STATEMENT FOR THE RECORD
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LEGISLATIVE HEARING ON H.R. 1433,
THE "DISTRICT OF COLUMBIA
HOUSE VOTING RIGHTS ACT OF 2007"

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COMMITTEE ON THE JUDICIARY
THE UNITED STATES HOUSE OF REPRESENTATIVES

I.
INTRODUCTION

Chairman Conyers, Ranking Member Smith, members of the Committee, it is an honor to appear before you today to discuss the important question of the representational status of the District of Columbia in Congress. I expect that everyone here today would agree that the current non-voting status of the District is fundamentally at odds with the principles and traditions of our constitutional system. As Justice Black stated in *Wesberry v. Sanders*:[1] "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

Today, we are all seeking a way to address the glaring denial of basic rights to the citizens of our Capitol City. Yet, unlike many issues before Congress, there has always been a disagreement about the means rather than the ends of full representation for the District residents. Regrettably, I believe that H.R. 1433 is the wrong means.[2] Despite the best of motivations, the bill is fundamentally flawed on a constitutional level and would only serve to needlessly delay true reform for District residents.[3] Indeed, considerable expense would likely come from an inevitable and likely successful legal challenge -- all for a bill that would ultimately achieve only partial representational status. The effort to fashion this as a civil rights measure ignores the fact that it confers only partial representation without any guarantee that it will continue in the future. It is the equivalent of

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[1] 376 U.S. 1, 17-18 (1964).

[2] *See generally* Jonathan Turley, *Too Clever By Half: The Unconstitutional D.C. Voting Rights Bill*, Roll Call, Jan. 25, 2007, at 3; Jonathan Turley, *Right Goal, Wrong Means*, Wash. Post, Dec. 12, 2004, at 8.

[3] In this testimony, I will not address the constitutionality of giving the District of Columbia and other delegates the right to vote in the Committee of the Whole. *See Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994) (holding that "Article I, §2 . . . precludes the House from bestowing the characteristics of membership on someone other than those 'chosen every second year by the People of the several States."). The most significant distinction that can be made is that the vote under this law is entirely symbolic since it cannot be used to actually pass legislation in a close vote.

allowing Rosa Parks to move halfway to the front of the bus in the name of progress. District residents deserve full representation and, while this bill would not offer such reform, there are alternatives, including a three-phased proposal that I have advocated in the past.[4]

As I laid out in detail in my prior testimony on this proposal before the 109th Congress,[5] I must respectfully but strongly disagree with the constitutional analysis offered to Congress by Professor Viet Dinh,[6] and the Hon. Kenneth Starr.[7] Notably, since my last testimony, the independent Congressional Research Service joined those of us who view this legislation as facially unconstitutional.[8] Permit me to be blunt, I consider this Act to be

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[4] While I am a former resident of Washington, I come to this debate with primarily academic and litigation perspectives. In addition to teaching at George Washington Law School, I was counsel in the successful challenge to the Elizabeth Morgan Act. Much like this bill, a hearing was held to address whether Congress had the authority to enact the law -- the intervention into a single family custody dispute. I testified at that hearing as a neutral constitutional expert and strongly encouraged the members not to move forward on the legislation, which I viewed as a rare example of a "Bill of Attainder" under Section 9-10 of Article I. I later agreed to represent Dr. Eric Foretich on a pro bono basis to challenge the Act, which was struck down as a Bill of Attainder by the Court of Appeals for the District of Columbia. *Foretich v. United States,* 351 F.3d 1198 (D.C. Cir. 2003). The current bill is another example of Congress exceeding its authority, though now under sections 2 and 8 (rather than section 9 and 10) of Article I.

[5] *District of Columbia Fair and Equal House Voting Rights Act of 2006*, *before the Subcommittee on the Constitution*, *H.R. 5388,* 109th Cong., 2nd Sess. 2 (testimony of Jonathan Turley).

[6] This analysis was co-authored by Mr. Adam Charnes, an attorney with the law firm of Kilpatrick Stockton LLP. Viet Dinh and Adam Charnes, "The Authority of Congress to Enact Legislation to Provide the District of Columbia with Voting Representation in the House of Representatives," Nov. 2004 found at http://www.dcvote.org/pdfs/congress/vietdinh 112004.pdf. This analysis was also supported recently by the American Bar Association in a June 16, 2006 letter to Chairman James Sensenbrenner.

[7] Testimony of the Hon. Kenneth W. Starr, House Government Reform Committee, June 23, 2004.

[8] Congressional Research Service, The Constitutionality of Awarding the Delegate for the District of Columbia a Vote in the House of Representatives

the most premeditated unconstitutional act by Congress in decades.[9] As shown below, on every level of traditional constitutional analysis (textualist, intentionalist, historical) the unconstitutionality of this legislation is plainly evident. Conversely, the interpretations of Messrs. Dinh and Starr are based on uncharacteristically liberal interpretations of the text of Article I, which ignore the plain meaning of the word "states" and the express intent of the Framers.

The bill's drafters have boldly stated that "[n]otwithstanding any other provision of law, the District of Columbia shall be considered a Congressional district for purposes of representation in the House of Representatives."[10] What this language really means is: "notwithstanding any provision of the Constitution." The problem is that this Congress cannot set aside provisions of the Constitution absent a ratified constitutional amendment. Of course, the language of H.R. 1433 is strikingly similar to a 1978 constitutional amendment that failed after being ratified by only 16 states.[11] Indeed, in both prior successful and unsuccessful amendments[12] (as well as in argument made in court),[13] the Congress has conceded that the

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or the Committee of the Whole, January 24, 2007, at i (Analysis by Mr. Eugene Boyd) (concluding "that case law that does exist would seem to indicate that not only is the District of Columbia not a 'state' for purposes of representation, but that congressional power over the District of Columbia does not represent a sufficient power to grant congressional representation.").

[9] To the credit of Congress, the Elizabeth Morgan Law was blocked by members on the House floor due to its unconstitutionality and was only passed when it was added in conference and made part of the Transportation Appropriations bill – a maneuver objected to publicly by both Senators and Representatives at the time. Efforts to allow a vote separately on the Act were blocked procedurally after the conference.

[10] H.R. 1433 §5.

[11] Likewise, in 1993, a bill to create the State of New Columbia failed by a wide margin.

[12] *See* U.S. Const. XXIII amend. (mandating "[a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a State.*")

[13] *Michel v. Anderson*, 14 F.3d 623, 630 (D.C. Cir. 1994) ("despite the House's reliance on the revote mechanism to reduce the impact of the rule permitting delegates to vote in the Committee of the Whole, [the

District is not a State for the purposes of voting in Congress. Now, unable to pass a constitutional amendment, sponsors hope to circumvent the process laid out in Article V[14] by claiming the inherent authority to add a non-state voting member to the House of Representatives.

I also believe that the concurrent awarding of an at-large congressional seat to Utah raises difficult legal questions, including but not limited to the guarantee of "one person, one vote." I will address each of these arguments below. However, in the hope of a more productive course, I will also briefly explore an alternative approach that would be (in my view) both unassailable on a legal basis and more practicable on a political basis.

II.
THE ORIGINAL PURPOSE AND DIMINISHING NECESSITY OF A FEDERAL ENCLAVE IN THE 21ST CENTURY

The non-voting status of District residents remains something of a historical anomaly that should be a great embarrassment for all citizens. Indeed, with the passage of time, there remains little necessity for a separate enclave beyond the symbolic value of "belonging" to no individual state. To understand the perceived necessity underlying Article I, Section 8, one has to consider the events that led to the first call for a separate federal district.

A. The Original Purposes Behind the Establishment of a Federal Enclave.

On January 1, 1783, Congress was meeting in Philadelphia when they were surprised by a mob of Revolutionary War veterans demanding their long-overdue back pay. It was a period of great discontentment with

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government] concede[s] that it would be unconstitutional to permit anyone but members of the House to vote in the full House under any circumstances.").

[14] U.S. Const. Article V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States or by Conventions in three fourths thereof . . . ").

Congress and the public of Pennsylvania was more likely to help the mob than to help suppress it. Indeed, when Congress called on the state officials to call out the militia, they refused. Congress was forced to flee, first to Princeton, N.J., then to Annapolis and ultimately to New York City.[15]

When the framers gathered again in Philadelphia in the summer of 1787 to draft a new constitution, the flight from that city five years before was still prominent in their minds. Madison and others called for the creation of a federal enclave or district as the seat of the federal government – independent of any state and protected by federal authority. Only then, Madison noted, could they avoid "public authority [being] insulted and its proceedings . . . interrupted, with impunity."[16] Madison believed that the physical control of the Capitol would allow direct control of proceedings or act like a Damocles' Sword dangling over the heads of members of other states: "How could the general government be guarded from the undue influence of particular states, or from insults, without such exclusive power? If it were at the pleasure of a particular state to control the sessions and deliberations of Congress, would they be secure from insults, or the influence of such a state?"[17] James Iredell raised the same point in the North Carolina ratification convention when he asked, "Do we not all remember that, in the year 1783, a band of soldiers went and insulted Congress?"[18] By creating a special area free of state control, "[i]t is to be hoped that such a disgraceful scene will never happen again; but that, for the future, the national government will be able to protect itself."[19]

In addition to the desire to be free of the transient support of an individual state, the framers advanced a number of other reasons for creating

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15 Turley, *supra*, at 8.

16 The Federalist No. 43, at 289 (James Madison) (James E. Cooke ed., 1961).

17 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 433 (Madison, J) (Jonathan Elliot ed., 2d ed. 1907).

18 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution, *supra*, reprinted in 3 The Founders' Constitution 225 (Philip B. Kurland & Ralph Lerner eds., 1987).

19 *Id.*

this special enclave.[20] There was a fear that a state (and its representatives in Congress) would have too much influence over Congress, by creating "a dependence of the members of the general government."[21] There was also a fear that symbolically the honor given to one state would create in "the national councils an imputation of awe and influence, equally dishonorable to the Government and dissatisfactory to the other members of the confederacy."[22] There was also a view that the host state would benefit too much from "[t]he gradual accumulation of public improvements at the stationary residence of the Government."[23]

The District was, therefore, created for the specific purpose of being a non-State without direct representatives in Congress. The security and operations of the federal enclave would remain the collective responsibilities of the entire Congress – of all of the various states. The Framers, however, intentionally preserved the option to change the dimensions or even relocate the federal district. Indeed, Charles Pinckney wanted that District Clause to read that Congress could "fix and *permanently* establish the seat of the Government . . ."[24] However, the framers rejected the inclusion of the word "permanently" to allow for some flexibility.

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[20] The analysis by Dinh and Charnes places great emphasis on the security issue and then concludes that "[d]enying the residents of the District the right to vote in elections for the House of Representatives was neither necessary nor intended by the Framers to achieve this purpose." Dinh & Charnes, *supra*. However, this was not the only purpose motivating the establishment of a federal enclave. Moreover, the general intention was the creation of a non-state under complete congressional authority as a federal enclave. The Framers clearly understood and intended for the District to be represented derivatively by the entire Congress.

[21] The Federalist No. 43, at 289 (James Madison) (James E. Cooke ed., 1961).

[22] *Id.*

[23] *Id.*

[24] *See generally* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160, 168 (1991) (citing James Madison, The Debates in the Federal Convention of 1787 Which Framed the Constitution of the United States of America 420 (Gaillard Hund & James Brown Scott eds., 1920)).

While I believe that the intentions and purposes behind the creation of the federal enclave is clear, I do not believe that most of these concerns have continued relevance for legislators. Since the Constitutional Convention, courts have recognized that federal, not state, jurisdiction governs federal lands. As the Court stressed in *Hancock v. Train*,[25] "because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent there is 'a clear congressional mandate,' 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.'"[26] Moreover, the federal government now has a large security force and is not dependent on the states. Finally, the position of the federal government vis-à-vis the states has flipped with the federal government now the dominant party in this relationship. Thus, even though federal buildings or courthouses are located in the various states, they remain legally and practically separate from state jurisdiction – though enforcement of state criminal laws does occur in such buildings. Just as the United Nations has a special status in New York City and does not bend to the pressure of its host country or city, the federal government does not need a special federal enclave to exercise its independence from individual state governments.

The original motivating purposes behind the creation of the federal enclave, therefore, no longer exist. Madison wanted a non-state location for the seat of government because ""if any state had the power of legislation over the place where Congress should fix the general government, this would impair the dignity, and hazard the safety, of Congress."[27] There is no longer a cognizable "hazard [to] safety" but there certainty remains the symbolic question of the impairment to the dignity for the several states of locating the seat of government in a specific state. It is a question that should not be dismissed as insignificant. I personally believe that the seat of the federal government should remain completely federal territory as an important symbol of the equality of all states in the governance of the nation.

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[25] 426 U.S. 167, 179 (1976).

[26] *See also Paul v. United States*, 371 U.S. 245, 263 (1963); *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 122 (1954); *California ex rel State Water Resources Control Board v. EPA*, 511 F.2d 963, 968 (9th Cir. 1975).

[27] 3 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 89 (Madison, J.) (Jonathan Elliot ed., 2d ed. 1907).

The actual seat of government, however, is a tiny fraction of the actual federal district.

Throughout this history from the first suggestion of a federal district to the retrocession of the Virginia territory, the only options for representation for District residents were viewed as limited to either a constitutional amendment or retrocession of the District itself.[28] Those remain the only two clear options today, though retrocession itself can take any different forms in its actual execution, as will be discussed in Section V.

III.
THE UNCONSTITUTIONALITY OF THE CREATION OF A SEAT IN THE HOUSE FOR THE DISTRICT UNDER ARTICLE I

A. H.R. 1433 Violates Article I of the Constitution in Awarding Voting Rights to the District of Columbia.

As noted above, I believe that the Dinh and Starr analyses is fundamentally flawed and that H.R. 1433 would violate the clear language and meaning of Article I. To evaluate the constitutionality of the legislation, one begins with the text, explores the original meaning of the language, and then considers the implications of the rivaling interpretations for the Constitution system. I believe that this analysis overwhelmingly shows that the creation of a vote in the House of Representatives for the District would do great violence to our constitutional traditions and values. To succeed, it would require the abandonment of traditional interpretative doctrines and could invite future manipulation of one of the most essential and stabilizing components of the Madisonian democracy: the voting rules for the legislative branch.

1. *The Text of the Constitutional Provisions.*

Any constitutional analysis necessarily begins with the text of the relevant provision or provisions. To the extent that the language clearly addresses the question, there is obviously no need to proceed further into other interpretative measures that look at the context of the provision, the

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[28] Efforts to secure voting rights in the courts have failed, *see Adams v. Clinton*, 90 F. Supp. 2d 35, 50 (D.D.C. 2000).

historical evidence of intent, etc. The instant question could arguably end with this simple threshold inquiry.

In this controversy, there are two primary provisions. The most important provision is found in Article I, 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 in the States Legislature.[29]

As with the Seventeenth Amendment election of the composition of the Senate,[30] the text clearly limits the House to the membership of representatives of the several states. The second provision is the District Clause found in Article I, Section 8 which gives Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over such District."

On its face, the reference to "the people of the several states" is a clear restriction of the voting membership to actual states. The reference to "states" is repeated in the section when the Framers specified that each representative must "when elected, be an inhabitant of that State in which he shall be chosen." Moreover, the reference to "the most numerous Branch in the States Legislature" clearly distinguishes the state entity from the District. The District had no independent government at the time and currently has only a city council. In reading such constitutional language, the Supreme Court has admonished courts that "every word must have its due force, and appropriate meaning; . . . no word was unnecessarily used or needlessly added."[31] Here the drafters refer repeatedly to states or several states as well as state legislatures in defining the membership of the House of Representatives. Putting aside notions of plain meaning,[32] the structure and

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[29] U.S. Const. Art. I, Sec.2.

[30] While not directly relevant to H.R. 5388, the Seventeenth Amendment contains similar language that mandates that the Senate shall be composed of two senators of each state "elected by the people thereof."

[31] *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840).

[32] It is true that plain meaning at times can be over-emphasized. *See* Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 Harv. J.L. & Pub. Pol'y 61, 67 (1994) ("Plain meaning as a way to understand language is silly. In interesting cases, meaning is not

language of this provision clearly indicate that the drafters were referencing formal state entities. It takes an act of willful blindness to ignore the obvious meaning of these words.

As will be discussed more fully below, the obvious meaning of this section is supported by a long line of cases that repeatedly deny the District the status of a state and reaffirm the intention to create a non-state entity. This status did not impair the ability of Congress to impose other obligations of citizenship. Thus, in *Loughborough v. Blake*,[33] the Court ruled that the lack of representation did not bar the imposition of taxation. Lower courts rejected challenges to the imposition of an unelected local government. The District was created as a unique area controlled by Congress that expressly distinguished it from state entities. This point was amplified by then Judge Scalia of the D.C. Circuit in *United States v. Cohen*:[34] the District Clause "enables Congress to do many things in the District of Columbia which it has no authority to do in the 50 states. There has never been any rule of law that Congress must treat people in the District of Columbia exactly as people are treated in the various states."

2. The Context of the Language.

In some cases, the language of a constitutional provision can change when considered in a broad context, particularly with similar language in other provisions. The Supreme Court has emphasized in matters of statutory construction (and presumably in constitutional interpretation) that courts should "assume[] that identical words used in different parts of the same act are intended to have the same meaning."[35] This does not mean that there cannot be exceptions[36] but such exceptions must be based on circumstances

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'plain'; it must be imputed; and the choice among meanings must have a footing more solid than a dictionary."). Yet, it should not be ignored when the context of the language makes its meaning plain, as here.

[33] 18 U.S. (5 Wheat.) 317, 324 (1820).

[34] 733 F.2d 128, 140 (D.C. Cir. 1984).

[35] *Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986).

[36] *See, e.g., District of Columbia v. Carter*, 409 U.S. 418, 419-20 (1973) ("[w]hether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.").

under which the consistent interpretation would lead to conflicting or clearly unintentional results.[37]

The most relevant language in this controversy is obviously the word "states." A review of the Constitution shows that this term is ubiquitous. Within Article I, the word "states" is central to defining the Article's articulation of various powers and responsibilities. Indeed, if states were intended to have a more fluid meaning to extend to non-states like the District, various provisions become unintelligible. For both the composition of the House and Senate, the defining unit was that of a state with a distinct government, including a legislative branch. For example, under the 17th Amendment in 1913, Article I, Clause 1 read: "The Senate of the United States shall be composed of two Senators from each state, chosen by the Legislature thereof . . ." For much of its history, the District did not have an independent government, let alone a true state legislative branch.

Likewise, the Framers referred to electors of the House of Representatives having "the Qualifications requisite for Electors of the most numerous Branch of the State legislature" in Article I, Section 2. The drafters also referred to the "executive authority" of states in issuing writs for special elections to fill vacancies in Article I, Section 2. Like the absence of a legislative branch, the District did not have a true executive authority.

In the conduct of elections under Article I, Section 4, the drafters again mandated that "each state" would establish the "[t]he Times, Places, and Manner." This provision specifically juxtaposes the authority of such states with the authority of Congress. The provision makes little sense if a state is defined as including entities created and controlled by Congress.

Indeed, if the Framers believed that the District was a quasi-state under a fluid definition, the District would have presumably had a representative and two Senators from the start. Article I, clause 3 specified that "each state shall have at Least one Representative." Yet, there is no

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[37] *See, e.g., Milton S. Kronheim & Co., v. District of Columbia*, 91 F.3d 193, 198-99 (D.C. Cir. 1996) (holding that the Commerce Clause and the Twenty-First Amendment apply to the District even though "D.C. is not a state.").

reference to the District in any of these provisions. It is relegated to the District Clause, which puts it under the authority of Congress.

The reference to "states" obviously extends beyond Article I. Article II specified that "the Electors [of the president] shall meet in their respective States" and later be "transmit[ted] to the Seat of the Government of the United States," that is, the District of Columbia. When Congress wanted to give the District a vote in the process, it passed the 23rd Amendment. That amendment expressly distinguishes the District from the meaning of a state by specifying that District electors "shall be considered, for the purposes of the election of President and Vice President, to be electors by a state."

Likewise, when the Framers specified how to select a president when the Electoral College is inconclusive, they used the word "states" to designate actual state entities. Pursuant to Article II, Section 1, "the Votes shall be taken by States the Representation from each State having one Vote."

Conversely, when the drafters wanted to refer to citizens without reference to their states, they used fairly consistent language of "citizens of the United States" or "the people." This was demonstrated most vividly in provisions such the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[38] Not only did the drafters refer to the two common constitutional categories for rights and powers (in addition to the federal government), but it would be absurd argue that a federal enclave could be read into the meaning of states in such provisions. The District as a whole was delegated to the United States. As the D.C. Circuit stressed recently in *Parker,* "the authors of the Bill of Rights were perfectly capable of distinguishing between "the people," on the one hand, and "the states," on the other." Likewise, when the drafters of the Constitution wanted to refer to the District, they did so clearly in the text. This was evident not only with the original Constitution and the Bill of

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[38] *See generally Lee v. Flintkote Co.,* 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) ("[t]he District, unlike the states, has no reserved power to be guaranteed by the Tenth Amendment."). The same can be said the Eleventh Amendment. *See LaShawn v. Barry*, 87 F.3d 1389, 1394 n.4 (D.C. Cir. 1996) ("The District of Columbia is not a state . . . Thus, [the Eleventh Amendment] has not application here.").

Rights, but much later amendments. For example, the Twenty-Third Amendment giving the District the right to have presidential electors expressly distinguishes the District from the States in the Constitution and establishes, for that purpose, the District should be treated like a State: mandating "[a] number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled *if it were a State.*"[39] This amendment makes little sense if Congress could simply bestow the voting rights of states on the District. Rather, it reaffirmed that, if the District wishes to vote constitutionally as a State, it requires an amendment formally extending such parity.[40]

These textual references illustrate that the drafters knew the difference between the nouns "state," "territory," and "the District" and used them consistently. If one simply takes the plain meaning of these terms, the various provisions produce a consistent and logical meaning. It is only if one inserts ambiguity into these core terms that the provisions produce conflict and incoherence.

3. The Original and Historical Meaning.

i. Original Understanding of the District as a Non-State Entity. As noted above, the District was clearly and expressly created as a non-state entity. The Supreme Court has observed that "[t]he object of the grant of exclusive legislation over the district was . . . national in the highest sense, and the city organized under the grant became the city, not of a state, not of

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[39] U.S. Const. XXIII amend. Sec. 1.

[40] Even collateral provisions such as the prohibition on federal offices and emoluments in Article I, Section 6 make little sense if the drafters believed that the District could ever be treated like a state. For much of its history, the District was treated either like a territory or a federal agency. Lyndon Johnson appointed Mayor Walter Washington to his post by executive power over federal agencies. Officials held their offices and received their salaries by either legislative or executive action. Since the District was a creation and extension of the federal government, its officials held federal or quasi-federal offices. In the 1970s, Home Rule created more recognizable offices of a city government – though still ultimately under the control of Congress.

a district, but of a nation."[41] While Madison conceded that some form of "municipal legislature for local purposes" might be allowed, the district was to be the creation of Congress and maintained at its discretion.[42]

Despite some suggestion to the contrary, the absence of a vote in Congress was clearly understood as a prominent characteristic of a federal district. During ratification, various leaders objected to the disenfranchisement of the citizens in the district and even suggested amendments that would have addressed the problem. One such amendment was offered by Alexander Hamilton, who wanted the District residents to be able to secure representation in Congress once they grew to a reasonable size.[43] Neither this nor other such amendments offered in states like North Carolina and Pennsylvania were adopted.

This is not to say that the precise conditions of the cessation were clear. Indeed, some states passed Amendments that qualified their votes – amendments that appear to have been simply ignored. Thus, Virginia ratified the Constitution but specifically indicated that some state authority would continue to apply to citizens of the original state from which "Federal Town and its adjacent District" was ceded. Moreover, Congress enacted a law that provided that the laws of Maryland and Virginia "shall be and continue in force"[44] in the District – suggesting that, unless repealed or amended, Maryland continues to have jurisdictional claims in the District.

Whatever ambiguity existed over continuing authority of Maryland or Virginia, the disenfranchisement of citizens from votes in Congress was clearly understood. Republican Rep. John Smilie from Pennsylvania objected that "the people of the District would be reduced to the state of subjects, and deprived of their political rights."[45] At the time of the ratification, leaders knew and openly discussed the non-voting status of the District in the clearest and strongest possible language:

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41 *O'Donoghue*, 289 U.S. at 539-40.

42 The Federalist No. 43, at 280 (J. Madison)

43 5 The papers of Alexander Hamilton 189 (Harold C. Syrett & Jacob E. Cooke eds., 1962).

44 Act of Feb. 27, 1801, ch. 15, § 1, 2 stat. 103.

45 10 Annals of Cong. 992 (1801); *see also* Congressional Research Service, *supra*, at 6.

> We have most happily combined the democratic representative with the federal principle in the Union of the States. But the inhabitants of this territory, under the exclusive legislation of Congress, partake of neither the one nor the other. They have not, and they cannot possess a State sovereignty; nor are they in their present situation entitled to elective franchise. They are as much the vassals of Congress as the troops that garrison your forts, and guard your arsenals. They are subjects, not merely because they are not represented in Congress, but also because they have no rights as freemen secured to them by the Constitution.[46]

Similarly, in New York, Thomas Tredwell objected that the non-voting status of the District residents "departs from every principle of freedom . . . subjecting the inhabitants of that district to the exclusive legislation of Congress, in whose appointment they have no share or vote."[47]

This debate in 1804 leaves no question as to the original understanding of the status of the District as a non-state without representational status. Indeed, not long after the cessation, a retrocession movement began. Members questioned the need to "keep the people in this degraded situation" and objected to subjecting of American citizens to "laws not made with their own consent."[48] The federal district was characterized as nothing more than despotic rule "by men . . . not acquainted with the minute and local interests of the place, coming, as they did, from distances of 500 to 1000 miles."[49] Much of this debate followed the same lines of argument that we hear today. While acknowledging that "citizens may not possess full political rights," leaders like John Bacon of Massachusetts noted that they had special status and influence as residents of the Capitol City.[50] Yet, retrocession bills were introduced within a few years of the actual cessation – again prominently citing the lack of any congressional

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46 Mark Richards, Presentation before the Arlington Historical Society, May 9, 2002 (citing Congressional Record, 1805: 910) (quoting Rep. Ebenezer Elmer of New Jersey).

47 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, at 402 (Jonathan Elliot ed., 1888).

48 Richards, *supra*, at 3

49 *Id.* (quoting Rep. Smilie)

50 *Id.* at 4.

representation as a motivating factor. Indeed, the retrocession of Virginia highlights the original understanding of the status of the District. Virginians contrasted their situation with those residents of Washington. For them, cessation was "an evil hour, [when] they were separated" from their state and stripped of their political voice.[51] Washingtonians, however, were viewed as compensated for their loss of political representation. As a committee noted in 1835, "[o]ur situation is essentially different, and far worse, than that of our neighbors on the northern side of the Potomac. They are citizens of the Metropolis, of a great, and noble Republic, and wherever they go, there clusters about them all those glorious associations, connected with the progress and fame of their country. They are in some measure compensated in the loss of their political rights."[52]

Thus, during the drive for retrocession that began shortly after ratification, District residents appear to have opposed retrocession and accepted the condition as non-voting citizens in Congress for their special status. The result was that Northern Virginia was retroceded, changing the shape of the District from the original diamond shape created by George Washington.[53] The Virginia land was retroceded to Virginia in 1846. The District residents chose to remain as part of the federal seat of government – independent from participation or representation in any state. Just as with the first cessation, it was clear that residents had knowingly "relinquished the right of representation, and . . . adopted the whole body of Congress for its legitimate government."[54]

Finally, much is made of the ten-year period during which District residents voted with their original states – before the federal government formally took over control of the District. As established in *Adams*, this

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51 *Id.*

52 *Id.*

53 Under the Residence Act of July 16, 1790, Washington was given the task – not surprising given his adoration around the country and his experience as a surveyor. Washington adopted a diamond-shaped area that included his hometown of Alexandria, Virginia. This area included areas that now belong to Alexandria and Arlington. At the time, the area contained two developed municipalities (Georgetown and Alexandria) and two undeveloped municipalities (Hamburg – later known as Funkstown—and Carrollsburg).

54 *Loughborough v. Blake*, 18 U.S. (5 Wheat.) 317, 324 (1820).

argument has been raised and rejected by courts as without legal significance.[55] This was simply a transition period before the District became the federal enclave. It was clearly neither the intention of the drafters nor indicative of the post-federalization status of residents. Rather, as indicated by the Supreme Court,[56] the exclusion of residents from voting was the consequence of the completion of the cessation 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.[57]

ii. Historical Evolution of the District Government. When one looks at the historical structure and status of the District as a governing unit, it is obvious that neither the drafters nor later legislators would have viewed the District as interchangeable with a state under Article I. When this District was first created, it was barely a city, let alone a substitute for a state: "The capitol city that came into being in 1800 was, in reality, a few federal buildings surrounded by thinly populated swampland, on which a few marginal farms were maintained."[58]

For much of its history, the District was not even properly classified as an independent city. In 1802, the first mayor was a presidential appointee -- as was the council.[59] Congress continued to possess authority over its budget and operations. While elections were allowed until 1871, the city was placed under a territorial government and effectively run by a Board and Commissioner of Public Works – again appointed by the President. After 1874, the city was run through Congress and the Board of Commissioners.[60]

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55 *Adams v. Clinton*, 90 F. Supp. 2d 35, 62 (D.D.C. 2000); *Albaugh v. Tawes,* 233 F. Supp. 576, 576 (D.Md. 1964) (per curiam).

56 *Reily v. Lamar*, 6 U.S. (2 Cranch) 344, 356-57 (1805).

57 *Adams v. Clinton*, 90 F. Supp. 2d 35, 62 (D.D.C. 2000).

58 Philip G. Schrag, *By the People: The Political Dynamics of a Constitutional Convention*, 72 Geo. L.J. 819, 826 (1984) (noting that "[t]he towns of Georgetown and Alexandria were included in the District, but even Georgetown was, to Abigail Adams, 'the very dirtyest Hole I ever saw for a place of any trade or respectability of inhabitants").

59 *Id.* at 826-828.

60 *Id.*

President Lyndon Johnson expressly treated the District as the equivalent of a federal agency when he appointed Walter Washington to be mayor in 1967.[61] Under Johnson's legal interpretation, giving the District a vote in Congress would have been akin to making the Department of Defense a member to represent all of the personnel and families on military bases. Thus, for most of its history, the District was maintained as either a territory or a federal agency. Both of these constructions is totally at odds with the qualification and descriptions of voting members of Congress. The drafters went to great lengths to guarantee independence of members from federal offices or benefits in Article I, Section 6. Likewise, no members are subject to the potential manipulation of their home powers by either the federal government or the other states (through Congress).

The historical record belies any notion that either the drafters or later legislators considered the District to be fungible with a state for the purposes of voting in Congress. These sources show that the strongest argument for full representation is equitable rather than constitutional or historical. As will be shown in the final section of this statement, the inequitable status of the District can and should be remedied by other means.

4. A Response to Messrs. Dinh, Starr et al.

It is true that the District is viewed as "an exceptional community" that is "[u]nlike either the States or Territories,"[62] this does not mean that this unique or "*sui generis*" status empowers Congress to bestow the rights and privileges to the District that are expressly given to the states. To the contrary, Congress has plenary authority in the sense that it holds legislative authority on matters *within* the District.[63] The extent to which the District has and will continue to enjoy its own governmental systems is due entirely to the will of Congress.[64] This authority over the District does not mean that it can increase the power of the District to compete with the states or dilute their constitutionally guaranteed powers under the Constitution. Indeed, as

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61 *Id.* at 829-830.

62 *District of Columbia v. Carter*, 409 U.S. 418, 452 (1973)

63 *Id.*, 409 U.S. at 429 ("The power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs.").

64 *See* Home Rule Act of 1973, D.C. Code §§1-201.1 *et seq.*

noted below, the District itself took a similar position in recent litigation when it emphasized that it should not be treated as a state under the Second Amendment and that constitutional limitations are not implicated by laws affecting only the federal enclave with "no possible impact on the states."[65]

Given the foregoing sources, it is hard to see the "ample constitutional authority" alluded to by Dinh and Charnes.[66] To the contrary, the arguments made in their paper strongly contradict suggestions of inherent authority to create de facto state members of Congress. For example, it is certainly true that the Constitution gives Congress "extraordinary and plenary power to legislate with respect to the District."[67] However, this legislation is not simply a District matter. This legislation affects the voting rights of the states by augmenting the voting members of Congress. This is legislation with respect to Congress and its structural make-up. More importantly, Dinh and Charnes go to great lengths to point out how different the District is from the states, noting that the District Clause

> works an exception to the constitutional structure of 'our Federalism," which delineates and delimits the legislative power of Congress and state legislatures. In joining the Union, the states gave up certain of their powers. Most explicitly, Article II, section 10 specifies which are prohibited to the States. None of these prohibitions apply to Congress when it exercises its authority under the District Clause. Conversely, Congress is limited to legislative powers enumerated in the Constitution; such limited enumeration, coupled with the reservation under the Tenth Amendment, serves to check the power of Congress vis-à-vis the states.[68]

This is precisely the point. The significant differences between the District and the states further support the view that they cannot be treated as the same entities for the purposes of voting in Congress. The District is not independent of the federal government but subject to the will of the federal government. Nor is the District independent of the states, which can exercise enormous power over its operations. The drafters wanted members

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65 Brief for the District of Columbia in *Parker v. District Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007), at 38.

66 Dinh & Charnes, *supra*, at 4.

67 *Id.*

68 *Id.* at 6.

to be independent of any influence exerted through federal offices or the threat of arrest. For that reason, they expressly prohibited members from holding offices with the federal government[69] other than their legislative offices and protected them under the Speech or Debate Clause.[70] The District has different provisions because it was not meant to act as a state. For much of its history, the District was treated like a territory or a federal agency without any of the core independent institutions that define most cities, let alone states. Thus, the District is allowed exceptions because it is not serving the functions of a state in our system.

It has been argued by both Dinh and Starr that the references to "states" are not controlling because other provisions with such references have been interpreted as nevertheless encompassing District residents. This argument is illusory. The relatively few cases extending the meaning of states to the District often involved irreconcilable conflicts between a literal meaning of the term state and the inherent rights of all American citizens under the equal protection clause and other provisions. District citizens remain U.S. citizens, even though they are not state citizens. The creation of the federal district removed one right of citizenship – voting in Congress – in exchange for the status of being part of the Capitol City. It was never intended to turn residents into non-citizens with no constitutional rights. As the Court stated in 1901:

> The District was made up of portions of two of the original states of the Union, and was not taken out of the Union by cessation. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution . . . The Constitution had attached to [the District] irrevocably. There are steps which can never be taken backward . . . . The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution. Neither party had ever consented to that construction of the cession.[71]

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69 U.S. Const. Art. I, Sec. 6, cl. 1.

70 U.S. Const. Art. I, Sec. 6, cl. 2.

71 *O'Donoghue v. United States*, 289 U.S. 516, 540-541 (1933) (quoting *Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901)).

The upshot of these opinions is that a literal interpretation of the word "states" would produce facially illogical and unintended consequences. Since residents remain U.S. citizens, they must continue to enjoy those protections accorded to citizens.[72] Otherwise, they could all be enslaved or impaled at the whim of Congress.

Likewise, the Commerce Clause is intended to give Congress the authority to regulate commerce that crosses state borders. While the Clause refers to commerce "among the several states," the Court rejected the notion that it excludes the District as a non-state.[73] The reference to several states was to distinguish the regulated activity from intra-state commerce. As a federal enclave, the District was clearly subsumed within the Commerce Clause.

None of these cases means that the term "states" can now be treated as having an entirely fluid and malleable meaning. The courts merely adopted a traditional approach to interpreting these terms as a way to minimize the conflict between provisions and to reflect the clear intent of the various provisions.[74] The District clause was specifically directed at the meaning of a state – it creates a non-state status related to the seat of government and particularly Congress. Non-voting status directly relates and defines that special entity. In provisions dealing with such rights as equal protection, the rights extend to all citizens of the United States. The literal interpretation of states in such contexts would defeat the purpose of the provisions and produce a counterintuitive result. Thus, Congress could govern the District without direct representation but it must do so in such a way as not to violate those rights protected in the Constitution:

> Congress may exercise within the District all legislative powers that the legislature of a State might exercise within the State; and may vest and distribute the judicial authority in and among courts and magistrates, and regulate judicial proceedings before

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72 *See, e.g., Callan v. Wilson,* 127 U.S. 540, 550 (1888) (holding that District residents continue to enjoy the right to trial as American citizens.).

73 *Stoutenburgh v. Hennick*, 129 U.S. 141 (1888).

74 *See also District of Columbia v. Carter,* 409 U.S. 418, 420 (1973) ("Whether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or constitutional provision depends upon the character and aim of the specific provision involved.").

> them, as it may think fit, *so long as it does not contravene any provision of the Constitution of the United States*.[75]

Supporting the textual interpretation of the District Clause is the fact that Congress had to enact statutes and a constitutional amendment to treat the District as a quasi-state for some purposes. Thus, Congress could enact a law that allowed citizens of the District to maintain diversity suits despite the fact that the Diversity Clause refers to diversity between "states." Diversity jurisdiction is meant to protect citizens from prejudice of being tried in the state courts of another party. The triggering concern was the fairness afforded to two parties from different jurisdictions. District residents are from a different jurisdiction from citizens of any state and the diversity conflict is equally real.

The decision in *National Mutual Ins. Co. v. Tidewater Transfer Co., Inc.*,[76] is heavily relied upon in the Dinh and Starr analyses. However, the actual rulings comprising the decision would appear to contradict their conclusions. Only two justices indicated that they would treat the District as a state in their interpretations of the Constitution. The Court began its analysis by stating categorically that the District was not a state and could not be treated as a state under Article III. This point was clearly established in 1805 in *Hepburn v. Ellzey,*[77] only a few years after the establishment of the District. The Court rejected the notion that "Columbia is a distinct political society; and is therefore "a state" . . . the members of the American confederacy only are the states contemplated in the constitution."[78] This view was reaffirmed again by the Court in 1948:

> In referring to the "States" in the fateful instrument which amalgamated them into the "United States," the Founders obviously were not speaking of states in the abstract. They referred to those concrete organized societies which were thereby contributing to the federation by delegating some part of their sovereign powers and to those that should later be organized and admitted to the partnership in the method prescribed. They obviously did not contemplate unorganized and dependent spaces as states. The District of Columbia

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75 *Palmore v. United States*, 411 U.S. 389, 397-398 (1973).
76 337 U.S. 582 (1948)
77 6 U.S. (2 Cranch) 445 (1805).
78 *Id.* at 453.

> being nonexistent in any form, much less a state, at the time of the compact, certainly was not taken into the Union of states by it, nor has it since been admitted as a new state is required to be admitted.[79]

However, the Court also ruled that Congress could extend diversity jurisdiction to the District because this was a modest use of Article I authority given the fact that the "jurisdiction conferred is limited to controversies of a justiciable nature, the sole feature distinguishing them from countless other controversies handled by the same courts being the fact that one party is a District citizen."[80] Thus, while residents did not have this inherent right as members of a non-state, Congress could include a federal enclave within the jurisdictional category.

When one looks at the individual opinions of this highly fractured plurality decision, it is hard to see what about *Tidewater* gives advocates so much hope.[81] Dinh and his co-author Charnes state that "[t]he significance of *Tidewater* is that the five justices concurring in the result believed either that the District was a state under the terms of the Constitution or that the District Clause authorized Congress to enact legislation treating the District as a state."[82] Yet, to make this bill work, a majority of the Court would have to recognize that the District clause gives Congress this extraordinary authority to convert the District into an effective state for voting purposes. In *Tidewater*, six of nine justices appear to reject the argument that the clause could be used to extend diversity jurisdiction to the District, a far more modest proposal than creating a voting non-state entity. It was the fact that five justices agreed *in the result* that produced the ruling, a point emphasized by Justice Frankfurter when he noted with considerable irony in his dissent:

> A substantial majority of the Court agrees that each of the two grounds urged in support of the attempt by Congress to extend diversity jurisdiction to cases involving citizens of the District of Columbia must be rejected -- but not the same majority. And so,

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79 *National Mutual Ins.,* 337 U.S. at 588.

80 *Id.* at 592.

81 The Congressional Research Service included an exhaustive analysis of the case in its excellent study of this bill and its constitutionality. Congressional Research Service, *supra*, at 16.

82 Dinh & Charnes, *supra*, at 13.

> conflicting minorities in combination bring to pass a result -- paradoxical as it may appear -- which differing majorities of the Court find insupportable.[i]

When one reviews the insular opinions, it is easy to see what Frankfurter meant and why this case is radically overblown in its significance to the immediate controversy. Justices Rutledge and Murphy, in concurring, based their votes on the irrelevance of the distinction between a state citizen and a District citizen for the purposes of diversity. This view, however, was expressly rejected by the Jackson plurality of Jackson, Black, and Burton. The Jackson plurality did not agree with Rutledge that the term "state" had a more fluid meaning – an argument close to the one advanced by Dinh and Starr. Conversely, Rutledge and Murphy strongly dissented from the arguments of the Jackson plurality.[83] Likewise, two dissenting opinions, Justice Frankfurter, Vinson, Douglas and Reed rejected arguments that Congress had such authority under either the District Clause or the Diversity Clause in the case. The Jackson plurality prevailed because Rutledge and Murphy were able to join in the result, not the rationale. Rutledge and Murphy suggested that they had no argument with the narrow reading of the structuring provisions concerning voting members of Congress. Rather, they drew a distinction with other provisions affecting the rights of individuals as potentially more expansive:

> [The] narrow and literal reading was grounded exclusively on three constitutional provisions: the requirements that members of the House of Representatives be chosen by the people of the several states; that the Senate shall be composed of two Senators from each state; and that each state "shall appoint, for the election of the executive," the specified number of electors; all, be it noted, provisions relating to the organization and structure of the political departments of the government, not to the civil rights of citizens as such.

Thus, Rutledge saw that, even allowing for some variation in the interpretation of "states," there was distinction to be drawn when such expansive reading would affect the organization or structure of Congress. This would leave at most three justices who seem to support the interpretation of the District clause advanced in this case.

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[83] *Id.* at 604 ("But I strongly dissent from the reasons assigned to support it in the opinion of MR. JUSTICE JACKSON.")

The citation of *Geofroy v. Riggs*,[84] by Professor Dinh is equally misplaced. It is true that the Court found that a treaty referring to "states of the Union" included the District of Columbia. However, this interpretation was not based on the U.S. Constitution and its meaning. Rather, the Court relied on meaning commonly given this term under international law:

> It leaves in doubt what is meant by "States of the Union." Ordinarily these terms would be held to apply to those political communities exercising various attributes of sovereignty which compose the United States, as distinguished from the organized municipalities known as Territories and the District of Columbia. And yet separate communities, with an independent local government, are often described as states, though the extent of their political sovereignty be limited by relations to a more general government or to other countries. Halleck on Int. Law, c. 3, §§ 5, 6, 7. The term is used in general jurisprudence and by writers on public law as denoting organized political societies with an established government.[85]

This was an interpretation of a treaty based on the most logical meaning that the signatories would have used for its terminology. It was not, as suggested, an interpretation of the meaning of that term in the U.S. Constitution. Indeed, as shown above, the Court begins by recognizing the more narrow meaning under the Constitution before adopting a more generally understood meaning in the context of international and public law for the purpose of interpreting a treaty.

Finally, Professor Dinh and Mr. Charnes place great importance on the fact that citizens overseas are allowed to vote under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA).[86] This fact is cited as powerful evidence that "[i]f there is no constitutional bar prohibiting Congress from permitting overseas voters who are not citizens of a state to vote in federal elections, there is no constitutional bar to similar legislation extending the federal franchise to District residents." Again, the comparison between overseas and District citizens is misplaced. While UOCAVA has

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84 133 U.S. 258 (1890).

85 *Id.* at 268.

86 Pub. L. 99-410, 100 Stat. 924 (1986), codified at 42 U.S.C. §§ 1973ff et seq. (2003).

never been reviewed by the Supreme Court and some legitimate questions still remain about its constitutionality, a couple of courts have found the statute to be constitutional.[87] In the overseas legislation, Congress made a logical choice in treating citizens abroad as continuing to be citizens of the last state in which they resided. This same argument was used and rejected in *Attorney General of the Territory of Guam v. United States*.[88] In that case, citizens of Guam argued (as do Dinh and Charnes) that the meaning of state has been interpreted liberally and the Overseas Act relieves any necessity for being the resident of a state for voting in the presidential election. The court categorically rejected the argument and noted that the act was "premised constitutionally on prior residence in a state."[89] The court quoted from the House Report in support of this holding:

> The Committee believes that a U.S. citizen residing outside the United States can remain a citizen of his last State of residence and domicile for purposes of voting in Federal elections under this bill, as long as he has not become a citizen of another State and has not otherwise relinquished his citizenship in such prior State.[90]

Given this logical and limited rationale, the Court held that UOCAVA "does not evidence Congress's ability or intent to permit all voters in Guam elections to vote in presidential elections."[91]

Granting a vote in Congress is not some tinkering of "the mechanics of administering justice in our federation."[92] This would touch upon the constitutionally sacred rules of who can create laws that bind the nation.[93]

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87 *See Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001); *De La Rosa v. United States*, 842 F. Supp. 607, 611 (D. P. R. 1994).

88 738 F.2d 1017 (9th Cir. 1984).

89 *Id.* at 1020.

90 *Id.* (citing H.R. Rep. No. 649, 94th Cong., 1st Sess. 7, reprinted in 1975 U.S. Code Cong. & Ad. News 2358, 2364).

91 *Id.*

92 *National Mutual Ins.* at 585.

93 In the past, the District and various territories were afforded the right to vote in Committee. However, such committees are merely preparatory to the actual vote on the floor. It is that final vote that is contemplated in the constitutional language. *See Michel v. Anderson*, 14 F.3d 623, 629 (D.C. Cir.

This is not the first time that Congress has sought to give the District a voting role in the political process that is given textually to the states. When Congress sought to have the District participate in the Electoral College, it passed a constitutional amendment to accomplish that goal – the Twenty-Third Amendment. Likewise, when Congress changed the rules for electing members of the United States Senate, it did not extend the language to include the District. Rather, it reaffirmed that the voting membership was composed of representatives of the states. These cases and enactments reflect that voting was a defining characteristic of the District and not a matter that can be awarded (or removed) by a simple vote of Congress.

The overwhelming case precedent refutes the arguments of Messrs. Dinh and Starr. Indeed, just last week in *Parker v. District of Columbia*,[94] the United States Court of Appeals for the District of Columbia reaffirmed in both majority and dissenting opinions that the word "states" refers to actual state entities.[95] *Parker* struck down the District's gun control laws as violative of the Second Amendment.[96] That amendment uses the term "a free state" and the parties argued over the proper interpretation of this term. Notably, in its briefs and oral argument, the District appeared to take a different position on the interpretation of the word "state," arguing that the court could dismiss the action because the District is not a state under the Second Amendment—a position later adopted by the dissenting judge. The District argued:

> The federalism concerns embodied in the Amendment have no relevance in a purely federal entity such as the District because there is no danger of federal interference with an effective *state* militia. This places District residents on a par with state residents. . . . The Amendment, concerned with ensuring that the national government not interfere with the "security of a free State," is not implicated by

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1994) (recognizing the constitutional limitation that would bar Congress from granting votes in the full House).

[94] *Parker v. District of Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007).

[95] The D.C. Circuit is the most likely forum for a future challenge to this law.

[96] U.S. Const. amend. II ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.").

> local legislation in a federal district having no possible impact on the states or their militias.[97]

In the opinion striking down the District's laws, the majority noted that the term "free state" was unique in the Constitution and that "[e]lsewhere the Constitution refers to 'the states' or 'each state' when unambiguously denoting the domestic political entities such as Virginia etc." While the dissent would have treated "free state" to mean the same as other state references, it was equally clear about the uniform meaning given the term states:

> The Supreme Court has long held that "State" as used in the Constitution refers to one of the States of the Union. [citing cases] . . . In fact, the Constitution uses "State" or "States" 119 times apart from the Second Amendment and in 116 of the 119, the term unambiguously refers to the States of the Union.[98]

The dissent goes on to specifically cite the fact that the District is not a state for the purposes of voting in Congress.[99] Thus, in the latest decision from the D.C. Circuit, the judges continue the same view of the non-state status of the District as described in earlier decisions of both the Supreme Court and lower courts.

B. H.R. 1433 Would Create Both Dangerous Precedent and Serious Policy Challenges for the Legislative Branch.

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[97] Brief for the District of Columbia in *Parker v. District Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007), at 38 (emphasis in original). Adding to the irony, the District's insistence that it was a non-state under the Constitution was criticized by the Plaintiffs as "specious" because the Second Amendment uses the unique term of "free states" rather than "the states" or "the several states." This term, they argued, it was intended to mean a "free society," not a state entity. Reply Brief for the Plaintiff-Appellant in *Parker v. District Columbia*, 2007 U.S. App. LEXIS 5519, December 7, 2006 (D.C. Cir. 2007), at 15 n.4

[98] The dissent noted that the three instances involve the use of "foreign state" under Article I, section 9, clause 8; Article III, section 2, clause 1; and the Eleventh Amendment.

[99] *Id.*

The current approach to securing partial representation for the District is fraught with danger. First, by adopting a liberal interpretation of the meaning of states in Article I, the Congress would be undermining the very bedrock of our constitutional system. The membership and division of Congress was carefully defined by the Framers. The legislative branch is the engine of the Madisonian democracy. It is in these two houses that disparate factional disputes are converted into majoritarian compromises – the defining principle of the Madisonian system. By allowing majorities to manipulate the membership rolls, it would add dangerous instability and uncertainty to the system. The rigidity of the interpretation of states serves to prevent legislative measures to create new forms of voting representatives or shifting voters among states.[100] By taking this approach, the current House could award a vote to District residents and a later majority could take it away. The District residents would continue to vote, not as do other citizens, but at the whim and will of the Congress like some party favor that can be withdrawn with the passing fortunes of politics. Moreover, as noted below in the discussion of the Utah seat, the evasion of the 435 membership limitation created in 1911 would encourage additional manipulations of the House rolls in the future.

Second, if successful, this legislation would allow any majority in Congress to create other novel seats in the House. This is not the only federal enclave and there is great potential for abuse and mischief in the exercise of such authority. Under Article IV, Section 3, "The Congress shall have Powers to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." Roughly thirty percent of land in the United States (over 659 million acres)

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[100] This latter approach was raised by Judge Leval in *Romeu v. Cohen*, 265 F.3d 118, 128-30 (2d Cir. 2001) when he suggested that Congress would require each state to accept a certain proportion of voters in territories to give them a voice in Congress. This view has been rejected, including in that decision in a concurring opinion that found "no authority in the Constitution for the Congress (even with the states' consent) to enact such a provision." *Id.* at 121 (Walker, Jr., C.J., concurring); *see also Igartua-De La Rosa v. United States*, 417 F.3d 145, 154 n9 (1st Cir. 2005). According to Chief Judge Walker, there are "only two remedies afforded by the Constitution: (1) statehood . . ., or (2) a constitutional amendment." *Id.* at 136.

is part of a federal enclave regulated under the same power as the District.[101] The Supreme Court has repeatedly stated that the congressional authority over other federal enclaves derives from the same basic source:[102]

> This brings us to the question whether Congress has power to exercise 'exclusive legislation' over these enclaves within the meaning of Art. I, § 8, cl. 17, of the Constitution, which reads in relevant part: 'The Congress shall have Power * * * To exercise exclusive Legislation in all Cases whatsoever' over the District of Columbia and 'to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.' The power of Congress over federal enclaves that comes within the scope of Art. I, § 8, cl. 17, is obviously the same as the power of Congress over the District of Columbia. The cases make clear that the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action.[103]

Congress could use the same claimed authority to award seats to other federal enclaves. Indeed, since these enclaves were not established with the intention of being a special non-state entity, they could claim to be free of some of these countervailing arguments. Indeed, they are often treated the same as states for the purposes of federal jurisdiction, taxes, military service etc. There are literally millions of people living in these areas, including Puerto Rico (with a population of 4 million people -- roughly eight times the size of the District). Puerto Rico would warrant as many as six districts.

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[101] *See* http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/FRPR_5-30_updated_R2872-m_0Z5RDZ-i34K-pR.pdf

[102] In addition to Article I, Section 8, the Territorial Clause in Article IV. Section 3 states that "[t]he Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

[103] *Paul v. United States*, 371 U.S. 245, 263-64 (1963).

Third, while the issue of Senate representation is left largely untouched in the Dinh and Starr analyses,[104] there is no obvious principle that would prevent a majority from expanding its ranks with two new Senate seats for the District. Two Senators and a member of the House would be a considerable level of representation for a non-state with a small population. Yet, this analysis would suggest that such a change could take place without a constitutional amendment.

Fourth, this legislation would create a bizarre district that would not be affected by a substantial growth or reduction in population. Whether the District of Columbia grew to 3 million or shrank to 30,000 citizens, it would remain a single congressional district – unlike other districts that must increase or decrease to guarantee such principles as one person/one vote.

Fifth, the inevitable challenge to this bill could produce serious legislative complications. With a relatively close House division, the casting of an invalid vote could throw future legislation into question as to its validity. Moreover, if challenged, the status of the two new members would be in question. This latter problem is not resolved by Section 7's non-severability provision, which states "[i]f any provision of this Act, or any amendment made by this Act, is declared or held invalid or unenforceable, the remaining provisions of this Act and any amendment made by this Act shall be treated and deemed invalid and shall have no force or effect of law." However, if the D.C. vote is subject to a temporary or permanent injunction (or conversely, if the Utah seat is enjoined), a provision of the Act would not be technically "declared or held invalid or unenforceable." Rather, it could

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104 In a footnote, Dinh and Charnes note that there may be significance in the fact that the Seventeenth Amendment refers to the election of two senators "from each state." Dinh & Charnes, *supra*, at n. 57. They suggest that this somehow creates a more clear barrier to District representatives in the Senate – a matter of obvious concern in that body. The interpretation tries too hard to achieve a limiting outcome, particularly after endorsing a wildly liberal interpretation of the language of Article I. Article I, Section 2 refers to members elected "by the People of the several states" while the Seventeenth Amendment refers to two senators "from each State" and "elected by the people thereof." Since the object of the Seventeenth Amendment is to specify the number from each state, it is hard to imagine an alternative to saying "two Senators from each State." It is rather awkward to say "two Senators from each of the several states."

be enjoined for years on appeal, without any declaration or holding of unenforceability. This confusion could even extend to the next presidential election. By adding a district to Utah, that new seat would add another electoral vote for Utah in the presidential election. Given the last two elections, it is possible that we could have another cliffhanger with a tie or one-vote margin between the main candidates. The Utah vote could be determinative. Yet, this is likely to occur in the midst of litigation over the current legislation. My challenge to the Elizabeth Morgan Act took years before it was struck down as an unconstitutional Bill of Attainder. Thus, we could face a constitutional crisis over whether the Congress will accept the results based upon this vote when both the Utah and District seats might be nullified in a final ruling.

Sixth, since delegates are not addressed or defined in Article I, these new members from the District or territories are not technically covered by the qualification provisions for members of Congress. Thus, while authentic members of Congress would be constitutionally defined,[105] these new members would be legislatively defined – allowing Congress to lower or raise such requirements in contradiction to the uniform standard of Article I. Conversely, if Congress treats any district or territory as "a state" and any delegate as a "member of Congress," it would effectively gut the qualification standards in the Constitution by treating the title rather than the definition of "members of Congress" as controlling. Another example of this contradiction can be found in the definition of the districts of members versus delegates. Members of Congress represent districts that are adjusted periodically to achieve a degree of uniformity in the number of constituents represented, including the need to add or eliminate districts for states with falling constituencies. The District member would be locked into a single district that would not change with the population. The result is undermining the uniformity of qualifications and constituency provisions that the Framers painstakingly placed into Article I.

Finally, H.R. 1433 would only serve to delay true representational status for district residents. On a practical level, this bill would likely extinguish efforts at full representation in both houses. During the pendency

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[105] *See* Art. I, Sec. 2 ("No Person shall be a Representative who shall not have attained to the age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.")

of the litigation, it is highly unlikely that additional measures would be considered – delaying reforms by many years. Ultimately, if the legislation is struck down, it would leave the campaign for full representation frozen in political amber for many years.

IV.
THE CONSTITUTIONAL AND STATUTORY PROBLEMS WITH THE CREATION OF AN AT-LARGE SEAT IN UTAH

While most of my attention has been directed at the addition of a voting seat for the District, I would like to address the second seat that would be added to the House. In my prior testimony, I expressed considerable skepticism over the legality of this approach, particularly under the "one-man, one-vote" doctrine established in *Wesberry v. Sanders*.[106] It was decided after the hearing that Utah would take the extraordinary step of holding a special session to create new congressional districts to avoid the at-large problem. This was a better solution on a constitutional level, but as I argued in a recent article,[107] there appeared to be a misunderstanding as to how those seats could be filled. There appears to be an assumption that both the D.C. and Utah seats could be filled immediately and start to cast votes. However, since the districts would change, these would not constitute ordinary vacancies that could be filled by the same voters in the same district. this would require the three current members to resign to create vacancies. At a minimum, all four members would have to stand for election and, as new districts (like redistricted districts), the four Utah districts arguably should be filled at the next regular election in two years for the 111th Congress. Reportedly, the prospect of a special election led to the abandonment of the new districts and a return to the more questionable use of an at-large seat.[108]

The return to the at-large seat option now guarantees that the Utah portion of the legislation will face a compelling constitutional challenge. Admittedly, this is a question that leads to some fairly metaphysical notions

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106 376 U.S. 1 (1964).

107 Jonathan Turley, *Too Clever By Half: The Unconstitutional D.C. Voting Rights Bill*, Roll Call, Jan. 25, 2007, at 3.

108 Elizabeth Brotherton, *Utah Section of D.C. Bill to be Reworked*, Roll Call, at Feb. 27, 2007, at 1.

of overlapping representation and citizens with 1.4 representational status.[109] On one level, the addition of an at-large seat would seem to benefit all Utah citizens equally since they would vote for two members. Given the deference to Congress under the "necessary and proper" clause, an obvious argument could be made that it does not contravene the "one person, one vote" standard. Moreover, in *Department of Commerce v. Montana*,[110] the Court upheld the method of apportionment that yielded a 40% differential off of the "ideal." Thus, a good-faith effort of apportionment will be given a degree of deference and a frank understanding of the practical limitations of apportionment.

However, there are various reasons a federal court might have cause to strike down this portion of H.R. 1433. Notably, this at-large district would be roughly 250% larger than the ideal district in the last 2000 census (2,236,714 v. 645, 632). In addition, citizens would have two members serving their interests in Utah -- creating the appearance of a "preferred class of voters."[111] On its face, it raises serious questions of equality among voters:

> To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People.'[112]

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[109] There remains obviously considerable debate over such issues as electoral equality (guaranteeing that every vote counts as much as every other) and representational equality (guaranteeing that representatives represent equal numbers of citizens). *See Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) (Kozinski, J., concurring in part and dissenting in part). Of course, when Congress is allowing citizens of one state to have two representatives, this distinction becomes less significant.

[110] 503 U.S. 442 (1992).

[111] *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications . . . The conception of political equality . . . can mean only one thing – one person, one vote.").

[112] *See Wesberry,* 376 U.S. at 7-8.

This massive size and duplicative character of the Utah district draws obvious points of challenge.[113] In *Wesberry v. Sanders,*[114] the Court held that when the Framers referred to a government "by the people," it was articulating a principle of "equal representation for equal numbers of people" in Congress.[115] While not requiring "mathematical precision,"[116] significant differences in the level of representation are intolerable in our system. This issue comes full circle for the current controversy: back to Article I and the structural guarantees of the composition and voting of Congress. The Court noted that:

> It would defeat the principle solemnly embodied in the Great Compromise - equal representation in the House for equal numbers of people - for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.[117]

While the Supreme Court has not clearly addressed the interstate implications of "one person, one vote," this bill would likely force it to do so.[118] The Court has stressed that the debates over the original Constitution reveal that "one principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress."[119] Moreover, the Court has strongly indicated that there is no conceptual barrier to applying the *Wesberry* principles to an interstate rather than an intrastate controversy:

> the same historical insights that informed our construction of Article I,

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113 *Cf.* Jamie B. Raskin, *Is This America? The District of Columbia and the Right to Vote*, 34 Harv. C.R.-C.L. L. Rev. 39 (1999) (discussing "one person, one vote" precedent vis-à-vis the District).

114 376 U.S. 1 (1964).

115 *Id.* at 18.

116 *Id.*

117 *Id.* at 14.

118 *But see Department of Commerce*, 503 U.S. at 463 ("although 'common sense' supports a test requiring 'a goodfaith effort to achieve precise mathematical equality' within each state, *Kirkpatrick v. Preisler*, 394 U.S. at 530-531, the constraints imposed by Article I, § 2, itself make that goal illusory for the Nation as a whole.").

119 *Wesberry*, 376 U.S. at 10.

> 2 ... should apply here as well. As we interpreted the constitutional command that Representatives be chosen "by the People of the several States" to require the States to pursue equality in representation, we might well find that the requirement that Representatives be apportioned among the several States "according to their respective Numbers" would also embody the same principle of equality.[120]

Awarding two representatives to each resident of Utah creates an obvious imbalance vis-à-vis other states. House members are expected to be advocates for this insular constituency. Here, residents of one state could look to two representatives to do their bidding while other citizens would limited to one. Given racial and cultural demographic differences between Utah and other states, this could be challenged as diluting the power of minority groups in Congress.

Moreover, while interstate groups could challenge the disproportionate representation for Utah citizens, the at-large seat could also be challenged by some intrastate groups as diluting their specific voting power as in *City of Mobile v. Bolden*.[121] At-large seats have historically been shown to have disproportionate impact on minority interests. Indeed, in *Connor v. Finch,* the Supreme Court noted at-large voting tends "to submerge electoral minorities and over-represent electoral majorities."[122] Notably, during the heated debates over the redistricting of Utah for the special session, there was much controversy over how to divide the districts affecting the urban areas.[123] The at-large seat means that Utah voters in concentrated areas like Salt Lake City will have their votes heavily diluted in the selection of their additional representative. If Utah simply added an additional congressional district, the ratio of citizens to members would be reduced. The additional member would represent a defined group of people who have unique geographical and potentially racial or political

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120 *United States Dep't of Commerce v. Montana*, 503 U.S. 442, 461 (1992).

121 446 .U.S. 55 (1980) (striking down an at-large system); see also *Rogers v. Lodge,* 458 U.S. 613, (1982).

122 431 U.S. 407, 415 (1977).

123 *See, e.g.,* Bob Bernick Jr., *Why is GOP so Nice about Redistricting?*, Deseret Morning News, Dec. 1, 2006, at 2. Lisa Riley Roche, *Redistricting Narrowed to 3 proposals*, Deseret Morning News, Nov. 22, 2006, at 1.

characteristics.[124] However, by making the seat at large, these citizens would now have to share two members with a much larger and more diffuse group – particularly in the constituency of the at-large member. It is likely that the member who is elected at large would be different from one who would have to run in a particular district from the more liberal and diverse Salt Lake City.

Another concern is that this approach could be used by a future majority of Congress to manipulate voting and to reduce representation for insular groups.[125] Rather than creating a new district that may lean toward one party or have increased representation of one racial or religious group, Congress could use at-large seats under the theory of this legislation. Congress could also create new forms of represented districts for overseas Americans or federal enclaves.[126] The result would be to place Congress on a slippery slope where endangered majorities tweak representational divisions for their own advantage.

The lifting of the 435 limit on membership of the House established in 1911 is also a dangerous departure for this Congress.[127] While membership was once increased on a temporary basis for the admission of Alaska and Hawaii to 437, past members have respected this structural limitation. These members knew instinctively that, while there was always the temptation to tweak the membership rolls, such an act would invite future manipulation and uncertainties. After this casual increase, it will become much easier for future majorities to add members. When presented with a plausible argument that a state was short-changed, a majority could simply add a seat. Use of an at-large seat magnifies this problem by abandoning the principle of

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[124] *See Davis v. Bandemer*, 4328 U.S. 109, 133 (1986) (reviewing claims of vote dilution for equal protection violations "where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively.").

[125] At-large districts have been disfavored since *Wesberry*, a view later codified in federal law. *See* 2 U.S.C. § 2c.

[126] Notably, rather than try to create representatives for overseas Americans as some nations do, Congress enacted a law that allows citizens to use their former state residence to vote if the state complies with the requirements of the Uniformed and Overseas Citizens Absentee Voting Act. 42 U.S.C. §1973ff.

[127] Act of Aug. 8, 1911, ch. 5 §§ 1-2, 37 Stat. 13, 14.

individual member districts of roughly equal constituencies. By using the at-large option, politicians can simply give a state a new vote without having to redistrict existing districts.

Finally, while it is difficult to predict how this plan would fare under a legal challenge, it is certain to be challenged. This creates the likelihood of Congress having at least one member (or two members if you count the District representative) who would continue to vote under a considerable cloud of questioned legitimacy. In close votes, this could produce great uncertainty as to the finality or legitimacy of federal legislation. This is entirely unnecessary. If a new representative is required, it is better to establish a fourth district not just a fourth at-large representative for legal and policy reasons.

V.
THE MODIFIED RETROCESSION PLAN: A THREE-PHASE ALTERNATIVE FOR THE FULL REPRESENTATION OF CURRENT DISTRICT RESIDENTS IN BOTH THE HOUSE AND THE SENATE

In some ways, it was inevitable (as foreseen by Alexander Hamilton) that the Capitol City would grow to a size and sophistication that representation in Congress became a well-founded demand. Ironically, the complete bar to representation in Congress was viewed as necessary because any half-way measure would only lead to eventual demands for statehood. For example James Holland of North Carolina noted that only retrocession would work since anything short of that would be a flawed territorial form of government:

> If you give them a Territorial government they will be discontented with it, and you cannot take from them the privilege you have given. You must progress. You cannot disenfranchise them. The next step will be a request to be admitted as a member of the Union, and, if you pursue the practice relative to territories, you must, so soon as their numbers will authorize it, admit them into the Union. Is it proper or politic to add to the influence of the people of the seat of Government by giving a representative in this House and a representation in the

> Senate equal to the greatest State in the Union? In my conception it would be unjust and impolitic.[128]

We are, hopefully, in the final chapter of this debate. One hundred and sixty years ago, Congress retroceded land back to Virginia under its Article I authority. Retrocession has always been the most direct way of securing a resumption of voting rights for District residents.[129] Most of the District can be simply returned from whence it came: the state of Maryland. The greatest barrier to retrocession has always been more symbolic than legal. Replacing Washington, DC with Washington, MD is a conceptual leap that many are simply not willing to make. However, it is the most logical resolution of this problem.[130]

For a number of years, I have advocated the reduction of the District of Columbia to the small area that runs from the Capitol to the Lincoln Memorial. The only residents in this space would be the First Family. The remainder of the current District would then be retroceded to Maryland.

However, I have also proposed a three-phase process for retrocession. In the first phase, a political transfer would occur immediately with the District securing a House seat as a Maryland district and residents voting in

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[128] Mark Richards, Presentation before the Arlington Historical Society, May 9, 2002 (citing Congressional Record, 1805: 979-980) (quoting Rep. James Holland of North Carolina).

[129] An alternative but analogous retrocession plan has been proposed by Rep. Dana Rohrabacher. For a recent discussion of this proposal, *see* Dana Rohrabacher, *The Fight Over D.C.; Full Representation for Washington – The Constitutional Way*, Roll Call, Jan. 25, 2007, at 3.

[130] At first blush, there would seem to be a promising approach found in legislation granting Native Americans the right to vote in the state in which their respective reservation is located. 8 U.S.C. § 1401(a)(2). After all, these areas fall under congressional authority in the provision: Section 8 of Article I. However, the District presents the dilemma of being intentionally created as a unique non-state entity – severed from Maryland. For this approach to work, the District would still have to be returned to Maryland while retaining the status of a federal enclave. *See also Evans v. Cornman*, 398 U.S. 419 (1970) (holding that residents on the campus of the National Institutes of Health (NIH) in Maryland could vote as part of that state's elections).

Maryland statewide elections. In the second phase, incorporation of public services from education to prisons to law enforcement would occur. In the third phase, any tax and revenue incorporation would occur.

These phases would occur over many years with only the first phase occurring immediately upon retrocession. Indeed, I recommend the creation of a three-commissioner body like the one that worked with George Washington in the establishment of the original federal district. These commissioners would recommend and oversee the incorporation process. Moreover, Maryland can agree to continue to treat the District as a special tax or governing zone until incorporation is completed. Indeed, Maryland may choose to allow the District to continue in a special status due to its historical position. The fact is that any incorporation is made easier, not more difficult, by the District's historic independence. Like most cities, it would continue to have its own law enforcement and local governing authority. However, the District could also benefit from incorporation into Maryland's respected educational system and other statewide programs related to prisons and other public needs.

In my view, this approach would be unassailable on a legal level and highly efficient on a practical level. I realize that there remains a fixation with the special status of the city, but much of this status would remain. While the city would not technically be the seat of government, it would obviously remain for all practical purposes our Capitol City.

This is not to suggest that a retrocession would be without complexity. Indeed, the Twenty-Third Amendment represents an obvious anomaly. Section one of that amendment states:

> The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct:
>
> A number of electors of President and Vice President equal to the whole number of Senators and Representatives in Congress to which the District would be entitled if it were a state, but in no event more than the least populous state; they shall be in addition to those appointed by the states, but they shall be considered, for the purposes of the election of President and Vice President, to be electors appointed by a state; and they shall meet in the District and perform

such duties as provided by the twelfth article of amendment.[131]

Since the only likely residents would be the first family, this presents something of a problem. There are a couple of obvious solutions. One would be to repeal the amendment, which is the most straight-forward and preferred.[132] Another approach would be to leave the amendment as constructively repealed. Most presidents vote in their home states. A federal law can bar residences in the new District of Columbia. A third and related approach would be to allow the clause to remain dormant since it states that electors are to be appointed "as the Congress may direct."[133] Congress can enact a law directing that no such electors may be chosen. The only concern is that a future majority could do mischief by directing an appointment when electoral votes are close.

VI.
CONCLUSION

There is an old story about a man who comes upon another man in the dark on his knees looking for something under a street lamp. "What did you lose?" he asked the stranger. "My wedding ring," he answered. Sympathetic, the man joined the stranger on his knees and looked for almost an hour until he asked if the man was sure that he dropped it here. "Oh, no," the stranger admitted, "I lost it across the street but the light is better here." Like this story, there is a tendency in Congress to look for answers where the political light is better, even when it knows that the solution must be found elsewhere. That is the case with H.R. 1433, which mirrors an earlier failed effort to pass a constitutional amendment. The 1978 amendment was a more difficult course but the answer to the current problems can only be found constitutionally in some from of either an amendment or retrocession.

Currently, the drafters of the current bill are looking where the light is better with a simple political trade-off of two seats. It is deceptively easy to

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131 U.S. Const. amend. XXIII.

132 I have previously stated that my preference would be to repeal the entire Electoral College as an archaic and unnecessary institution and move to direct election of our president. But that is a debate for another day.

133 *See generally* Peter Raven-Hansen, *The Constitutionality of D.C. Statehood*, 60 Geo. Wash. L. Rev. 160, 187-88 (1991); Philip G. Schrag, *The Future of District of Columbia Home Rule*, 39 Cath. U.L. Rev. 311, 317 (1990).

make such political deals by majority vote. Not only is this approach facially unconstitutional, but the outcome of this legislation, even if sustained on appeal, would not be cause for celebration. Indeed, H.R. 1433 would replace one grotesque constitutional curiosity in the current status of the District with new curiosity. The creation of a single vote in the House (with no representation in the Senate) would create a type of half-formed citizens with partial representation derived from residence in a non-state. It is an idea that is clearly put forward with the best of motivations but one that is shaped by political convenience rather than constitutional principle.

It is certainly time to right this historical wrong, but, in our constitutional system, it is often more important how we do something than what we do. This is the wrong means to a worthy end. However, it is not the only means and I encourage the Members to direct their considerable efforts toward a more lasting and complete resolution of the status of the District of Columbia in Congress.

Thank you again for the honor of speaking with you today and I would be happy to answer any questions that you might have. I would also be happy to respond to any questions that Members may have after the hearing on the constitutionality of this legislation or the alternatives available in securing full voting rights for District residents.

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[i] *Tidewater*, 337 U.S. at 654