams* opinion reveals that the understanding of those at the time that District residents would lose their right to vote once Virginia and Maryland ceded their lands. This would be for no other reason than that they no longer lived in a state. One Con-

[13] Report of the U.S. House of Representatives, 86th Congress, 2d Session, May 31, 1960, p.3.
[14] *Adams* v. *Clinton,* 90 F. Supp. 2d 35 (D.D.C.), *aff'd,* 531 U.S. 940 (2000).
[15] Id at p. 66–69, and 71–72.

gressman, Rep. Bird, remarked that the blame for D.C. residents losing their voting rights was not "to the men who made the act of cession, not to those who accepted it," but "to the men who framed the Constitutional provision, who peculiarly set apart this as a District" under the federal government. [16]

In fact, one of the early proponents of D.C. voting rights advocated the same position. The *Adams* opinion recounts that Augustus Woodward, a prominent lawyer in the District and protégé' of Thomas Jefferson, wrote in 1801 decrying the violation of "an original principle of republicanism" by passage of the Organic Act. He later said that passage of a Constitutional amendment was "the exclusive and only remedy." [17]

The *Adams* opinion likewise debunked the notion that Congress actively stripped District residents of their right to vote when it passed the Organic Act, officially creating the District. The *Adams* opinion dismissed such theory finding that:

> Thus, it was not the Organic Act or any other cession-related legislation that excluded District residents from the franchise, *something we agree could not have been done by legislation alone*. [18] (Emphasis added, citing a previous Supreme Court case holding that an individual's Constitutionally protected right to vote could not be denied by a vote of the state legislature.)

Instead the *Adams* opinion concludes that the loss of voting rights for District residents came because their residency status had changed from a resident of a "state" to resident of the District. The citizens were now residents a non-state, and therefore prevented from representation in Congress.

> Rather, exclusion was the consequence of the completion of the cession transaction-which transformed the territory from being part of a state, whose residents were entitled to vote under Article I, to being part of 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.[19]

Thus, the *Adams* opinion points back to the plain meaning of Article I, Section 2, as the determinative Constitutional provision for considering D.C. voting rights in Congress. until D.C. residents achieve status of residents of a state or until the Constitution is amended, the residents are barred from Congressional representation by the very language of the Constitution itself.

Conclusion

Because the Constitution clearly designed the House of Representatives to be composed of representatives of States, we believe that S. 1257 is not constitutional. Unfortunately, this leaves us with no other option but to oppose the bill and file these dissenting

[16] Id at p. 52.
[17] Id at p. 53.
[18] Id at p. 62.
[19] Id.

views. There is no question, though, that the objectives of S. 1257 are noble and worthy of Congressional attention, if not prompt action. However, Congress must resist the temptation to achieve a worthy policy objective by illegitimate means. This is especially true in this case due to the ready availability of better, and more clearly constitutional means, namely amending the Constitution.

In closing, we relay this commentary provided to this Committee by Professor Jonathan Turley when testifying regarding this issue:

> 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 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."[20]

TOM COBURN.
TED STEVENS.

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[20] Testimony of Professor Jonathan Turley before the U.S. Senate Judiciary Committee hearing on "Ending Taxation without Representation: The Constitutionality of S. 1257" May 16, 2007, p. 13–14 citing Joseph Story, Commentaries on the Constitution of the United States §§419–26, at 298–302 (2d ed. 1851).